NORTH CAROLINA REPORTS

VOL. 162

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

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Linville v. Nissen. Cited: *Taylor v. Stewart*, 172 N. C., 205, 207, 208.

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Kiger v. Scales Co. Cited: *Dunn v. Lumber Co.*, 172 N. C., 137.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SRING TERM, 1913

DAVID MILLER ET AL. v. A. L. CURL ET AL.

(Filed 9 April, 1913.)

1. Pleadings—Verification—Attorney—Principal and Agent — Interpretation of Statutes—Substantial Compliance.

An attorney of a party may verify the pleadings if the action or defense be founded upon a written instrument for the payment of money only, which is in the attorney's possession, or if all the allegations of the pleadings be within his personal knowledge; but when so verified, the statute requires (which requirements must be substantially complied with) that the attorney set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reason it is not made by the party. Revisal, secs. 488, 489, 490.

2. Same—Defective Affidavits.

A verification of a complaint made by an attorney of the plaintiff, setting forth in the affidavit "that the facts set forth . . . as of his own knowledge are true, and those stated on information and belief he believes to be true . . . ; that the action is based on a written instrument for the payment of money, and that said instrument is in his possession, and he therefore makes this verification pursuant to the provisions of the Revisal of 1905," does not comply with the requisites of the statute, and is defective in not stating the grounds of his belief and the reason why the party himself did not make the verification.

3. Same—Irregular Judgments—Defenses.

A judgment by default entered in an action on a note for the recovery of money where there is a defective verification made by the plaintiff's attorney, is not void, but irregular; and upon motion made to set it aside, the moving party must show he has a meritorious defense.

4. Same—Attorneys' Fees—Correction of Judgment—Harmless Error.

Where the Superior Court judge has refused to vacate an irregular judgment by default for the want of an answer, and the moving party has shown no meritorious defense, etc., and therefrom an appeal is taken by the defendant, the error of the lower court in reviewing the judgment and correcting it so as to exclude attorney's fees from the amount of the recovery is in favor of the appellant, of which he will not be heard to complain.

(2) APPEAL by defendant from *Cooke, J.*, at February Term, 1912, of GRANVILLE.

This is an action brought to February Term, 1912, upon a note. The complaint was verified by the attorney of the plaintiff as follows: "That the facts set forth in the foregoing complaint as of his own knowledge are true, and that those stated on information and belief he believes to be true. Deponent further says: That this action is based on a written instrument for the payment of money, and that said instrument is in his possession, and he therefore makes this verification pursuant to the provisions of section 490 of the Revisal of 1905." Judgment by default final was rendered in favor of the plaintiff at the return term. Defendant moved to set it aside at November Term, 1912, upon a notice of the motion served 15 June, 1912, and in it assigned three grounds:

1. For that the said judgment was rendered at the return term of the summons issued in said action and upon a complaint filed by the plaintiff, which is not properly verified.

2. For that said judgment was rendered for an amount considerably in excess of the amount due by the defendants to the plaintiff,

(3) and includes a commission of 10 per cent as attorney's fees.

3. For that the defendant A. R. Davis has discovered, since the rendition of said judgment, that said commission of 10 per cent as attorney's fees is included in the amount of said judgment.

The court refused to vacate the judgment, but amended it by striking therefrom an allowance of 10 per cent upon the amount of the note for attorney's fees, based upon a like stipulation in the note, and as thus amended the judgment was allowed to stand. There was no affidavit or other proof showing merit in the application. Defendant appealed.

T. Lanier for plaintiff.
B. S. Royster for defendant.

WALKER, J,. after stating the case: The statute requires that the verification shall state, in substance, that the pleading itself, in its

entirety, is true to the knowledge of the person making it, except as to matters therein stated on information and belief, and as to those matters, he believes it to be true. This is so where a party to the proceeding makes the verification, but it may also be made by an agent or attorney, if the action or defense be founded upon a written instrument for the payment of money only, which is in the possession of the agent or attorney, or if all the material allegations of the pleading be within his personal knowledge; but when the pleading is verified by an agent or attorney, he must set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reason why it is not made by the party. Revisal, secs. 488, 489, and 490. The object of the statute is to give the pleader a convenient substitute for the old bill of discovery in equity, and to eliminate all issues of fact that the parties are not willing to raise under the sanctity of an oath. *Griffin v. Light Co.*, 111 N. C., 434; *Phifer v. Insurance Co.*, 123 N. C., 410. It is also reasonably necessary for the protection of the other party in certain cases. This provision of the statute should, therefore, be at least substantially complied with. The verification in this case (4) is defective in its very first averment. *Phifer v. Insurance Co., supra; Carroll v. McMillan*, 133 N. C., 140; *Payne v. Boyd*, 125 N. C., 499. It would be useless to discuss this part of the verification, as the cases which we have cited present the identical question here raised, and are conclusive in their reasoning, to which we simply refer. There is another defect noticeable. The attorney does not state why the verification was not made by one of the plaintiffs, and there is nothing stated from which we can fairly infer the reason for this failure by them to verify their own pleading. Revisal, sec. 490; *Banks v. Manufacturing Co.*, 108 N. C., 282. The judgment, therefore, should not have been rendered. *Hammerslaugh v. Farrior*, 95 N. C., 135. The judgment, however, was not void, but merely irregular. *Cowan v. Cunningham*, 146 N. C., 453. It was held in that case: "If it should be conceded in such case that a judgment by default final is not allowable on an unverified complaint, the defect only amounts to an irregularity, and such judgments are not set aside as a matter of right in the party affected, but in the sound legal discretion of the court. It is always required that a party claiming to be injured should show that some substantial right has been prejudiced, and he must proceed with proper diligence and within a reasonable time," citing *Becton v. Dunn*, 137 N. C., 562. There is another important consideration. Where a party moves to set aside a judgment for irregularity or excusable neglect, he should make it appear that he has a meritorious defense. This

must be taken as finally settled. *Turner v. Machine Co.,* 133 N. C., 381; *Currie v. Mining Co.,* 157 N. C., 209; *Scott v. Life Association,* 137 N. C., 516; *Minton v. Hughes,* 158 N. C., 587; *Norton v. McLaurin,* 125 N. C., 185; *Leduc v. Slocomb,* 124 N. C., 347. The reason for this practice is clearly stated by *Justice Ruffin* in *Mauney v. Gidney,* 88 N. C., 200: "In the first place, and contrary to all the authorities, the defendants omit to set out in their application any defense whatsoever which they then had, or which it is conceived they could now make to the action; and for aught the Court can tell, looking to their allegations, it may be called upon, after setting aside the judgment, (5) to render just such another between the same parties. To avoid engaging in so vain a thing, the courts have uniformly required in all such applications that the parties should, at least, set forth such a case as *prima facie* amounted to a valid defense," citing *English v. English,* 87 N. C., 497; *Jarman v. Saunders,* 64 N. C., 367. And also by *Chief Justice Shepherd,* in *Everett v. Reynolds,* 114 N. C., 366: "Generally a judgment will be set aside only when the irregularity has not been waived or cured, and has been or may be such as has worked, or may yet work, serious injury or prejudice to the party complaining, interested in it, or when the judgment is void," citing *Williamson v. Hartman,* 92 N. C., 236; *Peoples v. Norwood,* 94 N. C., 167; 1 Freeman on Judgments, sec. 102. The subject is fully reviewed, the same reason substantially given and the same conclusion reached in *Scott v. Life Association,* 137 N. C., 516; and in *Turner v. Machine Co.,* 133 N. C., 381, we held that merits must be shown upon such a motion, citing from other jurisdictions, *Insurance Co. v. Rodecker,* 47 Iowa, 162; *Edwards v. Jamesville,* 14 Wis., 26. In the recent case of *Currie v. Mining Co.,* 157 N. C., 209, *Justice Allen* says: "An irregular judgment is one rendered contrary to the course and practice of the courts. and may be set aside within a reasonable time, and upon showing a meritorious defense."

In this case, the defendant has received full credit for the attorney's fee, which he alleges was wrongfully charged against him and included in the judgment in the legally questionable, but seemingly just, exercise of the court's discretion, as the inclusion of that amount was merely erroneous, and the judgment, in that respect, could be revised only by appeal. But the ruling was in defendant's favor, the plaintiff not complaining of it. It is, therefore, not before us for review. Our conclusion is that there was no error in the refusal of the defendant's motion.

No error.

(6)

JOHN D. HUDSON ET ALS., TRUSTEES OF CHURCH, v. DAVID S. MORTON ET ALS.

(Filed 16 April, 1913.)

1. Reference—Findings of Fact—Confirmation—Appeal and Error.

The findings of fact of a referee, confirmed by the trial judge, are conclusive on appeal if there is any evidence to support them.

2. Deeds and Conveyances—Description Sufficient—Parol Evidence.

A description of lands in a deed "being one acre of land adjoining L., in one corner of the field now turned out, and lies near and including the spring, it being a portion of the H. tract, conveyed by D. to M., and others, public school committee of District No. 10, Stanly County, deed bearing a certain date, giving book and page in register of deeds' office, being the property formerly owned by District No. 13, changed by redistricting the schools of the township," etc.: *Held*, sufficiently definite to admit of parol evidence in fitting the description in this case, it appearing that the land had been known as the "schoolhouse lot" for twenty or thirty years, etc.; and it is further held that a variance was immaterial, that the lot did not adjoin the L. lot, but cornered on it in an old field.

APPEAL by defendant from *Cooke, J.*, at September Term, 1912, of STANLY.

Jerome & Price for plaintiffs.
J. M. Brown & Son and A. C. Honeycutt for defendants.

CLARK, C. J. This is a controversy over one acre of land formerly used as a schoolhouse lot and recently purchased by the plaintiffs as trustees of the Union Grove Baptist Church. There was a reference made to R. L. Smith and two others as referees, whose report was confirmed by the judge. The finding of facts approved by the judge are conclusive, if there is any evidence to support the finding that is excepted to. The only point presented is the exception by the defendants that the description in the deeds under which the plaintiffs claim title was too vague and indefinite to admit of parol evidence to identify the land.

The deed to the plaintiffs describes the land as a piece, parcel, or lot of land situated in Stanly County, North Carolina, in Albemarle Township, "it being one acre of land adjoining Margaret Lowder lands in one corner of the field now turned out, and lies near (7) and including the spring, it being a portion of the Wiley Hudson tract of land, and being the land conveyed by E. W. Davis to Joseph Morton, Jesse Morton, and John Thompson, public school committee

of District No. 10 of Stanly County, North Carolina, said deed bearing date 11 February, 1882, and recorded in the office of the Register of Deeds of Stanly County, North Carolina, in Book of Deeds No. 31, page 271, etc., it being the property formerly owned by District No. 13 in the Albemarle Township, the number of the district being changed by virtue of a redistrict arrangement of the school districts of said township in said county."

There was uncontradicted testimony that the plaintiffs and those under whom they claim have been in possession of the lot of land in dispute for twenty-seven or twenty-eight years. The testimony further was that this lot was first used as a playground, and afterwards the schoolhouse was built thereon; that the lot was a part of the Wiley Hudson tract and was located in the corner of an old field, and this old field adjoins the Margaret Lowder land; that the defendant D. S. Morton told the surveyor that the lot which he surveyed was known as the schoolhouse lot; that the lot as conveyed had been known as the "schoolhouse lot" for twenty or thirty years, and that the school committee had been in possession of the lot for twenty-seven or twenty-eight years. It was also shown that the defendant D. S. Morton bid on the lot at the public sale made by the board of education and that he owned the Wiley Hudson tract except one acre.

Edwards v. Dean, 125 N. C., 61, is very much like this case. In that case there was a deed for 30 acres in the western part of a tract of 112 acres, and there was a survey of the 30 acres, followed by possession. It was held that the description was sufficient to admit of parol testimony to identify the land.

In *Perry v. Scott,* 109 N. C., 374, the language, "on the south side of Trent River, adjoining the lands of Colgrove, McDaniel, and others, containing 360 acres," was held not too vague and indefinite to permit identification by parol. In *Farmer v. Batts,* 83 N. C., 387, the Court sets out a list of descriptions which had been held to be too
(8) indefinite to admit of parol testimony, and also a list of descriptions which had been held sufficient to permit of such aid. Without elaborating the particulars in which this description differs from the others, we think it falls within the class of cases in which the description is sufficient to justify the admission of parol testimony to identify the lands in dispute.

The principal parts of the description in this case are: (1) the lot of land in dispute consists of only one acre; (2) it adjoins the Margaret Lowder lands; (3) it lies in one corner of an old field; (4) this old field was turned out in 1882; (5) the lot includes the spring;

(6) it is a portion of the Wiley Hudson tract; (7) it is the land conveyed by E. W. Davis in 1882 to school committee of District No. 10, which didstrict was afterwards changed to District No. 13.

The referees found that this lot did not "adjoin the Margaret Lowder land," but that it was in the corner of an old field which did adjoin the Lowder land. This was an immaterial variance. They found on the evidence that this was the "schoolhouse lot," and the description in the deed justified the admission of parol testimony. It is true that the deed of 1882 from Davis to the school committee described the land as lying "in Stanly County, North Carolina, adjoining lands of Thomas A. Lowder and others and bounded as follows, viz.: Being one acre adjoining the Margaret Lowder lands, in one corner of the old field now turned out; it lies near and including the spring, it being a portion of the Wiley Hudson tract of land, containing one acre, more or less." The evidence showed that the committee took possession of this lot of land and occupied it for a schoolhouse lot, and the subsequent deeds from the board of education to John M. Lowder and from him to the plaintiffs, trustees, refer to said deed and describe the land as that which had been held for school purposes under the Davis deed, and together with the parol evidence justified the finding of the referees which identified the property.

We are of opinion that parol testimony was properly admitted.

Affirmed.

Cited: Johnson v. Mfg. Co., 165 N. C., 107; *Norwood v. Totten*, 166 N. C., 652; *Patton v. Sluder*, 167 N. C., 503.

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(9)

E. M. HENDRIX v. SOUTHERN RAILWAY COMPANY.

(Filed 16 April, 1913.)

1. Pleadings—Interpretation—Demurrer.

A demurrer to a complaint admits all of its allegations, and if any part of the complaint presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it, under a liberal construction of its terms, the pleading will be sustained.

2. Same—Railroads—Easements—Rights of Way—Unlawful Use.

The grant by the owner of the lands in this action of a right of way to a railroad company thereon does not include the right of the latter to

go upon the lands except for the necessary purposes of constructing and maintaining the road according to the right granted; and where a demurrer is filed by the company to a complaint alleging that the company had taken dirt from the plaintiff's lands to his damage, for the purpose of making fills along other portions of the road, the allegation states a good cause of action for damages to the land arising from an invasion of the plaintiff's rights, and the demurrer should be overruled.

3. Railroads—Easements—Rights of Way—Increase of Widths—Prospective Use—Deeds and Conveyances—Interpretation of Deeds.

While the right of way of defendant is confined to the lands occupied for its tracks, banks, ditches, and works, not extending beyond the width provided for in its charter, it will not, in the proper exercise of this use, be liable in damages caused by widening its right of way and taking additional and necessary land, nor for damages cause by the elevating or lowering of its tracks or other necessary purposes, nor for the increased inconvenience to the plaintiff and his family from smoke from the locomotive or from other matters necessary to the operation of its trains.

(10) APPEAL by defendant from *Whedbee, J.*, at October Term, 1912, of GUILFORD. Action to recover damages. The plaintiff alleges in his complaint:

1. That plaintiff is a citizen and resident of the county of Guilford, North Carolina.

2. That at the times hereinafter mentioned the defendant was and is now a corporation organized and existing under and by virtue of the laws of Virginia, and owned, maintained, controlled, and operated within the State of North Carolina and elsewhere a system of railroads known as the Southern Railway, and was and is engaged in the business of a common carrier of passengers and freight.

3. That plaintiff was at the time hereinafter mentioned and is now the owner and in possession of a house and lot known as his home place, located in the city of Greensboro, county of Guilford State of North Carolina, described as follows: Beginning at the southwest corner of the land of James Dick on and at the mouth of the lane separating said Dick from Mrs. Kerr, and runs thence north 289 feet with said Dick's line; thence west 146 feet with said Dick's to the center of the track of the railroad; thence south 15 degrees west 296 feet along said railroad to Hendrix Street; thence with the said Hendrix Street east 3 degrees south 200 feet to the beginning. (Recorded in Book 65, page 483.) That plaintiff acquired title to said lands under and by mesne conveyances from one Jesse H. Lindsay, under whom defendant also claims title to its alleged right of way, as hereinafter described.

4. That the Piedmont Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of North Carolina, built, completed, and had in operation before the year 1865

a line of railroad from Danville, in the State of Virginia, to Greensboro, State of North Carolina, and its said railroad and right of way adjoined on the west the lands of plaintiff above described.

5. That the said Piedmont Railroad Company acquired its (11) title to that part of its right of way for said road adjoining plaintiff's lands, as above described, by deed 7 April, 1862, from Jesse H. Lindsay, above mentioned in the third paragraph of this complaint, to said railroad company, and same is recorded in the office of the Register of Deeds of Guilford, State aforesaid, in Book 38, page 704, which said record is hereby referred to and asked to be taken as a part of this complaint.

6. That after execution and delivery of said deed as aforesaid and under the authority therein given, the said Piedmont Railroad Company, prior to the year 1865, entered upon the lands in said deed described and located its right of way, constructed its roadbed and side ditches thereon. That as plaintiff is informed and believes, that part of said roadbed and side ditches adjacent to plaintiff's property was in a cut from 5 to 10 feet deep and from 40 to 45 feet wide at the bottom, and from 50 to 55 feet at the top, made by the said Piedmont Railroad Company, and those claiming under it, including the defendant, continued to use said roadbed and ditches in substantially the same condition and to the same extent as its right of way and roadbed for said railroad up to the ..... day of June, 1909, a short time prior to the institution of this action, and in so doing said company exercised its right of election of the location and extent of its right of way at the place in question, and those claiming under said railroad company are estopped thereby from changing or widening said right of way.

7. That the defendant was at the times hereinafter mentioned and is now in the possession of the right of way of the said Piedmont Railroad Company adjacent to plaintiff's land, as above described, and was operating its trains along and over the same, and at said times claimed, and claims now, to be the owner of the same under and as successor of the said Piedmont Railroad Company.

8. That the plaintiff's land adjoins the right of way in question on the east, extending along the same north a distance of about 290 feet, and extends east therefrom about 290 feet to a line running nearly parallel with said right of way, and fronts on Hendrix Street. That plaintiff's dwelling, outhouses, and garden are located on the eastern part of said lot, leaving a vacant lot between that part (12) of said lot occupied as aforesaid and the top of the cut, which is the eastern line of defendant's right of way, of about 80 feet fronting

on said Hendrix Street and 290 feet deep, which was sufficient in size to locate a dwelling upon and was a valuable piece of property.

9. That on ..... day of June, 1909, the defendant wrongfully lowered its roadbed and track along and adjacent to plaintiff's property about 17 feet, and wrongfully and unlawfully entered upon and took possession of a strip of plaintiff's vacant lot above described, about 45 feet wide, extending along said right of way from Hendrix Street to the northern line of said lot, a distance of about 290 feet, and removed the dirt therefrom to a depth of from 10 to 12 feet, and is now in possession of same as a part of its railroad line.

10. That the taking of plaintiff's land as aforesaid was not necessary for the defendant's lowering its roadbed or double tracking same, as the land occupied by defendant as its roadbed and right of way before taking the strip of the plaintiff's land above mentioned was amply sufficient to have enabled it to have lowered its roadbed and double tracked same, if it decided so to do; and plaintiff alleges that defendant entered upon and took said strip of plaintiff's land as aforesaid for the sole reason that it needed dirt to make fills along its alleged right of way one-half mile or more from plaintiff's land, and for this reason defendant took said land, removed the dirt as aforesaid, and used same in making said fills as aforesaid.

11. That as plaintiff is informed and believes, there were more than 6,000 cubic yards of the dirt wrongfully taken by the defendant from the plaintiff's vacant lot as aforesaid, and same was reasonably worth the sum of 35 cents per cubic yard.

12. That defendant operates along and over its track and roadbed a large number of trains daily, and that prior to the taking of plaintiff's land and lowering its roadbed as aforesaid, the smoke and soot from defendant's engines usually passed over plaintiff's residence, but since the lowering of said track a large part of the smoke and soot therefrom passes into the plaintiff's dwelling and porches, which annoy and
(13) trouble the plaintiff and his family, and also depreciates the value of said place as a residence.

13. That prior to the taking of plaintiff's property intersecting with Church Street, crossing said railroad track at grade, and at the point of said crossing the defendant lowered its said track about 17 feet, thereby making it necessary and the duty of defendant to erect a bridge at said Hendrix Street across said railroad track. That in constructing the same defendant has negligently and wrongfully made abutments for the approaches to said bridge several feet higher than was necessary, by reason whereof the eastern approach to said bridge will have to be

built so high that it will leave the remaining portion of plaintiff's vacant lot several feet below the grade of said street, which detracts from the appearance of the plaintiff's property and makes it inaccessible, and has thereby damaged same.

14. That by reason of the defendant's having taken strip of plaintiff's vacant lot, as hereinbefore stated, it has destroyed the value of the remainder of said lot, as the remaining part thereof is too small for a building lot.

15. That by reason of the wrongful acts of defendant, as hereinbefore alleged, plaintiff has been damaged to the amount of $2,000.

Wherefore plaintiff prays for judgment against the defendant for $2,000 and costs, to be taxed by the clerk.

DEED FOR RIGHT OF WAY TO PIEDMONT RAILROAD.

Whereas the construction of the Piedmont Railroad will be of great importance to the district of country through which it will pass, and will, it is believed, add materially to the value of the lands along the line which may be adopted for the same, and the undersigned are anxious, as far as possible, to induce the construction of the work through their respective lands:

Be it, therefore, known and declared by these presents that we whose names are hereunto subscribed, for and in consideration of the premises, and also of $1 to each of us in hand paid by the Piedmont Railroad Company, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, and convey to the said Piedmont Railroad Company all right, title, and claim to so much of our land as (14) may be occupied by the said railroad, its banks, ditches, and works; and we do furthermore hereby release all claims for damages, whether on account of increased fencing or otherwise, which may be occasioned by the passage of the said railroad through our respective lands, provided that the said Piedmont Railroad be located on a route having one of its termini at Danville and the other of its termini at Greensboro.

The defendant demurred as follows:

1. For that it appears upon the face of the complaint that the defendant, under deed to the Piedmont Railroad Company, under whom it claims and derives its title from those under whom the plaintiff claims and dervied his title, had a legal right to enter upon and take possession of the land involved in this action for the purpose for which it was taken, held, and used.

2. For that it appears upon the face of the complaint that the smoke and soot which the plaintiff complains of were caused by the ordinary operations of trains over the defendant's road, and the defendant being a common carrier, authorized by law to carry on the business of a common carrier, and it being its duty in the conduct of such business to operate trains over its road, it is not liable for damages resulting from the lawful performance of that duty.

3. For that it appears upon the face of the complaint that under the deed from those under whom the plaintiff claims to the Piedmont Railroad Company, under which the defendant claims, the defendant had a legal right to place the abutments of the bridge so as to leave the plaintiff's lot in the condition alleged in the complaint.

The demurrer was overruled, and the defendant excepted and appealed.

T. J. Shaw and Justice & Broadhurst for plaintiff.
Wilson & Ferguson for defendant.

(15) ALLEN, J. The demurrer admits all of the allegations made by the plaintiff, and if any part of the complaint presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it, under a liberal construction of its terms, the pleading will be sustained. *Brewer v. Wynne,* 154 N. C., 471.

Under this rule, it is admitted that the defendant has entered upon the land in controversy and has removed 6,000 cubic yards of dirt, when it was not necessary to do so in the use of the right of way, and for the sole purpose of filling at other places, which is an invasion of the rights of the plaintiff, although it be conceded that the defendant is right in its contention as to the construction of the deed for the right of way, and we are, therefore, of opinion the demurrer was properly overruled.

This disposes of the appeal; but the question as to the rights of the defendant under the deed, which is made a part of the complaint, has been fully discussed, and as it will necessarily arise on the trial, we will consider it.

The plaintiff contends that the right of way acquired by the defendant under the deed extends no further than the land actually occupied for railroad purposes, for its banks, ditches, and works, as located soon after the execution of the deed, while the defendant contends that it is of the width provided for in the charter of the Piedmont Railroad Company.

The deed is signed by twenty-six landowners. It recites that the construction of the road "will be of great importance to the district of

country through which it will pass, and will, it is believed, add materially to the value of the lands"; that the grantors are "anxious, as far as possible, to induce the construction of the work through their respective lands," and it conveys "all right, title, and claim to so much of our land as may be occupied by the said railroad, its banks, ditches, and works."

The parties to the deed were dealing with the future, and instead of desiring conditions to remain as they were, they hoped for greater development, and conveyed so much of the land "as may be occupied," etc.

It was within the contemplation and expectation of the parties that the business of the railroad would increase, and that it (16) would require more land for its operations, and while the grantors might thereafter have to surrender some additional land for this purpose, they would be compensated for the loss in the increased value of the adjoining lands.

The question involved in *R. R. v. Olive,* 142 N. C., 257, is similar to the one before us. In that case the deed to the railroad company conveyed a right of way, but did not specify any particular width. It conveyed only so much of the grantor's land as the railroad company, under its charter and amendments, would have a right to condemn, and upon examination of its charter it was found that that charter did not specify any particular width, but gave the railroad company the right to condemn land for its right of way and all other purposes of the company. In construing that deed, this Court used the following language:

"If we hold that a right of way of the width necessary to carry into effect the purposes of the company was granted, we are confronted with the question whether the words 'purposes of the company' must be confined to the purposes which existed at that time, and that its power to enter and occupy was exhausted when the road was constructed. This construction would, in the light of what we know to be the purpose of constructing a railroad, be entirely too narrow. It would confine the company to the soil actually covered by its cross-ties and rails, with the drains on either side. When we examine the charters of other railroads granted by the Legislature from 1833 to 1860, we find that when the width of the right of way is fixed, it is usually 100 feet from the center of the track. Revised Code, ch. 61, entitled 'Internal Improvements,' confers upon all railroad companies the power to condemn land of the width of 'not less than 80 feet and not more than 100 feet.' It would seem that in the absence of any limit in the charter, the Chatham Railroad Company, by the general public law referred to and the

express grant of all 'privileges, rights, etc., of corporate bodies in the State,' had 'the right to condemn' to the extent of 100 feet; and thus we find a standard by which to measure the right granted by the
(17) deed of May, 1862. Unless we can, in this way, give effect to the deed by rendering the description of the easement certain, we would be compelled to hold it invalid. The maxim, *ut res magis valeat quam pereat,* admonishes us that it is our duty to uphold the deed if by reasonable construction it can be done. We think that the words, 'so much as the said road would have the right to condemn,' carry the right of way to the extent of 100 feet, which would be fixed by adopting the center of the track as the point from which the measurement should be made, extending 50 feet on each side."

The language quoted in *Earnhardt v. R. R.,* 157 N. C., 362, from the *Olive case,* as to the construction of charters granted about the time of the charter to the Piedmont Company, is pertinent to the construction of a deed executed for the same general purpose: "The point of view from which charters for railroads were drawn in this State fifty years ago must not be lost sight of in construing them in the light of present conditions. If, to induce the investment of capital in the construction of railroads and development of the country, large privileges were conferred, not inconsistent with the exercise of the sovereign power of the State in controlling them, we may not construe them away without doing violence to sound principle and fair dealing. When these rights of way were granted, or statutes enacted permitting their acquisition in the exercise of the right of eminent domain, it was contemplated that they should be of sufficient width to enable the company to safely operate the road and protect the adjoining lands from fire communicated by sparks emitted by the engines. Land was cheap and population sparse. The railroads, as the charters show, were to be built by the citizens of the State, the capital stock to be subscribed by large numbers of people; Legislatures were ready to make broad concessions to these domestic corporations, and, as shown by the record in this and other cases in this Court, the owners of lands, because 'the benefits which will arise from the building of said railroads to the owners of the land over which the same may be constructed will greatly exceed the loss which may be sustained by them,' were desirous to promote
(18) the building thereof, and to that end to give them rights of way over their lands. When the road has been constructed and the benefits enjoyed, although new and unexpected conditions have arisen, the rights granted may not be withdrawn, although the long deferred assertion of their full extent may work hardship."

The same rule of construction was applied in *New Bern v. R. R.*, 159 N. C., 543, to a contract entered into in 1856, by which the railroad agreed to grade Hancock Street and to keep and preserve it in good order, and a mandatory injunction was there sustained commanding the defendant to pave the street, the Court saying, among other things: "This obligation is not to be measured by the size and condition of the city at the time when the contract was entered into. The increase of population and the consequent growth of the city must necessarily have been within the purview of the parties at the time the contract was made."

We are, therefore, of opinion that by correct interpretation of the language in the deed the right of way of the defendant is confined to the land occupied for its tracks, banks, ditches, and works, but that such occupation is not to be determined by the needs of the defendant at the time of the execution of the deed, and may be extended from time to time, when necessary to meet the growing demands upon the defendant, and for the development of its business, not to exceed, however, the width of the right of way provided in its charter.

If the defendant exceeds the right conferred as herein declared, the plaintiff may recover the damages directly caused thereby, but the defendant is not liable for damages incident to the lawful exercise of its right.

Affirmed.

Cited: *R. R. v. Bunting*, 168 N. C., 580.

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(19)

W. M. PATRICK v. C. F. DUNN ET ALS.

(Filed 16 April, 1913.)

1. Pleadings — Return Term — Criminal Courts — Ejectment — Defendant's Failure to Give Bond—Answer Stricken Out—Judgment by Default—Interpretation of Statutes.

Chapter 678, Laws 1909, permits process to be returnable and pleadings to be filed at criminal terms of the court, and where a defendant in ejectment fails to file the undertaking required by Revisal, sec. 453, or procure leave to defend without bond (Revisal, 454), the court, at such term, may strike out the answer and render judgment by default.

2. Judgments—Motions in Term—Notice.

It is unnecessary to serve notice of a motion for a judgment made during a term of court at which such judgment may properly be rendered.

3. Ejectment—Pleadings—Verification—Undertaking—Judgments by Default —Interpretation of Statutes.

Revisal, sec. 556 (4), construed with subdivisions 1, 2, and 3, does not require that the complaint in an action of ejectment be verified for a judgment by default for failure of the defendant to give the bond required by section 453, when leave has not been given to defend without bond under section 454.

4. Same—Inquiry—Harmless Error.

Where, in an action of ejectment, plaintiff has obtained a judgment for the failure of defendant to give the undertaking required by Revisal, sec. 453, the judgment is conclusive as to all matters therein determined; and where the judgment omits the inquiry as to damages, but is rendered only as to the plaintiff's title or right of possession, the defendant cannot be heard to complain that a final judgment had been entered.

CLARK, C. J., dissenting.

APPEAL by defendants from *Carter, J.*, at January Term, 1913, of LENOIR. Action to set aside a tax deed and for the recovery of land. The summons was returnable to the December Term of Lenoir, and the complaint was filed 29 November, 1912.

Two causes of action are set out in the complaint. In the first, the plaintiff alleges that he is the owner in fee of the land described; that the defendant wrongfully withholds the possession thereof, and that the defendant claims possession under a tax deed which is void; and
(20) in the second, he alleges ownership in fee and the wrongful withholding of possession by defendant.

The defendants filed answer 3 January, 1913, but filed no defense bond. At January Term, 1913, the plaintiff moved to strike out the answer and for judgment for want of a defense bond. The motion was allowed and judgment was rendered upon the complaint, and the defendant excepted and appealed.

Rouse & Land for plaintiff.
Charles F. Dunn for defendants.

ALLEN, J. The December and January terms of Lenoir Superior Court were criminal terms, but the statute 1909, ch. 678, permits process to be returnable to and pleadings to be filed at such criminal terms. Revisal, 453, requires the defendant in ejectment to file the undertaking therein specified before he shall be allowed to plead or defend, unless he shall procure leave to defend without bond in the manner prescribed by Revisal, 454. The defendants neither filed the undertaking nor procured leave to defend without giving the same, and the court therefore was within its power in striking out the answer and in granting judgment.

The judgment having been entered during a term of the court, the defendants were fixed with notice, and it was not necessary to serve notice of motion for judgment upon them. *Hemphill v. Moore,* 104 N. C., 379; *Reynolds v. Machine Co.,* 153 N. C., 342.

The Revisal, sec. 556, provides that, "Judgment by default final may be had upon failure of defendant to answer as follows," and then sets out four subdivisions.

In the first of these subdivisions a verified complaint is required by express terms, and the second refers to the first in such way that the same requirement would be necessary under it.

In the third subdivision there is no reference to a verified complaint, but in lieu thereof the plaintiff is required to make proof of the demand in the complaint.

The fourth subdivision is as follows: "In actions for the recovery of real property, or for the possession thereof, upon the failure of the defendant to file the undertaking required by law, or upon failure of his sureties to justify according to law, unless the defend- (21) ant is excused from giving such undertaking before answering."

It will be observed that the cause of action set out in the complaint in this action falls within the fourth subdivision, and in it there is no reference to the verification of the pleadings, and judgment is entered because of failure to file bond.

The fact that a verified complaint is mentioned in the first and second subdivisions, that there is a different requirement in the third, and that in the fourth the requirement as to verification is omitted, would seem to lead to the conclusion that the plaintiff is entitled to judgment by default final upon an unverified complaint, upon failure to give bond in an action to recover land.

If the General Assembly had intended that a judgment by default final should not be rendered in any case except upon verified complaint, it would have said, "Judgment by default final may be had on a complaint duly verified on failure of defendant to answer as follows."

If, however, the plaintiff was only entitled to judgment by default and inquiry, the judgment rendered amounts to no more than this, as it simply adjudicates that the plaintiff is the owner of the land, and directs the tax deed to be canceled, and no inquiry as to damages is ordered.

In *Blow v. Joyner,* 156 N. C., 140, it is held that a judgment by default and inquiry concludes as to all issuable facts properly pleaded, and that evidence in bar of plaintiff's right of action is not admissible on the inquiry as to damages, and that such a judgment establishes the cause of action set out in the complaint.

If so, a judgment by default and inquiry upon the complaint in this action would declare the plaintiff to be the owner in fee of the land in controversy, and would entitle him to an inquiry as to damages; and the judgment rendered does less than this, as the clause as to the inquiry is omitted and the plaintiff recovers no damages.

Affirmed.

(22) CLARK, C. J., dissenting: This is an action to set aside a tax deed and for the recovery of land. The plaintiff filed an unverified complaint. The defendants filed a full answer, duly verified, setting out a full and meritorious defense, but failed to file a defense bond. Thereupon the court, on motion of the plaintiff, struck out the answer and entered judgment by default final.

This was not only an irregularity, but was a fatal defect amounting to a lack of "due process of law." Thorough research, not only in the North Carolina Reports, but in the decisions of other jurisdictions, fails to disclose a single instance in which a man's land, or other property, has been taken from him by default final, and a jury trial denied, when the complaint was not verified.

The reason for this is that from the earliest times an oath has always been required to sustain the allegations of the plaintiff's demand. When the cause is litigated, there is the protection of an indictment for perjury against the witness who swears falsely. When no answer is filed, the plaintiff must still go on and prove his case except in cases where the demand is for a sum certain, or a definite object is sought to be recovered; then the plaintiff may have judgment by default final, provided the complaint is supported by the oath of the plaintiff. This gives the protection of an indictment for perjury, which is more especially needed when judgment is taken without trial or the benefit of cross-examination.

When the claim is for unliquidated damages, even then, though the complaint is verified, the plaintiff is only entitled to judgment by default and inquiry which is thereafter instituted before a jury. When the claim is for a sum certain or a definite thing, but the complaint is not verified, the plaintiff is entitled to judgment only by default and inquiry, and in such case proof has to be made when the inquiry is instituted before the jury. It is only when the complaint is verified and for a sum or a thing certain that judgment by default final can be entered.

It is true that when in an action for the recovery of realty no defense bond is filed, the judge can strike out the answer and render judgment by default, but this is only such default as is justified by the state of the

complaint. If that is verified, the judgment is by default final. If it is not verified, then it should be by default and inquiry. (23)

Formerly, judgment by default could not be taken in any case where the action was for the recovery of realty. Laws 1869-70, ch. 193, sec. 4, authorized "judgment by default" when no defense bond was given, leaving it open, upon the existing statutes, whether it should be a judgment by default and inquiry or by default final, depending upon whether the complaint was verified or not. In the C. C. P. and the Code of 1883 this was a separate section, being Code, 390, while secs. 385, 386 applied to judgments by default. The Revisal Commissioners in adding this Code, 390, as subsection 4 to Revisal, 556 (which last was Code, 385), did not intend, nor ought it to have the effect, to authorize a judgment by default final when the complaint is not verified. The plaintiff cannot expect the court to adjudicate a matter in his favor finally, and without possibility of defense before a jury, when he fails or is unwilling to swear to the truth of his allegations which would subject himself to liability for perjury if his statements in the complaint are untrue.

In every case in our Court in which by virtue of this statute (1869-70, ch. 193, sec. 4; Code, 390; Revisal, 556, 4) judgment by default final has been taken for realty, upon failure to file a defense bond, the fact is prominently set out that the complaint was verified. *Jones v. Best,* 121 N. C., 154; *Vick v. Baker,* 122 N. C., 100; *Junge v. McKnight,* 135 N. C., 107; *s. c.,* 137 N. C., 285.

The judgment by default final should be amended into a judgment by default and inquiry, so that the plaintiff shall prove in court the allegations which he has neither sworn to nor proven. The judgment by default and inquiry determines that he has a cause of action, and carries costs.

Cited: *Graves v. Cameron,* 161 N. C., 552; *Stelges v. Simmons,* 170 N. C., 44.

(24)

M. D. ARMFIELD, RECEIVER, v. RALEIGH AND SOUTHPORT RAILWAY COMPANY.

(Filed 16 April, 1913.)

1. Railroads—Negligence—Fire Damages—Evidence—Nonsuit—Questions for Jury.

In an action to recover damages from a railroad for negligently setting fire to the plaintiff's sawmill, there was evidence tending to show, and *per contra,* that the passing locomotive at that point put on its exhaust,

throwing out a great deal of smoke and cinders, which the wind carried to and enveloped the mill situated near; that from three to five minutes thereafter the ignition appeared on the side of the roof sloping nearest to the track; that no fire was there before the train passed, or within the building which could have caused the fire; and it is *Held*, that the evidence, construed as required in such motions, was sufficient upon the defendant's negligence, and a motion to nonsuit should not be sustained; and further *Held*, it was competent for a witness to testify that on this same trip at a trestle below the mill the same locomotive had set fire to the grass along its route.

2. Appeal and Error—Witnesses—Impeachment—Contradictory Statements—Record—Presumptions.

Where the testimony of a witness is sought to be impeached by his contradictory conversations held with others on the subject-matter of his evidence, it must appear of record on appeal, either by proof or proper suggestions, the substance or tenor of the conversations excluded, so the Supreme Court may see their pertinence or materiality; for otherwise the correctness of the ruling of the trial judge will be presumed.

APPEAL by defendant from *Bragaw, J.*, at October Term, 1912, of CUMBERLAND.

Action to recover damages for negligently setting fire to and burning the sawmill, kiln, etc., of plaintiff's company. There was testimony, on part of plaintiff, tending to show that, on or about 7 July, 1911, the sawmill of plaintiff's company, situate on or near the right of way of defendant, was destroyed by fire and that same was caused by the negligence of defendant in operating one of its trains, defective engine, etc. Defendant contended and offered evidence to show that the mill was burned by reason of fire starting within the mill, and that the defendant company's train had nothing to do with causing the destruction of the property. There was verdict for plaintiff, and de-
(25) fendant excepted and appealed.

H. L. Cook, Rose & Rose, C. W. Broadfoot, Shaw & McLean, and Sinclair & Dye for plaintiff.

Newton, Herring & Oates, Robinson & Lyon, and V. C. Bullard for defendant.

HOKE, J. Although there is a voluminous record in this case and the amount involved is a large one, the matter at issue is largely dependent on questions of fact. The jury having accepted the plaintiff's version of the occurrence, a cause of action is clearly established, and, after most careful consideration, we find nothing in the exceptions presented which would justify the Court in disturbing the results of the trial. It was chiefly urged for error that, upon the entire testimony,

there was no sufficient evidence that defendant's train had anything to do with causing the fire, but, on the record, this position cannot at all be sustained. Among other testimony, J. C. Ballard, for plaintiff, testified in part as follows: "At the time of this fire I was at Lane, N. C. At that time I was superintendent of the mill of the Racoarda Lumber Company, the mill that was burned. Lane is 13 miles from Fayetteville, and is situated on the R. and S. Railroad in Cumberland County. Was present the day the mill was burned. I first discovered the fire on top of the mill shed on the side next the railroad. That was at 3:25 in the afternoon. When I first discovered it, the fire was just about the size of the top of my hat. It was on to the top of the shed. I was standing on the platform of the depot on the end towards Raleigh from here. I was on the opposite side of the railroad from the mill. Mill was on one side and depot on the other side of the railroad. Train No. 8 of the defendant had just passed. It was a passenger train, and was coming to Fayetteville. I was there when that train passed, and I was standing right on the platform looking at it. This was the same platform I was on when I saw the fire. The wind was blowing very hard. The train referred to did not stop; it sort of slowed up. It ran faster after it got down by the planer shed. It increased its speed right against the dry-kiln and it commenced to throw out (26) a heavy exhaust and sparks after he pulled his throttle open—that is, he increased his speed by throwing his throttle open, and that threw out heavy smoke and cinders. As it came out of the smokestack, the smoke was heavy; it blew sort of over the mill. It made a heavy black smoke, and I could scarcely see the mill. Just as soon as the train passed and the smoke sort of cleared—it was not more than three to five minutes after it passed—there was fire on there about the size of this hat, and it flamed up like that. (Witness snapped his fingers to indicate flaming up of fire.) I think the railroad there, as near as I can tell, runs nearly north and south; I am not exactly certain. The railroad runs about north, and the wind was blowing from over the warehouse east of the railroad, and the mill was on the west side of the railroad, and the wind was driving the smoke square from the warehouse to the depot, right straight over the mill. From where the depot sits to where the mill site is, is directly across, and near it; but to where the shed sits is a little farther on, and it was in the path of the smoke from the train. The wind was blowing somewhere from 5 to 8 miles an hour that day, nearly all day. We had a heavy wind pretty much all that day. The weather was dry and hot. When I saw the fire, I spoke to the two men there with me. I told them to get some buckets. I

jumped off the platform and ran as hard as I could run across the railroad, right under the mill shed, and the fire was right on top of the mill shed." There was other testimony from this witness tending to show that the fire was caused by defendant's train and negligence in the condition of operation of the engine, and, further, that the fire did not originate in the mill. J. E. Parker, another witness for plaintiff, testified in part as follows: "I saw a train pass the mill just before the fire happened. It was a mail. I think I spoke to Mr. Bullard about it. It was about 3:24 o'clock p. m. The train was going south on the R. and S. road. I was on the depot with Mr. Bullard and Mr. Vinson. I didn't exactly see the fire when it started. When I first saw it, it looked to me between a peck and a half-bushel measure. It was
(27) between me and the comb of the building on the side next to me. I was on the southeast side from the building. I thought the wind was blowing from the southeast right across the mill. The fire was something like 4 or 5 feet from the combs of the house on the side towards the railroad. It was something like three to five minutes, to the best of my knowledge, after the train passed, when I saw the fire. Mr. Bullard, Mr. Vinson, and I were on the depot. Mr. Vinson was lying down, and I was sitting up, and Mr. Bullard was standing up between us both during the time the train passed. There was no fire on that roof before the train passed. The engine, before passing the mill, slowed up. It then went by, exhausting. I saw it exhaust. Certainly, the wind was making the exhaust go over the mill side. Mr. Bullard was the first to detect the fire, and called my attention to it. I saw some exhaust going out, steam and smoke. When the fire was called to my attention, I suggested plan to get the hands, and Mr. Bullard did not hear me, and went running to the mill, and I ran behind him part of the way, and thought of the planing mill and made for that. We got to the lumber and cut it in two and throwed it about and tried to break it away. If you understand as I told you about the wind blowing, the fire burned so fast, it got so hot, it ran us away and we could not work." Yet another witness, Adolphus Arunda, testified in chief as follows: "At the time fire started on the mill I had come out of the woods and come to mill, and train passed me—mail train. After mail train passed me, it opened for power, and I saw big fire on roof. Mill was about 40 yards from me. Came out of woods and went to mill to get a drink of water. Mail train passed about 3:30, just as I came up to mill, and in about three minutes after train passed I saw a big fire on top of mill shed. Was about 40 yards from fire when I first saw it. Train was throwing out sparks and smoke and cinders."

Witness was asked by attorney for plaintiff, in substance, the following questions: "Did you see any other fire that day, and if so, where? Defendant objected; objection overruled; exception. Exception No. 16.

A. Same engine also set fire to grass at trestle below the mill on same trip. Saw no fire under shed when under there. I (28) helped save lumber and pull belts off engines, or, rather, put some lumber out in effort to save it. Fire when first seen by me was on railroad side and as big as a hat."

There was much evidence on part of defendant in contradiction of this view, but, applying the accepted principle, that on motion to nonsuit the evidence making for plaintiff's right to recover must be taken as true and interpreted in the light most favorable to him, the evidence set out makes it clear that the motion for nonsuit could not have been allowed. Numerous decisions with us are to the effect that the evidence referred to is sufficient to carry the case to the jury (*Aman v. Lumber Co.*, 161 N. C., 373; *Currie v. R. R.*, 156 N. C., 419; *Kornegay v. R. R.*, 154 N. C., 389; *Deppe v. R. R.*, 152 N. C., 79; *Whitehurst v. R. R.*, 146 N. C., 588; *Williams v. R. R.*, 140 N. C., 623), and also recognize the competency of the statement made by the witness Arunda, that he had seen the same engine, on the same trip, set fire to grass at the trestle below the mill. *Whitehurst v. R. R., supra*, 4th headnote. In this connection we consider it well to note that the decision in *Currie v. R. R., supra*, disapproving a position maintained in *Williams v. R. R.*, the reference is to the *Williams case* appearing in 130 N. C., p. 116, and not the *Williams case*, 140 N. C., 623, which is cited and relied upon in the present opinion. It was further urged for defendant that the trial court made an erroneous ruling in refusing to permit a witness for defendant, Vinie Corbin, to testify to a conversation she had with one A. M. Ray on the afternoon of the fire. While there is authority to the contrary elsewhere, it is the accepted position in this State that "Whenever the credit of a witness is impeached, whether by proof of general bad character or by contradictory statements by himself, or by cross-examination tending to impeach his veracity or memory, or at times by his very position in reference to the cause and its parties, it may be restored or strengthened by any proper evidence tending to restore confidence in his veracity and in the truthfulness of his testimony, whether such evidence appears in a verbal or written statement, verified or not, or whether the previous statements were made (29) *ante litem motam* or pending the controversy." *S. v. Exum*, 138 N. C., 599, citing *Jones v. Jones*, 80 N. C., 246, and other cases. But the objection cannot be held for reversible error, because it nowhere

appears by suggestion or otherwise what was the substance or tenor of the conversation or that it would have tended in anywise to corroborate the witness. It is the principle and policy of the law that these trials at *nisi prius* should be upheld unless it is clearly made to appear that some substantial error has been committed to appellant's prejudice, and it is not permissible on an exception of this kind to annul the proceedings and entail upon the parties and the public the cost and labor of another protracted trial when it nowhere appears in the record by statement or suggestion that the conversation referred to would have corroborated the witness or in any way affected the result. *Fulwood v. Fulwood,* 161 N. C., 601; *Daniel v. Dixon,* 161 N. C., 377.

Attention is also called to the fact that though A. M. Ray, the person spoken to, was subsequently put on the stand, there was no effort made to have this witness testify to the alleged conversation. As heretofore stated, a careful examination of the record fails to disclose reversible error, and the judgment in plaintiff's favor must be affirmed.

No error.

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(30)

MOSES L. SMITH, ADMINISTRATOR, v. SALISBURY AND SPENCER RAILWAY COMPANY.

(Filed 16 April, 1913.)

1. Electric Railways—"Practical Fenders"—Negligence—Evidence—Questions for Jury.

The failure of an electric railway company to furnish its car with "practical fenders" to prevent injuries to those using the track, as required by Revisal, secs. 2616, 3801, is some evidence of negligence in an action to recover damages for personal injury inflicted by one of them in a collision with a pedestrian, and actionable when it is the proximate cause of the injury.

2. Appeal and Error—Instructions—Presumptions.

Where the charge of the trial judge to the jury is not set out in the record on appeal to the Supreme Court, it will be presumed to have been correctly given.

3. Evidence—"Scintilla"—Nonsuit.

Where there is more than a scintilla of evidence, and such as rises above the plane of mere conjecture, and is sufficient to prove the essential facts making for the plaintiff's contention in his action, a judgment for nonsuit should be refused.

4. Electric Railways—Outlook—Ordinary Care—Negligence.

It is the duty of a motorman on a moving electric railway car to keep a careful, constant, and continuous outlook for persons or obstructions on the track, such as is reasonable and practicable, and required in the observance of ordinary care.

5. Same—Persons on Track—Last Clear Chance—Nonsuit.

The defendant electric railway company being sued for damages for the negligent killing of plaintiff's intestate by one of its cars, while he was sitting, at night, on the defendant's track, his elbows on his knees and his head in his hands, introduced as a witness the motorman on the car, who testified that he was "looking forward" at the time, and failed to see the intestate, because the night was dark and foggy. There was evidence that the car was equipped with an electric headlight, that the track was straight and level where the killing occurred, and the deceased could have been seen at a distance of 400 feet, and that, at the speed the car was then going, it could have been stopped in about 35 feet: *Held*, the fact that the motorman was keeping a careful lookout, under the circumstances, was evidence that he saw the deceased in time to have stopped the car and avoided the injury; and a motion for a judgment of nonsuit on the evidence should not be granted, there being more than a scintilla of evidence that the defendant was negligent upon the issue of the last clear chance.

6. Same—Trespasser—Contributory Negligence—Ordinary Care.

The mere fact that a person on an electric railway right of way is a trespasser and has placed himself on the track in a dangerous position, of which he is apparently insensible, does not relieve the company of its duty to avoid running over him with its car, if this can be done by the exercise of ordinary care in the use of the means at the motorman's command, after he should have observed the danger to the pedestrian.

7. Electric Railways—Persons on Track—Apparent Insensibility to Danger—Presumptions.

Where a person is seen by the motorman down on defendant electric company's track, in a dangerous position, of which he is apparently unaware, in front of a running car, the motorman cannot assume that he will leave the track before the car overtakes him, and, free from negligence, continue to run the car until it is too late to avoid an injury.

APPEAL by defendant from *Cooke, J.*, at November Term, 1912, (31) of ROWAN.

Action to recover damages for the negligent killing of plaintiff's intestate, Cicero L. Wyatt. The defendant's car was proceeding north on its way from Salisbury to Spencer, running at the rate of about 12 to 15 miles an hour. The intestate had been seen walking from Spencer to Salisbury, and when struck by the car was sitting on the west side of the track, with his elbows resting on his knees and "bent over to conform to that position." There was evidence on the part of the

plaintiff that the night was dark, but not foggy, and that the intestate could have been seen for 300 or 400 feet, and he was actually seen by the witness Austin at a distance of about 400 feet. The intestate's son, who was on the car in search of his father, saw the motorman talking to Mr. Caddell, who was on the front platform, a few seconds before the car struck Wyatt. There was an electric headlight on the car. The track was nearly level for about 150 feet on the south side of the place where Wyatt was sitting, and straight at that point for a mile. The car could have been stopped in about a car's length,
(32) and it was stopped within that distance, 25 or 30 feet, that being a car's length. The body, when found, was lying 8 or 10 feet behind the car, between the rails. There was further evidence that the fender on the front of the car, a safety device, was defective, that is, too high and narrow, not properly equipped and out of date. On the other hand, there was evidence for defendant contradicting that of plaintiff. The motorman stated that he was not talking to Caddell, but keeping a proper lookout, and that it was dark and foggy, and for this reason he could not and did not see the man until he got within 30 or 35 feet of him, when he did all in his power to stop the car, applying the brakes and reversing the current, and it was not possible to stop the car sooner than he did. He had received a bell to stop at Carter's, a near-by station, and was "drifting at the rate of 15 miles, and sounding the gong," when he first saw Wyatt sitting on the track. He immediately tried to stop the car by the use of all available means. He said there was no indication to him that Wyatt was helpless or could not take care of himself at the time he first saw him and applied the brakes and reversed the current. The witnesses for both parties were corroborated. It was admitted that the defendant had a proper headlight on the car that night, and that the car was running at the usual speed.

The court submitted issues, which were answered as follows:

1. Was the plaintiff's intestate, said Cicero L. Wyatt, killed by the negligence of the defendant company, as alleged in the complaint? Answer: Yes.

2. Did the deceased, Cicero L. Wyatt, by his own negligence, contribute to his death? Answer: Yes (by consent).

3. Notwithstanding the negligence of plaintiff's intestate, could defendant, by the exercise of ordinary care, have avoided killing Cicero Wyatt? Answer: Yes.

4. What damage is plaintiff entitled to recover? Answer: $1,250.

The only question in the case was raised by the defendant's motion to nonsuit and his prayer for instruction, which was substantially, that

there was no evidence of negligence, or, to be more exact, that Wyatt was in a helpless condition or not in possession of his faculties, so that he could not see and hear, at the time he was sitting on the track, both of which were denied. Defendant duly excepted, and appealed from the judgment. (33)

Craige & Craige and Edwin C. Gregory for plaintiff.
Clement & Clement and Jerome & Price for defendant.

WALKER, J., after stating the case: We may pretermit any extended reference to the evidence as to the defective condition of the fender, which would be sufficient, perhaps, to justify the ruling of the court by which the nonsuit and the instruction were refused. The statute, Acts 1901, ch. 743; Revisal, secs. 2616 and 3801, require that street railway companies shall furnish their cars with "practical fenders" to prevent injuries to those using their tracks. If the company did not comply with this provision, it was evidence of negligence, or a circumstance from which negligence could be inferred by the jury, and if the negligence was found by the jury and was the proximate cause of the intestate's death, it became actionable. *Henderson v. Traction Co.,* 132 N. C., 779. But we will not rest our decision upon any such ground, as we think there was other evidence of negligence, which was properly submitted to the jury and, we must presume, under correct instructions, as the charge is not in the record. *S. v. Dickerson,* 98 N. C., 708. We are not concerned with the weight of the evidence, as that is for the jury to consider. If it is construed in the light most favorable to the plaintiff, which is the rule, and there is, in that view, more than a scintilla of evidence, and such as rises above the plane of mere conjecture and is reasonably sufficient to prove the essential facts, it was proper to refuse the nonsuit, as such evidence carries the case to the jury. This Court has held that those operating trains and cars should keep a careful outlook for persons and obstructions on the track. *Arrowood v. R. R.,* 126 N. C., 629; *Pickett v. R. R.,* 117 N. C., 616; *Sawyer v. R. R.,* 145 N. C., 24. We need not decide exactly the measure of vigilance required of a motorman on a street car in this respect, whether it should be constant and continuous, but it should be such as is reasonable and practicable, under the circumstances, and required by the duty to exercise ordinary care. In this case, the motorman said that he was "looking forward" as the car was approaching the place where Wyatt was sitting on the cross-tie, and he failed to see him in time to stop the car before he was reached, because the night was dark and foggy. The jury might well infer from this (34)

statement that the motorman saw Wyatt's situation in time to stop the car, when it is considered in connection with the other evidence that the track, which was laid upon the side of the public highway, was level for 150 feet and straight for a mile, and that Wyatt could be seen about 400 feet, with the headlight burning; so it cannot be said that there was no evidence of the motorman's ability to see Wyatt if he was looking ahead, and he testified that he was keeping a lookout and attending strictly to his business, instead of talking to Caddell. The fact that he looked and could see Wyatt is some evidence that he did see him. If he saw him the length of two cars, or say 70 feet, before Wyatt was struck, he could have stopped the car and avoided the injury.

Passing to the next point, there was evidence from which the jury could well have found that Wyatt was sitting in such a posture that any reasonably prudent man would at least *suspect* that he was asleep. There is no evidence that he was drunk, or even that he had been drinking, but he was bent over and evidently resting his head on his hands, as his elbows were upon his knees and he was "leaning forward to conform to that position," said the witness Caddell. There was evidence from which it might reasonably have been argued that he was asleep, and if not so, or otherwise insensible, he would have heard the sound of the gong and left the track. The motorman evidently thought that there was danger of injuring him, as he applied the brakes and reversed the current, he testified, as soon as he saw him. These energetic measures to which he resorted indicated his belief that Wyatt was unaware of his perilous situation or the approach of the car; but he was too late. If he looked and he saw him, and his situation was such as to produce the impression that he was oblivious to his surroundings, or if he was talking to Caddell and failed to look, he was negligent.

Edge v. R. R., 153 N. C., 212.

(35) The Court said in a case somewhat like this in its facts: "We do not think that, as a principle of law, it can be stated that where a trespasser is seen sitting upon the track, with his head in his hands and his hands resting on his knees, apparently asleep or unconscious, the presumption is that he will hear and obey the signals of the engineer warning him of the approach of the train. This undoubtedly would be true if the trespasser were walking or standing on the track. In that case the very fact that he was moving or standing up would indicate that he was not asleep or unconscious, but had possession of his faculties, and the engineer would have the right to suppose that he would hear and obey the danger signals. But the same rule would not necessarily prevail where the situation is as detailed in this case. A

man sitting on a cross-tie of a railroad track, apparently asleep or unconscious, presents an unusual, not to say extraordinary, spectacle, and we think it was the province of the jury to determine whether or not an engineer of ordinary prudence, seeing a man so situated, ought not to commence checking the train in time to prevent injuring him if it should transpire that he was unconscious or asleep." *Starett v. R. R.*, 110 S. W. Rep. (Ky.), 282. It is true, the jury found that Wyatt was negligent, but even a trespasser on the track, situated as he was at the time of the catastrophe, does not forfeit his life or limb if, after his discovery or by the exercise of proper care, his dangerous position can be seen and realized and the consequent injury to him avoided. He was not committing any offense, but simply placed himself in a place of danger. It may be admitted that he had no right to use the track in that way, but the defendant had no right to kill him because he did. If the jury had found that the motorman was in the exercise of due care, the defendant would have been relieved from responsibility for his death; but unfortunately for the defendant, they did not take that view of the facts, but by their verdict have said that his life could have been saved by the exercise of ordinary care in the use of the means at the motorman's command, making out a case of actionable negligence. *Hovins v. R. R.*, 76 Neb., 187. In the enjoyment and exercise of its franchise, the defendant is bound to recognize the rights of others. At common law, it is required to exercise ordinary care, to be measured in each case by the apparent situation (36) and the dangers naturally incident to the prosecution of its business. If a person be seen upon the track, who is apparently capable of taking care of himself, the motorman may assume that he will leave the track before the car overtakes him, but he cannot act upon that presumption with respect to a person who is apparently insensible of his danger from sleepiness, drunkenness, or any other like cause. *Sibley v. Ratliffe*, 50 Ark., 477. In *Henderson v. R. R.*, 159 N. C., 581, it was said by *Justice Allen:* "The allegation of negligence in the complaint is that the deceased was down on the track in an apparently helpless condition, and that the engineer of the defendant could have discovered him in time to stop the train before reaching him, by the exercise of ordinary care. The burden was on the plaintiff to prove the truth of this allegation and to establish in the minds of the jury: (1) that the deceased was down on the track in an apparently helpless condition; (2) that the engineer could have discovered him in time to stop the train before reaching him, by the exercise of ordinary care; (3) that he failed to exercise such care, and as a direct result the

deceased was killed," citing *Clegg v. R. R.*, 132 N. C., 294, which is in point. We add *Clegg v. R. R.*, on rehearing, 133 N. C., 303; *Upton v. R. R.*, 128 N. C., 173; *Guilford v. R. R.*, 154 N. C., 607. After a careful review of the facts, we are constrained to hold that there was some evidence of actionable negligence, and the motion and prayer of the defendant were both properly refused.

We have not discussed the relative and reciprocal rights of the street car company and the public in the use of the railway and the street or public road on which it was laid (*Moore v. Street Railway Co.*, 128 N. C., 455), as the jury found that Wyatt was a trespasser and guilty of contributory negligence, not being at the time in the exercise of a right incident to the customary use of the street or road, such as crossing it, either at a crossing or between the crossings. That question, therefore, is not now before us.

No error.

Cited: *Tyson v. R. R.*, 167 N. C., 217; *Hill v. R. R.*, 169 N. C., 741.

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(37)

CORAN TILLEY v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 16 April, 1913.)

1. Carriers of Goods—Dangerous Shipments—Corporation Commission's Powers—Interpretation of Statutes.

The Corporation Commission is given statutory powers in making orders and regulations for the safety, etc., of shippers or patrons of any public-service corporation, and particularly to regulate the shipment of articles rendering transportation dangerous, such as inflammable articles of freight. Chapter 471, Laws 1907; Revisal, secs. 1066, 1099, and 1112.

2. Same—Refusing Shipments—Penalty Statutes.

Where the Corporation Commission has authorized and fixed and approved the charges for the transportation of baled hay, without expressly requiring its acceptance by the carrier when unbaled or loose, and by express provision it does not require the carrier to receive "cotton or other merchandise and warehouse the same unless the articles offered are in good shipping condition," etc., the carrier is not liable, under the ruling of the Commission, for the penalty prescribed by Revisal, sec. 2631, for refusing to receive for shipment a car-load of loose hay, such shipments evidently being of such a character as to endanger the property, not only of the carrier, but that of others received by the carrier for shipment.

3. Carriers of Goods—Principal and Agent—Acceptance of Shipment—Scope of Agent's Authority.

An agent of the carrier is without authority from his principal to receive goods for shipment in a condition prohibited by law.

5. Pleadings — Inconsistent Proof — Penalty Statutes — Interpretation of Statutes.

In a suit for the penalty against the carrier for the refusal to accept a shipment (Revisal, sec. 2631), the plaintiff, necessarily alleging the refusal of the carrier, cannot contradict this averment by seeking a recovery upon the ground that the company had received this shipment, as it had a right to do, though under the law it may have refused to do so in the condition in which it was offered.

APPEAL by defendant from *Peebles, J.*, at January Term, 1913, (38) of DURHAM. Action to recover penalty under Revisal, sec. 2631.

The following are the issues:

1. Did the defendant wrongfully and unlawfully fail and refuse to accept and transport the pea-vine hay, as alleged in the complaint? Answer: Yes.

2. What penalty, if any, is the plaintiff entitled to recover? Answer: $650.

From the judgment rendered, the defendant appealed.

L. L. Tilley and Branham & Brawley for plaintiff.

Guthrie & Guthrie and Theodore W. Reath for defendant.

BROWN, J. The plaintiff tendered to defendant's agent at Willardsville, N. C., a lot of loose pea-vine hay (not baled, marked, or packed), for shipment to Durham, N. C. The agent told plaintiff to load the hay in a car on a side-track, which was done. Agent said to plaintiff that he had no classification for loose hay, and wired to headquarters at Roanoke to see if he could ship it. Upon receiving instructions, the agent refused to issue a bill of lading or to receive the hay and ship it, but unloaded it from the car into a near-by barn. Plaintiff then delivered the hay in Durham by wagon.

By motion to nonsuit, as well as prayers for instruction, defendant raises the question as to the liability of defendant for a penalty for failure to receive and ship the hay.

Section 2631, Revisal of 1905, penalizes railroads and other transportation companies, whose duty it is to receive freights, when they refuse to receive for shipment all articles "of the nature and kind received by such companies for transportation when ten- (39) dered at a regular depot. *Olive v. R. R.*, 152 N. C., 279.

The common-law duties of a common carrier by railroad in North Carolina as to *intrastate* traffic are largely superseded and supplemented by the statutory law of the State, and the carrier's duty to receive such freight tendered for carriage is now governed by the rules and regulations prescribed by the Corporation Commission of the State.

By section 1066, Revisal of 1905, the Commission is given general control and supervision of all railroad corporations, and by the act of 1907, chapter 469, it is authorized to make any necessary and proper rules, orders, and regulations for the safety, comfort, and convenience of passengers, shippers, or patrons of any public-service corporation, and particularly to regulate the shipment of articles likely to render transportation dangerous.

By chapter 471, Laws 1907, the Commission is particularly authorized to regulate the carriage of inflammable articles as freight.

By section 1099, Revisal of 1905, the Commission is given broad and general powers to "make reasonable and just rates" for freight and passenger service. The schedules of rates so made are declared to be *prima facie* evidence that such rates are just and reasonable, by section 1112, which provides for the certification of copies of all such schedules by the clerk of the Commission.

The Commission has authorized the transportation of baled hay and fixed and approved the charges therefor, but by its prescribed classification does not authorize the carriage of unbaled, loose hay; hence the defendant is not liable for the penalty by refusing to receive and ship the hay tendered by plaintiff.

Among the rules prescribed by the Commission is this: "Railroad companies are not required to receive cotton or other merchandise and warehouse the same unless the articles offered are in good shipping condition, well prepared by the shipper with proper packing and legible, plain marking, and accompanied with orders for immediate shipping."

Page 64, 13th Annual Report.

(40) Not only does nothing in the classification authorize the carriage of the commodity offered by plaintiff, but by the plainest implication such carriage is prohibited. Wherever in the classification hay or any like articles, such as sea-grass or hair or waste, are classified, it is always with the requirement that the commodity be offered baled, as the railway company insisted that plaintiff's shipment should be prepared in the present case. Such a commodity as loose hay on a railway whose motive power is fire-driven engines would be so dangerous as to imperil not only the railway company's property, but the property of all other shippers. It is for this reason that the reasonable precaution is prescribed by the classification of the Corporation Com-

mission that such an article and all similar articles must be rendered less dangerous by baling.

It is contended, however, that the agent of defendant actually received the hay for shipment and permitted plaintiff to load it in a car, and that the classification and rules of the Commission do not prohibit the carrier from receiving such commodity as loose hay if it elects to do so.

There are three answers to this argument: First. The agent had no authority from the defendant to receive such an article as loose hay for shipment. He telegraphed at once to headquarters for instructions, and was directed to refuse to receive it, and the agent at once informed plaintiff. *Newberry v. R. R.*, 160 N. C., 156.

Second. In any view of the evidence, there was in law no receipt of the hay by the defendant. The refusal to issue a bill of lading was a refusal to receive the hay for shipment, and the fact that the agent had permitted plaintiff to load the hay into a car makes no difference. We have distinctly held that when a common carrier permits a shipper to load a car with his goods and refuses to ship the car or to *issue a bill of lading* therefor, it is a *refusal* to receive the goods for shipment, under Revisal, sec. 2631, which is the section upon which plaintiff bases his action. *Garrison v. R. R.*, 150 N. C., 575; *Twitty v. R. R.*, 141 N. C., 355.

Third. Plaintiff having sued to recover the penalty prescribed for a failure to receive the hay for shipment, and having alleged a refusal to receive it, cannot now be permitted to contradict his own averment. (41)

The motion to nonsuit is allowed, and the action dismissed.

Reversed.

MARTHA E. MARTIN ET AL. v. J. W. MARTIN ET AL.

(Filed 23 April, 1913.)

1. Contracts, Written—Interpretation—Intent.

A written contract should be so construed as to effectuate the intent of the parties as gathered from the entire instrument, in accordance with the language used therein, in proper instances taking into consideration the condition of the parties and the purpose for which it was entered into.

2. Same—Reasonable Interpretation—Existing Conditions.

Where a written contract is susceptible of two meanings, one of which will render it valid and the other invalid, or if one is reasonable and the

other unreasonable, the construction will be adopted which will give life and force to the writing.

3. Same—Acts of the Parties.

The words of a written instrument or bond for the support of another are generally construed most strongly against the party using them, and in cases of doubt the construction adopted by the parties will have weight.

4. Same—Support of Another—Breach of Contract—Payee—Beneficiaries—Rights of Action.

Where a conveyance of lands is made in consideration of the support of the grantors, expressed in a separate instrument of writing, or bond, which was done for a while and discontinued by the act and fault of the obligor, in violation of its terms, the obligees thereunder may recover such sum or sums of money necessary for a reasonable support, though the bonds may not specify to whom it was to be payable, the plain intent of the instrument being that those for whose benefit the instrument was made are those to whom the money should be paid.

5. Contracts, Written—Breach—Support of Another—Death of Obligee—Abatement—Executors and Administrators—Parties—Courts—Rules.

Where the obligor on a bond given for the support of another for life, and for a valuable consideration, has failed to comply therewith, and the obligee has since died, leaving the obligor responsible under the terms of the bond for moneys due for the former's reasonable support, the action upon the bond, brought by the obligee, does not abate upon his death, and the Superior Court clerk has the authority to make his administrator a party (Revisal, sec. 417); or he could be made a party under Supreme Court Rule No. 46.

(42) APPEAL by plaintiff from *O. H. Allen, J.*, at September Term, 1912, of FORSYTH. Action to recover upon a contract for support. The plaintiff alleges in her complaint:

1. That she is the mother of the defendant J. W. Martin, and now an old woman, about 90 years old; that for some time prior to the year 1907 she and her husband were the owners of a tract of land in Davidson County, North Carolina, containing some 50 or 60 acres, and she and her husband, being old, conveyed it to the defendants on condition and for the consideration that they would support the said plaintiff and her husband, James Martin, as long as they should live; that the husband died in a few months thereafter, leaving the plaintiff him surviving.

2. That on 1 January, 1907, the defendants entered into a bond with the plaintiff, in words and figures as follows:

NORTH CAROLINA—FORSYTH COUNTY. January 1, 1907.

Know all men by these presents, that we, J. William Martin and wife, Eliza Martin, do hereby bind ourselves, our heirs, executors, and

administrators, in the sum of ($1,000) one thousand dollars, to care and support of James Martin and Martha E. Martin, at our home during their lives, and that this shall be a first lien on the farm on which I now reside, containing 85 acres, adjoining Mrs. Reed, J. H. Willard, and others.

His
J. WILLIAM × MARTIN.
Her mark
ELIZA × MARTIN.
mark

Witness as to J. W. Martin: E. P. Heitman.

That the private examination of the female defendant was (43) taken and the said bond is recorded in Book 86 of Deeds, page 242, in the office of the Register of Deeds of Forsyth County.

3. That the plaintiff resided with the defendants for about two years, but the conduct of the defendants towards the plaintiff became so intolerable that it was impossible for her to live at the house of the defendants; that, among other things, the defendants failed to provide the proper food and clothing and care suitable for a person of plaintiff's age and physical condition; neglected plaintiff; undertook to control and supervise her conduct; forbade her to visit her other children, and when she did go to visit another, defendants stated that they would not permit plaintiff to return to the home of the defendants; on account of which, and other things, the home of the defendants is an impossible place in which plaintiff may reside.

4. That the value of the place given defendants was about $1,000, and they have sold said place and received the benefits arising therefrom, without reasonably complying with their agreement of support.

5. That the said bond is, as stated therein, a lien for $1,000 on the home place of the defendants, located in Broadbay Township, Forsyth County, North Carolina, adjoining the lands of Mrs. Reed, J. H. Willard, and others, and containing 85 acres, more or less, and more particularly described as follows:

First Tract—Beginning at a stone on the south side of Randolph Road and C. Reed's corner, running thence south with said Reed's line 16.49 chains to a stone, C. Reed's corner; thence east with said line 14.62 chains to a stone, Parnell's corner; thence north with said Parnell's line 25.32 chains to a stone in the south side of Randolph Road; thence southwardly with the said road 16.95 chains to the beginning; containing 30 acres, more or less.

Second Tract—Beginning at a stone in Parnell's line, and runs north 19.90 chains to a stone in Willard's line; thence north 86 west with

said line 12.55 chains to a stone in said line; thence south 5.15 chains to a stone; thence north 86 west 956 chains to a stone in Glasscock's line; thence south ¾ west 25.25 chains to a stone, Reed's corner; thence north 81 east 1.70 chains to a stone; thence northeastwardly with
(44) public road 16.95 chains to the beginning; containing 55 acres, more or less.

6. That for about the past sixteen months plaintiff, on account of the conduct of the defendants, and their failure to comply reasonably with the terms and conditions of said bond, has been forced to live with another son, and is in need of and, as she is informed, advised, and believes, entitled to receive from the defendants sufficient monthly funds to keep her in clothing, pay for medicine and medical care and attention and nursing while sick, and for board, all of which plaintiff alleges she is greatly in need of, and has been for some time, which plaintiff alleges should be $25 a month."

The defendants demurred as follows:

"That the said complaint fails to state a cause of action against these defendants, or either of them, in that the bond, or obligation, which is set out in paragraph 2 of said complaint is not payable to the said plaintiff or to the said James Martin, and that they are advised and believe that the failure of said bond or obligation sued on to be payable to any person does not give the said Martha E. Martin, plaintiff, as aforesaid, the right to bring this action against these defendants."

His Honor sustained the demurrer and dismissed the action, and the plaintiff excepted and appealed.

Beckerdite & Beckerdite and J. E. Alexander for plaintiff.
Louis M. Swink, H. A. Sapp, and Benbow & Hall for defendants.

ALLEN, J. The ruling of his Honor is predicated upon the idea that the action is wholly upon the paper-writing set out in the second paragraph of the complaint, and that there is no payee or obligee named therein, and this requires an examination and construction of the writing.

"The object of courts in the construction of a paper-writing is to find out what the parties to it intended, and whether apt language has been used to give effect to the intention" (*Hornthal v. Howcott,* 154 N. C., 229), and "to arrive at the intent of the parties, it is proper to look at the entire instrument, the condition of the parties, and
(45) the purpose for which it was entered into." *Rhyne v. Rhyne,* 151 N. C., 403.

If it is susceptible of two meanings, one of which will render it valid and the other invalid, or if one is reasonable and the other unreasonable,

the construction will be adopted which will give life and force to the writing.

The words used are generally construed most strongly against the party using them, and in cases of doubt, the construction adopted by the parties will have weight. Clark Cont., p. 402.

Applying these principles to the facts alleged, we find that the plaintiff and her husband, who has since died, two old people, conveyed their land in 1907 to the defendant, their son, for the consideration that he would support them during their lives, and that about the same time the said son and his wife executed the paper-writing; that the writing was probated and registered, and thereafter the plaintiff resided with the defendants; that the defendants provided support for a time, but failed to do so for sixteen months.

It was evidently the intention of the defendants to make the promise to the plaintiff and her husband, the parties have recognized it as a subsisting obligation, and to adopt any other construction would convict the defendant of practicing a fraud on his father and mother by obtaining their land upon a promise of support, and then evading performance because he had failed to write the paper correctly.

The principal stated in *Leach v. Fleming,* 85 N. C., 449, is decisive of this case. The Court there says: "The first and principal objection directed against the validity of the bond is the alleged absence of the name of an obligee. The obligation assumed by the defendant is that he will be responsible for the amount due on the note, identifying it by an accurate description of its terms, 'if the said Hyams and Dale (the debtors) fail to pay said note (amounting to $760) at maturity.' With whom does he covenant when he says 'I pledge myself to be responsible for the same'? Of course, it is with the person to whom the note to be paid is payable."

In the case at bar the defendant binds himself to the care and support to the plaintiff and her husband, and his obligation must (46) be to those named who are to be benefited.

We are also of opinion that a cause of action is stated if the second paragraph be stricken from the complaint, as without it there is an allegation of a promise to support, based on a valuable consideration, and of a breach of the promise.

Reversed.

DEFENDANT'S APPEAL.

After the judgment was rendered in the Superior Court and before the appeal was docketed in this Court, the plaintiff died, and her administrator was made a party plaintiff by the clerk, and this was approved by the judge, and defendant excepted and appealed.

The action did not abate by the death of the plaintiff, and her administrator will be entitled to recover such amount for support as was due at her death.

The clerk had authority under Revisal, sec. 417, to make the administrator a party, or he could have been made a party in this Court under Rule 46 of the Supreme Court.

Affirmed.

Cited: *Temple Co. v. Guano Co., post,* 90.

CARPENTER, BAGGOTT & CO. v. WILLIAM W. HANES.

(Filed 26 April, 1913.)

1. Injunctions, Mandatory—In Personam—Residence—Jurisdiction.

A mandatory injunction to restrain an action upon the same subject-matter in a foreign jurisdiction is *in personam*, and will be issued only where both parties are residents of this State and the defendant is within our jurisdiction; and not where his residence and citizenship is in another State, and he is only constructively here, as by being plaintiff in the action wherein the restraining order is sought.

2. Actions and Defenses—Pendency of Another Action—Demurrer—Jurisdiction—Practice.

The defense that another action is pending between the same parties on the same subject-matter is by demurrer (Revisal, sec. 474, 3); and it must appear that the other action is pending in this State.

(47) APPEAL by plaintiff from *O. H. Allen, J.*, granting a restraining order 12 December, 1912; from FORSYTH.

Joseph E. Johnson for plaintiffs.
L. M. Swink for defendant.

CLARK, C. J. This is an appeal from a mandatory injunction. The plaintiffs instituted an action in New York against the defendant 12 November, 1912, and obtained jurisdiction by attachment and garnishment. On 18 November, 1912, the plaintiffs instituted this action against the defendants in this State for the same cause of action, being for the sum of $11,300 alleged to have been paid out in the purchase and sale of 5,000 bales of cotton at the request of the defendant and $750 for commissions thereon, less $9,305 that has been paid, leaving

balance due the plaintiffs $2,475. The defendant alleged that the transaction was a gambling transaction, being a dealing in "futures," and void under Revisal, 1689, 1690, and 1691, and asked for a recovery on a counterclaim of $3,000 which the defendant had put up as "margin" and which the plaintiffs had appropriated for their own use; and also a further counterclaim for wrongfully selling the cotton purchased by the plaintiffs for the defendant. The defendant further alleges that the attachment in the New York proceedings was wrongfully sued out, in that the defendant had no property or effects in that State, and that the purpose and intention was to injure and harass the defendant, asking damages herein for such wrongful act. The defendant further alleges that there was no personal service of process in New York in the suit instituted there, and that that action was for the same cause of action upon which this suit is instituted, and both parties being duly in court in this action (plaintiffs by bringing the action and the defendant by personal service), the defendant asks the court, in order to prevent multiplicity of suits and the expense attendant thereon, that a restraining order issue to enjoin and restrain the plaintiffs, their attorneys and agents, from the further prosecution of the said (48) cause in the courts of New York and from any interference thereby with the orders and process in this court, in so far as it embraces the cause of action set out in the complaint herein. The court issued a mandatory injunction in accordance with this prayer, and directed, further, that the plaintiffs and their agents and attorneys dismiss the said action in New York.

There are many cases that hold that the courts of a State where both parties are domiciled may restrain the prosecution of suits between such parties in a foreign jurisdiction. *Cole v. Cunningham;* 133 U. S., 107; *Morgan v. Sturgess,* 154 U. S., 256; *Cunningham v. Butler,* 142 Mass., 47. This power has been most frequently exercised in those cases where a resident creditor is seeking to evade the laws of his domicil, and the ability to exercise it rests upon having the person of the party enjoined within reach of the process of court. But even in such cases, the power should be exercised sparingly and only to suppress manifest injustice and oppression, and not from any arrogant sense of greater ability to do justice to either party or because of more favorable laws, or of convenience of the parties. *Bigelow v. Copper Co.,* 74 N. J., 457, and many other cases.

But such power cannot be exerted to enjoin parties who are not domiciled in the jurisdiction of the court, merely on the ground that the party has come into court by bringing an action herein. Probably

the only case that has asserted the power of the court to restrain a nonresident plaintiff from bringing an action in another jurisdiction is *Pickett v. Ferguson,* 45 Ark., 177, which was afterwards overruled by two cases in that State. *Griffith v. Langdale,* 53 Ark., 71, and *Greer v. Cook,* 88 Ark., 93.

Among the many cases holding that the court cannot thus enjoin a nonresident is *R. R. v. Telegraph Co.,* 49 Ill., 90; *Bank v. R. R.,* 28 Vt., 470; *Wicks v. Caruthers,* 8 Tenn., 353; *American School Co. v. Sauder Co.,* 106 Fed. 731; *Hawley v. Bank,* 134 Ill. App., 96.

(49) In *Wierse v. Thomas,* 145 N. C., 264, *Hoke, J.,* says: "The correct doctrine was held to be that the courts of the resident creditor have power in proper cases to issue an injunction, not in restraint of the action of a court in another jurisdiction, but operating *in personam* on the creditor and compelling him to obey the laws of his own Commonwealth," quoting Judge Story Eq. Jur., sec. 899, as follows: "When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon these parties, and direct them by injunction to proceed no further in such case." He also quotes with approval from *Keyser v. Rice,* 47 Md., 203: "The power of the State to compel its citizens to respect and obey its laws even beyond its own territorial limits is supported, we think, by the great preponderance of precedent and authority. . . . As long as a citizen belongs to a State, he owes it his obedience; and as between States, that State in which he is domiciled has jurisdiction over his person and his personal relations to other citizens of the State."

It will thus be seen that the jurisdiction to issue a restraining order of the nature here sought depends upon the party affected being a resident of this jurisdiction. The mere fact that a nonresident plaintiff brings an action here does not place his person under the control of the court for all purposes, nor for any purpose other than affecting the prosecution of his action. The court may prescribe the terms upon which he may be allowed to prosecute his action here, but that is the limit of its authority. This is fully discussed and so held in *Bank v. R. R.,* 28 Vt., 470; *Wicks v. Caruthers,* 81 Tenn., 353; *R. R. v. Telegraph Co.,* 49 Ill., 90, and *Hawley v. Bank,* 134 Ill. App., 96, already cited, all of which point out that such injunction could not be enforced, if granted, when the party affected does not reside in the jurisdiction and has no property therein.

The doctrine to be derived from the authorities is thus stated in *Griffith v. Langsdale,* 53 Ark., 71: "When the debtor and creditor are

domiciled in different States, and the creditor proceeds by attachment in the courts of the State of his domicile against the property of his debtor, there is no cause for interference by injunction on the part of the courts of the debtor's domicile, even though the creditor be temporarily found within their jurisdiction. This is necessarily so, for the equitable jurisdiction in this class of cases arises only from (50) the creditor's effort to evade the law of the State of his domicile."

If the parties were both domiciled here, such an injunction as this would not lie, but the remedy is by a demurrer, "That there is another action pending between the same parties for the same cause" (Revisal, 474, 3), and in such case even, it must appear that the other action is pending in this State. *Ridley v. R. R.,* 118 N. C., 996; *Sloan v. McDowell,* 75 N. C., 29.

The mandatory injunction was improvidently granted.

Reversed.

ELIZA SMITH v. CITY OF WINSTON.

(Filed 23 April, 1913.)

Cities and Towns—Streets and Sidewalks—Negligence—Reasonable Care—Instructions—Appeal and Error.

A city is required to maintain its streets and sidewalks in a reasonably safe condition for the safety of the public, and to exercise ordinary care and due diligence to see that they are so kept and maintained, and a charge which in effect requires the city to keep its streets and sidewalks in safe condition, and holds it responsible in damages to a pedestrian injured by a defect therein, without negligence on his part, makes the city insure or warrant the same condition of its streets, and is *Held* for reversible error.

APPEAL by defendant from *O. H. Allen, J.,* at September Term, 1912, of FORSYTH.

This action was brought to recover damages for injuries to plaintiff, alleged to have been caused by the negligence of defendant. Plaintiff was walking along what is claimed by her to be one of the streets of the city of Winston, when she stepped into a hole or depression in the sidewalk, or very near thereto, and fell, crushing one of her ankles. There was controversy as to whether the place where she fell was a part of any street or sidewalk of the city or was a part of the (51) property belonging to the Winston Development Company, the streets of which, as shown in the plat, not having been accepted by the

city, as claimed by defendant, and several exceptions arose out of this disputed question, which need not be considered in the view taken of the case by the Court. There was a verdict for the plaintiff upon the usual issues of negligence, and judgment thereon. Defendant duly excepted and appealed.

L. M. Swink and F. M. Parrish for plaintiff.
Manly, Hendren & Womble for defendant.

WALKER, J., after stating the case: There was a conflict in the evidence as to the dangerous condition of the place where the plaintiff alleges that she fell, the description of the witnesses differing materially. The court gave the following instruction to the jury, to which exception was duly taken: "The law requires all cities and towns to keep their streets and sidewalks in safe condition, and on failure to do so, if injury occurs without negligence on the part of the injured party, the city is liable in damages for such injury." We do not understand this to be the true measure of the responsibility of a city or town for the condition of its streets. It carries it beyond the limit fixed by this and many other courts. A city does not insure or warrant the safe condition of its streets. It must keep and maintain them in reasonably safe condition, and exercise ordinary care and due diligence to see that they are so kept and maintained. This is the principle approved and adopted in *Fitzgerald v. Concord,* 140 N. C., 110; *White v. New Bern,* 146 N. C., 447; *Bailey v. Winston,* 157 N. C., 253; *Rock Island v. Gingles,* 217 Ill., 185. In *Fitzgerald v. Concord, supra,* after stating that the authorities of a city or town are charged with the duty of keeping its streets in a "reasonably safe condition" only and to the extent that this can be done by exercising "proper and reasonable care and supervision," *Justice Hoke* says, for the Court, that, "The town, however, is not held to warrant that the condition of its streets shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not (52) sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the town knew, or by ordinary diligence might have discovered, the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated." We said in *Bailey v. Winston, supra,* approving what was held in *Brusso v. City of Buffalo,* 90 N. Y., 697, that it is the duty of a city to keep its streets in a safe condition by the exercise of reasonable diligence and care to accomplish that end, and to see that they are reasonably free from danger to travelers upon

the street. We were there discussing its absolute or primary duty to look after the condition and proper repair of its streets, with reference to the question whether such a duty could be delegated to an independent contractor, but the cases upon the extent of its duty to keep the streets in repair, decided by this Court, were cited and approved. The case of *White v. New Bern, supra,* approving *Fitzgerald v. Concord,* shows clearly the error of the instruction in this case. It is there said, with respect to the identical passage we have quoted from the case, that "The same doctrine has been announced in several other decisions of this Court," showing that the duty of maintenance and reparation does not call for absolute safety as the result of its performance, but only for a reasonably safe condition, although it does exact the exercise of reasonable care, skill, and diligence. The rule is thus briefly stated in 37 Cyc., 285: "Municipalities must use, and are liable to any one injured by their failure to use, at least ordinary diligence at all times to keep the road reasonably safe in view of probable traffic." Many authorities are cited in the notes, and an examination of them shows they fully support the text. The limit of duty on the part of the town with regard to the condition of its highways falls far short of making them absolutely safe under all circumstances, even for those who use them properly. A condition of perfect safety, beyond the possibility of an accident, is, of course, unattainable, but a condition of reasonable safety is required, with the exercise of proper care to produce such a condition of safety, where by statute, as is the case in some of the States, a more positive and unqualified duty is imposed. *Lane v. Han-* (53) *cock,* 142 N. Y., 510, 521, and cases cited; *Moriarity c. Lewiston,* 98 Me., 482; 2 Elliott on Roads and Streets (3 Ed.), p. 186 and sec. 788. The learned judge was, perhaps, misled by certain forms of expression to be found in some of the cases upon this subject, which were used, though, with reference to the particular question then under decision, and which, therefore, should be construed with reference thereto and considered also in connection with the facts and circumstances to which they referred. We cannot say that the error was harmless, as the parties were contending with each other upon every phase of the case, as presented. There was no correction of the error, or explanation of the instruction, other than appears in it, and standing by itself, without qualification, it imposed an absolute duty upon the city to keep its street in a safe condition. There was a conflict in the evidence as to the character of the alleged defect in the sidewalk, and as to whether it was not reasonably safe for the use of a pedestrian situated and circumstanced as the plaintiff was at the time. There was some evidence

of daylight sufficient to have made the place reasonably safe, though plaintiff said it was dark. The case should again be submitted to the jury, with proper instructions as to the measure of the city's duty upon the facts and circumstances as the jury may find them to have been at the time of the injury.

New trial.

Cited: *Hines v. Rocky Mount, post,* 416; *Alexander v. Statesville,* 165 N. C., 533; *Myers v. Asheville, ib.,* 704; *Schorn v. Charlotte,* 171 N. C., 541.

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(54)

STANDING STONE NATIONAL BANK v. J. G. WALSER AND D. F. CONRAD.

(Filed 26 April, 1913.)

1. Notes—Defenses—Fraud and Misrepresentations—Warranty—Damages—Pleadings—Counterclaim.

The defense to an action upon a note for fraud and misrepresentation is essentially different to that of breach of warranty, for in the latter case the instrument itself is not sought to be invalidated, and the remedy is for damages by way of counterclaim arising under the warranty.

2. Notes—Warranty—Compromise—New Note — Consideration — Interpretation of Statutes.

Where one of several makers of a note agree with the payee that they shall be released from their obligations by giving a new note in a smaller sum, subject to the same conditions of warranty as the old one, the giving of a new note is valid as a compromise under the Revisal, sec. 859, and the warranty in the former transaction is a part of the consideration for the new one, and is enforcible.

3. Notes—Contracts—Warranty, Breach of—Counterclaim—Evidence—Fraud and Misrepresentations.

Where a note is given in the purchase of a horse, and in an action thereon the defense is set up that by a collateral written agreement the horse was warranted to be a reasonably sure foal getter, and if otherwise, the maker of the note was to deliver him to the payee in good condition and receive in return one of the same breed, etc., evidence only that the animal sold was not as represented in being a good foal getter is irrelevant upon the question of fraud in the procurement of the note; and is alone competent, when properly pleaded, to show a breach of warranty that would entitle the defendant to recover damages upon his counterclaim.

4. Notes—Holder in Due Course—Contracts—Warranty—Performances—Indorsements—Guarantor of Payment.

Where a horse is sold upon the warranty that he is a reasonably sure foal getter, and if not as warranted, he was to be exchanged for one of

like breed, etc., it is *Held*, in an action upon a note given for the horse, and held by one claiming to be a holder in due course, for value, that the maker of the note must show a refusal on the part of the seller of the horse to comply with the conditions of the warranty in order to defeat a recovery thereunder, and this doctrine applies whether the plaintiff is an indorsee or a guarantor of payment.

WALKER, J., concurring in part; ALLEN, J., concurring in the opinion of WALKER, J.; HOKE, J., concurring in part.

APPEAL by defendants from *Cooke, J.*, at November Term, 1912, of DAVIDSON.

Avery & Avery and Walter Clark, Jr., for plaintiff.
E. E. Raper, Walser & Walser for defendants.

CLARK, C. J. This action was brought by the plaintiff on a (55) note given by defendants to H. P. Reynolds & Co. or bearer, at Lexington, N. C., 13 September, 1907, due 30 months after date, with interest, and payable at National Bank of Lexington. The plaintiff acquired the note at its bank in Pennsylvania, 4 May, 1908, and gave $350 credit therefor to H. P. Reynolds on his checking account. The note was indorsed, "For value received, I hereby guarantee payment of the within note at maturity. 4 May, 1908. H. P. Reynolds."

H. P. Reynolds & Co. are customers of the plaintiff bank, keeping a checking account there. Plaintiff alleges in the complaint that it took the note as assignee and innocent purchaser for value, before maturity. The note was duly protested for nonpayment, upon presentation at maturity, and plaintiff has since demanded payment thereof of the defendants, but no part thereof has been paid.

The answer admits the execution of the note, but sets up as a defense that its execution was procured by fraud and misrepresentation on the part of the payees, H. P. Reynolds & Co., in that (1) they falsely and fraudulently represented to the plaintiff that a number of gentlemen, including J. C. Ripple and others, had agreed to purchase a certain horse and pay therefor the price of $3,400, whereas in fact their agreement with said Ripple, and perhaps others, was that they were not to pay for said horse except out of the profits of the same, which fact was unknown to the defendants and they executed the note in ignorance thereof. There was no proof of this, and it would have been irrelevant in this action.

(2) That said Reynolds & Co. falsely represented that the horse which they sold to the defendants and others was an imported German coach and was a reasonable sure foal getter, and they also entered into a written guarantee and warranted the said horse to that effect, when in

fact, as defendants are informed and believe, the said horse was not an imported German coach and was not a reasonably sure foal getter as guaranteed, and tendered the said horse back to Reynolds & Co., who refused to accept the same.

(56) The defendants further aver that if the plaintiff is in fact a holder of the note sued on, he did not take same for valuable consideration and without notice of the defenses above set forth.

In the reply the plaintiff sets out that the defendants and ten others, on 12 September, 1907, executed three promissory notes, due respectively in 18, 30, and 42 months after date, with interest from date, aggregating altogether $3,400. That on the next day these two defendants sought the said H. P. Reynolds and proposed that if he would release them from liability as makers on said three notes aggregating $3,400, that they would execute said $400 note, now in suit, which offer was accepted, and the defendants were released from the other three notes, which the plaintiff pleads was a valid arrangement under Revisal, 859.

On the trial the jury found by consent that the note sued on was executed by the defendants in consideration of their release from liability on the three notes executed by them and others, aggregating $3,400, which had been executed on the previous day to said Reynolds & Co. for the purchase money of a horse. But this consent was subject to the exceptions as to the ruling of the court as to the competency of the evidence offered as to this issue and excluded by the court.

The jury further found that the plaintiff purchased the note sued on before maturity, for a valuable consideration, and in due course of trade and without notice of any alleged fraud or of any infirmity affecting the validity of said note.

It was in evidence for the plaintiff by depositions of its officers that the note was passed upon in regular course by the finance committee of the plaintiff bank and approved by its board of directors, and it was purchased in good faith for value and without notice of any alleged infirmity. On cross-examination, the officials of the plaintiff bank stated that they paid $350 for the note, that is, that they gave Reynolds credit to that amount on his checking account which he had with the bank. The witnesses for the plaintiff bank were a member of the finance committee and the cashier, whose evidence was full and explicit on these points, and there was no evidence to the contrary. There

(57) was testimony as to their good character. Protest of the note at maturity and nonpayment were also shown.

The defendants, in reply, introduced evidence that in the meeting between them and Reynolds the agreement was that this note of $400

was to be executed in consideration of their release from the $3,400 notes theretofore given, and $400 was indorsed upon the said three previous notes as having been paid by them. But they further testified that the $400 note was given with a further agreement that the same contract of guarantee as to the character of the horse was to apply to the new note, and that in that respect the horse was a total failure.

The first exception is because the court excluded the written guarantee given by Reynolds & Co. at the time the notes were executed for the $3,400. The defendants also excepted because the court ruled that the $400 note sued on having been given in consideration of a release of these defendants from the three original notes, he refused to admit the evidence as to the retention of the guarantee as to the character of the horse as a part of the consideration for the note of $400.

The defendant further excepted that the court charged that the only evidence before the jury as to the note being taken for value before maturity and without notice being that contained in the depositions offered by the plaintiff, if it was believed by the jury, it should answer the last issue "Yes."

The contention of the defendants before us was based upon the allegations of "fraud and false representations" and that the plaintiff took the note with notice of "defect in the title."

There was no proof that the horse was not a German coach. While it is alleged in the complaint that Reynolds & Co. represented the horse to be a good foal getter, and that as a matter of fact he was totally worthless in that respect, there is no allegation in the complaint that said Reynolds & Co. knew that the horse was defective, and no proof to that effect was offered.

The new note having been taken in discharge, or compromise, of the liability of the defendants upon the three former notes, evidence as to any false representations or other defects affecting the validity of said prior notes was properly excluded. 6 A. & E., 713; Revisal, 859. Also the guarantee accompanying the execution of said (58) prior notes would not be competent, but for the fact that the defendants offered evidence that a part of the consideration of the new $400 note was that it should "retain the same guarantee." It was error in the court, therefore, to exclude such evidence, for if it was believed, such guarantee was a part of the consideration for the new note. But the exclusion of this evidence was harmless error, for such guarantee was an equity and did not accompany the note into the hands of a purchaser for value, without notice and before maturity. The court properly told the jury that the only evidence as to the purchase of the

note was the deposition offered by the plaintiff, and that if it was to be believed, the plaintiff was an innocent purchaser for value, and to answer the last issue "Yes."

The defendants, however, contend that the burden was upon the plaintiff to prove that it actually paid out to Reynolds the $350 which the bank placed to the credit of Reynolds' checking account on 4 May, 1908. It is true that if such money was not checked out by Reynolds, the bank would not be purchaser of the note for value. Under the decisions of this State the rule is, "The first money in, the first money out" (*Reid v. Bank,* 159 N. C., 101), and the strong presumption is that a credit of $350 placed on the checking account of Reynolds nearly two years before the maturity of the note was drawn out by him. But the case does not depend upon probabilities. Revisal, 2201, defines "What constitutes a holder in due course" as follows: (1) That the instrument is complete and regular upon its face, (2) and the holder acquired it before due, and without notice of previous dishonor. (3) That he took it in good faith and for value. (4) That he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. The uncontradicted evidence of the plaintiff, if believed, filled all the above requirements. The only question which can be raised is as to whether the plaintiff took "for value," inasmuch as it is not shown that the $350 credit given Reynolds on his checking account two years before maturity was actually checked out. In short, the controversy narrows down to the proposition, Upon whom rests the burden (59) of showing or disproving the receipt of the money by the indorser?

Revisal, 2208, provides: "Every holder is deemed *prima facie* to be a holder in due course." Then there follows this exception, that "When it is shown that the title of any person who negotiated the instrument was defective, the burden is on the holder to prove that he or some other person under whom he claims acquired the title as a holder in due course." But to this exception itself there is the following exception: "But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." We need not discuss whether these defendants, under the exception to the exception, can take any benefit, because upon the face of the exception itself the burden is shifted to the holder only when "the title of the indorser is defective," and there is no evidence whatever to that effect in this case. In Revisal, 2203 and 2205, reference is made both to "infirmity in the instrument *or* defect in the title." Revisal, 2208, shifts the burden of proof to the holder only when there

is a "defect of title" pleaded by one whose liability did not accrue prior to such defect. Revisal, 2204, defines a defective title to be when the indorser "obtained the instrument or any signature thereto" by fraud, duress, or force and fear or other unlawful means, or for an illegal consideration, or when he negotiated it in breach of faith or under such circumstances as amount to a fraud." None of these things have been shown in this case. There was no duress, force, fear, illegal consideration, or breach of faith in transferring the note, nor, as we have seen, was there any fraud. The excluded evidence of the defendants, if admitted and believed, merely showed that Reynolds & Co. had agreed that the guarantee, given on a separate paper at the time of the execution of the three prior notes, that the horse was reliable as a sure foal getter, was continued as a guarantee collateral to the new $400 note, and there was evidence tending to show that the horse, while he was not shown to be entirely worthless, because he was doubtless a good work animal, did not come up to this guarantee. But the guarantee was the ground of a cross-action for damages for breach thereof, and was an equity which did not attach to the note in the hands of a holder (60) in due course.

Revisal, 2208, made the plaintiff *prima facie* a "holder in due course," and the exception that the burden is thrown upon the holder to prove that he is a holder in due course applies only when there is a "defect in the title," and the defendants have failed to show that the title was defective by merely showing that the guarantee given by Reynolds & Co. as to the character of the horse was broken. They have not shown any fraud or fraudulent representation. They have not shown that the horse was not a German coach horse, and while there is evidence that the character of the horse was not as represented, it has not been alleged nor shown that Reynolds & Co. were aware of that fact at the time of the sale nor that the defect may not have accrued subsequently to the sale.

A false representation must be "a false statement of an existing fact known to the payee and intended and calculated to deceive." This has not been shown in the present case. The mere allegation in the complaint that the representation as to the character of the horse did not come up to the terms of the guarantee is not sufficient to throw upon the holder of the note the burden of proving payment when he has testified that he paid for the note and placed $350 to the credit of the indorser in its purchase. *Prima facie* the holder held in due course, and there is no proof to the contrary, and nothing to rebut the presumption, therefore, that it was a purchaser "for value." *Treadwell v.*

Blount, 86 N. C., 33; *Bank v. Bridgers,* 98 N. C., 72; *Lewis v. Long,* 102 N. C., 208.

The fact that $350 was less than the face value of the note in no wise contradicts, but rather confirms the evidence that the plaintiff bought the note from the indorser. *Farthing v. Dark,* 111 N. C., 243. That the indorser guaranteed the note is nothing more than every indorser does when he procures the note of another, with his indorsement, to be discounted.

Revisal, 2172, provides: "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value." Revisal, 2173, provides: "Value is any consideration sufficient to support a simple contract." This note being pay-
(61) able to bearer, was negotiable by delivery. Revisal, 2178; *Tyson v. Joyner,* 139 N. C., 69.

The law is thus summed up in Selover Neg. Instr., 218: "The original consideration for a negotiable instrument is presumed, and consideration for an indorsement is also presumed, and it follows, as of course, that a holder is presumed to have given value for the instrument, and this presumption is not repelled merely by proof that as between the immediate parties the instrument was without consideration." Here there was at least a partial consideration, for the horse had value, even if he did not come up to the guarantee.

It is also true, as further stated by Selover Neg. Instr., 223, that "The transfer of negotiable paper to a bank in consideration of credit upon its books, which credit is not absorbed by an antecedent indebtedness, or exhausted by subsequent withdrawals, is not a purchase in the ordinary sense of the term." But the presumption that the instrument was issued for a valuable consideration (Revisal, 2172) and that the holder gave value (Revisal, 2201 and 2208), being presumptions in favor of the holder, they must be rebutted by the defendant. The "holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of these instruments to the full amount thereof against all parties thereto." Revisal, 2206, and numerous cases cited in Pell's Revisal under that section.

In *Joveshof v. Rockey,* 109 N. Y. Sup., 818, it is held upon the section of the Uniform Negotiable Instruments Law (which is our Revisal, 2172), providing that negotiable instruments shall be deemed to have been issued for a valuable consideration, and the section (which is our Revisal, 2176) making failure of consideration a matter of defense

against any person not a holder in due course, the burden is on the defendant, even in such cases, to show want of consideration. The Court says that whatever might have been the difference in the decisions prior to the Uniform Negotiable Instruments Law, it is now well settled that "the presumption that the indorser of a negotiable note is a (62) *bona fide* holder is not repelled merely by proof that the paper, as between the immediate parties, was without consideration," citing to that effect *Mitchell v. Baldwin,* 84 N. Y. Sup., 1043; *Harger v. Worrall,* 69 N. Y., 370; 25 American, 206. To the same effect are the hundreds of decisions collected 7 Century Digest, Bills and Notes, secs. 1653 and 1654.

In *Voss v. Chamberlain,* 139 Iowa, 569, it is held: "The transferee of negotiable paper regular on its face is presumed to be a holder in due course, and this presumption is not overcome by a mere showing that the title of the party transferring the same was defective, but those questioning his title are charged with the burden of proving his lack of good faith in acquiring it, for when one of two innocent parties to negotiable paper must suffer by the wrongful act of a third person, the one who has made the wrongful act possible must bear the loss," citing numerous authorities. Indeed, this principle is of almost universal application.

In *Shirk v. Mitchell,* 137 Ind., 194, the principles applicable are thus clearly summed up, with citation of numerous authorities: (1) When it is alleged and shown that a negotiable instrument was procured to be executed by fraud, it is incumbent upon the holder to prove that he is a *bona fide* holder for value; but (2) when the defense pleaded and proved is a failure of consideration, or a breach of warranty, the defendant has the burden of the issue to prove that the holder took it with notice of the defense thereto. This was the law prior to the adoption of the Uniform Negotiable Instruments Act, which is more decisively in favor of the holder, as above shown.

It is true, as we have already said, that if it is shown that the bank merely gave the indorser credit on his checking account, and that the money has not been checked out, the presumption is rebutted. But the burden is on the defendant to show this. Bank v. McNair, 114 N. C., 342; *s. c.,* 116 N. C., 554; *Reid v. Bank,* 159 N. C., 101; *Boyden v. Bank,* 65 N. C., 13.

There is nothing to the contrary of the above decisions in *Manufacturing Co. v. Summers,* 143 N. C., 102, and *Bank v. Fountain,* 148 N. C., 590, for they merely hold that where there is allegation and proof tending to show that the execution of the note was (63) procured by fraud, the holder must prove that he acquired it in

procured by fraud, the holder must prove that he acquired it in due course. But in this case there is no allegation, or proof, as to the execution of the $400 note sued on, beyond the fact that it was given in compromise and release of liability on prior notes for $3,400 and an offer to show that an agreement that this note should hold the same guarantee which the payees had given in regard to the character of the horse, which was executed as a collateral paper and part of the contract in the original sale of the horse. And even as to the original contract, there was nothing shown or alleged to prove fraud. There was an allegation that the payees, Reynolds & Co., represented that this was a German coach horse, but there is no proof that he was not, and while there is evidence that the character of the horse in other respects was not as represented, the mere allegation that it was false, without allegation that the vendors knew it to be false, and even without proof that it was false at that time, constitutes neither fraud nor allegation of fraud, as already said. Besides, as to the new note on which this action is brought, none of these things exist beyond the mere offer of evidence that the defendants were to have the benefit of the guarantee which was given in the original sale of the horse. A breach of this may be ground for an equity to recover damages, which does not attach in the hands of the plaintiff who took this note, without notice thereof before maturity, and for value.

There is a broad distinction between fraud and breach of warranty. The defendants, if well advised, would have placed sufficient reference to warranty in the face of the note.

In *Beaman v. Ward,* 132 N. C., 68, the well-settled principle is laid down by *Walker, J.,* as follows: "In an action to recover on a negotiable instrument, it is not sufficient for the defendant merely to allege fraud, but the facts constituting the fraud must be alleged."

The defendants rely upon an alleged breach of warranty as to the qualities of the horse. The warranty specifies that if the horse does not come up to the representations, that Reynolds & Co. would furnish another one at the same price and quality, upon delivery to them
(64) of the one sold. The defendants introduced in evidence the letter of H. P. Reynolds, offering to do this if the present horse was returned to them, which they did not show had been done. This being so, even if Reynolds & Co. were the plaintiffs in this action, they could recover, and of course the plaintiff bank can do so, even if it were not a holder in due course.

Furthermore, the law as to the bank may be thus summed up. The plaintiff is presumed to be a holder in due course, unless fraud had been

alleged and put in proof, in which case the burden would be thrown upon the plaintiff to show that it was a holder in due course. Revisal, 2208. But no fraud was properly pleaded and there was no evidence to show it; therefore the plaintiff is entitled to recover as a holder in due course.

The fact that the plaintiff went further, and showed that it gave Reynolds credit on his checking account, raised no presumption of law that the money was afterwards checked out, or that it was not, though the lapse of two years might raise a presumption of fact that it was checked out. But no fraud having been alleged, the burden was not thrown upon the plaintiff to show that the money was checked out. The plaintiff can rely upon the presumption that it was a holder in due course, and it was not required to prove actual payment.

Upon the whole case, we find no reversible error.

No error.

NOTE.—Our Negotiable Instruments Law was formulated by the American Bar Association and has been adopted by 41 States besides the District of Columbia, the territory of Hawaii, and the Philippine Islands; total, 44. Only 7 States, *i. e.*, Maine, South Carolina, Georgia, Mississippi, Texas, Arkansas, and California, and the territories of Alaska and Porto Rico, have so far failed to adopt it. It is important that uniformity shall not be marred by conflicting decisions in the courts of the jurisdictions which have adopted it.

WALKER, J., concurring: I agree to the conclusion of the Court that there is no error in the case, for the reason stated in its opinion by the *Chief Justice*, that the defendants had not complied with the stipulation of the contract, which required them to deliver to Reynolds & Co. the horse purchased of the latter by them, in as sound and as good condition as when they received him, before they should be (65) entitled to have another horse "of the same price and breed" in his place. There is no allegation or proof that this was done by the defendants, and of course they cannot recover for a breach of the contract which they have not themselves performed or offered to perform in the respect indicated. I also concur with *Justice Hoke* in the position taken by him in his separate opinion, that upon the facts, as shown by the evidence, the bank is not a *bona fide* purchaser for value or a purchaser in due course, so as to cut off equities or defenses.

ALLEN, J., concurs in this opinion.

HOKE, J. I concur in the disposition made of this appeal for the reason that it does not appear that defendants have pursued the method of adjustment provided and stipulated for by the contract nor that they

have made any reasonable effort to do so. I cannot assent to many of the other propositions appearing in the principal opinion as now stated. There is no doubt of the position that, under section 2208 of our statute on negotiable instruments and under general principles of law applicable without and before the provision of any statute, an indorsee plaintiff presenting a note, is presumed to be a holder in due course, and that, according to the terms of this law and except in cases where a defendant has become unimpeachably bound in the instrument, before any defect in the title to such paper arose, the statutory presumption holds unless and until the title of some one who negotiated the paper has been properly and sufficiently assailed; but the statute here is only dealing with presumptions, and rebuttable presumptions, and the general principle remains that, when the facts are all disclosed, to sustain the position of holders in due course, the claimant must have paid value. In the present case the plaintiff has undertaken to show this, and, from his own proof, has established the fact that it is not a holder for value and has not paid anything for the note it holds and seeks to recover on. It simply gave the payee credit on his bank account, and there is no evidence that payee was in its debt or that the money or any part of it had ever been checked out, or that plaintiff, if it fails to re-
(66) cover, is or is likely to be out of pocket one cent by reason of its alleged purchase. These are the facts as developed by plaintiff's own proof, and, as in such case the great weight of authority and, to my mind, the correct view is against the position that plaintiff may be considered a holder in due course, shutting off either defenses or counterclaims. 7 Cyc., 929, and cases cited; 6 A. & E. (2 Ed.), p. 298; *McKnight v. Parsons,* 136 Iowa, 390; *Warman v. Bank,* 185 Ill., p. 60; *Bank v. Blue,* 110 Mich., 31. In the citation from 6 A. & E., *supra,* the doctrine is stated as follows: "Where a bank discounts paper for a depositor who is not in its debt, and gives him credit upon its books for the proceeds of such paper, it is not a *bona fide* holder for value, so as to be protected against infirmities in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor; and so long as that relation continues and the deposit is not drawn out, the bank is held subject to the equities of prior parties, even though the paper has been taken before maturity and without notice."

The subject is not pursued, because the judgment is affirmed on other

grounds, but, owing to the importance of the question discussed, I consider it well to state what I conceive to be the correct position.

Cited: *Trust Co. v. Ellen,* 163 N. C., 46; *Bank v. Exum, ib.,* 203; *Bank v. Branson,* 165 N. C., 349; *Oltman v. Williams,* 167 N. C., 314; *Frick v. Boles,* 168 N. C., 657.

J. M. SPEAS AND WIFE v. P. C. WOODHOUSE.

(Filed 16 April, 1913.)

1. Estates by Entireties—Husband and Wife—Wife's Separate Estate—Tenants in Common—Deeds and Conveyances.

Where a brother and sister have inherited lands as tenants in common from their father, and in an interchange of deeds for a division the conveyance is made to the sister and her husband "and their heirs," etc., in entireties, and the wife dies leaving her husband surviving her, without children of the marriage, the husband acquires no right of title by survivorship, and the lands descend to the heirs at law of the wife. *Sprinkle v. Spainhour,* 149 N. C., 223, cited and applied.

2. Same—Wife's Consent—Evidence—Contract.

Where a deed in dividing lands held in common conveys the interest therein of a wife to her and her husband in entireties, the fact that the wife assented thereto cannot change the construction that the right of survivorship does not lie in the husband upon her death, and evidence thereof is immaterial; for she could only be deprived of her title thereto by contract having the formal legal requirements.

3. Equity—Cloud Upon Title—Possession—Interpretation of Statutes.

A suit can now be maintained to remove a cloud upon the title to lands by one who is not in possession thereof. Revisal, sec. 1589.

APPEAL by plaintiffs and defendant from *Cooke, J.,* at Fall (67) Term, 1912, of YADKIN.

Action to restrain waste and remove cloud from plaintiff's title, caused by a deed from J. N. Burch and wife to P. C. Woodhouse and wife, M. J. Woodhouse. The jury rendered their verdict as follows:

1. Was the deed executed by J. N. Burch and wife to P. C. Woodhouse and wife, M. J. Woodhouse, for the purpose of partition of the lands of the said J. N. Burch and M. J. Woodhouse, and that consideration alone? Answer: Yes.

2. Has the defendant, P. C. Woodhouse, since the death of his wife, committed waste on said land? Answer: No.

3. And if so, what damage has the plaintiff sustained? Answer: ....

4. Is the plaintiffs' cause of action barred by the statute of limitation? Answer: No.

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

R. C. Puryear, Winston & Biggs, and D. M. Reece for plaintiff.
E. L. Gaither for defendant.

(68) HOKE, J. It appeared in evidence that J. N. Burch and Mrs. M. J. Woodhouse, former wife of defendant, P. C. Woodhouse, were owners as tenants in common of certain lands in Alamance County, having inherited same from their father, Isaac Burch, deceased, and, on 10 January, 1886, these persons desiring to make voluntary partition of the property, executed mutual deeds for the different portions of the land, and, in the endeavor to carry out the purpose, the deed from J. N. Burch to his sister, Mrs. Woodhouse, in form conveyed an estate by entireties: "Hath bargained and sold and by these presents doth bargain, sell, and convey to P. C. Woodhouse and M. J. Woodhouse, and their heirs, a tract of land," etc., being the land in controversy; that Mrs. Woodhouse died many years ago without lineal descendants, having had issue born alive during coverture, and, since that time, defendant has been in possession and control of the land and claims to own same by survivorship and under the terms of the deed; that plaintiff, Mrs. Speas, is the child and sole heir at law of her father, J. N. Burch, deceased, and of her aunt, Mrs. Woodhouse. Upon these facts and under our decisions, the rights of these parties have been properly determined. The deed from J. N. Burch to his sister, Mrs. Woodhouse, did not convey and create any new estate, but only operated to sever the unity of possession between the tenants in common and ascertaining Mrs. Woodhouse to be the owner of the land as heir at law of her father. It constituted the wife's separate estate, and she could not be deprived of it by the fact that in a deed from her brother the husband was named as coöwner. The principle has been applied in several of the later decisions, notably in *Sprinkle v. Spainhour,* 149 N. C., 223; *Harrington v. Rawls,* 136 N. C., 65; *Carson v. Carson,* 122 N. C., 645; *Harrison v. Ray,* 108 N. C., 215. Speaking to the question in *Sprinkle's case, Brown, J.,* said: "Assuming for the sake of argument that this particular deed, under the circumstances attending it, had conveyed an estate in fee to husband and wife, both, the husband and those

claiming as his heirs would not be permitted to set up a claim to the land. It descended to S. E. V. Sprinkle from her ancestor, and this partition deed was made during her coverture. At the date of its execution the land belonged to her separate estate. It is one of the essentials of the peculiar estate by entireties sometimes en- (69) joyed by husband and wife, that the spouses be jointly entitled as well as jointly named in the deed. Hence, if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. And it matters not if the conveyance is so made at her request, because being a married woman, she is presumed to have acted under the coercion of her husband. *Moore v. Moore,* 12 B. Mon., 664; *Babbitt v. Scroggins,* 1 Duval, 273; *Gillan v. Dixon,* 65 Pa. St., 395, all cited in 18 Am. Dec., pp. 383, 384." Nor was there any error in excluding the testimony tending to show that the deed was executed in its present form with the assent or according to the wishes of the wife. Being, as we have seen, a part of her separate estate, and Mrs. Woodhouse holding same as heir of her father, she could only be deprived of such interest by contract having the formal legal requirements. Public Laws 1911, ch. 109; Revisal, sec. 2107. In the absence of such a contract, a trust would result in the wife's favor, even if the deed operated to create the estate which it purports to convey. *Ray v. Long,* 128 N. C., 90. The authorities cited to the effect that only one in possession may maintain an action to remove a cloud from title, were decisions rendered prior to the act of 1893, Chapter 6; Revisal, sec. 1589. Since that statute, it is held that the action is maintainable, though plaintiff is not in the present possession or control of the property. *Campbell v. Cronly,* 150 N. C., 457; *Daniel v. Fowler,* 120 N. C., 14.

No error.

(70)

J. H. HOOD v. AMERICAN TELEGRAPH AND TELEPHONE COMPANY.

(Filed 23 April, 1913.)

1. Actions—Wrongful Death—Interpretation of Statutes—Executors and Administrators—Parties—Trespass—Damages.

The right of recovery of a defendant for wrongful death rests entirely by statute, and the right of action thereunder is only given to the executor or administrator (Revisal, sec. 59); and hence a husband may not recover damages therefor in his action against the defendant in aggravation of damages caused by the defendant's tortious acts while trespassing on his lands.

2. Pleadings—Forcible Trespass—Demurrer—Appeal and Error—Practice—Repleading.

Where the complaint alleges that defendant trespassed on the home and lands of the plaintiff and his wife, in their possession without regard to their resistance and rights, and at that time offered them indignities by demonstrations and by force and violence, which were willful and wanton and accompanied by acts of oppression, a cause of action for damages for forcible trespass is stated, to which a demurrer is bad; and, in this case, the trial judge having erroneously sustained the demurrer, and it not specifically appearing whether the lands are owned by the plaintiff or his wife, the Superior Court should order a repleader so as to present more clearly the acts of trespass, the ownership of the land, and eliminate the objectionable features in the pleadings.

APPEAL by plaintiff from *Allen, J.*, at October Term, 1912, of CASWELL.

Action for damages, heard upon demurrer *ore tenus* to complaint, upon the ground that it fails to state a cause of action. The court sustained the demurrer and dismissed the action. The plaintiff appealed.

Justice & Broadhurst and P. W. Glidewell for plaintiff.
Wilson & Ferguson for defendant.

BROWN, J. The plaintiff and his wife are alleged in the complaint to have been in possession of the house and some land which was their home, and it is alleged that the defendant, through its agents and employees, after being forbidden by the plaintiff and his wife, and
(71) without regard to the resistance or rights of the plaintiff and his wife, trespassed upon this land, and at the time of trespass offered the plaintiff and his wife indignities by demonstrations and by force and violence. It is alleged in paragraph 8 of the complaint that the trespass and wrongful conduct of the defendant was willful and wanton and was accompanied by acts of oppression, and that the plaintiff is entitled to recover from the defendant actual and punitive damages.

It is true that as an element of damage and in aggravation thereof the plaintiff seeks to recover damages for the death of his wife, averring that it was brought about by the tortious conduct of defendant's servants while acting for the defendant.

These allegations should be eliminated from the complaint, as the plaintiff cannot recover damages by way of aggravation or otherwise for his wife's death. At common law a civil action does not lie for an injury resulting in death. To recover for such injuries, the statute known as Lord Campbell's Act was enacted by the English Parliament,

9 and 10 Victoria, and has been engrafted into our law. Revisal, sec. 59.

Under the statute the only person who can sue is the personal representative of the deceased. *Howell v. Commissioners,* 121 N. C., 363.

The right conferred by statute is plainly given to the representative only. The statute confers a new right of action, which did not exist before and must be strictly followed. The parent cannot maintain it even when the statute expressly provides that the recovery shall be for his or her benefit. In such cases only the executor or administrator can sue. *Killian v. R. R.,* 128 N. C., 263, *Hood v. Telegraph Co., post,* 92.

But the complaint does charge a forcible trespass upon the possession of the plaintiff and his wife. It does not specifically appear, as it should, whether the land belonged to the plaintiff or to his wife; therefore we will not decide whether the husband can maintain an action for a trespass upon his wife's land. *Manning v. Manning,* 79 N. C., 293-301.

We think it advisable that the Superior Court order a repleader so as to present more clearly the acts of trespass and eliminate the objectionable features in accord with this opinion. (72)

Reversed.

K. A. WATSON ET AL. v. D. D. HINSON ET AL.

(Filed 23 April, 1913.)

1. Wills—Subscribing Witnesses—Interpretation of Statutes.

Revisal, sec. 3113, does not require the testator to manually sign his will in the presence of the subscribing witnesses, and the validity of the written instrument in this respect will be upheld if the testator produces the will itself, and acknowledges and identifies it and his signature thereto, at the time the witnesses subscribe their names as such.

2. Wills—Subscribing Witnesses—Witness Dead—Proof of Handwriting—Testator—Interpretation of Statutes.

Where one of the subscribing witnesses to a will survives and is competent to testify upon its offer for probate, proof may be taken both of the handwriting of the testator and the other witness or witnesses, and of such other circumstances as shall satisfy the clerk of the Superior Court of the genuineness and the due execution of such will; with the proviso that when the testator has signed by making his mark, proof of his handwriting is not necessary. Revisal, sec. 3127.

3. Wills—Devisavit Vel Non—Propounders—Burden of Proof—Trials de Novo—Record, Evidence—Handwriting—Testator.

Upon an issue of *devisavit vel non*, purporting to be signed by testator himself, it is necessary for the propounders to show, in the Superior Court, the handwriting of the testator and his signature to the will, where only one of the subscribing witnesses to the will is alive, the matter of probate being *de novo*, and the record of the clerk not being competent evidence in this respect.

4. Wills—Interpretation—Separate Papers—Incorporation by Inference.

A will properly executed may so refer to another unattested will or other written paper or document as to incorporate the defective instrument and make the same a part of the perfect will; the condition being that the paper referred to shall be in existence at the time the second will is executed and the reference to it shall be in terms so clear and distinct that from a perusal of the second will, or with the aid of parol or other proper testimony, full assurance is given that the identity of the extrinsic paper has been correctly ascertained.

5. Wills—Executors and Administrators—Erasures—Legal Execution—Subscribing Witnesses.

Where a testator has intentionally erased the name of an executor, who has died, from a paper-writing purporting to be his will, and substituted another executor without observing the statutory requirements as to the witnessing, etc., of the paper, the substitution of the executor is inoperative, and without any effect on the instrument, and the result is that the testator died testate of the property therein disposed of, but without naming an executor.

APPEAL by plaintiff from *Bragaw, J.*, at December Term, 1912, of RICHMOND.

Issue of *devisavit vel non* as to the last will and testament of D. W. Watson, deceased.

Propounders offered in evidence a paper-writing purporting to be the last will and testament of D. W. Watson, deceased, and to be signed at bottom and sealed by D. W. Watson, deceased, and to be witnessed as follows: "Test: W. I. Everett, W. T. Covington." This paper (74) as in the issue and proceedings below will be referred to as Exhibit A. This being handed to the witness W. T. Covington, he testified thereto as follows: "That D. W. Watson brought this paper, Exhibit A, into my office and told me that it was his will; that he wrote his name signed to the will; 'That is my name,' and he asked me to witness it and sign my name as subscribing witness to Exhibit A. I signed my name where it appears on Exhibit A, in his presence. I knew Captain W. I. Everett, and know his handwriting. His name where it appears above mine on Exhibit A is in his own handwritng. W. I. Everett is dead. His name appeared above mine on Exhibit A. I can-

not say whether his name appeared on the paper when I signed or not. I think Mr. Kelly was present when I signed the paper, but I am not positive about that."

Evidence was then offered of the death of W. I. Everett, and that his signature as witness to said will was in his own proper handwriting. Propounders then offered another paper-writing purporting to be an addition to the last will and testament of D. W. Watson of date 11 November, 1911, the same purporting to be signed by him and witnessed by A. W. Porter and W. M. Hale, and said witnesses, being sworn, testified to the due execution of said will and to their signatures as subscribing witnesses, etc. This paper-writing, referred to as Exhibit B, was in form as follows:

NORTH CAROLINA—RICHMOND COUNTY.

I, Daniel W. Watson, of the aforesaid county and State, being of sound mind, do make and declare this addition to my last will and testament, and this addition is in no wise to interfere with former will:

First. I give and devise to my beloved wife, Laura Hinson Watson, one-half acre of land on which is now situated by ginhouse, together with said ginhouse, all machinery, farming implements, and farm produce that may belong to me at the time of my death, that may be on said half-acre of land. The said half-acre of land is situate on the left-hand side of the road leading from my present dwelling to the road from Rockingham to Mrs. Hattie Diggs' place, and is known as the Sand Hill Road. (75)

Second. I hereby constitute and appoint my beloved wife, Laura Hinson Watson, my lawful executrix to all intents and purposes of this addition to my former will, according to the true meaning of the same, but in no wise is my former will to be affected by this addition, but the said will to stand as first intended.

In witness whereof I, the said Daniel W. Watson, do hereunto set my hand and seal, this the 1 November, 1911.

D. W. WATSON [SEAL].

Signed, sealed, published, and declared by the said Daniel W. Watson to be an addition to his last will and testament, in presence of us, who at his request and in his presence (in the presence of each other) do subscribe our names as witnesses thereto. A. W. PORTER.
W. M. HALE.

One of the witnesses to this will tsetified that when the same was executed D. W. Watson said that he had made a will aready and did not want this in any way to interfere with his former will.

Propounders then offered the records of probate court, showing the admission of Exhibit A will to probate on the testimony of W. I. Covington, the death of the witness W. I. Everett, proof that his signature as subscribing witness was in his own handwriting and on proof of the signature to handwriting of D. W. Watson. This, on objection, was excluded by the court, and propounders excepted.

Propounders then offered D. E. Hinson as witness, who testified as follows: "I live in Rockingham. Mrs. Laura Hinson is my sister. She and Mr. Watson have been married something like twelve or thirteen years. I never saw the paper-writing marked Exhibit B but once up to the time of Mr. Watson's death. Exhibit A was exhibited to me at my office at the livery stable. Mr. Watson came in and had this paper all fixed, and said, 'Ed, your brother M. T. is dead'; and I said, 'Yes; that is right.' He came and gave me this paper that had M. T.'s name on it, and said, 'I want you to mark out M. T. and put
(76) D. D. there.' I wrote the name and gave it back, and he took it and sealed it up and told me to keep it; that I had a safe place to keep it, and he did not. So I put it in my safe and kept it until he died. I got Exhibit B after Mr. Watson's death. Mr. A. W. Porter told me he had some papers of Mr. Watson's. I told him I would like to get them, and he gave them to me. After Mr. Watson's death I gave the two papers to Major Shaw. He opened them and read them to me, and I found out what they were. Major Shaw brought the papers to the clerk's office. They were probated before the clerk. Mr. Watson put Exhibit A in an envelope."

Issues were submitted to the jury as follows:

1. Is the paper-writing propounded for probate, bearing date 27 January, 1903, purporting to be witnessed by W. I. Everett and W. T. Covington, being "Exhibit A" in evidence, the last will and testament of D. W. Watson, deceased, or any part thereof?

2. Is the paper-writing propounded for probate, bearing date 1 November, 1911, purporting to be witnessed by A. W. Porter and W. M. Hale, being Exhibit B in evidence, the last will and testament of D. W. Watson, deceased?

The court charged the jury that if they believed the testimony to answer the first issue "No."

The jury rendered their verdict, answering first issue "No" and second issue "Yes."

Judgment on the verdict, and plaintiff excepted and appealed.

J. R. McLendon, Robinson & Caudle, Lockhart & Dunlap for plaintiff.

J. D. Shaw and J. P. Cameron for defendants.

HOKE J. Under our present law, Revisal, sec. 3113, "A written will with witnesses must have been prepared in the testator's lifetime and signed by him or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least," etc. Construing this law, the courts have held "that it is not necessary always that the testator should sign the will in the presence of (77) the witnesses; it is sufficient that the will be acknowledged by the testator in their presence, the will being physically present and identified." *In re Herring's Will,* 152 N. C., 258; *Nickerson v. Brick,* 66 Mass., 332. Nor is it required that the witnesses should subscribe to the will in the presence of each other. *In re Herring's Will, supra; Payne v. Payne,* 54 Ark., 415; *Eulbecks v. Granberry,* 3 N. C., 232; Gardner on Wills, p. 217. With these authoritative interpretations in mind, it is always required that in order to a valid written will with witnesses the same should, as stated, be signed by the testator or some other person in his presence and by his direction, and subscribed in his presence by at least two witnesses.

In regard to the proper probate, the method by which these essential facts should be established, the statute, sec. 3127, makes provision as follows: "In case of a written will, with witnesses, on the oath of at least two of the subscribing witnesses, if living; but when any one or more of the subscribing witnesses to such will are dead, or reside out of the State, or cannot after due diligence be found within the State, or are insane or otherwise incompetent to testify, then such proof may be taken of the handwriting, both of the testator and of the witness or witnesses so dead, absent, insane, or incompetent, and also of such other circumstaces as will satisfy the clerk of the Superior Court of the genuineness and the due execution of such will. In all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead or reside out of the State, or are insane or otherwise incompetent to testify, it shall not be necessary to prove the handwriting of the testator, but proof of the handwriting of the subscribing witness or witnesses so dead, absent, insane, or incompetent shall be sufficient. The probate of all wills heretofore taken in compliance with the requirements of this section are hereby declared to be valid."

It will thus be noted when any one of the subscribing witnesses survives or is competent to testify, proof may be taken of the handwriting, both of the testator and the other witness or witnesses, and of such other circumstances as shall satisfy the clerk of the Superior (78) Court of the genuineness and the due execution of such will, with

the proviso that when the testator has signed by making his mark, proof of his handwriting is not necessary. According to the express provisions of the law, therefore, whenever the facts indicated have been properly established before the clerk he may adjudge the will to be duly proven and record the same, and, when such testimony is offered on an issue of *devisavit vel non,* it affords evidence from which the will may be established by the jury, and it is not required, as contended by the caveators, that, in order to a valid probate, the surviving witness should testify that he saw the other witness subscribe his name to the instrument. In *Thomas' Will,* 111 N. C., 412, one of the authorities relied upon by the caveators to sustain their position, the original will was lost, and, in the endeavor to prove the will, it was shown, apparently without exception, that when the instrument was offered for probate in common form one of the subscribing witnesses had testified to having subscribed the same as witness, and another, who was not a subscribing witness, testified that the signature of the other subscribing witness was in his own proper handwriting. This, with proof of the death of J. W. Thomas, the other subscribing witness, was the entire evidence offered on the issue. There was no evidence offered as to the handwriting of the testatrix, and *Associate Justice Avery,* delivering the opinion denying probate said: "The propounders failed to produce any witness who had ever seen the signature of Ada W. Thomas to the original will or the signature of either of the witnesses, or that would testify to their genuineness. Indeed, the only evidence offered to show the loss of the original paper was that of D. C. Mangum, who last saw it in possession of the sole legatee and devisee." And in *R. R. v. Mining Co.,* another case to which we were referred by counsel, the Court only held that a certificate of probate in another State, disposing of property in this State, would not suffice here when it did not affirmatively appear that the provisions of our statute had been complied with as to the due execution of a will. Revisal, sec. 3133. The other authorities relied upon were chiefly cases under
(79) the old Revised Statutes, where proof in common form was permissible by one of the subscribing witnesses, and it was held that when proof of that character was resorted to, the witness who was examined, if his evidence was set out, should appear to have testified to the proper attestation of the other witness (*In re Thomas, supra; Blount v. Patton,* 9 N. C., 237); but these decisions do not bear on the requirements of the present statute, nor should they be allowed to control the positive provisions of our present law as to the proper probate of a will. While the ruling on this question favors the propounder's position, it

would probably not avail them on this record, because we find no direct evidence admitted by the court as to the handwriting of D. W. Watson and the genuineness of his signature to the will. Such testimony was had before the clerk, on the probate in common form, but this was ruled out by his Honor, and the authorities seem to hold that in the trial of an issue of *devisavit vel non,* on caveat duly entered, the proof as to the formal execution of the will shall be made *de novo. In re Hedgepeth,* 150 N. C., 245; *In re Thomas,* 111 N. C., *supra,* 416. True, the witness D. E. Hinson testified that Mr. Watson brought this will (Exhibit A) to him, "all fixed up," and "spoke of it as his will," and this undoubtedly is a relevant circumstance; but the statute seems to require that, when the will purports to be signed by the testator himself, and only one of the subscribing witnesses is alive and competent, that some evidence should be introduced as to the handwriting of the testator or the genuineness of the signature. Without further reference to this feature of the case, we are of opinion that the propounders are entitled to a new trial of the cause by reason of the fact that from the form of the issues and the charge and rulings of the court, the execution of the second will (Exhibit B) has been allowed no effect whatever as to the validity of the first (Exhibit A). It is well recognized in this State that a will, properly executed, may so refer to another unattested will or other written paper or document as to incorporate the defective instrument and make the same a part of the perfect will, the conditions being that the paper referred to shall be in existence at the time the second will be executed, and the reference to it shall be in terms so clear and distinct that from a perusal of the second will, or with (80) the aid of parol or other proper testimony, full assurance is given that the identity of the extrinsic paper has been correctly ascertained. The principle is sometimes referred to as "The doctrine of incorporation by reference," and is very well stated by *Chief Justice Gray* in *Newton v. Seaman's Friend Society,* 130 Mass., 91, as follows "If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will, and should be admitted to probate as such." While there are some discrepancies in the application of the principle to the facts of the different cases, this statement is in accord with the great weight of authority here and in other jurisdictions

in this country and in England, where the subject has been very much considered. *Siler v. Dorsett,* 108 N. C., 300; *Bailey v. Bailey,* 52 N. C., 44; *Chambers v. McDaniel,* 28 N. C., 226; *Bullock v. Bullock,* 17 N. C., 307; *Thayer v. Wellington,* 9 Allen, 85 Am. Dec., 761; *Allen v. Maddox,* 11 Moore P. C., 427; 14 English Rep. Reprint, 757; *Smart v. Prujean,* 6 Ves. Chan., 559; 1 Redfield on Wills, p. 262; Theobald on Wills, p. 50; 1 Jarman on Wills, 5 Am. Ed., p. 265. And the position, we think, should undoubtedly prevail in the present instance. In the opening clause of Exhibit B the declaration is, "I do make and declare this addition to my last will and testament, and this addition is in no wise to interfere with my former will," and, in the closing paragraph the language is: "I hereby appoint my beloved wife, Laura Hinson Watson, my lawful executrix of this addition to my former will, according to the true meaning of the same, but in no wise is my former will to be affected by this addition, but the said will to *stand* as at *present intended.*" At the time of the execution of this later instrument, the testator said to one of the subscribing witnesses "that
(81) he had made a will already and did not want this in any way to interfere with his former will," and the witness D. E. Hinson testified that Mr. Watson brought the first paper, Exhibit A, to him "all fixed," had the witness to erase the name of M. T. Hinson as executor, he having died, and insert the name of D. D. Hinson, and asked witness to put it away and keep it for him, as the witness had a more secure place for the purpose, and this the witness did, and handed same to propounder's attorney after Mr. Watson's death. The second instrument clearly refers to the *one former will,* and there is no evidence or suggestion that any other will had ever been made or prepared by or for the testator. On this record, therefore, we are of opinion that the references in Exhibit B to the extrinsic paper are sufficiently clear and definite to permit that parol or other proper proof should be received as to the identity of Exhibit A, and that a perusal of the second will and the facts in evidence *dehors* afford testimony of a kind and character to require that the question as to such identity should be determined by the jury. If, on a second hearing, this Exhibit A should not be declared a valid will, as an original and separate proposition, then, on the first or some issue properly responsive, the question should be decided whether Exhibit A is the "former will" referred to in Exhibit B, and has its identity been established by clear and satisfactory proof. In the appeal of *W. J. Bryan,* 77 Conn., 240, reported with an elaborate note in 68 L. R. A., p. 353, to which we were referred by counsel, while the principle of "incorporation by reference" is stated

in somewhat more exacting terms than in some of the other decisions, the doctrine is recognized as the basis of the Court's ruling. In that appeal the sum of $50,000 was given "in trust for the purposes set forth in a sealed letter which will be found with this will," and *Chief Justice Torrance,* delivering the opinion, thus states the *ratio decidendi* of the case: "There is not in the language quoted, nor anywhere else in the will, any clear, explicit, unambiguous reference to any specific document as one existing and known to the testator at the time his will was executed. Any sealed letter or any number of them, setting forth the purposes of the trust, made by anybody at any time (82) after the will was executed, and 'found with the will,' would each fully and accurately answer the reference; and if we assume that the reference calls for a letter from the testator, it is answered by such a letter or letters made at any time after the will was drawn. The reference is 'so vague as to be incapable of being applied to any instrument in particular' as a document existing at the time of the execution of the will." And like statement will serve to distinguish a recent case in our own reports of *Freeman v. Shields,* 158 N. C., 123.

All the authorities agree that, in order to a proper application of the principle, the paper referred to should be in existence at the time the valid instrument is executed; to hold otherwise would be to repeal the statutory requirements as to valid execution of written wills. An extrinsic paper could not be incorporated with the proper formalities unless it then existed. But the decision in any aspect should not control or affect the disposition of the present appeal when it appears, as heretofore stated, that the second and valid will makes clear and distinct reference to "my former will," directing further that said will is to *stand* as *first intended,* and with no evidence or suggestion that there had ever been more than one such former will or any other paper of that character. *Bryan v. Bigelow,* 77 Conn., 604, reported with a full note in 107 Am. St., 64, simply hold that "the letter" referred to, having been properly rejected as a constituent part of the will, was not efficient as a declaration of trust, and has no bearing on the question presented on this record.

We are not inadvertent to the fact stated by the witness, that at the request of the testator, and just before he put away the first will, he erased the name of M. T. Hinson, who had been designated as executor, and inserted that of D. D. Hinson. Under our statute and decisions construing laws of similar import, if M. T. Hinson had been alive at the time, the effect of the erasure would or might have amounted to a partial revocation of the will, to wit, as to the designation of the

first named executor, but the insertion of the name of D. D. Hinson, not having been properly made or witnessed, would be inopera-
(83) tive. The first named executor, being dead at the time, the erasure of the one name and insertion of the other is without any effect on the instrument; the result being that, if Exhibit A is properly established, the testator would have died testate as to the property disposed of therein, but without naming an executor. Revisal, sec. 3115; *In re Shelton's Will,* 143 N. C., 218; *Bigelow v. Gillette,* 123 Mass., 102.

For the error heretofore indicated, the propounders are entitled to a New trial.

Cited: *Smathers v. Jennings,* 170 N. C., 603.

(84)

BESSIE K. BROWN ET AL. v. VIRGINIA-CAROLINA CHEMICAL COMPANY.

(Filed 23 April, 1913.)

1. Nuisance—Permanent Damages—Easement—Measure of Damages.

Where permanent damages to contiguous lands are sought by the owner for the operation of a fertilizer plant of such character as to be a nuisance, the suit amounts to the partial taking of another's property, and it becomes, in effect, proceedings to condemn the complainant's land, an easement to operate the plant for all time in a specified way; and the measure of damages is the difference in value of the property with and without the existence of the wrong, diminished by the incidental benefits especial and peculiar to the property by reason of the plant, but not by any benefits which are common to property of like kind similarly situated in that immediate neighborhood.

APPEAL by plaintiff from *Whedbee, J.,* at July Special Term, 1912, of DURHAM.

Action to recover damages by reason of an alleged nuisance in the construction and operation of the defendant's plant.

There was evidence on part of plaintiff tending to show "that she was the owner in fee of 2½ acres of land with a cottage house upon it, situated in Durham Township in the county of Durham, near the property and plant of the defendant; that the said property was on the macadam road leading east from East Durham in the city of Durham, and the defendant's plant and property was on the opposite side of said road; that the plaintiff's property was in a northerly direction from

the defendant's plant; that prior to and at the time defendant's plant was originally constructed her residence was near said plant, and that the plaintiff's house was built prior to said time, and that it was rented, but not occupied by the plaintiff as a residence; that her said lot was capable of being divided into building lots, and was also capable of being used for agricultural purposes; that part of defendant's plant was erected five or six years before this action was tried; that little more than a year before the time the defendant built its acid plant, and began the operation of the same in June, 1911; that there was no complaint and no suit against the defendant prior to the time of the erection of the acid plant or chambers; that since the erection of the said acid chambers, in which sulphuric acid is made, the gases and fumes escaping from the plant permeated the surrounding atmosphere, causing people to cough and sneeze, irritating eyes, throat, and nose, disagreeable in odor and pungent to the smell; that the effect of the escaping gases was to kill vegetation, trees, corn, millet, (85) snaps, tomatoes, flowers, grapevines, pine trees, willow oaks and other trees, and the dust from the phosphate rock covered the floors of the porches, was carried into the houses, settled on food and drinking-water, and that the people living near it had to keep their windows and doors closed facing in the direction of defendant's plant; that the defendant's plant was operated day and night, and every day in the week, and these odors were discovered 300 and 400 yards from the defendant's plant; that in the fall of 1911 the plaintiff was contemplating building other residences upon her property, but did not do so on account of the acid plant of the defendant"; and further testimony as to the amount of the pecuniary injury. There was evidence of defendant in denial of plaintiff's right to recover, that the injury done to plaintiff's property was not near so extensive as claimed, and that, on the whole, the value of such property was greatly enhanced by the construction and operation of defendant's works. The parties having elected to treat the case as an action for permanent damages, issues were submitted as follows:

1. Are the plaintiffs the owners of the property described in the complaint?

2. Has the plaintiffs' property been injured by the wrongful act of the defendants, as alleged in the complaint?

3. What permanent damages, if any, have the plaintiffs sustained?

In his charge on the third issue, the court, among other things, instructed the jury as follows: "In considering the question of damages, you cannot take into consideration any increase in the value of the

property by reason of the establishment of this plant and making a market and demand for labor, and therefore an increased demand for buildings or an increase in the value of property. In other words, the plaintiff will not be permitted in this case to have value of her property increased by reason of the location of the defendant's plant and the increased demand for houses and labor, and at the same time charge for diminution in value by reason of the presence of gases and odors."

There was verdict for plaintiff, assessing permanent damages at $300. Plaintiffs excepted to the charge on that issue, and appealed.

(86) *Manning, Kitchin & Everett and J. W. Barbee for plaintiff.*
Bryant & Brogden and Fuller & Reade for defendant.

HOKE, J., after stating the case: Plaintiff excepted to the charge of the court on the issue as to damages, the objection being that it fixes an improper valuation of plaintiff's property as a basis for estimating the damages suffered. We are of opinion that the position is well taken. On the facts in evidence, it appears that the plant of defendant company was erected and carried on for five or six years without damage done or threatened to plaintiff's property, and that the injury arose by reason of an enlargement of the operations, including the construction and maintenance of certain chambers or tanks for the manufacture of sulphuric acid about one year before action commenced. This is the time the wrong was committed, and plaintiff is clearly entitled to have the value of his property considered as of that date, whether its value was owing to the existence of the plant or otherwise. It was not open to defendant to invoke and use the benefits arising by reason of a former and rightful operation of its plant as a protection for the subsequent wrong. *Kimel v. Kimel,* 49 N. C., 121; *Giles v. Stevens,* 79 Mass., 146; *Talbot v. Whipple,* 73 Mass., 122. The portion of his Honor's charge above excepted to in effect withdrew from the jury, as a basis of estimate, any and all enhancement of value on plaintiff's property by reason of the existence of defendant's plant either before or after the injury, and is prejudicial error, entitling plaintiff to a new trial of the issue. Taking, then, the value indicated as a proper basis and in reference to the enlargement of the plant, including the addition of the acid tanks, etc., from which the injury resulted, when an action is brought for recurring damages, by reason of a nuisance in the operation of a manufacturing plant, causing injury to an adjoining or neighboring proprietor, the general rule is that incidental benefits or enhancement of value by reason of such plant or its enlargement, etc., may not

be considered in diminution of damages. *Francis v. Schoellkoff,* 53 N. Y., 152; *Sulphur Co. v. Barnes,* 60 S. W., 593 (Tenn. (87) Chancery); 2 Wood on Nuisances (3 Ed.), sec. 877.

But where, as in this case, the parties elect to treat the action as one for permanent damages, the suit then amounts to the partial taking of another's property, and it becomes in effect proceedings to condemn on the complainant's land an easement to operate the plant for all time in the specified way, and the damages are awarded very much on the principles which obtain in proceedings of that character, the true measure being the difference in value of the property with and without the existence of the wrong, diminished by the incidental benefits especial and peculiar to the property by reason of the plant as enlarged and conducted, but not by any benefits which are common to property of like kind and similarly situated in that immediate neighborhood. *R. R. v. Platt Land,* 133 N. C., 266; *R. R. v. Estelee,* 76 Ky., pp. 667-677; Sutherland on Damages, sec. 1056; 21 A. & E. (2d Ed.), Title, Nuisances, p. 730. The general position is very well stated in the last citation, as follows: "The general rule is that the incidental benefits accruing to plaintiff cannot be set off against the damages resulting from the nuisance, as the plaintiff cannot be required to accept indemnity in any manner other than that provided by law; but, when a nuisance operates as a partial taking of the plaintiff's property, any resulting benefit peculiar to him may be considered in mitigation of damages."

For the error indicated, plaintiff is entitled to a new trial on the issue as to damages.

Partial new trial.

Cited: Donnell v. Greensboro, 164 N. C., 335; *Brown v. Chemical Co.,* 165 N. C., 423; *Rhodes v. Durham, ib.,* 680.

WINSTON-SALEM MASONIC TEMPLE COMPANY v. UNION GUANO COMPANY.

(Filed 26 April, 1913.)

1. Landlord and Tenant—Written Leases—Interruption.

Where there is ambiguity in the wording of a written lease of lands, the doubt must be settled against the lessor.

2. Same—Lessee's Option—Continuance of Term—Period of Time of Lease.

A written lease of lands providing that it shall be "for a term of six months" and that the lessee "may have the privilege of continuing this

lease for a term of four years on the same terms and conditions," is construed from the language employed, to give the lessee either one or two options: a lease for a term of six months or one for four years; and if the latter option is exercised, it will include the six months period, making in all a period of four years from its commencement.

3. Landlord and Tenant—Option to Continue—Occupancy—Payment of Rent—Exercise of Option—Evidence.

Where a written lease of lands provides for an extension of the term, at the option of the lessee, his continued occupancy of the premises and the payment of rent constitute sufficient notice of his election to extend the term.

(88) APPEAL by defendant from *Cooke, J.*, at February Term, 1913, of FORSYTH.

Watson, Buxton & Watson for plaintiff.
Louis M. Swink and J. E. Alexander for defendant.

WALKER, J. This is an action for the recovery of rent. The parties, on 1 April, 1908, entered into an agreement by which plaintiff leased to the defendant the first floor of its building for "office purposes," with this provision: "for a term of six months from 1 April, 1908, to 1 October, 1908. It is further mutually agreed that the said Union Guano Company may have the privilege of continuing
(89) this lease for a term of four years on the same terms and conditions. The first of said monthly installments of $95.83⅓ is to become payable to the authorized collector of the Winston-Salem Masonic Temple Company, of Winston-Salem, N. C., on 1 April, 1908, and on first day of each month thereafter during the continuance of this lease." Defendant took possession of the rooms designated in the lease and occupied the same, not only for the six months mentioned in the lease, but until 1 April, 1912, that is, for four years from the date of the contract, 1 April, 1908. A dispute then arose between the parties as to the length of the term demised, defendant contending that it was for four years in all and ended 1 April, 1912, while plaintiff claimed that it was a lease for a term of four and one-half years and terminated on 1 October, 1912. Defendant refused to pay $95.83, the rent for the month of April, 1912, and this action was brought to recover the same. The court ordered a nonsuit, and the plaintiff appealed.

The decision of the case turns upon the meaning of the contract. The defendant contends that the lease was for only four years, and therefore terminated on 1 April, 1912. If this is the right construc-

tion of the lease, the judgment of the court was correct. We must ascertain what was the intention of the parties. What did they mean by what they have said in this paper? If there is any real ambiguity, the doubt must be settled against the lessor, for "it is a general rule, in construing provisions of a lease relating to renewals, where there is any uncertainty, that the tenant is favored, and not the landlord, because the latter having the power of stipulating in his own favor, has neglected to do so; and also upon the principle that every man's grant is to be taken most strongly against himself. Taylor's Landlord and Tenant (9th Ed.), sec. 81." *Kaufman v. Liggett,* 209 Pa. St., 87. But we have concluded that, upon a fair and reasonable construction of the instrument, its meaning is in accordance with the contention of the defendant. We think the language of the parties justifies the inference that they intended to give to the lessee either one of two options, a lease for a term of six months or one for a term of four years. The language is that he shall have a term of six months, with a privilege or option of "continuing *this lease* for a term of (90) four years." The words italicized by us are important in ascertaining the meaning. They can only refer to the lease, or, more properly speaking, the term already created. The words "lease" and "term" are often treated by conveyances as convertible, and the use of the word "lease," as descriptive of the estate or interest conveyed by the instrument, is recognized by the authorities. Taylor Landlord and Tenant, sec. 16; *Harding v. Seeley,* 23 Allen, 1118. One of the definitions of the word "lease" is, "any tenure by grant or permission; the term of duration of such tenure; any period of time allotted for possession." The indenture or writing is the evidence of the lease, although the term "lease" is sometimes used to designate the writing or instrument itself. *Mattlage v. McGuire,* 111 N. Y. Sup., 1083. More properly, it should describe the conveyance by which the tenure or term is created (Black's Dict., 1 Ed., p. 697), but Webster defines it as applying indifferently to the demise or letting of lands for life; for a term of years or at will; to the contract for such letting; to the tenure itself or the term during which it holds good—the allotted term. So that we cannot confine ourselves to the strict technical definition of the terms used in the contract without, perhaps, doing violence to the intention. We must search for the purpose in the instrument and be governed by its language, it is true, but it should not be subjected to any strained or narrow construction, for he who stops at the letter "goes but skin deep into the meaning." Broom L. M., 657; *Hornthal v. Howcott,* 154 N. C., 228; *Rhyne v. Rhyne,* 151 N. C., 403; *Martin v.*

Martin, ante, 41. The words should be taken in their ordinary sense, unless this construction is forbidden by the context, nor should a lease, more than any other contract, be interpreted according to the strict letter, especially if it will defeat the manifest intention, as gathered from the whole instrument. 24 Cyc., 915. If we accept this view of the matter, the words "this lease" refer to the estate or term created by the contract, not necessarily to the six months term, but to the entire term, the extreme continuance or length of which should be four years.

(91) The word "continue" imports duration, and as used in the contract it meant that the six months term should be extended in duration from its beginning for a term of four years, and no new or additional term was created. In other words, the term of six months was enlarged into one of four years. This construction we believe to be more in harmony with the authorities than the other. *Delashmar v. Berry,* 20 Mich., 292 (20 Am. Rep., 392) is a leading case, in which there was a lease of premises "for the term of one year, with the privilege of having the same for three years for the same rent, at the option of the lessee," and it was held to create only one term of one year or three years, as the lessee might elect. The lease in *Gensler v. Nicholas,* 151 Mich., 529, was "for the term of three years, with privilege of five years, for the sum of $25 annually," which was held to grant one term of three or five years, and not a term of three years with the privilege of five additional years. *Kimball v. Cross,* 136 Mass., 300, is more like our case in the words employed to fix the duration of the term. The lease was "for the term of one year for $75, with the privilege of *continuing* five years at $100 per year," which was construed to be a lease for a single and continuous term of one or five years at the lessee's option, the extended term provided for as a substitute for the original one, if the lessee exercised the right of choice, being called the optional term, the original term being fixed at all events. Those contracts were held to be for a definite term of so many months or years, with an option for a longer or extended term, and the continuance of the *same* state of things or the *same* relation. The Court said in *Kimball v. Cross, supra,* that the words were apt "to create a *then* present demise (of the longer term), when, at the end of the first year, the occupation continued," and the election was made by the lessee. See, also, *Montgomery v. Commissioners,* 76 Ind., 362; *Quinn v. Valiquette,* 8 Vt., 434.

Having held that the original term of six months was merely prolonged or lengthened out to one of four years by the terms of the option clause, it follows that the ruling of the court was correct, for, at common

law, if a tenant holds over by consent, given either expressly or constructively, after the determination of a lease for years, it is held to be evidence of a new contract, without any definite period, and (92) is construed to be a tenancy from year to year. (*Montgomery v. Commissioners, supra*); but when the lease provides merely for an extension of the term, at the option of the lessee, nothing need be affirmatively done by the lessor, as the continued occupancy of the premises by the lessee and the payment of rent constitute sufficient evidence of his election to extend the term. *Quinn v. Valiquette* and other cases, *supra.* While defendant, by his conduct, elected to take the longer term, he has paid the rent to the end of the time for which it lasted, and, therefore, is not liable to the plaintiff for the installment of rent which he now alleges to be due.

We may well repeat what we have said, that if the construction we have placed upon this lease is not perfectly clear or free from uncertainty, the doubt as to its meaning is equally fatal to the plaintiff's contention. It would have been easy for him to free it from ambiguity by the mere insertion of one word. He should not have left it uncertain whether the optional term was to be for four years from the end of the six months or from the beginning. *Murrell v. Lion,* 30 La. Ann., 255; *Broom's Legal Maxims* (6 Am. Ed.), star p. 571; *Dunn v. Spurrier,* 3 B. & P., 399; 24 Cyc., 1337. In no view, therefore, was there any error in the judgment.

Affirmed.

J. H. HOOD, ADMINISTRATOR, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY.

(Filed 26 April, 1913.)

1. Executors and Administrators—Wills—Personal Assets—Wrongful Death—Damages—Interpretation of Statutes.

The right to recover damages for wrongful death rests entirely on statute, Revisal, sec. 59, and when a recovery is had therefor it is not a part of the personal assets of the deceased; and the husband of deceased who left a will disposing of all of her property and naming another as executor, may not qualify as her administrator upon the theory that his wife had died partially intestate as to such damages, and as such maintain an action to recover them. Revisal, sec. 4.

2. Same—Parties.

Where a deceased has left a will disposing of all his property and therein naming an executor, that right of action against a defendant for his wrongful death must be by the executor named; for the right of ac-

tion being purely statutory, the one entitled to sue is governed by the provision of the statute, which gives it to the executor, when one is named, and not to the one who would have had the right of administration in case of intestacy. Revisal, sec. 59.

(93) APPEAL by plaintiff from *O. H. Allen, J.,* at October Term, 1912, of CASWELL.

Action to recover damages caused by the wrongful conduct of the defendant, resulting in the death of the plaintiff's intestate, Jennie Hood, his wife. At the time of the death of Jennie Hood she had made a will devising and bequeathing her property to Annie Land, and appointing her executrix of her will. The will purports to dispose of all the property of the testatrix, and has a general residuary clause. The plaintiff, J. H. Hood, demanded of the executrix that she bring an action against the defendant for damages for the wrongful death of his wife, and when she declined to do so, he then applied to the clerk for letters of administration, and upon the same being issued, commenced this action. His Honor being of opinion the plaintiff could not maintain the action, dismissed it, and the plaintiff excepted and appealed.

P. W. Glidewell and Justice & Broadhurst for plaintiff.
Wilson & Ferguson for defendant.

ALLEN, J. The contention of the plaintiff is that the right of action for wrongful death is a part of the personal estate of the wife, and as it was not in terms and could not be disposed of by her will, she died "partially intestate," and that he is, therefore, entitled to administer such part of the estate under section 4 of Revisal, providing that the husband may administer on the personal estate of his wife if she "shall die wholly or partly intestate."

(94) The error in the contention is in assuming that the right of action is a part of the personal estate of the wife.

We held otherwise at the last term in *Broadnax v. Broadnax,* 160 N. C., 432, where the authorities are cited supporting the opinion.

In that case the widow sought to have a year's allowance or support allotted from a recovery of damages for the wrongful death of her husband, and in denying her petition we said: "The allowance (to the widow) 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, 98 Am. St., 725; *Vance v. R. R.,* 138 N. C., 463."

We also cited *Neill v. Wilson,* 146 N. C., 244, and pointed out that when it spoke of a recovery for wrongful death as a part of the estate of the deceased, it referred to such a recovery being a part of the estate only for the purpose of distribution.

The statute conferring the right of action (Revisal, sec. 59) is also conclusive against the plaintiff.

Prior to the statute, which was first enacted in 1854, there was no right of action to recover damages for wrongful death (*Killian v. R. R.,* 128 N. C., 261), and as the right of action is conferred by the statute, it may designate who may sue.

In 8 A. and E. Ency. Law, 887, the author says: "The right of action for the death of any person caused by the wrongful act of a defendant is, with the isolated exceptions mentioned, purely statutory, and in all cases the statute must be looked to in determining to whom such right belongs."

When we turn to our statute, we find that the right of action is given to the executor, administrator, or collector, and there being an executor in this case, the plaintiff cannot sue. The statute designates the person to bring the action and determines the disposition of the recovery.

As was well said by *Justice Walker* in *Hartness v. Pharr,* 133 N. C., 570: "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 (95) 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. *Baker v. R. R.,* 91 N. C., 308. The latter does not derive any right, title, or authority from his intestate, but he 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. *Baker v. R. R., supra.*

The wife in this case left a will in which she purports to dispose of all of her property, and she carefully adds a general residuary clause, and if her executrix cannot maintain an action for wrongful death, the word "executor" may as well be stricken from section 59 of the Revisal, as she has done all that human foresight could provide against, and

ought not to be required to anticipate a wrongful death and to dispose of the fruits of such a recovery to avoid dying "partially intestate."

Affirmed.

Cited: Hood v. Tel. Co., ante, 71; *Hartis v. Electric Co., post,* 237, 242; *Causey v. R. R.,* 166 N. C., 12.

A. Y. LINVILLE v. C. F. NISSEN AND CARL NISSEN.

(Filed 26 April, 1913.)

1. Automobiles—Negligence Per Se—Liability of Owner.

An automobile is not inherently a dangerous machine so as to render the owner liable for damages caused by the unauthorized acts of another, by virtue of the fact that he is the owner.

2. Automobiles—Parent and Child—Master and Servant—Negligence—Respondeat Superior.

A parent is not liable for the torts of his minor son done without his knowledge and consent; and where under such circumstances the son has taken an automobile owned by his father, and by his negligent or reckless driving has caused damages, the father is not responsible therefor by reason of the relationship; and to make him so it must appear that the son was in some way acting in a representative capacity, such as would make the master responsible for the servant's tort.

3. Same—Scope of Employment.

To hold the master responsible for the tort of his servant it must be shown that the tort complained of occurred while the servant was acting within the scope of his duties and while in pursuance of them, and the driving of an automobile comes within this principle; and where it is shown that at times a father used the services of his son as a chauffeur, as in taking the family for a pleasure ride, etc., the tort of the son while taking a party of his friends to ride without the knowledge and against the commands of his father cannot be considered an act done for or in behalf of the latter, and as no negligence can therein be imputed to the father, he cannot be held liable, though he knew the son to be a reckless driver and had not locked up the automobile to prevent his having access to it.

(96) APPEAL by defendants from *O. H. Allen, J.,* at September Term, 1912, of FORSYTH.

Jones & Patterson, A. E. Holton, and H. O. Sapp for plaintiff.

Manly, Hendren & Womble and Watson, Buxton & Watson for defendants.

CLARK, C. J. On Sunday afternoon 23 April, 1911, the plaintiff's son, a young man of 19, took three of his young friends to ride in his father's automobile, from his home in Waughtown, in the direction of High Point. On his return, about 5 miles from Waughtown, he passed the machine owned by the defendant C. F. Nissen, which was driven by his son, the other defendant, Carl Nissen, a young man of about 20, who also had taken three of his young friends out to ride that afternoon. The latter machine was standing still with its head pointed towards Kernersville, in the opposite direction from that in which the plaintiff's machine was going. Whether by invitation or not is in doubt, but soon afterwards Carl Nissen turned his machine around and started after the plaintiff's machine. At that time the plaintiff's machine was going about 25 miles an hour. As soon as the defendant's machine started to follow, a race began in which both machines proceeded (97) at the rate of 40 miles or more. After racing some 3 miles, the driver of the foremost machine, Stokes Linville, perceived that the other machine was about to overtake him, and turned his machine to the right. The road was in good condition 10 feet in the center, being macadam and 10 feet on each side, being sand-clay road. Stokes Linville's evidence is that his machine went entirely off upon the dirt road to the right. The evidence for the other side is that it was partly on the dirt road and partly on the macadam. However that may be, there was room for the defendant's machine to pass, and for a short while they ran side by side; but as the defendant's machine was forging ahead its right hind wheel struck the left fore wheel of the plaintiff's machine, smashing it and throwing the latter machine upside down, injuring its occupants somewhat and damaging the machine. This action is against C. F. Nissen, the owner of the machine, who was not present, and Carl Nissen, the driver, for the injury to the plaintiff's machine.

The plaintiff's machine was a 1,500 pounds "Ford" and the defendant's was a 3,500 pounds "Cadillac" and capable of greater speed than the other. There was conflicting evidence as to how the injury occurred. The plaintiff contended that it was caused entirely by the negligence of Carl Nissen, the driver of the defendant's machine, and the defendants contended that it was caused by the negligence of the plaintiff, whose machine, they allege, swerved to the left as the defendant's machine was passing. This was a question of fact for the jury, who found that the defendant Carl Nissen was negligent and that the driver of the plaintiff's machine did not contribute to the negligence. There was evidence that the occupants of the rear car were drinking, eighteen empty beer bottles being found therein. This and the fact that the

race was begun by defendant's car, which ran into the other, doubtless had weight with the jury.

Both parties were in violation of Laws 1907, ch. 728, which makes it a misdemeanor for any person to exceed 15 miles an hour with an automobile on the roads of Forsyth County, and of the general law of the State, Laws 1909, ch. 445, sec. 9, which makes it a mis-
(98) demeanor to operate an automobile at a greater speed than 25 miles an hour outside the towns and villages and with slower speed allowed within municipal limits. A strict enforcement of this law would prevent such dangerous occurrences as this. It is to be presumed that the public prosecutor has done his duty, and that both these young men have answered for their violation of law at the bar of the criminal court. The public are entitled to this protection.

There were exceptions to evidence, but they do not merit serious consideration. There is no ground to consider seriously the exceptions as to Carl Nissen, whose negligence was a matter of fact to be determined by the jury, nor as to the measure of damages, which was fairly presented to the jury by the charge of the court and were assessed by the jury at $225.

The real controversy in the case is as to the liability of Charles F. Nissen, the owner of the machine, who was not present. He and his son both testified that his son took out the machine that Sunday afternoon not only without the consent of his father, but against his positive prohibition. There was evidence that C. F. Nissen had bought the machine for the use of himself and his family, and also for the collection of bills incident to his business, and that Carl at different times had acted as chauffeur, sometimes with his father and sometimes when his father was not present. There was also evidence offered to show the recklessness of Carl Nissen in that while driving the machine he had injured two buggies, and that his father had paid the damages. This was competent as tending to show that he was reckless and a careless driver, and that his father knew it. It was in evidence that when he had another machine the father on one occasion had taken off a wheel to keep Carl from using it, and that though he had forbidden his son to use this machine, he had not locked up the garage, on which there was no lock. It was argued, therefore, that as the son, as a member of the family, had an implied authority to use the machine, and that if forbidden to use the machine, his father being aware of his reckless and negligent driving, was himself negligent in not locking it
(99) up to prevent his son taking it out, and hence was responsible for the consequent injury which occurred.

The principles of law involved are important and should be clearly stated. They may be thus summed up upon the authorities:

(1) The owner of an automobile is not liable for personal injuries caused by it, merely because of his ownership. "It is not *per se* a dangerous machine, requiring it to be placed in the same category with the locomotive, ferocious animals, dynamite, and other dangerous contrivances and agencies. The dangers incident to their use as motor vehicles are commonly the result of the negligent and reckless conduct of those in charge of and operating them, and do not inhere in the construction and use of the vehicles. It is well known that they are being devoted to and used for the purposes of traffic, and as conveyances for the pleasure and convenience of all classes of persons, and without menace to the safety of those using them or to others upon the same highway, when they are operated with reasonable care. The defendant cannot, therefore, be held liable upon the ground that the automobile is a dangerous contrivance." *Steffen v. McNaughton* (Wis.), 26 L. R. A., 382, which further states that this principle has been adopted in *Slater v. Thresher Co.*, 97 Minn., 305; *McIntyre v. Orner* (Ind.), 4 L. R. A. (N. S.), 1130; *Lewis v. Amarous*, 3 Ga. App., 50; *Jones v. Hoge* (Wash.), 14 L. R. A. (N. S.), 216; *Cunningham v. Castle*, 111 N. Y. Sup., 1057. There are many other cases to the same effect, among them, *Vincent v. Crandall*, 115 N. Y. Sup., 600; *Danforth v. Fisher*, 75 N. H., 3; *Freibaum v. Brady*, 143 App. Div. N. Y., 220.

(2) A parent is not liable for the torts of his minor son. "The relationship does not alone make a father answerable for the wrongful acts of his minor child. There must be something besides relationship to connect him with such acts before he becomes liable. It must be shown that he has approved such acts or that the child was his servant or agent." *Johnson v. Glidden*, 74 Am. St., 795, which cites a large number of cases. This is quoted and approved in *Brittingham v. Stadiem*, 151 N. C., 300, this Court adding: "Wherever the principles of the common law prevail, this is a well-established (100) doctrine."

We would not be understood, however, as holding that the father would not be liable if he should place his automobile in charge of a child of tender years any more than if he would intrust an unruly horse to him. But in such case the liability arises from the father's negligence, and not from the imputed negligence of the child. This is too well settled to need discussion. It is, however, contended that in this case the son was acting by the authority of the father, and therefore *quasi* his servant. Aside from the fact that the evidence of both the

father and son is that he took the automobile out not only without his father's consent, but against his prohibition, the reason of the thing cannot sustain the proposition that the son was *pro hâc vice* acting as his father's agent. He did not take any of the family out to ride, but some of his friends, and was acting for his own purposes and not as agent for his father. In *Way v. Powers,* 57 Vt., 135, a son who was living as a hired man on his father's farm took his horse without his permission, though he would have given permission if asked, and drove to the railroad station for one of his friends. He there tied the horse, which broke loose and ran into the plaintiff's team and injured him. It was held that though the son was negligent, the father was not liable.

In *Reynolds v. Buck,* 127 Ia., 601, it was held that "the owner of an automobile is not liable from injury resulting from the negligent operation of the machine by a son, without the father's knowledge and consent, and not at the time in his employ or about his business." That case is exactly "on all-fours" with this.

In *Doran v. Thomsen,* 76 N. J., 754, where a father was possessed of an automobile which he kept upon his premises, and his daughter, about 19 years of age, was accustomed to drive it, and did so whenever she felt like it, asking permission to use it when the father was at home, but when not at home, taking it sometimes without permission, it was held that when she used the machine for her own pleasure and negligently injured a person in the highway there was no proof suffi-
(101) cient to constitute her the servant or agent of the master, and that her father was not responsible. This case is thoroughly discussed and cites numerous authorities which sustain the proposition that "the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of wrong, at the time and in respect to the very transaction out of which the injury arose." It also cites numerous authorities to the other well-settled principle that "the mere fact of the relation of parent and child does not make the child the servant of the defendant" in actions for tort. That case well says that while "liability might arise by reason of the father's intrusting a dangerous machine or agency to the hands of an inexperienced or incompetent person, such liability does not rest upon the negligence of the servant in permitting his child to use a dangerous machine." In such case the ground of the action is the negligence of the father and not the imputation of the negligence of the servant to the master. The distinction between the two is well set out in 29 Cyc., 1665. This latter was not the case here, for there is no evidence that the father intrusted

the machine to the hands of his son or that he was inexperienced, but the evidence on both points is to the contrary.

(3) Even if the son had been the servant of his father in driving the machine, the father would not be liable for his negligence unless his son was at the time acting in the scope of his employment and in regard to his master's business. 26 Cyc., 1518; 20 A. & E., 167; 2 Thompson Neg., 855, 885, 886; S. & R. Neg., 62, 63; Cooley on Torts, 533. The authorities applying this well-known principle to automobiles are already numerous. In *Riley v. Roach,* 168 Mich., 294, the Court held: "A chauffeur employed by defendant was especially instructed by him not to take the automobile out without permission. But without his knowledge or consent, he did take the machine out, and on the trip collided with the plaintiff's buggy: *Held,* this was not in the scope of the chauffeur's employment, and the owner was not liable." Numerous authorities are cited to this effect, which is a well-settled principle of general law. This case cited and distinguished *Moon v. Matthews* (Pa.), 29 L. R. A. (N. S.), 856, in that, in that case, the automobile having been taken out by the chauffeur (102) in obedience to the command of the master's family for the entertainment of the friends and guests of the family, he was not acting outside the scope of his employment so as to relieve the master from liability for injury by the negligent handling of the car.

In this case the father had sold out his business a year before the accident, and had no chauffeur. But even if the son had been a regularly employed chauffeur, in *Jones v. Hoge,* 47 Wash., 663, it was held that "Where the chauffeur, without authority, took defendant's automobile from the garage without his knowledge or permission, and, while using it on a personal errand of his own, ran over plaintiff, the accident occurred while the chauffeur was acting beyond the scope of his master's business, and hence defendant was not liable." This case also is well considered and cites very numerous authorities to the same effect, some of which are cited in Huddy Automobiles, 95-98.

In *Stewart v. Baruch,* 103 App. Div. N. Y., 577, the Court said: "A chauffeur who in violation of the instructions of his employer takes out the latter's automobile for his own pleasure, is not, in so doing, acting in the scope of his employment, and his employer is not responsible to a stranger for his negligence." But this is so well settled as a general principle of the law that it scarcely needs discussion further than to say that repeated authorities, which are indeed uniform, hold that there is nothing in the nature of automobiles which excepts them from the application of this principle.

In *Durham v. Straus,* 38 Pa. Sup. Ct., 621, which was the case of a collision like the present, it was held that the chauffeur having taken the machine out contrary to the owner's general order not to do so without his consent, the owner was not responsible, the Court saying: "The plaintiff must not only show that the person in charge was defendant's servant, but the further fact that he was at the time engaged on the master's business. Evidence of the mere ownership of the machine is insufficient." To the same effect, *Sarver v. Mitchell,* 35 Pa. Sup., 69, and numerous cases there cited. And *Danforth v. Fisher,* (103) 75 N. H., 111, which held that the owner of an automobile was "not liable for injuries caused by the negligence of his servant in driving his machine, not in the scope of his master's employment, but for purposes of his own." This case cites numerous authorities.

In *McIntyre v. Hartfelder,* 9 Ga. App., 406, it was held that "The owner of an automobile is not usually liable for the injuries inflicted by one who at the time is driving it without his consent, contrary to his directions, even though he is an employee of the owner and had authority to drive it for certain purposes." In that case the chauffeur, instead of leaving the machine at the garage as he was told to do, used it to go to dinner, and inflicted the injury while in pursuit of that object.

Indeed, the rule is thus stated with full citation of authorities in *Slater v. Thresher Co.* (Minn.), 5 L. R. A. (N. S.), 601: "It is not controlling that the master intrust the servant with exclusive control of the instrumentality causing the injury. The test is, Was the servant acting in the scope of his employment at the time of the act complained of?" citing English and American authorities. It is true that the "employer is liable for damages caused by his employee's negligence while driving his automobile in the scope of his employment, though the negligent act was not necessary to the performance of his duties or especially authorized by or known to the employer, and was forbidden by him." *Winfrey v. Lazarus,* 148 Mo. App., 388. There is nothing that brings this case within this principle, but it is cited that there may be no misconception of the purport of this decision.

In *Stowe v. Morris,* 147 Ky., 386, which is relied on by the plaintiff, the defendant had bought an automobile for the comfort and pleasure of his family, and the son was authorized to use it at any time for that purpose. He took it out for the purpose of giving his sister and himself and friends a pleasure ride. In that case it was held that the son was not performing an independent service of his own, but was discharging the business of the defendant and was acting as the servant

of his father in the scope of his agency, and hence the father was liable for the son's negligence in driving it. That case resembles *Moon v. Matthews* above cited, in which the machine was taken out by (104) the authority of the sister of the owner, she being a member of the family. In both those cases the owner was held liable because the driver was acting within the scope of his authority. The facts of those cases in no wise resemble this.

In *Power v. Engineering Co.*, 142 App. Div. N. Y., 401, it was held that where an automobile owned by a corporation and used in its business was at the time of the accident driven and occupied by officers of the corporation and their friends on a pleasure trip, unconnected with the business of the corporation, the corporation was not liable for damages sustained by the negligence of the driver.

The general principle that "the master is not responsible for the tort of his servant when done without his authority and not for the purpose of executing his orders, or while doing the work, but wholly for the servant's own purposes and in pursuit of his private or personal ends," has been repeatedly held in our own Court and has very recently been restated in *Bucken v. R. R.*, 157 N. C., 443, and *Dover v. Manufacturing Co., ib.*, 325.

The court below erred in refusing to give prayers for instruction in accordance with the principles of law above laid down. Indeed, the judge might well have directed a nonsuit in respect to Charles F. Nissen, for the evidence is undisputed that the driver at the time of the injury to plaintiff's car was not engaged in any business for the owner, but was about his own business or pleasure, and no jury question was raised on that point.

As to appellant, Carl Nissen, there is no error. As to C. F. Nissen there is

Error.

Cited: *Cates v. Hall,* 171 N. C., 364.

(105)

PERL JACKSON AND WIFE, NANCY LEE JACKSON, v. D. E. AND JAMES R. BEARD.

(Filed 26 April, 1913.)

1. Deeds and Conveyances—Married Women—Separate Examination—Joinder of Husband—Interpretation of Statutes—Constitutional Law.

Revisal, sec. 952, requiring the privy examination of a married woman, separate and apart from her husband, etc., to her conveyances of realty, is constitutional and valid (Art. X, sec. 6); and unless the formalities of this statute are complied with the deed of the married woman is absolutely void.

2. Deeds and Conveyances—Married Women—Statutory Requirements—Joinder of Husband—Curtesy Initiate—Valuable Rights—Infants—Voidable Contracts—Ratification.

After a child of the marriage has been born alive and capable of inheriting, the husband is tenant by curtesy initiate in his wife's lands, and as such has a valuable right; the requirement of the statute, Revisal, sec. 952, where the wife's lands are conveyed, are of a contractural nature on his part; and hence when the husband, being a minor, joins in the deed to lands of his wife, the conveyance is voidable, subject to his affirmance or ratification when he becomes of age; and where the deed has been disapproved in apt time by him, the conveyance, requiring his valid or statutory consent, is void.

3. Deeds and Conveyances — Married Women — Statutory Requirements — Husband's Estate—Interpretation of Statutes—Pari Materia.

Upon construing the Revisal, sec. 952, as to the contractual nature of the husband in joining in the wife's conveyance of land, and as to his parting with a valuable interest therein when issue of the marriage has been born alive capable of inheriting, other sections of the Revisal should be considered, to wit, sections 2109-2111, regarding him as a freeholder, which estate may be lost by decree of divorce, in certain cases; that because of this interest in his wife's land he must become a party to her action concerning her title thereto (Revisal, sec. 2102). Nor does section 2108 affect this construction, its provisions relating to contracts between husband and wife, and not to such as made between them and third parties.

CLARK, C. J., dissenting; BROWN, J., concurring in the dissenting opinion.

(106) APPEAL by plaintiffs from *Peebles, J.*, at April Term, 1912, of CUMBERLAND. Action to set aside certain deeds and to recover one undivided seventh of a tract of land.

On the hearing it was properly established that on 21 November, 1907, Nancy Lee Jackson, *feme* plaintiff, was the owner of one undivided seventh of the tract of land in controversy, the same having descended to her from her father, John C. Beard, and on said day, for

a small consideration, executed a paper-writing purporting to be a valid deed of conveyance to James R. Beard, one of defendants, and on 6 December, 1907, the said grantee conveyed the same to his brother and codefendant, D. E. Beard. That the consideration for said deed from Nancy Lee Jackson was alleged to be only $18, and admitted by defendants to have been only $35. That Perl Jackson, husband of Nancy Lee Jackson, joined in the execution of the conveyance of 29 November, and at the time was under the age of 21. That immediately after his becoming of age he and his wife, as coplaintiffs, joined in the present suit to set aside the deed and recover the land, and that said Perl Jackson has "done nothing since arriving at full age to ratify or confirm said deed." The court being of opinion that the infancy of the husband did not in any way affect the validity of the deed of himself and wife, so instructed the jury. There was verdict and judgment for defendant, and plaintiffs excepted and appealed.

V. C. Bullard for plaintiff.
H. L. Cook for defendant.

HOKE, J. Our statute, Revisal, sec. 952, provides that: "Every conveyance, power of attorney, or other instrument affecting the estate, right, or title of any married woman in lands, tenements, hereditaments, must be executed by such married woman and her husband, and due proof or acknowledgment thereof must be made as to the husband and due acknowledgment thereof must be made by the wife, and her private examination touching her voluntary assent to such instrument shall be taken separate and apart from her husband, and such acknowledgment or proof as to the execution by the husband, and such acknowledgment by the wife and her private examination shall (107) be taken and certified as provided by law." This section has been repeatedly held a constitutional and valid enactment, and authority with us is equally decisive that unless the formalities established by this statute are complied with, the deed of a married woman is absolutely void. *Council v. Pridgen,* 153 N. C., 443; *Bank v. Benbow,* 150 N. C., 781; *Ball v. Paquin,* 140 N. C., 83; *Smith v. Bruton,* 137 N. C., 79; *Ferguson v. Kinsland,* 93 N. C., 337; *Southerland v. Hunter,* 93 N. C., 310.

In *Council v. Pridgen,* the accepted doctrine on this subject is stated as follows: "Article X, sec. 6, of our Constitution, requiring that a married woman conveying her separate real estate shall have the 'written assent of her husband,' the statute law, now embodied in Revisal, sec. 952, provides the manner in which the assent of the husband must be

obtained, to wit, that the deed 'must be executed by such married woman and her husband and due proof or acknowledgment thereof must be made by the wife and her privy examination taken,' etc.; and thus construed, the statutes are constitutional and valid.

"In order to convey a married woman's separate real estate or fix a charge upon it, her privy examination is required, and the husband must join in the deed.

. . . . . .

"A deed executed by a married woman to her separate real property, the name of the husband not appearing in the body of the deed or his signature thereto, proved on oath of a subscribing witness and registered on such probate, without her privy examination, is inoperative, and the written assent of her husband indorsed on the deed does not meet with the constitutional and statutory requirements necessary for her to make a valid conveyance."

It will be noted that the essential requirements to a valid deed by the *feme covert* are that her husband must join in the execution of the deed, and the privy examination of the wife must be taken, and this act of the husband being contractual in its nature both by the express terms of our statutory law and in its operative effect, we are of (108) opinion that it is subject to the general principle prevailing here and elsewhere, that the deeds and contracts of an infant, except for necessaries, etc., may be avoided by him in a reasonable time after coming of age. *Weeks v. Wilkins,* 134 N. C., 516; *McCarty v. Woodstock Iron Co.,* 92 Ala., 463; *s. c.,* 12 L. R. A., 138; *Miles v. Lingerman,* 24 Ind., 385; 22 Cyc., p. 546. The purpose of our statute in making these requirements as to the deeds of *femes covert* is stated by *Chief Justice Smith* in *Ferguson v. Kinsland, supra,* as follows: "The requirement that the husband should execute the same deed with the wife was to afford her his protection against the wiles and insidious arts of others, while her separate and private examination was to secure her against coercion and undue influence from him." And *Connor, J.,* in *Ball v. Paquin, supra,* says: "For the purpose of throwing around her the protection of her husband's counsel and advice, the Legislature declared that with certain exceptions she could not contract without the written consent of her husband."

The basic reason for permitting infants to avoid these deeds and contracts is that until they are 21 they are not supposed to have the mental capacity to make them, and if the reasons for such enactment be correctly stated by these eminent jurists, the principle should apply, we think, when in order to its validity the husband is required to join

in the execution of the deed for his wife's property. If the husband were shown to be a lunatic, and this fact were known to the purchaser, it would hardly be contended that his assent to his wife's deed would stand; and the same reason for avoiding the deed in the one case appears in the other, to wit, the mental incapacity to make a deed. The question has been directly presented to the Supreme Court of Tennessee in *Barker v. Wilson,* 51 Tenn., 268, and it was there held: "That a bargain and sale made by an infant husband jointly with a wife of full age, of the real estate of the wife, is voidable at the election of the husband"; and in *Craig v. Van Bebber,* 100 Mo., 584, the Court, treating of a similar question, said: "Now, it is true that in the cases cited the deeds were worthless from the beginning, whilst here the deed is voidable only; but we do not see that this makes any difference. When the deed is disaffirmed because of the minority of the wife, (109) it becomes worthless as to the husband. As said in the case last cited, the title can only be transferred by an indivisible integer, or not at all. So, too, if the deed be avoided as to the wife, it is avoided as to the husband. It must stand or fall as a whole."

And our own Court is not without expression on the subject. The same article of our Constitution which (in section 6) enables a married woman to convey her property with the written assent of her husband, in section 8 provides that no deed by the owner of a homestead shall be valid without the "voluntary signature and assent of the wife, signified on her private examination, according to law." There is nothing here said as to whether the wife shall be over or under 21 years old, and in *Ritch v. Oates,* 122 N. C., at page 633, in discussing the validity of a deed by the husband and his wife, who had joined in the deed, being privily examined and was under age at the time of its execution, the present *Chief Justice* said: "She, being under age, her assent, though given with privy examination, is invalid, but the interest of the husband, a mere right to call for the title, was not such an interest as to require her legal assent to the conveyance to bar the husband's assertion of a homestead therein." As the excerpt shows, the case was decided on other grounds, to wit, that the husband's interest did not amount to a homestead; but the view of the learned judge as to the validity of a deed, under section 8 of the Constitution, by an infant wife, seems to be in full accord with the Tennessee decision. On reason and authority, therefore, we are of opinion that it was open to the husband to disaffirm his consent on arrival at full age, and that, having done so, the deed must be held void as not conforming to our statute on the subject.

It is earnestly urged that the act of the husband in consenting to his

wife's deed has no operative or contractual effect, as he has no longer any interest in his wife's land; but this, we think, cannot be maintained. It is true that under the terms of our Constitution we have held that a wife may devise her land and thus defeat any and all interest of the husband therein (*Tiddy v. Graves,* 126 N. C., 620); but unless this has been done, the estate and interest of her husband, as tenant (110) by curtesy after issue born alive, is still regarded as existent under our law, recognized both in our statutes and decisions as a valuable interest. In Revisal, sec. 1730, "where the interest of one who has entered land dies the estate is recognized." It may be lost by decree of divorce in certain cases. Revisal, 2109-2111. By virtue of such estate he is regarded as a freeholder. *Thompson v. Wiggins,* 109 N. C., 508.

In *McGluminy v. Miller,* 90 N. C., 215, it was held: "That a husband, tenant by curtesy, has an interest in his wife's land and is a necessary party to a suit concerning it, and if he refuses to become a coplaintiff in an action by the wife to assert her right to the property, he must be made defendant." Pell's Revisal and note to section 2102.

In *Tiddy v. Graves, supra,* there are some expressions in the opinion which seem to favor defendant's position, but the decision properly rests upon the express provision of the Constitution that the wife may devise her lands, and on the question presented here the expressions referred to may not be allowed to reverse the entire current of authority to the effect that a tenancy by the curtesy initiate must still be considered as existent interest. As to section 2108 of the Revisal, a provision much relied upon by defendant, it clearly refers throughout to contracts between the husband and the wife, and does not and was not intended to affect the cotracts between the husband and the wife and third parties. These, as we have seen, are chiefly controlled by section 952 of the law as heretofore cited.

We have not referred to the fact that the first grantee, a brother of the *feme covert,* had conveyed the property to another brother. It does not appear whether the second grantee did or did not have notice, but this does not seem to affect the application of the principle that an infant may avoid his deed within a reasonable time after coming of age. 22 Cyc., p. 551.

For the reasons stated, we hold there was error in the proceedings below which entitles plaintiff to a

New trial.

(111) CLARK, C. J., dissenting: The requirements of Revisal, 952, as to the conveyance of real estate by a married woman have

been in every particular scrupulously complied with. The deed was executed by her and her husband with due proof thereof as to both the husband and the wife, and her private examination duly certified. The first cause of action alleging fraud or undue influence is negatived by the jury, and there is no appeal on that point.

The plaintiff seeks to set aside the deed because he insists that the court should write into the statute words that are not placed therein by the Legislature and which are not in the Constitution, to wit, "the husband being 21 years of age." He insists that these words are implied because a conveyance of realty can only be made by one 21 years of age. But "the written assent of the husband," which is all that is required by the Constitution and to which the Legislature cannot add, and has not sought to add, is not a conveyance.

The husband had nothing to convey. He has no interest in his wife's estate. The Constitution expressly prohibits his having any. It says (Const., Art. X, sec. 6) that "The real and personal property of any female in this State . . . shall be and remain the *sole and separate* property of such female . . . and may be devised and bequeathed and, with the written assent of her husband, may be *conveyed* by her *as if she were unmarried.*" If the property of a married woman "shall be and *remain* her *sole and separate* property, *as if she were unmarried,*" her husband certainly cannot have any interest therein during her lifetime, nor acquire any at her death, unless by her will or dying intestate he succeeds thereto under the general statute of distribution and descent. Such "possibility of inheritance" is not an "interest in" her property. He is forbidden the latter by the Constitution. Her children or her heirs at law have exactly the same possibility of succeeding to her property by devise, or in case of intestacy. But that does not confer on them any interest in her estate which requires them to join in any conveyance of her property. (112)

This written assent does not invest him with any interest in the property, but is merely a "veto power," and there is nothing in the Constitution or in the statute which requires that the husband should be 21 years of age. To so hold is for the Court to write into the Constitution words which are not placed there, and which the Legislature has not attempted to place in the statute, and which would have been unconstitutional if it had done so, by requiring an *addition* to the simple requirement of the Constitution. That simply gives the husband a veto power. It requires merely for the "written assent" that he shall be her "husband," and nothing more.

It is true that Revisal, 952, does require that the husband must join

in the deed, and proof of his execution must be made. If this meant that he must convey, it is an additional requirement, negativing the guarantee given by the Constitution that his "written assent" shall be the only clog upon the wife's right to convey her property as if she had "remained unmarried." It can only be construed that the law required his formal acknowledgment to the deed, not as a conveyance (for he has nothing to convey), but simply as a method of authenticating his signature, and being such, there is no necessity of his being 21 years of age. If he is old enough to be legally her "husband," he is old enough under the Constitution to withold his assent, or to give it.

The privy examination which is still required of women by the statute as to conveyances of her own property has been sustained by the Court "upon the ground solely that it is not an additional clog upon her power of conveyance (because the Legislature could not add additional requirements), but because it was merely a means of authenticating her signature, and is therefore allowable." *Rea v. Rea,* 156 N. C., 532; *Douglas, J.,* in *Weathers v. Borders,* 124 N. C., 621.

After the sweeping provision of the Constitution which emancipated women as to their property rights, retaining only the requirement of the written assent of the husband as to conveyances of realty, that provision came to be construed by judges who were imbued with the previous learning as to the status of married women and whose decisions, to say the least, were not in accordance with the clear meaning of the Constitution. Some of these decisions have been overruled since and others have been sustained by the majority of the Court solely
(113) upon the ground that it "has been so decided." *Connor, J., Ball v. Paquin,* 140 N. C., 90, 94. Many of these have since been cured by repeated acts of the Legislature conforming the law more closely to the terms of the Constitution. But up to this time there has been no decision of the Court that has written into the Constitution, or the statute, the words requiring the husband to be of age when he gives or withholds his written assent.

But it is urged that it is in the eternal order of things that before a man can make himself responsible, or do any act, he must be 21 years of age. That is true in our law, as to conveyances and contracts, but the "written assent" of her husband required by the Constitution is neither a conveyance nor a contract. He has nothing to convey, for he has no interest in his wife's land; nor is it a contract, for there is no consideration to him from the grantee. There is nothing magical in being "21 years of age." For the purposes of contracts and conveying and of suffrage there must be some arbitrary age substituted for proof

of discretion which otherwise would be required for each conveyance or contract. This is purely arbitrary, and varies in different countries. In many countries the age for suffrage is 25, and in some it is 30. In Russia, and indeed in most countries, a monarch who is a minor becomes of legal age, and is invested with the highest powers of government, at 16. We know that in this country the Governor of one of our territories was under 21 years of age when he succeeded to that position under the authority of the President. *U. S. v. Bixby,* 10 Bissell (U. S.), 520. In that case there is a full discussion of the subject by *Judge Gresham,* who points out that notaries public are not required to be 21 years of age except in those few States where this is specially required by statute. He says: "While at common law persons are not admitted to full enjoyment of civil and political rights until they have attained the age of 21 years, yet infants are capable of executing mere powers and, as agents, of making binding contracts for others. In England they are allowed to hold the office of park keeper, forester, jailer, and mayor of a town; and in both England and this country they are capable of holding and discharging the duties (114) of such mere ministerial offices as call for the exercise of skill and diligence only." He then points out that Stevens S. Mason at 19 years of age was appointed Secretary of the Territory of Michigan by President Jackson in 1831, and succeeded to the duties of Governor before he was 21, which he discharged with "vigor and wisdom, that vindicated the propriety of his appointment." We know that LaFayette was a major general in the American Army at 19, in the command of four brigades, the duties of which position he discharged with ability. We need not multiply other well known instances which are numerous. It is sufficient to say that neither the Constitution, nor the statute, nor the eternal fitness of things requires the Court to write into the Constitution an additional requirement that a married woman cannot convey her realty "as if she remained single" unless her husband is "21 years of age." It may be that the courts could write a better Constitution in some respects than the Convention with the approval of the people have done, but that duty was not committed to the courts, and we should observe the plain requirements of the Constitution, adding nothing thereto and taking nothing therefrom.

That the husband has no interest in the wife's estate has been again and again held by this Court, but we need only cited the lucid remarks of *Merrimon, C. J.,* in *Walker v. Long,* 109 N. C., 510, in which he says: "The Constitution, Art. X, sec. 6, has wrought very material and far-reaching changes as to the rights respectively of husband and wife

in respect to her property, both real and personal, and enlarged her personality and power in respect to and control over her property. It provides that 'the real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may after marriage become in any manner entitled, *shall be and remain the sole and separate estate and property of such female,* and shall not be liable for any debts, liabilities, or engagements of her husband, and *may be devised and bequeathed* and with the written assent of her husband conveyed by her *as if she were unmarried.* This (115) provision is very broad, comprehensive, and thorough in its terms, meaning, and purpose, and *plainly gives and secures to the wife the complete ownership and control of her property as if she were unmarried, except in the single instance of conveying it.* She must *convey* with the assent of her husband. It clearly excludes the ownership of the husband as such, and *sweeps away* the *common-law right of estate* which he might at one time have had as *tenant by the curtesy initiate.* The strong and exclusive language of the clause above recited is that the property 'shall be and remain the sole and separate property of such female.' The husband shall be, *not* tenant by the curtesy initiate, but tenant by curtesy *after the death of his wife,* in case *she die intestate.*" The Court in *Tiddy v. Graves,* 126 N. C., 622, cited *verbatim* and indorsed the above quotation, and negatived the argument which was insisted on, in that case, that the curtesy of the husband in the whole of the wife's realty is the correlative of the dower of the wife in one-third of the husband's realty, and hence, that if the Legislature can confer dower, it can retain curtesy. The Court referred to the Constitution as conclusive of the absolute and unlimited ownership of the wife in her property during her lifetime, and vests the power in the Legislature to confer both dower or curtesy, *after the death* of a party, upon the ground that no one has a natural right to control his property after death, and that the disposition thereof, whether by will or by inheritance, is purely statutory.

The decision in *Tiddy v. Graves,* 126 N. C., 620, that the tenancy by the curtesy initiate as an interest in the wife's property has been destroyed by the Constitution and is now only a personal right to associate with his wife, and the possibility of inheriting (like her heirs at law) if she dies intestate, is not only a summary of all previous decisions, but it is the last discussion of the subject. Indeed, it has never been questioned since, but has been cited and approved, on rehearing, 127 N. C., 502 (though the result was changed in that case on the ground that it did not appear that the marriage occurred since

1868); *Ex Parte Watts,* 130 N. C., 242; *Hallyburton v. Slagle, ib.,* 482; *s. c.* (on rehearing), 132 N. C., 948; *S. v. Jones, ib.,* 1047; *Watts v. Griffin* (*Walker, J.*), 137 N. C., 579; *Eames v. Armstrong,* 146 N. C., 6 (where *Connor, J.,* says, "That her husband had 'no (116) estate or interest' in the land, notwithstanding birth of issue, is settled"); *Richardson v. Richardson* (*Walker, J.*), 150 N. C., 553. The husband, therefore, had nothing to convey, and there is no ground to require him to be "of age." He could marry under age, and his veto power is given by virtue of marriage, and not by virtue of his age.

Long before *Walker v. Long,* this Court, in *Manning v. Manning,* 79 N. C., 293 and 301, in a strong and lucid opinion by *Bynum, J.,* had affirmed the absolute ownership and control of her property by a married woman, and held that the husband had no interest therein of any kind whatever.

In three cases, filed on the same day and written by three different judges, *Thompson v. Wiggins,* 109 N. C., 508; *Walker v. Long, ib.,* 511; and *Jones v. Coffey, ib.,* 515, all three speaking for a unanimous Court, it was held that while a husband may still be called a "tenant by the curtesy initiate" and deemed a freeholder for the purposes of sitting on a jury, he has in fact *no estate or interest* whatever in his wife's property, and was entitled to no more than the right of ingress and egress, and that she could, as the statute provides, sue for the possession of her property and for rents and damages thereto without joining her husband. There are numerous other decisions to the above effect.

It being clear upon the face of the Constitution and the above cited decisions that the husband has "no estate or interest" in his wife's property which he can convey or refuse to convey, there is nothing that authorizes judicial legislation to read into the Constitution, or the statute, additional words which will forbid a wife to convey her realty, when she has the written assent of her husband, without the additional clog added by the courts, "provided such husband is 21 years of age." This is not required by the Constitution, nor by the statute, nor by the "reason of the thing," which gives a husband the veto power *ex virtute officii,* without any reference to his age.

No opinion can be found which denies the power of a wife to convey her realty unless her husband is of age. *McGlennery v. Miller,* 90 N. C., 216, which is relied upon by the plaintiff, states in the face of the opinion that "the marriage took place in 1850; the (117) wife was seized in fee of the lands at the time of the marriage, and there were children of the marriage born alive. *Hence* the husband has a life estate in the land as tenant by the *curtesy initiate.*" The

opinion is by *Merrimon, J.,* who wrote *Walker v. Long,* 109 N. C., 510, and there said that the Constitution *"sweeps away* the common-law right of estate which he might at one time have had as tenant by the curtesy initiate." The case of *Barker v. Wilson,* 51 Tenn., 268, speaks of a "bargain and sale" made by an infant husband jointly with a wife of full age, and is under a Constitution totally different from ours. Indeed, Revisal, 2102, especially restricts the tenancy by the curtesy to cases "after the death of the wife *intestate."* The absolute power of the wife to devise her property is set out in the Constitution and in Revisal, 2098, which could not be the case if the husband had any vested interest in her realty. *Walker, J., Watts v. Griffin,* 137 N. C., 572. This is further recognized by Revisal, 2116 and 2117, which make the deed of the wife of her property valid if the husband is an idiot or lunatic or has abandoned her, without any assent of the husband, which could not be the case if he had any interest therein. See numerous cases cited in Pell's Revisal under those sections, holding them constitutional.

It may be noted that in all the more recent State constitutions the requirement of the "written assent" of the husband has been dispensed with, as has also been the case in England and in Australia and Canada and other English-speaking countries. The requirement of a privy examination of the wife to a deed was abolished in England some forty years ago, and also this has been followed in Australia and Canada and in all the States of this Union, including all the States adjoining us—Virginia, South Carolina, Georgia, and Tennessee—except in North Carolina and seven others. There can therefore be no protection, and only an unnecessary clog, in requiring an addition to the "written assent" of the husband which is not set out in our Constitution nor in any statute.

BROWN, J., concurs in the opinion of CLARK, C. J.

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(118)

MARY L. DOCKERY, ADMINISTRATRIX, v. TOWN OF HAMLET.

(Filed 30 April, 1913.)

1. Cities and Towns—Presenting Claims—Period Allowed—Complaint—Demurrer—Interpretation of Statutes.

Where upon the face of a complaint, in an action against a town, etc., to recover for services rendered, it does not appear that claim was made upon its officers as the statute (Revisal, sec. 396) provides, within two

years after its maturity, the claim is barred by the express provision of the statute, and demurrer, that it states no cause of action, should be sustained.

2. Cities and Towns—Presenting Claims—Period Allowed—Condition Precedent—Interpretation of Statutes.

Revisal, sec. 396, requiring a claim against a city to be presented, etc., within two years after its maturity, is not strictly a statute of limitation, for it imposes this as a duty on the claimant as a condition upon which he may successfully maintain his action.

3. Same—Maturity—Evidence.

Where a claim has been made on the city for services rendered, and it nowhere therein appears when the services were rendered, in an action to recover therefor the plaintiff must not only show that the claim had been presented in the statutory period, but that the amount claimed had matured within that time; and when he has failed to make this necessary allegation in his complaint, a demurrer thereto should be sustained; but as the complaint is a defective statement of a cause of action, and not necessarily a statement of a defective cause of action, it was error to dismiss the action, and the plaintiff may amend by setting out the matters required by the statute.

4. Pleadings—Defective Cause—Demurrer—Practice.

Objection to a statement of a defective cause of action must be taken advantage of by demurrer, or it will be deemed waived.

WALKER, J., did not sit on the hearing of this case.

APPEAL by plaintiff from *Peebles, J.*, at December Term, (119) 1912, of RICHMOND.

Morrison & McLain for plaintiffs.
M. W. Nash for defendant.

CLARK, C. J. The plaintiff, administratrix of her husband, instituted this action 12 December, 1912, against the town of Hamlet for the "statement of an account" for the services of her husband as an attorney. The complaint, paragraph 7, alleges, "that plaintiff's intestate, previous to his death, rendered various services as an attorney at law to the defendant, the exact character of which she is not informed of, and the exact amounts which should be paid her for said services are unknown to her; that she is prepared to prove (as she is informed and believes) service in various matters, but the exact amount which she should receive is uncertain unless defendant is to be bound by the bill presented by intestate on or about 10 May, 1910, a copy of which is hereto attached." The bill attached reads as follows:

EXHIBIT A.

TOWN OF HAMLET TO A. S. DOCKERY, Attorney.

Services in Steve Propst, Harrington, Dobbin, Griffin, Henderson, Charles Hall, Nowell, Napier, Kendall, Hubbard, Cooper, Harrington, Bennett, Brown, Gordon, Suttle, Carter, Adams, Parham, and other cases before the mayor, including retainer for two years, drafting ordinances, etc., attending several meetings of the board of commissioners, including retainer for two civil suits, McLean and Napier v. Town, including services and advice in Griffith case, together with prosecution of application for pardon before Governor, together with costs aggregating $40; statements for all of which were regularly presented to the board, less $100 paid, $750.

The defendant town demurred:

(1) In that the complaint does not state a cause of action against the defendant.

(2) That the complaint does not show that an itemized verified account was presented to the defendant to be audited and allowed;

(120) therefore no itemized account was ever presented as required by sections 1385 of the Revisal of 1905.

(3) That the complaint does not show that any claim was presented to the chief officers of the town within two years after the maturity of said claim.

Taking the last paragraph of the demurrer first, it appears from the complaint that even if the bill set out in "Exhibit A" was sufficient in law, the demand is barred, and the demurrer should have been sustained.

Revisal, 396, provides:

"1. All claims against the several counties, cities, and towns in this State, whether by bond or otherwise, shall be presented to the chairman of the board of county commissioners, or to the chief officers of said cities and towns, as the case may be, within two years after the maturity of said claims, or the holders of such claims shall be forever barred from recovery thereof."

In *Wharton v. Commissioners,* 82 N. C., 14, where this section first came up for review, the Court said: "The statute relied on is not in strict terms an act limiting the time in which the action may be prosecuted, but it imposes upon the creditor the duty of presenting his claim within a defined period of time, and upon his failure to do so forbids a recovery in any suit thereafter brought. If the claim is presented and the commands of the statute complied with, no bar or obstruction is interposed in the way of its successful prosecution." Further on it

is said that the act is "a restricted and conditional limitation upon the right to sue."

The statute is in effect the same as Revisal, 59, as to an action for "wrongful death," which has also been held to be not strictly a statute of limitations, but an action prescribing the time within which action can be brought (*Best v. Kinston,* 106 N. C., 205), and in which a demurrer lies, unless it appears on the face of the complaint that the action was brought in the time limited.

The language above cited is quoted and approved in *Royster v. Commissioners,* 98 N. C., 151. In *Board of Education v. Greenville,* 132 N. C., 4, the above rulings are affirmed, *Walker, J.,* saying: "We think it unnecessary to inquire, or to decide, whether the statute is strictly one of limitation or whether it merely imposes the duty (121) upon the holder of a claim against a municipal corporation the performance of which is a condition precedent to his right of recovery. In either view of the nature of the statute, the claimant by its very words is 'barred from a recovery' of any part of the claim that did not mature within two years immediately preceding the date of his demand, and this conclusion as to the effect of the statute is all-sufficient for the disposition of this appeal."

It appears upon the face of the complaint, therefore, that this claim was presented more than two years prior to the beginning of this action, to wit, on 10 May, 1910. As the claim must have been mature then, if valid, it appears upon the face of the complaint that this action which was not begun till 12 December, 1912, was not within two years, and therefore no cause of action is stated. The plaintiff does not aver that she has made any demand, but, on the contrary, says in the complaint as above set out that she "is not informed as to the character of the services or the amount that ought to be paid," and that she has "asked a settlement."

But even if there has been a demand alleged of so uncertain and insufficient a claim, it is not alleged to have been made within two years after 10 June, 1910. Nor even as to the claim filed on 10 June, 1910, does it appear therein that the services were rendered in two years prior thereto, and hence it was invalid when filed, and could be no basis for a subsequent demand, if it had been made. Therefore, upon the face of the complaint, the first and third grounds of the demurrer were properly sustained by the judge for "no cause of action stated." *Wharton v. Commissioners,* 82 N. C., 14; *Kinston v. Best,* 106 N. C., 205. It is therefore unnecessary to discuss the second ground of demurrer.

The demurrer was properly sustained. But as the complaint is a defective statement of a cause of action, and not necessarily a statement of a defective cause of action, it was error to dismiss the action, and the plaintiff should be allowed to amend by setting out the matters required by the Statute. *Bowling v. Burton,* 101 N. C., 176; (122) *Mizzell v. Ruffin,* 118 N. C., 69. Objection to a statement of a defective cause of action must be taken advantage of by a demurrer or will be deemed waived. *Knowles v. R. R.,* 102 N. C., 59; *Ladd v. Ladd,* 121 N. C., 118. The judgment dismissing the action is reversed, but the action of the court in sustaining the demurrer is Affirmed.

WALKER, J., did not sit on the hearing of this case.

Cited: *Burnett v. R. R.,* 163 N. C., 93.

NEILL McLEOD v. J. W. GOOCH ET AL.

(Filed 30 April, 1913.)

1. Motions—Judgments—Excusable Neglect—Findings of Fact—Record—Presumptions—Appeal and Error.

Upon appeal from the refusal of a motion to set aside a judgment for excusable neglect, the ruling of the Superior Court will be sustained when no facts are found by the judge upon which his ruling was based, the burden being upon the appellant to show error, and the presumption being in favor of the validity of the action of the lower court.

2. Same—Exceptions—Assignments of Error.

It is the duty of the party appealing from an adverse ruling of the trial court, upon his motion to set aside a judgment for excusable neglect, to have requested the court to find the facts upon which the ruling was based, or his exception aptly taken of record to a refusal to have done so at the appellant's request; and an assignment of error, which is no part of the record, but of the attorney in grouping the exceptions noted in the case on appeal, which merely states that the request was made and refused, unsupported by an exception of record, will not be considered on appeal.

3. Attorney and Client; Duty of Client—Laches—Judgment by Default.

A party litigant should bestow upon his case that degree of care and attention which a man of ordinary business prudence usually gives to his important business, and the laches of his attorneys in permitting a judgment by default to be taken therein against him is imputable to the client.

4. Parties—Motions—Agreements Upon Condition—Hearings—Notice—Court Officers—Laches.

Where the parties to an action have agreed that a motion to set aside a judgment for excusable neglect be heard on a specified day of a term of court, provided that the term held until then, and acting on this agreement the movant appeared after the adjournment of the court for the term, before which time and during the term, the court had refused to grant his motion, it is his own fault that he took the chances of the court's holding until the day thus specified; and his neglect will not be held as excusable on appeal; neither will it avail him that he relied upon notice from the officers of the court, for they are under no legal obligations in such matters.

APPEAL by plaintiff from *Peebles, J.*, at February Term, 1913, (123) of GRANVILLE.

Motion to set aside a judgment upon the ground of "mistake, inadvertence, surprise, or excusable neglect," under Revisal, sec. 513. The facts are that plaintiff brought this action to November Term, 1910, for the recovery of a planing machine with its outfit, alleged to be unlawfully detained by defendant. He filed his complaint 10 January, 1911, and defendant answered 27 February, 1911. The cause was continued until April Term, 1912, when, plaintiff having failed to appear, the court submitted the issues to the jury, which were answered as follows:

1. Is the plaintiff the owner of the property described in the complaint? Answer: No.

2. What was the value of the milling machinery, planer, and other apparatus at the time of the seizure by the sheriff in the claim and delivery proceedings in this action? Answer: $275.

And entered judgment for the defendant upon the verdict.

Plaintiff moved to set aside the verdict and judgment, upon the ground of mistake, surprise, inadvertence, fraud, and excusable neglect, which motion the court refused, and plaintiff assigned the following errors:

1. To the signing of the judgment denying the motion to set aside the judgment rendered at April Term, 1912, and the judgment and order rendered at November Term, 1912.

2. Plaintiff excepts to the failure to set aside the judgment rendered at April Term, 1912, for the reason that said judgment was void and absolutely null, since defendant's answer was not verified (124) as required by statute.

3. The plaintiff excepts to the judgment on the ground that the court failed and refused to find the facts and set them out in the case.

Baggett & Baggett and D. G. Brummitt for plaintiff.
Graham & Devin for defendant.

WALKER, J. There are no findings of fact in the record as to excusable neglect. The judge, at the hearing, merely denied the motion. In the absence of the findings, we must presume that the judge found such facts as would support his ruling, for we do not presume error, but the appellant must show it, the burden of doing so being upon him. If he wished to review the decision of the court, he should, in apt time, have requested a finding of the facts. *Albertson v. Terry,* 108 N. C., 75; *Hardware Co. v. Buhmann,* 159 N. C., 511. This is the well settled practice. The plaintiff, it is true, states in one of his assignments of error that such a request was made and refused, but an assignment of error, as we have repeatedly held, must be based upon an exception duly taken during the trial of an action or the hearing of a motion, and there is no such exception, and nothing in the record to show that the request was made and refused. "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 of error not supported by an exception, it will be disregarded." *Worley v. Logging Co.,* 157 N. C., 490. We have, nevertheless, examined the affidavits filed by the plaintiff in support of his motion, and find nothing stated therein which tends to show a case of excusable neglect. The case was pending in the court nearly two years before the trial was had and the judgment rendered at April Term, 1912, and no steps were ever taken to ascertain when it would be called for trial. It seems that plaintiff and his counsel relied on the clerk or some one else to notify them of the time,
(125) but there was no legal obligation resting upon any one to do so, and no request was made to the clerk or to opposing counsel to give the information, so far as appears, and no promise made by them, or either of them, to give seasonable notice of the time when the case would be reached in regular order on the calendar. The motion was first made before *Judge Whedbee,* to set aside the judgment, but plaintiff failed to appear at the time appointed for the hearing of the same, and he then moved before *Judge Peebles* to set aside the judgment and the former order of *Judge Whedbee* denying the first motion. The judgment was rendered at April Term, 1912, motion to set it aside made 10 July, 1912, nearly three months afterwards, and July Term, 1912, set for the hearing. The defendant did not appear in person or by counsel at that term, but the court allowed plaintiff time to file additional affidavits, and Tuesday of the next (November) term was set as the day for hearing the motion. It appears that plaintiff's counsel, by letter of 1 November, 1912, requested of defendant's counsel that the time for the hearing be changed to Wednesday, the 27th, and

plaintiff's counsel agreed to this date, "if convenient to the judge," but insisted that the motion be heard during the term. The court adjourned on the 26th, the day first set for the hearing. If counsel of defendant had agreed unconditionally that the motion should be heard on the 27th, our decision might be different, but they did not, and plaintiff should not have relied upon the conditional promise, as he was warned by the terms of the letter that the term might end before the 27th, and if so, it would not be convenient to the judge to hear the motion, and he was further notified that if the court did adjourn before the 27th, "the matter would be disposed of" by the judge before adjournment. The terms of the letter gave the plaintiff full notice that his presence, or that of his attorney, was required on Tuesday of the term, in order to protect his interests, and that delay was dangerous. He should not have taken the chance of the court continuing in session until Wednesday, the 27th, in the circumstances; and having taken it and lost his day in court, he must abide the consequences. He was making serious charges against the defendant, and should not have (126) trusted to his favor or leniency. Defendant's counsel were as liberal towards him as he had a right to expect and as was consistent with their plain duty to their client. Plaintiff should have employed resident counsel to watch the calendar, or he should, at least, have seen that his nonresident counsel attended the court and remained on guard to take care of his interests, or, as another alternative, that he had a more definite agreement with plaintiff's counsel as to the time for the hearing. Instead of this, there was inattention and seeming indifference throughout the progress of the case. The undisputed facts do not show a case of excusable neglect. *White v. Rees,* 150 N. C., 678. A party has no right to abandon all active prosecution of his case simply because he has retained counsel to represent him in the court. We have held that he must bestow that attention and care upon it which a man of ordinary prudence usually gives to his important business. *Roberts v. Allman,* 106 N. C., 391.

It seems that the defendant has recovered judgment for about $215 more than, in law and good conscience, he is entitled to have, and plaintiff's application to be relieved of the judgment appeals strongly to our sense of justice and right. Defendant bought the machine for $250, paid $60, and now owes $190 on the price. He has a judgment for $275. Now, deducting the $60 paid by defendant, the latter has made a clear gain of $215, unless he pays the $190, and we infer that he is insolvent. Plaintiff has the property, to be sure, but he must pay $215 and the costs for the privilege of keeping it. It appears to be a very

hard case, but by his own neglect he has deprived us of the power to help him by requiring the defendant to deal fairly and account for the price of the property, which he promised to pay at the time he received the machine and as a condition of acquiring the title thereto. This is taking the plaintiff's statement of the transaction between them. The defendant denies it, but the fact remains that he will receive far more then he has parted with. In law, however, he is entitled to keep it, because the plaintiff has slept soundly upon his rights, and the Court, therefore, cannot aid him. If he had been vigilant as the defendant was, and as alert and enterprising, he would not have lost them. We are not now passing upon the merits, however. They may all (127) be with the defendant, as the facts, perhaps, have not yet been fully disclosed.

The plaintiff contended that the judgment was irregular or taken contrary to the course and practice of the court, but he made no such point below, and the judge, therefore, has not passed upon it. This proceeding, though, will not bar him from moving to set aside the judgment upon the ground of irregularity, and have it vacated, if the facts and the law will sustain such action by the court. *Brock v. Scott,* 159 N. C., 513.

There was no error that we can discover in the rulings of the court upon the motions.

No error.

Cited: School v. Peirce, 163 N. C., 427, 428; *S. v. Freeze,* 170 N. C., 711.

IN RE BIG COLD WATER DRAINAGE DISTRICT.

(Filed 30 April, 1913.)

1. Drainage Districts—Constitutional Law.

Chapter 442, Laws 1909, providing for the laying off of drainage districts, is constitutional and valid.

2. Drainage Districts—Instructions, How Construed—Benefits to the Proposed District—Health—Interpretation of Statutes.

Where detached portions of a charge are erroneous, when considered alone, but correct when considered with the other parts, as a whole, the charge will not be held for error; and when it appears in proceedings to lay off a drainage district under chapter 442, Laws 1909, that the jury were instructed to consider "not only the increased facilities of the land

for producing crops, but the benefit to the health of the people who live in the district," it will not be construed as erroneous because other parts of the charge, taken singly, did not appear to confine the question of health to those living in the proposed district.

3. Drainage Districts—Findings of Fact by Clerk—Sufficiency—Exceptions—Trial de Novo.

On appeal from the clerk, proceedings to lay off a drainage district are heard *de novo* in the Superior Court, upon exceptions taken before the clerk, and only these exceptions may be considered (amendments to Drainage Act, sec. 3, ch. 67, Laws 1911), and it is sufficient that the clerk has found as a fact that the allegations set out in the petition are true, if these allegations are sufficient, and distinctly and clearly made.

4. Drainage Districts—Interpretation of Statutes—Repealing Clauses—Purview of Act.

Chapter 20, Laws 1895, authorizing adjacent owners on Cold Water Creek to clean out and straighten the channel thereof, under a certain method, does not come within the purview of the Drainage District Act, ch. 442, Laws of 1909, and hence the exception in the latter act as to "any local drainage law already enacted," etc., does not apply.

APPEAL by defendant from *Daniels, J.*, at August Term, 1912, (128) of CABARRUS.

Heriot Clarkson, L. T. Hartsell, and J. Lee Crowell for petitioners.
Morrison Caldwell and H. S. Williams for defendants.

CLARK, C. J. This is a proceeding under the General Drainage Act, ch. 442, Laws 1909. The petitioners, fifty-eight in number, filed their petition, duly signed, and setting out the necessary allegations. The summons was served upon nine others in the district who did not join in the petition. Under section 3 of the act, and after hearing objections, the order was made establishing the drainage district and appointing the board of viewers. Upon objections filed, the clerk confirmed the report of the viewers, and an appeal was taken to the judge. At term an issue was submitted to the jury, upon the only objection filed by the objectors; *i. e.*, "Is the cost of construction greater than the benefits that will accrue to the land?" to which the jury responded "No," and thereupon judgment was rendered confirming the action of the clerk.

The proceedings were regular in all respects under chapter 442, Laws 1909, whose constitutionality was thoroughly discussed and upheld by *Mr. Justice Hoke* in *Sanderlin v. Luken,* 152 N. C., 739, which has been reaffirmed, *White v. Lane,* 153 N. C., 17; *Trustees v. Webb,* 155 N. C., 386; *Carter v. Commissioners* (*in re* Drainage of Mattamuskeet Lake), 156 N. C., 187.

(129) The objectors filed two assignments of error to the charge. The first of these is abandoned here. The other, that the court instructed the jury to take into consideration the health of the community instead of confining them to the question of health in so far as it affected the lands within the drainage district, cannot be sustained, for the court charged that the jury should consider "not only the increased facilities of the land for producing crops, but the benefit to the health of the people who live in the district." Taking a detached portion of the charge, there might be some ground for the exception, but as *Walker, J.*, said 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 error to them, when, if considered with the other parts 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, and this is the only reasonable rule to adopt." Reading the entire charge, we do not think the jury was misled.

The third exception is that in the judgment the clerk failed to find as a fact that the lands described were "wet, swamp, or overflowed lands, or lands covered by water, or that the drainage of the lands described would benefit the public health or be conducive to the general welfare." The court found as a fact that the allegations set out in the petition were true, and those allegations are distinctly and clearly made in the petition. Besides, on appeal the cause was tried *de novo*, and the only issue raised by the objectors was as to the cost of construction, and whether it would exceed the benefits. The amendment to the drainage act, sec. 3, ch. 67, Laws 1911, provides that appeals in these cases "shall be based and heard only upon the exceptions theretofore filed by the complaining parties, either as to the issues of law or fact, and no additional exceptions shall be considered by the court upon the hearing of the appeal." In fact, none other was raised.

The objectors' last exception is that chapter 442, Laws 1909, provided that it should not repeal or change "any local drainage law already enacted or to be enacted by the General Assembly of (130) 1909." It was earnestly debated before us whether that restriction applied to local drainage acts already enacted by the General Assembly of 1909 or to those enacted prior thereto. But we need not pass upon the point. Aside from the fact that this exception was not made before the clerk, and, therefore, under section 3, chapter 67, Laws 1911, was not a matter for consideration on appeal, we are of opinion that chapter 206, Laws 1895, which defendants claim is a bar to this

proceeding, in no wise covers the ground of the statute under which this proceeding is taken out.

Chapter 20, Laws 1895, simply authorized the adjacent owners on Cold Water Creek to clean out and straighten the channel thereof, somewhat upon the system under which our roads have been worked by conscription of labor. The hands to be furnished were to be worked not less than four nor more than twenty days in each year. Chapter 442, Laws 1909, was a new departure in North Carolina. It is the adoption of a system, heretofore successfully operated in many other States, for the coöperation of landowners in the drainage of lands by forming drainage districts, which were to become *quasi*-public corporations, for the purpose of improving the health of the district and the fertility of the lands. Under this drainage district system the lands are assessed in proportion to the benefits derived. An organization is effected in each district, to execute and maintain a system of drainage. As in every community there are some who oppose any proposition looking to coöperation for the public health, or any other purpose, this act provides that when three-fifths of the landowners in any proposed district shall sign a petition, notice shall be issued to the others, and if upon examination of the petition, and the evidence, the clerk of the court shall find that the law has been complied with, a board of viewers shall be appointed, who shall make investigation and report, with the aid of a competent civil engineer, and upon coming in of the report of the viewers the clerk will hear the objections raised and render a judgment, from which an appeal lies to the Superior Court.

This act is well drawn, and is based upon the experience and the statutes of other States, and up to date more than 100 of (131) these drainage districts have been organized in North Carolina with great benefit to the health, and in the increased productiveness of the lands, in these districts. Together with the increased school facilities and better roads, this new drainage system is aiding vastly in promoting the development of this State. In Florida, the State itself has created a drainage district of 4½ million acres. This system operating in many States has by the coöperation of landowners redeemed a vast acreage.

The proceedings herein have been regular, and we find therein

No error.

Cited: Shelton v. White, 163 N. C., 93; *Griffin v. Comrs.,* 169 N. C., 645; *Lang v. Development Co., ib.,* 664; *Banks v. Lane,* 170 N. C., 16; *Coal Co. v. Fain,* 171 N. C., 648.

F. E. THOMAS v. R. C. ELLINGTON, R. P. BALLINGER, AND DORA BALLINGER, ADMINISTRATRIX.

(Filed 30 April, 1913.)

Executors and Administrators—Heirs at Law—Notes—Security—Orders on Administrator—Venue—Removal of Causes—Interpretation of Statutes.

Where a maker of a note, jurisdictional as to the amount in a court of a justice of the peace, is sued in the Superior Court thereon, and it appears from the complaint that it was given for a stock of goods which had been entirely disposed of; and that the action was to enforce an order, given as security to the note, on the interest of the maker, as heir at law of a deceased person, in the hands of the administrator, who was made a party for the purpose, the action involves an account and settlement by the administrator, and should be brought where he has qualified, and when brought elsewhere, should be removed thereto on motion aptly and formally made. Revisal, sec. 421.

APPEAL by plaintiff from *O. H. Allen, J.*, at December Term, 1912, of FORSYTH.

Motion to remove cause. On motion, formally made, in apt time, the cause was removed to the county of Guilford, the court entering the following judgment:

"On written motion on the part of the defendants to remove this cause to the Superior Court of Guilford County, and it appearing to the court that the intestate of the executrix, Mrs. ..... Bal-
(132) linger, lived and died in Guilford County, and then the executrix duly qualified as such before the Superior Court of Guilford County, and that the plaintiff seeks to recover out of the assets of the said intestate in her hands, the estate being unsettled: It is now ordered that the motion to be removed to the Superior Court of Guilford County for trial be allowed."

Plaintiff excepted and appealed.

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

HOKE, J. Revisal, sec. 421, enacts: "All actions upon official bonds or against executors and administrators in their official capacity shall be instituted in the county where the bonds shall have been given, if the principal or any of the sureties on the bond is in the county; if not, then in the plaintiff's county."

On the record it was made to appear that the father of the defendant R. P. Ballinger died resident in Guilford County, and that defendant Dora T. Ballinger duly qualified in said county as his administratrix,

and that a suit to adjust and settle the estate is now pending in that county; that plaintiff heretofore sold to defendants Ellington and R. P. Ballinger a tailoring business and outfit and took and holds three notes for the purchase price in the aggregate sum of $200, and, as security for said notes, a "pledge" of the property sold, and, as further security, R. P. Ballinger assigned to plaintiff "all his interest due him from his father's estate."

It is alleged in the complaint that the business and property sold has been entirely disposed of, and the action is to recover judgment on the $200 note and to condemn and apply the interest due R. P. Ballinger from his father's estate to its payment. The note for $200, being of itself within the jurisdiction of a justice of the peace, and the complaint having alleged that the property sold had been entirely disposed of, the only jurisdictional fact alleged in the pleadings or appearing of record is an action to recover from the administratrix the amount due R. P. Ballinger from his father's estate. This involves an account and settlement of said estate, and, by the express words of the statute, such an action must be instituted in the county where (133) the administrator qualified. The case of *Roberts v. Connor,* 125 N. C., 45, does not conflict with this position. That was a suit which concerned the conduct of a bank operated by an executor, and the decision was put on the express ground that the official acts and conduct of the executor was in no wise involved.

The judgment removing the cause is

Affirmed.

Cited: Craven v. Munger, 170 N. C., 426.

GERNIE KIGER, BY HIS NEXT FRIEND, v. LIIPFERT SCALES COMPANY.

(Filed 7 May, 1913.)

1. Master and Servant—Negligence—Safe Appliances—Defects—Ordinary Care—Duty of Master.

While it is the duty of the master to furnish his servant reasonably safe machinery and appliances with which to do his work, including under certain conditions the peremptory obligation of supplying such as are "known, approved, and are in general use," the responsibility of the master is not that of an insurer, for the requirement is only made of him to provide such as are reasonably safe, with the burden on the servant, in his action for damages for an injury alleged to have been thus neg-

ligently inflicted, to show the defective condition of the machine at which he was at work; that it was the proximate cause of the injury; and that the defendant knew of this defect, or could have discovered it by the exercise of ordinary care.

2. Same—Instructions.

Where the servant sues for damages for a personal injury caused by the alleged negligence of the master in furnishing him a defective machine with which to do his work, an instruction is erroneous which makes the defendant's liability depend only on whether the machine was defective at the time the servant received the injury, the evidence being conflicting upon whether the defective condition was brought to the master's notice or he should have known thereof in the exercise of ordinary care.

3. Same—Res Ipsa Loquitur—Questions for Jury.

Where there is conflicting evidence upon the question of the master's negligence in not furnishing his servant a proper machine with which to do his work, as the proximate cause of the injury complained of, the doctrine of *res ipsa loquitur*, a question for the jury, does not relieve of the requirement that, in charging the jury upon the issue, the constituent features of the law of negligence as applicable to the facts in evidence should be correctly given.

(134) APPEAL by defendant from *O. H. Allen, J.*, at December Term, 1912, of FORSYTH. Action to recover damages for alleged negligence on part of defendant company, causing permanent physical injury to plaintiff.

On the usual issues in such action there was verdict for plaintiff. Judgment on the verdict, and defendant excepted and appealed.

Benbow & Hall and Jones & Patterson for plaintiff.

Manly, Hendren & Womble and Watson, Buxton & Watson for defendant.

HOKE, J. There was evidence to show that on 25 April, 1910, plaintiff, an employee of defendant company, had his hand severely and permanently injured while engaged in operating an Adams duplex lump machine. Without going into a minute description, this is a machine used in the process of manufacturing plug tobacco, by which the tobacco is made into lumps preparatory for its subsequent pressure into the plugs. It weighs about 2,300 pounds, is 4 feet 6 inches high in all, has a base of 22 x 36 inches, and 33 inches from the floor has a surface like a table 22 x 42 inches. On this surface are two cells or hoppers into which the tobacco is put by hand, and there are also two drop blocks or plungers, which are raised and lowered alternately as the power is applied, fitting into the hoppers or cells and supplying

the pressure required to make the tobacco into lumps, one block being down when the other is raised, etc. The power is applied by a contrivance beneath the table and is controlled by a lever having a handle affixed to the side of machine, and when the machine is in proper condition the power will only operate and the position of the (135) block change when the operator lifts the lever 4 inches and pulls it 2; unless this is done, the machine does not "repeat," but holds its position, and no injury could result. The evidence of plaintiff tended to show that on the day of the injury, and soon after he commenced working the machine, it had an uncertain movement, and the blocks would change position without moving the lever. That he called the attention of the boss or foreman to this, and was told that the machine was all right, to go back to work. That he went back, and in the attempt to operate the machine further, and by reason of such an eccentric movement, his hand was caught and crushed by one of the blocks and held until the bolts could be removed. The evidence of defendant tended to show that the machine was a proper one for the work and was in perfect condition; that it worked true both before and after the injury, and that from its construction and in the condition it was then shown to be, the power could not be applied nor the position of the blocks changed except by moving the lever in the regular way; that plaintiff had made no complaint whatever of any eccentric or irregular movement of the machine, and that he was injured while engaged in conversation with a girl at the time, and not properly attentive to the work or the position of his hands.

On this, the evidence chiefly relevant to the question presented, the court charged the jury as follows: "That if you find by the greater weight of the evidence, the burden being upon the plaintiff to establish that (the defendant put the plaintiff to work on a machine which was out of order, and by reason of its being out of order, and by reason of the failure of the defendant to provide him with a machine in proper condition, the plaintiff was injured in the manner contended for by him, then the plaintiff was injured by the negligence of the defendant in putting him to work at a machine that was out of order). If the plaintiff fails to satisfy the jury by the greater weight of the evidence that he was injured on account of a failure of the defendant to provide him with a machine in proper condition for the work which he was placed there to do, then the jury should answer the first issue 'No'; I say if he fails to satisfy the jury by the greater weight (136) of the evidence. It is a clear proposition for you to determine, according to the weight of the evidence. Was that machinery out of

order, and on account of its being in improper condition was the plaintiff, while attempting to take out a plug of tobacco, injured on account of the dropping of the weight when it ought not to have dropped, and its dropping on account of defect about the machine?"

It has been repeatedly held in this State that in the exercise of reasonable care employers of labor are required to provide for their employees a safe place to do their work, and appliances safe and suitable to do the work in which they are engaged. And as a feature of this obligation in the operation of mills and other plants where the machinery is more or less complicated, such employers are held to the duty of supplying machinery and implements which are known, approved, and in general use. *Hicks v. Manufacturing Co.*, 138 N. C., 325; *Marks v. Cotton Mills*, 135 N. C., 287; *Lloyd v. Haynes*, 126 N. C., 359; *Witsell v. R. R.*, 120 N. C., 557.

In the application of the more general principle, it is also well established here and elsewhere that an employer is not an insurer of the employee's safety. In the discharge of the duty he is held only to that degree of care that a man of ordinary prudence should exercise under like conditions and charged with a similar duty; and if when proper machinery and implements have been provided, a defect occurs or exists which results in injury to an employee, it is necessary to show, in order to fix liability, that the defect was a proximate cause of the injury and that the employer had actual or constructive notice of its existence. *Mincey v. R. R.*, 161 N. C., 467; *Pritchett v. R. R.*, 157 N. C., 88; *Blevins v. Cotton Mills*, 150 N. C., 493; *Nelson v. Tobacco Co.*, 144 N. C., 418; *Carnegie Steel Co. v. Byers*, 149 Fed., 667. In *Mincey's case, Associate Justice Walker* for the Court said: "The duty of the master to provide reasonably safe tools, machinery, and place to work does not go to the extent of a guaranty of safety to the employee, but does require that reasonable care and caution be taken to secure such safety." In *Pritchett's case, Associate Justice Allen* thus
(137) correctly states the principle: "The burden is on the plaintiff to prove that the place where he was at work was unsafe, and that the defendant knew it to be so or that it could have been discovered in the exercise of ordinary care"; and in *Blivens v. Cotton Mills* and *Nelson v. Tobacco Co., supra*, it was held: "In an action for damages sustained by an employee, alleged to have been caused by a defect in a machine, at which he was at work in the course of his employment, it is necessary for him to show that his injury was caused by the defect, and that the employer had actual notice thereof, or constructive notice, implied by failure to exercise reasonable inspection or care, or from the length of time the defective condition had previously existed."

In the charge of his Honor on the first issue and on the facts in evidence we do not think there has been a correct application of the principle. Both in the direct charge and in the closing explanation the impression may very well have been made on the mind of the jury that responsibility would attach if the machine was defective, without more. Thus, after saying that if injury occurred by reason of a failure to provide plaintiff with a machine in proper condition, the court proceeds: "It is a clear proposition for you to determine, according to the weight of the evidence. Was that machinery out of order, and on account of its being in improper condition was the plaintiff, while attempting to take out a plug of tobacco, injured on account of the dropping of the weight when it ought not to have dropped, and its dropping on account of defect about the machine?"

True, the plaintiff testified that he notified the foreman of this defect, but this was expressly denied by defendant's witnesses; there was testimony also that both before and after the occurrence the machine was found to be in good shape and worked properly, and if there was a defect causing the injury there were facts in evidence from which it could be a permissible inference that the irregular or eccentric movement was from a defect of which the employer did not know and had no reasonable opportunity to learn.

We are not inadvertent to the doctrine of *res ipsa loquitur,* (138) which may have been present in this case and which seems to have been properly stated by his Honor; but "If the facts in evidence call for its application, its effect is only to carry the case to the jury on the issue" (*Ross v. Cotton Mills,* 140 N. C., 115), and does not relieve of the requirement that in charging the jury on the issue the constituent features of the law of negligence as applicable to the facts in evidence should be correctly given.

We are of opinion that the defendant is entitled to have his cause tried before another jury.

New trial.

Cited: Ainsley v. Lumber Co., 165 N. C., 126; *Lloyd v. R. R.,* 166 N. C., 33; *Hornthal v. R. R.,* 167 N. C., 629; *Deligny v. Furniture Co.,* 170 N. C., 202.

YORKE FURNITURE COMPANY v. SOUTHERN RAILWAY COMPANY.

(Filed 7 May, 1913.)

Carriers of Goods—Cars Requested—Cars Furnished—Agreed Rate—Interstate Commerce Commission's Rules—Interstate Commerce.

A consignor of an interstate shipment requested two cars of certain dimensions from the carrier, sufficient for the purpose, which the carrier was unable to furnish, though of a size constantly used; and is furnished for the shipment smaller cars, requiring four, upon which the freight rate was greater. These smaller cars were, under the circumstances, billed at the rate of the larger cars, and the consignee was charged the greater rate, which the shipper had to pay under his contract of delivery: *Held*, that while the rates fixed by the Commission should prevail against the other carriers, as to the one charged with the duty of supplying the cars at the point of shipment, or taking part in such initial arrangement, the shipper could recover, this being a case expressly provided for by the rule of the Interstate Commerce Commission, and coming directly within its terms.

APPEAL by defendant from *Daniels, J.*, at August Term, 1912, of CABARRUS. Action to recover $46.35, and interest, tried on appeal from a justice's court.

The jury rendered the following verdict:

"1. Is the defendant indebted to the plaintiff; if so, in what (139) amount? Answer: Yes; $46.35, with interest from 30 September, 1907."

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

J. Lee Crowell for plaintiff.

L. C. Caldwell for defendant.

HOKE, J. The evidence on part of plaintiff tended to show that in January, 1907, plaintiff company, desiring to ship an assortment of furniture from Concord, N. C., to Kansas City, Mo., applied to the agent of defendant company for two 50-foot cars. That these cars were adequate for the purpose, and on the route designated and for cars of that size the proper rate was 88 cents per hundred pounds. That after much delay the agent finally succeeded in obtaining cars for the shipment, but having been unable to procure cars of the size ordered, supplied four 36-foot cars, this number being required for the goods shipped, owing to the smaller size. That by reason of this change in the size of the cars, the regular freight rate as shown by the printed and published schedules on file with the Interstate Commerce Commission was $1.10½ per hundred pounds, making a difference of

$46.35 on the entire shipment. It was shown further that at the time of shipment the agent of defendant stated that he had been unable to furnish cars of the size ordered, but that the company would protect the shipment at the rate of 88 cents, and this was the rate specified in the bill of lading; the full amount as per scheduled rate having been paid by the plaintiff on arrival of goods at Kansas City. The action is instituted against defendant, the initial carrier, for the amount paid in excess of 88 cents, to wit, $46.35. The position insisted on by defendant, that notwithstanding the specifications of the bill of lading the plaintiff was properly chargeable according to the printed and published schedules of the company on file with the Interstate Commerce Commission, is undoubtedly correct (*R. R. v. Mugg,* 202 U. S., 242); but the charge of the court is in full recognition of this principle, and defendant has been held responsible not so much by reason of the stipulations of the bill of lading, but because of its failure to furnish the cars of the capacity ordered and the proper rate (140) chargeable in cars of that size.

Rule 339 of the Interstate Commerce Commission, issued 9 March, 1912, supplied us on argument by counsel, seems to be directly applicable to the case and is as follows: "Upon informal complaints and numerous inquiries it is held that the act of a carrier in furnishing two small cars in lieu of a larger car ordered by the shipper under appropriate tariff authority is binding, at the rate and minimum applicable to the car ordered, upon all the carriers that are parties at the point of origin; the shipper is entitled to all privileges in transit, to reconsignment, and to switching at the same charges as would be applicable under the joint tariff had the shipment been loaded into one car of the capacity ordered; and demurrage will likewise accrue on that basis. If the shipment moves beyond the point to which the joint rate applies, the connecting line or lines are entitled to and should collect their transit, reconsigning, switching, and demurrage charges as provided in their own tariffs. In all cases the initial carrier will be liable for such additional charges as may be imposed on the shipper by reason of its failure to furnish a car of the capacity ordered. Carriers that are parties to the joint rate under which the shipment commences to move may share in such additional expense so incurred by the initial carrier."

This rule embodied in the charge of the court announces and approves the position upon which plaintiff's recovery is predicated, and on the facts presented we are of opinion that there has been no error in the disposition of the case.

No error.

(141)

A. H. MOSER ET AL. v. CITY OF BURLINGTON.

(Filed 7 May, 1913.)

1. Cities and Towns — Governmental Functions — Liability — Nuisance — Damages.

A city or town is liable in damages, notwithstanding its being a governmental agency, for creating or maintaining a nuisance causing appreciable damage to the property of a private owner.

2. Same—Sewerage—Permanent Damages—Constitutional Law.

The operation and maintenance of a disposal plant by a city or town, with septic tank for treatment of sewage before discharging it into a stream upon which the plaintiff lived and owned his home near-by, in a manner that creates a nuisance, causing damages to his health and property, is, to the extent of the damages, regarded and dealt with as a taking or appropriation of his property, and cannot be done except on compensation to the owner and pursuant to some of the recognized methods, and as required by the "law of the land."

APPEAL by defendant from *Carter, J.*, at May Term, 1912, of ALAMANCE. Action to recover damages for alleged nuisance, etc. There was allegation, with evidence on part of plaintiffs tending to show, that they were the owners of a tract of land in said county situate on Little Alamance Creek; that the house occupied by plaintiff for a residence was near the stream; there was also a mill on said creek,

(142) operated by water power, and a stone dam had been erected across the stream to enable plaintiff to utilize said power, the house referred to being near the pond, etc.; that about one year before action commenced, to wit, in 1909, defendant had installed a sewerage system for the city of Burlington, and, in connection therewith, had constructed and was operating a disposal plant with septic tank for treatment of sewage before discharging same into said creek; such plant and outlet into the waters of the stream being situate about 1½ miles above plaintiff's property. That by reason of the existence of said plant and its methods of operation, a large amount of filth, excrement, and sewage and other offensive substances were daily discharged into the waters of said stream, above the home of plaintiff, and in time of freshet same was brought down and much of it lodged upon the lowlands along said stream and upon lands of plaintiff, causing most offensive smells, odors, etc.; thereby creating a nuisance which rendered home of plaintiff most uncomfortable, threatening the health of his family, and causing great and permanent damage, etc., to the property. A recovery for such permanent damage was sought in the action.

The defendant, admitting the erection and operation of the sewerage plant and their intention to continue the same, averred and offered evidence tending to show that the plant in question was a modern and up-to-date plant, entirely adequate for the purpose; that it was properly operated, and that no nuisance had been created by defendant and no appreciable damage done to plaintiff's property.

On issues submitted, the jury rendered the following verdict:

"What permanent damages are plaintiffs entitled to recover of defendant on account of the construction and operation of its said sewerage system and disposal plant? Answer: $3,000."

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

Long & Long and A. L. Brooks for plaintiff.

E. S. W. Dameron, W. H. Carroll, and Parker & Parker for defendant.

HOKE, J. While the general rule prevails in this State, "That (143) unless a right of action is conferred by statute, a municipal corporation may not be held civilly liable to individuals for failure to perform or neglect in performing duties of a governmental character," it is also well recognized that neither a corporation nor other governmental agency is allowed to create or maintain a nuisance causing appreciable damage to the property of a private owner, without being liable for it. As we have recently said in the case of *Hines v. Rocky Mount, post,* 409, "To the extent of the damage thereby done, it is regarded and dealt with as a taking or appropriation of the property, and such an interference cannot be made or authorized except on compensation first made by some of the recognized methods and pursuant to the laws of the land." This limitation on the more general principle was declared and upheld in a well considered opinion by *Associate Justice Manning* in *Little v. Lenoir,* 151 N. C., 415,. and the position is in accord with right reason and the great weight of authority. *Hines v. Rocky Mount, supra,* and cases cited; 3 Abbott on Municipal Corporations, sec. 961; 1 Lewis Eminent Domain, 3d Ed., sec. 65; Dillon on Municipal Corporations, sec. 1047; Wood on Nuisances, sec. 427; Joyce on Nuisances, sec. 284. Quoting from Joyce an excerpt approved by the learned judge in *Little v. Lenoir,* the author says: "Though a municipality or other body has power to construct and maintain a system of sewers, and although the work is one of great public benefit and necessity, nevertheless such public body is not justified in exercising its power in such a manner as to create, by a disposal of its

sewage, a private nuisance, without making compensation for the injury inflicted or being responsible in damages therefor, or liable for equitable restraint in a proper case; nor can these public bodies exercise their powers in such a manner as to create a public nuisance, for the grant presumes a lawful exercise of the power conferred, and the authority to create a nuisance will not be inferred. It therefore constitutes a nuisance to pollute and contaminate a stream by emptying sewage of a city therein, rendering it unwholesome, impure, and unfit for use."

On the question of defendant's liability, the cause has been (144) properly tried in the light of these principles, and, on the question of damages, his Honor correctly applied the rule as it obtains with us, that the damages are confined to the diminished pecuniary value of the property incident to the wrong. *Metz v. City of Asheville,* 150 N. C., 748; *Williams v. Greenville,* 130 N. C., 93, the evidence as to specific cases of sickness in plaintiff's family having been admitted and its consideration allowed only as it tended to establish the existence of the nuisance and the amount of damage done to the property.

While the cause, however, has been in the main carefully and correctly tried, we think there must be a new hearing on the issues by reason of the portion of his Honor's charge, duly excepted to, as follows: "No matter what the result of this case, the city would not acquire any right to discharge raw or untreated sewage into the stream, but, if the plaintiffs should prevail in this action and have an award of damages, that would operate to vest perpetually in the city of Burlington the right to operate and maintain this sewerage system and disposal plant in the way and manner in which it is now operated and maintained."

Although the testimony on the part of plaintiff and defendant is in direct conflict both as to the nuisance and the damage, there are facts in evidence from which the existence of an indictable public nuisance and of negligent methods in the operation of the plant could well be inferred. From the general language of this charge, the jury might very well have concluded that the force and effect of a verdict for plaintiff would establish and justify the continuance of both conditions, and that their award of damages should be estimated in view of this result. The right of a plaintiff to recover permanent damages for the entire injury in certain cases is well recognized here. *Harper v. Lenoir,* 152 N. C., 728; *Parker v. R. R.,* 119 N. C., 667; *Ridley v. R. R.,* 118 N. C., 996. But, when a work of this character is justified and to be continued by reason of a recovery of permanent damages incident to its erection and maintenance, the principle is allowed to prevail on the theory that such a work is carefully conducted and properly carried on,

and, if there is default in this respect amounting to actionable (145) negligence, this would give rise to a new cause of action, and the recovery for permanent damages would not be effective as a protection. *Duvall v. R. R.*, 161 N. C., 448. And, in view of all the facts in evidence, we think the portion of the charge referring to the verdict was not sufficiently restrictive as to its effect on the right of plaintiffs as individual litigants, and that the minds of the jury were allowed too wide a range in their estimate of the amount of damages, and to such an extent that the charge should be held for reversible error.

We are confirmed in this view by the very great difference as shown in the record between the amount allowed in the present verdict and the award of a former jury on the same issue and substantially the same state of facts, giving indication that the directions excepted to very likely had controlling effect to defendant's prejudice. We are of opinion that defendant is entitled to a

New trial.

WALKER and ALLEN, JJ., concur in result.

Cited: Donnell v. Greensboro, 164 N. C., 334.

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(146)

DAVID A. THOMPSON ET AL. v. JULIA A. ROSPIGLIOSI ET AL.

(Filed 12 February, 1913.)

1. Partition—Petition—Demurrer—Appeal from Clerk—Superior Court's Jurisdiction.

An appeal by a guardian *ad litem* in proceedings for partitioning lands from an order of the clerk overruling his demurrer to the cause of action stated carries the entire case into the Superior Court, which, being a court of general jurisdiction in law and equity, is vested with full authority to proceed therewith.

2. Partition—Sales—Superior Courts—Discretion — Minors — Private Sale—Power of Court.

The Superior Court may, in the exercise of its discretion, order a sale of lands in proceedings for partition, where minors are interested and represented by guardian *ad litem*, either to be publicly or privately made, and where no abuse of this discretion is shown on appeal, the action of the lower court will not be reviewed.

3. Same—Confirmation—Increased Bid—Interpretation of Statutes.

Revisal, sec. 2513, applies to public sales, and not to a sale decreed by the court of lands held in common, for the purpose of partition; it is

therefore not required that the report of such sale remain on file ten days, or that the court wait twenty days before confirmation; but the matter of confirmation being in the sound legal discretion of the court, the court may confirm it at once, or at any time during the continuance of the term to which the report of sale is made; and this may be done notwithstanding there is an increased bid offered of 10 per cent subsequently to the confirmation of the sale, if in the exercise of this discretion it seems best to the court to do so in the interest of the parties, under existing conditions.

4. Same—Motions—Parties—Reasonable Discretion.

A commissioner to sell lands at private sale for partitioning the proceeds among tenants in common, received and recommended an unconditional bid of $130,000, and reported it to the court, where it was confirmed; one who was not a party, and represented as acting for another, made an offer of $145,000 for the property, provided its title was good, moved for a resale and to be made a party by reason of certain deeds to a part interest in the lands, which, it appeared, were procured by him, without consideration paid, for the purpose of his motion: *Held*, it having been found as a fact by the lower court that it was to the best interest of the real parties, who were not objecting, that the confirmation of the sale be not disturbed, its refusal to grant the motion and order a resale was not an abuse of the court's discretion.

5. Partition—Motion to Make Parties—Parties at Interest—Appeal and Error.

Upon the facts presented in this case, the Superior Court properly refused the motion of the petitioner to be made a party in proceedings to sell lands for partition, it appearing that he was not a real party at interest, and his only purpose being to set aside a sale confirmed by the court, satisfactory to those actually interested therein.

CLARK, C. J., dissenting.

APPEAL from *Justice, J.*, at July Special Term, 1912, of HENDERSON.

This proceeding was commenced on 22 April, 1912, before the (147) clerk of the Superior Court of Henderson County. It is alleged in the petition that the petitioners and the defendants are the owners in fee simple as tenants in common of a large body of lands, described in 77 grants issued by the State, and that within these boundaries there is a tract of 290 acres, described in paragraph 2 of the petition, and two tracts of 220 acres and 800 acres, respectively, described in paragraph 3 of the petition.

It is further alleged in the petition:

"(6) That, owing to the large number of parties interested, and the character, condition, and location of said property, actual partition thereof cannot be had without injury to all the parties interested, and the interests of all parties require a sale of said lands, and the interests of all will be enhanced by the sale thereof.

"(7) That the Appalachian Power Company, a corporation, has offered for the tract of land and water rights described in paragraph 2 of this petition the sum of $40,000 cash, and your petitioners are advised and believe, and so allege, that the said sum is a full and fair price for the same; that the said Appalachian Power Company is ready, able, and willing to pay the said price for the said land and water rights on the delivery to it of a deed conveying a good and sufficient title in fee simple therefor.

"(8) That the owners have a prospective purchaser for the tract of land and water rights described in paragraph 3 of the petition for approximately the sum of $90,000 cash, and your petitioners are advised and believe, and so allege, that the said sum is a full and fair price for the same."

And the petitioners pray judgment, among other things, as follows:

"(2) That, if upon investigation it shall be found by the court that the price offered by the said Appalachian Power Company for the lands and water rights described in paragraph 2 of the petition is a full and fair price, the court direct the said commissioners to sell the same to the said Appalachian Power Company for said price at private sale and execute deed therefor to said corporation upon (148) payment of said purchase money.

"(3) That if upon investigation it shall be found by the court that the price offered by such prospective customer mentioned in paragraph 8 hereof for the lands and water rights described in paragraph 3 of this petition is a full and fair price, the court direct the said commissioners to sell the same to the said purchasers for said price at private sale, and to execute a deed therefor upon payment of the said purchase price.

"(4) That the other lands be sold either at public or private sale in such manner and at such time as the court may direct."

There are many defendants, all of whom are nonresidents, some being unknown, and some infants.

Process was served on the defendants by publication, which was complete on 23 May, 1912. Guardians *ad litem* were duly appointed for the parties unknown and for the infants. On 23 May, 1912, one of the guardians *ad litem* filed a demurrer to the petition, upon the ground that the clerk did not have jurisdiction of the matters therein alleged, and, upon the same being overruled, appealed, which appeal was heard at July Special Term of said county of Henderson. The said term convened 29 July, 1912. Prior to the meeting of the said court, the attorneys practicing therein had prepared a calendar, and

the above entitled case was placed on said calendar for hearing on 6 August, 1912. On the published calendar it was noted that motions in all cases would be heard on the first day of the court. It was called to the attention of counsel for the plaintiffs in the case that the case had been inadvertently placed upon the civil-issue docket for the trial of jury cases, and thereupon counsel for the plaintiffs prior to the commencement of the court lodged notice that the said case would be called for hearing on the first day of said court; this being in accordance with the practice prevailing among the members of the bar of said county. On the first day of the court the demurrer which the guardian *ad litem* had filed to the jurisdiction of the clerk of the court, before whom the action was brought, was heard, and the same was overruled,

(149) and the court thereupon appointed a separate guardian *ad litem* for the infant defendant, Charlotte T. B. Cram, and a separate guardian for the unknown defendants and those holding contingent interest, all of which will appear in the record. These orders were made on the first day of the court, and the guardians *ad litem* filed answers on the second day of the court.

On 30 July, 1912, the Appalachian Power Company made the following offer to Justice, who had been appointed commissioner to sell, which was reported to the court, with the recommendation that it be accepted:

"The Appalachian Power Company, a corporation, hereby makes an offer of forty thousand dollars ($40,000) in cash for the tract of land and water rights described in paragraph 2 of the petition. The said Appalachian Power Company also offers ninety thousand dollars ($90,000) for the land and water rights described in paragraph 3 of the petition, the same to be paid as follows: Fifteen thousand dollars ($15,000) in cash and the balance to be paid in twelve (12) months, without interest, title to be retained by the commissioner until payment in full."

The guardians *ad litem* filed answers, admitting the allegations of the petition, and that the amounts offered by said power company were a fair value for the property. In addition to the personal knowledge which each of the guardians *ad litem* had of the value of the land and water rights and easements mentioned in the second and third paragraphs of the petition, there were at the time of filing these answers the affidavits of five persons conversant with said values, to the effect that the sums of $40,000 and $90,000 were, respectively, full and fair value for the land, water rights, and easements set forth in the second and third paragraphs of the complaint, and the court found that the guardians *ad litem* were entirely justified in filing answers admitting

that these sums were fair value for the same. The commissioner appointed to sell the lands was himself a resident of Henderson County, and familiar with the values of the property in question, and he reported to the court that the said offers were full and fair value for the same.

On the afternoon of Wednesday, 31 July, a motion was made by counsel for the plaintiffs that the bids of the Appalachian Power Company be accepted, and the said motion was considered in open court, and upon considering the same and the recommendation (150) of the commissioner, together with the affidavits as to the valuations, the court found that the said offers were full and fair value, and that it was for the best interest of all concerned that the said offers should be accepted. Before accepting the same, however, the court inquired if there was any objection on the part of any one to the acceptance of said bids, and there was no objection, and thereupon the court signed the order, as appears in the record, accepting said bids, and directing the commissioner to make title upon the payment of the purchase money in accordance with said bids. Attorneys for the plaintiffs demanded that the said Appalachian Power Company immediately pay the cash payments called for in said bids, and thereupon, in accordance with the said demand, the Appalachian Power Company did on the evening of 31 July give to the commissioner drafts or checks for the amount of the bids, which said drafts or checks were paid a day or two later, and the commissioner executed and delivered to the Appalachian Power Company a deed conveying to said corporation the lands, water rights, and easements described in the second paragraph of the petition, and gave also to the said Appalachian Power Company a receipt for $15,000 cash payment for the other land.

On 6 August, 1912, H. L. Borland, purporting to be the agent of Kuhn & Kuhn, made an offer in their behalf in open court to pay $145,000 for said property, which said offer was amended on 9 August, 1912, by offering $145,000 for a good title to said property. At the same time he made the offer to pay $145,000 for a good title to said property as the agent of Kuhn & Kuhn, the said Borland filed an application in his own behalf to have the decree confirming the sale to the power company set aside, and that he be made a party, alleging that he owned an interest in said lands. The claim of the said Borland to own an interest in said lands is based on three deeds, all of which were executed to him after said July special term began, one being of date 31 July, 1912, and the consideration therefor being $100, one of date 31 July, 1912, the consideration being $1 and other valuable con-

siderations, and one of date 1 August, 1912, and the consideration $1 and other good and valuable considerations. In opposition to
(151) the motion of the said Borland, the petitioners filed the affidavits of E. B. Goelet and S. J. Justice as follows:

E. B. Goelet, being duly sworn, says: That he is a notary public residing at Saluda, in Polk County, and that on 1 August, 1912, he was called upon by some person, whose name he does not recollect, but who, he understood, resided in New York, to go to the residence of John and Martha Paris in Henderson County, to take the acknowledgment of certain papers, but, upon arriving, that the parties declined to sign the papers; that on the next day the same person requested him to go back to the same place, and that then the said John Paris and wife, Martha Paris, and Bessie Owens, their daughter, and her husband, Andrew Owens, all signed the paper and acknowledged it before him; that the paper was an instrument quitclaiming to one Borland all their rights in said lands in Henderson County bordering on the waters of Green River and Camp Creek; that the said parties who signed the deed stated that they had no papers to show any rights in the land, but thought they had some claim through Noah R. Paris; that all of them were illiterate people, and requested affiant to sign their names to said instrument while they held the pen; that the person at whose request he went out to take the acknowledgment stated that he desired the papers for use in the court in Hendersonville, then in session; that no money was paid at all, but an agreement was entered into to the effect that, if the paper was used, some $50 or $100 was to be paid, and in the event it was not used, nothing was to be paid; that affiant met the said Martha Paris in Saluda on yesterday morning, 9th inst., and she asked him if he had seen any of the parties, and stated that she had not yet received any money for the papers. E. B. GOELET.

Sworn to and subscribed before me, this the 10th day of August, 1912. C. M. PACE, C. S. C.

(152) S. J. Justice, being duly sworn, says: That he is now, and has been for a number of years, the local agent representing the owners of what are known as the Speculation Company lands, in Henderson, Polk, and other counties, and that he has in his possession the documents and papers of said estate, extending over a long period of time; that these lands are the same ones mentioned in the complaint in this action, having been originally owned by Isaac Bronson and Goold Hoyt; that among the papers in his possession is a contract signed by William

Redmond, Jr., and Francis M. Scott, surviving trustees, to R. N. Paris, dated 11 January, 1894; that the said N. R. Paris was a son of John and Martha Paris, as he is informed, and the said N. R. Paris is not dead; that the description in said contract is as follows: "All that piece of land in the counties of Polk and Henderson, North Carolina, about 50 acres, adjoining Joseph Guice and John Johnston, in patents 1024 and 250, on the waters of Green River"; that the said contract appears to have gone into the hands of John Paris, and was by him transferred to one Dalton; that he found in the papers a statement to the effect that if the said Dalton did not pay cash due on or before January, 1903, that he would surrender all rights, and that it appears that he did not pay the same, and that the original contract, unrecorded, was surrendered to the estate; that he is informed and believes that if John and Martha Paris and their children claim any rights in any lands owned by the Speculation Company, it is through this contract; that the lands described in the contract are too indefinite to be located, but there are still lands belonging to the estate and not embraced in the boundaries set forth in paragraphs 2 and 3 of the complaint, which would fill this description in a general way; that he is familiar with the lands described in paragraphs 2 and 3, and that there are no adverse claimants located upon this land, but that it is in the possion of the estate. S. J. JUSTICE.

Sworn to and subscribed before me, this 10th day of August, 1912.
C. M. PACE, C. S. C.

The interest of all parties in the land wso are nonresidents, and ase not personally represented, does not exceed 25 per cent of the whole.

Upon the hearing of said motions of said Borland, in behalf of (153) himself and Kuhn & Kuhn, counsel for plaintiffs requested the court not to set aside the sale to the Appalachian Power Company, for the reason that they considered the sale was fair and just, and that the best interests of their clients would be subserved by letting the sale stand. Counsel for the Appalachian Power Company stated to the court that the offer made by the power company would be withdrawn, unless the same was accepted at that term of the court.

After considering all these matters, it was determined by the court that, even if the court had power to set aside the sale to the Appalachian Power Company, it was for the best interests of all parties that the sale should not be set aside. After hearing the said motions, the court made and entered the two orders thereon which appear in the record, and to the denial of the said several motions, and each of

them, the said J. A. and W. S. Kuhn and the said H. L. Borland excepted, in open court, and appealed to the Supreme Court.

Martin, Rollins & Wright for appellants.
Tillett & Guthrie for appellee Appalachian Power Company.

ALLEN, J. The appeal of the guardian *ad litem* from the order of the clerk overruling his demurrer carried the entire case into the Superior Court, and vested it with full jurisdiction of the cause, under Acts 1887, ch. 276, now Revisal, par. 614 (*Faison v. Williams,* 121 N. C., 152; *Roseman v. Roseman,* 127 N. C., 494; *Batts v. Pridgen,* 147 N. C., 134); and the Superior Court, being a court of general jurisdiction in law and equity, had the power to order and confirm a private as well as a public sale (*Rowland v. Thompson,* 73 N. C., 504; *Sutton v. Schonwald,* 86 N. C., 202; *Barcello v. Hapgood,* 118 N. C., 725; *McAfee v. Green,* 143 N. C., 418). In the *Rowland case, Pearson, C. J.,* says: "It is most usual for sales made by the order of a court of equity to be public sales, but the court, as the guardian of infants, has full power in regard to the mode of sale, and under special circumstances not only has power, but should, in the exercise of its discretion, authorize and confirm what is called a private sale; that is, a sale without advertisement and public outcry. The question, Has a court (154) of equity power to order the sale of the land of an infant to be made either at public or private sale? is not an open one. It is settled." This case was approved in *Sutton v. Schonwald, supra,* the Court saying, after citing it: "In which it was held that a court of equity, as the guardian of infants, had full power in its discretion to authorize or confirm a private sale of lands belonging to such a person." And in *Barcello v. Hapgood, supra,* in which *Justice Avery* says: " 'It is usual,' said the Court in *Rowland v. Thompson,* 73 N. C., 504, 'for sales made by order of the court of equity to be public sales; but the court as the guardian of infants has full power in regard to the mode of sale, and under special circumstances not only has power, but should, in the exercise of its discretion, authorize and confirm what is called a private sale; that is, a sale without advertisement and public outcry.' " And he adds: "It is settled by a number of adjudications that The Code has not taken away from the Superior Court the jurisdiction heretofore exercised by courts of equity." In *McAfee v. Green, supra, Justice Connor,* referring to the same question, says: "To the exception that the sale is directed to be made privately it is sufficient to cite *Rowland v. Thompson,* 73 N. C., 504; *Barcello v. Hapgood,* 118 N. C., 712. The power of the court to order the sale to be made privately, when it

appears to be promotive of the interests of the parties, has been too frequently adjudged by this Court to be considered an open question." The first three of these cases were decided when the statute was in force (Acts 1868-69, ch. 122, par. 15), now a part of section 2513 of the Revisal, which required the officer appointed to make sale to file his report of sale within ten days, and the last when the statutes were as they are now in that section of the Revisal, and in no one of them does it appear that the report of sale was required to remain on file ten days or that the court waited twenty days before confirmation. On the contrary, the inference is clear from the report of the *Thompson case* that the decree of confirmation was entered at the time the report of the commissioner was made, and in the *McAfee case,* decided under existing statutes, the offer to buy, the report of the commissioner, and the decree of confirmation were all at the same term of (155) court, as the case before us.

We conclude, therefore, that the section of the Revisal referred to (section 2513) relates to public sales, and that it does not purport to interfere with the power of a court of equity to order and approve a private one.

We have, then, before us a proceeding properly instituted, process duly served, an offer to buy, which has been accepted and performed, a decree of confirmation of the sale, regularly entered by a court of competent jurisdiction, and a deed executed pursuant to the decree, and we are asked by one not a party to reverse the ruling of the judge of the Superior Court refusing to set aside the decree, upon the ground of an advance bid of 10 per cent. There is authority for the position that after confirmation the biddings will never be reopened, except in case of fraud (*Attorney-General v. Navigation Co.,* 86 N. C., 412), but as the decree of confirmation and the motion to set aside were at the same term of court, and as orders and decrees are usually within the control of the court during the term, we will consider the question as if the motion to confirm and a motion to accept an advance bid of 10 per cent had been made at the same time. It is undoubtedly true that an offer to increase the bid 10 per cent is a sufficient reason for ordering a resale, and that it is usual to accept such an offer, and the refusal of the court to do so should be exercised with extreme caution and only after careful investigation; but the offer is addressed to the discretion of the court, which means, according to *Chief Justice Marshall,* when presiding at the trial of Aaron Burr, that it is addressed "not to the inclination of the court, but to its judgment, which is to be guided by sound legal principles." In *Trull v. Rice,* 92 N. C., 572, the proceeding was for a sale of land for partition. The land was sold under an order

made in the cause, and a report filed recommending a confirmation of the sale. A party to the proceeding made an advance bid of 10 per cent, and a motion to confirm the sale and a motion for a resale were heard at the same time. The clerk refused to order a resale and confirmed the sale made, and this ruling was affirmed by the judge
(156) and again upon appeal to the Supreme Court; the rule being then declared that: "It is a well settled rule of practice in this State, which has long prevailed, to regard an offer of an advance bid of not less than 10 per cent on the sum reported upon a sale by a commissioner acting under an order of the court, as a sufficient reason for refusing to confirm the sale, and directing a resale of the property, while, after confirmation, the biddings will not be reopened, except in case of fraud or unfairness or other adequate cause shown for reversing the order. *Attorney-General v. Navigation Co.,* 86 N. C., 408. But we have been referred to no cases in which, upon the mere ground of a proposal to increase the bid, and without regard to surrounding circumstances, this Court has undertaken in the exercise of an appellate jurisdiction in matters of law to compel the judge in the Superior Court to refuse the proposal of the reported bidder, and to direct a resale of the property."

This case has been approved on this point in *Uzzle v. Weil,* 151 N. C., 132; *Copping v. Manufacturing Co.,* 153 N. C., 330; and in *Tayloe v. Carrow,* 156 N. C., 8, the present *Chief Justice* saying in the first of those cases, which was a sale in foreclosure proceedings: "The brief of counsel for appellant is based on the ground that the court had the power to set aside the sale, and should have done so, upon the advance bid of 40 per cent. But conceding that, notwithstanding the increase in the value of land since 1895, it would have been just to the purchaser to now reopen the sale, the action of the court in refusing to do so is not reviewable. *Trull v. Rice,* 92 N. C., 572." And in the second, which was a proceeding in partition: "This action of the judge in setting aside the report and ordering a sale is not reviewable unless there is an error of law committed. In *Simmons v. Foscue,* 81 N. C., 86, the Court said: 'Of the force and effect of the evidence in inducing the exercise of that reasonable discretion reposed by law in the judge when called on to confirm the action of the commissioners, he alone must determine, and if no error in law was committed, we cannot reverse his decision.' This has been cited and approved. *Trull v. Rice,* 92 N. C., 572."

(157) It follows, therefore, that his Honor exercised a discretion vested in him by the law when he refused to accept the advance bid, associated as it was with other unfavorable circumstances, and

that his discretion is not reviewable unless there has been an abuse of it, and we find none. The wise, prudent, and impartial judge before whom the hearing was had, lives in an adjoining county, and knows more of the parties and of existent conditions, perhaps, than any other judge of the Superior or of the Supreme Court, and he finds, after full consideration, that it is best for those interested in the land to leave the decree of confirmation in force. No party to this proceeding objects to this finding, or excepts to his ruling, and 75 per cent or more of the interest in the property is represented personally, and the remainder by guardians *ad litem*. The person who does except is one Borland, who purports to be the agent of Kuhn & Kuhn, and no evidence of the agency was furnished except the affidavit of Borland. The offer which he filed as the agent of Kuhn & Kuhn on 5 August, 1912, was to pay $145,000 for the property, but he amended the offer on 9 August, 1912, by stipulating that the sum would be paid for a good title to the property, and at the same time filed an application in his own behalf to be made a party, claiming an interest in the lands under deeds procured by him for nominal consideration, after the commencement of the term of court at which the application was made. It appears, also, that one of these deeds was based on a contract of purchase, which had been surrendered; that no money was paid for it, and that Borland said he wanted the deed for use in court; and there is no suggestion that any of the grantors in the several deeds had ever claimed an interest in the land until approached by Borland. Kuhn & Kuhn have signed no offer, and the person who purports to be their agent comes into court holding in one hand an offer to buy if a good title can be made, and in the other a declaration that the court cannot give a good title, while the power company offers to take the property as it is. His Honor would have been justified, under these circumstances, in holding that there was not sufficient evidence of good faith, and that it was the part of wisdom to accept a fair price without litigation. We not only conclude that his Honor did not abuse his discretion, but think, on the facts appearing in this record, that he acted wisely in (158) refusing to set aside the decree of confirmation.

The application of Borland to be made a party was properly denied upon the facts presented, and any rights he has are preserved in the order entered.

Affirmed.

CLARK, C. J., dissenting: This was a proceeding for partition of certain lands lying in Polk and Henderson counties, brought before the clerk of the latter county by David A. Thompson, trustee, Samuel

J. Justice, administrator, and Willett Bronson, against Julia Ethel Rospigliosi and Prince Gian Baptista Rospigliosi, her husband, and 250 or more other defendants, many of whom are alleged in the petition to be minors, and others are alleged to be unknown, and many are contingent remaindermen. None of the defendants were served with process except by publication, but guardians *ad litem* have been appointed for the unknown defendants and one or two of those who are known. It is alleged in the complaint that the Appalachian Power Company had made an offer of $40,000 for the land described in paragraph 2, and that there were prospective purchasers for the other land. The case was transferred to the Superior Court and docketed on the civil-issue calendar for 6 August, which calendar was advertised in the press. The court was a special term, and began on 29 July. No answer was filed for any of the defendants, except the formal answer of the guardians *ad litem*, filed on 30 July, 1912, admitting the allegations of the complaint. Thereupon, on that day, the lands were ordered to be sold, without stating whether at public or private sale. George W. Justice was appointed commissioner to sell the lands and George H. Valentine was appointed a referee to ascertain and report to the next term of the court the names of all parties interested in the lands and the extent of their interests. There is no suggestion in the complaint that a valuable water power was for sale nor any reference even to such power beyond the incidental expression, "land and water rights."

On the same day, 30 July, on which the order of sale was made the commissioner reported that the Appalachian Power Company
(159) had made an offer to buy the property described in section 3, as well as that in section 2.

An agreement had been made privately beforehand by one of the attorneys for the plaintiffs and the Appalachian Power Company, which was in substance that the said power company should become the owner of the property described in paragraph 3 of the petition at the price of $90,000, and if other persons should bid for the property at a price in excess of $90,000 the surplus over $90,000 should be paid to said power company; and a similar agreement was made at the price of $40,000 in regard to the property in paragraph 2 of the petition. On 30 July the court ordered the commissioner to sell the property to the Appalachian Power Company at those prices. Of said price $15,000 was paid down and the balance on twelve months credit without interest, title to be retained until payment in full.

On 5 August, 1912, the appellants Kuhn & Kuhn filed their petition in the cause, the court being still in session, alleging they had spent

$15,000 relying upon the representations made by William Redmond Cross, one of the defendants, in investigating the condition of the property, and at the same time offered $145,000 cash for said property, $15,000 down and security for the payment of the other $130,000 in cash upon acceptance of their bid by the court. They alleged that they had been thrown off their guard and misled by the publication in the press that the case would be called on 6 August. At the same term of court, while it was in session, the appellant Borland filed a petition claiming an interest in the property ordered to be sold, asking that he be made a party to the action, offering proof of his interest, and joining in the petition that the order of sale be set aside and the property resold at public sale. On 9 August, the court still being in session, Kuhn & Kuhn filed an amended petition in the cause, asking that the order for sale should be set aside and the property resold at public sale, averring that means had been used to suppress bids for said property, and giving detailed information of declarations made by one of the plaintiffs and his attorney to that effect. They further stated that they would have made this offer of $145,000 for the property on 29 July (160) if given an opportunity to bid, but were prevented by the advertisement by the court that the case would be called on 6 August. The petition of Borland to be made a party was denied, as was also the petition of himself and of Kuhn & Kuhn to set aside the sale and order resale at the advance bid.

The courts act as guardians and protectors of infants and unknown persons having interest in property in cases like this. It is always the duty of the court to see that the property is disposed of for the most it will bring. Revisal, 2513, provides that in partition "a report of the sale shall be made within ten days thereafter, and if no exception thereto be filed in twenty days the same shall be confirmed." This requirement of twenty days clearly is for the purpose of giving opportunity that the bid may be raised. There is no intimation in the statute of any distinction in this respect between private and public sales. But if there is any difference there is ten times more reason why there should be a delay given to raise the bid as to private sales than at public sales. In the latter case there has been some publicity and the public has had at least an opportunity to bid, while in the former the transaction was made privately and there is much greater opportunity for fraud and collusion and, as in this case, the suppression of competing bids.

The bid here of Kuhn & Kuhn of $145,000 cash is nearly $20,000 over the bid of the Appalachian Power Company of $130,000, because

the latter offered to pay only $15,000 cash and the balance on a credit of twelve months without interest. It is certainly to the interest of the vast mass of the parties in interest that the property should be put up at the advance price of $145,000. There are only three plaintiffs, but they assumed to do all the bargaining and entire control of the whole proceeding in total disregard of the rights of the 250 or more defendants.

It is suggested that if the bid is reopened at $145,000 the offer of the Appalachian Power Company of $130,000 may be lost. Not so; they are bound by their bid until the court reopens the bidding by accepting the offer of the advance bid of Kuhn & Kuhn, which the court would not do until it has received the approved security which
(161) Kuhn & Kuhn offered for the payment of their bid in cash. When that is done, it will be open to the Appalachian Power Company or any one else to bid at the sale then ordered, and if a new bid is put in at such sale there will be twenty days in which to raise that bid by an advance of 10 per cent. This is the regular proceeding prescribed by the statute and the practice of the courts in sales for partition. If observed on this occasion, and the common report as to the nature of the property is correct, a sum greatly in excess even of the $145,000 offered by Kuhn & Kuhn will boubtless be obtained. The complaint does not set out the horse-power, and indeed does not mention even that there is any water power. The answer does not set it out, for there is none filed except the formal answer of the guardians *ad litem* admitting the allegations of the complaint. But there is reason to believe that on this property for which only $90,000 has been offered there are 70,000 horse-power that can be utilized by a power plant. At least the nature and extent of such power should appear in the complaint and in the evidence before the court, for if the price offered is inadequate, a court of equity should set aside a sale and order a new advertisement, even when there is no advance bid. A property of this kind should be advertised in the press and in the commercial centers outside of the State.

In *Dula v. Seagle,* 98 N. C., 458, 460, it is said: "It is well settled that an advance bid of 10 per cent is sufficient grounds for reopening the bidding when the performance of the offer was properly secured." In *Clement v. Ireland,* 129 N. C., 220, where there was a sale under foreclosure at the Spring Term, the court at Fall Term, upon motion, set aside the sale for irregularity, saying that it was contrary to the course of the court to confirm a sale without lapse of time between the day of the sale and its confirmation, that there might be opportunity to file exceptions and procure an increased bid, citing *White ex parte,*

82 N. C., 377; and further said that in analogy to the requirement of the statute in sales for partition, there should be at least twenty days allowed for such purpose. In the present case the sale was made privately by an agreement between three of the parties in inter- (162) est who figured as plaintiffs, without any consultation with the 250 or more defendants, and the sale was confirmed the same day without any opportunity to file exceptions or to raise the bid, and the motion to set aside such order and raise the bid was made at the same term of court while the judgment was still *in fieri.*

Under the settled practice of the Court and under the statute, Kuhn & Kuhn were entitled to an opportunity to raise the bid within twenty days, and the court should have examined their offer of security, and, if the security was approved, should have reopened the bidding and ordered a resale at the advanced bidding. In not doing so, the court committed a grave error.

As Kuhn & Kuhn, or any one else, had the *right,* under the statute and according to the settled practice of the Court, to have the bidding reopened upon making an advance bid of 10 per cent, such bid gave them a status in the court which entitled them to appeal if their bid was arbitrarily refused. In *Attorney-General v. Navigation Co.,* 86 N. C., 408, after the sale was made an advance bid was offered and a resale ordered; thereupon the original bidders appealed. This Court entertained the appeal and affirmed the order of the judge reopening the bids. If that case was properly here on appeal, so is this.

"Any party aggrieved may appeal." Revisal, 585; 2 Cyc., 627, 637. In *Kneeland v. American L. and T. Co.,* 136 U. S., 93, it is said: "A bidder at a marshal's sale makes himself thereby so far a party to the proceeding that for some purposes he has a right of appeal," and on page 95 it is said: "A party bidding at a foreclosure sale makes himself thereby a party to the proceedings." In *Blossom v. R. R.,* 1 Wallace, 656, which was quoted and approved in the case last cited, it is said that "a *bidder* at a judicial sale has a right to appeal from the judgment of the court *refusing to accept his bid.* And such appeal will not be dismissed, but entitles such bidder to have the case considered and decided on its merits." *Blossom v. R. R.* was cited and approved on this point in *R. R. v. Souter,* 5 Wallace, 662; *Butterfield v. Usher,* 91 U. S., 248; *Hinkley v. R. R.,* 94 U. S., 468; (163) *Williams v. Morgan,* 111 U. S., 698, and in many other cases.

It is true, the court will not open the bids after the confirmation except in cases of fraud. But that means when the confirmation is made in regular course after the twenty days required by the statute to give opportunity to file exceptions or raise the bid. It does not

mean that the court will not set aside the decree of confirmation when it was entered irregularly and contrary to the custom of the court and the statute, without such delay and without opportunity to raise the bid. A motion to set aside such irregular judgment, as we have seen, was made in *Clement v. Ireland,* 129 N. C., 220, at the next term of the court, and allowed. Here it was made at the same term of the court. The practice in our courts to set aside a sale upon an offer of an advance of 10 per cent upon the price is well settled. *Blue v. Blue,* 79 N. C., 69; *In re Bost,* 56 N. C., 482; *Wood v. Parker,* 63 N. C., 379; *Vass v. Arrington,* 89 N. C., 13. In Daniel Ch. Pr., 1465, the rule is laid down that when property is sold under a judicial decree "the court considers itself to have greater power over the contract than it would have were the contract made between party and party, and as the chief aim of the court is to obtain as great a price for the estate as could possibly be got, it is in the habit, after the estate has been sold, of 'opening the biddings,' that is, of allowing a person to offer a larger price than the estate was originally sold for, and, upon such offer being made, and proportionate deposit being paid in, of directing a resale of the property."

The sale in this case was conducted in a most peculiar manner. It was made secretly, without publicity and several days ahead of the time that according to the published calendar the case was to be called for an order of sale to be made. It was sold according to terms previously agreed upon privately between the three plaintiffs and the purchaser, which in its terms was a most remarkable contract and in total disregard of the rights or wishes of more than 250 defendants, none of whom have been served with process or were represented by counsel.

(164) A motion was made at that very term of court, while the judgment was *in fieri,* to set it aside and for a public sale upon an advance bid of more than $20,000. It was an error not to consider the advance bid and not to reopen the bidding if the advance offer was found to be properly secured. The bidders, Kuhn & Kuhn, are owners of large property in the immediate neighborhood of this.

Not only was there error and irregularity in failing to keep the report of the sale open for twenty days, as required by the statute, but there was further irregularity in this: The statute, Revisal, 2514, requires, for sales of land in partition, that "such sale shall be made *after the same notice* as required by law for sales of real estate by sheriffs under execution." Here there was a private sale, without notice to any one, and at least $20,000 under the price that a solvent party was ready and willing and able to pay. Certainly the Court ought not to hold that proceedings to sell land for partition are valid

and regular when only the three plaintiffs and the guardians *ad litem* for only one defendant and for unknown persons who may be interested in the property were represented, and when, too, the sale has been made privately without the notice required by the statute, without the twenty days delay between the sale and confirmation which is required by the statute, and in the face of an advance bid of nearly $20,000, by parties owning large property in the vicinity and therefore known to be *bona fide* bidders.

It was error also to refuse to make Borland a party, who showed deeds which entitled him to an interest in the said property. *Jones v. Asheville,* 116 N. C., 817. On the refusal of his application to be made a party, he had the right to appeal. *Rollins v. Rollins,* 76 N. C., 264; *Keathly v. Branch,* 84 N. C., 202. Borland as well as Kuhn & Kuhn appealed from the refusal to consider the advance bid.

A proceeding in violation of the express requirement of the statute, both as to giving notice of the sale and in failure to leave open the report of the sale for twenty days, cannot be sustained. The judgment was irregular on these accounts, and should be set aside. The court of equity, having due regard to the interests of the numerous defendants, none of whom were served with process or were represented by counsel, should upon motion, made at the same term, have (165) ordered the sale to be reopened. To affirm such proceedings as occurred in this case would leave wide open the door to collusion and fraud between the plaintiffs in such cases and a favored purchaser. The evidence herein of suppressing competition is plenary.

The judgment should be set aside. The court below should consider the bid of Kuhn & Kuhn, and, if it is found to be properly secured, direct a resale upon the notice given by the statute and with opportunity after that sale of twenty days in which to file exceptions. The requirements of the statute should not only be observed, but the courts should use diligence to prevent all opportunity of collusion or of imposition in judicial sales. The value of the property should be inquired into more fully before any sale is finally confirmed. Water power of the estimated extent of 70,000 horse-power is doubtless worth vastly more than even the advanced bid of Kuhn & Kuhn. The courts should always see that there is a fair sale without suppression of bidding, and order another sale even then, unless a fair price for the property, after full investigation of its value by the court, has been offered. Such property as this is rare, and a good price can be had if fair and full opportunity is given to bidders. This has not been done in this case.

Cited: Henry v. Hilliard, 170 N. C., 581; *Wooten v. Cunningham,* 171 N. C., 126.

WESTON v. JOHN L. ROPER LUMBER COMPANY.

(Filed 12 March, 1913.)

1. Partition—Tenants in Common—Judgments—Title—Severalty of Possession.

Where the title to lands is not put in controversy, in partitioning lands among tenants in common, the effect of the proceeding is to designate the shares of the tenants in common, allotted in severalty to each, which cannot have the effect of creating any title that the tenants had not formerly held.

2. Same—Estoppel.

A judgment in proceedings for partition does not estop a grantee of one of the parties, who has purchased the lands allotted in severalty to his grantor, to deny the title of another party to a different part of the lands divided in proceedings wherein the title to lands had not been raised or adjudicated.

(166) APPEAL by defendant from *Bragaw, J.*, at March Term, 1912, of CAMDEN.

Civil action. A number of issues were submitted, but it is only necessary to set out two, viz.:

3d. Is the plaintiff the owner of the tract of land first described in the complaint as Lot No. 1 in the New Lebanon Division? Answer: Yes.

7th. Is the plaintiff the owner of the tract of land described in the complaint as Lot No. 4 in the New Lebanon Division? Answer: No.

The jury assessed the plaintiff's damages at $7,630. From the judgment rendered, the defendant appealed.

Winston & Biggs, G. Taylor Gwathmey, M. H. Tillett, Ward & Grimes, Charles Whedbee, Ward & Thompson for plaintiff.

W. B. Rodman, W. M. Bond, and Angus D. MacLean for defendant.

BROWN, J. This action was brought to try the title to certain lands in Camden County known as Lots Nos. 1 and 4 of the New Lebanon Division, a partition of a large body of land made in 1819 among a large number of tenants in common, and recorded in said county.

In apt time the defendant entered a motion to nonsuit, upon the ground that the plaintiff upon all the evidence had failed to show title in himself to the lands in controversy. This motion was overruled, and the defendants duly excepted.

There are a large number of assignments of error in the record, but in the view taken by a majority of the Court, it is only necessary to

consider the motion to nonsuit, as we are of opinion that it should have been sustained.

The plaintiff deraigned his title from the New Lebanon partition and offered in evidence no grant from the State. By this division Lot No. 1 was allotted to Enoch Sawyer, who conveyed to Cary Weston. Plaintiff claims by descent from him.

Lot No. 12 of the New Lebanon Division was allotted to Mills (167) and Josiah Riddick, and for the purpose of showing that the defendant claimed Lot No. 12 under Mills Riddick and under said division, plaintiff offered deeds conveying Lot No. 12 from Mills Riddick to Whitehead, and from Whitehead to John L. Roper, and from him to the defendant.

For the purpose of showing an independent source of title, acquired by the defendant long afterwards, the defendant introduced a deed from the State Board of Education to George W. Roper, date 24 October, 1904, and from George W. Roper to defendant, 14 March, 1905. It is admitted that all the lands in controversy are within the boundaries of these deeds.

It is practically admitted, and all the evidence for plaintiff as well as defendant shows that the lands in controversy are swamp lands. The New Lebanon Division refers to and calls these lands a juniper swamp, and plaintiff's witness Lewis testified that the land in controversy is swamp land.

Upon these facts it is plain that unless the plaintiff proved that the *locus in quo* had been granted by the State prior to 1825, the title vested in the State Board of Education and passed from it to George W. Roper, and from him to the defendant. *Board of Education v. Lumber Co.*, 158 N. C., 315. Constitution, Art. IX, secs. 9 and 10.

The law presumes that those claiming such lands under the deed of the State Board of Education acquired a good and valid title, and the burden of proof is placed on the adverse party to rebut such presumption by showing a good and valid title in himself. Revisal 1905, sec. 4047; *Board of Education v. Makely*, 139 N. C., 34; *Board of Education v. Lumber Co., supra.*

No grant from the State to any one covering the land in controversy is in evidence; but to meet this difficulty plaintiff contends that it is admitted in the pleadings (section 1 of amended complaint and section 1 of answer thereto) that the lands in controversy were granted to Benjamin Jones. The answer admits "that on 10 July, 1788, the State of North Carolina issued a grant to one Benjamin Jones; that that appears upon the books found in the office of the Register of deeds of Camden

County in Book D, page 363, which purports to be a copy of said
(168) grant. The other matters alleged in section 1 are denied."

This section practically denies everything alleged except that a grant to one Benjamin Jones appears on the records of Camden County. It denies the validity of the grant, and that its descriptive words embrace the land in controversy.

We find no evidence in the record tending to prove that the description in the grant covers the land in controversy, although there is evidence that the description in the complaint does.

The plaintiff does not claim title to any part of the lands in controversy by possession. All his testimony negatives such claim. On this point the plaintiff testified: "I never claimed the lands in controversy until one or two years ago, when a man named Johnson came to me about some property in this same Dismal Swamp, situated in Pasquotank County, and told me the Richmond Cedar Works had been in possession long enough to give them title, and that I had only paper title, not actual possession; he wanted to buy it. I employed Mr. Gwathmey to go down and look into it; he dug up the record as to this property in dispute; and then I entered into a contract with the Richmond Cedar Works by which they were to pay a part of the expense of this litigation and to receive a part of whatever money might be recovered in this suit. . . . I had never paid any taxes on this land; so far as I know, my father never paid any taxes on this land; so far as I know, my father never claimed this land."

Therefore we conclude, under the authorities cited, that the defendant has shown a clear title to the land in controversy paramount to that of the plaintiff.

This disposes of the plaintiff's contention that he and the defendant claim under the same common source, to wit, the Lebanon Division, and that defendant cannot deny plaintiff's title.

We have held that defendant has shown an outstanding valid title to the *locus in quo* and has connected itself with such title. *Mobley v. Griffin*, 104 N. C., 115; *Whissenhunt v. Jones*, 78 N. C., 361; *Love v. Gates*, 20 N. C., 498.

(169) But the plaintiff contends that as he claims title to Lot No. 1 under Enoch Sawyer, to whom it was allotted in the New Lebanon Division, and as he has shown mesne conveyances from Mills Riddick to defendant for Lot No. 12, which was allotted to Riddick, that by virtue of the partition proceedings defendant is estopped to deny that plaintiff as the successor in title of Enoch Sawyer is the owner in fee of the land in controversy, and is precluded from setting up this after-acquired paramount title against plaintiff. In support

of this position, plaintiff relies upon the principles laid down in *Carter v. White,* 134 N. C., 466.

We are not disposed to call in question this decision, although it reversed the former decision in the same case (131 N. C., 14), and its correctness was challenged by the present *Chief Justice* in a dissenting opinion.

We are of opinion that the principle laid down in *Carter v. White* does not debar a purchaser of lands, who acquired the title of one of the partitioners through mesne conveyances to a part of the land divided, from afterwards acquiring an outstanding and valid legal title to other portions of the tract so divided.

The title which the defendant purchased from the State Board of Education through George W. Roper was an after-acquired outstanding valid title to Lots 1 and 4, and we see nothing in law or morals which debarred defendant from purchasing it. At the very time defendant acquired this title, plaintiff testifies he did not claim these lots in controversy.

In the opinion of the Court in *Carter v. White,* 134 N. C., 473, it is said: "In the view which we take of the effect of the partition proceedings it is not necessary to decide the effect of this estoppel upon an after-acquired title, and we forbear to express an opinion thereon."

We think the learned counsel for plaintiff in their brief practically admit that the proposition now under consideration is left an open question, when they say: "It is suggested in what is so lucidly enunciated in *Carter v. White* that the judgment of the court is conclusive as to an after-acquired title, not only upon the parties, but would also conclude their heirs, assigns, and grantees."

However, that is left an open question, and it may be that the court would hold that the defendant in this case, which is a successor in title, would not be estopped to set up an outstanding para- (170) mount title and to claim under it.

It is not necessary to decide this question here, insomuch as there is no paramount outstanding title shown.

That there is a paramount valid title which has been acquired by defendant from the State many years after the New Lebanon Division was made, we have already held.

This title was in no way represented by any of the parties to the partition proceedings, and although the defendant may be a grantee of Lot No. 12, we do not think it is estopped to set up this new and independent title, subsequently acquired, to Lots 1 and 4. 17 A. and E. Enc. (1 Ed.), 819. *Henderson v. Wallace,* 72 N. C., 451; 16 Cyc., 716; *Frey v. Ramsour,* 66 N. C., 466.

We doubt very much that the learned judge who wrote the opinion in *Carter v. White* intended to deny the right of a grantee of a tract of land allotted to his prior grantor in partition proceedings to acquire an outstanding legal title, or to hold that he would be estopped under all circumstances to deny the title of every partitioner to the tracts allotted to such partitioner in the division.

In commenting upon *Carter v. White,* the judge who wrote that opinion says: "The decision in that case is based upon the fact that the exact interest of each party was put in issue and settled by the judgment," citing *Forder v. Davis,* 38 Mo., 107, in which it is said of the judgment: "The partition establishes the title, severs the unity of possession, and gives to each party an absolute possession *of his portion.*" "As a general rule, parties to a judgment are not bound by it in a subsequent controversy between themselves, unless they are adversary parties in the original action; that is to say, a judgment for or against two or more joint parties ordinarily determines nothing as to their respective rights and liabilities as against each other in their own subsequent controversy," citing Black on Judgments, sec. 599; 1 Freeman on Judgments, sec. 158.

(171) The learned judge proceeds to say: "It would work a great wrong to the defendants herein to permit the judgment in the partition proceedings, the only purpose of which was to have Colonel Simmons' one-half interest in the land set apart to him, to divest them of their title to a share of the land, not in any way in litigation. To do so would make estoppel justly odious." *McCollum v. Chisholm,* 146 N. C., 24.

In *Harrison v. Ray,* 108 N. C., 215, which was a partition by consent wherein the tenants mutually conveyed by deed to each other the several allotments, it was held that the deeds did not operate as an estoppel, except so far as they established the extent of the interest of each tenant in his ancestor's lands.

In *Harrington v. Rawls,* 131 N. C., 39, it is held that a deed of partition conveys no title, but is simply a severance of the unity of possession.

In *Jones v. Myatt,* 153 N. C., 230, in the opinion of the Court by *Mr. Justice Manning* it is said: "It is settled by several decisions of this Court that actual partition merely designates the share of the tenant in common, and allots to him in severalty. It does not create or manufacture any title," citing *Carson v. Carson,* 122 N. C., 645; *Williams v. Lewis,* 100 N. C., 142.

In other jurisdictions it is held that a judgment in partition is conclusive upon all the parties thereto as to whatever title or claim they

had to the land at the time of the rendition of the judgment, but it did not have the legal effect of changing the title nor of vesting any new or additional title in the land allotted and set off to each in severalty. *Wade v. Dera,* 50 Cal., 376; *Christy v. Waterworks,* 68 Cal., 73.

At common law, when partition was made pursuant to the writ *de partitione facienda,* and the shares were allotted in severalty, and final judgment was given that the partition be holden, firm and effectual forever, nothing further was necessary; for the partition was completely effected. The judgment or law operated to vest in each party a sole estate in his allotment; but nothing further was wrought than to affirm or ascertain the possession. *Cave v. Holford,* 3 Ves., 656.

In Indiana it is held that partition proceedings do not settle title, or create a new title, but simply divide into separate shares (172) the land held under existing titles. *Miller v. Noble,* 86 Ind., 528; *Elstone v. Piggott,* 94 Ind., 24. In this latter case it is said: "It results from these settled rules that the decree in partition does not estop the appellant from asserting the title acquired under the deed issued on the decree of foreclosure."

In commenting upon this subject, Mr. Bigelow says in his work on Estoppel (5 Ed.), p. 345: "It does not in modern times constitute a case of privity for the purpose of estoppel to show that one man holds a conveyance of land from another. The modern grantee, unlike a feoffee, acquires the property for himself, and his faith is not pledged to maintain the title of the grantors. A relation of privity is a relation of dependence, not of independence or of superiority. Between the grantor and grantee the recitals of the deed will doubtless be conclusive evidence in a proper case; but the instrument will not for all purposes prevent the grantee from asserting a paramount title which he has acquired from a third person. And this being the case between the grantor and grantee, it follows that the grantee may assert a title which he has acquired paramount to that of such grantor in a contest with one who claims under the same grantor." In support of the text, the author cites a large number of authorities.

The same author, referring to a judgment on a writ of partition at common law and a decree in chancery compelling partition, says: "In neither case does the judgment operate beyond the title held at the time of the suit; it does not affect a title afterwards acquired." Page 79, sec. 4; see, also, *Embry v. Palmer,* 107 U. S., pages 3 to 11.

We think the following additional cases support our views: *McClery v. McClery,* 65 Me., 177; *Macktot v. Dubreuill,* 9 Mo., 282; *Robertson v. Pickerell,* 109 U. S., 608; *Blight v. Rochester,* 7 Wheaton, 534.

In this last case *Chief Justice Marshall* says: "It is contended that

he is so restrained, because John Dunlop sold to Hunter, and Hunter has conveyed to the present defendant. It is very clear that these
(173) sales do not create a legal estoppel. The defendant has executed no deed to prevent him from averring and proving the truth of the case. If he is bound in law to admit a title which has no existence in reality, it is not on the doctrine of estoppel he is bound. It is because by receiving a conveyance of title which is deduced from Dunlop, the moral policy of the law will not permit him to contest that title.

"The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of the title unless he should be called upon in consequence of some covenant or warranty in his deed. The property having become by the sale the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of it. No principle of morality restrains him from doing this; nor is either the letter or spirit of the contract violated by it."

We have been unable to find a single case where a grantee of one of the parties to the partition proceedings purchasing the tract allotted in severalty to his grantor has been held estopped to deny title of another party to a different part of the land divided in the partition proceedings from that acquired from the grantor.

Upon the facts of this case as presented by any view of the evidence we are of opinion: (1) that there is no strict estoppel operating in favor of the plaintiff against the defendant in respect to Lots 1 and 4; (2) that the parties did not claim the same tract of land under the same common source; (3) and that if that were so, the defendant has shown an outstanding legal title paramount and has connected itself with it.

His Honor erred in overruling the motion to nonsuit, and the said motion is sustained.

Error.

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

(174) ALLEN, J., concurring: The plaintiff has offered no evidence of possession in himself, or in any one under whom he claims, and it is conceded that his title to the land in controversy depends upon the estoppel of the partition proceeding of 1815.

Do these proceedings prevent the defendant from denying the title of the plaintiff, because of the implied warranty arising from a compulsory partition between tenants in common, or because of an estoppel by the judgment in the proceedings?

There are several principles in regard to compulsory partition at common law that seem to be well settled:

1. Partition could only be compelled as between parceners, and not between joint tenants and tenants in common.

2. If a portion of the estate held in coparcenary was lost before partition, the loss fell equally on all, and they were not to be in a worse plight after partition.

3. That there was an implied warranty and a condition annexed to the partition.

4. In the event of eviction after partition *by suit,* the remedy was upon the implied warranty to have recompense pro rata for the loss; but if the eviction was *by entry without suit,* the remedy was to enter upon the shares of the other tenants and have a reallotment.

5. That by the statutes of 31 Henry VIII. and 32 Henry VIII., the right of compulsory partition was extended to tenants in common and in joint tenancy, but that under these statutes the remedy of a tenant in common or of a joint tenant, in the event of eviction, was limited to obtaining recompense upon the implied warranty.

6. That the condition and the implied warranty depended on privity of estate, and if one conveyed his share after partition and his grantee was evicted, he had no remedy against the others, although one who retained his share could, after eviction, have his remedy against a grantee.

The most comprehensive and learned discussion of the subject I have found is in *Sawyers v. Cator,* 8 Hump., 256 (Tenn.), 47 A. D., 608, in which *Judge Turley* treats of it historically and in the light of reason and authority.

The last proposition, which seems to be well sustained, bears (175) directly upon the case before us, because if the condition and the implied warranty depend on privity of estate, and if this privity is broken by an alienation, and the grantee is without remedy upon the condition or the implied warranty, the plaintiff in this case cannot rely upon the implied warranty against the defendant, as he claims title by descent from a grantee of one to whom shares were allotted.

In *Sawyers v. Cator, supra, Judge Turley* says: "But this condition and implied warranty holds only in privity of estate, and, therefore, if either parcener aliens in fee, and the alienee is evicted, the aliening parcener cannot enter on the other allotment, because by the alienation she has dismissed herself from having any part of the tenements as parcener, by thus severing the connection which previously existed (Allnatt on Partition, 159), and my Lord Coke says that when the whole privity of estate between coparceners is destroyed, there ceases to

be any recompense to be expected, either upon the condition in law or the implied warranty. Co. Lit., 174a. Yet it is otherwise if the privity be not wholly destroyed; for instance, supposing the alienation to be for years, for life, or entail; then, on account of the reversion, the parcener whose alienee is evicted shall enter on the other part. *Ib.*, 173b. The reasoning which would prevent the aliening parcener from entry or vouching upon the warranty in cases of eviction applies with greater force to the alienee, who is a stranger in blood, and who unquestionably could not enter or vouch."

This is approved in *Smith v. Sweringer,* 26 Mo., 567, as follows: "The doctrine of implied warranty on a compelled partition among coparceners is not free from obscurity in some of its details, but it seems to be a part of that doctrine as known in England and adopted in some portions of this country, that when the privity of estate is destroyed by an alienation, neither the coparcener nor the alienee has any recourse upon the remaining coparceners. (Allnatt, sec. 3; *Sawyers v. Cator,* 8 Hump., 256.)"

In 1 Wash. on Real Property, ch. 13, sec. 7, the author declares the same principle: "If, after the partition has been made, one of the parties is evicted of his property by a paramount title, the parti-
(176) tion as to him is defeated at his election, and he may enter upon the shares of the others as if none had been made, and have a new partition of the premises. But this right does not extend to the alienee of one of these tenants, because by such alienation the privity of estate between them and the holder of his share is destroyed. Nor can the alienee himself enter upon the shares of the other tenants in such a case and defeat the partition." And this is quoted with approval in *Kitchen v. Patrick,* 32 S. C., 433: "But the same writer (Wash. Real Prop.) says in the very next paragraph: 'This right does not extend to the alienee of one of these tenants, because by such alienation the privity of estate between them and the holder of his share is destroyed.' Now, unquestionably, when the plaintiff bought the interest of the three Mobleys at the sheriff's sale, he became their alienee, and the qualification above stated would apply."

When it is remembered that the doctrine of implied warranty arose from the right to compulsory partition among caparceners, and that it was imposed upon tenants in common when the same right was conferred on them, the case of *Weiser v. Weiser,* 5 Watts, 279 (Pa.), 30 A. D., 318, is also authority for this position, where the Court says: "The implied warranty in partition between coparceners was only in privity, for none shall vouch by force of it, except the parties to the

partition, or their heirs, and no assignee. *Bustard's case,* 4 Co., 121; Litt., sec. 262. And Lord Coke says: 'When the whole privity between coparceners is destroyed, there ceases any recompense to be expected, either upon the condition in law or warranty in law by force of the partition.' 1 Inst., 174a."

Jones v. Bigstaff, 44 Am. St., 245 (95 Ky., 395), is to the same effect, where it is said: "It is maintained by counsel for the appellants that an implied warranty of the title arising by operation of law, or from the statute, upon the making of a partition by the judgment of a court of competent jurisdiction, like an express covenant or warranty, runs with the land, and, therefore, the alienee of one petitioner or one of the tenants in common, when rightfully evicted, may maintain the action for contribution. In *Venable v. Beauchamp,* 3 Dana, 321, 28 Am. Dec., 74, it is said: 'To every partition of land the law (177) annexes an implied warranty, whether expressed in the deed or not. Each partitioner becomes the warrantor of the other, but, as said in the case cited, the warrtnty in such cases is special, not only with regard to the person or persons who may take advantage of it, but also with regard to the amount of recompense.' Does the privity exist between the heirs of one of the tenants, dead, and the surviving tenants, and does it extend further, and authorize a recovery by the vendee of one of the tenants after partition and an eviction by a superior title? Where the tenant, whether holding as a coparcener, joint tenant, or in common, dies, his holding as against his cotenants, with reference to the joint title to land, passes to the heir, either for the purpose of demanding partition or exacting contribution where there has been a partition and an eviction. The privity of estate is not destroyed by the death of one of the tenants, whose right and title pass by operation of law to his heirs. Their right to recover, if the ancestor could, is not doubted, but we cannot well see how the implied warranty passes to the alienee or vendee. In the well considered case of *Sawyers v. Cator,* 8 Hump., 280, 47 Am. Dec., 608, *Turley, J.,* says: 'This implied warranty holds only in privity of estate, and, therefore, if either parcener aliens in fee and the alienee is evicted, the aliening partner cannot enter on the other allotment, because by the alienation she has dismissed herself from having any part of the tenements as parcener, by thus severing the connection which previously existed.' It is well settled that parties to a partition, whether coparceners, joint tenants, or tenants in common, are liable upon an implied warranty of title, when loss occurs after partition, and that this implied warranty does not, like an express covenant, run with the land."

It would seem, therefore, that the plaintiff cannot avail himself of the implied warranty, and that the question remaining for consideration is, whether the adjudication in the partition proceeding estops the defendant to deny the title of the plaintiff. We may, I think, eliminate the suggestion at the outset, that if an estate less than a fee
(178) simple was claimed by the tenants in common, there is no evidence it is not still outstanding, because the petition was filed in 1815, ninety-eight years ago, and at that time the youngest petitioner must have been 21 years of age, as there is no allegation of nonage, and no party was represented by a guardian *ad litem,* and we may safely assume that one born one hundred and nineteen years ago is now dead particularly when the plaintiff does not contend otherwise.

The estoppel cannot extend beyond the estate passed upon and adjudicated, or necessary to sustain the judgment, and if that estate was less than a fee simple, and has expired by lapse of time, the plaintiff must fail in his action, as the burden is on him to prove title, and he has shown none, outside of the estoppel.

If so, the real question on this branch of the case, is whether it was adjudicated in the partition proceeding that the tenants in common held in fee simple. Some of the authorities hold that judgments estop, not only as to matters litigated, but also as to those which might have been litigated, but also as to those which might have been litigated, while others confine the effect of the judgment to the facts in issue. Both rules are correct, but they are applicable to a different state of facts, and the distinction between the two is clearly drawn in *Cromwell v. County of Sac,* 94 U. S., 352, where the Court says: "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it
(179) although it may be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery,

want of consideration, or payment. If such defenses are not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Our case belongs to the second branch of the rule, which was applied in *Coltraine v. Laughlin,* 157 N. C., 287, in which the Court quoted with approval from *Tyler v. Capeheart,* 125 N. C., 64, that, "A judgment is decisive of the points raised by the pleadings, or which might be properly predicated upon them, but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which, in fact, are neither joined nor embraced by the pleadings."

If so, the question before us is still further narrowed to the single inquiry as to the estate *actually* litigated and adjudicated in the partition proceedings. (180)

In the consideration of this question it may be accepted:

1. That at common law, as the only unity between tenants in common was one of possession, the judgment in partition had no effect except to sever the possession, and did not operate upon the title.

2. That at common law and now, partition may be had of estates less than a fee simple.

3. That statutes have been passed in the different States which authorize an adjudication of title in partition proceedings.

4. That under the statutes of this State, as they exist now, persons

"claiming real estate as tenants in common" may have partition; that upon a petition being filed, the court may appoint commissioners "to divide and apportion such real estate among the several tenants in common"; that the commissioners shall partition the land "among the tenants in common, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as near as possible," and shall make report, which, when confirmed, "shall be binding among and between the claimants, their heirs and assigns," and that these statutes were substantially in force in 1815.

5. That when title is put in issue under the statute, the judgment is an estoppel as to that title.

Mr. Freeman, the author of the work on Cotenancy and Partition, says in 30 Cyc., 310, in reference to the last proposition: "We have hereinbefore shown that, in many of the States, title may be put in issue and determined in suit for partition. We may assume that, even in those States, the title is not put in issue merely by the allegations necessary for a declaration in partition at common law, and that where nothing is known about the pleadings in such a suit, it will be presumed that title was not put in issue by them, nor determined in any judgment based on them. We apprehend, however, that whenever plaintiff alleges himself to be the owner in fee, or of any specified estate, or avers any other ultimate fact under which he is entitled to relief, it becomes the duty of defendant either to concede or take issue with the allegation or averment, and that the judgment in the action (181) will be as conclusive as it would be upon a like issue in any other action."

The Supreme Court of Indiana, discussing the same subject, says in *Miller v. Noble,* 86 Ind., 530: "In ordinary proceedings it is only necessary to allege and prove such a title as entitles the party to a division of the land. The adjudication in such a case goes no further than to declare that such a right is shown as will support partition and to allot the shares to the cotenants entitled to them. If a conclusive adjudication upon the character of the title is desired, issue must be formed directly and fully presenting that question for decision," and in *Green v. Brown,* 146 Ind., 9: "A question of title is not, ordinarily, presumed to be in issue in partition proceedings; on the contrary, the presumption is that title is not in issue."

In the absence of authority, the language of our statute would seem to lead to the same conclusion, that there is no adjudication of title unless directly in issue.

It is not required thereunder that the estate owned shall be alleged, and any persons *claiming* as tenants in common are entitled to partition,

and there is no provision that the quantity of the estate shall be defined in the order appointing commissioners, in the report of the commissioners, or in the decree of confirmation.

It is true that the statute says that the report and the decree confirming it "shall be binding among the claimants, their heirs and assigns," but this language was inserted to meet the common-law doctrine that a decree in partition did no more than sever the possession, and is fully satisfied by giving it effect as a conclusive determination of the equality of the division, and of such title as the parties put in issue.

If it means more than this, it will conclude as to titles and estate not litigated, and when it is not necessary to do so to sustain the judgment.

This seems to be the construction adopted by our Court, which says, in *Graves v. Barrett,* 126 N. C., 269: "But in a petition for partition, title is not at issue, unless the defendants put it in issue by pleading 'sole seizin.' That was not done in this case. The Code, sec. 1892, does not require averment of title as in ejectment, but (182) simply an allegation of seizin and possession as tenants in common, and the seizin and possession of one are that of all"; and in *Lindsay v. Beaman,* 128 N. C., 192: "In the case of deeds, title passes from owner to purchaser, and to constitute color of title must be registered (*Austin v. Staten,* 126 N. C., 783), while in partition proceedings between tenants in common no title passes, only the unity of possession is dissolved and title vests in severalty, notice of which is fully given by the record itself, the common source of title resting undisturbed"; and in *Buchanan v. Harrington,* 152 N. C., 334, citing Cyc., 310: "We apprehend, however, that whenever plaintiff alleges himself to be the owner in fee, or of any special estate, or avers any other ultimate fact under which he is entitled to relief, it becomes the duty of the defendant either to concede or take issue with the allegation or averment, and that the judgment in the action will be as conclusive as it would be upon a like issue in any other action. The truth is, that a judgment in partition is as conclusive as any other. It does not create or manufacture a title, nor divest the title of any one not actually or constructively a party to the suit, but it operates by way of estoppel; it prevents any of the parties from relitigating any of the issues presented for decision, and the decision of which necessarily entered into the judgment; and it divests all titles held by any of the parties at the institution of the suit."

Applying these principles, it appears that it was not alleged in the partition proceeding that the petitioners and the defendants were tenants in common in fee, nor does it appear that there was any adjudication of title.

The petition alleges that the petitioners and the defendants "are owners as tenants in common," without alleging that the ownership is in fee, and there is nothing in the petition to show whether the interests of the parties were acquired by descent or purchase. No answer was filed, and the order appointing commissioners makes no adjudication as to title or as to the tenancy in common, but simply appoints commissioners "to go upon the premises mentioned in the petition
(183) and lay off the land according to the prayer thereof and make report," and the confirmation of the report, which was an allotment of shares, was by an entry on the docket, "Report confirmed." The word "owner," used in the petition, may be broad enough to include an estate in fee simple, but it also includes estates less than a fee (29 Cyc., 1550), and when associated, as it is with the words, "as tenants in common," in a petition for partition, and considered in connection with the history of partition, whose primary and chief purpose was and is to sever the unity of possession, and keeping in mind that partition may be had of estates less than a fee, it is reasonable to conclude that the allegation was as strong as the title, and that it was merely sufficient to sustain the proceeding. The conduct of the plaintiff and of his father, under whom he claims, sustains this view, as it appears that neither claimed any interest in the land, nor did either ever exercise any act of ownership over it until a short time before this action was instituted, when an agent of the Richmond Cedar Works suggested to the plaintiff that he held the title to the land, and that his company would pay the expense of the litigation if he would contest the title with the defendant.

The plaintiff testified, among other things: "I am the plaintiff in this case; am 29 years old. My father's name was John Carey Weston; he lived in Norfolk, and died in 1895; his father was named Carey Weston." "I never claimed the lands in controversy until one or two years ago, when a man by the name of Johnson came to me about some property in this same Dismal Swamp, situated in Pasquotank County, and told me that the Richmond Cedar Works had been in possession long enough to give them title, and that I had only a paper title, not actual title; he wanted to buy it. I employed Mr. Gwathmey, the lawyer, to go down and look into it, and he dug up the record as to this property in dispute, and I then entered into a contract with the Richmond Cedar Works, by which they were to pay a part of the expense of the litigation and to receive a part of whatever money might be recovered in this suit. They were to pay a part of the expense and to get one-third of whatever might be recovered in this litigation,
(184) and I agreed to sell the land to them if I should recover it, at

a price to be fixed by the number of cords of juniper timber on the land. The Richmond Cedar Works was to pay me for the land, if I could recover it, $1 per cord for all timber measuring over 8 inches in diameter, and 50 cents per cord under 8 inches in diameter, measuring at 18 inches from the ground. They were not to take it unless I could give them a good title. I had never paid any taxes on this land; so far as I know, my father never paid any taxes on this land; so far as I know, my father never claimed this land. My father was 9 years old when my grandfather died."

If, however, the allegation in the petition is sufficient as to ownership in fee, there has been no adjudication of the title.

No issue as to title was raised by answer, and there is no reference in the order appointing commissioners, in the report, or in the decree of confirmation to the quantity of estate held by the tenants in common, and when it is remembered that partition could be had of an estate less than a fee, and that while title could be put in issue and finally settled, it was not obligatory to do so, and that a judgment in partition which simply severs the unity of possession is valid, it seems to follow that the proceeding relied on as an estoppel cannot have that effect, because the title was not adjudicated, and it was not necessary to do so to sustain the judgment rendered. The only facts essential to the validity of the judgment, and necessarily presumed to exist in order to sustain it, are that there was a unity of possession and an equality of division.

"The estoppel of a judgment cannot be extended beyond the particular facts on which it was based; it determines only such points or questions as are sufficient to sustain the legal conclusion that judgment must be given for one or the other of the parties in the particular form and amount in which it was rendered, not additional matters, unnecessary to the decision of the case, although they come within the scope of the pleadings, unless they are actually litigated and passed upon." 23 Cyc., 1290.

If these positions are sound, and the defendant is not bound (185) by the implied warranty, and the judgment in the partition proceeding only estops as to the unity of possession and the equality of division, the plaintiff has failed in his proof of title, as he has offered no evidence of possession by himself or by those under whom he claims, and no evidence of title, except the partition proceedings upon which he relies as an estoppel, and the motion for judgment of nonsuit should have been allowed.

This disposes of the appeal, and it is unnecessary to discuss the validity of the deed of the State Board of Education to the defendant,

or of the right of the defendant to rely upon this deed as an after-acquired title.

CLARK, C. J., concurs in this opinion, and in opinion of BROWN, J., as well.

WALKER, J., dissenting: At May Term, 1815, of the county court of Camden County, plaintiff's assignor and others filed their petition for partition of a large body of land called the New Lebanon estate, containing many thousand acres, and alleged therein that they were "the owners thereof as tenants in common," and prayed for a division of said lands according to the provisions of the statute. In the proceedings they are also called "proprietors of the New Lebanon estate." Partition was decreed, and Lot No. 1 was allotted to Enoch Sawyer, Lot No. 4 to Sawyer and Proctor, and Lot No. 12 to Mills and Josiah Riddick. Unless the decision of this Court upon the effect of the judgment in the partition suit is correct, the plaintiff owns Lots Nos. 1 and 4, and, as appears in the opinion, he is deprived of both by the judgment of this Court, which I think is erroneous. The Court, and I say so most respectfully, has overlooked the provisions of our statute, which, if they had been read in connection with the authorities relied on, and some from other States too, where there is no such statute, would have so explained them as to have led the Court to reverse its conclusion. Coparceners were the only tenants who could compel a partition at common law, and the reason given for this exceptional rule, and also for the warranty implied from the partition, was that parceners had the estate cast upon them by law, viz., by descent, and as the act (186) of the law does injury to no one, *actus legis nemini facit injuriam,* they were allowed to sever the tenancy and to have an implied warranty, as between themselves, for one parcener could not otherwise force a partition by deed with express warranty, and both partition and warranty would, in that case, depend upon the will of his coparceners. The partition among parceners was effected by writ commanding it to be made, and took effect from the judgment of the court—after the interlocutory order *quod partitione fiat,* the issue of the *breve de partitione facienda,* and the sheriff's return—which judgment was that "the partition so made remain firm and stable forever," and (unlike the decree in chancery in such cases) of itself passed the title to the allotments in severalty. Rawls on Covenants for Title (5 Ed.), sec. 277, note 2. But the right of partition was not extended to joint tenants and tenants in common until by 31 Henry VIII., ch. 1, and 32 Henry VIII., ch. 32; but they did not by these statutes acquire the right of reëntry for condition broken.

With this preliminary statement, we may now consider as to the warranty and condition of reëntry implied from partition. The latter being by writ, of course the warranty was implied from the partition itself, and not from any particular words used. It is familiar that the right to partition existed at common law solely between coparceners, and there was this difference between the warranty and the condition: when a parcener reëntered for condition broken, she defeated the partition in the whole; but when she vouched by force of the warranty, the partition was not defeated in the whole, but she recovered recompense for the part that was lost. But to joint tenants and tenants in common there was by the common law no right to partition by writ; between them it must have been voluntary merely. And hence was passed the well known statute of 31 Henry VIII., ch. 1, which gave to all joint tenants and tenants in common the right to make partition between them by writ, "in like manner and form as coparceners by the common laws of this realm have been and are compellable to do," with the proviso, "that every of the said joint tenants or tenants in common and their heirs, after such partition made, shall and may have aid of the other or of the heirs, to the intent to deraign the warranty paramount and to recover for the rate, as is used between coparceners after (187) partition made by the order of the common law." It will be perceived that this statute gave the right to the warranty only, and as to joint tenants and tenants in common the condition neither existed nor exists by common law or by statute. The common law, therefore, in cases of partition by writ, gave to parceners a warranty and a condition, and the statute gave to joint tenants and tenants in common warranty alone. But the reason why warranty was implied in a partition between coparceners is not perhaps very clearly stated in the books, and in view of a few decisions the subject would seem to bear some explanation. Rawle on Covenants for Title (5 Ed.), sec. 277.

As between parceners, in case of any eviction by suit upon a paramount title after the partition, the remedy was at common law by vouching the coparcener to assist in deraigning the warranty paramount annexed to the purchase of the ancestor, and in case of failure to have recompense pro rata for the loss, and in case of eviction by entry without suit, by reëntry into the portion of the other coparceners under an implied condition annexed to the partition so to do. There is this difference between the warranty and the condition which the law thus creates upon the partition: When a coparcener takes benefit of the condition, she defeats the partition in the whole, but when she vouches by force of the warranty in law for part, the partition shall not be defeated in the whole, but she shall recover recompense for that part

which was lost, to the end that the loss may be equal. For both claim by descent, which is an act of law, and by the law each of them ought to have an equal part of the inheritance of their ancestor; therefore, she shall recover in value but the moiety of what she lost, so that the loss shall be equal, she bearing her portion of it with the sister vouched. Co. Lit., 174a; Allnatt, 156; 4 Rep., 271; *Sawyers v. Cator,* 8 Humphreys (Tenn.), 256.

In *Bustard's case,* 4 Rep., 121, it was adjudged: "That in every exchange, lawfully made, this word *excambium* implies in itself *tacite,* a condition and a warranty; the one to give reëntry, the other voucher and recompense, and all in respect of reciprocal consideration, (188) the one land being given for the other; but it is a special warranty, for upon the voucher by force of it he shall not recover other land in value, but that only which was given in exchange, for inasmuch as the mutual consideration is the cause of the warranty, it shall, therefore, extend only to land reciprocally given, and not to other land; and the same is law in the case of partition."

Mr. Rawle, at p. 488, thus states the law where, instead of pursuing their remedy, in the case of parceners, by writ, and in the case of joint tenants and tenants in common, according to the statutes, they partition voluntarily by deed:

If the parceners, instead of making partition by writ, as by law they were compellable to do so, chose voluntarily to make partition by deed, as of course joint tenants and tenants in common could always do, the estate in coparcenary was, of course, at an end; and as each of them had thus, as in the case of alienation, "altogether dismissed herself to have any part of the tenements as parcener," the warranty was gone. Then when the statute of Henry VIII. gave to joint tenants and tenants in common (who before could only partition by deed) the right to have partition by writ "in like manner and form as coparceners," to make the analogy perfect, it provided that after partition each of them and their heirs (but not assigns) should have aid of the other to deraign the warranty paramount and to recover for the rate "as is used between coparceners after partition made by the order of the common law"; and, still to keep up the analogy, it was held, after this statute had been in force for more than a century, that if joint tenants, who thus equally with coparceners were compellable to make partition, chose voluntarily to make partition by deed, the warranty was gone; their right to deraign the warranty paramount and to recover for the rate was their right by statute as an incident to the remedy it afforded; they had not pursued that remedy, and they could not, therefore, have that right. Nothing

could be more logically consistent than the whole of this system. And Coke, commenting upon Littleton's statement of the law, puts this case: "Hereupon it followeth, that if one parcener maketh a feoffment in fee, and after her feoffee is impleaded and vouched the feoffor, she may have aid of her coparcener to deraign a warranty para- (189) mount, but never to recover pro rata against her by force of the warranty in law upon the partition; for Littleton here saith that by her alienation she hath dismissed herself to have any part of the land as parcener, and without question as parcener she must recover pro rata, upon the warranty in law, against the other parcener."

It will be seen from this recital of the law, as taken from Littleton, Coke, Cruise, and the old reports, as well as from the most modern cases and recent authors whose works are of standard authority, exactly what the law is upon this important subject; and I commend the case of *Sawyer v. Cator,* in which *Chief Justice Turley* delivered a learned opinion, to a careful perusal, as containing a most lucid historical statement of the law, and further because he deals with our early law, before the separation of the two States, which, as we know, prevails in Tennessee. The clear net result is that, as incident to a judgment in partition, there is an implied warranty of title. If partition was not compulsory now as to all tenants, but could be had only by voluntary deed, any tenant, by withholding his consent, could require an express warranty, and as his case should not be worse by the laws of compulsion, for this reason he should, in the latter case, have an implied warranty; and so is the law. I have not cited *Carter v. White,* 134 N. C., 466, or any other of our decisions, as yet, because I believe that the law can be shown to be with the plaintiff without them.

It will be noted that in the passage quoted above from Rawle on Covenants, the statute of Henry VIII. provided that, after partition, each of the tenants and their heirs (but not assigns) should have benefit of the implied warranty; but while, at the separation of the colonies from England, we adopted these statutes as part of our jurisprudence, the language was amended by Acts 1787, ch. 274, sec. 1; Acts 1789, ch. 309, and Revised Statutes, ch. 85, sec. 1, so as to provide that the "return and appropriations" of the commissioners appointed to make the partition, "when certified and enrolled, shall be binding and valid in, among, and between the claimants, their heirs *and assigns forever* (italics mine); and this is our law to this day. Revised Code, ch. 82, sec. 1; Acts 1868-9, ch. 122, sec. 6; Code, sec. 1897; (190) Revisal (1905), sec. 2495. And herein is to be found the provision of our law applicable when this partition was made, and which the Court has overlooked. I do not doubt some other courts have held

that judgment in partition only ascertains the several shares, being a possessory action, and leaving the title as it found it; but in Freeman on Cotenancy and Partition, sec. 532, it is said: "The preponderance of the authorities is probably in favor of the theory that as each cotenant who has been evicted after a compulsory partition may call upon his cotenants to contribute their proportions of his loss, each of them is, by his obligation of warranty, estopped from asserting any independent adverse title to the purparties assigned to the others." And again: "In the conveyance of a fee-simple estate in lands, no warranty is implied, because there is no tenure. In partition of land, a warranty is implied, because of the *privity of estate." Doe v. Prettyman,* 1 Hous. (Del.), 334; *Whittemore v. Shaw,* 8 N. H., 397; *Venable v. Beauchamp,* 3 Dana, 325; *Walker v. Hall,* 15 Ohio St., 362. "The judgment of partition establishes the title to the land which is the subject of the partition, and, in an action of ejectment upon an adverse possession, or an adverse title existing at the date of the partition, it is final and conclusive at law upon all parties to the record, and on all persons holding under them afterwards." *Clapp v. Bromagham,* 9 Cowen, 569. "One of the issues which such a judgment ordinarily determines is, that the parties were in possession of the property, holding it as cotenants. Hence, a party to a partition suit is estopped from showing that at the time of the partition he was holding any part of the premises in severalty adversely to his cotenants, or that the petitioner had no interest in the property." *Reese v. Holmes,* 5 Rich. Eq., 540; *Muse v. Edgerton,* Dud. Eq., 179; *Burghardt v. Van Denson,* 4 Allen, 376. Freeman on C. and P., secs. 530 and 531, is authority for these propositions. He also says at section 530: "But if a judgment in partition is not conclusive upon the title of the parties, this is only because the title was not, according to the law of the State where the partition was made, within the issues made or tendered in
(191) the action. The rule that a judgment is conclusive upon all the issues determined by it is not less applicable to judgments in partition than to judgments in any other form of action," and he puts our State in that class, citing *Mills v. Witherington,* 19 N. C., 433, as the leading case with us; and it does so decide—fairly and squarely—that the judgment in partition is conclusive of the title, and that the parties are by it estopped, as to each other, to deny the title; and not only the parties, but "their heirs and assigns." The opinion in *Mills v. Witherington* was written by *Judge Daniel,* who was profoundly learned in the common law; *Chief Justice Ruffin* and *Judge Gaston* concurring with him. It is a settled precedent, as we will presently see, involving the title to real property in our State, and must be to us the

authoritative construction of the common law as enlarged or broadened in its scope by our statute. It approves *Clapp v. Bromagham, supra.* In the course of the opinion, *Judge Daniel* says: "The Legislature, by the act of 1789 (Revisal, ch. 309), gave to tenants in common of real estate the *petition* for partition, in the place of the ancient *writ* of partition. The final judgment at common law in a writ of partition runs thus, *ideo consideratum est quod partitio prædicta firma et stabilis in perpetuum teneatur.* Thomas's Coke, 700. And it was conclusive on the parties and all claiming under them. (*Ibidem,* note 55.) In *Clapp v. Bromagham,* 9 Cowen's Rep., 569, the Court say that the judgment in partition, it is true, does not change the possession, but it establishes the title, and, in an ejectment, must be conclusive. The judgment of the court, adjudging a share to belong to one of the parties, and allotting it to him to hold in severalty, must be sufficient to authorize him to recover it as to all the parties to the record; the judgment is, as to them, an estoppel. The act of 1789 gives the same force to a final judgment in a petition for partition of real estate. It declares that the division, when made, shall be good and effectual in law to bind the parties, their heirs and assigns."

Commenting on that case, *Judge Battle,* who annotated it, says that the doctrine of estoppel, as laid down in it, is clearly established. He cites *Armfield v. Moore, ibid.,* 168, and then adds that the judgment is binding and conclusive, not only on a party to the pro- (192) ceedings, but on a purchaser from him; and he also cites *Coble v. Clapp,* 54 N. C., 173, which is to the same effect as the *Mills case,* and holds that the judgment, as to the title, "is binding on all the parties to it and their privies," the plaintiff in the suit being a privy in estate by his purchase from one of the tenants. *Mills' case* is affirmed in *Latta v. Morrison,* 23 N. C., 149; *Long v. Orrell,* 35 N. C., 123; *Stewart v. Mizell,* 43 N. C., 242; *Turpin v. Kelly,* 85 N. C., 399; *Grantham v. Kennedy,* 91 N. C., 148.

Chief Justice Ruffin, in *Long v. Orrell, supra,* says that the estoppel arising out of a partition is conclusive as to the title. In that case one of the parties had conveyed the share "derived by her under the partition." In *Stewart v. Mizell, supra,* the same judge says that the judgment at law is conclusive as to the estate in common in the thing partitioned, and in respect to the share to which each tenant is entitled, and to the parcel allotted to each in severalty. He also says that where the tenants were alleged to be the owners of the land in common, and there is an allotment of shares in severalty, the judgment is conclusive and the partition is in itself a good title, as between the parties to it, in any dispute among them. We have seen by the statute, and the

authorities construing it, that it is also binding upon the "heirs and assigns" of the petitioners. To the same purport is *Turpin v. Kelly, supra,* opinion by *Justice Ashe. Grantham v. Kennedy, supra,* approves the *Mills case,* and *Justice Merrimon* says: "The decree in the partition proceedings mentioned is conclusive upon all parties to it, and it estops the plaintiffs in this action to deny the title of the defendant, Helen Kennedy, to that part of the land allotted to her, if the said proceedings are valid. *Mills v. Witherington,* 19 N. C., 433; *Stewart v. Mizell, supra; Gay v. Stancell,* 76 N. C., 369."

In the leading case of *Armfield v. Moore,* 44 N. C., 157, *Judge Pearson* says: "Now, in effect, partition amounts to a mutual transfer of title to different parts; that is, one passes his right to that, to be held in severalty, in consideration of a transfer by the other to this, to be
(193) held in severalty." And in *Dixon v. Warters,* 55 N. C., 449, *Judge Manly* says: "The slave in question had been a part of the estate of the said Benajah, and was decreed, upon the final hearing of the bill, to belong to the plaintiff. The parties are unquestionably estopped by the decree. The rights of property, as declared under it, are conclusive upon them, until it is reversed; *res adjudicata est, et interest reipublicæ ut finis sit litium.* . . . Where a decree or judgment of court is rendered, declaring rights of property in tenants in common of things capable of division, and a partition is ordered, made and reported, an inchoate right of property is raised, which the subsequent judgment of confirmation perfects. In such case the title has relation back to the division, and starts from that time." And this is the way *Judge Battle* puts it in *Branch v. Goddin,* 60 N. C., 493: "If the plaintiff's testator had been a party to the suit for partition, then he would have been estopped by the record from setting up any title to the slaves."

Speaking of the effect of an estoppel by record (for there are three, the others being by writing or deed and by matter *in pais*), *Judge Bynum* said in *Gay v. Stancell,* 76 N. C., p. 374: "The ground of the rule, that in a subsequent action you are not permitted to go behind the judgment deciding the same point between the same parties, is that otherwise there would be no end of litigation. It may sometimes operate apparent hardships, but not more so than the statute of limitations and other rules of repose, the necessity and convenience of which all acknowledge. *Duchess of Kingston's case,* 2 Smith L. C., 435 (note)." There are many cases in other jurisdictions to the same effect. The rule, that a judgment is conclusive on all the issues determined by it, applies as well to judgments in partition as to judgments in any other form or kind of actions: *Flagg v. Thurston,* 11 Pick., 431; *Ihmsen v. Ormsby,* 32 Pa. St., 200; *Foxcroft v. Barnes,* 29 Me., 129;

Robb v. Aiken, 2 McCord's Ch., 125; *Herr v. Herr,* 5 Pa. St., 428; *Burghardt v. Van Deusen,* 4 Allen, 375; *Whittemore v. Shaw,* 8 N. H., 397; *Clapp v. Bromagham,* 9 Cowen (N. Y.), 569; *Forder v. Davis,* 38 Mo., 115; *Doe v. Prettyman,* 1 Houst. (Del.), 334. (193) Hence, whenever the title is in issue, it is settled by the judgment.

In most of the States the action of partition has ceased to be a mere possessory action, and has come to involve the right as well as the possession. After a review of all the authorities, the better and now generally accepted doctrine is that, as each tenant after a compulsory partition, if evicted, can call on his cotenants to contribute their proportion to his loss, each is estopped from asserting any independent adverse title to purparties assigned to the others. *Venable v. Beauchamp,* 4 Dana, 321 (28 Am. Dec., 74, and note); *Walker v. Hall,* 15 Ohio St., 362. These cases are exactly in line with *Mills v. Withington,* 19 N. C., 433. In *Venable v. Beauchamp,* 4 Dana, 321, it was held, "One parcener, joint tenant or tenant in common, cannot purchase in an adverse claim to the land, for his exclusive benefit; still less can he use it to expel his cotenant. And because of the reciprocal warranty, implied by law, as between the parties to a partition, their relation to each other, as to the title, remains the same after the partition as before; so that tenant of one parcel cannot place himself in an attitude hostile to his former cotenants and the common warrantor. To every partition of land the law annexes an implied warranty. And though this warranty is, in some respects, limited, it extends to the whole land, and estops each partitioner from asserting any adverse claim to any parcel of the land allotted to another. A and B are tenants in common. B sells his interest to C by executory contract. A and C agree upon a partition, and deeds of partition are accordingly made by A and B (holders of the legal title), and then B conveys his part to C, in compliance with his previous executory contract; in equity, C shall be considered as standing in B's place precisely and in all respects, subject to the same liability as warrantor to the former cotenant, A, against whom he can set up no adverse claim to the land. Where one or two cotenants purchase an adverse claim to the land, it operates for the benefit of both." See, also, *Jones v. Stanton,* 11 Mo., 433; *Burghardt v. Conrad,* 86 Mass., 374; *Whittemore v. Shaw,* 8 N. H., 393.

Lord Chancellor Redesdale said in *Whaley v. Dawson,* 2 Sch. & Lefroy, at p. 367, that partition at law and in equity are different things. The first operates by the judgment of a court of law, and (195) delivered up possession in pursuance of it, which concluded all the parties to it. Partition in equity proceeds upon conveyances to be executed by the parties; and if the parties be not competent to execute

the conveyances, the partition cannot be effectually had. And in *Gay v. Parpart,* 106 U. S., 679, the same principle was thus stated: The difference between a judgment and writ of partition at common law, and a partition by decree in chancery as it affects the title, is that the former operates by way of delivery of possession and estoppel, while in the latter the transfer of title can be effected only by the execution of conveyances between the parties, which may be decreed by the court and compelled by attachment. These two cases will explain *Nicely v. Boyles,* 4 Humphreys, 177, opinion by *Chief Justice Turley,* who gave the judgment also in *Sawyers v. Caton, supra.* The case of *Nicely v. Boyles* is also reported in 40 Am. Dec., 638, with a valuable note, which sustains by the great weight of authority the doctrine of *Mills v. Witherington, supra,* and places this State with those that hold the partition to be an estoppel by record, with the same force and conclusive effect as any other estoppel by judgment. "When the same matter is directly in question, and the judgment in the former suit upon the point, it will then be as a plea, a bar, or as evidence, conclusive upon the parties. 2 Phil. Ev., 13. So a judgment is conclusive upon a matter legitimately within the issue, and necessarily involved in the decision. 4 Cow., 559; 8 Wend., 9; C. and H. notes, part 2, note 22." *McCall v. Carpenter,* 59 U. S., 302.

There should be no prejudice against an estoppel of this kind, or of any sort. *Judge Pearson* shows the great necessity for the doctrine in the administration of justice, by saying, in *Armfield v. Moore,* 44 N. C., at p. 161: "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 (196) 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 of 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 question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed." It is a rule of law founded upon one of its wisest maxims, *Interest reipublicæ ut sit finis litium,* which means that

it is the interest of the State that there should be an end of strife and litigation. When a party has had a fair opportunity to assert his rights, neither he nor any one claiming in privity under him should be heard to raise the question again for decision. All the law gives the party is his day in court.

Now the case of *Carter v. White,* 134 N. C., 466, falls naturally under consideration. The case decides two propositions:

1. That the effect of the judgment in the ejectment suit, ascertaining that plaintiffs were the owners of fifty-three fifty-fourths of the land, was to leave the parties in possession as tenants in common, with the interest adjudged by the court upon the verdict; and this is the estoppel referred to by *Justice Connor,* who wrote the opinion, in the extract therefrom which we find in the opinion of the Court in this case, as follows: "In the view which we take of the effect of the partition proceeding, it is not necessary to decide the effect of this estoppel upon an after-acquired outstanding title, and we forbear to express any opinion thereon." He was not referring to the estoppel of the judgment in partition, as might be inferred from the Court's opinion in the case at bar. And here is where I think the Court misapprehends the legal effect of the decision in *Carter v. White.* Nor is the extract taken from the brief of plaintiff's counsel pertinent or accurate. The counsel (197) had his mind also on the judgment in the ejectment suit, for the effect of that, as an estoppel, is the only question referred to by *Justice Connor* in that extract. We have no such question here, and, besides, defendant's counsel were alluding to what *Justice Connor* said merely to emphasize the fact that there is no outstanding paramount title in this case, and, therefore, it is unnecessary to argue as to the effect of an estoppel, in any view, upon such a title; and that is all. The Court omits all reference, as I think, to the vital part of the decision in *Carter v. White*—pretermits it or overlooks it—and this, it seems to me, has resulted in a misinterpretation and misunderstanding of the case.

2. The second proposition decided in the *Carter case* was, that the judgment in the partition proceeding raised an implied warranty of title as between those who had formerly been tenants in common, and further, that the said judgment also operated as an estoppel of record, and an implied warranty, by way of rebutter, not only against the parties to the suit, but also against his heirs and assigns, and if not against their assigns, certainly as against their heirs. But the statute, Revisal, sec. 2495, fastens the estoppel upon their assigns, as we have seen. The case of *Carter v. White* recognizes the implied warranty, though, in some respects, special, as binding and conclusive upon the parties and their heirs as if it had been express. The effect of a warranty of title is to estop or rebut the party who made it, and his heirs, or the one who has

succeeded to his title, from denying the title of the party to whom the warranty was given, and the benefit of the warranty passes to the heirs and assigns of the warrantee, and its burden falls upon the heirs and assigns of the warrantor. The last proposition, that the heirs and assigns of the warrantor are bound by the warranty, even though not named therein, and that the benefit of the warranty passes to the heirs and assigns of the warrantee was expressly decided in *Wiggins v. Pender,* 132 N. C., 628. The warranty runs with the land. The legal effect of this implied warranty, operating as a rebutter, and of the "solemn (198) judgment in partition" as an estoppel of record, is clearly stated by *Justice Connor* in the *Carter case,* and the statement supported by the highest authority, such as Shep. Touchstone, 2 to 6, 204-6; Rawle on Cov. for Title, 402; *Rich v. Holmes,* 5 Rich Eq., 540; Freeman on Cotenancy, sec. 533; Washburn on Real Property, 723; *Venable v. Beauchamp,* 3 Dana, 321; *Forder v. Davis,* 38 Mo., 107. In the last cited case the Court said: "In reference to this plaintiff, we think the judgment operates as a bar against him at law, not only in respect of the estate and title which he then had, but in respect of any title which he might thereafter acquire. There is here no covenant of warranty by deed; but there is such a thing as an estoppel *in pais,* and by matter of record, which, like an estoppel by deed, may have the effect to pass an after-acquired title, by operation of law. The partition establishes the title, severs the unity of possession, and gives to each party an absolute possession of his portion. A partition is something altogether the act of the parties rather than the act of the law. This binding and conclusive judgment is, in its very nature, very much like the old livery of seizin, under a feoffment, which was matter *in pais,* or like a fine, or a common recovery which was a matter of record, and these ancient assurances were of that solemnity and high character that they not only passed an actual estate, and divested what title the party then had, but operated by way of estoppel to pass all future estate and possibility of right which he might thereafter acquire; and we see no good reason why this solemn judgment in partition, which the statute declares shall be firm and effectual forever, should not be allowed to have the same operation against all parties to the record."

The courts, in construing 31 Henry VIII and 32 Henry VIII, which provided that the judgment in partition should be firm and effectual forever, held that it bound and concluded all parties to the record and their privies in blood; and when our statute, and some of the statutes in other States, extended the effect of it to the assigns of the parties of record, they necessarily became bound in the same manner and to the same extent as the heirs and their privies had been bound under the

statutes of Henry VIII. Of course as a general rule, no man is estopped by a deed which he takes from another, because the (199) grantee holds adversely to the grantor, but when his grantor has made a warranty or is himself estopped by a judgment with reference to the land, both the warranty and estoppel run with the land, that is, follow it into the hands whomsoever may purchase it, and the latter becomes as much charged with the warranty and liable upon it, and as much affected by the estoppel, as his grantor. He assumes the burden of both warranty and estoppel when he buys, because they are annexed to and inseparable from the land. *Wiggins v. Pender, supra; Hallyburton v. Slagle, supra;* especially at pages 949 and 950.

Justice Connor did not intend, in *McCollum v. Chisholm,* 146 N. C., 24, to change the doctrine so clearly stated in *Carter v. White,* but was merely distinguishing the two cases when he used the language quoted in the opinion in this case. The *McCollum case* presented a decidedly different question from that involved in the *Carter case.* The question there was whether the estoppel of the judgment in the partition, the effect of which was firmly and definitely fixed, would extend to land held by the same parties in common, but not embraced by the pleadings or issues in the partition suit. There could be but one answer to this question; nor was the judgment an estoppel as to the interests of any of the parties but Colonel Simmons, because the extent or quantity of those interests was not within the issue.

The cases of *Harrison v. Ray,* 108 N. C., 215, and *Harrington v. Rawls,* 131 N. C., 39, cited by the Court, have no bearing upon the case. They were voluntary partitions by deed, and no warranty was implied, as each party had the opportunity to demand an express warranty when the division took place, and having failed to do so, the law will not aid him by implying a warranty. He simply waived the warranty by not asking for it. The law aids the vigilant and not those who sleep upon their rights. It is very different when the partition is compulsory and is made *in invitum* or by judicial procedure; and so say all the books.

The expression, that the partition "does not create or manufacture any title," was used by *Justice Manning* in *Jones v.* (200) *Myatt,* 153 N. C., 229, and he was there alluding to a partition by deed, for he says: "The partition was effected by deed, and we think it was competent to be so done" (p. 229). The cases he cites for the proposition were of the same kind—partitions by deed. The first quoted expression is used elsewhere, and its meaning fully explained. "The truth is, that a judgment in partition is as conclusive as any other. It does not create nor manufacture a title, nor divest the title of any one not actually or constructively a party to the suit; but it operates by way of estoppel." 30 Cyc., 310. The clear effect of the estoppel and the

warranty is to prevent any party to the partition suit and his heirs and assigns from settling up a new title, whenever acquired, as against another party to the suit, or his heirs or assigns; and it is not material to inquire whether any new title is "created or manufactured" or not. The question does not turn upon that, but rests for its solution upon the warranty and the estoppel, and their legal effect or operation, which is well settled. *Hallyburton v. Slagle, supra; Wiggins v. Pender, supra; Armfield v. Moore, supra; Van Rensselaer v. Carney,* 11 Howard (U. S.), 297; *Hazensick v. Castor,* 53 Neb., 495; *French v. Spencer,* 21 Howard (U. S.), 240; 11 Am. and Eng. Enc. (2 Ed.), p. 403; *Ryan v. U. S.,* 136 U. S. 68; *Cuthrell v. Hawkins,* 98 N. C., 203; *Johnson v. Farlow,* 35 N. C., 84; *Eddleman v. Carpenter,* 52 N. C., 616. The authorities cited by the Court, such as Bigelow on Estoppel (5 Ed.), p. 345; *Blight v. Rochester,* 7 Wheaton, 534, and the other cases associated with it, refer to deeds taken by a party where there was no estoppel or warranty running with the land, and are clearly distinguishable from the case at bar. Bigelow on Estoppel, p. 29, sec. 4, and *Embrey v. Palmer,* 107 U. S., 3 to 11, refer to partitions under the statutes of Henry VIII, and if intended to limit the effect of the judgment in partition, they are in direct conflict with *Carter v. White,* and the very numerous authorities cited in its support. In the Indiana case cited in the opinion, the mortgage under which one of the tenants claimed covered the entire interest in the land, and the partition was, of course, made subject to it,
(201) the equitable title being still in the tenants, and sufficient to support the partition. The court was right in holding that there was no estoppel in such a case. We have held the same thing. And so it is with most, if not all of the cases relied on: they have peculiar facts which call for the application of some other principle than the one we are discussing, though it may have arisen incidentally and received some notice. In *Forder v. Davis, supra,* it is said: "No party to a partition can be permitted to assert an adverse title for the purpose of ousting another party from the portion allotted to him in the same partition, whether it be acquired before or after the partition is made." *Venable v. Beauchamp,* 3 Dana, 324, is to the same effect, and it is there held that, "One tenant in common cannot purchase a superior outstanding title and afterwards use it for the purpose of expelling his cotenant from his share," and a long list of cases will be found in the notes to that case, as reported in 28 Am. Dec. (Extra Anno.), at p. 83, which decide the same thing. *Jones v. Stanton,* 11 Mo., 433, is a case directly in point. Judge Freeman says that this doctrine is not confined to the original parties, but extends to those holding under them. Freeman on C. and Part., p. 644, citing *Clapp v. Bromagham,* 9 Cowen (N. Y.), 569; and this is so by the express words of our statute as to assigns, and it is so

held in *Mills v. Witherington,* citing the same case. "The Act of 1789 gives the same force to a final judgment in a petition for partition of real estate (as an estoppel), for it declares that the division, when made, has been good and effectual in law to bind the parties, their heirs and assigns." The plaintiff in that case (*Mills v. Witherington*) claimed as does the defendant here, under a grant from the State, but he was held to be estopped.

Why should we go into other jurisdictions to find authorities opposed to our own decisions, if they are in conflict, when the law of real property in this State must be fixed by our own decisions? It is the *lex loci rei sieæ* that governs in such cases. Every State decides the question for itself, and our people have relied on our cases as settling the law of titles. The doctrine of *stare decisis,* therefore, applies most strongly. *Hill v. R. R.,* 143 N. C., 539.

Justice Hoke says in *Smith v. French,* 141 N. C., 1, that when our decisions involve a rule of property, they should stand for (202) law to us (*stare decisis*). But the case of *Owen v. Needham,* 160 N. C., 381, is an authority for my contention. It is true that Alexander Jordan, under whom the plaintiff claimed, was not allotted any land in the partition, but he was a party to the suit and was held to be estopped to deny the title of defendant, who was allotted a share, under *Armfield v. Moore,* 44 N. C., 161, with a strong intimation by the Court that if Alexander Jordan had been a party to the partition in his own right, claiming as a tenant in common and not in right of his wife, the case of *Carter v. Wright, supra,* would apply and also estop plaintiff. It must be observed that in *Owen v. Needham* plaintiff was claiming, by purchase from Alexander Jordan, under a grant from the State, as an outstanding superior title; and yet he was held to be estopped. It can make no difference in this case, or in that, how the party is estopped, whether under *Carter v. White* or *Armfield v. Brown.* One estoppel is as good and effective as the other, and just as conclusive and far-reaching.

It is suggested, however, that the title should have been actually litigated in the partition suit, in order to constitute an estoppel upon the parties or their privies, or to be a *res judicata.* This is contrary to the universal and elementary rule of pleading and procedure, for it is well settled that, "A judgment by confession or consent may constitute *res judicata,* for such a judgment is quite as final and conclusive between the parties and their privies as any other judgment, and a judgment by default is just as conclusive as to the rights of the parties before the court as a judgment on issue joined, and consequently the doctrine of *res judicata* applies to such a judgment with the same validity and force as to a judgment rendered upon a trial of issues." It is, therefore, not necessary, says a great law writer on this subject, that the judgment

should have been awarded upon the decision of an issue, for where it is given for want of a plea, which is judgment by *nil dicit,* or where is is one by *non sum informatus,* or by confession, or by default, the conclusiveness of it is the same as if the fact had been actually con-
(203) tested by plea or traverse. Stephen on Pleading (9 Am. Ed. by Heard), pp. 109 and 195. This he calls estoppel by record. There was no answer in *Mills v. Witherington, supra,* and consequently no actual litigation of the title and no specific reference to it in the pleadings. And there is another principle equally as well established in pleading, that whatever is necessarily implied is traversable as much as if it were expressed, and this was said in regard to the question of sole seizin. Stephen on Pl., marg. p. 196. In this case the parties to the former suit alleged that they were "owners as tenants in common." It was not necessary to allege that they were "owners in fee," as the law implied such an estate, nothing to the contrary appearing. It will be found that the authorities hold that the usual meaning expressed by the word "owner," without any qualification, is the person who has the absolute title to the property as distinguished from one having only a limited interest, though the latter may be considered the owner if the context shows that the word was so used. Standing alone, it means, in law, and especially in pleading, the one who is the real owner thereof against the world at large—the one whose right and title thereto are paramount. This is the natural and obvious meaning, without resorting to subtle and forced constructions for the purpose of either limiting its import or extending its operation. The Court in *Directors v. Abila,* 106 Cal., 355-363, said that "where a limited signification was not indicated, the word 'owner,' in its general sense, means one who has full proprietorship in and dominion over property. In Bouvier's Law Dictionary, it is said that: 'The word "owner," when used alone, imports an absolute owner.' In *Johnson v. Crookshanks,* 21 Or., 339, which was an action of ejectment, the point was as to the meaning and sufficiency of an averment in the complaint that plaintiff was 'the owner' of the demanded premises. The Court held it sufficient, and said: 'This is undoubtedly an allegation of title in plaintiff. The word "owner" has a definite meaning, and is one who has dominion over a thing which he may use as he pleases, except as restrained by law or by agreement. (Anderson's Law Dictionary, title "Owner.") The precise meaning, perhaps, depends upon the nature of the subject-matter, and the connection in
(204) which it is used; but when applied to real estate, without any qualifying words, in common as well as legal parlance, it *prima facie* means an owner in fee.' (Authorities cited)." So in *Atwater v. Spalding,* 86 Minn., 101, the Court held that to require the particular estate to be alleged in regard to the land would be altogether too narrow

and technical for pleading, the word "owner" having a comprehensive meaning. It then says: "Owner, according to Black's Dictionary, is the person 'in whom is vested the ownership, dominion, or title of property.' Webster defines an 'owner' as one who owns; a rightful proprietor; one who has the legal or rightful title, whether he is the possessor or not." It includes the highest as well as the lowest or most precarious kind of title, and is referable to the former, unless some inferior one is designated. *McLain v. Maricle,* 60 Neb., 353; *Turner v. Cross,* 83 Tex. 218; *Hardin v. R. R.,* 113 Ga., 357; *Smith v. Ferris,* 6 Hun, (N. Y.), 553; 4 Scammon, 258; *R. R. v. Matthews,* 16 Minn., 341; *Merritt v. Kewanee,* 175 Ill., 537; *Bowen v. John,* 201 Ill., 292; *Garver v. Insurance Co.,* 69 Iowa, 202; *Gravlee v. Williams,* 112 Ala., 539; *Ruggles v. Nantucket,* 11 Cush., 433. The Court said in *Frank v. Arnold,* 73 Iowa, 370, that "there is no distinction between 'ownership' and 'title' as applied to real estate, but the 'owner' is the one who has the title"; and in *Bowen v. John, supra,* that "the term 'owner,' when applied to real estate, means one holding an estate in fee simple," citing *Insurance Co. v. Manufacturing Co.,* 1 Gilm., 236. See 26 Am. and Eng. Enc. (1 Ed.), p. 567, and note.

But even if the word "owners" had not been used in the petition for partition, and the allegation had simply been that they were tenants in common, it would just as well have involved the title, for that is exactly what *Mills v. Witherington,* 19 N. C., 433, decides. I have examined the record of that case, and found that the petition alleged merely that the parties were tenants in common, without any suggestion of ownership or title of any kind, otherwise than was implied by law from the allegation as made. *Judge Gaston* so states the case. A grant for
that part of the land which had been assigned to the defendant (205)
Witherington in severalty was obtained, and plaintiff's lessor
claimed under it. The Court held, as we have already shown, that "while judgment in partition does not change the possession, it establishes the title, and, in ejectment, must be conclusive on the parties and all claiming under them." This, it is said, was so at common law. And the Court adds: "The judgment is, as to them, therefore, an estoppel, and the act of 1789 gives the same force to a final judgment in a petition for partition of real estate. It declares that 'it shall be good and effectual in law to bind the parties, their heirs and assigns.'" It has been settled in the law too long for any question to be now raised, that estoppels by record or judgment are binding and conclusive, not merely on the original parties, but that privies in estate, as the feoffee, lessee, and so forth; privies in law, as the lords by escheat; tenant by the curtesy; tenant in dower; the incumbent of a benefice, and others that come in by act in law, in the *post,* shall be bound by and take advantage of estoppels. Co. Lit., 352a; *Outram v. Morewood,* 3 East, marg. p. 353.

There is another view of this case. In the partition, it was adjudged that the parties were the owners of the land as tenants in common. This much is conceded, and it can make no difference whether they were tenants in common in fee, for life, or for years; the estate, whatever it was, is still outstanding, as there is no evidence that it is terminated. If they were owners of any estate at that time (1815), the State was not the owner, but it had parted with its title, for no person can be said to own lands unless he has, in some way, by grant or otherwise, acquired the State's title. It is impossible for it to be so. The title being out of the State, it follows that the State could not, by the act relied on, pass title to the Board of Education, without office found, or by any proceeding which deprived the owner of his land without a hearing, or without due process of law, unless we are disposed to overrule *Parish v. Cedar Co.*, 133 N. C., 478, and *Lumber Co. v. Lumber Co.*, 135 N. C., 743, which distinctly held that a similar act was unconstitutional and void, and that the Legislature could not, by such a statute, divest the property of the citizen. The cases were well consid-
(206) ered, decided by a unanimous Court, and there is absolutely no reason why they should not stand as the law. To reverse them would unsettle innumerable titles in the State, not only of swamp, but of other lands.

The result is that, (1) Defendant is rebutted by the warranty to claim the land under his deed from the Board of Education, if otherwise it would convey a paramount title. (2) That he is estopped by the judgment to assert any such claim. (3) That as it has been adjudged in the partition proceeding that the parties thereto were the owners, as tenants in common, of the land in 1815, the State could not transfer that ownership to the Board of Education without giving the parties notice and an opportunity to be heard, even if the taxes on the land had not been paid; and the act of the Legislature purporting to do so is, therefore, inoperative, it being void. (4) That defendant, as assignee of Lot No. 12, stands in no better position than the original owner, as the statute operates not only upon the parties, but also upon their "heirs and assigns."

I conclude that to enter a nonsuit would be erroneous, and that there is no error in the defendant's appeal. A new trial should be granted in the plaintiff's appeal, as the judge should have charged the jury that the testimonial clause in the deed, reciting that the seal had been affixed to it, was not merely evidence of the fact, but raised a presumption that the seal was actualy affixed. *Heath v. Cotton Mills*, 115 N. C., 202.

HOKE, J., concurs in dissenting opinion.

Cited: Clark v. Aldridge, post 332, 333; *McKimmon v. Caulk*, 170 N. C., 56; *Probst v. Caldwell*, 172 N. C., 597.

POPE & BALLANCE v. RIGHTER-PARRY LUMBER COMPANY.

(Filed 7 May, 1913.)

Bills and Notes—Conditional—Reference to Other Papers—Non-negotiable—Equity—Interpretation of Statutes.

Where a promissory note given for the purchase price of timber refers to a deed and recites that it is "subject to the provisions of said deed," it is conditional in form, and being dependent in its provisions upon an outside paper, it is nonnegotiable and subject to the equities between the original parties, in the hands of a purchaser. Revisal, sec. 2151.

APPEAL by intervenor, J. F. Sherron, from *Ferguson, J.,* at (207) November Term, 1912, of HARNETT.

Clifford & Townsend for plaintiffs.
Sinclair & Dye for J. F. Sherron, intervenor.

CLARK, C. J. The appellant, J. F. Sherron, was permitted to intervene and assert his title to the $2,000 note signed by K. L. Howard, payable 1 January, 1911. There is evidence that he received it before maturity and for value. The note is worded as follows:

$2,000. DUNN, N. C., 15 January, 1909.

On 1 January, 1911, I promise to pay to the Righter-Parry Lumber Company, or order, two thousand dollars ($2,000), with interest from date at 6 per cent per annum; payable at the First National Bank of Dunn, N. C.

This note is for part of the purchase price of timber conveyed to the undersigned by the said company by deed of even date herewith; is secured by retention of the title to said timber by said company, and subject to the provisions of said deed.

K. L. HOWARD.

The jury found that the defendant broke his contract with the plaintiff, who under the terms of the deed was entitled to recover damages therefor. It is admitted in the case agreed that such finding was unexceptionable. The court refused to charge that this note was a negotiable instrument, and therefore that James F. Sherron was holder in due course and held the same free from all equities.

Revisal, 2151, specifies the requirements of a negotiable instrument. The second of these requirements is that it "must contain an unconditional promise or order to pay a sum certain in money." This note contains the following condition: "and subject to the provisions of said deed." The note being, therefore, conditional in form and dependent

in its provisions upon an outside paper referred to therein, was
(208) nonnegotiable, and his Honor properly so held. There is nothing in the provisions of Revisal, 2153 or 2154, which cures this defect or renders the note negotiable, and Sherron took it subject to all equities.

No error.

POPE & BALLANCE v. RIGHTER PARRY LUMBER COMPANY.

(Filed 7 May, 1913.)

Appeal and Error—Two Appellants—When Two Records Are Unnecessary—Practice.

Where there are two appeals by different parties in the same cause and on the same side, presenting exactly the same question, and they are not antagonistic to each other, only one record is required. Though separate records are sent up, it is, however, immaterial except as to unnecessary expense.

APPEAL by F. W. McCurdy, intervenor, from *Ferguson, J.*, at November Term, 1912, of HARNETT.

Clifford & Townsend for plaintiffs.
Sinclair & Dye for F. W. McCurdy, intervenor.

CLARK, C. J. The appellant, F. W. McCurdy, presents the same point upon another note, in the same cause of *Pope v. Lumber Co.*, above decided. The only difference is as to the amount of the note, which is $1,000.

We note that separate records were sent up in these two appeals. This was an unnecessary expense, as the appeals are in the same cause and present exactly the same question, though, of course, both parties should appeal. If not, the judgment is suspended only as to the one which appeals (*Rollins v. Love*, 97 N. C., 210); yet it was not necessary to send up separate records.

It is true that where both "parties" appeal, a transcript of the record must be sent up by each appellant, and the appeals must be docketed separately as distinct cases. This rule cannot be waived by consent of
counsel, and unless there are separate records, the case will not
(209) be heard. *Morrison v. Cornelius*, 63 N. C., 340; *Perry v. Adams*, 96 N. C., 347; *Jones v. Hoggard*, 107 N. C., 349; *Caudle v. Morris*, 158 N. C., 594. But this applies where both the plaintiff and the defendant appeal, and therefore present different exceptions, or

where the parties appealing, though on the same side, present distinct questions or are antagonistic to each other. It does not apply to this case, where the appellants are not antagonistic and present exactly the same question. However, it has worked no harm to send up two records beyond the unnecessary expense.

Upon the ruling in Sherron's appeal in this case we find in McCurdy's appeal also,

No error.

Cited: Hagaman v. Bernhardt, post, 382.

JAMES M. AYERS ET ALS. v. ISRAEL H. BAILEY ET ALS.

(Filed 7 May, 1913.)

1. Demurrer—Misjoinder—Multiplicity of Actions—Interpretation of Statutes.

Where it is alleged that the officers and chief stockholders of a bank, in order to merge with another bank, procured the indorsement of the papers in bank by the plaintiffs upon the agreement that the defendants would also indorse them, all assuming a pro rata liability therein, and that the defendants delivered these papers, many of which were worthless, to the other bank for the purpose of merger, but without having indorsed them as agreed; that the plaintiffs have been forced by judgment to pay off some of these indorsed papers in a large amount: it is *Held* that a demurrer for misjoinder of parties and causes of action is bad; for the subject-matter of the action and the parties being the same, a multiplicity of suits was prevented. Revisal, sec. 469 (2).

2. Demurrer—Misjoinder—Same Subject-matter and Parties—Torts—Equity.

Where the stockholders of a corporation sue its officers for damages for their mismanagement and negligence in accepting worthless paper, and inducing the plaintiffs to become indorsee thereon to their loss and damage, and in failing to indorse these papers themselves under an agreement to do so, the causes of action are properly joined, one sounding in tort and the other being to enforce an equitable right arising out of transactions connected with the same subject-matter.

3. Demurrer—Cause of Action—Misjoinder—Motion to Divide—Procedure.

A demurrer for misjoinder of causes of action in a complaint is bad, the procedure being by motion to divide them.

4. Demurrer — Good Faith — Answer Over—Procedure—Interpretation of Statutes.

Where a demurrer to a complaint is interposed in good faith, and overruled, the defendant is entitled to answer over. Revisal, sec. 506.

(210) APPEAL by plaintiffs from *Cline, J.*, at November Term, 1912, of MITCHELL.

Black & Wilson, Hudgins & Watson for plaintiffs.
W. B. Councill and A. H. Yount for defendants.

CLARK, C. J. The complaint alleges that the defendants were the officers of the Bank of Mitchell, and as such negotiated the merger of said bank with the Mitchell County Bank, and that as a part of the contract of merger and as a consideration and inducement thereto, they contracted with the latter bank that the defendants and plaintiffs, who were all stockholders in said Bank of Mitchell, should guarantee all notes, bonds, and instruments which were transferred by it to said Mitchell County Bank. That the plaintiffs, at the special request of the defendants, as stockholders entered into written agreement, together with one J. B. Boone, to guarantee all such paper and to be liable pro rata among themselves according to the number or value of the shares of stock held by them in the Bank of Mitchell. That the defendants, owning the greater amount of stock in said Bank of Mitchell, procured these plaintiffs to sign said agreement, upon an agreement with these plaintiffs that these defendants would join in said agreement and would be responsible pro rata according to the stock held by each of them, and would sign said agreement; but that, after obtaining the signatures of these plaintiffs to said agreement, as above alleged, they failed
(211) and refused to sign the same, and fraudulently delivered them to said Mitchell County Bank without their signatures. It is further alleged that these defendants, being the officers and chief stockholders in the Bank of Mitchell, and in sole control of the same, took for their own advantage, or by negligence in the discharge of their duties, paper which was not sufficiently secured, and, knowing that fact, transferred and assigned said uncollectible paper to the Mitchell County Bank, which has obtained judgment against these plaintiffs by reason of inability to collect said paper, in the sum of $6,393.58, which these plaintiffs have paid off pro rata (except W. L. Young, who has not yet paid), and this action is brought to recover of these defendants, on above grounds, the sums due the plaintiffs by the defendants.

The defendants demur because of alleged misjoinder of parties and misjoinder of causes of action. This contention, if sustained, would logically require that the plaintiffs, eight in number, should each bring his action against each of the three defendants, making twenty-four actions. This view was ably presented, but we cannot assent thereto. It is contrary to the entire spirit of our modern procedure (Revisal, 469), which forbids multiplicity of actions, and, besides, it would be almost impossible to adjust the rights of the parties unless they were

all before the court in one action. In *Pretzfelder v. Insurance Co.*, 116 N. C., 491, there were several insurance policies in different companies, the policies having been taken out at different times, but each containing a provision that the loss should be prorated according to the amount in the several policies. This Court held: "It is not only no misjoinder, but essentially proper, that all the companies should be made parties defendant. If each company should be sued separately, not only would the same propositions of law arise, and the same evidence be gone over, in five different actions at the expense of five times the amount of court costs and much needless consumption of the time of the court, but as the trial would be before five different juries, the loss might be assessed at five different amounts."

This case is stronger, for here there is only one contract or agreement, or at any rate only one transaction that is to be investigated. Besides, in this case there are eight plaintiffs and three defend- (212) ants, making a total of twenty-four trials of one subject-matter, which ought to be disposed of in one trial and with all the parties in interest, on both sides, represented. The principle laid down in *Pretzfelder v. Insurance Co.* has often been affirmed, among other cases, in *Cook v. Smith,* 119 N. C., 355; *Daniels v. Fowler,* 120 N. C., 17; *Weeks v. McPhail,* 128 N. C., 138; *Fisher v. Trust Co.,* 138 N. C., 242. Another case very much in point is *Smith v. Patton,* 131 N. C., 396, and there are very many others.

In *Morton v. Telegraph Co.,* 130 N. C., 299, relied upon by the defendants, there were three different plaintiffs, each suing in a separate right and upon a different cause of action. In *Cromartie v. Parker,* 121 N. C., 204, also relied upon by the defendants, the complaint set up separate causes of action against several parties, among whom there was no community of interests. But here the basis of action is an alleged agreement between the plaintiffs and defendants for a pro rata liability in guaranteeing certain paper of the bank, which was duly assigned, and apparently a further cause of action against these defendants for mismanagement and negligence as officers of the bank in accepting said worthless paper. *Solomon v. Bates,* 118 N. C., 320; *Caldwell v. Bates, ib.,* 325. These causes of action could be properly joined: *Benton v. Collins,* 118 N. C., 196, which holds that a cause of action in tort can be joined with one to enforce an equitable right where both arise out of transactions connected with the same subject-matter, which is here liability for the worthless papers taken by the defendants and guaranteed by the plaintiffs, it is alleged, at the request of the defendants under the agreement set out. See, also, *Daniels v. Fowler,* 120 N. C., 17.

There was not only no misjoinder, but they are all necessary parties. If there had been a misjoinder of causes of action, the action should

have been divided, and not dismissed. *Weeks v. McPhail,* 128 N. C., 138; Revisal, 476.

The demurrer should have been overruled. Should the court find that the demurrer was interposed in good faith, as it doubtless was, the defendants are entitled to answer over. Revisal, 506.

(213) Reversed.

Cited: Lee v. Thornton, 171 N. C., 214.

IN RE WILL OF M. SWAIM.

(Filed 7 May, 1913.)

Wills—Interpretation—Detached Sheets—Subscribing Witnesses—Evidence of Authenticity as a Whole.

It is not necessarily required for the validity of a will that several sheets of paper purporting to be one are physically attached together at the time the witnesses subscribe; and it is sufficient if it appears that the several sheets were written by the same person at the same time, were all read to the testator as his will, and were present at the time of the execution, and the papers themselves, by coherence and adaptation, and by their internal sense, bear evidence that, while separate, they were connected in the mind of the testator as a whole.

APPEAL by caveators from *Daniels, J.,* at February Term, 1913, of ALEXANDER.

A paper-writing purporting to be the last will and testament of M. Swaim was offered for probate before the Clerk of the Superior Court of Alexander County, and a caveat was filed thereto. The paper-writing consists of one sheet, of four pages of legal-cap paper, which pages are in the handwriting of J. L. Gwaltney, Esq., and one sheet of four pages, one page of which sheet was written in the handwriting of said Gwaltney, detached, the two sheets never having been fastened together.

Mr. Gwaltney testified that the paper-writing was in his handwriting; that it was signed in his presence and in the presence of Mr. Carson; they saw the testator sign the paper. The paper-writing was signed by Mr. Swaim and Messrs. Gwaltney and Carson, on the last sheet on the first page thereof, as subscribing witnesses. Mr. Gwaltney folded the paper, put it in an envelope, and, his recollection is, wrote across the envelope, "M. Swaim's Will," and then handed it to Mr. Swaim. The signature of Mr. Swaim is on the second or detached sheet.

(214) W. H. Carson testified that he was register of deeds, in 1911, for Alexander County, and his name, as appears upon the sheet of paper, was written by himself in Mr. Gwaltney's office, in the presence

of Mr. Swaim; he signed the paper in his presence and Mr. Gwaltney's. He signed the only sheet that he has any recollection of seeing; it was on the table. He does not remember there being any other sheet there; it might have been or it might not. Don't remember seeing but one sheet, and knows nothing about it except the sheet he signed.

Mr. Gwaltney further testified that both sheets were on the table at the time of the signing by the testator and the witness, and that he read both sheets to Mr. Swaim before he signed his name.

The paper begins: "I, M. Swaim, of the county and State aforesaid, being of sound mind and disposing memory, knowing the uncertainty of life and the certainty of death, do make, publish, and declare this to be my last will and testament in manner and form following, to wit:" and the last five lines on the fourth page of the first sheet are:

"ITEM 7. It is my will that after the bequest to my wife has terminated, that all my solvent credits, money and effects of every description (including the tract of land on"—and the first page of the second sheet is as follows: "which Finly Kerly now lives, containing 130 acres, more or less, and upon which he has been living since the death of my daughter Mag, after the death of the said Finly Kerly), shall be converted into money and so distributed among my children as to make them share equal in my effects.

"ITEM 8. I hereby constitute my trusted friend, James Watts, my lawful executor, to execute this my last will and testament, and every section and clause thereof, according to the true intent and meaning of the same.

"In witness whereof I have hereunto set my hand and seal, in the presence of J. L. Gwaltney and W. H. Carson, who, at my request and in my presence, signed their names as witnesses thereto. This July 1, 1911. All interlineations and erasures made before signing.

Witness: M. SWAIM [SEAL].
J. L. GWALTNEY.
W. H. CARSON."

It was admitted that Mr. Swaim was of sound mind, and that (215) there was no undue influence, the caveators resting their case upon the position that as there was no signature of the testator or of the witnesses on the first sheet of paper, and as it was not attached to the second, it was no part of the will.

There was a verdict in favor of the propounders, and the caveators appealed from the judgment rendered thereon.

J. L. Gwaltney and W. A. Self for propounder.
F. A. Linney, J. H. Burke, and L. C. Caldwell for caveators.

ALLEN, J. We have carefully considered the earnest and learned argument of counsel for the caveators, and recognize the danger of permitting detached papers to be established as one will, but difficulties of administration cannot justify the refusal to exercise jurisdiction, and we find an unbroken line of authority in England and America in support of the doctrine as contended for by the propounders.

In *Bond v. Seawell,* 3 Bur., 1774, *Lord Mansfield* said: "If the first sheet was in the room at the time when the latter sheet was executed and attested, there would remain no doubt of its being a good will and a good attestation of the whole will"; and in Wikoff's Appeal (15 Pa. St., 597), in which the writing offered for probate consisted of different pieces of paper, written at different times, the last of which was signed and witnessed, *Chief Justice Gibson* said: "It is a rudimental principle that a will may be made on distinct papers, as was held in *Earl of Essex's case,* cited in *Lee v. Libb,* 1 Show., 69. It is sufficient that they are connected by their internal sense, by coherence or adaptation of parts."

In Cyc., vol. 40, p. 1093, the author says: "A will need not be written entirely on one sheet of paper, but may be written on several sheets, provided the sheets are so connected together that they may be identified as parts of the same will. Connection by the meaning and coherence of the subject-matter is sufficient, as physical attachment by mechanical, chemical, or other means is not required, although it is sufficient when made"; and in 30 A. and E., 580: "It is a rudimentary principle that a will may be made on distinct papers. It is sufficient that they
(216) are connected by their internal sense, by coherence or adaptation."

In the case before us, every requirement of the law has been complied with.

The evidence of Mr. Gwaltney, whose credibility is not challenged, established the fact that the two sheets were written at the same time, that both were read to the testator as his will, and were present at the time of the execution, and the papers themselves bear intrinsic evidence that, while separate, they were tacked together in the mind of the testator.

On the first page of the first sheet the testator says, "I, M. Swaim, do make this my last will and testament." The fourth page of that sheet concludes in the middle of an item of the will and a description of a tract of land, which is concluded on the first page of the second sheet, and both sheets are in the handwriting of the same person.

We find

No error.

Cited: *Alexander v. Johnston,* 171 N. C., 471.

SHELBY NATIONAL BANK v. D. W. HAMRICK.

(Filed 30 April, 1913.)

Corporations—Receivers—Notes—Payments—Limitation of Actions.

Payments made on a note given by a corporation with individuals as sureties, by a receiver of the corporation are not such as will repel the bar of the statute of limitations.

APPEAL by plaintiff from *Justice, J.*, at Fall Term, 1912, of CLEVELAND.

Civil action to recover on a note an alleged balance of $638.31, executed by the Ottoway Furniture Company to plaintiff, with the other defendants as sureties.

The plea of statute of limitations was sustained, and plaintiff appealed.

Quinn, Hamrick & McRorie for plaintiff.
Ryburn & Hoey for defendants.

BROWN, J. It is agreed by counsel that the only question in- (217) volved is whether the payments made by the receiver of the Ottoway Furniture Company at the times and in the amounts shown by the credits entered upon the note prevented the bar of the statute of limitations.

We agree with the court below, that such payments do not prevent the bar of the statute. Payments made by trustee, or assignee, for the benefit of creditors do not have such effect. *Battle v. Battle,* 116 N. C., 161; *Cone v. Hyatt,* 132 N. C., 810; *Robinson v. McDowell,* 133 N. C., 185.

Neither do payments made by an assignee in bankruptcy have such effect. 13 Am. and Eng. Enc., 760; Burrill on Assignments (6 Ed.), sec. 399, and cases there cited; *Battle v. Battle,* 116 N. C., 164, bottom of page.

Nor payments by a receiver. 25 Cyc., p. 1383, and cases cited.

In *Battle's case, supra,* page 164, it is said partial payments are allowed the effect of stopping the running of the statute "only when made under such circumstances as will warrant the clear inference that the debtor recognizes the debt as then existing, and his willingness, or at least his obligation, to pay the balance."

Affirmed.

J. F. MABRY v. MISSOURI F. BROWN.

(Filed 7 May, 1913.)

1. Wills—Interpretation—Powers of Disposition—Limitations.

Where a testator has bequeathed and devised all of his property, personal and real, to his wife, "with the power of disposing of the same as she may deem best," with the direction that all of the undisposed of real and personal property at her death be equally divided among the testator's children, the conveyance of any part of the land carries an absolute fee-simple title thereto to her grantee in the exercise of her power of disposition under the terms of the will. As to whether the widow acquired a fee-simple absolute title to the lands under the will, it is not necessary to decide, for the exercise of the power cuts off all limitations, if any, so far as the title of her grantee is concerned.

2. Same—Executors and Administrators—Debts.

Where an absolute and valid power of disposition is given in a will to a devisee, who is also named as one of several executors, and there is a subsequent clause authorizing and empowering the executors to sell or otherwise dispose of any part of the estate to effectuate the testator's intent and to make a good and sufficient conveyance of the same, it is held that the latter clause referred to the payment of the testator's debts, etc., which he had required to be paid, and not to a deed to lands made by the devisee and executor under the absolute power of disposition; and that her deed conveyed an absolute fee-simple title to the grantee, subject to the testator's debts, etc., without the necessity of the other executors joining therein.

(218) APPEAL by plaintiff from *Webb, J.*, 12 February, 1913; from CABARRUS.

This is a controversy without action, submitted by the parties upon an agreed state of facts, as follows: R. A. Brown died in the year 1907, leaving a will, with these provisions:

"1. My executors, hereinafter named, shall give my body a decent burial, suitable to the wishes of my friends and relatives, and pay all funeral expenses, together with all my just debts, out of the first moneys which may come into their hands belonging to my estate.

"2. I give, devise, and bequeath to my beloved wife, Missouri, all of my property of every description and kind, both real and personal, with the power of disposing of same as she may deem best.

"3. I hereby direct that all of my property, both real and personal, undisposed of by my beloved wife at her death, be divided equally among my children, share and share alike.

"4. I hereby authorize and empower my executors, hereinafter named, to sell or otherwise dispose of any part of my estate to carry out the intents and purposes of this my last will and testament, and make a good and sufficient conveyance for same.

"5. I hereby constitute and appoint my beloved wife, Missouri, and my two sons, Lewis A. and J. Leonard Brown, my lawful executors, to all intents and purposes to execute this my last will and testament, according to the true intent and meaning of the same, and every part and clause thereof, hereby revoking and declaring utterly (219) void all other wills and testaments by me heretofore made.

Defendant sold a part of the land, so devised to her, to the plaintiff, and tendered a deed duly executed by herself individually and in her capacity as executrix, and by Lewis A. and J. Leonard Brown as executors of the will. The plaintiff declined to accept this deed, alleging that it was imperfect and insufficient to convey a good title, as the deed was not signed or executed by the children of R. A. Brown as individuals, who, it is asserted by the plaintiff, took in remainder under the will, and therefore their joinder in the deed, as parties thereto, is necessary to pass the title. The court held that this was not the case, but that Missouri F. Brown took such an estate under the will that she could, by her own deed, convey a good and indefeasible title in the lot which she had sold to the plaintiff. Judgment was entered accordingly, and plaintiff appealed.

M. H. Caldwell for plaintiff.
Morrison & Caldwell for defendant.

WALKER, J., after stating the case: It is provided by statute that when there is a devise of real estate to any person, the same shall be construed to be in fee simple, unless the devise shall in plain and express words show, or it shall plainly appear by the will or some part thereof, that the testator intended to pass an estate of less dignity. Revisal, sec. 3138; *Whitfield v. Garris,* 134 N. C., 27. It was argued by her counsel, from this provision, that defendant acquired a fee simple absolute by the terms of the will, and that the limitation over to the testator's children, being repugnant to the estate so devised, is void. This Court has stated that the purpose of that statutory provision is to establish a rule as between the heir and the devisee, in respect to the beneficial interest of the latter. *Alexander v. Cunningham,* 27 N. C., 430. But we can decide the case without giving any opinion upon this important question, for whether a fee simple absolute passed to the defendant or not, it is undoubtedly true that plaintiff acquired a good title by the exercise of the express and unlimited power of disposition and control. It seems to us that the very question now presented (220) to us for decision was before the Court in *Roberts v. Lewis,* 153 U. S., 367. In that case the devise was to the testator's wife of all his estate, real and personal, with power to dispose of the same as to her

shall seem most meet and proper, so long as she remained his widow, but upon the express condition that if she married again, all of the estate devised and bequeathed to her, or whatever remained, should go to his surviving children. The Court held, following and approving a decision of the State Court in a similar case (*Little v. Giles,* 25 Neb., 321), "that the intention of the testator was to empower his widow to convey all of his real and personal estate, if she saw fit to do so, and, as she had exercised this right and power before her remarriage, the grantee under her deeds acquired all the title of the testator to such lands." The Court further said: "It is unnecessary to express a positive opinion upon the question whether, under this will, the widow took an estate in fee, for if she took a less estate with power to convey in fee, the result of the case, and the answers to the questions certified, must be the same as if she took an estate in fee herself." The two cases are sufficiently alike in their facts for the application of the same principle to both. If the widow in this case did not acquire a fee simple absolute by the devise, she at least got a fee simple, which was defeasible only by her failure to exercise the power, and having exercised the power by selling and conveying to the plaintiff, the limitation over was thereby defeated and of no effect, as to the lot conveyed. The subject is fully discussed, and with great clearness in 30 Am. and Eng. Enc. of Law (2 Ed.), pp. 736 to 739, and in the notes a vast array of cases will be found. It is there said that where the quantity of the estate is devised definitely and specifically, the rule that a devise coupled with an unlimited power of disposition and control carried an absolute interest in the property has no application, and only a life estate coupled with a power of disposal passes. This power, it has been adjudged, is only coextensive with the estate which the devisee takes under the will. It is clear, however, that by appropriate expressions of intent, the power will not refer merely to the life interest of the first taker, but will
(221) give him a life estate coupled with a power to dispose of the entire estate absolutely.

In *Troy v. Troy,* 60 N. C. (Ann. Ed.), marg. p. 624, where it appeared that property was devised to testator's wife for life, with remainder to his son, coupled with an express power to sell all or any part of the property in the exercise of her judgment, the terms of the will showing a clear intention on the part of the testator to confer upon the wife a general power of disposition, this Court held that it was a power *appurtenant* to the estate, and the estate created by its exercise took effect out of the life estate as well as out of the remainder, which was legally equivalent to saying that the exercise of the power by the widow defeated the remainder and passed the absolute fee to the purchaser from her. If such is the law with regard to an estate for life, the same result must

follow where there is no restriction as to quantity of the wife's estate, but she takes an estate of indefinite duration, whether it be the beneficial interest absolutely in fee or not, which we do not decide.

The case of *Troy v. Troy* was cited with approval in *Parks v. Robinson,* 138 N. C., 269, and *Herring v. Williams,* 158 N. C., 1. In the latter case, this Court, by *Justice Brown,* said that where "there is a devise for life, with language which expressly gives the devisee a general power to dispose of both real and personal property, or where the devise is not limited to a life estate, but the property is devised absolutely, with a provision that what remains at the death of the devisees shall go to certain designated persons," the exercise of the power, express or implied, will defeat the remainder and vest the fee in the appointee under the power or purchaser, citing *Troy v. Troy, supra.* The cases of *Wright v. Westbrook,* 121 N. C., 155; *Stroud v. Morrow,* 52 N. C., 463; *Little v. Bennett,* 58 N. C., 156; *Gifford v. Choate,* 100 Mass., 343, and *Barford v. Street,* 16 Vesey, 134, are strong authorities for the position that the exercise by Mrs. Brown of the power conferred upon her by the will defeats the limitation over to the children and passes the fee to the purchaser.

In the first case cited the suit was for the specific performance of a contract to convey, and involved the ability of W. A. Wright and his wife, the vendors, to convey a good title to Westbrook, the (222) vendee—the same question we have here. But our case is stronger than those in favor of the defendant, for in some, if not all, of those cases a life estate only was devised to the donee of the power. The question in this case is fully considered in the recent case of *Chewning v. Mason,* 158 N. C., 578. See, also, *Patrick v. Morehead,* 85 N. C., 62. The devise in *Barford v. Street, supra,* was in trust for a married woman during her life, and after her decease to convey (and so forth) according to her appointment, with a limitation over, in case of her death in the lifetime of the testator, or in default of appointment by her. With reference to these facts the Master of the Rolls (Sir William Grant) said: "What do you contend to be the nature and extent of her interest? An estate for life, with an unqualified power of appointing the inheritance, comprehends everything. What induced me at first to doubt was the indication of an intention, in the codicil, that the estate should remain in the trustee for the life of the plaintiff, with powers to her inconsistent in a great degree with the supposition of her having, or being able to acquire, the absolute interest. But I do not think I can by inference from thence control the clear and express words by which the power is given to the devisee to dispose of this estate in her lifetime by any deed or deeds, writing or writings, or by her last will and testament. How can the court say that it is only by will that she can appoint? By

her interest she can convey her life estate. By this unlimited power she can appoint the inheritance. The whole equitable fee is thus subject to her present disposition. The consequence is that the trustee must convey the legal fee according to the prayer of the bill." It will be observed that the case goes beyond what is necessary for us to decide, but it clearly and conclusively determines the question now raised in favor of the sufficiency of defendant's deed to pass the fee absolutely. The case of *Smith v. Bell,* 6 Peters (U. S.), 68, has no bearing upon the point, and, besides, it has been criticised and doubted in more recent cases. *Gifford v. Choate, supra; Parks v. Robinson, supra.*

But looking at this will with the view of ascertaining the intention of the testator therefrom, it appears to us very clearly that his
(223) wife was the chief object of his bounty. He evidently reposed the greatest trust and confidence in her, and believed that she would carry out his wishes with respect to their children and would be influenced by the same motives as he would have been, if living. He therefore gave her unlimited power and control of his estate, subject to the payment of his debts and funeral expenses. We cannot conceive of any more appropriate words to express the idea of an unrestricted power of disposition than those he used in his will. It was certainly intended that she should have a beneficial interest, and with reference to a power of appointment, where such an interest is given, *Chief Justice Pearson* said, in *Troy v. Troy, supra:* "A power of this description is construed more favorably than a naked power given to a stranger, or a power *appendant,* because, as its exercise will be in derogation of the estate of the person to whom it is given, it is less apt to be resorted to injudiciously than one given to a stranger or one which does not affect the estate of the person to whom it is given."

Upon a consideration of the whole will, we conclude that Mrs. Brown, if she did not acquire an absolute estate in fee, was given a power to appoint absolutely in fee, and the exercise of the power will vest in the purchaser such an estate. *Troy v. Troy, supra; Alexander v. Cunningham, supra.* What will be the result if Mrs. Brown dies without having fully exercised the power as to all of the property, we need not say, as that question is not before us. Nor can we undertake to decide matters relating to the title of other persons who have bought from her, as they are not parties to this suit and will not be bound by our decision.

Before taking leave of the case, we may remark, with propriety, that it is not necessary for the executors to join in the deed. The will does not provide that they shall unite with Mrs. Brown in making any sale of the land or in exercising the power. The fourth clause evidently refers to the first, as it is the duty of the executors to pay the debts and

funeral expenses and, if necessary, to sell the property or so much thereof as may be required for that purpose. *McDowell v. White*, 68 N. C., 65. We have said that Mrs. Brown's power (224) of disposition under the will is subject to the payment of the debts of the testator, so that the purchasers from her will, of course, take subject to the encumbrance. If they would have a clear title, they must be sure that the debts and other liabilities are paid, for a man is required to be just before he is generous, and his gifts, by will or otherwise, are made subject to the payment of his debts, and in this case he has expressly directed that they must first be paid.

Affirmed.

GEORGE PEARSON, BY HIS NEXT FRIEND, v. HARRIS CLAY COMPANY.

(Filed 7 May, 1913.)

Master and Servant—Negligence—Safe Place to Work—Cause Removed Since Injury—Contradictory Evidence—Instructions.

The plaintiff was employed by the defendant to go upon a trestle of a railroad, which it was building, to dump dirt, and his evidence tended to show that while so engaged he went upon a plank, put there for the purpose, which gave way with him, and he thereby received the injury complained of in his action to recover damages. There was also evidence that this plank was defective, and *per contra*, and defendant resisted recovery on the ground of an accident: *Held*, evidence was competent that the plank had been replaced and nailed down since the injury, as contradictory of the defendant's contention that the injury could not have occurred as plaintiff claimed, and the court having restricted its application to this phase of the case, and excluded its consideration upon the issue as to negligence, in the charge to the jury, there was no error.

APPEAL by defendant from *Cline, J.*, at November Term, 1912, of MITCHELL.

The plaintiff was employed by defendant to carry dirt in a dump car for the purpose of assisting in laying a railway. In order to do his work, he was required to go upon a trestle with his car to dump the dirt, and while engaged in doing so he stepped upon a plank, laid upon the ties on the outside of the rail or on the outer edge of the trestle, which gave way with him, and he fell across the tie and (225) was badly ruptured. There was evidence that the plank was defective. The plank was placed there for him and his coservants to

stand on when doing their work. Plaintiff testified that the "plank was cross-grained and split off," letting him down on the cross-ties. There were only two issues submitted to the jury: one as to negligence and the other as to damages. It was not contended that plaintiff had been guilty of any contributry negligence. Verdict and judgment for plaintiff, and defendant appealed.

John C. McBee and Pless & Winborne for plaintiff.
Charles E. Greene and Hudgins & Watson for defendant.

WALKER, J., after stating the case: The defendant contended and introduced evidence to show that plaintiff was not injured in the manner stated by him, but that he had been ruptured before the time of the alleged occurrence. The plaintiff was permitted to testify, over defendant's objection, that when he returned to his work after the injury, "the plank had been either pulled back and fixed, or a new one put there." The defendant objected to this evidence, and argued here that it was incompetent as tending to show negligence of defendant, under *Lowe v. Elliott,* 109 N. C., 581; but the court carefully instructed the jury not to consider it in that view, and it was admitted only to show that plaintiff had been hurt in the way described by him, and for this purpose it was clearly admissible. *Dillon v. Raleigh,* 124 N. C., 184. The very point is decided in *Tise v. Thomasville,* 151 N. C., 281, where plaintiff was permitted to show that a hole into which he had fallen, as he had testified, had been filled up after the occurrence, not to prove negligence, but to contradict defendant's assertion that the hole was not there at the time of the alleged fall, it having been filled up. Besides, Charles Gilbert, the plaintiff's witness, testified that he had "put the plank back and nailed it," and there was no proof that the defendant had done it so as to imply an admission of negligence on its part. It was surely competent to prove by Charles Gilbert that he had (226) restored the plank and securely fastened it since the occurrence. It not only corroborated the plaintiff, who testified, in his own behalf, to the fact that the plank had been put back in its place and nailed, but it tended to show that plaintiff was injured in the manner described by him, contrary to the defendant's contention that the place was in such a safe condition that plaintiff could not have fallen upon the cross-tie as he alleges. The rule laid down in *Lowe v. Elliott* is a sound and wholesome one, and should be strictly enforced, but it was adopted to promote justice, not to defeat it, and there is no room in this case for its application. Defendants in negligence cases will not be permitted to avail themselves of the rule for the purpose of preventing

a fair and full disclosure of pertinent facts, not tending to establish negligence. The only exception of the defendant upon which an assignment of error is based is to this evidence. Without any exception and assignment of error, it will not be heard to allege that there was no evidence of negligence or that the injury to the plaintiff was the result of unavoidable accident. *Jones v. High Point,* 153 N. C., 371, and cases cited.

We find no error in the ruling to which exception was taken.

No error.

Cited: Smith v. R. R., 170 N. C., 186; *McMillan v. R. R.,* 172 N. C., 856.

(227)

J. J. MEISENHEIMER v. S. B. ALEXANDER, JR., ET ALS.

(Filed 13 May, 1913.)

1. Corporations—Stockholders' Meetings—Resolution—Consent.

A stockholder in a private corporation is bound by a resolution regularly passed at a stockholders' meeting in accordance with its charter and by-laws, and when he is present at the time a measure is formally passed, and votes or fails to vote thereon, he is ordinarily concluded.

2. Same—Diminishing Holdings of Stock—Contracts—Consideration—Benefits Received.

The corporation agreed to issue 33 shares of its stock to plaintiff in consideration of the purchase price of his part of the option on the lands, and for services performed and to be performed by him, and a similar arrangement was made with the defendant P. Thereafter, the stockholders of the corporation finding the requisite amount of stock could not be sold, and to ascertain the liability of each subscriber and to arrange for deferred payments about to become due on the purchase price of the lands, held a meeting, the plaintiff being present, and either with his consent or without his protest, passed a resolution to the effect that shares should be issued to the subscribers only in the amount each had paid in cash, and that as no services were required of plaintiff and P., all certificates issued to them in excess of the cash paid by them were to be invalidated or canceled; and, further, to meet the deferred payments on the purchase price of the land, the corporate charter be amended so as to permit an issuance of common and preferred stock in certain amounts: *Held,* (1) the plaintiff was concluded by the resolution from claiming the ownership of the 33 shares, and from voting them in relation to the proposed amendment to the charter; (2) if his right to these shares be regarded as contractual, their withdrawal was supported by the considerations (*a*) that plaintiff would not be called upon to perform the serv-

ices required of him; (*b*) the consent of the other stockholders affecting his individual liability for the debts of the concern; (*c*) the benefits he has received, in common with the other stockholders, from the surrender by P. of his stock, similarly issued.

3. Same—Annulment of Shares—Specific Performance—Damages.

Where a corporation formed for a certain purpose requiring the sale of its stock in a certain amount, fails to sell the requisite amount thereof, and finding it necessary to meet certain of its obligations, its stockholders provide by resolution for the issuance of certificates only for money actually paid in, and withdraws certain certificates issued to plaintiff for an option on certain lands to be used in the enterprise, and for certain services to be rendered by him, to which the plaintiff, being present, does not object, and receives the benefits of the resolution: *Held*, as between the parties, the resolution had the force and effect of annulling the shares of plaintiff referred to, which is not the stock itself, but only *prima facie* evidence of ownership; and the question as to whether the plaintiff's remedy was for specific performance of a contract or agreement, based upon the resolution, or one sounding in damages, is not relevant to the inquiry.

4. Corporations—Decrease of Capital Stock—Notice—Resolutions Binding Between Parties—Creditors—Interpretation of Statutes.

Revisal, sec. 1164, providing the method by which a domestic corporation may decrease its capital stock, requiring the publication of proper notices, etc., is for the protection of the stockholders of a corporation against its creditors; and as between the stockholders, a resolution for such purpose, if otherwise lawful and valid, will bind the members, and may be enforced by corporate action.

(228) APPEAL from judgment rendered at chambers by *Webb, J.*, 28 January, 1913; from MECKLENBURG.

Action to enjoin the issuance of 800 shares of stock, 400 of same being preferred and 400 common stock at par value, $100 per share, in a corporation known as the Equitable Realty Company, involving also a change of name and amendment to charter of the company; heard on return to restraining order. On the hearing it was made to appear that plaintiff, holding certificate for 33 shares of stock in said company, was present at the meeting when the issue was determined upon, and proposed to vote his 33 shares against the measure. He was allowed to vote 14 shares and prevented from voting the entire 33 shares, defendant insisting that this was the extent of his right. It was admitted that the question depended on whether the facts in evidence established the right of plaintiff to vote these 33 shares, or raised serious questions as to such right.

The court entered judgment dissolving the restraining order, and plaintiff excepted and appealed.

G. A. Shuford, C. A. Duckett, and Stewart & McRae for plaintiff.
Burwell & Cansler for defendant.

HOKE, J. The evidence tended to show that on or about 15 April, 1912, plaintiff and one W. M. Paul had acquired and held an option on a valuable lot in the city of Charlotte, known as the mansion house lot, at the stipulated price of $80,000, and as a consideration had deposited their notes for $500 each. That desiring to avail themselves of their option, the holders, with others, chiefly the defend- (229) ants, proposed to form a corporation and erect a sky-scraper on such lot, to cost not less than $400,000, the undertaking to be entered upon when a *bona fide* stock subscription of $100,000 should have been obtained. In pursuance of this purpose, plaintiff and his associate, W. M. Paul, and defendants, subscribed to as much as 260 shares of said stock at par value of $100 per share. That much of the stock subscribed for was on condition that the amount considered requisite, to wit, the $100,000, should be first subscribed, and several of them on condition that they should be allowed to pay for their subscription in service of value to the company. That the option being about to expire, the corporation having been first formed, the company took over the option and bought and took a deed for the property, paying therefor $20,000 in cash and securing the remainder of the contract price, $60,000, by notes to the vendee and deed of trust on the property to secure the same; the notes of plaintiff and Paul having been assumed by the company and liquidated in the deal. In making the cash payment of $20,000, the amount of $10,000 was raised on the note of the company, indorsed by plaintiff and defendants, and the second $10,000 was secured by second mortgage on the property. In taking over the option at $5,000, the same was paid for by issuing 33 shares, the shares in controversy, to plaintiff and 17 shares to plaintiff's associate, W. M. Paul, and there was evidence tending to show that in addition to the option the plaintiff and W. M. Paul were to give their services to the company in the effort to obtain the amount of stock subscription considered necessary to render the undertaking a feasible project.

The evidence further tended to show that the parties failed to obtain the amount of subscription desired and deemed requisite for the purpose contemplated, and the subscribers having some concern as to their possible liability to creditors by reason of their subscription, and desiring to settle the amount and question of such liability, assembled in corporate meeting and passed resolutions as follows:

At a called meeting of the stockholders of the Equitable Realty (230) Company, held in the office of Paul Chatham on the 25th day of

November, 1912, the following stockholders being personally present, S. B. Alexander, Jr., E. T. Garsed, Paul Chatham, C. C. Hook, C. A. Meisenheimer, and J. J. Meisenheimer, and the following represented by proxy, W. H. Thompson, the following resolutions were unanimously adopted:

Whereas, at and before the organization of this company the following parties agreed to subscribe for the stock therein in the amounts set opposite their respective names, filed with the secretary of this company, to wit:

Paul Chatham	50 shares
C. A. Meisenheimer	10 shares
S. B. Alexander, Jr.	25 shares
E. T. Garsed	25 shares
Charles C. Hook	25 shares
W. G. Rogers	25 shares
Walter M. Paul	25 shares
J. J. Meisenheimer	25 shares
Robert E. Milligan	10 shares
T. C. Thompson Brothers, approximately	35 shares
W. R. Ebert	5 shares

The original incorporators, to wit, W. F. Harding, W. O. Gardner, and F. H. Chamberlain, having theretofore each subscribed for ten shares; and whereas the said S. B. Alexander, Jr., E. T. Garsed, Charles C. Hook, W. B. Rogers, T. C. Thompson Brothers subscribed for the number of shares of said stock in said company set opposite their respective names as above, upon the condition that the same should be paid for in services to be rendered the corporation in the construction of a fourteen-story building to be located at the corner of Church and West Trade streets in the city of Charlotte, and the said Walter M. Paul and J. J. Meisenheimer subscribed for the shares of stock in said company set opposite their respective names as above, on condition that the same should be paid for in services rendered and to be rendered the said corporation, and in consideration of the assignment of an option which the said Paul and Meisenheimer had upon the lot of land (231) above referred to; and whereas the other stockholders above mentioned subscribed for stock set opposite their respective names on condition that the company would proceed forthwith to the erection of said buildings upon said lot, all of which conditions were by the mutual mistake of the parties left out of the paper-writing, signed by them; and whereas, since the organization of said company the follow-

ing parties have paid in upon said stock subscriptions, the following amounts, to wit:

Dr. C. A. Meisenheimer	$1,400.00
J. J. Meisenheimer	1,400.00
Paul Chatham	1,400.00
E. T. Garsed	1,400.00
T. C. Thompson Brothers	1,400.00
Hook Rogers	1,400.00
S. B. Alexander	1,400.00
W. M. Paul	1,200.00

for which certificates of stock have been issued them respectively; and whereas, it has been decided by the stockholders and officers of said corporation that it is not expedient at this time to proceed with the erection of said building upon the lot aforesaid, in view of the fact that a sufficient amount of stock has not been subscribed to enable the company to proceed therewith, thereby rendering it unnecessary that the parties above named should render the services with which they were to pay for their respective stock subscribed, and that those who made cash subscriptions should pay the same into the treasury of the company: Therefore, be it

Resolved unanimously, That each of the stockholders and stock subscribers to this corporation be and is hereby released from any and all liabilities on his respective stock subscription to said corporation beyond the amount which he has paid in in cash and for which stock certificates have been issued, it being recognized by this company that it is unable to fulfill the conditions upon which said stock subscriptions were made.

It is *Further Resolved,* That the certificates of stock issued (232) to the said Walter M. Paul and J. J. Meisenheimer for the original amount of their subscriptions be for a like reason surrendered, and that new certificates be issued to each of them for the amount of cash paid in by them respectively as above set forth.

There being no further business, the meeting adjourned.

PAUL CHATHAM, *Chairman.*

CHARLES C. HOOK, *Secretary.*

The evidence of defendant was to the effect that plaintiff was present at the meeting and voted for these resolutions, and of plaintiff that he was present and did not vote or make protest against them. In pursuance of the same, certificates of stock were issued to the different subscribers other than plaintiff W. M. Paul, the associate of plaintiff,

as original holder of the option, surrendering his 17 shares, the number issued to him by the company at the time the option was taken over. The plaintiff, who has received a check for $17.01, the difference between the par value of the 14 shares to which he was entitled by the terms of the resolution and the cash paid in by him, to wit, $1,417.01, but has not received and has declined to take the 14 shares or to surrender the 33 shares of original issue.

Thirty thousand of the indebtedness for the purchase money being about to mature, the company having no available means to meet the demand, it was formally proposed to amend the charter, make the issue of stock at present in question, to wit, 400 shares preferred and 400 common stock, as a means of relieving the company and raising the money required to pay the claim. It is assumed and seems to be agreed upon as determinative that, at the corporate meeting when this was decided upon, the measure was properly carried, if plaintiff had the right to vote only 14 shares of stock, and that it would fail if he had the right, as claimed by him, to vote the entire 33 shares. It may be well to note that the resolutions referred to, after reciting that plaintiff and W. M. Paul had made their subscriptions on condition that same should be paid for in services rendered and to be rendered and on assignment of the option, contains provision:

(233) "Therefore, be it *Resolved,* That each of the stockholders and stock subscribers to this corporation be and is hereby released from any and all liabilities on his respective stock subscription to said corporation, beyond the amount which he has paid in cash and for which stock certificates have been issued, it being recognized by this company that it is unable to fulfill the conditions upon which said stock subscriptions were made.

"It is *Further Resolved,* That the certificates of stock issued to the said Walter M. Paul and J. J. Meisenheimer for the original amount of their subscriptions be for a like reason surrendered, and that new certificates be issued to each of them for the amount of cash paid in by them respectively as above set forth."

On these, the facts chiefly relevant, we concur in the ruling of his Honor below, that plaintiff's right to vote should be restricted to the 14 shares, and that he is concluded by the force and effect of the corporate resolutions above set out and the acts done pursuant thereto, as to any right to vote the shares in excess of that amount. It is well understood that a stockholder in a private corporation is bound by a corporate resolution regularly passed in accordance with its charter and by-laws (Clark on Corporations, p. 460), and although attended with

some irregularities, a member who is present when a measure is formally passed and votes for the same or fails to make protest, is ordinarily concluded. 1 Cook on Corporations, 6th Ed., secs. 39-730; *Callahan v. Ditch Co.*, 37 Col., 331; *Wood v. Waterworks*, 44 Fed., 146.

It is urged for plaintiff, as we understand his position, that his option was a valuable right which he has passed to the company, and that this transaction should be regarded as an executory agreement to surrender 33 shares in exchange for the 14, and that as to him the resolution providing for such exchange is unenforcible, from a total lack of consideration.

It is not infrequently true that as between the corporation and its stockholders and the stockholders themselves, a by-law or resolution of the company may be considered as a contract. *Trust Co. v. Abbott*, 162 Mass., 148; 10 Cyc., 351. But assuming, as plaintiff contends, that this is a case calling for the application of the principle, the further premise of defendant cannot be maintained, that on the (234) facts in evidence there is a total lack of consideration. In a case of this kind the consent of one stockholder may well be regarded as a consideration for the consent of the others, and the position is emphasized in this instance by the fact that W. M. Paul, the associate of plaintiff, as original holder of the option and who received 17 shares of stock as part of the 50 issued, has surrendered these shares pursuant to the resolution and received or has the right to the number equivalent to the actual cash paid in by him, about $1,200, thus giving the company and plaintiff as one of its members the pecuniary value of the difference. And the surrender of this claim on plaintiff's services recited in the resolutions as part of the consideration for the 50 shares and the relief against the contingent liability of plaintiff to creditors existent when stock has been issued in payment for property, may also be referred to in support of the resolution, the same being one of the requisite steps in affording plaintiff protection from such a demand.

Speaking further to plaintiff's position, that this resolution providing for the surrender of the 33 shares and the issue of the 14 in lieu thereof should be treated as a contract or agreement: while contracts for the sale or transfer of Government securities or shares of stock on the market and readily obtainable, will not as a general rule be specifically enforced, it is otherwise when the agreement, as in this instance, concerns stock of a different character and there are terms giving the contract special significance and presenting a case where the award of ordinary damages in case of breach would be inadequate. The distinction adverted to is very well stated in Cook on Corporations, sec.

338, as follows: "An entirely different rule prevails as regards contracts for the sale of stock of private corporations. If the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted to be deliv-
(235) ered, a court of equity will decree a specific performance and compel the vendor to deliver the stock."

It is not required, however, in this case that defendants should have recourse directly to this principle in the doctrine of specific performance or the remedy ordinarily available in such cases. The certificate for 33 shares held by plaintiff is not the stock itself, but constitutes only *prima facie* evidence of the ownership of that number of shares. Cook on Corporations, 6 Ed., sec. 13; Clark on Corporations, p. 260. And as between the parties, this resolution of 25 November, approved or certainly acquiesced in by plaintiff, had the force and effect of annulling the 33 shares of stock held by plaintiff or reducing the same to 14, and the company was well within its rights in denying the right of plaintiff to vote the larger number.

It is further insisted for plaintiff that the reduction contended for is not valid because of the failure of the company and the parties to comply with the statutory requirements contained in Revisal, sec. 1164, and particularly as to the publication of the proper notices; but it will appear from a perusal of the section that this provision as to notice is only necessary to afford the stockholders of a corporation protection against creditors. As between the parties, the reduction, if otherwise lawful and valid and pursuant to resolutions properly passed, will bind the members, and may be enforced, as in this instance, by corporate action.

There is no error, and the judgment dissolving the restraining order is Affirmed.

CLARK, C. J., not sitting.

(236)

J. M. HARTIS, ADMINISTRATOR, v. CHARLOTTE ELECTRIC RAILWAY COMPANY.

(Filed 13 May, 1913.)

Evidence—Depositions—Personal Injury — Wrongful Death — Negligence—Same Issue—Executors and Administrators—Parties.

The difference between hearsay evidence and that obtained by deposition is that in the latter instance testimony is taken before one who is empowered to administer oaths, and the adverse party is given full opportunity to cross-examine; and where depositions have been regularly taken of a deceased person in his action for damages for negligence alleged of the defendant in causing a personal injury, his administrator, in his action against the same defendant for death alleged as resulting from that same injury, involving the same subject-matter and the same issue of negligence, may avail himself of the testimony in the present action by introducing the deposition taken in the former one, notwithstanding his right of action rests by statute only, and that therefore the parties plaintiff in the two actions are technically not the same.

BROWN, J., dissenting; WALKER, J., concurring in dissenting opinion.

APPEAL by plaintiff from *Webb, J.*, at January Term, 1913, of MECKLENBURG.

It is alleged that Maggie J. Hartis was injured by the negligence of the defendant on 24 May, 1910, and soon thereafter the said Maggie J. Hartis and her husband commenced an action against the defendant to recover damages for the injury.

During the pendency of that action the deposition of the said Maggie J. Hartis was regularly taken and filed, and thereafter the said Maggie J. Hartis died.

This action was then commenced by J. M. Hartis, as administrator of his wife, to recover damages for her wrongful death, caused, as the plaintiff contends, by the injuries of 24 May, 1910.

Upon the trial of the action the plaintiff offered as evidence the deposition taken in the former action, which was excluded, and the plaintiff excepted.

The deposition, if admissible, contains material evidence on the issue of negligence, and the record shows that the defendant had the opportunity to cross-examine, although it did not do so.

The plaintiff having no other evidence of negligence, submitted to a judgment of nonsuit, and appealed. (237)

E. R. Preston and Neill R. Graham for plaintiff.

Burwell & Cansler for defendant.

ALLEN, J. The question presented by this appeal has not been heretofore decided by this Court.

If we adopt the rule prevailing in some jurisdictions, that there must be an exact identity of parties or of their privies and of causes of action before a deposition taken in one action is admissible in another, we must sustain the ruling of his Honor, because we have recently held in *Broadnax v. Broadnax* that damages for wrongful death are not in the usual acceptation of the term a part of the personal estate of the deceased, and in *Hood v. Telegraph Co., ante,* 92, that the administrator or executor does not sue because of succession to the rights of the deceased, but by virtue of his designation in the statute, and the deductions from these authorities are that the causes of action are not identical, and that the administrator in actions of this character is not in privity with the intestate.

This rule finds support in *Miller v. Gillespie,* 54 W. Va., 462; *R. R. v. Gumby,* 99 F. R., 197; 6 A. & E. Pl. and Pr., 579, and is expressly adopted in *Murphy v. R. R.,* 31 Hun., 358, in which a deposition was excluded under facts in all material respects like those before us.

These authorities, in our opinion, sacrifice substance to form, and exclude material evidence which has been subjected to the tests of truth, and in favor of a party who has had an opportunity to cross-examine.

The witness in this case was sworn at the time of taking the deposition by a competent officer; she testified as to the one fact upon which both actions depend—the cause of her injury; the plaintiffs in both actions were endeavoring to establish the same fact—the negligence of the defendant; the same party is a defendant, and it had the opportunity to cross-examine; and the plaintiff in the present action is the administrator of the plaintiff in the former.

Professor Wigmore says, in reference to identity of issues, in vol. 2, sec. 1387 (1): "It is sufficient if the issue was the same, or sub-
(238) stantially so with reference to the likelihood of adequate cross-examination, because the opponent has thus already had the full benefit of the security intended by the law"; and as to parties, in section 1388: "It ought, then, to be sufficient to inquire whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has; and the determination of this ought to be left entirely to the trial judge"; and he adds, while discussing the admissibility of a deposition taken in another action: "It is enough to suggest that the situation is one that calls for common sense and liberality in the application of the rule, and not a narrow and pedantic illiberality."

Mr. Greenleaf, vol. 1, sec. 163, says: "The chief reasons for the exclusion of hearsay evidence are the want of the sanction of an oath and of any opportunity to cross-examine the witness. But where the testimony was given under oath, in a judicial proceeding, in which the adverse litigant was a party and where he had the power to cross-examine, and was legally called upon to do so, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted, after the decease of the witness, in any subsequent suit between the same parties"; and in section 553: "We have seen that in regard to the admissibility of a former judgment in evidence it is generally necessary that there be a perfect mutuality between the parties; neither being concluded unless both are alike bound. But with respect to depositions, though this rule is admitted in its general principles, yet it is applied with more latitude of discretion; and complete mutuality or identity of all the parties is not required. It is generally deemed sufficient if the matters in issue were the same in both cases, and the party against whom the deposition is offered had full power to cross-examine the witness."

In Tiffany on Death by Wrongful Act, sec. 192, the author says: "It has been held that, in an action under the statute, it is admissible to prove the testimony of a deceased witness in a suit by the intestate for the personal injury which abated on his death, upon (239) the ground that the causes of action were the same, and that the admissibility of such evidence turns rather upon the right to cross-examine than upon the precise nominal identity of the parties."

This rule, approved by the text-writers, from which we have quoted, that the admissibility of the deposition is not dependent upon exact identity of parties and causes of action, but rather upon identity of the question being investigated and upon the opportunity of the party *against whom the deposition is offered to cross-examine,* has been adopted in *Dawson v. Smith's Will,* 3 Houst. (Del), 340; *Wade v. King,* 19 Ill., 308; *Watson v. St. Paul R. R.,* 76 Minn., 362; *Andricus v. Coal Co.,* 121 Ky., 731; *R. R. v. Hengst,* 36 Tex. Civ. App., 219; and it has been held in three cases (*R. R. v. Venable,* 67 Ga., 699; *R. R. v. Stout,* 53 Ind., 158, and *Walkerton v. Erdman,* 23 Can. Sup. C., 352) that a deposition taken in an action to recover damages for personal injuries is admissible in evidence in a subsequent action against the same defendant to recover damages for wrongful death, which is the case at bar.

In the Georgia case the mother had sued for personal injuries to herself by the railroad company, and in that case her interrogatories were taken. Subsequently she died, and her child, by next friend, sued

for her homicide, and recovered. Objection was made to the introduction of her testimony on the former trial, but it was admitted, and the Court said: "The admissibility of the interrogatories turns on the questions whether the action was substantially on the same issue and substantially between the same parties. Substantially, we think that the issue was the same. The injuries for which she had sued caused her death, and for that result of those injuries the child sued. . . . It is true that the child could not have sued had not her mother died; and in the mother's case the literal cause of action is the injury done her, not resulting in death, and in the child's the literal cause of action is the homicide; but the substantial cause in both cases is the one cause of both actions, the wrong done by the railroad company, and that was the issue. The interrogatories were introduced, too, only in respect to the injury and the manner in which it was done and how it occurred,
and this was the real thing in issue in both cases. Was the
(240) company negligent or diligent? Was the mother? These were
the main, substantial questions at issue."

In the Indiana case it was said that, "On the trial of an action brought by an administrator to recover damages for the death of his intestate, caused by the wrongful act of the defendant, evidence is admissible to prove what was the testimony of witnesses, since deceased, on the trial of an action brought by said intestate, and abated by his death, for damages for injuries caused by said wrongful act"; and in the case from Canada: "Though the cause of action given by Lord Campbell's Act for the benefit of the widow and children of a person whose death results from injuries received through negligence is different from that which the deceased had in his lifetime, yet the material issues are substantially the same in both actions, and the widow and children are in effect claiming through the deceased. Therefore, where an action is commenced by a person so injured in which his evidence is taken *de bene esse* and the defendant has a right to cross-examine, such evidence is admissible in a subsequent action taken after his death under the act."

This rule, confined to facts like those before us, commends itself to our judgment as based upon reason and authority, and it is just, as it deprives the defendant of no right and permits a trial of the issue between the plaintiff and the defendant upon its merits.

The cross-examination in the two cases would be practically the same, as the two facts to be investigated in each would be negligence, and the extent of the injuries, unless it would be broader and more extended in the first, due to the fact that in an action for personal injury recovery

may be had for expenses, pain, loss of time, impaired capacity to make a living, etc., while in an action for wrongful death the inquiry as to damages is confined to the single question of the present value of net earnings, based on life expectancy.

The sum demanded in the first, $10,000, the same being demanded in the second, was sufficient to put the defendant upon (241) notice of the importance of the action.

We are of opinion the deposition was competent, and a new trial is ordered.

New trial.

BROWN, J., dissenting: I am of opinion that the deposition is incompetent evidence in this case, for these reasons:

1. The parties to the two actions were different.

2. The causes of action were different.

3. There was no privity of interest between the parties to the first and second action.

4. The cause of action for wrongful death of plaintiff's intestate did not exist when deposition was taken in first action.

5. That deposition was never opened or ordered to be admitted in evidence in the first action.

In *Murphy v. R. R.*, 31 Hun., 358, which was an administrator's action for injuries causing death, the Court, in ruling out similar testimony, said:

"The deposition of the deceased, taken in an action prosecuted by him in his lifetime, was not competent evidence in this action. That action terminated with the death of the plaintiff therein, and all interlocutory proceedings went down with it, and are not saved by section 881 of the Code of Civil Procedure. While the plaintiff is the personal representative of the deceased, the action is prosecuted for the benefit of those who do not claim under him, but is an original cause of action that did not exist in the lifetime of the deceased."

In *R. R. v. Gumby*, 99 Fed., 192, it was held by the Circuit Court of Appeals for the Second Circuit that testimony in an action by an infant claiming damages for his pain and suffering from an injury is not admissible (the witness having died in the meantime) in a subsequent action against the same defendant by the infant's mother, claiming damages for loss of his services, there being no privity between the plaintiffs.

The opinion in that case was very able and exhaustive, citing and distinguishing many authorities relied on in favor of the admis-

(242) sion of the testimony, and quoting from many others holding *contra,* and is, therefore, instructive.

To same effect are *Nelson v. Harrington,* 1 L. R. A. (O. S.), 719; *Miller v. Gillespie,* 54 W. Va., 462; 6 A. and E. Pl. and Prac., 579.

In *Oliver v. R. R.* (Ky.), 32 S. W., 759, it was held that in an action by husband and wife for personal injuries to the wife, depositions taken in a former action by the husband against the same defendant, for loss of services of the wife, caused by the same accident, were inadmissible, though they related wholly to the character of the injury and the manner in which it was received, the Court saying:

"And, although the depositions referred to relate wholly to the character of the injury received by her (the wife), and the manner in which it was done, and are, therefore, pertinent to the question of legal liability, as well as measure of damages, in each action, still the personal injury, if the result of the defendant's negligence, constituted two distinct causes of action, for one of which he (the husband) could alone sue, and for the other of which she (the wife) might have sued alone in case of his refusal to join with her. And while reason for the rule mentioned does not exist to the same extent as if there had been different occurrences or transactions, we can very well see how disregard of it by the court might have taken defendant by surprise and deprived it of the advantage of developing, on cross-examination, admissions and confessions of the wife it was not permitted to show in other suits. Moreover, defendant could not be legally deprived of an opportunity afforded him by enforcement of the rule, to again cross-examine the witnesses."

I admit there are authorities cited in the majority opinion that hold the deposition admissible, but I am of the opinion that the conclusion reached by the courts whose opinions I have cited are more logical and convincing and better accord with our own decisions as to the character of this action. *Hood v. Telegraph Co., ante,* 92; *Broadnax v. Broadnax,* 160 N. C., 432; *Hall v. R. R.,* 146 N. C., 345; *s. c.,* 149 N. C., 108.

(243) It further appears that the deposition was never passed on, opened, or admitted in evidence in the first action. That being so, the deposition never became legal evidence in the first action, and the court, therefore, had no power or authority to permit it to be opened for the first time, upon notice given by the plaintiff in the present action.

MR. JUSTICE WALKER concurs in this opinion.

W. S. EDWARDS v. THOMAS J. PRICE.

(Filed 13 May, 1913.)

Character Witnesses—Impeaching Evidence—Admissibility.

A witness introduced to impeach the character of a party who has testified may only be asked as to the general character of that party by the one introducing him; but after affirmatively answering the question the witness may qualify his own testimony by stating that his knowledge thereof extends to certain localities and for certain stated qualities. Testimony as to specific acts is not admissible for the purpose of impeachment of character of witness. The rule as to the admissibility of this character of evidence stated by CLARK, C. J.

APPEAL by defendant from *O. H. Allen, J.*, at August Term, 1912, of ALLEGHANY.

R. A. Doughton for plaintiff.
T. C. Bowie for defendant.

CLARK, C. J. This is an action to recover damages in a horse trade, alleging breach of warranty and deceit.

The first and second assignments of error are abandoned by not being stated in the appellant's brief. Rule 34. We find no error in the other assignments of error, except the fourth assignment of error and the fifth, seventh, eighth, and ninth, which present the same proposition. The tenth assignment of error is that the witness, when asked as to the general reputation of the defendant, answered that he knew only his general reputation as a horse trader around Jefferson and down in Wilkes County, but he did not know his reputation in his own community, nor anywhere except as a horse trader, which was (244) bad in the localities named.

It is not competent for the party introducing the character witness to ask further than as to the general character of the party impeached. But the witness can qualify his own testimony by stating that he does not know the general character, but only in certain localities or for certain qualities. The witness's means of knowing the character of the defendant was confined, it seems, to those localities and to that one business which seems to have been the occupation of the defendant in those localities. The defendant had testified in the case. We do not see that the defendant has sustained any injury in regard to the admission of this evidence. He had the right to cross-examine, and there was much other evidence as to character, both for and against him. The fourth exception was: "Did not the defendant have the general

reputation of having seduced Miss Blevins, an innocent and virtuous woman?" It was error to admit this question. As was also the admission of the same question and answer as to other witnesses, as set out by assignments of error 5, 7, 8, and 9.

The rule as to this matter has been fully settled by many decisions in this Court. It is this: The party himself, when he goes upon the witness stand, can be asked questions as to particular acts, impeaching his character, but as to other witnesses it is only competent to ask the witness if he "knows the general character of the party." If he answers "No," he must be stood aside. If he answers "Yes," then the witness can, of his own accord, qualify his testimony as to what extent the character of the party attacked is good or bad. The other side, on cross-examination, can ask as to the general character of the party for particular vices or virtues. But it is not permissible either to show distinct acts of a collateral nature nor a general reputation for having committed such specified act. McKelway Ev., secs. 123, 125; 1 Gr. Ev., sec. 461-b. To permit this would protract trials to an indefinite extent by permitting the investigation of numerous incidents,

(245) if not indeed the whole life of the party, and would distract the attention of the jury from the real points at issue in the case and turn the trial into an investigation of the character of the party. It is important to confine the rule strictly as above stated, both to concentrate the attention of the jury upon the matters in issue and to avoid unnecessary length of trials.

The Court is reluctant to give a new trial upon a matter of this kind. But aside from the necessity, for the reasons already given, for restricting inquiries, it is also extremely probable that questions of this kind would prejudice the defendant not merely as to the weight to be given to his testimony, but also upon the merits of the case. The proposition as we have laid it down is clearly stated in *S. v. Bullard,* 100 N. C., 487, and in many cases there cited; *Marcom v. Adams,* 122 N. C., 222; *S. v. Hairston,* 121 N. C., 579.

The same rule was reiterated and again clearly stated by *Allen, J.,* in *S. v. Holly,* 155 N. C., 492, giving the reasons requiring the maintenance of the well-settled rule, and citing numerous cases, with the reasons for its maintenance.

We must direct a new trial for this

Error.

TRUSTEES OF CATAWBA COLLEGE v. MRS. ZETA M. FETZER, EXECUTRIX OF P. B. FETZER, DECEASED.

(Filed 13 May, 1913.)

Removal of Causes—Executors and Administrators—Answer—Waiver—Interpretation of Statutes.

A motion to remove an action brought in the wrong county against an executor must be formally made at the term of court for filing pleadings and before answer filed; and where answer has been filed and withdrawn for the purpose of the motion, at the proper term, the right to remove will be taken as waived. Revisal, sec. 425.

APPEAL by defendant from *Daniels, J.*, at February Term, 1913, of CATAWBA.

Action to recover on a note for $1,000, executed by P. B. Fetzer, testator of defendant, heard on motion to remove cause.

The action was instituted in Catawba County, returnable to (246) February Term, 1913, commencing 3 February. Verified complaint was duly filed 11 December, 1912; verified answer to merits filed 5 February, 1913; formal replication filed 8 February, 1913. Defendant is executrix of the obligor of the note, duly qualified and acting as such in the county of Cabarrus, and, later in the term, to wit, on 10 February, having obtained leave to withdraw her answer, made a motion, in writing, to remove the cause for trial in said county of Cabarrus. The motion was denied, and defendant excepted and appealed.

George McCorkle, R. R. Moore, and W. A. Self for plaintiff.
L. T. Hartsell for defendant.

HOKE, J. Our statute, Revisal, sec. 425, provides that, "if the county designated in the summons and complaint be not the proper county, the action may, notwithstanding, be held there, unless the defendant, before the time for answering expires, demands, in writing, that the trial be held in the proper county." Construing the section, our Court holds that, "in order for a litigant to avail himself of the right, conferred by the statute, the motion to remove must be formally made and in apt time," and further, that, although a defendant might have answered at any time during the term, his time to answer has expired, within the meaning of the law, whenever he has filed a formal answer to the merits. *County Board v. State Board,* 106 N. C., 82; *McMim v. Hamilton,* 77 Mo., 300. If it be conceded that a right of removal

exists in the present case, the defendant having filed formal answer, must be taken to have waived his privilege of removal.

The authorities are decisive against the defendant's position, and the judgment of the Superior Court, denying the motion is,

Affirmed.

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(247)

E. M. ASBURY ET AL. v. TOWN OF ALBEMARLE.

(Filed 13 May, 1913.)

1. Cities and Towns—Waterworks—Legislative Restrictions—Derogation of Rights—Interpretation of Statutes.

A statute which is mandatory, and is in derogation of the usual and common rights of a municipality to construct or purchase, as well as to manage, its public utilities in the exercise of a sound discretion by the municipal authority, must be construed liberally in favor of the public and strictly against those specifically favored.

2. Same—Words and Phrases.

When words are used in the expressions of a statute which have a well known legal meaning, and nothing appears therein which would show that a different meaning was intended by the use of these words, there is no ambiguity of expression for the courts to construe, the presumption being that the lawmaking power had expressed its intent according to the legal significance of the words it had employed.

3. Same—"Corporations."

Chapter 86, Public Laws of 1911, provides that a municipal corporation, before undertaking to build "any public system of waterworks, shall . . . first acquire, either by condemnation or purchase, the property of such system already laid, operated, and maintained" by a "private or *quasi*-public corporation," within the municipality, etc.: *Held*, the word "corporation" has a definite legal meaning, and will not be construed to embrace an unincorporated company of individuals, or a partnership, operating and maintaining a waterworks plant within the limits of the muncipality. *Efland v. R. R.*, 146 N. C., 135, cited and distinguished.

4. Cities and Towns—Waterworks—Acquisition of Plant—Discretion—Private Plants—Constitutional Law—Legislative Restrictions.

A water plant is a necessity which a municipal corporation may, in its discretion, acquire for the benefit of its own citizens, and the exercise of this discretion is local in its nature, not governmental in character, and is subject to the constitutional legislative restraints upon private corporations; hence an act of the Legislature which provides that before constructing its water plant the municipality shall acquire by purchase or condemnation a system maintained in its corporate limits by a pri-

vate corporation, etc., is an unconstitutional interference by the Legislature in attempting to control the municipality in the exercise of its discretion in the management of its local affairs, and is an undue limitation upon the right of local government.

HOKE and ALLEN, JJ., dissenting.

APPEAL by defendants from *Cooke, J.*, at September Term, (248) 1912, of STANLY. Action to restrain defendants from proceeding with the construction of municipal waterworks in the town of Albemarle. Motion to nonsuit was overruled. Certain issues were submitted to a jury, and under the instructions of the court found for plaintiff. The court rendered judgment that the defendant commissioners "be, and each of them, peremptorily commanded and directed to proceed forthwith to acquire the waterworks system or plant of the plaintiffs described in the complaint in the manner provided by chapter 86, Public Laws of 1911," etc.

The defendants appealed.

J. R. Price, R. L. Brown, and Burwell & Cansler for plaintiff.
R. L. Smith, and Manly, Hendren & Womble for defendant.

BROWN, J. Chapter 86, Public Laws 1911, among other things, provides that "whenever any incorporated town or city, which under this or by special act has been or may be authorized, from the sale of bonds, or otherwise, to build, operate, and maintain a public waterworks . . . there shall have been constructed in said town or city by any private or *quasi*-public corporation . . . waterworks . . . then in active operation and serving the public, which construction or operation was authorized by said town or city . . . then before constructing any proposed system of waterworks . . . heretofore or hereafter authorized by law, along or upon the streets occupied by such private or *quasi*-public corporation, the town or city within which such utilities are located and owned, proposing to build any public system of waterworks, shall, before undertaking to do so, first acquire, either by purchase or condemnation, the property of such system already laid, operated, and maintained by such private or *quasi*-public corporation. (Then follows the machinery pointed out in the said act for the acquire- (249) ment by condemnation of the property aforesaid.)

The defendants contend, among other defenses:

1. That upon all the evidence the plaintiff's plant is not a "system of waterworks" constructed by a private or *quasi*-public corporation in "active operation and serving the public," and therefore the plaintiffs do not come within the act.

2. That the act is unconstitutional.

We are of opinion that the allegations of the complaint as well as the evidence in support thereof fail entirely to bring the plaintiffs within the terms of the act of 1911, commonly known as the Battle Act.

The evidence shows that the waterworks plant which the plaintiffs are endeavoring to compel the town to take over was not constructed or owned by a private or *quasi*-public corporation, but was constructed and is owned by a partnership, and that at the time of the plaintiff's demand under the act this private plant was not "in active operation, serving the public," within the sense and meaning of the law.

This statute is mandatory and not directory in its terms. No discretion is left to the municipal authorities. Again, the statute is in derogation of the usual and common rights of all municipalities to construct or purchase as well as to manage their public utilities in the exercise of a sound discretion by the municipal authorities to manage them for the public good.

Statutes in derogation of common rights or conferring special privileges are to be construed liberally in favor of the public and strictly against those specially favored. Also, where the requirements of a statute are mandatory in terms, it must be strictly construed. 36 Cyc., 1173.

Another rule applicable to the construction of statutes is that when they make use of words of definite and well known sense in the law, they are to be received and expounded in the same sense in the statute. *Adams v. Turrentine,* 30 N. C., 149. In that case *Chief Justice Ruffin* says: "Indeed, this rule is not confined to the construction of statutes, but extends to the interpretation of private instruments. There are exceptions to it, where it is seen that a word is used in a sense (250) different from its proper one in instruments made by a person *inops consilii.* But that is a condition in which the Legislature cannot be supposed, and, therefore, although the intention of the Legislature, as collected from the whole act, is to prevail, a technical term having a settled legal sense, cannot be received in any other sense, unless at the last it be perfectly plain on the act itself what that other sense is. This principle, which is as well one of common sense as of common law, seems to be decisive of the present question."

It is well settled that the province of construction lies wholly within the domain of ambiguity, and that if the language used is clear and admits but one meaning, the Legislature should be taken to mean what it has plainly expressed. *Hamilton v. Rathbone,* 175 U. S., 421; 26 A. and E. Enc., 598.

As *Mr. Justice Story* says in *Gardner v. Collins*, 2 Pet. (U. S.), 93, "What the legislative intention was can be derived only from the words they have used, and we cannot speculate beyond the reasonable import of those words; the spirit of the act must be extracted from the words of the act and not from conjectures *aliunde*."

Where the words used are plain and have a well known meaning, "any departure by the courts from the language used would be unjustifiable assumption of legislative power." *Foley v. People*, 1 Ill., 57; 26 A. and E. Enc., 598.

The words "private corporation" and "*quasi*-public corporation" are technical terms of well known significance in the law, and so much so that it is unnecessary to define them.

In the use of such terms we have no right to say that the Legislature intended also to embrace a single individual or a partnership. The latter is a contract between private individuals for the purpose of trade or gain. Their relation to the public is very different from that of a corporation.

Efland v. R. R., 146 N. C., 135, is not a precedent. In that case we held that the word "companies" as used in the statute was plainly intended to embrace "all corporations, companies, or persons" engaged as common carriers in transportation of freight.

The word "company" has no such technical and legal meaning (251) as the word "corporation."

The authorities generally hold that "company" is a generic and comprehensive word, and may include individuals, partnerships, and corporations. 8 Cyc., 399.

But we are cited to no authority which holds that the word "corporation" may include a partnership or an unincorporated association of individuals.

It is said that this construction will work a great hardship on plaintiffs. That is not our fault. *Ita lex scripta est.* If the Legislature intended to include an individual or partnership, it should have so declared by appropriate and unambiguous language.

It is not probable that the General Assembly intended to compel municipalities to purchase such private waterworks as the entire evidence in this case shows plaintiffs' plant to be. As a sample, we copy from the evidence of plaintiffs' witness Finger, who had charge of the plaintiffs' plant since 1905:

"The average daily capacity of the plant is 15,000 gallons. We have been pumping this amount for the last two or three months. It has about the same capacity in the winter-time. Our customers use about

as much again water in the summer as they do in the winter. During the dry season this summer we have furnished water from 6 o'clock in the morning to from 12 to 2 in the afternoon. When we turn it on, there is from three to five thousand gallons in the tank, which is drawn out almost immediately by the customers and put in buckets and tubs."

Plaintiffs have 185 customers in the town, and there are 240 other families unsupplied. The plant has one tank of 1,000 gallons capacity only on a 40-foot tower. It furnishes not more than a third of the business houses and no supply at all for fire purposes. Its pipes are so small as to be useless for fire protection and are worthless in the construction of a new plant.

The evidence shows that the town is now installing a large and modern plant with a 100,000-gallon tank on top of a 112-foot tower. There will be, when completed, 5 miles of distributing pipe ranging
(252) from 10 inches to 6 inches in diameter, and that the capacity will be three-fourths of a million gallons per day.

The defendants offered to prove by a civil engineer that no part of the property or system of waterworks belonging to the plaintiff could be or could have been used or utilized by the defendant as a part of its proposed system of waterworks, and that as a part of its proposed system of waterworks it would have no value to the town.

While this evidence was improperly excluded by the court, it is manifest from all the admitted evidence that the plaintiffs' plant could not be of the slightest value in constructing the new one. To purchase it would be to take the money of the taxpayers and devote it to a private use exclusively, and to give something for nothing—a result not contemplated by the statute.

The learned counsel in this and the similar case of *Shute v. Monroe* have challenged in their briefs the constitutionality of the act as being an invasion of the rights of municipal corporations under the organic law.

We next come to consider the power of the Legislature to deprive a municipal corporation of the right through its governing body to exercise its *discretion* in the purchase of a waterworks or sewerage plant.

It must be admitted that the act of 1911 attempts to do so, and places the municipality entirely in the power of a compulsory arbitration, without even a right of review or appeal to the courts. If this be a valid exercise of legislative authority, then the right to exercise its own discretion in a purely local matter is taken from the municipality and the money of the taxpayers may be donated to a private concern.

By the action of a majority of the arbitrators, the city may be com-

pelled to purchase something which, according to the judgment of its own authorities, is of no sort of value or use to it.

Our Constitution recognizes municipal corporations, and gives the Legislature power to create them, and also confers upon them the right to provide for their necessary expenses. We have held that waterworks, sewerage, and some other public utilities are neces- (253) sary expenses.

We do not think the Legislature can dictate to a municipal corporation the manner in which it may acquire its waterworks any more than it can dictate the kind of engine to be used in pumping the water. The principle of local self-government requires that this of necessity must be left to the sound discretion of the municipal authorities.

"Municipal corporations possess a double character: the one governmental, legislative, or public; the other, in a sense, proprietary or private. . . . In its governmental or public character the corporation is made, by the State, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the State rather than for itself. . . . But in its proprietary or private character the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* as a private corporation, or at least not public in the sense that the power of the Legislature over it or the rights represented by it are omnipotent."

In matters purely governmental in character, it is conceded that the municipality is under the absolute control of the legislative power, but as to its private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations.

The *Detroit Park case,* 28 Mich., 228, page 208 *et seq.,* in 15 Amer. Rep.; *Bailey v. New York,* 3 Hill, 531; *Philadelphia v. Fox,* 64 Pa. St., 180; *Small v. Danville,* 51 Me., 362; *Western College v. Cleveland,* 12 Ohio, 375; Dillon's Municipal Corporations (4 Ed.), volume 1, pages 99 to 101, inclusive, and especially pages 107, 108, and pages 111 to 123, inclusive.

"It may be admitted that corporations . . such as . . . (254) cities, may in many respects be subject to legislative control. But it will hardly be contended that even in respect to such corpora-

tions the legislative power is so transcendent that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith."

Dartmouth College case, 4 Wheat., 518, 694, 695; Cooley's Const. Lim. (6 Ed.), pages 284, 285, and 290; *Hewison v. New Haven,* 37 Conn., 475.

The case of *People v. Hurlburt,* 24 Mich., 44, is in point. In a learned and forcible opinion, *Judge Cooley* says:

"The doctrine that within any general grant of legislative power by the Constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people."

Again: "The officers in question involve the custody and control of the . . . sewers, waterworks, and public buildings of the city, and the duties are purely local. The State at large may have an indirect interest in an intelligent, honest, upright, and prompt discharge of them, but this is on commercial and neighborhood grounds rather than political, and *it is not much greater or more direct than if the State line excluded the city.* Conceding to the State the authority to shape the municipal corporations at its will, it would not follow that a similar power of control might be exercised by the State as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it."

See, also, the opinion of *Chief Justice Breese* in *People v. Mayor of Chicago,* 51 Ill., 17; *People v. Batchellor,* 53 N. Y., 128; 1 Dillon Mun. Corp., 72.

It is well settled that local conveniences and public utilities, like water and lights, are not provided by municipal corporations in their political or governmental capacity, but in that *quasi*-private capacity, in which they act for the benefit of their citizens exclusively. 1 (255) Dillon Mun. Corp., p. 99; *San Francisco Gas Co. v. San Francisco,* 9 Cal., 453; *Detroit v. Corey,* 9 Mich., 195.

The same doctrine is held by this Court, *Fisher v. New Bern,* 140 N. C., 506. *Terrell v. Washington,* 158 N. C., 288.

A town cannot be compelled by the Legislature to undertake public improvements not governmental in character. This is well settled. 1 Abbott Mun. Corp., 134.

If the Legislature cannot compel a municipality to establish waterworks, how can it control the exercise of its discretion by the municipality when it undertakes to install them? The exercise of such a

power would be destructive of the most cherished principles of local self-government. We are cited to a very strong and learned opinion directly in point, *Water Co. v. Steele,* 20 Mont., 1.

The Legislature of Montana passed a statute similar to the Battle Act. The Supreme Court of Montana held that the statute placed a restriction upon the municipality and made mandatory the incurring of indebtedness for the purpose of acquiring the plant if it decided to maintain and operate its own works. The Court, in addition to other objections, declared the statute to be an infringement of the right of local self-government inherently vested in all municipal corporations in a matter relating purely to its property rights and private affairs as distinguished from the rights and duties as an agency of the State.

In referring to the moral obligation to purchase an established plant, the Court said:

"It is contended that the moral obligation of the city to assume this compulsory indebtedness is sufficient to support the law and relieve it of its unconstitutionality, if it be in conflict with the Constitution. But we are unable to see what moral obligation the city is under, or has ever assumed, that will bring the matter under the rule contended for by counsel of respondent.

"The city never agreed for all time to buy water from the plaintiffs. It expressly reserved the right to do otherwise. Plaintiffs' plant may not be capable of furnishing an ample supply of wholesome water for the inhabitants of the city, either now or as the city may expand or increase in population in the future. The plant and system (256) may be practically worthless.

"The city may be able to secure the water system and supply for half what plaintiffs' plant would cost. Is there any such moral obligation on the part of the city disclosed in this case as would justify this Court in compelling it to assume the indebtedness necessary for it to assume in order to purchase plaintiffs' plant, tax the people for money to meet such indebtedness, in total disregard of all these possible and probable events?

"Shall it be said, in obedience to this law, that the city authorities, the legal representatives of the inhabitants of the city, have no discretion in the premises, but must obey, notwithstanding disaster and oppressive taxation and ruin may come upon the people as a consequence?

"We think the two provisos of the law under discussion are in violation of the clauses of the Constitution quoted and referred to above, as well as the spirit of our governmental system, which recognizes 'that

the people of every hamlet, town, and city of the State are entitled to the benefits of local self-government.'

"The law is not supported by any moral obligation, but is rather a violation of the law, the Constitution, as well as the principle of moral obligation invoked by the respondent. It violates the general rule of the law that the consent of parties to a contract is necessary to its validity, whether the parties be natural or artificial persons.

"We are at loss to find any theory of law, equity, or justice upon which we can conscientiously sustain the constitutionality of the statute in question."

This case is cited by the Federal Supreme Court in an action between the same parties, coming up upon the appeal of the waterworks company from a decree of the Circuit Court of Appeals of the Ninth Circuit, where it was sought to restrain the city of Helena from acquiring a system of its own, except by purchasing an existing system. *Waterworks Co. v. Helena,* 195 U. S., 383, 393.

We are of opinion that the statute under consideration is void in so far as it attempts to control the exercise of discretion by the
(257) defendant in the management of its purely private and property rights.

The motion to nonsuit is allowed and the action dismissed.

Reversed.

HOKE and ALLEN, JJ., dissenting.

Cited: Sewerage Co. v. Monroe, post, 276; *S. v. Knight,* 169 N. C., 352.

AMERICAN TRUST COMPANY, COMMISSIONER, v W. L. NICHOLSON.

(Filed 13 May, 1913.)

1. Estates—Deeds and Conveyances—Trusts and Trustees—Sales—Proceeds Held in Trust—Equity.

Where an estate is granted for life, then to the children of the first taker, the children of such of them as may then be dead taking *per stirpes,* in trust to be held until the youngest child of the tenant for life shall become 21 years old, after the death of the first taker, all the parties at interest being before the court, equity may decree a sale, subjecting the proceeds in the hands of the trustee to the conditions originally imposed, and the purchaser will acquire a perfect title. *Springs v. Scott,* 132 N. C., 563, cited and applied.

2. Estates—Deeds and Conveyances—Restraint Upon Alienation—Sales—Proceeds—Trusts and Trustees—Partition.

An estate in remainder, with the provision "that no partition of said land or sale thereof shall be made by any" of the remaindermen until the youngest child of the tenant for life "shall arrive at the age of 21 years": *Held,* that part of the provision prohibiting a sale, regarded as a restraint upon alienating, is void; nor is that part which prohibits a partition of the lands violated by a decree of court for a sale which further orders that the trustees retain the whole proceeds, subject to the terms and conditions of the written instrument, for reinvestment.

3. Estates in Remainder—Deeds and Conveyances—Trusts and Trustees—Changed Conditions—Hardship on Beneficiaries—Equity.

Where the donor has created an estate in remainder for the benefit of his grandchildren, etc., to be held in trust until the youngest one shall have become 21 years of age, and it is made to appear to the court that to preserve the estate in its then condition, owing to changed conditions, would work a hardship upon the beneficiaries, and that to preserve their interest a sale should be decreed and the proceeds invested and held subject to the terms imposed: *Semble,* a court of equity may act accordingly, and the purchaser at the sale will acquire a good title.

APPEAL by defendant from *Webb, J.,* at March Term, 1912, (258) of MECKLENBURG.

Controversy submitted without action, for the purpose of determining the validity of the title to real estate contracted to be purchased from the plaintiff by the defendant. It is admitted that the title was good in Andrew J. Dotger and wife, and that if the proceeding in the Superior Court of Mecklenburg County, wherein an order of sale was made by Lyon, judge, at January Term, 1912, appointing the plaintiff a commissioner to sell the land described in the complaint, and the subsequent order in regard to the particular sale in controversy were obtained, is valid, then the title offered defendant by the plaintiff is good and indefeasible.

On 26 April, 1899, A. J. Dotger, who was then the owner of the lands in controversy, and his wife, executed the following paper-writing, which was duly probated and registered:

Whereas I, Andrew J. Dotger, of the aforesaid county and State, am the owner in fee simple of a certain tract of land lying and being in the county of Mecklenburg, State of North Carolina, near the city of Charlotte, containing about 89 acres, and described in a deed made to me by McD. Arledge and wife, which is duly registered in the office of the register of deeds for said county of Mecklenburg, in Book 104, page 122, and in a deed made to me by J. H. and W. R. Wearn, which deed is also duly registered in the office of said register of deeds, in Book 110, page 306, to which two deeds reference is made for a more

perfect description of the said tract of land; and whereas, because of my love and affection for my brother, Henry C. Dotger and his wife, Bertha M., and their children, I desire that they shall have the use and benefit of the said tract of land: Now, in consideration of my love and affection for them, and of $10 to me in hand paid, I, Andrew J.
(259) Dotger, do covenant with the said Henry C. Dotger and his wife, Bertha M., and their children as follows:

(1) That the said Henry C. Dotger and his wife, Bertha M., and the survivor of them, may occupy and use the said plantation as a home so long as they, or the survivor of them, may elect to live upon the said place and use and occupy it as a home for themselves and their children; and that while they, or the survivor of them, may use and occupy the said plantation as aforesaid, they shall have and hold the same free and clear from any demand for rent on the part of myself, my heirs or assigns; they or the survivor of them paying, when due, all taxes and assessments which may be levied against the said plantation.

(2) Upon the death of Henry C. Dotger and his wife, Bertha M., I covenant and agree that the title to the said plantation shall vest in fee simple in the children of the said Henry C. Dotger and his wife, Bertha M. Dotger, that may then be living, and in the children of any one of their children who may then have died leaving issue; such grandchildren, if any there be, to take *per stirpes* and not per capita: *Provided, however,* that no partition of said land nor any sale thereof shall be made by any of the issue of the said Henry C. Dotger and his wife, Bertha M. Dotger, until the youngest child shall arrive at the age of 21 years, that date being fixed as the time when partition is to be made.

(3) Upon my death, if that should occur before the demise of my said brother and his wife, I covenant and agree that the title to the said land shall vest in the executor of my will, to be held by him upon the same trusts and conditions as I hold the said land under this instrument.

(4) And in the event of the death of my executor before the death of my brother and his wife, then the title to the said land shall vest in my heirs at law, to be held by them upon the trusts and conditions herein set out.

(5) If my said brother and his wife shall elect not to use and occupy the said plantation as a home, and shall signify such election by removing from it, or shall attempt to encumber it or to assign or mortgage any right which they acquire hereunder, then and in that event
(260) the possession and control of the said plantation shall be reserved by me or by my successor or successors hereunder, and I

or they shall collect the rents and profits thereof, and having first paid all taxes and assessments due thereon, and all expenses incurred in the administration of this trust, shall apply the balance of such rents to the support and maintenance of the said family, as the trustees may see fit to do; and upon the death of both the said Henry C. Dotger and his wife, Bertha M. Dotger, the possession and control of the said plantation shall immediately pass over to the descendants of the said Henry C. Dotger and his wife, Bertha M. Dotger, as above provided, who shall then become, by the operation of this instrument, invested with the fee-simple title of the said land, subject only to the limitation aforesaid. And Clara L. Dotger, wife of the said Andrew J. Dotger, joins her husband in the execution of this deed in token of her renunciation of all right of dower in the land above described.

In witness whereof the said Andrew J. Dotger and wife, Clara L. Dotger, have hereunto set their hands and seals, this 26 April, 1909.

ANDREW J. DOTGER [SEAL]
CLARA L. DOTGER [SEAL]

On 16 November, 1911, an action was commenced in the Superior Court of Mecklenburg County for a sale of said lands or parts thereof, subject to confirmation by the court, and to reinvest the proceeds of sale.

Henry C. Dotger and wife; all their children, Freda L. Burch, Anna D. Kirby, Bertha C. McLaughlin, F. W. Dotger, and Dorothy F. Dotger; all their grandchildren, Florence E. Burch and Caroline Kirby; the Fidelity Trust Company, executor of A. J. Dotger, deceased; Annie C. New, Dora Warner, Elizabeth Wolf, Claire Richards, and Herbert L. Richards, who with the plaintiffs are all the heirs of A. J. Dotger, were parties to said action, and the plaintiffs alleged, among other things, in their complaint:

"That the plaintiffs, Henry C. Dotger and wife, Bertha M. Dotger, have, since the execution of said deed, occupied and used the lands therein described as a home, and have in every respect (261) complied with all the terms and conditions of said deed.

"That at the time said deed was executed the lands therein described were of small value and were suitable only for agricultural purposes; that the city of Charlotte has grown and extended in area until the greater part of said lands are now situated within said city, and all of said lands have become very desirable for residential purposes; that said lands have so increased in value that they are now worth the sum of $100,000, and are assessed for taxation at the sum of $25,000, which assessment will likely be increased at the next appraisal of property for taxation; that said lands are likely to be subjected at any time to

assessment for purposes of public improvement; and that on account of the high taxes levied against said lands and the assessments to which they may at any time be subjected, the lands have not only ceased to be profitable for farming and trucking purposes, but have actually become burdensome to plaintiffs.

"That the interest of all parties concerned would be materially enhanced if said lands or parts thereof were sold, and the proceeds reinvested in other real estate of a profit-bearing character or in the improvement of other real estate or such part of said lands as may not be sold, such newly acquired or improved real estate to be held upon the same contingencies and in like manner as was the property ordered to be sold."

Answers were filed, guardians *ad litem* appointed, and at the hearing the following judgment was rendered therein at January Term, 1912:

This cause coming on to be heard, and being heard upon the pleadings filed in the cause, and it appearing to the court from the pleadings, the affidavits of John F. Orr, Paul Chatham, and N. W. Wallace, and other evidence introduced, that the interest of all parties concerned would be materially enhanced if the lands described in the complaint herein filed, or parts hereof, were sold and the proceeds reinvested in other real estate of a profit-bearing character or in the improvement of other real estate or such part of said lands as may not be sold; and it further appearing that the American Trust Company, a corporation, having its principal office and place of business at Charlotte, N. C., is a suitable entity to act as commissioner for the purpose of making
(262) sale of said lands and reinvestment of the proceeds derived from such sale:

It is, therefore, upon motion of Morrison & McLean, attorneys for plaintiffs, ordered and adjudged that the American Trust Company be and it is hereby appointed a commissioner, clothed with full power and authority to sell said lands, or any parts or parcels thereof, subject to confirmation by the court, at either public or private sale, and reinvest the proceeds under order of court, after first paying the costs of this proceeding to be taxed by the clerk, in other real estate of a profit-bearing character or in the improvement of such other real estate or such parts of said lands as may not be sold, such newly acquired or improved real estate to be held upon the same contingencies and in like manner as the property ordered to be sold.

And this cause is retained for the further orders of the court.

C. C. LYON,
Judge Presiding.

In October, 1912, the commissioner appointed in said judgment reported to the court that the defendant Nicholson had offered $5,000 for $187\frac{7}{100}$ acres of said land, upon the terms set out in the report, and at October Term, 1912, of said court said offer was accepted, and the commissioner was directed to execute a deed to the purchaser upon compliance with the terms of the offer.

The commissioner offered to execute a deed in accordance with said last judgment, and the defendant refused to pay the purchase money, alleging that the title was defective, and thereupon the following judgment was rendered:

This cause coming on to be heard, the plaintiff being represented by its attorneys of record, Morrison & McLain, and the defendant by his attorneys of record, Stewart & McRae, and being heard: It is ordered and adjudged that the title tendered to the defendant by the plaintiff is good and indefeasible, and that the plaintiff is entitled to judgment against the defendant for the amount of the purchase money upon the execution to the defendant of the deed referred to in (263) the case submitted to the court.

JAMES L. WEBB,
Judge Presiding.

The defendant excepted and appealed.

Morrison & McLain for plaintiff.
Stewart & McRae for defendant.

ALLEN, J. The power of the court to order a sale of the land in controversy, with the parties before it, considered independent of the provision in the declaration of trust, "that no partition of said land nor any sale thereof shall be made by any of the issue of the said Henry C. Dotger and his wife, Bertha M. Dotger, until the youngest child shall arrive at the age of 21 years, that date being fixed as the time when partition is to be made," is settled in *Springs v. Scott,* 132 N. C., 563, where *Justice Connor,* in an elaborate and learned opinion, after reviewing the authorities, says:

"Upon a careful examination of the cases in our own reports and those of other States, we are of the opinion:

"1. That without regard to the act of 1903, the court has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, upon failure thereof, over to persons, all or some of whom are not *in esse,* when one of the class being first in remainder after the expiration of the life estate is *in esse* and a party to the proceeding to represent the class, and that upon decree passed,

and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons *in esse* or *in posse.*

"2. That when the estate is vested in a trustee to preserve contingent remainders and limitations, the court may, upon petition of the life tenant and the trustee, with such of the remaindermen as may be *in esse,* proceed to order the sale and bind all persons either *in esse* or *in posse.*"

Nor do we think the provision quoted prevents the exercise of this power.

If treated as a restraint on alienation, it is void. *Dick v. Pitchford,* 21 N. C., 480; *Mebane v. Mebane,* 39 N. C., 131; *Pace v. Pace,*
(264) 73 N. C., 119; *Lattimer v. Waddell,* 119 N. C., 370; *Wool v. Fleetwood,* 136 N. C., 465; *Christmas v. Winston,* 152 N. C., 48.

In *Wool v. Fleetwood, supra,* where the subject is fully discussed by *Justice Walker,* it is held, citing *Dick v. Pitchford,* that a condition against alienation annexed to a *life estate* is void; and in *Christmas v. Winston, supra,* citing *Lattimer v. Waddell,* that such a condition, whether annexed to a life estate or a fee, is not made valid because limited to a certain period of time.

The other condition as to partition has not been violated, as no actual partition has been had, and the sale is not for the purpose of dividing the proceeds, which are directed to be held for reinvestment.

It is not necessary for us to decide the question, in the view we have taken of the case, but there is also high authority for the position that conditions like those before us annexed to estates, limiting the powers of trustees or *cestui que trust,* if valid, do not prevent the court of equity from ordering a sale of property contrary to such condition, upon facts like those alleged in the complaint. *Curtis v. Brown,* 29 Ill., 230; *Weld v. Weld,* 23 R. I., 318; *Johns v. Johns,* 172 Ill., 470; *Conkling v. Washington Univ.,* 2 Md. Ch., 504; *Stanly v. Colt,* 72 U. S., 169; *Jones v. Habersham,* 107 U. S., 183; *Gavin v. Curtin,* 171 Ill., 648.

In the first of these cases (*Custis v. Brown*) the court says: "This question of jurisdiction does not depend upon the necessities of this case, but if it is possible that such a case might have existed as would authorize the court to break in upon the provisions of this trust deed, and order a disposition of the property not in accordance with its terms, then the power to do so is established. The case might exist where the property was unproductive, as in this case, but where the *cestui que trust* was absolutely perishing from want, or forced to the poorhouse, or where the trustee could not possibly raise the means to pay the taxes upon the property, and thus save it from a public sale and a total loss, can it be said that the beneficiary of an estate which

would bring in the market $100,000 should perish in the street from want, or be sent to the poorhouse for support, or that the (265) estate should be totally lost, because there is no power in the courts to relieve against the provisions of the instrument creating this trust? Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, wuld undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency. In *Harvey v. Harvey,* 2 P. Wms., the Court said it 'would do what in common presumption the father, if living, would, nay, ought to have done, which was, to provide necessaries for his children.' It is true that courts should be exceedingly cautious when interfering with or changing in any way the settlements of trust estates, and especially in seeing that such estates are not squandered and lost. Trust estates are peculiarly under the charge of and within the jurisdiction of the court of chancery. The most familiar instances in which the court interferes and sets aside some of the express terms of the deed creating the trust is in the removal of the trustee for misconduct and the appointment of another in his stead. But this is as much a violation of the terms of the settlement as is a decree to sell the estate and reinvest it, or to apply the proceeds to the preservation of the estate, or the relief of the *cestui que trust* from pinching want. From very necessity a power must exist somewhere in the community to grant relief in such cases of absolute necessity, and under our system of jurisprudence that power is vested in the court of chancery. This power is liable to be abused or imprudently exercised, no doubt, and so may every power vested in the courts or other branches of the Government. The liability to the abuse or misuse of power can never prove its nonexistence, else all powers of government would be at once annihilated." And in the last (*Gavin v. Curtin*): "We think it is well settled that a court of equity, if it has jurisdiction in a given cause, cannot be deemed lacking in power to order the sale of real (266) estate which is the subject of a trust, on the ground, alone, that the limitations of the instrument creating the trust expressly deny the power of alienation. It is true, the exercise of that power can only be justified by some exigency which makes the action of the court, in a sense, indispensable to the preservation of the interests of the parties in the subject-matter of the trust, or, possibly, in case of some other necessity of the most urgent character. The jurisdiction and power of a court of

chancery in this respect were the subject of discussion in this Court in *Curtiss v. Brown,* 29 Ill., 201; *Voris v. Sloan,* 68 *id.,* 588, and *Hale v. Hale,* 146 *id.,* 227, and the conclusion reached in each of such cases is in harmony with the view hereinbefore expressed, that courts in equity have full power to entertain bills and grant relief in such cases as that at bar."

We are, therefore, of opinion, upon a careful review of the whole record, that the plaintiff can convey a good title to the defendant.

Affirmed.

Cited: Bank v. Exum, 163 N. C., 199; *Dunn v. Hines,* 164 N. C., 121; *Holloway v. Green,* 167 N. C., 94; *Fisher v. Fisher,* 170 N. C., 381; *Lee v. Oates,* 171 N. C., 722; *Short v. Gurley,* 172 N. C., 868.

P. H. MOORE v. MARY JOHNSON, ET AL.

(Filed 13 May, 1913.)

1. Deeds and Conveyances—Common Source—Unregistered Deeds—Color of Title.

Where the parties to an action to recover land claim from a common source, an unregistered deed of one of them is not color of title as against the other, a grantee for value, under a registered deed; it only becomes so from the time of its registration, and ripens the title after seven years adverse possession therefrom.

2. Deeds and Conveyances—Common Source of Title.

A common source of title is one appearing somewhere in the chain of paper title relied on by each party in an action to recover lands, and is not affected by the fact that theretofore it is claimed from different sources.

3. Deeds and Conveyances—Coverture—Joinder of Husband—Privy Examination.

A deed made by a married woman, without taking her privy examination and the joinder of her husband, is void.

4. Deeds and Conveyances—Registration—Notice—Bona Fide Purchasers—Interpretation of Statutes.

Where in an action to recover lands it appears that both parties are purchasers in good faith for value, one claiming by adverse possession under an unregistered deed as color, and the other under a prior registered deed, and both under a common source, no notice, however full and formal, will supply the place of registration, and the party claiming under the registered deed has the better title.

MOORE *v.* JOHNSON.

APPEAL by plaintiff from *Lyon, J.*, at September Term, 1912, (267) of WILKES.

Action for the recovery of 23 acres of land. The defendants are Mary Johnson and her children, Thomas Johnson and Walter Johnson. If Mary Johnson can successfully defend the action, plaintiff cannot recover against her codefendants, her children, as they are in possession under her.

Plaintiff claimed title as follows:

1. Grant from the State to Richard Parker for 80 acres of land, dated 29 July, 1843.

2. Deed from Richard Parker to William Tedder, 1 June, 1830, and from William Tedder to James Calloway, 16 April, 1844; the will of James Calloway, 30 December, 1878, appointing George H. Brown, his executor, with power to sell his lands, in his discretion, to pay his debts, and make title to the same, and deed to George H. Brown, executor of James Calloway, to Wilson Moore, 8 April, 1880, registered 16 March, 1909, and deed from Wilson Moore to plaintiff, P. H. Moore, 12 January, 1901, registered 2 December, 1907.

There was some evidence that all these deeds, and the will, cover the land in dispute, and evidence to the contrary. There was also evidence of possession by plaintiff of the land for about twenty-four years before this suit was brought.

Defendant denied the plaintiff's title and asserted title in herself, as follows:

1. Grant of the State to James Fletcher, dated 17 April, 1799.

2. Deed from James Calloway to Jesse Anderson, dated 19 October, 1863, and registered 20 February, 1906.

3. Death of Jesse Anderson, leaving four children, (1) James Anderson, to whom Calloway conveyed; (2) Mary Anderson, who married John Johnson in 1880, he being still alive; (3) John Ander- (268) son, who died twenty-five years ago intestate and without having married, and (4) Reuben Anderson, who conveyed his one-third interest in his father's land to plaintiff, P. H. Moore, 14 March, 1891.

4. Deed from P. H. Moore and wife to James Anderson, dated 6 October, 1900, and registered 27 September, 1912.

5. James Anderson and his sister, Mrs. Mary Johnson, the defendant, partitioned their lands and executed deeds accordingly, James Anderson conveying to Mary Johnson her one-half share in severalty by deed dated 6 January, 1907, and registered 6 March, 1909.

6. There was some evidence that the grant and deeds in defendants' chain of title covered the *locus in quo*.

The court, in its charge, made the case turn, first, upon the question whether the defendants' deeds covered the land in dispute, instructing

the jury, if they did, to answer the issue as to ownership in favor of defendants, and still to answer in that way if they found that plaintiff's deeds did not cover the land, the burden being upon plaintiff to show that fact; but he further instructed them to answer the issue for the plaintiff if they found that his deeds covered the land and the defendants' did not. The court then proceeded to instruct the jury as follows: "Both parties claim under James Calloway. They admit that at one time James Calloway owned the 150-acre tract and the 80-acre tract, and that he made a deed to the defendants or to those under whom the defendants claim, and that his executor made a deed to Wilson Moore, under whom the plaintiff claims. Now, the deed of James Calloway to Jesse Anderson, under whom the defendant Mary Johnson claims, was made in 1863, and was registered in 1906. The deed from George Brown to Wilson Moore, under whom the plaintiff claims, was made in 1880 and registered 16 March, 1909, about three years after the deed to Jesse Anderson was registered. So there is no question in this case of adverse possession. The plaintiff, P. H. Moore, has not introduced any
(269) deed under which he has held possession of the land for seven years. While his deed is seven years old, it only counts as color of title against Mary Johnson from the date of its registration, and that was in 1909, and not seven years before the suit was brought (which was 3 March, 1908). In passing upon the issues in this case, you will not consider the quitclaim deed of James Anderson either as against him or any one else. The whole question turns on whether or not the James Fletcher grant and deeds to the defendants from James Calloway, on down, cover the land in dispute. If they do, the plaintiff is not entitled to recover; but if the defendants' deeds do not cover the land in dispute, and if the deed from James Calloway to Jesse Anderson did not cover the land in dispute, the plaintiff would be entitled to recover, provided you find from the evidence, and by the greater weight of the evidence, that the Richard Parker grant and the deeds introduced by the plaintiff do cover the land in dispute."

The jury returned a verdict for the defendant, and plaintiff appealed having assigned as error each instruction of the court, as above stated, and also the refusal of the court to give this instruction, requested by him in apt time: "If the jury find from the evidence that the plaintiff and those under whom he claims have been in the open, peaceable, and notorious possession of the land in controversy, holding the same adversely to the defendants for seven years prior to the commencement of this action under color of title, such possession would ripen title in plaintiff, and the jury should answer the first issue 'Yes.'"

W. W. Barber for plaintiff.

H. A. Cranor and Hackett & Gilreath for defendant.

WALKER, J., after stating the case: We do not see why the charge of the court was not correct under the rule, now well established by the decisions of this Court, that where the parties to the action claim from a common source of title, in this case James Calloway, the true title and right to recover depends, not upon color of title and adverse possession under it, but must be determined by reference to the date of registration of the deeds of the respective parties. It was held in *Austin v. Staten,* 126 N. C., 783, that in such a case "an unregistered deed (270) does not constitute color of title," since the passage of Laws 1885, ch. 147 (Revisal, sec. 980). This view of the law was adopted in *Janney v. Robbins,* 141 N. C., 400, the Court following the decisions in *Austin v. Staten, supra; Lindsay v. Beaman,* 128 N. C., 189; *Collins v. Davis,* 132 N. C., 106, and *Laton v. Crowell,* 136 N. C., 380. *Justice Hoke* in *Janney v. Robbins,* referring to what has been decided in *Austin v. Staten,* and its legal effect upon titles as a construction of Laws 1885, ch. 147, Revisal, sec. 980, said: "The plaintiff, in *Austin v. Staten,* claimed under a deed to himself from H. W. Staten and two others, dated 31 March, 1896, registered the same day. The defendant claimed under a deed to himself from the same parties, dated 31 December, 1887, registered 31 May, 1897. It will be noted that there both parties claimed from the same grantor, and the plaintiff's deed, though dated nine years or more later than the defendant's, had been registered more than a year prior to the defendant's deed. There were questions of fraud involved in the case, in no way material to the point now considered. By the express provisions of the registration act, the plaintiff on the record and face of the papers had the superior right, because his deed had been first registered. Defendant then took the position that though his deed, by virtue of the registration act, was avoided as against plaintiff, yet the same was good as color of title, and proposed to maintain his title by showing occupation under his unregistered deed for seven years. The court held that to allow this would be in effect to destroy chapter 147, Laws 1885, and this we cannot do." It will be observed that the facts thus recited as those in *Austin v. Staten* are substantially the same as those we have before us in this record.

The Court, both in *Janney v. Robbins* and *Collins v. Davis,* expresses a very serious doubt as to whether the Legislature intended to effect such a radical change, by the Act of 1885, in the law of color of title, as formerly declared, but this doubt was finally settled in *Collins v. Davis, supra,* by the use of this language: "We therefore hold that where one makes a deed for land for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder (271) and remains thereon for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subse-

quent deed for a valuable consideration who has duly registered his deed. Except in cases coming within this rule, the rights acquired by adverse possession for seven years under color of title are not disturbed or affected by the act of 1885. To this extent we affirm the law as laid down in *Austin v. Staten, supra.* It is in harmony with the legislative purpose and policy incorporated into our laws by the act of 1885. The act intended to make secure and give notice of the condition of titles, and thereby prevent the evils existing under the law prior thereto, and must be construed with reference to this evil and in furtherance of the remedy," which was afterwards approved in *Janney v. Robbins, supra.* The Court did say in both of these cases that the doctrine of color of title is not modified except to the extent stated, that is, where the parties claim from the same source of title and in cases coming strictly within the principle, and that when they do not so claim, but derive their alleged right from independent sources, the doctrine of color of title, with respect to an unregistered deed, still exists. The paintiff argues, though, in his brief, that the parties in this case do not claim from a common source, and he seems to think that because the plaintiff introduced one grant from the State to Richard Parker for the 80 acres, and defendant a grant to James Fletcher for the 150 acres, both of which covered the disputed land, they claimed by independent titles. But not so, for the true title afterwards was acquired, or is presumed to have been acquired, by James Calloway, who thereby became, if we may so speak by analogy to a descent, the propositus of both parties, as they both introduced mesne conveyances to themselves from him and those under whom they claimed. The grants are of no importance, as there was no evidence of any better title than that presumed to have been held by Calloway, with which plaintiff connected himself.

It was upon the idea that, by the introduction of the grants it was shown that the parties claimed under different titles, and not
(272) from a common source, that plaintiff requested the instruction which was refused, and properly so, and his exceptions to the charge are all based upon the same erroneous view of the law. This is not a question of the lappage of two grants, though they may actually interfere with or overlap each other. The true title, so far as appears, came finally into James Calloway, and we start with him and are not required to consider the Parker and Fletcher grants. It may be added, that neither of the parties is connected by mesne conveyances or otherwise with the Fletcher grant. The rulings of the court were all correct, unless it be that the plaintiff's deed was color of title, and we had held that it was not.

The case was tried upon the theory that the pivotal question involved was whether the plaintiff's deed, not having been registered until the

year 1909, was color of title, the defendant's having been registered before that year and before the bringing of this suit, and upon this theory we decided it. There is no merit in the other question. A quitclaim deed from James Anderson to Wilson Moore, who conveyed to the plaintiff, can play no part in the case, as it appears that, at the time it was made Anderson had parted with his title, and the joinder in the deed of Mary Johnson, alone or without her hsuband, was void as to her, she being a married woman, and the joinder of her husband, with acknowledgement of both and her privy examination, being necessary to give efficacy to the deed. But plaintiff's counsel admits that this, the second, exception becomes immaterial and the ruling unprejudicial in view of our holding as to the other assignment of error. The act of 1885 was intended, of course, to protect only *bona fide* purchasers for value and without notice, but there is no question of that sort in this case. No notice, however full and formal, will supply the place of registration. *Robinson v. Willoughby,* 70 N. C., 358; *Blevins v. Barker,* 75 N. C., 436; *Quinnerly v. Quinnerly,* 114 N. C., 145, and cases cited. Both parties appear to have acted in good faith in buying the land, and to have given value therefor, and the plaintiff loses unfortunately by his neglect to have his deed duly registered. There was no request for instructions, except as indicated. The only prayer raises the same question practically as the exception to the charge. We have (273) considered the questions discussed in the brief of appellant, covered by his assignments of error, and have discovered

No error.

Cited: *Trust Co. v. Sterchie,* 169 N. C., 24.

GEORGE W. VANDERBILT v. FRANCES E. A. ROBERTS ET AL.

(Filed 13 May, 1913.)

Partition—Clerk of Court—Reference—Findings—Sale for Division—Exceptions—Questions for Court—Appeal and Error.

Where under a reference ordered by the clerk in proceedings for partition the referee has found that actual partition cannot be made of the lands without serious injustice to the various and numerous owners, an exception thereto by one of the parties does not involve an issue of title; and the question presented being confined to the exception taken, is one to be passed on by the clerk, and by the judge of the Superior Court on appeal; and the judge's ruling that the matter was one for the jury is held reversible error.

APPEAL by plaintiff from Lyon, J., judgment rendered at chambers, 24 January, 1913; from MCDOWELL.

Petition for partition of a certain tract of land of 50 acres in Henderson County, removed to and tried in McDowell County because of the disqualification of the clerk of the former county.

The clerk referred the cause to a referee, who heard the cause, reported the evidence, and found as a fact that partition cannot be made without serious injustice to the various and numerous owners, and that the interest of all parties will be greatly promoted by a sale of the entire tract for partition.

There are a large number of defendants, all of whom consent to a sale, except the heirs of W. T. Johnson, whose names are set out in their joint answer on pages 12 and 13 of the record.

These defendants duly excepted to the order of reference. They also excepted to the report of the referee, and demanded a jury trial
(274) in these words: "that the question whether the said land can be actually divided or not be submitted to a jury."

Lyon, J., granted defendants' motion and directed that the cause be tried by a jury upon the issues raised by the pleadings.

Plaintiff excepts and appeals.

Harkins & Van Winkle, J. S. Merrimon, and Pless & Winborne for plaintiffs.

Michael Schenck for the heirs of W. T. Johnson, defendants and appellees.

BROWN, J., after stating the facts: It is needless to consider the question as to whether the joint answer of the heirs of W. T. Johnson raises an issue of fact, except as to whether the land is susceptible of actual partition without serious injury to the many owners. The answer certainly raises no issue of title.

These defendants in their exceptions to the referee's report have pointed out with particularity the only matter upon which they demand a jury trial, viz., as to whether the land can be actually divided. Having specified their issue in their exception to the referee's report, they are necessarily limited to that. *Driller Co. v. Worth,* 118 N. C., 746.

These defendants are not entitled to have that matter passed on by a jury, because that is not an issue, but only a question of fact to be determined first by the clerk and on appeal by the judge.

The clerk heard the cause and found the facts fully and ordered a sale. These defendants appealed to the judge. The judge held as a matter of law "that the answer of these defendants raises issues of fact which should be tried by a jury." In this he erred.

No issues of title or fact are raised except as to the feasibility of dividing the 50-acre tract of land among a large number of owners. This is only a question of fact.

In *Ledbetter v. Pinner,* 120 N. C., 455, it is held: "The only controverted fact arising on the pleadings was as to the advisability of a sale for partition or an actual partition. This was not an issue (275) of fact, but a question of fact for the decision of the clerk in the first instance, subject to review by the judge on appeal." *Tayloe v. Carrow,* 156 N. C., 8, and cases cited.

The order of *Judge Lyon* is set aside and the cause remanded, to be proceeded with in accordance with this opinion. The costs of this appeal will be taxed against the heirs of W. T. Johnson, whose names are set out in their answer.

Reversed.

SHUTE SEWERAGE COMPANY ET AL, V. CITY OF MONROE.

(Filed 13 May, 1913.)

Cities and Towns—Sewerage—Private System—Injunction.

This case, involving the right of an injunction against a city in constructing a sewerage system without first acquiring that of the plaintiff existing within the corporate limits of the town, is controlled by the decision in *Asbury v. Albemarle, ante,* p. 247

HOKE and ALLEN, JJ., dissenting.

APPEAL by defendant from *Peebles, J.,* judgment rendered at chambers 3 December, 1912, from UNION, in an action to restrain defendant from constructing a municipal sewerage system.

The judge enjoined the defendant from continuing the construction of its sewerage system, and defendant appealed.

Williams, Love & McNeely and Tillett & Guthrie for plaintiff.
Adams, Armfield & Adams and Redwine & Sikes for defendant.

BROWN, J. The affidavits in the record show that the plaintiff's plant was not "constructed or owned by either a private or a *quasi*-public corporation," as it must have been in order for plaintiffs to come under the provisions of the act of 1911. It was constructed by J. Shute & Sons, a firm of individuals. The Shute Sewerage Company had not been incorporated at the time the city made its contract for a (276) sewerage system, but it belonged to J. Shute as an individual. The Shute Sewerage Company was not incorporated until the city's contractor had been at work for four months and had actually constructed one-seventh of the proposed system of the city.

The corporation was formed very shortly before the bringing of this action, and evidently for that purpose.

The affidavits establish in this case that the Shute sewer is not a public system. It has never purported to be one serving the public, but a reading of the ordinances which attempted to give Shute authority to put the pipes in the streets shows that it was for a limited purpose, this purpose being to supply buildings that the firm of J. Shute & Sons owned.

The fact that Shute incidentally supplied some others with sewerage who desired it does not make it a public system serving the public. The affidavits show that Shute's sewerage does not serve over 5 or 10 per cent of the inhabitants of Monroe, and that it was not constructed with a view to serving the public generally.

The affidavits of the civil engineer show that Shute's line of sewerage will not *articulate* with the city's system, and is of no possible value to it.

Assuming that the plaintiff is a private or *quasi*-public corporation, within the meaning of the act of 1911, ch. 86, and as such had constructed this sewerage line, the defendant could not be compelled to purchase it, and pay for it with the money of the taxpayers, if it is of no practical value to the municipality.

The case is governed by our decision in *Asbury v. Albemarle, ante,* 247.

The judgment of the Superior Court is reversed and the injunction dissolved.

Reversed.

HOKE and ALLEN, JJ., dissenting.

Cited: *S. v. Knight,* 169 N. C., 352.

JACOB CARPENTER v. CAROLINA, CLINCHFIELD AND OHIO RAILWAY COMPANY.

(Filed 13 May, 1913.)

Evidence—Collateral Matters—Appeal and Error.

In an action to recover damages of a railroad company for ponding water upon plaintiff's lands, to its injury, by filling up the original bed of a stream and diverting the water thereof into an inadequate channel, and the evidence tends to show an actionable wrong, testimony is properly excluded that lands of the same character as that of plaintiff some distance below and above his location had been turned out before the construction of the railroad and its cultivation no longer attempted, as being more likely to distract than aid the jury in their deliberation upon the issues involved in the case

CARPENTER *v.* R. R.

APPEAL by defendant from Adams, J., at August Term, 1912, of RUTHERFORD. Action to recover damages for wrongfully (227) ponding water on plaintiff's land.

Verdict for plaintiff. Defendant appealed.

McBrayer & McBrayer and S. Gallert for plaintiff.
Quinn, Hamrick & McRorie and J. J. McLaughlin for defendant.

HOKE, J. There was allegation with evidence on part of plaintiff tending to show that the defendant company, in constructing its roadbed along French Broad River, just below plaintiff's lands, had filled up the original bed of the stream, thereby diverting the water into an artificial channel, inadequate for the flow of the stream, causing the waters of same to pond back upon and sob and injure plaintiff's lands, to his great damage, etc.

There was evidence on the part of the defendant in denial of this view, but the issue is almost exclusively one of fact, and, the jury having accepted plaintiff's version of the matter, an actionable wrong had been clearly established. It was chiefly urged for error that the court sustained an exception to questions proposed by defendant to two or more of the witnesses and to the effect that certain lands on the river, some distance below and above that of plaintiff, and of same (278) character, had been turned out before the construction of the railroad and its cultivation no longer attempted. There are so many reasons which might have led to this course on the part of the owners of these other tracts that the proposed questions, in our opinion, were properly excluded as tending to introduce issues entirely foreign to the inquiry and more likely to distract than to aid the jury in their deliberations. *Chaffin v. Manufacturing Co.*, 135 N. C., 102; *Warran v. Makely*, 85 N. C., 12.

After careful examination of the record, we find no reason for disturbing the results of the trial, and the judgment in plaintiff's favor is Affirmed.

Cited: Westerman v. Fiber Co., post, 297.

CRAWFORD EDWARDS, BY HIS NEXT FRIEND, H. E. EDWARDS,
v. SOUTHERN RAILWAY COMPANY.

(Filed 22 May, 1913.)

1. Carriers of Passengers—Ejecting Passenger—Allegations—Proof—Variance—Interpretation of Statutes.

A variance between the allegation and the proof must be of such a character as to mislead the adverse party to the action; and where a railroad company is sued by a passenger for a wrongful ejection from its train alleged to have been at a certain one of its stations, and upon the trial the evidence of both parties relates with unanimity to a certain other of its stations, the variation will not be deemed as material. Revisal, sec. 515.

2. Carriers of Passengers—Ejecting Passenger—Good Faith of Conductor—Punitive Damages—Evidence.

Where a railroad company has wrongfully ejected a passenger from its train, evidence tending to show the good faith of the conductor in his belief that the passenger had not given him his ticket is not relevant except where punitive damages are recoverable.

3. Carriers of Passengers—Ejecting Passenger—Actual Damages—Instructions—Punitive Damages—Appeal and Error.

Where a recovery of punitive damages in an action against a railroad company for wrongfully ejecting a passenger from its train is denied by the trial court, the refusal of the court to give certain of defendant's prayers for instruction on the issue of punitive damages is not erroneous.

APPEAL by defendant from Justice, J., at February Term,
(279) 1912, of RUTHERFORD. Action to recover damages for wrongfully ejecting the plaintiff from the defendant's train.

The plaintiff offered evidence tending to prove that on 3 July, 1910, he bought a ticket at Lattimore for Gilkey, stations on the defendant's road; that he entered the defendant's train as a passenger; that he gave his ticket to the conductor, and that he was ejected from the train against his will at Coxe's Crossing, before he reached Gilkey.

The ticket agent of the defendant testified in corroboration of the plaintiff as follows: "Am agent Southern Railway at Lattimore. Know plaintiff. Sold him ticket on 3d July, Sunday, 1910, from Lattimore to Gilkey. This is the stub. He paid 60 cents. Conductor asked me if I sold ticket to plaintiff for Gilkey. I told him yes. He said plaintiff had no ticket to Gilkey. Afterwards he said plaintiff had no ticket at all. Ticket would show same as stub."

There was no controversy that the plaintiff left the train at Coxe's Crossing, but the defendant offered evidence tending to prove that the

plaintiff either had no ticket to Gilkey or failed to give his ticket to the conductor.

The defendant moved for judgment of nonsuit, which was overruled, and defendant excepted.

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

"4. That if the jury should find from the evidence, or the greater weight thereof, that the conductor of the defendant believed, or had good reason to believe, that the plaintiff had not given him a ticket from Lattimore to Gilkey, and that the plaintiff had represented to the conductor that he had paid 65 cents instead of 60 cents, which was the regular fare for such a ticket, and if the jury should further find that such representation, in connection with the fact that the conductor of the defendant had not in his possession, among the tickets collected by him, a ticket from Lattimore to Gilkey, if the jury should find from the evidence such a fact was reasonable ground to believe (280) plaintiff had not handed him such a ticket, then the plaintiff cannot recover in this action, and the jury should answer the second issue 'No.'"

The court refused this prayer of the defendant, and the defendant excepted.

The court instructed the jury, among other things, as follows:

1. "If you find from the evidence that the plaintiff had a ticket from Lattimore to Gilkey, and you find such fact from the greater weight of the evidence, and that he gave his ticket to the conductor, then the court instructs you that he had a right to ride on defendant's train from Lattimore to Gilkey, the destination called for in his ticket; and the court instructs you that if he was ejected from the train (unless on account of his own wrongful conduct or disorderly behavior, and there is no evidence of such behavior), his ejection was wrongful and in violation of the duty which defendant owed him, and that he would be entitled to recover compensatory damages. The amount or quantity of damage which plaintiff would be entitled to recover in this view would depend upon the facts as you find them to be from the evidence. If you find from the evidence, and from its greater weight, that the defendant's conductor, after taking up the plaintiff's ticket, went to plaintiff and again demanded a ticket, and stated that unless he paid his fare, he (the conductor) would put him off the train, and that this was stated to plaintiff in the presence of other passengers and in a manner to humiliate and wound the feelings of plaintiff, and that defendant's conductor, actually did eject plaintiff from its train, then you will consider these facts as elements of compensatory damages. And if you further find that defendant's conduct in ejecting and putting plaintiff off its train was calculated to humiliate plaintiff, then you will con-

sider his humiliation and the suffering entailed thereby as elements of damages, as above explained to you. And if you further find out that the plaintiff was actually humiliated by the conduct of the defendant in putting him off the train in an out-of-the-way place, if you find that he
(281) was put off at an out-of-the-way place, after he had bought and turned in his ticket to the conductor, and that he suffered mental pain on account of such conduct by defendant, then he would be entitled to compensation in damages, notwithstanding the conductor may not have had any intention of causing him humiliation and pain. The question is, Was the conduct of defendant (if you find it to be wrongful, as explained to you above) calculated to entail mental suffering upon the plaintiff by humiliation and mortification, and did he actually suffer in that manner?" Defendant excepted.

2. "The court instructs you that compensatory damages cover and include a reasonable and fair compensation for loss of time, loss of money, physical inconvenience and mental suffering and humiliation endured, and which could be considered as a reasonable and probable result of the wrong done. Of course, you must find that the plaintiff sustained the wrong, and that it was the proximate cause of the damage sustained, if you find that there was damage, and as to this you have been instructed above." Defendant excepted.

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

No counsel for plaintiff.
S. Gallert for defendant.

ALLEN, J. The motion to nonsuit is insisted upon in this Court, principally upon the ground of a variance between the allegation and the proof, in that the complaint alleges that the plaintiff was ejected at Rutherfordton, and the proof is he was ejected at Coxe's Crossing; but the whole record shows that there was no controversy as to place, and the Revisal, sec, 515, provides: "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."

The prayer for instruction asked by the defendant was properly denied.

Construing the verdict with the charge, the jury has found that the plaintiff was a passenger and had given his ticket to the con-
(282) ductor, and that he was expelled from the train against his will. If so, his expulsion was wrongful, and gave the plaintiff a right of action, and the good faith of the conductor could not defeat the action,

and would only be material on the question of punitive damages. *Ammons v. R. R.*, 138 N. C., 555.

McGraw v. R. R., 135 N. C., 264, is not in point. In that case, as the train was leaving Charlotte the plaintiff jumped on the platform of the baggage car, and the conductor testified that, "When I got to the front end of the mail car the train had begun to move, and I saw these two men up there. About the time I got there the baggage-master stepped up on the other side. I told the men to come down. They did not get down, and in order to get them on the ground before the train got up too much speed. I reached up and pulled them down and let them light on the ground. When I put the second one down I caught on the back end of the same car. I just caught hold of them and pulled them down. They did not resist. I had no conversation with them; did not see any ticket; did not suppose for a moment that they had any ticket, or they would not be there, because it was not a place for passengers, and they could not pass from that end of the car to the other. There is no doorway from the mail car to the baggage car. Passengers are not allowed to go through them at all."

On appeal it was held to be error to charge the jury, in any view of the evidence, to answer the issues against the defendant, because the plaintiff, according to the conductor, was where passengers had no right to be.

The instructions given to the jury and excepted to are fully sustained by the authorities.

The exceptions for failure to give certain instructions on the issue of punitive damages need not be considered, because his Honor expressly told the jury there was no evidence to sustain the plaintiff's allegation of punitive damages, and refused to submit the issue.

There are other exceptions in the record, which we have examined, and in which we find

No error.

G. C. HOWELL v. EDITH HOWELL AND G. A. BRIGGS.

(Filed 22 May, 1913.)

1. Pleadings—Nonsuit—Averments; How Construed.

Where an action has been dismissed upon the allegations of the complaint, these allegations will be taken as true upon the plaintiff's appeal.

2. Parent and Child—Divorce—Concealment of Child—Abettor—Damages—Pleadings—Cause of Action.

Where a divorce absolute has been obtained by the husband, leaving open the matter of awarding the custody of a minor child, which re-

mained with the wife, the judge of the Superior Court, at the suit of the father, alleging the concealment of the child by the wife and her father, may order the production of the child, if it is within the State, and award its custody; and a civil action for damages will lie against the father of the wife in aiding and abetting her in concealing the child, sending it beyond the borders of the State; and an allegation of the complaint that the defendant procured, aided, assisted, and advised (the wife) in the taking off the child and concealing its whereabouts "causing plaintiff great and agonizing distress both of mind and body," states a good cause of action against the person thus acting.

(283) APPEAL from *Adams, J.*, at March Term, 1909, of YANCEY.

Hudgins, Watson & Watson and A. Hall Johnston for plaintiff.
No counsel for defendant.

CLARK, C. J. The plaintiff entered into a contract with his wife, the defendant Edith Howell, and the defendant G. A. Briggs, her father, that the daughter of the plaintiff, Lucy Howell, might remain with her mother, Edith Howell, at the home of said G. A. Briggs until said child should reach the age of 6 years, when she should be returned to her father. The plaintiff soon after said contract, obtained a divorce from his wife on the ground of her adultery, and the decree provided that the custody of the child should be left open for further orders of the court. There has been no decree fixing the custody of said child.

It is alleged in the complaint that a few days prior to the child's attaining 6 years of age, the defendant, Edith Howell, with the
(284) advice and assistance of her codefendant, G. A. Briggs, spirited the child away beyond the State to some place unknown to the plaintiff.

The complaint asks judgment against the defendant G. A. Briggs for damages, and against both defendants for the custody of said child, if she can be located, and for a rule upon the defendant Briggs requiring him to disclose the present whereabouts and residence of the plaintiff's child.

Abduction is usually prosecuted on the criminal side of the docket. But there are many cases in which damages have been recovered for wrongful abduction. The court having dismissed the action upon the pleadings, we must take the statements in the complaint to be true, because by the dismissal of the action the plaintiff has been debarred the opportunity of proving his allegation to be true. The question is whether the complaint states a cause of action.

In *Harris v. Harris*, 115 N. C., 589, it was held that a father who was entitled to the custody of the child might recover damages on a bond given for the return of the child to his custody, for failure to do so. A

grave wrong was done the plaintiff if, as the complaint avers, his child was taken out of the State or secreted by the mother with the aid and assistance of the defendant G. A. Briggs. If the child were in the State, this action can be maintained for the production of the child before the judge, who upon hearing the evidence would award her custody. As to the defendant G. A. Briggs, if the allegations of the complaint are proven to be true, he is clearly liable for damages.

It is true that at common law abduction of a female for immoral purposes was not an offense (*S. v. Sullivan,* 85 N. C., 506), but as *Judge Settle* remarked in *S. v. Oliver,* 70 N. C., 60 (referring to the common-law right of a husband to whip his wife), "We have advanced from that barbarism," to some extent, by Laws 1879, ch. 81, now Revisal, 3358, which makes *abduction under some circumstances* an offense if the child is under 14 years of age. *S. v. George,* 93 N. C., 567; *S. v. Chisenhall,* 106 N. C., 676; *S. v. Burnett,* 142 N. C., 579.

At the common law, abduction of a child was not an offense. *S. v. Rice,* 76 N. C., 194. But 3 Blackstone Com., 140, holds that a civil action lay therefor, and that a father could recover dam- (285) ages, though he says it was a doubtful question, on which the authorities were divided, whether a father could recover for the abduction of any other child than the oldest son and heir. In *Barham v. Dennis,* Cro. Eliz., 770, it was held that he could not. But later cases held that an action would lie for taking away any of the children, because the parent "had an interest in them all." It is interesting to quote the reasoning of the courts at common law as given in *Barham v. Dennis, supra. Anderson, Walmsley,* and *Kingsmil, JJ.,* said: "The father should not have an action for the taking of any of his children, which is not his heir; and that is by reason the marriage of his heir belongs to the father, but not of any other his sons or daughters; and by reason of this loss only the action is given unto him; the writ in the Register is for the son and heir, or daughter and heir only; which proves that the law has always been taken, that the action lies not for any other son or daughter. And although it hath been said that a writ of trespass lies for divers things whereof none of them are in the Register, and it hath been adjudged that it lies for a parrot, a popinjay, a thrush, and, as in 14 Henry VIII, for a dog; the reason thereof is, because the law imputes that the owner hath a property in them; . . . But for the taking of a son or daughter not heir, it is not upon the same reason, and therefore not alike. Here the father hath not any property or interest in the daughter which the law accounts may be taken from him." *Glanville, J.,* dissenting, said: "The father hath an interest in every of his children to educate them, and to provide for them, and he hath his comfort by them; wherefore it is not reasonable that any should

take them from him, and to do him such an injury, but that he should have his remedy to punish it." The majority of the Court are sustained by the form of the writ as preserved in Fitz-Herbert's *Natura Brevium,* 90 H., which was of date 12 Hen. IV, 16. But *Judge Glanville* based his dissent upon reason and justice, and has been sustained by subsequent cases.

In Cooley on Torts (3 Ed.), 482, 483, it is said that an action for damages for abduction of a child will lie in favor of the parent.
(286) In *Rice v. Nickerson,* 91 Mass. (9 Allen), 478, it was held in a case much like this, that the plaintiff might recover actual damages for expenses incurred in the pursuit of his child which had been abducted. The Court also indicated that upon proper allegations, such as have been made in this case, the plaintiff would be entitled to recover punitive damages for the wrong inflicted upon him. Among other cases sustaining an action for damages for abduction of a child are *Bradley v. Shafer,* 71 N. Y. (64 Hun), 428; *Hills v. Hobert,* 2 Root (Conn.), 48; *Dobson v. Cothran,* 34 S. C., 518; *Kreag v. Anthus,* 2 Ind. App., 482.

In *Brown v. Crockett,* 8 La. Ann., 30, it is held that in an action for the wrongful abduction of a minor the jury has a right to award damages for mental anguish as a part of the compensatory damages for such wrong. In *Baumgartner v. Eigenbrot,* 100 Md., 508, it was held that if the child was kept in defendant's custody in a clandestine manner an action would lie.

In *Steele v. Thacher,* 1 Ware (U. S., 85), it was held that "A parent may maintain a libel in admiralty for the wrongful abduction of his child, being a minor, and carrying him beyond the sea." This has been cited with approval in 22 Fed. Cases, 13, 348, where the above case is reprinted. The subject is very interestingly discussed in *Everett v. Sherfey,* 1 Iowa, 356, and Schouler Dom. Rel. (3 Ed.), sec. 260; 2 Hilliard on Torts (3 Ed.), 519, 521, which sustain the proposition that a parent can maintain damages for the abduction of his child. To same effect *R. R. Co. v. Showers,* 71 Ind., 451; *Sargent v. Mathewson,* 38 N. H., 54, and other cases.

The most usual case in which this action is brought has been upon the abduction of a daughter for marriage or immoral purposes. But the modern authorities, as we have said, have advanced, and now the parent can recover damages for the unlawful taking away or concealment of a minor child, and is not limited to cases in which such child is heir or eldest son, nor to cases where the abduction is for immoral purposes, nor are the damages limited to the fiction of "loss of
(287) services." This Court pointed out in *Hood v. Sudderth,* 111 N. C., 215, and *Willeford v. Bailey,* 132 N. C., 402, that this is

"an outworn fiction," even in actions for seduction. The real ground of action is compensation for the expense and injury and "punitive damages for the wrong done him in his affections and the destruction of his household," as said in *Scarlett v. Norwood,* 115 N. C., 285; *Abbott v. Hancock,* 123 N. C., 99; *Snider v. Newell,* 132 N. C., 614, 623, 624.

The law is summed up with citations of numerous authorities in 1 A. & E. (2 Ed.), 167, as follows: "A father has a right of action against every person who knowingly and wittingly interrupts the relation subsisting between himself and his child or abducting his child away from him or by harboring the child after he has left the house."

It can make no difference that the child at the time she was carried away was not in the immediate custody of the father. She was temporarily with her mother, but he was legally entitled to her custody or to have it adjudged by the court, and to take her out of the jurisdiction of the court, or secrete her, was an injury for which he was entitled to damages. The allegation of the complaint that the defendant Briggs "procured, aided, assisted, and advised the taking off of the child and conceals its whereabouts and has thereby caused the plaintiff great and agonizing distress of both mind and body," states a good cause of action against him.

The judgment dismissing the action is

Reversed.

Cited: Howell v. Solomon, 167 N. C., 590.

ROBERT G. HAYES, TRUSTEE, AND NATIONAL FIRE INSURANCE COMPANY v. M. TOMS PACE, TRUSTEE, AND K. G. MORRIS.

(Filed 22 May, 1913.)

1. Mortgages—Sales—Fraud—Equity.

A court of equity has power to vacate a foreclosure sale which is shown to have been tainted with fraud or deceit, or to have been made in pursuance of a corrupt scheme to gain possession of the premises inequitably.

2. Same—Assignment of Mortgage—Transfer of Title.

The difference between a mere assignment of a mortgage of lands and the substitution of a trustee is, that the terms of the former do not profess to act upon the lands, or pass the mortgaged estate thereto, but only the security it affords to the holder of the debt; and where a foreclosure sale of the lands had been brought about by collusion and fraud of the

holder of the security for the purpose of acquiring the land at the sale, courts of equity will intervene, whether there has been only an assignment of the security or a transfer of the title to the lands to another trustee.

3. Mortgages—Sales—Trusts and Trustees.

The owner of a debt secured in a deed in trust made to a third party as trustee, with power of sale, may lawfully bid and purchase at the sale, where there is no fraud or collusion between the creditor and the trustee.

4. Same — Fraud — Collusive Sales — Liens — Junior Judgment Creditors—Equity.

Where fraud and collusion is shown between the holder of a first mortgage debt in the foreclosure sale of the mortgaged premises, junior mortgagees or lien creditors will be protected by the courts to the same extent as the mortgagor.

5. Same—Injunction.

Where there are a first and second mortgage on lands and several junior judgments for materials furnished for a building thereon, and one of these junior judgment creditors has bought in the lands at an execution sale of another of the junior judgment creditors, and in pursuance of a scheme to get the lands, has procured the assignment of the first mortgage to a trustee, whom he controls, and under his instruction the mortgaged premises were sold, bid in by another of his agents at the foreclosure sale, so that the result of the scheme is to have obtained the land at a grossly inadequate price, the second mortgagee having offered to pay off the first mortgage debt and given notice of his rights at the sale; it is *Held*, that the evidence of fraud is sufficient to be submitted to the jury, and that equity will enjoin the making of the deeds to the purchaser at the sale, and preserve the equities to the hearing of the second mortgagee and the other junior judgment lienors for materials furnished.

6. Mortgages—Notice of Sale—Hour of Sale—Fraud—Evidence—Injunction—Equity—Sale Vacated.

The failure of the notice of a foreclosure sale under a mortgage to state the hour thereof is sufficient evidence of fraud for an order to issue restraining its consummation to the hearing and to preserve the equities of the parties thereunder arising; and should it then appear that the hour was not thus stated, the sale should be set aside.

(289) APPEAL by defendants from restraining order issued by *Lyon, J.*, at chambers, 7 March, 1913; from HENDERSON.

Appeal by defendants from an order continuing a restraining order to the final hearing.

Brooks, Sapp & Hall for plaintiffs.
Smith, Shipman & Justice for defendants.

BROWN, J. This litigation grows out of the case of *Roper v. Insurance Co.*, 161 N. C., 151. In the present action the judge restrained the defendants from completing the sale of certain lands referred to in the pleadings.

From the pleadings and affidavits in the record these facts appear:

On 26 November, 1908, C. E. Roper and wife executed to A. L. Holmes a deed of trust to secure $3,200 and interest, the land included in the conveyance being a boundary of about 300 acres situated near Hendersonville. The grantors subsequently built a hotel on one of the lots included in the boundary, and gave other mortgages and deeds of trust upon the same property.

On 6 May, 1910, C. E. Roper individually, and as executor of his wife, executed a deed of trust upon the same property to Smith as trustee for J. M. Stepp, and thereafter procured a fire insur- (290) ance policy on the hotel to be written by the plaintiff, the National Fire Insurance Company, with a standard mortgage clause payable to J. M. Stepp.

Thereafter the hotel was destroyed by fire, and the National Fire Insurance Company, in obedience to a decree of this Court at its last term, paid the amount due on the mortgage, with interest, to G. H. Valentine, trustee in bankruptcy for J. M. Stepp, and took an assignment of the said deed of trust. That subsequent to the execution of the Stepp deed of trust in 1910, several parties filed liens against C. E. Roper for materials furnished in the construction of his hotel. Subsequently, judgments were taken thereon.

That R. C. Clark was one of these junior judgment holders, having purchased the hotel tract at a sheriff's sale under one of these judgments, known as the Loenhardt and Garren judgment, for the sum of $265, and took the deed therefor.

Thereafter, in order to forestall the rights of the National Fire Insurance Company as assignee of the Stepp mortgage, Clark caused an insolvent clerk in his employ, M. Toms Pace, to purchase for him the Holmes mortgage of $3,200, and interest, and take an assignment of the said mortgage to the said M. Toms Pace as assignee and trustee for Clark.

Following this up, Clark requested Pace, assignee of the Holmes mortgage, to advertise the Roper lands for sale on 14 February, 1913, and engaged K. G. Morris to attend the sale as his agent and bid for the land, with the understanding between himself and M. Toms Pace at the time that it was to be sold in separate lots.

On the day of the sale plaintiffs offered to pay to Pace the entire amount of his mortgage, interest, costs, and expenses, and take an assignment of the mortgage without prejudice to await a settlement of the

equities between the parties. This was declined. The plaintiffs then requested that the land be sold *en masse*. This was refused. Immediately after the last lot of land was knocked down to K. G. Morris, he having purchased it all, as per agreement, at the price of $394, the plaintiffs offered $4,000. This bid was declined.

The following notice in writing was read by plaintiffs at and
(291) immediately preceding the sale:

Notice to all bidders and prospective purchasers: Representing a mortgage creditor who holds a deed of trust upon the property included in the advertisement of this sale, I have offered, and do here and now offer to pay to A. L. Holmes or his assignee or attorney all the principal, interest, cost, and taxes due him or them, and for which he or they are liable to account at this sale, if he or his representatives will assign the said mortgage to me, to be held without prejudice to await the settlement of the equities, by the court, of subsequent creditors to this mortgage. This has been refused.

I demand that A. L. Holmes and his representatives conducting this sale shall offer all the property included in his mortgage for sale *en masse*, so that the largest possible amount may be obtained from this sale, satisfying his mortgage and providing, if possible, other funds to be distributed among the junior creditors of C. E. Roper, executor of F. A. Roper, deceased, the makers of this mortgage, and against whom the junior liabilities exist. ROBERT G. HAYES.

It appears from the affidavits that the land is worth $7,000 to $8,000, and that it was bid off for Clark at $394.

It does not appear in the record that Holmes, the original trustee in the deed in trust, executed a formal deed to Pace, conveying the land subject to the trusts and with the consent of the *cestui que trust*. As the record appears, he merely assigned the papers to Pace.

However that may be, we think that his Honor committed no error in continuing the injunction, restraining the making of deeds and passing the title to Clark upon the facts disclosed in the record.

It clearly appears that Pace was the trustee and personal agent of Clark, who had purchased several of the mortgages and the liens filed upon this property, and that he sold the property for Clark and to Clark, through another agent, at a price which as stated by this
(292) Court in a former case, is calculated to cause the bystanders to exclaim that he got the property for nothing.

We do not controvert the proposition, supported by abundant authority, that the owner of a debt secured in a deed in trust made to a third

party as trustee with power of sale, may lawfully bid and purchase at the sale, where there is no allegation or evidence of fraud or collusion between the creditor and the trustee. *Monroe v. Fuchtler,* 121 N. C., 101.

There is a difference between an assignment of a mortgage and the substitution of another trustee in a deed in trust by all the parties interested in it.

A mere assignment of a mortgage in terms which do not profess to act upon the land does not pass the mortgagee's estate in the land, but only the security it affords to the holder of the debt. *Williams v. Teachey,* 85 N. C., 403.

But whatever may be the form of the assignment by Holmes to Pace, the evidence of collusion between Pace and Clark is plenary, and a sale conducted under such circumstances, even by a legal trustee, would not be permitted to stand by a court of equity.

There is no question that a court of equity has power to vacate a foreclosure sale which is shown to be tainted with fraud or deceit, or to have been made in pursuance of a corrupt scheme to gain possession of the premises inequitably.

In *Jones v. Pullen,* 115 N. C., 471, it is said: "There is no question, according to our authorities, that if a mortgagee with power to sell indirectly purchases at his own sale, the mortgagor may elect to avoid the sale, and this without reference to its having been fairly made and for a reasonable price. This is an inflexible rule, and it is not because there is, but because there may be fraud." *Gibson v. Barbour,* 100 N. C., 192; *Froneberger v. Lewis,* 79 N. C., 426; *Cole v. Stokes,* 113 N. C., 270.

In *Mosby v. Hodge,* 76 N. C., 388, *Pearson, C. J.,* said: "The exercise of the power is only allowed in plain cases where there is no complication and no controversy as to the amount due upon the mortgage, and the power is given merely to avoid the expense of foreclosing the mortgage by action, but that when there is such complication and controversy the court will interfere and require the foreclosure to be made under the direction of the court after all the controverted (293) matters have been adjusted and the balance due is fixed, so that the property may be brought to sale when purchasers will be assured of a title, and not to be deterred by the idea that they are buying a lawsuit."

This case is cited with approval in *Menzel v. Hinton,* 132 N. C., 670.

Merrimon, C. J., in *Gooch v. Vaughan,* 92 N. C., 615, says: "Courts regard such powers with suspicion and watchfulness, and never fail to

scrutinize the exercise of them when it appears that there is ground to apprehend that injustice in any respect is done or about to be done to the mortgagor. The mortgagor is, in an important sense, completely in the power of the mortgagee, and besides, the latter is a trustee, first, to control the property and apply the proceeds of it when sold to the payment of the mortgage debt, and, second, for the mortgagor as to any surplus, and he is held to a strict account."

The junior mortgagee or lien creditor will be protected by the courts to the same extent as the mortgagor.

In 27 Cyc., 1713, it is said: "And where the fraud takes the form of causing the sale to be made for a larger sum than is due, or collusion between the mortgagee and the purchaser, to the injury of the mortgagor's rights, or of misrepresentation and deceit, practiced upon the purchaser, or upon a junior lien creditor, the sale may be set aside."

The books are full of cases where courts of equity have interfered to guard the rights of mortgagors, junior mortgagees, and lien creditors with jealous care, and have set aside sales made by mortgagees and trustees where manifest wrong and oppression are made to appear.

The affidavits not only show abundant evidence of collusion, and that Pace was Clark's agent, acting for him and under his control, but it appears further that the advertisement of sale mentioned no hour when the sale was to take place.

In 27 Cyc., 469, the rule with respect to the time and place of sale is stated as follows: "The notice must specify the place at which the sale will be held with a degree of certainty that intending bidders will not be misled, but will be able to find it, and it must also give *the time of the sale with equal certainty,* stating not only the day, but
(294) also the hour at which it will be held." *Fitzpatrick v. Fitzpatrick,* 75 Am. Dec., 681.

The omission of such an essential requisite to make a valid sale is strong evidence of a fraudulent purpose to deceive and mislead probable bidders.

This fact alone is sufficient to justify the judge in continuing the injunction, and if it be shown at the final hearing that no time of sale was given in the advertisements, the sale should be set aside.

It is a familiar principle of equity jurisprudence that the status of the parties should be preserved pending a trial upon the merits.

The order continuing the injunction is

Affirmed.

WESTERMAN ET AL. V. CHAMPION FIBER COMPANY.

(Filed 22 May, 1913.)

1. Contracts—Cutting Timber—Breach—Counterclaim—Evidence of Damages—Increased Cost—Foreign Issues.

Where the plaintiff and defendant had entered into a contract for the former to cut and deliver wood from a large body of the latter's timber land, at a certain price per cord, and the damages are laid for the plaintiff's profit therein which was alleged to have been prevented by the acts of the defendant, the latter contending for damages by way of counterclaim for an increased price it was forced to pay by reason of the plaintiff having abandoned its contract, testimony of defendant's witnesses as to the cost of cutting the wood from other parts of the lands and under contracts with other parties is incompetent, as it involves the capacity of these persons for management, the price paid for hands, without reference to or description of the methods pursued or conditions under which the work was done by them, or their manner of doing it.

2. Contracts — Cutting Timber — Abandonment — Damages in Part — Instructions.

The plaintiff and defendant contracted for the former to cut and deliver from the latter's lands timber estimated at 50,000 cords, the plaintiff to build eight or ten shacks on the land for the accommodation of the defendant's hands, which the plaintiff had to build for the prosecution of the work. There was evidence tending to show that defendant prevented the plaintiff from fulfilling his contract by having others to cut the timber on the lands in violation of the contract:. *Held*, the plaintiff was entitled to recover such damages as he may have sustained in building the shacks, though this would not in itself have justified the abandonment of a contract of this magnitude, and a charge is held correct that if the jury should find that the defendant agreed to build the shacks for plaintiff's use, and that such agreement was a material part of the contract, which defendant violated, the defendant would be liable.

3. Appeal and Error—Trial—Presumptions of Correctness—Objections and Exceptions.

There being evidence in this case which would justify damages for an entire breach of contract by reason of defendant's act in preventing the plaintiff from fulfilling his part, the Supreme Court, on appeal, will presume that the features of the case relating to the measure of damages has been correctly tried, in the absence of error assigned therein.

APPEAL by defendant from *Lyon, J.*, at January Term, 1913, (295) of MCDOWELL. Action to recover damages for alleged breach of contract.

Verdict and judgment for plaintiff. Defendant appealed.

Johnston & McNairy and Hudgins & Watson for plaintiff.

Pless & Winborne, Bourne, Parker & Morrison, and T. F. Davidson for defendant.

HOKE, J. The evidence on part of plaintiffs tended to show that, in November, 1909, they made a contract with defendant company to cut for it the cordwood on a given boundary of land in Haywood County on the waters of Shiney Creek, to begin on one side of the creek, cut the timber up and around the head of the stream and down on the other side till 50,000 cords were "cut, calculated, and paid for," etc., this being the amount estimated within the boundary, the wood to be cut and put on the edge of the branch and corded up at the price of $3 per cord, and defendant company was to construct and have ready the shacks required for housing plaintiff's hands engaged in the
(296) work; that the shacks not having been built by defendant, plaintiffs, with their hands, were compelled to construct the same and, shortly after commencing the work, other persons, acting under contract with the company, and by its authority, commenced cutting wood within the boundary and on the more advantageous portions of the same, and so obstructed and interfered with plaintiffs that they were compelled to desist and abandon the undertaking altogether; that they remonstrated with the managing agent of the company about this interruption, who not only declined to interfere, but sanctioned and approved the same, and endeavored to induce plaintiffs to cut elsewhere; that the wood within the boundary could have been cut and placed on the creek at an average of $2.50 per cord, and plaintiff had suffered great damage.

The evidence on the part of defendant was to the effect that the contract was not for any definite boundary, but that the plaintiff was to cut and cord the wood on the branch at or about the place stated and to be paid for same at $3 per cord as cut; that owing to the rugged nature of the land, the dense undergrowth and its character, it was worth at least $6 per cord to cut and place the wood as agreed upon, and that plaintiff had abandoned the contract without legal excuse, to defendant's great damage.

The plaintiff, as heretofore stated, having recovered judgment below, the case is before us on defendant's appeal, and it is contended that the trial court committed error in refusing to allow a witness for defendant, W. J. Mashburn, to say what it had cost him per cord to get out wood on this boundary for the two weeks after plaintiffs had abandoned their contract, and also, in a similar ruling, excluding a question addressed by defendant to another witness, J. L. Smith, as to "what it had cost him to get out cordwood in a cove in the same locality and similar to the one in which Mashburn worked."

The Court has held in several recent cases that it was proper to permit "lumbermen of experience, having personal knowledge of facts

and conditions," to give their opinion on the cost of cutting and delivering timber in specified localities, a case presented in *Younce v. Lumber Co.*, 155 N. C., 239, and evidence of this very kind was received on this trial; but the questions addressed to these witnesses do (297) not, in our opinion, come within the principle. Involving, as they do, an inquiry into the capacity of these persons for management, the price paid for hands, etc., etc., in the way now presented and without further reference to or description of the methods pursued or the conditions under which the work was done by them and their manner of doing it, the proposed questions were properly excluded, as tending to introduce issues "foreign to the inquiry and calculated rather to distract than aid the jury in their deliberations." *Carpenter v. R. R., ante,* 277; *Chaffin v. Manufacturing Co.*, 135 N. C., 104; *Warren v. Makely*, 85 N. C., 12.

Exception was made further, that his Honor charged the jury as follows: "If you should find that the defendant agreed to build the shacks for plaintiffs to use, and that such agreement was a material part of the contract, and defendant violated such agreement to build the shacks, then the defendant would be liable, and you should answer the first issue 'Yes.'"

It is not every breach of contract that will operate as a discharge and justify an entire refusal to perform further. Speaking generally to this question, in Anson on Contracts, p. 349, the author says: "But though every breach of the contractual obligation confers a right of action upon the injured party, it is not every breach that relieves him from doing what he has undertaken to do. The contract may be broken wholly or in part, and if in part, the breach may not be sufficiently important to operate as a discharge, or, if it be so, the injured party may choose not to regard it as a breach, but may continue to carry out the contract, reserving to himself the right to bring action for such damages as he may have sustained." And, if this portion of the charge must be construed as holding that the failure to build these shacks went to the full measure of the obligation and justified an entire severance of the contract relation, it would, in our opinion, constitute reversible error. In a contract of this magnitude, a default in respect to building eight or ten ordinary shacks to house the hands engaged in the business should not effect a complete discharge. The plaintiffs themselves did not so regard or treat it, but very properly (298) went on and built the shacks themselves. This, however, would not prevent plaintiff from recovering damages, in this respect, as for a partial breach, and the charge is both technically correct and, on the

allegations of the pleadings and the evidence, is a proper charge upon the issue. It would only amount to prejudicial error in case it should be given undue significance on the issue as to damages, but we do not think such an objection is open to defendant on the record. There were facts in evidence that would justify a recovery of the damages as for an entire breach, to wit, the interruption and prevention of plaintiffs' work by others acting under the approval and authority of the company. The entire charge of the court is not sent up, nor is there any exception made thereto on the issue as to damages, and, in the absence of error assigned or suggested, we must presume that this feature of the case has been rightly dealt with and the questions submitted under proper instructions. *Graves v. R. R.*, 136 N. C., 3.

After giving the case our full consideration, we find no reversible error, and the judgment in plaintiffs' favor is affirmed.

No error.

WILSON LUMBER AND MILLING COMPANY v. J. B. ATKINSON ET AL.

(Filed 22 May, 1913.)

1. Fraud—Character Witness—Corroborative Evidence—Instructions — Substantive Evidence—Appeal and Error.

Where an action is of a civil nature to set aside an agreement for fraud in its procurement, and the party against whom the fraud is alleged has testified, evidence as to his good character is permissible only to corroborate his testimony, and an instruction that the jury may consider it as substantive evidence on the issue of fraud is erroneous.

2. Account and Settlement—Fraud—Evidence—Questions for Jury—Principal and Agent.

The plaintiff had contracted with the defendant for the latter to cut, haul, and deliver a large quantity of timber at a certain place, and after the expiration of several years it appeared that the plaintiff had overpaid the defendant. An agreement as to the amount was made by the parties, and to secure to the plaintiff the payment thereof a certain quantity of lumber was placed in the hands of a trustee. In his action to set aside this agreement there was allegation and evidence tending to show that the lumber pledged by the plaintiffs was some which the defendant had delivered and the plaintiff had paid for; that this fact was peculiarly within the defendant's knowledge; that upon investigation the overpayment was found to be greater than the sum agreed upon, which fact was also, under the circumstances, peculiarly within the defendant's knowledge: *Held*, evidence sufficient to be submitted to the jury upon the question of defendant's fraud in procuring the agreement

of settlement; and further *Held*, under the circumstances of this case, there was evidence of fraud and collusion between the plaintiff's agent, who received the lumber, and the defendant.

3. Principal and Agent—Adverse Interests—Fraud—Knowledge Imputed.

Where an agent acts in his own behalf and in a manner antagonistic to the interest of his principal in dealing with another, as in fraud and collusion against the principal, knowledge of the agent of the facts involved in the transaction will not be imputed to the principal, and will not be binding upon him in the absence of other knowledge thereof, express or implied.

APPEAL by plaintiff from *Lyon, J.*, at November Term, 1912, (299) of CALDWELL.

This action was brought to set aside a compromise and settlement between the plaintiff and the defendant J. P. Rabb, made on 29 December, 1909. Plaintiff, during the years 1904, 1905, 1906, and 1907, was engaged in the lumber business, of which J. B. Atkinson, the other defendant, was its manager at Lenoir, N. C. The defendant Rabb cut, sold, and delivered to the plaintiff at Morganton and other points a large quantity of lumber, for which the plaintiff paid him from time to time. At the end of that period the books of the plaintiff showed that the plaintiff had overpaid Rabb for lumber so cut and delivered, in the sum of $4,354.82. Plaintiff alleged and offered proof to show that, while this was the apparent amount due by Rabb, he had in fact received a large payment or credit for lumber which had not been delivered, and the real balance should be $10,900, instead of $4,354.82, and in addition to this amount thus owing by Rabb to the (300) plaintiff, the latter paid for him four certain notes for the aggregate amount of $1,900, which was not charged on its books against him. Plaintiff further alleges that these items were omitted from the books by reason of fraudulent collusion between Atkinson and Rabb, or by mistake of the parties. It then appears that, on 29 December, 1909, plaintiff and defendant Rabb entered into an agreement for a settlement, by which certain timber was conveyed to J. H. Beall, as trustee, to be sold and the proceeds of sale, together with any cash paid by Rabb, to be applied to the liquidation of Rabb's debt to the plaintiff. This agreement was made for the purpose of "adjusting and settling" the account between the plaintiff and Rabb. Plaintiff alleges that, at the time this agreement was entered into by the parties, it was totally ignorant of the fact that the lumber on the yard at Morganton had been delivered by Rabb, under its contract with him, or that Rabb owed the company a much larger amount than the balance of $4,354.82 recited in the compromise agreement. That these facts were only

known to Rabb and fraudulently concealed by him from the plaintiff, whereby it was made to convey its own property for the payment of a debt due by Rabb to it, and that Rabb otherwise suppressed the true facts for the purpose of obtaining an unfair advantage of the plaintiff. Issues were submitted, and upon them the jury returned the following verdict:

1. Did the plaintiff company, at various times prior to 29 December, 1909, advance to the defendant J. P. Rabb money to be used by him in purchasing lumber and timber to be manufactured into lumber by him for the said lumber company? Answer: "Yes."

2. Did the plaintiff and defendant, by contract entered into between them on 29 December, 1909, make a full and final settlement of all matters of account existing between them, growing out of their lumber transactions? Answer: "Yes."

3. Did the defendant Rabb, at the time of making the contract of 29 December, 1909, fraudulently suppress or conceal from plaintiff facts within his knowledge as to the true status of the account between them? Answer: "No."

(301) 4. If so, was the plaintiff thereby misled to its injury? (No answer.)

5. Was said contract entered into by mutual mistake as to the true status of the account? Answer: "No."

6. Is the defendant Rabb indebted to the plaintiff; if so, in what amount? (No answer.)

7. Is the plaintiff's cause of action barred by the statute of limitations? Answer: "No."

In the verdict proper, the answer to the first issue is simply "Yes," while the recital of the verdict in the judgment of the court states that it was "Yes, but not as agent." But this discrepancy is not considered material in the view we now take of the case. By the contract with Rabb for cutting the timber and delivering the lumber, it is provided that the lumber shall be considered as delivered and shall become the property of the lumber company when it is piled on the yard.

At the close of the evidence the court ordered a nonsuit as to Atkinson, and the case proceeded as to Rabb with the result above stated. Judgment was entered upon the verdict, and plaintiff having duly excepted to certain rulings, appealed to this Court.

Mark Squires and A. E. Holton for plaintiff.

W. B. Councill and Lawrence Wakefield for Atkinson.

W. C. Newland and S. J. Ervin for defendant Rabb.

WALKER, J., after stating the case: We have stated so much of the pleadings and evidence as is necessary to present clearly one of the exceptions of the plaintiff, which we think was properly taken and should be sustained. Evidence of the general character of the defendant, J. P. Rabb, was introduced, the witnesses testifying that it was good. He had testified himself, at great length, as a witness in his own behalf, and had denied circumstantially the charge of fraud made against him. It was competent to prove his good character so far as necessary to sustain his credibility as a witness, but in his charge to the jury the learned judge expressly permitted the jury to consider his character as a substantial fact involved in the issue of fraud. This is the language of the particular instruction to which exception was noted: "The defendant Rabb being charged with fraud, evidence of his good character should be considered by you as substantive as (302) well as corroborative evidence in passing on the issue of fraud." This was error. It has been said "that a person did or did not do a certain act because his character would predispose him to do or not to do it, is an inference which, although sometimes logically probative, the English law of evidence, with some exceptions, absolutely rejects in civil cases." 16 Cyc., 1263. The text-writer cites numerous cases in the notes to this passage in support of the proposition, and, among others, several decided by this Court. *Jeffries v. Harris,* 10 N. C., 105; *McRae v. Lilly,* 23 N. C., 118; *Heilig v. Dumas,* 65 N. C., 214; *Marcom v. Adams,* 122 N. C., 222.

In *McRae v. Lilly, supra, Judge Gaston* applied the rule of exclusion to a case of seduction in these words: "It is also insisted that the judge erred in rejecting the testimony offered by the defendant to show that his general character was that of a modest and retiring man. We are satisfied that there was no error in rejecting the testimony proposed. In civil suits, the general rule is, that unless the character of the party be put directly in issue, by the nature of the proceeding, evidence of his character is not admissible. And no reason is seen why, in this case, there should be an exception to the general rule." More directly to the point is the language of the Court in *Heilig v. Dumas, supra:* "If such evidence is proper, then a person may screen himself from the punishment due to fraudulent conduct till his character becomes bad. Every man must be answerable for every improper act, and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties," citing *Thompson v. Bowie,* 4 Wall. (U. S.), 470, and quoting from *Fowluer v. Insurance Co.,* 6 Cowen (N. Y.), 673.

The subject is treated exhaustively, with full citations, in *Norris v. Stewart,* 105 N. C., 455, where the defendant was charged with fraud, and testimony as to his good character was offered and rejected. The ruling was approved by this Court, *Justice Shepherd* saying: "As a general rule, evidence of good character is inadmissible, by way of defense, in civil actions in which a party is charged with a (303) specific fraud, because the character of every transaction must be ascertained from its own circumstances and not from the character of the parties. Such evidence is not admitted in civil actions unless the nature of the action involves the general character of the party or goes directly to affect it." So, whatever the rule may be elsewhere, the law of this State has been settled by repeated decisions. We need not inquire, therefore, whether the reasons for the rule are sufficient to justify it.

The distinction between civil and criminal cases in this respect was clearly stated by the present *Chief Justice* in *Marcom v. Adams, supra,* approving the rule in civil cases as we have stated it. The court committed a positive error in giving the instruction excepted to, and a new trial must be granted, if it was prejudicial. The defendant, J. P. Rabb, contends that it was harmless, as upon a fair consideration of the facts which the evidence tends indisputably to establish, the defendant was entitled to the verdict which was rendered by the jury. But we do not understand this to be the state of the evidence, and the plaintiff strenuously insists that, on the contrary, there is strong proof of fraud on the part of Rabb and of a collusive arrangement between him and Atkinson, his codefendant, to cheat and defraud the plaintiff. We might, by a discussion of the testimony, demonstrate that there is evidence for the consideration of the jury upon the question of fraud. If the lumber on the yard at Morganton had been delivered and belonged to the plaintiff, it is strange that, if it had knowledge of the fact, the lumber should have been transferred to the trustee to pay a debt due by Rabb—in other words, that it should pay Rabb's debt, due to it, with its own property. If the lumber did not belong to the plaintiff, not having been delivered, then Rabb has received credit on the books of the plaintiff to which he was not entitled, and, in either view, he would be indebted to the plaintiff, unless the latter is in some way estopped or concluded by the settlement. There is enough on the face of the agreement and in the conduct of the parties to show that the plaintiff did not understand that the lumber had been delivered, and, therefore, that the title had passed to it. It might fairly be argued that if it did, it would not have arranged to pay a debt due by

Rabb to it, and there is evidence, as we look at the case, that (304) Rabb knew that plaintiff was acting upon the false assumption that the lumber was not its property, and yet dealt with the plaintiff in making the settlement, well knowing that plaintiff was acting in ignorance of the facts. The phraseology of the agreement is such as to indicate that plaintiff had some claim on the lumber, which was released, but was not the owner; either that, or it is so ambiguously worded that the jury might have drawn such an inference from it, in view of the other facts and circumstances. If by his conduct and the manner of dealing with the plaintiff in making the settlement, he induced the plaintiff to believe that the lumber belonged to him and not to the plaintiff, and took advantage of his own peculiar knowledge of the true situation, and plaintiff was misled, beguiled, and overreached in the transaction, the law will not permit the settlement to stand in the way of an equitable adjustment between the parties. As was said in *Manter v. Truesdale,* 57 Mo. App., at p. 443: "The general rule is that mere silence cannot be treated as a representation, but a party may put himself in a position where he is bound to speak. The Supreme Court, in the case of *McAdams v. Cates,* 24 Mo., 223, discussing this subject, said: 'Although many duties must be left by law to the honor and conscience of individuals, the public morals require us to lay down and enforce such rules in relation to the business affairs of men as will secure fair and honorable dealing, as far as this is practicable, consistently with the freedom of individual action and the interests of commerce. If, in a contract of sale, the vendor knowingly allow the vendee to be deceived as to the thing sold in a material matter, his silence is grossly fraudulent in a moral point of view, and may be safely treated accordingly in the law tribunals of the country. Although he is not required to give the purchaser all the information he possesses himself, he cannot be permitted to be silent when his silence operates virtually as a fraud. If he fails to disclose an intrinsic circumstance that is vital to the contract, knowing that the other party is acting upon the presumption that no such fact exists, it would seem to be quite as much a fraud as if he had expressly denied it, or asserted the reverse, or used any artifice to conceal it, or to call off the (305) buyer's attention from it.'" And again: "When the law attaches consequences to silence, it does so, it seems, upon a footing of a breach of duty to speak." See, also, *Thomas v. Murphy,* 87 Minn., 358. It was said by Lord Cranworth, in Reynell and Sprye, 1 De Gex M. and G., 708: "Once make out that there has been anything like deception, and no contract resting in any degree on that foundation

can stand." There is room to argue that Rabb knew that plaintiff, when the agreement for settlement was being negotiated, was evidently misled as to the title of the lumber and was acting in utter ignorance of its rights, while Rabb himself knew whether or not the lumber had been delivered under the contract of 1905, so that the title had passed to the plaintiff, for he was the one to make the delivery. The books of the plaintiff disclosed the fact, perhaps, after an expert's examination of them, conducted through several months, but there is evidence that an ordinary inspection of them would not have discovered the true situation. While notice to an agent is notice to his principal, we cannot hold, under the facts and circumstances of this case, that knowledge of the true title to Atkinson, plaintiff's manager and a director, was notice to plaintiff of such title. If the agent is so circumstanced as to make it his interest to withhold information from his employer, then the rule that notice to him is notice to his principal, or the doctrine of imputed knowledge, does not apply. *Stanford v. Grocery Co.*, 143 N. C., 419, and Tiffany on Agency, 262, 263, where it is said: "The principal is not bound by the knowledge of his agent when it would be against the agent's interest to inform him of the facts. Therefore, if the agent is engaged in perpetrating an independent fraud on his own account, knowledge of facts relating to the fraud will not be imputed to the principal. The principal is not bound, it is said, when the character and nature of the agent's knowledge make it intrinsically improbable that he will inform his principal. Whether the rule or the exception rests upon a presumption that the agent will or will not communicate the facts to his principal may be doubted. Whatever the reasons for the exception, it is well established. Of course, if
(306) the agent is openly acting adversely to his principal, his knowledge will not be imputed to the latter. In such case he is not acting as agent, but on his own behalf." Whether the plaintiff knew of its title to the lumber, or could have known of it by the exercise of ordinary care and reasonable diligence, were questions for the jury, and they were properly submitted to them by the court in this case. It must not be understood that we are even intimating any opinion upon the weight of the evidence or its sufficiency to establish fraud. As the case must be tried again, we would scrupulously refrain from indicating any view upon that question, lest we might prejudice one or the other of the parties. All we decide is that there is evidence in the case, as now presented, upon the issue of fraud, and that it was error to instruct the jury that they should consider what was said by the witnesses in regard to the good character of J. P. Rabb "as sub-

stantive evidence in passing upon that issue." We cannot consider this instruction as harmless. It may have had great weight with the jury in deciding with the defendant.

We have examined the evidence very carefully, and think the judge committed error in holding that there was no evidence against the defendant John B. Atkinson. The evidence may not have been either strong or convincing, but we are unable to say that there was absolutely none. He was the general agent of the plaintiff company at Lenoir, and there are facts and circumstances disclosed by the evidence, in regard to his management of its affairs and his relations and dealings with his codefendant, which in our opinion should be submitted to the jury. It might prejudice one or the other of the parties if we discussed the evidence in this connection, or even commented upon it, and for this reason we refrain from doing so.

New trial.

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(307)

A. BLANTON GROCERY COMPANY v. J. W. TAYLOR ET AL.

(Filed 22 May, 1913.)

1. Mortgages—Stock of Goods—Debtor and Creditor—Fraud—Presumptions.

A mortgage upon a stock of goods, the possession of which is left with the mortgagor, to secure a debt maturing in the future, which contains no provision for an account of sales and the application of the proceeds to the debt, is presumptively fraudulent as to existing creditors.

2. Same—Rebuttal Evidence—Intent.

Where there is presumption of fraud as to existing creditors arising from a mortgage of a stock of goods, it cannot be rebutted by proving the absence of an actual intent to defraud, the motive being immaterial.

3. Mortgages—Stock of Goods—Debtor and Creditor—Fraud—Rebuttal Evidence—Property Sufficient.

The presumption of fraud as to existing creditors in a mortgage of a stock of goods may be rebutted by proving that there was no other creditor of the mortgagor at the time of the registration of the mortgage, or if there was such creditor, that the mortgagor owned other property at that time, which could be subjected to the payment of the debt, sufficient to pay such creditor.

4. Mortgages—Debtor and Creditor—Fraud—Registration—Subsequent Creditors.

In the absence of actual or presumptive fraud, a mortgage on a stock of goods is valid as to debts contracted subsequent to its registration

5. Mortgages—Stock of Goods—Fraud—Instructions Inconsistent—Appeal and Error.

The plaintiff, a mortgagee of a stock of goods, brings his action against the mortgagor and his assignee for the benefit of his creditors and takes the goods under claim and delivery. The character of the transaction of the mortgage was such as to raise an issue of fraud as to the other creditors of the mortgagor. A charge held to be inconsistent and for reversible error, which instructed the jury, one part thereof, that the issue was to be determined by the greater weight of the evidence, and in another part, without correcting this error, that the evidence must be clear, strong, and convincing.

APPEAL by defendant from *Ferguson, J.*, at December special Term, 1912, of RUTHERFORD.

This is an action to recover a stock of goods, the plaintiffs claiming ownership under a chattel mortgage executed by the defendant J. W. Taylor, on 25 January, 1910, to secure a note of $100 due
(308) 3 March, 1910, in the form prescribed by section 1039 of the Revisal.

The defendants are J. W. Taylor and J. C. Hampton, the latter claiming under a general assignment to secure creditors, executed to him by the said Taylor.

The plaintiffs alleged, among other things, "if as a matter of law the said mortgage does not cover all goods, without regard from whom purchased, subsequently added, up to the time of the satisfaction of the mortgage, then the same was incorrectly drawn by reason of a mutual mistake of both parties to said mortgage."

The defendants denied this allegation, and also that there was anything due the plaintiffs, and the defendant Hampton further alleged: "That the chattel mortgage described in the complaint was fraudulent, as well as void, as to the creditors of J. W. Taylor, because it pretended to mortgage the stock of merchandise of the defendant J. W. Taylor, and allowed said defendant J. W. Taylor to sell the same without making provision for the application of the proceeds of sale of said stock of goods, and because the description in said chattel mortgage is not sufficient in law."

The stock of goods was seized under proceedings in claim and delivery, issued in the action, and delivered to the plaintiffs, and sold by them under their mortgage, at which sale the goods were bought for the plaintiffs for $450.

The defendants tendered the following issue, among others:

"2d. If so, was the mortgage fraudulent and void as against other creditors of the defendant J. W. Taylor?"

The court refused to submit the issue, and the defendants excepted.

Prior to the trial, the plaintiffs made a tender of judgment under section 860 of the Revisal, for $395, with interest from 24 March, 1911, and costs. The court permitted this tender to be offered in evidence, and the defendants excepted.

There was evidence on the part of the plaintiffs that the goods were not worth more than $450, but it was admitted that after the sale they sold them for $475, and there was evidence for the (309) defendants that the goods were worth $800.

The verdict of the jury was as follows:

1. In what amount, if any, is J. W. Taylor indebted to plaintiffs? Answer: $78.29.

2. Was there a mutual mistake in drawing the chattel mortgage, by which the provision that the mortgage should cover all the merchandise subsequently added to the stock omitted, as alleged? Answer: Yes.

3. What was the value of the property taken by the plaintiffs at the time of the seizure? Answer: $462.50.

His Honor charged the jury on the second issue: "The plaintiff contends that the parties agreed between themselves—that is, Taylor and Laughridge—that the mortgage should be so amended as to express that all goods which might be in stock or hereafter bought (did not make any difference from whom the purchases were made), and that having agreed upon that, with the understanding to put it in the mortgage, it was a mistake made by both Laughridge and Taylor in getting the expression necessary to convey the idea that the mortgage should be on goods which might hereafter be bought, not only from the Blanton Grocery Company, but from any other parties from whom he purchased. The burden is on the plaintiff to satisfy you by the greater weight of the evidence that such agreement was made and left out by mistake. In other words, that both parties understood what it was, and intended it should be so embraced by the mortgage, but in failure to use proper words to convey their meaning as agreed upon, it was left out. They are not to satisfy you beyond a reasonable doubt, as in criminal cases, but by the greater weight of the evidence." Defendants excepted.

And again: "When you come to the second issue, you will remember it is a rule of law that when people reduce their contracts to writing, that the writing is presumed to express what they agreed upon, and the party insists that something is left out of the writing which was agreed upon, by mutual mistake, is called upon to give the court and jury a class of evidence which is clear within itself, and strong (310) and convincing."

Judgment was entered upon the verdict. Defendant appealed.

Quinn, Hamrick & McRorie and J. W. Pless for plaintiff.
S. Gallert and McBrayer & McBrayer for defendant.

ALLEN, J. The issue of fraud is raised by the pleadings, and if there was any evidence justifying an answer thereto favorable to the defendants, it was error to refuse to submit it.

If we were dealing with any other class of property than a stock of goods, or if it was necessary in this case to prove a corrupt and fraudulent intent, we would hold there was no such evidence, as there is nothing in the evidence suggesting that the plaintiffs had any unlawful or wrong purpose, but the character of the property and the admitted facts are such that there arose a presumption of a legal fraud, which the plaintiffs were required to rebut.

In *Cheatham v. Hawkins,* 76 N. C., 335, the Court says, in commenting upon a mortgage of a stock of goods: "To secure a debt, the bargainor conveys in mortgage an entire stock of miscellaneous merchandise, and at the same time, in the deed, expressly reserves the possession of them for at least nine months. The implication is irresistible, from the very nature of the business, that he was to continue in selling and trading as before; otherwise, why retain possession of goods, which would be a dead encumbrance upon his hands without the power of disposition? There is no provision for his accounting for the proceeds of sale. He could apply the money in payment of debts, other than the mortgage debt; he could apply it to family expenses, or even to the purposes of pleasure or waste. Substantially, the proceeds belonged to him until the maturity of the Hawkins debt, to be expended as he pleased; and in the meantime the entire stock of goods was to be secure from the reach of his creditors. . . . The power to sell was the power to destroy, and the sale was the destruction and extinction of the property. If there were other unsecured creditors at the time of this assignment, and no other property of the debtor than that conveyed in the mortgage, out of which creditors could make their (311) debts, the fraudulent intent would seem to be irrebutable. A clear benefit is secured to the debtor and a clear right is withheld from the creditor beyond what the law permits. Here is not only a retention of possession by the assignor, which is presumptive evidence of fraud, but there is the further power to dispose of it for the debtor's benefit, and still more, the exercise of that power annihilates the thing itself. We have, then, one of the strongest cases of presumptive fraud"; and in the same case, 80 N. C., 161: "The only rebutting evidence adduced against the fraudulent purpose inferred from the provisions of the deed itself and their obvious and necessary effect upon the rights

of creditors is found in the declaration of the several parties to the transaction, that an intent to favor the mortgagor, or to delay or defraud his creditors, was not in their minds at the time. This cannot be allowed to remove the legal presumption arising from the facts. Acts fraudulent in view of the law because of their necessary tendency to delay or obstruct the creditor in pursuance of his legal remedy do not cease to be such because the fraud as an independent fact was not then in mind. If a person does and intends to do that which from its consequences the law pronounces fraudulent, he is held to intend the fraud inseparable from the act."

And this has been affirmed in *Holmes v. Marshall,* 78 N. C., 264; *Boone v. Hardie,* 83 N. C., 475; *Booth v. Carstarphen,* 107 N. C., 400; *Cowan v. Phillips,* 119 N. C., 28; *Edwards v. Supply Co.,* 150 N. C., 172.

The principles to be deduced from these authorities are:

1. That a mortgage upon a stock of goods, the possession of which is left with the mortgagor, to secure a debt maturing in the future, which contains no provision for an account of sales and the application of the proceeds to the debt, is presumptively fraudulent as to existing creditors.

2. That the motive or intent entering into the transaction is immaterial, and that the presumption of fraud cannot be rebutted by proving the absence of an actual intent to defraud.

3. That the presumption of fraud may be rebutted by proving that there was no other creditor of the mortgagor at the time of the registration of the mortgage, or, if there was such creditor, that the mortgagor owned other property at that time, which could be (312) subjected to payment of the debt, sufficient to pay such creditor.

It has also been held that such a mortgage as we have described is valid as to debts contracted subsequent to its registration. *Messick v. Fries,* 128 N. C., 454.

The case of *Bynum v. Miller,* 86 N. C., 559, and the same case, 89 N. C., 393, proceed on a different principle. In those cases the contest was between the mortgagee and a purchaser from the mortgagor, and the Court said, in 86 N. C., 562: "Whatever diversity of views may exist elsewhere, the law is well settled by adjudications in this State, that a subsequent purchaser of personal property from one who has previously made a fraudulent assignment of it, or an assignment without consideration and for his own benefit, whether the purchase be with or without notice and for a valuable consideration, and such assignment has been proved and registered as required by law, stands

in the place of his assignor, and neither is permitted to impeach its force and validity. The estoppel upon the assignor extends to his subsequent vendee, and as to both, the conveyance, though it may be void as to creditors, is equally efficacious as to them."

Nor is there anything in *Kreth v. Rogers,* 101 N. C., 270, which was approved in *Brown v. Dail,* 117 N. C., 46, in conflict with these views. It is true, there were existing creditors in the *Kreth case,* but these were paid in full, and the controversy was between the first and a second mortgagee. In the first mortgage there were stipulations as to the manner in which the business should be conducted by the mortgagor, and, among others, that no purchases should be made except for cash, and it appeared that $600 was paid on the debt in a short time, and upon these facts the Court held, if there was a presumption of fraud it was rebutted.

Applying these principles, we are of opinion there was error in refusing to submit the issue of fraud.

We also think the tender of judgment ought not to have been admitted in evidence, although we doubt if, standing alone, this would justify a new trial, as it is not clear it was prejudicial to the defendants.

The statute authorizing a tender of judgment (Revisal, sec. 860) says that the tender, when not accepted, "is to be deemed with-
(313) drawn, and cannot be given in evidence," and while this provision is primarily for the protection of the one making the tender, and to prevent its introduction against him, the statute is a part of the wholesome scheme devised to encourage compromises and settlements, before and after action commenced, and the purpose of the statute can be best subserved by holding according to its language that a tender of judgment unaccepted "cannot be given in evidence," and can only be used after verdict, before the judge, to enable him to adjudge who shall pay the costs.

It appears to us a little remarkable that after the plaintiffs introduced the tender, and insisted on it, that the defendants should have recovered less than the sum offered, the amount of the tender being $395 and the judgment being for $386.21, the last sum being obtained by deducting $78.29, the answer to the first issue, from the value of the goods as found by the jury, $462.50, although there is a mistake of $2 in the calculation.

The facts bearing on the second issue are not clearly stated, but we are inclined to the opinion that after-acquired goods did not pass under the mortgage as executed, and that the issue was material.

If so, his Honor instructed the jury in one part of the charge that it was to be determined by the greater weight of the evidence, and in

another, without correcting this error, that the evidence must be clear, strong, and convincing.

These instructions are inconsistent, and constitute reversible error. *Patterson v. Nichols,* 157 N. C., 412.

The verification of the account complies substantially with the requirements of the statute. For the errors pointed out, there must be a New trial.

(314)

WADSWORTH LAND COMPANY v. PIEDMONT TRACTION COMPANY ET ALS.

(Filed 22 May, 1913.)

1. Street Railways — Quasi-public Corporations — Private Business — Condemnation—Easements.

Where a corporation is authorized to conduct the *quasi*-public business of operating a street railway, it may exercise the right of eminent domain in respect to this business given to it by its charter and Revisal, secs. 1138, 2575, notwithstanding it is also authorized to conduct business of a private nature.

2. Same—Petition—Presumption of Good Faith—Use for Private Purposes—Remedies—Quo Warranto.

Where an electric street railway company, also authorized to conduct business of a private nature, sets forth in its petition to condemn lands that it desires the lands in connection with its works for production of power "to generate electricity for the use and benefit of the public," and it does not appear that the lands are to be used for other purposes, it will not be presumed that the corporation is acting in bad faith; and should it afterwards appear that the land thus acquired was for private purpose, the remedy would be by *quo warranto,* etc.

3. Street Railways—Radius of Operation—Interstate Connections—Charter Rights—Interpretation of Statutes.

A corporation chartered under Revisal, 1138, may operate a "street railway," which includes railways operated by steam or electricity, between points in the same municipality, or between points in different municipalities within a radius of 50 miles, and may haul and deliver freight, etc.; and a violation of its charter is not effected by the fact that the railway thus operated interchanges traffic with other carriers doing an interstate business.

APPEAL by plaintiffs from *Webb, J.,* at January Term, 1913, (315) of MECKLENBURG.

Burwell & Cansler, Tillett & Guthrie, and Maxwell & Keerans for plaintiff.

Osborne, Cooke & Robinson and Pharr & Bell for defendants.

CLARK, C. J. The plaintiff contends that the Piedmont Traction Company cannot exercise the power of eminent domain, because under its charter it is authorized to engage in private business in addition to its authority to operate a street railway, which is a *quasi*-public business. We think the law is clearly stated thus in 15 Cyc., 579: "But the fact that the charter powers of the corporation, to which the power of eminent domain has been delegated, embrace both private purposes and public uses does not deprive it of the right of eminent domain in the promotion of the public uses." The traction company has the power of eminent domain, not only by virtue of its charter, but by Revisal, secs. 1138 and 2575; *Street R. R. Co. v. R. R.*, 142 N. C., 423.

In *McIntosh v. Superior Court*, 56 Wash., 214, it is said: "It is next contended that while the company is authorized to construct and build railroads, it is also authorized to engage in private business. Conceding this to be true, the company may condemn and appropriate the land for the aid of its public purposes for public uses only." To same purport, *Power Co. v. Webb*, 123 Tenn., 596.

The plaintiff further objects that the defendant's charter shows that a great many of its purposes are private, and that the petition does not show that the lands sought to be taken will not be used for such private purposes. Looking into the petition, it is there stated that the defendant desires this land in connection with its works for the production of power "to generate electricity for the use and benefit of the public." It has the power of condemnation under its charter and the general statute, and nothing in this record discloses that the petitioner is seeking the land for any other than public purposes. We cannot presume it to be acting in bad faith. If, after acquiring the land under condemnation for a public use, the petitioner should devote it to private purposes, there is a remedy by *quo warranto* and otherwise. The
(316) mere possession of incidental powers under the charter to engage in private enterprises will not be held to deprive the corporation of the right of eminent domain to effectuate its public purposes, and when it is seeking to exercise this right for the public uses which it is authorized to undertake. *Walker v. Power Co.*, 19 L. R. A. (N. S.), 725; *Brown v. Gerald* (Me.), 109 Am. St., 526; *Collier v. R. R.*, 113 Tenn., 121; Lewis on Em. Dom. (3 Ed.), 314.

In *Street R. R. v. R. R., supra*, it was contended that the plaintiff was not pursuing the public purpose expressed in its charter of building a street railroad in Fayetteville, but was building a branch line in the country, and was therefore acting *ultra vires*. The Court said that such objections, "even if valid, can only be made available by direct

proceedings instituted by some member of the company for unwarranted or irregular procedure on the part of the officers, or by the State for abuse or nonuse of its franchise, and are not open to collateral investigation in a case of this character nor at the instance of the defendant."

The traction company has taken out its charter under the general corporation law as authorized by Revisal, 1138, and that section provides that the term "street railway" includes railways operated by steam or electricity or any other motive power, used and operated between different points in the same municipality or between points in municipalities lying adjacent to each other, and that such railways may carry and deliver freight, etc., with the restriction that the line so operated shall not extend in any direction more than 50 miles from the municipality in which the home office is situated.

We do not see anything in the petition of an intention on the part of the traction company to use the property sought to be condemned for any other than *quasi*-public purposes. It is true, as the plaintiff contends, that the petition uses the words "commercial railway." But that is purely a matter of phraseology, for the company is engaged in commerce when it carries articles of merchandise.

The plaintiff contends that the traction company proposes to engage in interstate business. The traction company, however, is now operating only between Charlotte and Gastonia. It would not (317) be in violation of the terms of its charter if it should take freight or passengers to be delivered at either terminus to other carriers to be transported beyond the limits of the State. The traction company would not thereby be exceeding its chartered rights, and if it did, the remedy is, as already stated, not to be found by refusing the company the right to condemn an easement through the land, which certainly is within the scope of its chartered powers, for the transaction of legitimate business. The Court will not sustain a collateral attack, and deny the right of condemnation, upon a suggestion that the petitioner may exceed its chartered right in the use of the property thus acquired by condemnation.

Affirmed.

Cited: Power Co. v. Power Co., 171 N. C., 256, 257.

SALLIE R. HERNDON v. SOUTHERN RAILWAY COMPANY.

(Filed 22 May, 1913.)

Instructions—Interest of Witnesses—Courts—Expression of Opinion—Interpretation of Statutes.

A charge in an action for damages for a personal injury alleged to have been negligently inflicted, wherein the plaintiff as well as other witnesses, both for the plaintiff and defendant, had testified, some in the latter's employment, that in weighing the conflicting evidence the jury had the right to consider the interest the parties had in the result, the conduct of the wtinesses upon the stand, their demeanor or bias upon the stand, their means of knowledge of what they had testified to, their character and reputation, etc., is not an intimation from the judge upon the weight of the evidence prohibited by statute, Revisal, sec, 535, as it applies equally to all witnesses testifying, both those of the plaintiff and defendant, and is not prejudicial as to either the one or the other.

CLARK, C.J., dissenting.

(318) APPEAL by plaintiff from *Justice, J.,* at September Term, 1912, of MECKLENBURG. Action tried upon these issues:

1. Was the *feme* plaintiff, Sallie R. Herndon, injured by the negligence of defendant, as alleged in the complaint? Answer: Yes.

2. What damages are the plaintiffs entitled to recover of the defendant? Answer: $500.

From the judgment rendered, plaintiffs appealed.

Maxwell & Keerans for plaintiff.

O. F. Mason, Shannonhouse & Jones for defendant.

BROWN, J. The only assignment of error is directed to the charge of the court.

It must be admitted by any one who reads the charge in this case that it is a full, clear, and accurate statement of the law bearing upon each issue.

As each issue is found for plaintiff, it would seem that she has no reason to complain of the judge. If she was not awarded as large damages as she hoped for, it was evidently because the jury did not think she had sustained them. The charge upon the issue of damage was especially liberal to plaintiff, and permitted the jury to take into consideration every possible element of damage permissible in such cases, especially suffering in body and mind and shock to the nervous system. Taking the charge as a whole, we find nothing that either party can justly complain of. *Speight v. R. R.,* 161 N. C., 80.

His Honor, after charging fully, fairly, and correctly on each issue, concluded his charge with these words, to which plaintiff excepts, to wit: "Weigh all of this evidence, gentlemen, in every way, and in weighing it you have a right to take into consideration the interest that the parties have in the result of your verdict, the conduct of the witnesses upon the stand and their demeanor, the interest that they may have shown, or bias, upon the stand, the means they have of knowing that to which they testify, their character and reputation, in weighing this testimony, so as to arrive at the truth of what this matter is. Take the case, gentlemen."

This is but an admonition to the jury, and not pointed to any particular witness or party. It applies with equal force to the defendant as to plaintiff, and to all witnesses alike. The record shows that the defendant introduced quite a number of witnesses, in- (319) cluding some in its employ.

In no sense can the charge quoted be considered as an expression of opinion upon the facts upon the part of the judge, and it is hard to see how it could be prejudicial to one party more than to the other.

His Honor's charge is but a caution to the jury, and is supported by authority.

In *Hill v. Sprinkle,* 76 N. C., 353, the trial judge was requested to instruct the jury "that when there is a conflict of testimony between witnesses of equal respectability, one of whom is a party in interest and the other not, the jury have the right to consider the question of interest in deciding upon the credibility of the witnesses"; and the Court said: "His Honor did not give the instructions in so many words, but told the jury 'that they had a right to consider all the circumstances attending the examination of the witnesses on the trial, and to weigh their testimony accordingly.'

"The plaintiff had a right to the instructions asked for, and it may be that the court intended those given as a substantial compliance with the prayer for instruction; but we do not think that they were, or that the jury so considered them. It is a question as to whether they or others understood that the interest of the defendant in a suit as affecting his credibility was a circumstance attending the examination of a witness as distinguished from deportment, intelligence, means of knowledge, and the like, which are more frequently understood as circumstances attending the examination of witnesses.

"At all events, the charge is not such a clear and distinct enunciation of an important principle or fact as could leave any reasonable doubt of its meaning in the minds of the jury. The prayer was distinct, and the response should have been equally so.

"For generations past and up to within the last few years interest in the event of an action, however small, excluded a party altogether as a witness, and that upon the ground, not that he may not
(320) sometimes speak the truth, but because it would not ordinarily be safe to rely on his testimony. This rule is still applauded by great judges as a rule founded on good sense and sound policy. The parties to the action are now competent witnesses, but the reasons which once excluded them still exist, to go only to their credibility."

It is said in 30 A. & E., Enc., 1094: "While the testimony of a party in interest, as that of any other witness, must be submitted to the jury, the interest . . . is a matter to be considered by the jury in weighing the testimony and determining what force it shall have."

"It is very generally held proper to instruct the jury that they may take into consideration the interest of a party or other witness in determining the credibility of his testimony, and according to the weight of authority the court may instruct the jury that they should consider such interest. Instructions of this character are not objectionable as charging the jury with respect to matters of evidence, and the refusal of such instruction is error, and the error is not cured by a general instruction that the jury are the judges of the credibility of the witnesses and the weight to be given to the testimony of each, nor by an instruction that the jury are to use their common sense and experience in regard to the credibility of witnesses." 38 Cyc., 1729.

"An instruction to the jury that they may consider the relations of the parties and witnesses, their interest, temper, bias, demeanor, intelligence, and credibility in testifying, is not a violation of the constitutional provision prohibiting judges from charging juries with respect to matters of fact, or commenting thereon." *Klepsch v. Donald,* 31 Am. St., 936; *Saalzar v. Taylor,* 9 Utah, 123; 46 Cent. Dig., title "Trial," 418, 193.

The instruction was not only very general in its character, but was not even imperative. It did not require the jury to scrutinize the testimony or even to consider the interest of parties, but stated simply that the jury had the right so to do.

In this respect the case is clearly distinguishable from the cases relied upon by the learned counsel for plaintiff.

(321) In those cases the court directed the jury to "scrutinize all the evidence with great caution, considering their interest in the result of the verdict," or that it should "be regarded with suspicion and carefuly scrutinized," or to "scrutinize the testimony of the defendants and receive it with grains of allowance on account of their

interest," or that "it was their duty to scrutinize the testimony," or to "scrutinize the testimony and receive it with grains of allowance," or some similar direction; whereas, in the case at bar, the trial judge simply informed the jury that they had "a right to take into consideration the interest that the parties have in the result of your verdict, the conduct of the witnesses upon the stand, and their demeanor, the interest that they may have shown or bias upon the stand, the means they have of knowing that to which they testified, their character and reputation, in weighing this testimony, so as to arrive at the truth of what the matter is."

This charge did not single out the plaintiff as an object of suspicion, as in *S. v. Holloway,* 117 N. C., 732, in which the court instructed the jury "they had a right to scrutinize closely the testimony of the defendants and receive it with grains of allowance on account of their interest in the event of the action."

To same effect is *S. v. Graham,* 133 N. C., 652, and *S. v. McDowell,* 129 N. C., 532; *S. v. Vann, post,* 534.

In *Speight v. R. R.,* 161 N. C., 80, the court singled out the plaintiff, and charged, "It is your duty to carefully consider the testimony of the plaintiff and ascertain the best you can what influence the interest she has in the suit would have upon her testimony," etc.

It is useless to comment further upon the cases cited by plaintiff, for in none of them was the charge so general and so applicable to all parties and all witnesses alike as in this case.

We fully agree with what *Mr. Justice Walker* well says in *S. v. Ownby,* 146 N. C., at page 678, that "the slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a (322) fair and impartial trial."

But we cannot agree with counsel for plaintiff, that the charge quoted is the slightest expression of opinion upon the facts. It is but the statement of a proposition, the truth of which is self-evident, and was applied alike to all parties and their witnesses.

No error.

CLARK, C. J., dissenting: The *feme* plaintiff was seriously injured in a derailment. The defendant placed no witness on the stand to explain the cause of the derailment or to testify to the extent or nature of the injuries sustained by the *feme* plaintiff. The only witnesses testifying as to these injuries and the derailment were the plaintiff

herself and her son. The defendant did not put upon the stand a single witness who was or had been in its employ. The physicians on both sides testified that they could not tell exactly how severe nervous shocks affected patients, and had to rely upon what the patient told them in the treatment thereof.

Not a single witness on either side had, or claimed to have any interest in the result of the action except the *feme* plaintiff, her husband and her son. These alone knew the extent of her suffering and injuries. The verdict of the jury on the second issue as to damages was dependent almost entirely upon the testimony of these witnesses. While there were other witnesses, the testimony of these was the foundation upon which the jury had to rely in awarding damages. The defendant contended before the jury that these witnesses had magnified plaintiff's injuries, and that she was not really injured at all.

The court told the jury: "Weigh all this evidence, gentlemen, in every way, and in weighing it you have a right to take into consideration the interest that the parties have in the result of your verdict." No parties testified in the action who had any interest in the same except the *feme* plaintiff, her husband and son. No one else, on either side, had any interest in the result. The instruction of the court, therefore, could apply only to them, and was a caution to the jury to consider their evidence with suspicion, or, at least, in a different way from the other witnesses testifying, because they were interested in the result of the verdict and might be disposed to magnify the in-
(323) juries of the *feme* plaintiff, as was contended by the defendant.

Upon all the authorities in this State, this charge, when nothing further is said by the court, is contrary to our statute, which forbids any intimation upon the weight of the evidence by the judge. There are decisions to the contrary in those States which have no statute like ours, and in which, as also in the Federal court, the judge is not forbidden to express an opinion upon the evidence.

Under the unbroken line of authorities in this State, it has always been error for the judge to caution the jury as to the interest of witnesses in the result of the verdict, unless he goes further, and explains to the jury that, notwithstanding the interest of the parties in the result of their verdict, their testimony as such witnesses may be believed, and, if believed, should be given the same weight as that of disinterested witnesses. It is plain that if this added instruction is not given, and the testimony of such witnesses goes to the jury with the criticism upon the interest they have, the judge has depreciated seriously the weight which should be given to their testimony.

In *S. v. Graham,* 133 N. C., 652, this Court, speaking through *Connor, J.,* said: "It is error to instruct the jury that because of interest they should carefully scrutinize the evidence of the defendant, *without adding, that if the jury believe the evidence, it should have the same weight as if the witness was not interested.*"

In *S. v. McDowell,* 129 N. C., 532, the Court said: "If they find the witness to be credible and that he has sworn to the truth, his testimony should have the same weight as if he was not interested; *and it was error in the court when charging upon the subject of interest not to have so charged the jury.*"

In *S. v. Holloway,* 117 N. C., 732, the court below instructed the jury: "They had a right to scrutinize closely the testimony of the defendants and receive it with grains of allowance, on account of their interest in the event of the action." This Court said thereon: *"This charge is capable of misleading the jury* into the impression, or belief, that the evidence of interested parties is to some extent discredited, although the jury may think the witness is honest and has told the truth. His Honor *should have gone further,* and have ex- (324) plained to the jury, after having properly called their attention to the interested relation of the witness, that if they believed the witness to be credible, *then they should give to this testimony the same weight as to the evidence of other witnesses.*" This rule has been approved *S. v. Boon,* 82 N. C., 648; *S. v. Byers,* 100 N. C., 517; *S. v. Collins,* 118 N. C., 1203; *S. v. Lee,* 121 N. C., 545; *S. v. Apple, ib.,* 585.

In *Speight v. R. R.,* 161 N. C., 80, the Court approved the following charge: "It is your duty to carefully consider the testimony of the plaintiff, and ascertain the best you can what influence the interest which she has in the suit would have upon the truthfulness of her testimony, and take into consideration all the testimony. If you find she told the truth, then you must give to her testimony the *same faith and effect* that you would to the *testimony of any disinterested witness.*" To the same effect is the statement of the rule as laid down by *Walker, J.,* in the still more recent case of *S. v. Vann, post,* 534.

The act of 1796, ch. 452, now Revisal, 535, prohibits a judge, in this State, to intimate, directly or indirectly, to the jury any opinion as to the credibility of a witness, whether they are interested or not. That is the province of the jury. Here the weight to be attached to the testimony of the *feme* plaintiff and her husband and son (who are the only witnesses who were interested in the result of the action) was a vital matter, and the court told the jury that such testimony was to be considered with allowance for their interest. He therefore disparaged

it greatly in the eyes of the jury, and it was error under our authorities, and under a just construction of our statute, to fail to tell the jury that, notwithstanding such interest, they were at liberty to give to the testimony of these witnesses the same weight as if they were disinterested, if the jury believed what they said.

In *S. v. Ownby,* 146 N. C., 678, *Walker, J.,* says: "The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury, and therefore we must be careful to see that neither party is
(325) unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial."

The instruction here given very clearly discredited the parties as witnesses, because of their interest in the event of the action.

The judge told the jury that it was their duty to consider the fact that the parties named were interested. The jury certainly must have understood the greater weight would be given to the testimony of disinterested parties and that less weight would be given to the testimony of these witnesses because they were not disinterested. This was error. There are numerous opinions in other States to this effect. But the decisions under our statute have been so clear and uniform that nothing can be added to them from outside sources.

Further, the court erred, as claimed in the second exception, in telling the jury that they should "take into consideration the interest that they (the parties testifying) may have shown, or their bias, on the stand." This assumes that the witnesses have shown interest or bias, because the judge did not add that it was for the jury to determine if they had shown such interest or bias in testifying. The judge did not say, "If you find they have shown such bias."

The amount of the verdict shows very clearly that the jury did not give full weight to the testimony of these witnesses. If the judge had told them that they could give to the testimony of these witnesses the same faith and weight as if they were disinterested, and then the verdict had been as it is, the result would clearly be due to the fact that the jury did not believe these witnesses. But when the judge told them that the testimony of interested parties was discredited by the mere fact of interest, and did not add (as our statute and our decisions require) that such interest was merely a circumstance, and that the jury could, notwithstanding, give that testimony such weight as they thought proper, the plaintiff was deprived of the benefit of having the testimony placed impartially before the jury with entire freedom to give it full credit without any suspicion being cast upon it, as a matter of law, as was done by the charge in this case.

To call attention to any circumstance which will impair the (326) weight of testimony is erroneous, unless the judge shall further explain that it is not a matter of law, but merely a circumstance for the jury to consider in giving such weight to such testimony as in their opinion and belief it is entitled, untrammeled by any rule laid down by the court.

Cited: In re Smith, 163 N. C., 469; *S. v. Fogleman,* 164 N. C., 464; *Ferebee v. R. R.,* 167 N. C., 296, 297.

T. P. CLARKE ET AL. v. BENJAMIN ALDRIDGE ET AL.

(Filed 22 May, 1913.)

1. Writ of Assistance—Motions—Notice—Procedure—Equity—Possession.

A writ of assistance is one issuing from a court having equitable jurisdiction for the enforcement of decrees or orders, conferring a right to the present possession or enjoyment of property, usually upon motion after notice duly served, when the right thereto is clear; and, as a rule, only against parties or persons bound by the terms of the decree.

2. Partition—Issues—Superior Court—Writ of Assistance—Original Action—Procedure—Appeal and Error.

These proceedings to partition land were transferred to the Superior Court in term, to try equitable issues as to the title therein arising, when the defendant intervened and claimed title under independent deeds, which proceeded to final judgment in his favor. Upon motion properly made for a writ of assistance to put him in possession, a trial was had as if in an original action: *Held,* though a writ of assistance appears to have been the proper method, the Supreme Court takes the view adopted by the parties and decides the case accordingly.

3. Deeds and Conveyances—Survey—Location for Description—Erroneous Description—Parol Evidence.

Where the parties, with the view of making a deed, go upon the land and make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed, though a different and erroneous description may appear upon the face of the deed, the land thus ascertained and intended will pass as between the parties or voluntary claimants who hold in privity, this being an exception to the general rule that parol evidence may not vary or contradict the written instrument.

4. Same—Judgments—Conclusiveness—Issues Involved.

A judgment in an action for lands which only involves the issue as to whether the deed under which a party claims title has been delivered,

does not, as between the parties or against privies who claim as volunteers, prevent the party claiming title under the deed from showing that the original grantor had gone upon the lands, and made a physical survey of the same, and that the *locus in quo* was included within the intended boundaries, though they do not so appear on the face of the deed as written, there being no question of boundaries raised in the action wherein the judgment relied on was rendered.

(327) APPEAL from *Cline, J.*, at November Term, 1912, of MITCHELL.

On the trial it was made to appear that, heretofore, plaintiffs and defendants, other than Benjamin Aldridge, as children and heirs at law of D. S. Clarke, deceased, had instituted suit for partition of certain lands in said county. Owing to the existence of equities affecting the title, and not relevant to the present inquiry, the cause was brought to Superior Court in term. Pending the controversy, defendant Benjamin Aldridge, on motion, was made party defendant and pleaded sole seizin as to a portion of the land, under and by virtue of two deeds from D. S. Clarke to two of his sons, H. W. Clarke (Henry) and J. B. Clarke, of date, 3 March, 1898; said Aldridge having acquired and holding whatever estate and interest were conveyed in these deeds. A deed to a third son, Harvey, for an additional portion of the land, purporting to have been made at the same time. The plaintiffs, in the partition proceedings, denied the validity of his claim on the part of Aldridge, asserting that the alleged deeds by D. S. Clarke to his sons had never been delivered.

The following issue was submitted and responded to by the jury:

"1. Were the three deeds of 3 March, 1898, executed by D. S. Clarke and wife, Susan, to James Clarke, Harvey Clarke, and Henry Clarke, delivered to said parties? Answer: Yes."

It was thereupon adjudged that Benjamin Aldridge was owner of the tracts of land described in the two deeds from D. S. Clarke to Henry and J. B. Clarke, and that Harvey Clarke owned the land "de-

(328) scribed in the deeds to him." Thereupon the defendant Aldridge, asserting his rights under said deeds and claimed by him to be in accordance with said decree, particularly under the deed to H. W. Clarke (Henry), which contained the land lying next to that of plaintiffs, occupied the property up to a divisional line: "Beginning at a recognized corner at D, runs thence S. 80 E. 33 poles to a stake; thence S. 65 E. 15 poles to a stake; thence N. 72 E. 60 poles to a stake; thence S. 87 E. 52 poles to a black gum, W. W. Clarke's corner," etc.

On the face of the deed to H. W. Clarke, this divisional line is described as follows: "Beginning at the recognized corner, D, runs thence S. 11 E. 33 poles; thence S. 65 E. 15 poles to a stake; thence N. 72 E.

60 poles to a stake; thence S. 87 E. 52 poles to a black gum, W. W. Clarke's corner," etc., the discrepancy, as it is now presented, being caused by running the line from D, S. 80 E. 33 poles, instead of S. 11 E. 33 poles, the call on the face of the deed.

The plaintiffs then, on affidavit filed and notice duly issued and served on all the adverse parties, returnable to term, moved the court for a writ of assistance to place them in possession of the land, according to the terms of the decree. On this notice, pleadings were regularly filed, and at said November Term, 1912, the cause was submitted to the jury and the divisional line was established by the verdict to be as contended for by plaintiffs. There was judgment for plaintiff, and defendant excepted and appealed, assigning for error certain rulings of the court on questions of evidence.

T. A. Love for plaintiff.
W. L. Lambert, W. C. Newland, S. J. Ervin for defendant.

HOKE, J., after stating the case: The writ of assistance, in its ordinary acceptation, is one issuing from a court having general equitable jurisdiction for the enforcement of decrees or orders conferring a right to the present possession or enjoyment of property. It usally issues on motion after notice duly served, when the right thereto is clear, and, as a rule, only against parties or persons bound by the terms of the decree. *Wagon Co. v. Byrd,* 119 N. C., 464; *Exum v. Baker,* 115 N. C., 244; *Knight v. Houghtalling,* 94 N. C., 408; 2 Beach (329) Modern Eq. Practice, sec. 897; *Schenck v. Conover,* 13 N. J. Eq., and see editorial note to *Clay v. Hammond,* 199 Ill., 370, appearing in 93 Amer. State Reports at p. 154. It seems that the facts of the present case would properly call for or permit a resort to this process, but we are not required to determine this question, for the reason that, on notice duly served and returnable to term, pleadings have been regularly filed and the issues determined by the jury, and the parties having thus elected to treat the proceedings as an original action to recover land, we have concluded it is best to adopt their view and consider and deal with the case in that aspect.

Coming, then, to the principal question, the validity of the present trial before the jury, the plaintiffs put in evidence the original proceedings, including the decree and the deeds under which defendant claimed, particularly that to H. W. Clarke, describing the divisional line as running from the recognized point at D, S. 11 E. 33 poles to a stake; thence S. 65 E. 15 poles to a stake, etc., to the black gum corner,

and offered evidence further of the value of the lands wrongfully occupied by the defendant if the line from D, S. 11 E. were run as called for on the face of the deed. Defendant then offered to prove that, just prior to the execution of the deeds in question, and with the view of making the same, the grantor, D. S. Clarke, desiring to make division of said land among his children, went on the premises with a surveyor and the grantees, J. B. and Harvey Clarke, and ran and marked the boundaries, including this divisional line in controversy, running said line from "the corner fixed at D, thence along a fence, S. 80 E. 33 poles to a stake, thence S. 65 E. 15 poles to a stake along the fence, thence N. 72 E. 60 poles to G, thence S. 87 E. 52 poles to the black gum at H," said D. S. Clarke indicating the line and marking some of the trees and having others marked on the line as surveyed; that "the deed in question was made pursuant to said survey and intending to convey the land embraced in the same." This, with other evidence of similar purport, was, on objection, excluded by the court, and we are of opinion that the ruling must be held for reversible error.

It has been long held for law, in this State, that when parties, with the view of making a deed, go upon the land and make a physi-
(330) cal survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed, such land will pass, certainly as between the parties or voluntary claimants who hold in privity, though a different and erroneous description may appear on the face of the deed. This is regarded as an exception to the rule, otherwise universally prevailing, that in the case of written deeds the land must pass according to the written description as it appears in the instrument (*Reed v. Schenck,* 13 N. C., 415); but it is an exception so long recognized with us that it must be accepted as an established principle in our law of boundary. In *Cherry v. Slade,* 7 N. C., 82, the position referred to is thus stated: "Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed"; and in *Reed v. Schenck, supra,* it was again referred to as follows: "Parol evidence to control description of land contained in a deed is in no case admissible, unless where monuments of boundary were erected at the execution of the deed. If the description in the deed varies from these monuments, the former may be controlled by the latter. Soon after these decisions and in some of the cases, expressions will be found giving intimation that the principle should only be al-

lowed to prevail when there are some other written data in the principal deed or elsewhere, by reference to which the physical survey could be attached; but a careful examination of the authorities controlling in the matter will disclose that this suggested limitation on the exception may not be sustained. Thus, in *Cherry v. Slade, Chief Justice Taylor,* delivering the principal opinion, refers with approval to the case of *Person v. Roundtree,* 2 N. C., 378, as follows: "In *Person v. Roundtree,* the latter entered a tract of land, lying in Granville County, upon Shocco Creek, which was run out, 'beginning at a tree on the bank of Shocco Creek, running south a certain number of poles to a corner, thence north a certain number of poles to a corner on the creek, thence (331) up the creek to the beginning.' By a mistake, either in the surveyor or secretary who filled up the grant, the courses were reversed, placing the land on the opposite side of the creek to that on which it was really surveyed, so that the grant did not cover any of the land surveyed. Roundtree settled on the land surveyed, which was afterwards entered by Person, who obtained a deed from Lord Granville, and brought an ejectment against Rountree, who proved the lines of the survey and a possession under his grant. The Court decided that Roundtree was entitled to the land intended to be granted, and which was surveyed, and that he should not be prejudiced by the mistake of the surveyor or secretary." The question received very full consideration in several cases appearing in 119, 117, and 116 volumes of our reports, to wit: in *Higdon v. Rice* and *Deaver v. Jones,* 119 N. C., pp. 623 and 598; *Shaffer v. Gaynor,* 117 N. C., 15, and *Cox v. McGowan,* 116 N. C., 131, in which *Associate Justice Avery,* for the Court, in opinions of great force and learning, gives adherence to the principle as announced in *Cherry v. Slade* and *Person v. Roundtree;* and in *Higdon v. Rice,* the learned judge said: "It seems to have been conceded that, subject to some not very clearly defined restrictions, it is a rule of law that deeds and patents shall be so run as to include the land actually shown to have been surveyed with a view of its execution." In *Deaver v. Jones* the Court held: "That when a grant is located by contemporaneously marked lines, these lines govern and control its boundary and fix the location so as to supersede other descriptions."

In *Shaffer v. Gaynor* it was held: "A deed is a contract, and the leading object of the courts in its enforcement, where the controversy involves a question of boundary, is to ascertain the precise lines and corners as to which the minds of grantor and grantee concurred. Hence, though parol proof is not, as a rule, admissible to contradict a plain written description, it is always competent to show by a witness that the parties by a contemporaneous, but not by a subsequent, survey

agreed upon a location of lines and corners different from that ascertained by running course and distance."

(332) And again, in *Cox v. McGowan:* "All rules adopted for the construction of deeds embody what the law, founded on reason and experience, declares to be the best means of arriving at the intention of the parties at the time of the delivery of the deed; hence, course and distance, or even what is considered, in law, a more certain or controlling call, must yield to evidence, if believed, that the parties at the time of the execution of the deed actually ran and located a different line from that called for, such evidence being admitted to show the description of the line to be a mistake." And numerous and well considered cases, before and since these decisions, are in approval of the principle, notably *Lance v. Rumbough,* 150 N. C., pp. 19-24; *Fincannon v. Sudderth,* 140 N. C., 246; *Elliott v. Jefferson,* 133 N. C., 207; *Barker v. R. R.,* 125 N. C., 596; *Bonaparte v. Carter,* 106 N. C., 534; *Baxter v. Wilson,* 95 N. C., 137. In *Lance v. Rumbough, Associate Justice Walker,* speaking to the question, said: "The survey made under such circumstances is considered a practical location of the land by the parties."

It is insisted for plaintiffs, that although the principle is fully recognized in this jurisdiction, it should not be allowed to prevail in the present instance, and this by reason of the language of the decree in the former proceedings, "That defendant is the owner of the land described in the deeds," and that defendant is thereby estopped from claiming the lands in controversy. But this position cannot, in our view, be sustained: First, for the reason that the parties only joined issue as to the delivery of the deeds, and the question of their boundary or correct location was in no way involved, and certainly was not considered or determined. It is the accepted rule, in such cases, "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 matters contained in the pleadings, and though not issuable in a 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 at the hearing." A correct application of this principle, announced in *Capehart v. Tyler,* 125 N. C., 64, and approved in many other decisions of this Court (*Weston v. Lumber Co., ante,* 165; *Coltrane v. Laughlin,* 157 N. C., 282,

(333) and *Gillam v. Edmonson,* 154 N. C., 127), is against the plaintiff's position. As heretofore stated, the boundary of these deeds and their correct location were not necessarily involved in the partition

proceedings, nor were they in any wise put in issue or investigated, and no estoppel arises, therefore, as to their proper location. Secondly, and apart from this, the law of boundary, which we have discussed and held applicable to the facts presented in the record, whether it be referred for its basic principle to the doctrine of mistake, as suggested by *Associate Justice Avery* in *Higdon v. Rice,* or to that of estoppel, as intimated by *Mr. Justice Douglas* in *Barker v. R. R.,* as between the parties or against privies, who claim as volunteers, is a principle governing the correct location of deeds which prevails in actions at law. In such case it has not been held that any change in the phraseology of the deeds is required, and, therefore, in a case where the only issue involved was as to the delivery of the deeds, and there was no question of boundary either raised, considered, or determined, a decree awarding to a party litigant the lands contained in the deeds should, by correct interpretation, be construed to mean "as contained" in the deeds correctly located according to law.

For the error in excluding the evidence there must be a

New trial.

Cited: Allison v. Kenion, 163 N. C., 585; *McMillan v. Teachey,* 167 N. C., 90; *Lumber Co. v. Lumber Co.,* 169 N. C., 89.

J. W. CARMICHAEL v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

(Filed 22 May, 1913.)

1. Telephone Companies—Cutting Out Phones—Malice—Evidence.

In this action for damages against a telephone company for maliciously taking plaintiff's phone from his residence for nonpayment for its service, when the service had in fact been paid for, the testimony of the plaintiff's daughter that the defendant's collector, in plaintiff's absence, presented the bill at his residence in a rude manner, is held competent as a part of the transaction complained of.

2. Evidence—Objections and Exceptions—Competent in Part—Appeal and Error.

When a part of the testimony of a witness excepted to is competent, the admission of the whole thereof, though incompetent in part, will not be held for reversible error.

3. Telephone Companies—Cutting Out Phones—Malice—Punitive Damages—Financial Condition—Evidence.

Where a plaintiff is entitled to recover punitive damages in his cause of action, evidence of the defendant's financial condition is competent; as in case where a telephone company maliciously takes a telephone out of the house of a subscriber under such circumstances as to cause him damages.

4. Instructions—Construed as a Whole—Erroneous in Part—Burden of Proof.

Where in a charge in an action for damages alleged to have been wrongfully inflicted, it appears that the burden of proof is put on plaintiff to establish his cause by the greater weight of the evidence, when considered as a whole, a detached portion thereof which fails to require this will not be held for reversible error.

5. Telephone Companies—Duty to Patrons—Instructions.

In this action against a telephone company for damages caused the plaintiff for wrongful cutting out a telephone from his residence, a charge is held correct that defendant's business is affected with a public use, that it is a public-service corporation, and among its duties is to give its patrons courteous and prompt service, and that the defendant must be sure it is within its rights before depriving a patron of its service.

BROWN, J., dissenting.

(334) APPEAL by defendant from *Lyon, J.*, at January Special Term, 1913, of NEW HANOVER.

This action is to recover damages for the wrongful and malicious cutting out of the plaintiff's telephone.

The facts are stated in the report of the former appeal in the same action, 157 N. C., 21.

(335) Miss May Carmichael, a witness for plaintiff, testified as follows: "I am a daughter of Mr. J. W. Carmichael, and live on St. James Square in the city of Wilmington, and have been living there for some years. My grandfather was Mr. W. H. Northrop, my mother's father, and he was in the hospital in 1908. My other grandfather was Dr. James Carmichael, the preacher. We had a telephone in our house in 1908, and had it there ever since we lived there. It had never been disconnected before. This was what happened: The bell rang, and I went to the door, and this young man standing at the door asked, 'Is your father in?' and I said, 'He is not,' and he thrust this bill in the door and said, 'Give this to him when he comes in, and tell him if he don't come down and pay this bill, I will cut his phone out.' His manner was abrupt. I told my father. I told him this gentleman had come to the door and he was very rude to me; came in an abrupt way and gave this message, which I repeated to him; had thrust the bill in the door and said if he did not come down and pay the bill,

he would cut his phone out." Defendant objected; objection overruled, and defendant excepted.

The plaintiff was examined in his own behalf, and testified, among other things, as follows:

"Q. As a matter of fact, is the Southern Bell Telephone Company a rich corporation or not? A. They sent me a stockholders' book; why they sent it to me I don't know; but it showed assets of $869,000,000, which I should say was a very rich corporation." (Objection by defendant; objection overruled, and defendant excepted.)

Cross-examination: "That was the statement of the American Bell and the Southern Bell Telephone Companies together. The consolidation was $869,000,000. That was the statement of the American Telephone and Telegraph Company, which owns the Southern Bell, and it included the Southern Bell. That's a statement of the consolidated, but they showed separately for the minor company."

This evidence was admitted on the issue of punitive damages.

The manager of the defendant at Wilmington testified, among other things: "Am in the employ of the defendant company. I would say the defendant is a reasonable sized company. I don't know (336) what is the capital stock. I don't recollect that I ever heard. I have seen a statement, and I recollect it was in the millions, but can't recollect exactly what it was. It is a subsidiary company to the American Telephone and Telegraph Company."

The court charged the jury, among other things, as follows:

1. "And if you find from the evidence, and by the greater weight thereof, the burden being on plaintiff to so satisfy you, that the defendant had knowledge or could have known by the exercise of ordinary care, that plaintiff's father-in-law was in the hospital, and the phone was being used to ascertain his condition and communicate it to the plaintiff's wife, you may consider the mental suffering that the plaintiff sustained by reason of the disconnection of the phone." Defendant excepted.

2. "If you should find that the defendant cut out the phone through malice to the plaintiff, or if it was cut out recklessly, wantonly, without any regard to the rights of the plaintiff, it would still be within your discretion whether or not to punish the defendant. You can give damages on the third issue if you are satisfied it was done recklessly, wantonly, maliciously, or you cannot, if you find it was so done." Defendant excepted.

"Defendant's business is one which is affected with public use, and the company is a public-service corporation, with certain well-defined rights and duties, among the latter of which is to give to each and all

of its patrons, and to those who desire to become patrons, courteous and prompt service in the transmission of messages; and it is the duty of the defendant to be sure that it is strictly within its rights before it undertakes to deprive one of the public of the right of its service." Defendant excepted.

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

Rountree & Carr and H. M. McClammy for plaintiff.

John D. Bellamy & Son, J. Brutus Clay, and H. E. Palmer for defendant.

(337) ALLEN, J. This action has been tried in accordance with the opinion delivered on the former appeal, and we find no reversible error.

The testimony of the daughter of the plaintiff as to the conduct of the agent of the defendant was competent as a part of the transaction complained of, but, if not, the exception could not avail the defendant, as the objection was to the whole of her testimony, a part of which the defendant does not contend was incompetent. *Ricks v. Woodard,* 159 N. C., 647.

The testimony of the plaintiff as to the financial condition of the defendant was admissible on the issue of punitive damages (*Tucker v. Winders,* 130 N. C., 147), but in any event its admission would not be reversible error, because the facts objected to were brought out without objection on the cross-examination of the same witness, and in the examination of the manager of the defendant.

The first exception to the charge is that there was no evidence that the defendant knew, or could have known by the exercise of ordinary care, that the plaintiff's father-in-law was in the hospital, and that the phone was being used to ascertain his condition.

We doubt if there was any evidence of the fact, but are of opinion it was not necessary to prove knowledge on the part of the defendant, and that his Honor placed a burden on the plaintiff which he did not have to assume.

The verdict of the jury, read in the light of the charge, establishes the facts that the plaintiff had paid his phone charges and had the receipt of the defendant therefor, and that the defendant maliciously cut out the phone. If so, the defendant was guilty of a tort, and is liable for all damages flowing naturally and proximately from the wrongful act, although not foreseen.

In *Johnson v. R. R.,* 140 N. C., 576, the Court quotes with approval from Sutherland and Hale on Damages as follows: "Mr. Sutherland,

after discussing many decided cases, says: 'The correct doctrine, as we conceive, is that if the act or neglect complained of was wrongful, and the injury sustained resulted in the natural order of cause and effect, the person injured thereby is entitled to recover. (338) There need not be in the mind of the individual whose act or omission has wrought the injury the least contemplation of the probable consequences of his conduct; he is responsible therefor because the result proximately follows his wrongful act or nonaction.' 1 Damages, 16. 'A tort feasor is liable for all injuries resulting directly from his wrongful act, whether they could or could not have been seen by him. . . . The real question in these cases is, Did the wrongful conduct produce the injury complained of? and not whether the party committing the act could have anticipated the result.' Hale Damages, 36; 8 Am. and Eng. Enc. (2 Ed.), 265."

The criticism of the second excerpt from the charge is that his Honor used the expression, "If you shall find," without adding, "by the greater weight of the evidence"; but if this should be held to be erroneous, standing alone, an examination of the whole charge shows that immediately before the part complained of, his Honor told the jury, "You cannot allow any damages under the third issue unless you find from the evidence and by its greater weight, the burden being on the plaintiff to so satisfy you, that the phone was cut out through malice or was cut out wantonly or recklessly."

The learned counsel for the defendant does not contend, in his carefully prepared brief, that there was no evidence to support a finding for the plaintiff on the issue of punitive damages, and it is, therefore, unnecessary to discuss the evidence bearing upon the issue, which in our opinion was sufficient to justify submitting it to the jury.

The last exception is to a part of the charge defining the duty of the defendant to its patrons, as follows: "Defendant's business is one which is affected with a public use, and the company is a public-service corporation, with certain well-defined rights and duties, among the latter of which is to give to each and all of its patrons, and to those who desire to become patrons, courteous and prompt service in the transmission of messages; and it is the duty of the defendant to be sure that it is strictly within its rights before it undertakes to deprive one of the public of the rights of its service."

This rule imposes no greater burden on the defendant than is (339) imposed on all who are under legal or contractual obligations to others, as all must be sure they are strictly within their rights before they refuse to perform a duty arising from contract or imposed by law,

or they will be liable in damages for failure to do so. The language of David Crockett, "Be sure you are right, and then go ahead," has become axiomatic. We find

No error.

BROWN, J., dissenting: The judge submitted these issues:

1. Did the defendant unlawfully cut out plaintiff's telephone, as alleged in the complaint? Answer: Yes.

2. If so, what actual damage is the plaintiff entitled to recover therefor? Answer: $100.

3. If so, what punitive damage is the plaintiff entitled to recover therefor? Answer: $500.

The court charged: "If you should find that the defendant cut out the phone through malice to the plaintiff, or if it was cut out recklessly, wantonly, without any regard to the rights of the plaintiff, it would still be within your discretion whether or not to punish the defendant. You can give damages on the third issue if you are satisfied it was done recklessly, wantonly, maliciously, or you cannot, if you find it was so done."

I am of opinion there is no just ground upon the evidence in this case to warrant the imposition of punitive damages. The plaintiff's own evidence shows there was a *bona fide* difference between him and defendant's manager as to whether he had paid his phone rental. Plaintiff admits that his phone charges became due 1 April, and that up to 3 June he had not paid them, although asked for them repeatedly. He claims to have paid them to Murray, the defendant's clerk, on 3 June. The defendant had indulged him for a full month. On 29 June, being dunned again for his dues, he stated to defendant's manager Boyd, that he had paid them in full. Boyd said: "Our books show only $1.50 was paid, and if you will bring your receipt around, we will be glad to fix our books."

Plaintiff admits that he could not find his receipt.

(340) Plaintiff further testifies that on 27 June he and his wife had gone to a hospital to see her father, and on his return home they found the phone cut out. Plaintiff, on 29 June, paid the balance of $3 under protest, and the phone was at once restored. He was without the use of a phone about 36 hours. A week afterwards his wife found the receipt. Plaintiff further testifies that Murray came to see him and asked to see the receipt, and he declined to let him have it. He further says that at once Boyd, defendant's manager, came to see him, and offered to settle the matter, and pulled out a roll of bills, but plaintiff declined to negotiate.

There is no evidence here of either malice, wantonness, or a reckless disregard of plaintiff's just rights. There is evidence of a *bona fide* difference as to the payment of plaintiff's rental. He failed to produce his receipt until some time after the phone had been taken out, and at once the defendant's manager offered to compensate plaintiff for any damage he may have sustained, but plaintiff refused even to discuss the matter.

I believe in holding public-service corporations to a full performance of their duty, but they are compelled to use human beings to perform their functions for them, and humanity is not infallible.

In this case an honest mistake was made, and $100 actual damage is a very large compensation for the injury suffered. I find nothing in the record which in my opinion warrants the imposition of "smart money" upon defendant.

Cited: S. v. English, 164 N. C., 508; *Webb v. Telegraph Co.,* 167 N. C., 490; *Beam v. Fuller,* 171 N. C., 771.

RICHARD C. GREEN v. CHARLES F. DUNN.

(Filed 22 May, 1913.)

1. Tax Sales—Tender—Issues Sufficient.

The issue in this case being sufficient as to a tender by the owner of amount of taxes, costs, and 20 per cent interest to the purchaser of lands at a sale for taxes, and as to the ownership, etc., of the lands, it was not error for the court to refuse to submit the issues tendered by the defendant.

2. Tax Sales—Tender as Agent—Equitable Owner—Appeal and Error—Regularity of Trial—Presumptions.

The plaintiff purchased certain lands with the erroneous understanding that taxes for that year had been paid. The lands were sold for these taxes, and he testified that he had made a proper tender to the purchaser within the year, as required by the statute, in his own name and in the name of his grantor, which had been refused. The jury having found on this issue for the plaintiff, it is *Held,* that the question whether the plaintiff, as equitable owner, could make a legal tender of the taxes does not arise, the presumption being that the jury was correctly instructed, when no exception to the charge is taken and the charge does not appear in the record.

3. Pleadings—Demurrer—Answer.

A demurrer to a complaint is overruled by the filing of an answer.

4. Appeal and Error—Stenographic Notes—Record.

Transcribed stenographer's notes of the evidence taken at the trial should not be sent up as a part of the case on appeal, nor will they be accepted as such when tendered in the Supreme Court for the first time.

(341) APPEAL by defendant from *Justice, J.*, at March Term, 1912, of LENOIR.

G. V. Cowper for plaintiff.

C. F. Dunn in propria persona for defendant.

CLARK, C. J. On 15 March, 1910, Florence Henderson owned a small lot in Kinston. According to the plaintiff's evidence, she sold the lot to him for $36, and he paid for the same in full, but the vendor being ill at the time, she did not make him a deed, but her agent gave him a receipt for the money, and by her authority he took possession of the property, rented it out, and later started a building on it, and has been in possession to the present. In May, 1910, the lot was sold for taxes (23 cents), and was bought by the defendant for 32 cents. In June, 1910, the plaintiff, who had understood that the taxes were paid when he bought, testifies that on learning that the lot had been sold for taxes, he tendered the purchase price, legal costs, and 20 per cent interest four or five times during 1910 to the purchaser, and also to the sheriff and to the city tax collector, each of whom declined to receive
(342) the same. In May, 1911, the defendant obtained a deed from the sheriff for the land. The defendant, in his testimony, denied that any tender had been made him by the plaintiff until after he had received the deed from the sheriff. The sheriff testified that the plaintiff several times during 1910 offered to pay him all taxes, costs, and 20 per cent, but that each time he referred him to Dunn, who had purchased the land. The city clerk testified that it was his custom not to take taxes from the owners of land after it had been sold, but that he always sent them to settle with the purchaser; that the plaintiff's character was good, but that he does not remember whether he tendered him the taxes, etc., or not. Witness Hodges stated that during 1910 he heard the plaintiff tender the defendant the taxes, costs, and 20 per cent. The plaintiff also testified that in tendering the taxes he did so as agent of Florence Henderson, who had so authorized him.

This is an action to remove cloud upon title. The court submitted as issues:

1. Did the plaintiff within one year from the date of the tax sale to the defendant make an offer and tender of the amount of taxes paid by defendant, together with costs and 20 per cent charged?

2. Is plaintiff, Richard C. Green, the owner of the land described in complaint and entitled to possession thereof?

To both of which the jury responded "Yes." These issues presented every phase of the controversy, and it was not error to refuse those tendered by the defendant.

In May, 1912, Florence Henderson executed a deed to the plaintiff to the land, which was prior to the beginning of this action, and he was properly the party in interest and entitled to maintain this action. It is immaterial to consider whether the plaintiff, as equitable owner, could make a legal tender of the taxes, as he testified that he also tendered them as agent of Florence Henderson. We must presume that his Honor charged properly upon these points, as there is no exception to his charge, and it is not sent up.

We need not consider the proposition set up in the demurrer, as that was, of course, overruled by filing the answer. *Moseley v. Johnson,* 144 N. C., 273.

The stenographer's notes were not sent up as a part of the (343) record, and cannot now be filed, as the defendant offers to do. They are material which the judge could consult in making up the case. But it would have been error for the judge himself to send them up as a part of the record, as we have repeatedly held. *Locklear v. Savage,* 159 N. C., 240.

We find in the record no indication that the judge committed any error in the trial of the cause.

No error.

MAURICE L. MYERS v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 22 May, 1913.)

Interstate Commerce — Federal Employers' Liability Act — Local Employment—Interpretation of Statutes.

The Federal Employers' Liability Act applies only when the employee of a railroad company receives the injury complained of while in some way engaged on trains connected with interstate commerce, and in this case it is held not to apply where the plaintiff was employed by the defendant railroad company to work on its roadbed, and was injured while obeying an order of his superior in boarding an interstate train to go to a near-by point, also situated within the State, for mail.

APPEAL by defendant from *Daniels, J.,* at January Term, 1913, of WILKES.

Action for damages for a personal injury to a railroad employee, tried upon these issues:

1. Was the plaintiff injured by the negligence of the defendant? A. Yes.

2. Did the plaintiff by his own negligence contribute to his own injury? A. Yes.

3. Did the plaintiff execute the release offered in evidence by the defendant? A. Yes.

4. Was the plaintiff induced to sign the release by the fraud and deceit of the defendant's agent? A. Yes (but set aside on motion of defendant).

(344) 5. Was the plaintiff 21 years of age when he signed the receipt and has since ratified it? A. No.

6. What damage is the plaintiff entitled to recover of the defendant? A. $1,000.

From the judgment rendered, the defendant appealed.

Charles B. Spicer for plaintiff.

Watson, Buxton & Watson for defendant.

BROWN, J. This action was tried under the act of Congress known as the Federal Employers' Liability Act.

The evidence tended to prove these facts: Plaintiff, a resident of Wilkes County, North Carolina, was employed by the defendant company, and in February, 1911, was working in West Virginia as a hand on an extra force on a work train. His business was to assist in surfacing up the roadbed, straighten out freight wrecks, and when there were slides, to clean them up. He was working under Mr. Shaw, general foreman of the work train, and under Mr. Lineberry, the assistant foreman. On Sunday, 12 February, 1911, the plaintiff was not working, but some time during the afternoon he attempted to catch a freight train which was passing the camp, and running from 6 to 8 miles an hour. The plaintiff claimed he was ordered by the foreman to catch this moving train to go for the mail. He failed to catch the train, and fell under it and had his leg cut off.

According to the plaintiff's own evidence, we do not think he was engaged in interstate commerce, and therefore his action was erroneously tried under the act of Congress. He testified that he was engaged solely in local repair work on the track in West Virginia as a workman on a work train.

At the time of his injury he was not engaged in any service whatever for the defendant. On Sunday, 12 February, the work-train hands were in camp, when plaintiff was told by Lineberry to catch a passing freight train and go to Naugatuck for the mail for the camp.

One of the essentials is that the employee when injured must be

engaged in an act of interstate commerce. Horton was engineer of a train engaged in interstate commerce when injured, and so was Fleming, 160 N. C., 196.

In *Zachary's case,* 156 N. C., 496, we held that the act of Con- (345) gress applies only to a carrier by rail while engaged in interstate commerce, and only to an employee suffering injury while he is employed by such carrier in such commerce. In that case we said:

"We do not think the Federal act applies, for the reason that the deceased at the time when killed was not employed by the Southern Railway, the lessee, in interstate commerce. At the time he was killed deceased was not engaged in an act of any kind of commerce. He was on the way to his boarding-house for a purpose entirely personal to himself and not on the carrier's business."

This case is directly supported by Federal authorities. *Lamphere v. R. R.,* 116 C. C. A., 156; 193 Fed., 248. In this case it is held "that the employee at the time of the injury must have been employed in such interstate commerce."

It is also held that an extra conductor in the employ of a railroad company, directed, on reporting for work, to ride to another point within the same State for service on a work train working in that State, and who was injured while proceeding to his work train, was not at the time of the injury engaged in interstate commerce within the Employers' Liability Act. *Feaster v. R. R.,* 197 Fed., 581; *Pederson v. R. R.,* 197 Fed., 537. In this last case the subject is fully discussed by *Buffington, Circuit Judge,* and it is held that "the act applies only to such employees who at the time of the injury have a real and substantial connection with an act of interstate transportation," citing *Employers' Liability cases,* 207 U. S., 463; *Adair v. U. S.,* 208 U. S., 161.

On the occasion when injured the plaintiff was not engaged in any kind of commerce. He had been directed by Lineberry to go to Naugatuck for the mail for the working force, and was injured while endeavoring to board a passing freight train for that purpose and no other.

It is contended that according to plaintiff's evidence, on the occasion when injured, he was not engaged in any act of service for defendant, and if Lineberry or Shaw directed him to catch the freight and go for the mail for the camp, they were not acting within the scope of their authority or in furtherance of the defendant's work. It is unnecessary to decide this now. Another trial may develop the (346) facts more fully.

New trial.

Cited: *S. c.,* 166 N. C., 234.

J. L. SMATHERS & CO. ET AL. v. TOXAWAY HOTEL COMPANY ET AL.

(Filed 22 May, 1913.)

1. Negotiable Instruments—"Value"—Interpretation of Statutes.

A holder of a negotiable instrument for value is one who acquired the instrument for a consideration sufficient to support a simple contract, such as an antecedent or preëxisting debt; or a lien on the instrument arising either from contract or by implication of law, to the extent of the lien. Revisal, secs. 2173, 2175.

2. Negotiable Instruments—Infirmity—"Notice"—Interpretation of Statutes—Instructions—Appeal and Error.

To constitute notice of infirmity of a negotiable instrument, the holder or transferee for value before maturity must have had actual knowledge thereof or of such facts that his action in taking it amounted to bad faith; and notice that would put a reasonably prudent man upon inquiry is insufficient (Revisal, sec. 2205); and a charge to the jury will be held for reversible error that lays down for the guidance of the jury the incorrect as well as the statutory rule of the sufficiency of the notice required.

3. Instructions—Appeal and Error—Favorable to Appellant—Harmless Error.

The appealing party cannot complain of error in a charge of the court which is in his own favor.

APPEAL by defendants from *Foushee, J.*, at November Term, 1912, of BUNCOMBE.

Action in nature of creditor's bill. The relevant facts are very correctly stated in one of the briefs as follows:

"On 13 November, 1906, the Toxaway Hotel Company executed a bill of sale conveying to R. A. Jacobs certain merchandise, cattle, and other personal property in Transylvania and Jackson counties; on the said day said Jacobs executed to the Toxaway Hotel Company, as payment for said property, fourteen (14) notes of $500 each, (347) one payable each successive three months thereafter, and at the same time said Jacobs executed a deed of trust to the Wachovia Bank and Trust Company whereby it conveyed all of said property as security for the payment of said purchase-money notes, which deed in trust was duly registered in Transylvania and Jackson counties, respectively, on 20 and 26 November, 1906.

"On 16 November, 1906, the Toxaway Hotel Company indorsed four of said notes to McMichael & Co.; and on the same day said Toxaway Hotel Company indorsed five of said notes to Frank & Co., of Savannah, as collateral security for a debt of about $2,500, which it owed to said Frank & Co. The first two notes falling due were paid by Jacobs, one

of them being held by Frank & Co. On 6 June, 1907, the plaintiffs herein—general creditors of the Toxaway Hotel Company—instituted this action, alleging that the sale to Jacobs, and execution of the notes and deed in trust by him, were done for the purpose of hindering, delaying, and defrauding creditors, and the property in the hands of Jacobs was attached, and the appointment of a receiver of said property was procured by the creditors, who took charge of the same.

The Toxaway Hotel Company answered, denying the allegations of fraud, and alleging that the sale to Jacobs was *bona fide*.

"The Wachovia Bank and Trust Company, by permission of the court, intervened at the request of McMichael & Co. and Frank & Co., holders of some of the notes as aforesaid, and asked possession of the property held by the receiver, in order that it might enforce the lien of said deed in trust. The plaintiffs, creditors of the Toxaway Hotel Company, resisted, alleging that McMichael & Co. and Frank & Co. were not innocent purchasers. McMichael & Co. and Frank & Co., by order of court, also became intervenors, and alleged that they had taken the notes held by them in the usual course of business, before maturity, in good faith and for value, and had no notice or knowledge of any fraud in connection with the execution thereof.

"The plaintiffs, creditors of the Toxaway Hotel Company, replied that the transfer of the notes to McMichael & Co., and Frank & Co. was a part of the original scheme of the Toxaway Hotel (348) Company to hinder, delay, and defraud its other creditors, and that if McMichael & Co. and Frank & Co. did not have actual knowledge of this fraudulent purpose and intent of said Toxaway Hotel Company and said Jacobs, said transfer of the notes to them was made 'under such circumstances and with knowledge of such facts and circumstances on the part of said alleged transferees as would and ought to lead a reasonably prudent and careful man to discover the wrongful and fraudulent intent of the parties so transferring the same.'

"By consent of all the parties, the receiver, under order of the court, sold the property taken into possession and is holding the proceeds pending the results of this action."

The jury rendered the following verdict:

1. Is the Toxaway Hotel Company indebted to the plaintiffs, as alleged in the complaint? Answer: Yes.

2. Were the bill of sale, deed of trust, and notes dated 13 November, 1906, mentioned in the pleadings in this cause, and executed between Toxaway Hotel Company and R. A. Jacobs, made and executed with intent to hinder, delay, or defraud the creditors of the Toxaway Hotel Company? Answer: Yes.

3. Are the intervenors, J. C. McMichael, Incorporated, innocent purchasers for value and without notice of said fraud of the notes mentioned in paragraph 7 of the plea of intervention filed herein? Answer: No.

4. Are the intervenors, Frank & Co., innocent purchasers for value and without notice of said fraud of the notes mentioned in paragraph 7 of the plea of intervention filed herein? Answer: No.

Judgment on the verdict for plaintiffs. Defendants appealed.

J. C. Martin, C. W. Malone, and W. R. Whitson for plaintiff.
Bourne, Parker & Morrison for defendant intervenors.

HOKE, J. Our statute on negotiable instruments, Revisal, ch. 54, sec. 2205, makes provision as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such (349) facts that his action in taking the instrument amounted to bad faith."

A perusal of the record will disclose that the court below, on the third and fourth issues, at first charged the jury in substantial accord with the statute. The only criticism suggested is that, having been given in the exact language of one of defendant's prayers for instructions, it is couched in terms too persuasive, in view of the conflict of evidence on the subject; but such an objection is not open to the appellant, for the error here, if one existed, is in defendant's favor. In a later portion of the charge, however, and more than once his Honor, on these issues, stated, in effect, the correct rule to be that, if the jury should find that there was fraud in the execution of the notes and that these creditors "had notice of the fraud, or had notice of any facts or circumstances which ought to have put a reasonably prudent man upon inquiry, and if they had made such inquiry they could have discovered the fraud or the facts or circumstances constituting the same, and they failed to make such inquiry and discovery, it would be the duty of the jury to answer the issue 'Yes.'"

This position, in our opinion, is in direct conflict with the statutory provision, as expressed in the first portion of his Honor's charge, and must be held for reversible error. *Anderson v. Meadows,* 159 N. C., 404. The question as to what is the character of notice required to affect the status of one claiming to be the holder in due course of a negotiable instrument has been subject to some fluctuation in the courts and has given rise to much contrariety of decision. As shown in the

learned and suggestive argument and brief with which we were favored by counsel for appellant, the doctrine for a time prevailed in England as it is laid down by his Honor in the latter portion of his charge; that is, that the holder was put upon inquiry by facts or circumstances which would induce a cautious and prudent man to make one, and was affected by notice or knowledge of conditions which such inquiry would disclose. This seems not to have been the rule as it first obtained in the English Courts, and later they returned to the original position, (350) and it has been long firmly established there that, in this respect, the title of the holder can only be impugned by showing direct knowledge of the infirmity or notice of such facts as would make the acquisition of the instrument amount to bad faith. 2 Randolph on Commercial Paper (2d Ed.), sec. 996 *et seq.;* Norton on Bills and Notes (3d Ed.), 319; Huffcut on Negotiable Instruments, pp. 29 and 400-417.

In Huffcut, p. 29, a succinct account of the varying phases of the doctrine is given in a citation from Chalmers Bills of Exchange Act, as follows: "The test of *bona fides* as regards bill transactions has varied greatly. Previous to 1820 the law was much as it now is under the act. But under the influence of Lord Tenterden due care and caution was made the test (*Gill v. Cubitt,* 5 D. & R., 324), and this principle seems to be adopted by section 9 of the Indian Act. In 1834 the Court of King's Bench held that nothing short of gross negligence could defeat the title of a holder for value. (*Cook v. Jadis,* 5 B. & Ad., 909). Two years later Lord Denman states it as settled law that bad faith alone could prevent a holder for value from recovering. Gross negligence might be evidence of bad faith, but was not conclusive of it. (*Goodman v. Harvey,* 4 A. & E., at p. 876; *Uther v. Rich,* 10 A. & E., 784.) This principle has never since been shaken in England, and it seems now firmly established in the United States. (*Murray v. Lardner,* 2 Wallace, at p. 121; *Chapman v. Rose,* 56 N. Y., at p. 140)," and, in Norton, *supra,* p. 319, the author, after laying down the rule as it temporarily prevailed in England, says: "But this doctrine the law merchant rejects, and it is now the rule of the law merchant that mere knowledge of any facts sufficient to put a reasonably prudent man on inquiry is not sufficient, but that, to defeat his claim to be a *bona fide* holder in due course, he must be guilty of bad faith." There has been conflict of decision in this country, but we think the position requiring that bad faith be shown or notice or knowledge of facts from which bad faith in taking over the instrument could be reasonably inferred, has been long recognized here by the great weight of author- (351) ity. *Hotchkiss v. National Banks,* 21 Wallace, 354; *Goodman v. Simonds,* 20 Howard, 343; *Bank v. Weston,* 161 N. Y., 521;

Bank v. Savery et al., 127 Mass., 75; *Bradwell v. Prior,* 221 Ill., 602; *Bank v. Morgan,* 195 Pa. St., 199; *Richards v. Monroe,* 85 Iowa, 359; *DeVoss v. Richmond,* 18 Grattan, 338, etc.; *Tescher v. Mercer,* 118 Ind., 586; *Hamilton v. Vought,* 34 N. J. L., 187. Speaking to the rule, in this last case, and the reason for it, *Chief Justice Beasley* has well said: "From this brief review of the cases, I think it may be safely said that the doctrine introduced by Lord Tenterden stands at the present moment marked with the disapproval of the highest judicial authority. Nor does such disapproval rest upon merely speculative grounds. That doctrine was put in practice for a course of years, and it was thus, from experience, found to be inconsistent with true commercial policy. Its defect—a great defect, as I think—was that it provided nothing like a criterion on which a verdict was to be based. The rule was, that to defeat the note, circumstances must be shown of so suspicious a character that they would put a man of ordinary prudence on inquiry; and by force of such a rule it is obvious every case possessed of unusual incidents would, of necessity, pass under the uncontrolled discretion of a jury. An incident of the transaction from which any suspicion could arise was sufficient to take the case out of the control of the court. There was no judicial standard by which suspicious circumstances could be measured before committing them to the jury. And it is precisely this want which the modern rule supplies. When *mala fides* is the point of inquiry, suspicious circumstances must be of a substantial character, and if such circumstances do not appear, the court can arrest the inquiry. Under the former practice, circumstances of slight suspicion would take the case to the jury; under the present rule, the circumstances must be strong, so that bad faith can be reasonably inferred."

Our own Court has not escaped the perplexities which seem to have attended the subject, as indicated by the case of *Farthing v. Dark,* 109 N. C., 291, reviewed on appeal and disapproved in case, same title, 111 N. C., 243; and these and other cases with us, as in *Hulbert v.*
(352) *Douglas,* 94 N. C., 122, give countenance to the position of "putting a prudent man upon inquiry." But whatever may be the correct estimate of our former decisions, we regard the matter as put at rest by the express language of the statute: "That to constitute notice of infirmity, etc., the holder must have had actual knowledge of the infirmity, or knowledge of such facts that his action in taking the instrument amounted to bad faith," and are of opinion that the law, by correct interpretation, was designed and intended to establish on this subject and in this jurisdiction the rule as it has been long recog-

nized in England and sustained in this country as stated by the great weight of authority. As a legal proposition, the same statute justifies defendants in making the claims that they are purchasers for value. Section 2173, providing that: "Value is any consideration sufficient to support a simple contract. An antecedent or preëxisting debt constitutes value and is deemed such whether the instrument is payable on demand or at a future time" (*McMichael's case*), and section 2175: "Where the holder has a lien on the instrument arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien" (*Frank & Co.'s case*), and on the facts as they now appear of record, the determination of the third and fourth issues were very properly made to depend on whether these creditors held without knowledge or such notice of the alleged infirmity as the law requires to affect their title. Randolph Commercial Paper, sec. 1892; *Carpenter v. Longan,* 83 U. S., 271; *Canon v. McDaniel,* 46 Tex., 300; *Logan v. Smith,* 62 Mo., 455; *Updegraft v. Edwards,* 45 Iowa, 513.

For the error indicated, there must be a new trial of the cause upon all of the issues.

New trial.

Cited: Bank v. Seagroves, 166 N. C., 609; *Smathers v. Hotel Co.,* 167 N. C. 475.

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(353)

J. B. McCALL v. M. W. GALLOWAY.

(Filed 28 May, 1913.)

1. Issues—Objections and Exceptions—Appeal and Error—Issues Sufficient.

When the appellant fails to tender issues which he considers necessary and proper to present his case to the jury, he may not take advantage of the failure of the court to give them, by an exception to the issues submitted by the court. He must point out at the time the errors therein complained of. The issues submitted in this case presented every phase of the controversy, and no error therein is found.

2. Husband and Wife—Enticing Wife—Criminal Conversation—Declarations of Wife—Evidence—Interpretation of Statutes.

In an action brought by the husband against the defendant for unlawfully enticing the plaintiff's wife from him, etc., declarations of the wife as to improper relations with the defendant are incompetent as evidence. Revisal, sec. 1636.

APPEAL by defendant from *Long, J.*, at August Term, 1912, of TRANSYLVANIA. Action tried upon these issues:

1. Did the defendant M. W. Galloway unlawfully entice the plaintiff's wife from him and unlawfully and licentiously debauch and carnally know her, as alleged in the complaint? Answer: Yes.

2. What damages, if any, has the plaintiff sustained by reason of the defendant's alleged wrongful acts? Answer: Five hundred dollars ($500).

From the judgment rendered, the defendant appealed.

George A. Shuford, D. L. English, and Manning & Kitchin for plaintiff.

Welch Galloway and W. W. Zachary for defendant.

BROWN, J. There is evidence in the record sufficient to be submitted to the jury tending to establish the allegations of the complaint. It is unnecessary and will serve no good purpose to set it out.

The defendant excepted to the issues, but tendered no others.

If the issues framed by the court are deemed insufficient to develop the case, the party prejudiced thereby must lay the foundation for an exception and appeal by suggesting the proper corrections at the (354) time. *Moore v. Hill,* 85 N. C., 218; *Robinson v. Sampson,* 121 N. C., 99.

The defendant having failed to tender such issues as he deemed essential, cannot now assign as error the failure of the court to submit such issues. Clark's Code, sec. 391, and cases cited.

The issues submitted by the court are the real issues raised by the pleadings, and were properly submitted. Under them the defendant had opportunity to submit any evidence pertinent in his defense.

Exception is taken to the ruling of his Honor in admitting the testimony of Tom Loftis, a witness for the plaintiff, as to acts of intimacy between plaintiff's wife and defendant subsequent to the time the action was brought.

This evidence was admitted only as corroborative of the principal allegation and to be considered by the jury only as it may tend to corroborate the proof as to the relations of the defendant and plaintiff's wife prior to the commencement of the action. We see no error in this.

The defendant contends that the court erred in excluding the following evidence contained in the deposition of Mrs. J. P. Malley:

"Did you ever hear Mrs. Etta McCall, wife of J. B. McCall, while in the presence of her husband, make any statement in regard to the suit pending between her husband and M. W. Galloway? Answer: 'Yes.'"

The plaintiff in apt time objected to the foregoing question and answer. The objection was sustained, and the defendant excepted.

Question 20 in said deposition was as follows: "Please give, as nearly as you can, what the conversation was, and all that she said in his presence to you about this case? Answer: Mrs. McCall told him in my presence that she was not going into court and swear to any pack of lies for him or anybody else; that she had heard all about swearing for him that she wanted to hear, and that she would die before she would be made to do such a thing. She said further that he had made her go before the clerk of the court and swear enough to send her soul to hell, if she had been held accountable for it."

Of course, the declarations and conduct of the defendant are competent against him, but as we construe this, it is intended solely to put in evidence the declarations of the wife as against the hus- (355) band, and it is therefore incompetent. This Court said in *Grant v. Mitchell,* 156 N. C., 15, that "in an action brought by the husband for damages for criminal conversation with his wife, the wife was incompetent as a witness for or against the husband at common law. The statute (Revisal, sec. 1636) removes this disability in certain actions, but specifies those actions in which she cannot testify, and as to the one under consideration, 'on account of criminal conversation,' says: 'Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding on account of criminal conversation.'"

There are several other assignments of error which it is unnecessary to consider.

We have examined the entire record, and find

No error.

Cited: Ins. Co. v. Bonding Co., post, 388; *Powell v. Strickland,* 163 N. C., 401.

FERGUS REID v. NORFOLK SOUTHERN RAILROAD COMPANY ET AL.

(Filed 28 May, 1913.)

1. Foreign Corporations—Internal Management—Power of Court.

Our courts have not the power and will not undertake to administer or control the internal affairs of a foreign corporation.

2. Legislative Acts—Public Policy—Ratification.

The public policy of our State, which has been not inaptly termed the "manifested will of the State," is very largely a matter of legislative con-

trol, and in so far as the public is concerned and when not interfering with vested rights, a Legislature may ratify measures which it might have originally authorized.

3. Courts—Private Acts—Pleadings—Notice—Judicial Notice—Abstract Propositions—Appeal and Error.

While our courts, as a general rule, will not take judicial notice of a private statute or its terms (Revisal, sec. 500) requiring that it shall be specially pleaded, this rule will not be allowed to prevail when a private statute relating to and effectually settling the matter in controversy has after due notice been formally brought to the attention of the Supreme Court; for then only an abstract proposition would be left for the Court's determination, which will not be entertained.

4. Same—Merger—Mortgage Bonds—Public Policy—Railroad Corporations.

An injunction is sought in this action against a foreign railroad corporation issuing mortgage bonds on property partially acquired by a merger including several North Carolina railroad corporations, upon the ground that it is against the public policy of this State. A private act of the Legislature, passed subsequently to the commencement of the action, validated the merger and the bond issue, and thus disposed of the question of public policy raised. This act, after due notice to the complaining party, was formally brought to the attention of the Supreme Court on appeal by a duly certified copy from the office of the Secretary of State: *Held*, though this private act was not specifically pleaded, the court will recognize it as determinative upon the question presented.

5. Corporations—Franchises—Special Privileges—Exceptions—Constitutional Law—Legislative Acts—Ratification of Merger—Subsequent Acts.

The grant of a special charter to a railroad or other like corporation is not in conflict with the Constitution, Art. I, sec. 7, providing that no man or set of men are entitled to exclusive emoluments or privileges but on consideration of public services, our decisions being to the effect that the charters of public-service corporations come directly within the exception contained in the constitutional provision; and especially in view of Article VIII, sec. 1, authorizing the formation of corporations by general laws and special acts which may be altered or repealed by the Legislature.

(356) APPEAL by defendant from *Ferguson, J.*, at November Term, 1912, of WAKE.

Civil action to obtain a permanent injunction.

The action was instituted by plaintiff as stockholder of the Norfolk Southern Railroad, alleged and, for the purposes of this action, admitted to be a corporation of the State of Virginia, and certain directors of said company, and also five North Carolina railroad corporations operating under charters of this State and having their properties here.

The suit being to restrain said Norfolk Southern from incurring
(357) an indebtedness of $5,456,000 and executing a mortgage to secure same on all the properties of said Norfolk Southern Railroad,

including the properties formerly owned by the North Carolina companies and which the Norfolk Southern had acquired. Among other things and as a basis for relief in this jurisdiction, it was alleged that the Norfolk Southern having purchased the capital stock of the North Carolina companies, had caused four of them to convey their properties to the fifth, the Raleigh, Charlotte and Southern Railroad, and that a certificate of merger had then been executed by the last named company, by which it was certified "That the whole of the capital stock of said four railroads had been surrendered and transferred to it and its capital stock issued in exchange therefor, as will appear by copy," etc., and that the indebtedness and mortgage referred to were for the purpose of obtaining the means to carry out said enterprise and to further extend and equip and operate the Raleigh, Charlotte and Southern Railroad, etc.

It was further alleged that the Norfolk Southern was without power by charter or otherwise to engage in said business or incur an indebtedness therefor, and that the entire enterprise, in so far as it affected the railroads operating under such North Carolina charters, was contrary to our public policy and the express provisions of our statute law, etc.

The defendants demurred, assigning for cause, among others:

1. That the court has not and will not undertake to exercise jurisdiction and control over the "internal management of the affairs of a corporation of the State of Virginia or the action of its officers and directors."

2. That under and by virtue of the various charter provisions, annexed as exhibits to the complaint, the companies had the power to carry out the proposed undertaking, and there was nothing in the plan that was in any way contrary to the policies or statutes of this State, etc.

The demurrer having been sustained, plaintiff appealed to this Court. Pending said appeal, on notice duly issued, defendant by proper affidavit brought to attention of the Court and filed a duly certified copy of an act of the last General Assembly, chapter 516, Laws 1913,
and which in express terms ratified and made valid the said (358) merger and all acts done purusant thereto, with certain restrictions and provisos not relevant to the question as now presented, and on said statutes and by reason of the terms of same, moved the Court to dismiss the case.

T. Lanier and R. Randolph Hicks for plaintiff.

W. B. Rodman, R. N. Simms, and Chadbourne & Shore for defendant.

HOKE, J., after stating the case: It is well understood that our courts have not the power nor will they undertake to administer or control the internal affairs of a foreign corporation (*Brenizer v. Royal Arcanum,* 141 N. C., 409); and this being true, the only facts presented in this complaint which tend to establish a cause cognizable here are those which injuriously affect or threaten the chartered rights and privileges or holdings of these North Carolina companies. As a basis for such jurisdiction, it is alleged that the proposed merger, and incurring the indebtedness in aid thereof, are contrary to our public policy and the express provisions of our State law. If this be conceded on the facts as set forth in the complaint, the objection, in our opinion, has been entirely removed by the statute which has been formally called to our attention. This public policy, which has been not inaptly termed the "manifested will of the State," is very largely a matter of legislative control, and it is a well recognized principle that in so far as the public is concerned and when not interfering with vested rights, a Legislature may ratify and make valid measures which it might have originally authorized. *Barrett v. Barrett,* 120 N. C., 127; *Anderson v. Santa Anna,* 116 N. C., 356; *Schenck v. Jeffersonville,* 152 Ind., pp. 214-217; *Illinois v. R. R.,* 33 Fed., pp. 730-771.

The plaintiff, not challenging the enactment of the statute, contends that the defendant's motion should be denied: Chiefly, (1) because the court will not take judicial notice of a private act; (2) because the statute is in violation of Article I, sec. 77, of our Constitution, which provides: "That no man or set of men are entitled to exclusive
(359) emoluments or privileges from the community but on consideration of public services."

It is true, as a general rule, that a court does not take judicial notice of a private statute or its terms. This is a rule of pleading designed and intended primarily to prevent a litigant from being taken by surprise, and has been directly recognized both in our decisions and statutes (*Corporation Commission v. R. R.,* 127 N. C., 283; Revisal, sec. 500), but the principle was never intended, nor should it be allowed to prevail when a statute which effectually settles all matters in controversy of which the court has jurisdiction has after due notice been formally brought to the attention of the court, and no issue made or suggested as to its existence or its terms. It has been repeatedly held here that the court will not entertain or proceed with a cause merely to determine abstract propositions and when the questions in controversy are no longer at issue, and this is a case coming clearly within the principle. *Wallace v. Wilkesboro,* 151 N. C., 614; *Wikel v. Com-*

missioners, 120 N. C., 451. In this last case judgment for a peremptory mandamus had been entered against commissioners, requiring that body to build a bridge over the Tuckaseigee River and to levy a tax therefor pursuant to a certain statute. Pending an appeal, the Legislature repealed the act: *Held,* that the repeal abated the action, and the present *Chief Justice,* delivering the opinion and in reference to this repeal, said: "This destroyed the cause of action, and there only remains the judgment against the defendant for costs. It has been repeatedly held that when pending an appeal the subject-matter of an action or the cause of action is destroyed in any manner whatever, this Court will not go into a consideration of the abstract question which party should have rightly won, merely in order to adjudicate the costs, but the judgment below as to the costs will stand."

Nor will the second objection avail plaintiff, that the act violates the section of the Constitution which prohibits the granting of special privileges and emoluments. The very section relied on by the appellant closes with the exception, "but in consideration of public services," and under our decisions these franchises granted to (360) public-service corporations come directly within the words and meaning of the exception. *In re Spease Ferry,* 138 N. C., pp. 219-222. Our Constitution, Art. VIII, sec. 1, also contains provision as follows: "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the object of the corporations cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed." The grantees of these *quasi*-public charters and their stockholders take and hold them subject to both of these constitutional provisions as construed and interpreted, and the act ratifying this consolidation and merger is no more the conferring of special privileges nor the violation of vested rights than the statutes by which they were originally created.

On the facts as they now appear of record, we are of opinion that the action should be dismissed, the costs of this Court to be equally taxed against plaintiff and defendant.

Action dismissed.

Cited: Kinston v. Trust Co., 169 N. C., 209.

NORA W. BURNS, ADMINISTRATRIX, v. HENRY STEWART ET AL.

(Filed 28 May, 1913.)

1. Appeal and Error—Agreements of Record—Instructions.

Where the parties to an action entered into an agreement in the trial court, which appears of record on appeal, that the judge should direct a verdict according to his ruling on the law, as in this case, and should he hold a judgment relating to the land or certain conveyances thereof to be color of title, the jury should find that the party claiming under them had held adverse possession sufficient to ripen his title, the agreement entered into will be held as binding upon the parties, leaving only the ruling as to color to be passed upon on appeal.

2. Judgments—Effect—Title to Lands—Estoppel.

Where the disputed title to lands sufficiently described in a grant, under which a party claims, has been finally adjudicated, and the decree, by its terms, has the force and effect in law either of confirming or of vesting the title in that tract, the losing party to the record or those claiming under him are afterwards estopped from claiming any interest in the land as against the successful litigant or those claiming under him.

3. Judgments—Color of Title.

A judgment of competent jurisdiction in an action involving title to land in dispute, declaring that a certain party is the owner and entitled to the possession thereof, vests the title in the successful party as fully as if a deed had been required therein to be made, and constitutes color of title in his favor.

4. Same—Lands—Sufficiency of Description.

In this case it is held that the judgment relied upon as color of title adjudicated the title to lands in dispute with sufficient certainty, as they were definitely described therein by metes and bounds, and it also referred to a certain grant in evidence; and objection to the judgment not being color on the ground of a defect in the description of the lands, cannot be sustained.

(361) APPEAL by plaintiff and Macon County Land Company from *Lane, J.*, at Spring Term, 1912, of MACON.

This action was brought to recover for a breach of a covenant of seizin, contained in a deed dated 23 April, 1909, and executed by Henry Stewart, Sr., and wife, Cassie Stewart, and Henry Stewart, Jr., and wife, Lula Stewart, to J. M. Burns, intestate of the plaintiff.

The plaintiff's intestate had purchased the lands in question from the Stewarts, paying one-third of the purchase money in cash, and giving notes, payable in one and two years after date respectively, and securing the payment of said notes by deed of trust to A. W. Horn, trustee.

The one-year notes being about to mature, and the holders thereof threatening to foreclose, the plaintiff brought this action, partly to restrain the collection of the notes and the foreclosure of the deed of trust, and as a basis for her action alleged that there was a defect in the title to a portion of the lands her intestate had purchased of the Stewarts, to wit, that portion of the land which was covered by Grant No. 3625 to John Ingram, K. Elias, and T. J. Keener, bearing date 19 February, 1883, containing about 500 acres, and that portion covered by Grant 3414 to G. R. Patton, assignee, dated 17 September, 1875.

The Macon County Land Company was made a party defend-
ant for the reason that it claimed to be the owner of the dis- (362)
puted lands by virtue of mesne conveyances from the grantees named in Grant No. 3084, which was issued on 21 May, 1869, to A. L. Herren, J. R. Ammons, G. C. Hinson, and John G. Eve, recorded in Macon County in Book M, p. 462. This grant, No. 3084, was a large one, covering about 30,000 acres of land, and included the land embraced in Grants Nos. 3625 and 3414, under which the Stewarts claimed title.

The question, therefore, involved in this action is, Whether or not the Stewarts were the true owners of said lands under their alleged title, acquired by Grants Nos. 3625 and 3414, or whether the Macon County Land Company was the owner of the disupted land under said Grant No. 3084, it being admitted that Grants 3625 and 3414 lay entirely within the boundaries of No. 3084.

The plaintiff offered in evidence the deeds to her intestate from the defendants Henry Stewart and Cassie Stewart, Henry Stewart, Jr., and Lula Stewart, conveying the lands in dispute, and containing the covenant of seizin, and further offered in evidence the notes of the intestate to the Stewarts, and the deed of trust securing the same, and for the purpose of showing a breach of said covenant, and for that purpose only, offered in evidence Grants Nos. 3625 and 3414, and the mesne conveyances to the Stewarts from the grantees named in said grants; and also offered in evidence Grant No. 3084 to A. L. Herren *et al.*, and the mesne conveyances from the grantees therein to the Macon County Land Company. It was also shown that Grant No. 3084 entirely overlapped Grants Nos. 3625 and 3414, and being senior in date, passed the title, nothing else appearing. The plaintiff also, for the purpose of showing a breach of the covenant of seizin, and for the purpose of showing an estoppel against the Stewarts to claim title under Grant 3625, offered in evidence the record of a certain suit, including the judgment therein, entitled *Harvey P. Wyman et al.*

v Henry Stewart et al., heretofore pending in the District Court of the United States for the Western District of North Carolina at Asheville, the judgement therein having been rendered on 9 November, 1891, and after Henry Stewart had acquired title under Grant
(363) 3625 from the grantees therein, by the terms of which judgment the plaintiffs in said suit, Harvey P. Wyman *et al.,* were decreed to be the owners of the lands covered by Grant No. 3084, except as hereinafter stated.

At the time this judgment was rendered, Henry Stewart, Sr., under whom the defendant Henry Stewart, Jr., and Cassie Stewart claim, had already attempted to acquire title to the lands covered by Grant 3625, by deed from Ingram, Elias, and Keener, dated 4 March, 1889. The judgment so rendered in the District Court of the United States adjudged that H. P. Wyman *et al.* were the owners in fee simple of all the lands covered by Grant No. 3084, except such portion thereof as is covered by grants which were based upon entries dated prior to 16 July, 1867. Grant 3625 did not come within the exception, as it was based upon an entry made 10 January, 1882, but Grant 3414 was within the exception, as it was based on an entry of a date prior to 1867, that is, 23 September, 1859. The defendant Macon County Land Company afterwards became the owner of the lands covered by Grant 3084, by virtue of deeds from H. P. Wyman *et al.,* the plaintiffs in said action in the Federal court.

Defendant Henry Stewart introduced the record in the case of Henry Stewart, Sr., under whom he claimed, against A. J. Calloway, James Evitt, *et al.,* showing a judgment at Spring Term, 1899, of Macon Superior Court, in which it was declared and adjudged, upon issues answered by a jury, that the plaintiff in that case was the owner and entitled to the possession of the land covered by Grant No. 3625, lying on Brush and Skittie's creeks in said county, giving its metes and bounds. The following agreement was made in the case:

As the court was beginning its charge to the jury, in order to simplify the issues before them, it was agreed between all the parties in court that if his Honor should be of opinion that the grant to Ingram, Keener, and Elias, or the conveyances thereunder, or that the decree in the Superior Court in the case of *Henry Stewart, Sr., v. A. J. Calloway, James Evitt, et al.,* heirs at law of D. M. Evitt, or either of them, constituted color of title, then that the possession of Henry
(364) Stewart, Sr., and the defendants Cassie and Henry Stewart was adverse and sufficient to ripen title, and that the court should so charge the jury, and the first issue should be answered "Yes;" but that

if the court should be of the opinion that said records, nor either of them, did constitute color of title, that he should so charge the jury; and thereupon, the court being of the opinion that said records, nor either of them, did constitute color of title, charged the jury that the said defendants Henry Stewart and Cassie Stewart had offered a paper-writing covering the lands in dispute which, the court holds, constitutes color of title, and had offered evidence showing possession sufficient to ripen the title, and that if they believed the evidence they should answer the first issue "Yes."

The jury returned the following verdict:

1. Did the defendants Henry Stewart and Cassie Stewart convey a good title to plaintiff's intestate under the deeds set up in this action? Answer: Yes.

2. If not, what sum is the plaintiff entitled to recover from the defendants Henry Stewart and Cassie Stewart? (No answer.)

Judgment was entered upon the verdict, and plaintiff and the Macon County Land Company appealed.

Bourne, Parker & Morrison, Z. V. Weaver, and Johnston & Horn for appellants.

J. F. Ray, R. R. Sisk, G. L. Jones, and Robinson & Benbow for Stewart.

WALKER, J., after stating the case: The agreement of the parties, which is copied in the statement, greatly simplifies the case. It appears from the charge that the court held, and so instructed the jury, that the judgment or decree in the case of *Stewart v. Calloway, Evitt, and others* was color of title, and as the appellants had admitted the adverse possession necessary to ripen this color into a good title, they would, if they believed the evidence, answer the first issue "Yes." So the decision of the case turns mainly upon the correctness of this ruling as to color of title, and this is necessarily so, because the parties have, by their solemn agreement, declared that it shall be so. In the brief of appellant's counsel it is also admitted to be so, by this (365) statement: "The Stewarts claimed this judgment was color of title as against appellants, and as they had shown possession for more than seven years after the judgment, they had matured title; and the court so held, and charged the jury to that effect." Counsel for appellants contend that there is no evidence as to what lands were in controversy between the parties in that case, and that the judgment did not pass any title to Stewart, and therefore it is not sufficient color of title, but we think otherwise. It clearly appears that the title to

several tracts of land was litigated in the suit, and that it was finally adjudged that Stewart was the owner of the land covered by Grant No. 3625, and the decree, by its terms, had the force and effect in law either of confirming or of vesting the title to that tract, as between the parties to the action, in Stewart, who was plaintiff in the action. If the defendants had any title or interest in that tract, they lost it by the decree, and it became vested in their adversary, Henry Stewart, Sr., and was transferred to him by force of the judgment, and they were forever afterwards estopped from claiming any interest in the land as against him. Color of title has been variously defined by the courts of this country. It was early held to be any writing which on its face professes to pass a title, but which it fails to do, either from want of title in the person making it or from the defective mode of conveyance employed; but it must not be so obviously defective as not to mislead a person of ordinary capacity, but not skilled in the law. *McConnell v. McConnell,* 64 N. C., 342; *Tate v. Southard,* 10 N. C., 119; *Dobson v. Murphy,* 18 N. C., 586. The courts have generally concurred in defining it to be that which in appearance is title, but which in reality is not. *Wright v. Mattison,* 18 How. (U. S.), 56; *Jackson v. Frost,* 5 Cowen (N. Y.), 346; *Baker v. Sawn,* 32 Md., 355; *La Frombois v. Jackson,* 8 Cowen, 589; *Hall v. Law,* 102 U. S., 466. The doctrine is said to have originated in the necessity for showing good faith in entering upon the land, the law not permitting a person to be ousted who had settled upon land in good faith, believing it to be his, and after holding it adversely for seven years (*Grant v. Winbourne,* 3 (366) N. C., 220); but it was subsequently held that whether the writing was good color of title did not depend upon his good faith, for even if he knew the land belonged to another person than his grantor, it would still be color. *Riddick v. Leggat,* 7 N. C., 539; *Rogers v. Mabel,* 15 N. C., 180; *McConnell v. McConnell, supra.* Finally, the definition we have first given was adopted, and an unconstitutional act of the General Assembly was held to be within the meaning of the definition and to confer a good title where the necessary adverse possession had been held under it for the requisite time. *Church v. New Bern Academy,* 9 N. C., 233. Color of title is necessary, not so much to show good faith, as to fix the extent or boundaries of the land to which title may be acquired by the continuous and adverse possession. *Thurston v. University,* 4 Lea., 520; *Goodwin v. McCabe,* 75 Cal., 584; *Greenleaf v. Bartlett,* 146 N. C., 495. The case last cited shows the liberal tendency of the courts upon this question, and we think follows the more reasonable principle. The subject is fully

discussed in Sedgwick and Wait on Title to Land, sec. 761 *et seq.* Judgments or decrees may be color of title. 1 Cyc., 1100; *Wardlaw v. McNeill,* 106 Ga., 29; *Patton v. Dixon,* 58 S. W., 300; *Kimball v. Lohmas,* 31 Cal., 157; *Thurston v. University, supra; Wood v. Conrad,* 2 S. D., 341; *Reedy v. Canfield,* 159 Ill., 254; 7 Enc. U. S. Sup. Ct., p. 955; *Defferback v. Hawke,* 115, U. S., 407. We have held that a judgment in a proceeding for partition is color of title, although it does not divest or vest any title. The Court said in *Bynum v. Thompson,* 25 N. C., at p. 584, that "partition does not, indeed, constitute a title, except as against the parties to it, but it is color of title, as much as any of the defective instruments which have been thus deemed." And this case has been followed ever since. *Smith v. Tew,* 127 N. C., 299; *Lindsay v. Beaman,* 128 N. C., 189; *Hill v. Lane,* 149 N. C., 267. To the same effect are *Johnson v. Britt,* 56 Tenn. (9 Heisk & M.), 756; *Brind v. Gregory,* 120 Cal., 640; *Duncan v. Gibbs,* 9 Tenn. (1 Yerger), 256. The Court said in *Lindsay v. Beaman, supra,* that title passes by deed, from owner to purchaser, and to constitute color of title the deed must be registered (*Austin v. Staten,* 126 N. C., 783), (367) while in partition proceedings between tenants in common no title passes; and in *Johnson v. Britt, supra,* it was said that in such a proceeding there is no divestiture of title, but the decree merely defined the claim of the parties to their respective shares.

In this case the judgment in the suit of Stewart against Calloway and others vested the title in Stewart as much so as if the other parties had been required to execute deeds to him for the land. It is a solemn adjudication, after trial and investigation, that the true title is in him, and it would be singular if we should hold that such a judgment is not color of title, when the deed of one having not even the pretense of a title would be. The judgment not only declares the title to be in Stewart, but also the right of possession. An adverse possession taken and continued for seven years under such a solemn determination should be as much protected as one under a void deed or a deed ineffectual to pass title. To rule otherwise would be to sacrifice the substance of the thing to the mere form or shadow. It appears that the judgment clearly adjudges Stewart's right and title, defined the extent of it with perfect accuracy, and declares him to be entitled to the possession of the land. It comes, therefore, within every reason or principle upon which the doctrine in respect to color of title is founded. The effect of the judgment was to pass any title in the land which the other parties may have had to Stewart—at least by estoppel. *Keener v. Goodson,* 89 N. C., 273, does not militate against this view. There

no question of title was involved, the allotment of the homestead having, as said by the Court, "no other effect than simply to attach to his (homesteader's) existing estate a quality of exemption from sale under execution." We do not pass upon the merits of that decision, for the facts and the reasoning have no application to our case.

Holding, as we do, that the judgment in the Calloway suit was color of title, it follows, under the terms of the stipulation made by counsel, that the ruling of the court was correct.

No error.

Cited: Seals v. Seals, 165 N. C., 413, 416; *Knight v. Lumber Co.,* 168 N. C., 454; *Buchanan v. Hedden,* 169 N. C., 224; *Alsworth v. Cedar Works,* 172 N. C. 22.

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GEORGE W. HURST v. SOUTHERN RAILWAY COMPANY.

(Filed 22 May, 1913.)

Foreign Corporations—Purchaser at Foreclosure Sale—Domestic Corporations—Removal of Causes—Diversity of Citizenship—Interpretation of Statutes—Jurisdiction.

A railroad corporation of another State purchasing the property of a railroad corporation of this State at a foreclosure sale under a mortgage or deed in trust becomes a new corporation of this State to the extent of the franchise, etc., of the domestic corporation thus acquired (Code, sec. 679), and may not remove a cause of action against it to the Federal court upon the ground of diversity of citizenship, brought by a citizen of North Carolina; and this being so, as a matter of law, the State courts, upon petition and bond for removal filed, are not deprived of their jurisdiction to pass upon this question when the uncontradicted facts are made to appear upon the face of the proceedings.

CLARK, C. J., concurring; WALKER and BROWN, JJ., dissenting.

APPEAL by plaintiff from *Long, J.,* at October Term, 1912, of SWAIN.

This is a motion to remove the action from the Superior Court of Swain County to the Federal Court upon the ground that the defendant is a Virginia corporation. The motion was allowed, and the plaintiff excepted and appealed.

Frye, Gant & Frye for plaintiff.
Mastin, Rollins & Wright for defendant.

ALLEN, J. The plaintiff has followed the allegations of the complaint in *Ice Co. v. R. R.*, 144 N. C., 732, and the allegations in the petition for removal are substantially as those made in a similar petition filed in that case.

The question now presented is not, therefore, a new one, but was fully considered in the case referred to in a learned and exhaustive opinion by *Justice Connor*, concurred in by all the members of the Court, and decided in favor of the contention of the appellant, and we have no disposition to disturb that decision.

It is alleged in the complaint that the defendant became the purchaser of the Western North Carolina Railroad Company under foreclosure proceedings, and the conclusion reached by the Court in the coal company case was: "A suit cannot be removed from (369) the State to the Federal court upon the ground of diversity of citizenship by a corporation of another State which became the purchaser of a corporation of this State under a sale made pursuant to a deed of trust or mortgage, by virtue of The Code, sec. 679, providing, upon the conveyance being made to 'the purchaser, the said corporation shall *ipso facto* be dissolved and the said purchaser shall forthwith be a new corporation, by any name which may be set forth in the conveyance;' etc."

The case of *Herrick v. R. R.*, 158 N. C., 310, is not in conflict with this view.

It was there held that "all *issues of fact* made upon the petition for removal must be tried in the Circuit Court, but the State court is at liberty to determine for itself whether, on the face of the record, a removal has been effected," and that the theory on which the rule as to removal rests is "that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents, then, to the State court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petition is entitled to a removal of the suit. That question the State court has the right to decide for itself."

Applying this rule to the record before us, it appears that there is no dispute as to the facts, and that the real controversy is whether, upon these facts, the defendant is, as matter of law, a North Carolina corporation under our statutes, by reason of its purchase of the Western North Carolina Railroad Company, and this question the State courts can decide.

Reversed.

CLARK, C. J., concurring: The State courts are certainly competent to try a controversy arising over 6½ bushels of Irish potatoes, and as to the damages claimed, there is no reason to believe that the State courts will be less fair to either side than the Federal court.
(370) On the other hand, though the Constitution does not guarantee to every man a trial by "jury of the vicinage," this is reasonable, and while a jury in the Federal court may be called such, still it is a great inconvenience, and usually an imposition of considerable expense to require a plaintiff, by removal to the Federal court, to litigate his case, over 100 miles away possibly, at Asheville, Charlotte, or Greensboro, when other defendants find a just trial in the same county in which the transaction occurred. It is not unnatural that our people should prefer to try their causes before their neighbors as jurors and before judges selected by themselves, and not before judges appointed by a distant authority, and with the enormous cost attending trial at a distant point. Of course, when the statute grants a removal to another jurisdiction, it must be complied with. But whether it does so, being in derogation of common right and not applying to resident defendants, nor to nonresident defendants where the amount does not exceed $3,000, the courts will not be astute to find ground for removal unless the statute is clear.

In this case, so far from being clear, the statute was held by the unanimous decision of this Court not to confer this right upon this defendant. *Coal and Ice Co. v. R. R.*, 144 N. C., 732. The opinion was written with great care and after thorough examination of the Federal decisions, by *Mr. Justice Connor,* now the accomplished judge of the United States Federal Court for the Eastern District of North Carolina, and was concurred in by the other four judges, all of whom are still on this Bench, and now by *Mr. Justice Allen,* who occupies the seat then filled by *Judge Connor.* Such a decision so carefully considered and so ably and fully discussed, if reversed, should be set aside only by the United States Supreme Court. The inconvenience to the public of reversing this decision will be so great to the people along the line of this road and throughout Western North Carolina that we should be slow to question its authority.

The defendant itself has recognized the justice of that decision, and has been acting upon it, by exercising the right of eminent domain, which it could not do unless it possessed that power as a North
(371) Carolina corporation. This is not the question of "domestication," as in the *Allison case,* but the defendant here bought the franchises and property it now uses, knowing that by the terms of the

statute its purchase would be invalid and its title void unless, by the terms of the statute and of the deed it accepted, *ipso facto* as purchaser it became a North Carolina corporation. Solely by virtue of being such has it exercised any corporate or other functions in operating the Western North Carolina Railroad.

There is the Southern Railroad of Virginia, which as lessee operates the North Carolina Railroad, and there is the Southern Railroad of North Carolina, which is *ab initio* a North Carolina corporation, and by virtue thereof, only, operates the former Western North Carolina Railroad franchise. It is not unusual that there should be two individuals of the same name, but that does not make them identical. The same is true of corporations. We have the Atlantic Coast Line, a North Carolina corporation, as we held in *Staton v. R. R.*, 144 N. C., 148. There is the Atlantic Coast Line of Virginia; the Atlantic Coast Line of Georgia; the Atlantic Coast Line of South Carolina; the Atlantic Coast Line of Connecticut. This Court held that this did not entitle the Atlantic Coast Line to remove a case to the Federal court when the cause of action arose in this State, for the Atlantic Coast Line of North Carolina was responsible and properly sued here. This is sustained by *Patch v. R. R.*, 207 U. S., 277, which holds that if a railroad is incorporated in two States, if sued in that one in which the cause of action arose, the case is not removable.

The subordinate Federal courts are created and have been abolished at will by statute, and their jurisdiction also has been conferred and modified from time to time, within the limits authorized by the Constitution, by acts of Congress. The primary function of these courts is to aid in the execution of the Federal laws. So far as jurisdiction is given them by reason of "diverse citizenship," this was based on the prejudice existing in 1787 (when the Constitution was formed), but now outworn, between different sections, and the limit has been raised from $500 in the Judiciary Act of 1789 to $3,000. By uniform decisions it was held by the United States Supreme (372) Court that "Corporations" were not "citizens" within the meaning of this section, until the Court overruled itself in *R. R. v. Letson*, 43 U. S. (2 How.), 497, in 1842. Certainly there can be no reason to exempt from the jurisdiction of the State courts a corporation that is living, acting, and doing business here, under the daily protection of the State Government and its courts. Beyond question, a corporation like this, which has been created and given existence and its franchises to do business by a State statute, cannot exempt itself from the jurisdiction of this State, its creator, as a "foreign corporation."

The opinions of this Court, rendered by *Judge Connor* in *Coal and Ice Co. v. R. R.* and *Staton v. R. R.*, both above cited, are so fully discussed and so clearly expressed that nothing can be added thereto.

WALKER, J., dissenting: While hesitating always to disagree with my brethren of the majority, for whose opinion I entertain the most deferential respect, my mind is so thoroughly convinced of the error in this case that I cannot withhold my dissent to their view. The action was brought to recover accumulated penalties to the amount of $14,050, for failure to receive and ship 6½ bushels of Irish potatoes from Wesser Creek Station, North Carolina, to Bushnell, N. C. We are not concerned now with the merits of this demand, as the amount stated, if recoverable, is certainly sufficient to justify a removal of the case if the defendant is otherwise entitled to it.

The petition for removal alleges that the defendant in this case, whose agent was served with process, is a Virginia corporation, and so far as this Court may consider that allegation, it must be taken as admitted. If there is any controversy about it, *we* cannot settle it here. *Stone v. South Carolina,* 117 U. S., 432; *Carson v. Hyatt,* 118 U. S., 279. In the case last cited, *Chief Justice Waite* said: "The State court is not bound to surrender its jurisdiction until a case has been made which, on its face, shows that the petitioner for removal has a right to the transfer; but it may also be said that 'all issues of (373) fact made upon the petition for removal must be tried in the circuit court.' The State court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further." This feature of the case will be referred to again. The petition further alleges that the Southern Railway Company of Virginia is authorized, by its charter, to acquire property and operate railroads in other States.

I think the decision of this Court is wrong, and that of *Judge Long,* who presided at the hearing of this motion, is right, upon two grounds. Let me say, in the beginning, that there is an essential difference, in my opinion, between the facts in this case and those presented by the record in *Coal and Ice Co. v. R. R.,* 144 N. C., 732, upon the authority of which the Court alone bases its judgment.

First. There are two propositions which cannot be gainsaid at this time: (1) That a corporation has general power to hold property in States other than the one which incorporated it, in the absence of statutory prohibition in such States, is firmly established. *Telegraph Co. v. Trust Co.,* 147 U. S., 431 (37 L. Ed., 231). (2) A corporation cannot change its residence or citizenship, but must have its legal home

only at the place where it is located by or under the authority of its charter; but it may, by its agents, transact business anywhere, unless prohibited by its charter or excluded by local laws. *Ex parte Scholl-enberger,* 96 U. S., 369 (24 L. Ed., 853). There is another proposition which naturally follows from the other two just stated: (3) A corporation created by the laws of one State may carry on business in another, either by virtue of being created a corporation by the laws of the latter State also, as in *R. R. v. Vance,* 96 U. S., 450, or by virtue of a license, permission, or authority, granted by the laws of the latter State, to act in that State under its charter from the former State. *Martin v. R. R.,* 151 U. S., 673, 677. Other cases illustrating the difference between "incorporation" and mere "license" will be found in 6 Enc. of U. S. Supreme Court Reports, at p. 308, note 8. *Justice Miller* said, for the Court, in *R. R. v. R. R.,* 118 U. S., 290, that it does not seem to admit of question that a corporation of one State, owning property and doing business in another State by its permission, express or implied, does not thereby become a citizen of the (374) latter State.

With these general principles before us, let us look at the facts of this case. It appears that the Southern Railway, which purchased the franchise and property of the Western North Carolina Railroad Company, except its right to be a corporation, is itself a foreign corporation, having received its charter from the State of Virginia. It is so alleged in the petition for removal, and the original process in this case was served upon an agent of said corporation, he having verified the petition, in which the allegation of such service upon him as agent of the Southern Railway Company, the Virginia corporation, is plainly and distinctly alleged. It is also alleged that the Virginia corporation purchased the said franchise and property at the sale, which, as we know, was made under a decree of the United States Circuit Court for the Western District of this State.

Upon the admitted, or at least uncontroverted, facts of this case, the Southern Railway Company has never become a resident or citizen of this State by virtue of its purchase at the said judicial sale of the franchise and property of the Western North Carolina Railroad Company. *R. R. v. James,* 161 U. S., 545, it seems clear to me, is a direct authority against any such contention. It appeared in the *James case* that the State of Arkansas permitted a foreign railroad corporation to lease or purchase any railroad in that State upon filing its charter with the Secretary of State, whereby it should become a corporation of the State of Arkansas. With regard to a controversy in that case of substantially the same nature as the one in our case, and referring to the

James case, the same Court said in *R. R. v. Allison,* 190 U. S., 326: "There was a corporation, originally incorporated in the State of Missouri, going into the State of Arkansas and operating a railroad in that State by leasing a portion of it therein and complying with a statute which provided that, upon filing a certified copy of its articles of incorporation with the Secretary of State of Arkansas, it should be regarded as formally incorporated in that State, and it should (375) thereby become a domestic corporation, and yet it was held that defendant could not be sued by a citizen of Missouri in the Federal court in the State of Arkansas; that, although to some extent and for some purposes it might be regarded as a corporation of Arkansas, it was for purposes of jurisdiction in the Federal courts to be regarded as a corporation of the State of Missouri. The case, it will be seen, was not decided upon the ground that the cause of action had arisen in the State of Missouri. It was admitted that the cause of action was transitory, but the broad question was decided that the company was a corporation of Missouri and a citizen of that State, and could not be sued by another citizen of that State in the Federal courts of Arkansas." And in the same connection, the Court in the *Allison case* referred with approval, and as strongly supporting its view of the *James case,* to what was said by *Mr. Justice Shiras,* in the latter case, as follows: "The presumption that a corporation is composed of citizens of the State which created it accompanies such corporation when it does business in another State, and it may sue or be sued in the Federal courts in such other State as a citizen of the State of its original creation. We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one State, indisputably taken, for the purpose of Federal jurisdiction, to be composed of citizens of such State, is authorized by the law of another State to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second State, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the State of its original creation. We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that State corporations were composed of citizens of the State which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this Court, it was settled that the pre-

sumption of citizenship is one of law, not to be defeated by (376) allegation or evidence to the contrary. There we are content to leave it." And in *R. R. v. Trust Co.*, 174 U. S., 552, the Court, upon a state of facts not materially different from, and certainly not stronger for the corporation which was seeking a removal, than those in this record, thus stated the law: "But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this Court to be required for the disposition of this case, either as to the jurisdiction or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the State of Indiana, even if it was afterwards created a corporation of the State of Kentucky also, it was and remained for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the State by which it was originally created. It could neither have brought suit as a corporation of both States against a corporation or citizen of either State, nor could it have sued or been sued as a corporation of Kentucky, in any court of the United States. So it seems that a corporation may be made what is termed a domestic corporation, or in form a domestic corporation, of a State in compliance with the legislation thereof, by filing a copy of its charter and by-laws with the Secretary of State; yet such fact does not affect the character of the original corporation. It does not thereby become a citizen of the State in which a copy of its charter is filed, so far as to affect the jurisdiction of the Federal courts upon a question of diverse citizenship."

R. R. v. Alabama, 107 U. S., 581, was distinguished in the *Allison case* from it and the other cases, because it appeared in the *Alabama case* that there was not only a separate corporation created in Alabama, but also a real one in law and in fact, there having been a full organization under a provision of law for that purpose, and not merely a declaration of corporate existence. There had been, in other words, a genuine incorporation of two distinct companies in the State of Tennessee and Alabama. Speaking of this view of that case, the Court, in *Allison's case,* said: "This Court held that, by reason (377) of the particular language used in the act, there was a separate, original Alabama corporation formed; that the sections, taken altogether, made it a corporation created as well as controlled by the State of Alabama." The two railroad companies were, in fact, separate corporations or entities, though they connected at the State line and had joint traffic arrangements. Each had control and jurisdiction, so to speak, over distinct railway systems.

While I am entirely unable to perceive any practical difference between the *James* or the *Allison case* and this one, it seems to me that the question as to what corporation was the purchaser at the judicial sale of the franchise and property of the Western North Carolina Railroad Company is completely foreclosed by the decision of the Supreme Court of the United States in *Julian v. Trust Co.*, 193 U. S., 93. That was a writ of *certiorari* to the United States Circuit Court of Appeals for the Fourth Circuit, to review a judgment which affirmed a decree of the Circuit Court for the Western District of North Carolino, enjoining a sale of the franchise and property of the Western North Carolina Railroad Company, purchased by the Southern Railway Company at the foreclosure sale, under certain judgments and executions obtained by certain persons in the State courts against said Western North Carolina Railroad Company. It was then determined, upon a full review of all the records and facts in the case, that the purchase at the foreclosure sale was made by the Southern Railway Company, the Virginian corporation, which was protected by law against any sale of the same by the judgment creditors. In the course of its opinion by *Mr. Justice Day*, the Court said: "It is true, the sections of the North Carolina Code herewith given clothe the purchaser with the right and privilege of organizing a corporation to operate the purchased property, but we find no requirement that he shall do so. The language of the last paragraph of section 1936 is, 'such purchaser or purchasers may associate with him or them any number of persons, and make and acknowledge and file articles of association as prescribed in this chapter; such purchaser or purchasers and
their associates shall thereupon be a new corporation, with all
(378) the powers, privileges, and franchises, and be subject to all the
provisions of this chapter.' This confers a privilege, but does not prevent the purchaser from transferring the property to a company already formed and authorized to purchase and operate a railroad. *People v. R. R.*, 89 N. Y., 75. The Southern Railway Company was authorized by its charter, among other things, to purchase or otherwise acquire the property of any railroad company organized under the laws of another State. We have been cited to no statute of the State of North Carolina forbidding the purchase of a railroad at foreclosure sale by a corporation of another State." In that case the Court reviewed the decision of this Court in *James v. R. R.*, 121 N. C., 523, in which it was held by unanimous decision, that the Southern Railway Company, a Virginia corporation, purchased the franchise and property of the Western North Carolina Railroad Company and "had gone into

possession and control of the same, and has been running and operating the same ever since, under said purchase and deed." This is a clear and unmistakable decision by this Court upon the very question, in favor of the correctness of the order of removal made by *Judge Long* in this case, because if the Southern Railway Company of Virginia owns and operates the road, it follows, by all the authorities, that being a citizen of another State sued in one of the courts of this State, it has the right to a removal of the case to the United States Court.

In discussing questions of this kind, we are very apt to lose sight of the well marked distinction between legislation of a State which domesticates a corporation to the extent of subjecting it to control and regulation of local laws, and legislation which attempts to create a domestic out of a foreign corporation in such a sense as to make it a citizen of a State other than that of its origin and thus deprive it of the right of removal to the United States courts of a suit brought against it by a citizen of the State where it is claimed to have been domesticated. When the question involves the jurisdiction of the Federal courts, the distinction is an important one; its subjection to the influence and operation of local laws being generally conceded.

Second. This brings me to the consideration of my second proposition. If the facts in this case are not practically admitted or undisputed, then there must be an issue or question of fact as (379) to the diverse citizenship of the parties to the record, and as that disputed question can only be tried by the Federal Court, which must determine as to its own jurisdiction, the removal by *Judge Long* was proper in order that it might be tried in the only forum designated by law for the purpose. *Rea v. Mirror Co.*, 158 N. C., 24; *Herrick v. R. R., ibid.*, N. C., 307. The petition filed in this case alleges facts entitling the plaintiff to a removal, if they be true. If they had been contested, the issue thus raised would have been one to be settled by the Federal court alone. As said in *Rea v. Mirror Co., supra:* "That Court being charged with the duty of exercising jurisdiction in such case, must have power to consider and determine the facts upon which jurisdiction rests," citing numerous cases to support the position. In any view, therefore, the case was properly removed by *Judge Long.*

It may be observed, in conclusion, that no railroad corporation has ever been recognized by this State, in its legislative or executive department, as the owner of the Western North Carolina Railroad, except the Southern Railway Company of Virginia. No such corporation has ever been organized in this State, nor has it ever been recognized by the North Carolina Corporation Commission in any way. On the

contrary, that commission has always considered it as a part of the system of the Southern Railway Company of Virginia, and has fixed transportation rates over it and assessed it for taxation and otherwise dealt in respect to it upon the basis of that understanding. Such a corporation is, therefore, of a most anomalous character, existing only in the imagination, or, at most, on paper, and so far is it from having any tangible or legal existence that it is entirely mythical. If it be contended that the Southern Railway Company of Virginia has no right to hold the franchise and own, use, and operate the property of the Western North Carolina Railroad Company, the conclusive answer is that the State alone can complain of the wrongful exercise of corporate rights and privileges, or of such *ultra vires* action of the railroad company. *Barcello v. Hapgood,* 118 N. C., at p. 729; *Bass v. Navigation Co.,* 111 N. C., at p. 449, and cases cited, and especially
(380) *Asheville Division, No. 15, v. Aston,* 92 N. C., 578. This is familiar learning. The Court held in the case of *Asheville Division, No. 15, v. Aston,* that for an abuse of powers and franchises by a corporation or for usurpation of powers not granted or for non-user of such as may have been granted, the only remedy is in the name of the State, as such a cause of forfeiture or a usurpation of corporate rights not granted by the State should not be questioned collaterally, but by a direct proceeding, so that the corporation may be heard by answer. The Court said, quoting from *Academy v. Lindsey,* 28 N. C., 476: "The sovereign alone has a right to complain, for if it is a usurpation, it is upon the rights of the sovereign, and his acquiescence is evidence that all things have been rightfully performed," citing *Attorney-General v. R. R.,* 28 N. C., 456, which is very pertinent to the facts of this case, for there it is said: "If the sovereign, with us the lawmaking power, with a distinct knowledge of the breach of duty by the corporation, a knowledge declared by the Legislature, or so clearly to be inferred from its own archives that the contrary cannot be, thinks proper by an act to remit the penalty, or to continue the corporate existence, or to deal with the corporation as lawfully and rightfully existing, notwithstanding such known default, such conduct must be taken, as in other cases of breaches of condition, to be intended as a declaration that the forfeiture is not insisted on, and, therefore, as a waiver of the previous default." The "archives" and statutes of this State nowhere sanction the view now taken by the Court of the rights of the Southern Railway Company of Virginia, but, on the contrary, it appears from them that it has been fully and continuously for many years recognized in all branches of the Government, having dealings

with it, as the owner of the franchise and property of the Western North Carolina Railroad Company, and this recognition is in strict accordance with the legal rights of the defendant, as declared by the court of last resort which has supreme jurisdiction to finally pass upon and determine the question.

BROWN, J., concurs in the dissent.

Cited: *R. R. v. Spencer,* 166 N. C., 523; *Hyder v. R. R.,* 167 N. C., 586.

(381)

JOHN R. HAGAMAN v. J. M. BERNHARDT AND S. F. HARPER.

(Filed 22 May, 1913.)

1. Appeal and Error—Appeal by Two Parties—One Record.

Where both defendants appeal to the Supreme Court on exceptions which are not antagonistic to each other, it is an unnecessary expense to send up separate records.

2. Deeds and Conveyances—Evidence—Maps Unidentified.

Where boundaries to lands are in dispute, a map is incompetent as evidence when there is nothing thereon to identify it, and it is not attached to any muniment of title.

3. Deeds and Conveyances—Boundaries—Admitted Corners—Evidence.

In an action involving a disputed boundary to lands, *Held,* testimony of a witness that in surveying the land he had commenced at a spanish oak marked as a corner, etc., was competent, as the spanish oak was admitted to be the corner by both parties to the controversy.

4. Deeds and Conveyances—Boundaries—Disputed Corners—Declarations—Interests—Evidence.

Declarations of one as to a disputed corner of lands in controversy, as the one he claimed at that time as a corner of his own lands, is incompetent, being in his own interest.

5. Deeds and Conveyances—Boundaries—Disputed Corners—General Reputation—Evidence.

The reputation of the marking of a disputed corner to lands in controversy is incompetent as evidence, it being necessary to show its general reputation as such.

6. Deeds and Conveyances—Boundaries—Course and Distance—Evidence—Instructions.

The lands in dispute in this case involve the location of a boundary line which in part reads "south to and with C's line 145 poles to a stake,"

the next call being "east 135 poles to a stake in M. C.'s line": *Held*, a requested prayer for instruction should be refused, under all the circumstances, that "the call in said grant is 'south to and with said C.'s line 145 poles to a stake,' " which "would follow the C. line from the point E. 145 poles, *irrespective of course*, and at the end of the 145 poles, wherever that line would be, the line should turn east and continue that course until it struck the next line called for," it appearing that to run this line south in the direction and in the number of poles called for and then to run it in the direction and extent of the next call, would close the calls to the deed, and that the charge of the court in this respect was correctly given. In such case the course (S.) and the distance (145 poles) should control, and not the various courses of C.'s line.

BROWN, J., dissenting.

(382) APPEAL by defendants from *Adams, J.*, at May Term, 1912, of CALDWELL.

Ejectment, the plaintiff claiming to be owner and entitled to the possession of the land described in the complaint, of which the defendant S. F. Harper was in possession and the defendant J. M. Bernhardt has cut timber thereon, both defendants claiming title under G. A. Sullivan, and asking an injunction against the defendants from cutting said timber or removing that which has already been cut. The jury rendered a verdict in favor of the plaintiff, assessing the damages at $60. Judgment was rendered accordingly in favor of the plaintiff for the tract of land described in the first issue and for said damages. The defendants appealed.

W. C. Newland for plaintiff.
Edmund Jones for defendant Harper.
Lawrence Wakefield and Mark Squires for defendant.

CLARK, C. J. Both defendants appealed and sent up separate records, but as they were not on opposite sides nor presented antagonistic exceptions, this was an unnecessary expense. *Pope v. Lumber Co., ante,* 208. (McCurdy's appeal.)

The decision of this case depends upon the location of Grant No. 384 to Aaron Bradshaw. The first exception by the defendant Harper is for the refusal of the motion to nonsuit. This motion could not have been granted, as there was sufficient evidence to go to the jury.

Harper's second exception is for the refusal to admit in evidence a map claimed by the defendants to be a plat of McCaleb Coffey's land. This map consisted of some lines only, nothing being written upon it explaining what lands were referred to, and there was nothing to give it validity or authority as evidence in this controversy. It was

not attached to any muniment of title, and was incompetent. *Jones v. Huggins,* 12 N. C., 134; *Dancy v. Sugg,* 19 N. C., 515; *Dobson v. Whisenhant,* 101 N. C., 645. (383)

The defendant Bernhardt's first exception is to permitting the witness Sullivan to state that when he bought the land from Coffey and began to survey he commenced at a spanish oak marked as a corner down next to the river 30 poles from the river. The spanish oak referred to was admitted by both parties to be a proper corner of the land in controversy. Kirby, witness for defendants, testified under their examination, that J. T. Montgomery, now deceased, pointed out to him the spanish oak as the corner of the land in controversy.

Bernhardt's second exception is abandoned and his third exception is the same as Harper's first exception above. Bernhardt's fourth exception is the exclusion by the court of the map made by J. C. Harper, and was incompetent, upon the same authorities that are cited in passing upon Harper's second exception above. It was not attached to any deed and was merely an isolated plat, and not competent in this controversy. Bernhardt's fifth exception is to the refusal of the court to permit C. C. Coffey to testify that his father, Thomas Coffey, pointed out to him a rock as the corner of Grant No. 4157. The witness stated that his father in pointing out this rock was pointing out to him his own lines. It was therefore incompetent as a declaration in his own interest.

Bernhardt's sixth exception was to the refusal of the court to allow the said witness to answer the question, "Do you know the reputation of the rock as being the corner of Grant No. 4157?" This seems to be repetition of the last question above, for the witness was not asked if he knew the *"general* reputation of said rock as a corner."

The chief exception and controversy seems to be this: The defendants asked the court to charge that "the call in said grant is 'south to and with said Elijah and Wilborn Coffey's line 145 poles to a stake,' and the court charges you that the line of the Brawshaw grant would follow the Wilborn Coffey line from the point E. 145 poles, irrespective of course, and at the end of the 145 poles, wherever that might be, the line should turn east and continue that course until it struck McCaleb Coffey's line, the next call of the Bradshaw grant being 'east 135 poles to a stake in McCaleb Coffey's line.'" Instead of this, (384) the court charged: "The proper interpretation of the next succeeding call in the Bradshaw grant, 'thence south to and with Wilborn Coffey's line 145 poles to a stake,' would be met by running the line from the circle in the parallelogram to the line E F, and then from the

intersection of these two lines south 145 poles along the line E F and to the *'south as far as the distance may extend.'"*

We think there was no error in the above respect. If the prayer asked by the defendant had been given, the lines could not have been closed. Under the instruction given, the jury followed the line E F, which was the Wilborn Coffey line (as admitted by the defendants) prolonged to 145 poles.

Under the defendant's prayer, if given, the line would have followed the Wilborn Coffey line a short distance south, and then have turned west with that line and then south, and the lines, as already said, would not have closed. Under the instruction as given, the line ran with the Wilborn Coffey line till it turned square off to the west, and then kept on in its course "south to a stake 145 poles from E" (where the line had struck the Wilborn Coffey line). It could not have been intended to follow all the turns of the Wilborn Coffey line, irrespective of course.

No error.

BROWN, J., dissenting.

Cited: Sullivan v. Blount, 165 N. C., 10.

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(385)

DIXIE FIRE INSURANCE COMPANY v. AMERICAN BONDING COMPANY.

(Filed 28 May, 1913.)

1. Issues Submitted—Issues Tendered.

There is no reversible error in refusing issues tendered by a party litigant, if those submitted present every phase of the controversy and permit every possible contention.

2. Contracts—Indemnity Bonds—Acceptance—Lex Loci Contractus.

Where a foreign corporation has issued a bond indemnifying a North Carolina concern against loss under a contract with an agency, located in another State, established to collect moneys, etc., as in this case, for insurance premiums, which bond was delivered to the agent to be sent to the indemnified here for approval and acceptance, the contract of indemnity is to be construed and enforced in accordance with our own laws.

3. Principal and Agent—Embezzlement.

Where an agent intrusted by the principal to collect moneys has fraudulently and feloniously converted moneys thus collected to his own use, he is guilty of embezzlement.

4. Principal and Agent—Surety—Indemnity Bond—Notice of Default—Reasonable Notice.

Where a contract of indemnity only provides that the indemnified give immediate notice of the default of an agent in accounting for moneys, for which the indemnifying company is liable under its bond, a failure of strict compliance in giving the notice will not always prevent a recovery, the provision not being in the form of a condition, or an express warranty.

5. Same—Questions of Law—Notice Sufficient.

The plaintiff sues the defendant on its bond indemnifying against loss by reason of an agent's defalcation in failing to account for moneys collected, wherein it was provided that immediate notice be given the indemnifying company of such default. It was not disputed that this notice was given five days after the knowledge thereof of the plaintiff: *Held*, the reasonableness of the notice is a question of law, and the time thereof in this case is sufficient.

6. Same—Interpretation of Contract—Expressio Unius.

Where an indemnifying bond requires immediate notice of the default indemnified against, but does not make the failure to give notice a ground of forfeiture, as expressed in relation to other and different requirements therein, the maxim *expressio unius est exclusio alterius* applies, and a reasonable notice will be sufficient for enforcing the bond.

7. Principal and Surety—Indemnity Bond—Limitations of Actions—Interpretation of Statutes.

Suits upon an employee's indemnity bond are regulated by Revisal, sec. 4809, forbidding the time for bringing suits on contracts of this character to less than one year; and a provision therein is void which required that no suits "or proceedings at law or in equity shall be brought against the surety after the expiration of six months from the end of the time during which, under the terms of this bond, the employer's claim may be filed with the surety."

8. Principal and Surety—Indemnity Bonds—Judgment Against Principal—Prima Facie Case—Rebuttal Evidence—Defenses — Interpretation of Statutes.

In an independent action against a surety on its indemnity bond, a judgment against the principal is *prima facie* evidence of the sum or amount which the surety is thereon obligated to pay, although the surety is not a party, which the surety may impeach for fraud, collusion, or mistake, or he may also set up an independent defense. Revisal, sec. 285, has no application.

9. Principal and Agent—Surety—Declarations of Agent—Evidence.

In an independent action against a surety on a bond indemnifying against an agent's default, the declarations of the agent, the principal on the bonds, are incompetent.

10. Principal and Surety—Judgments—Prima Facie Case—Instructions—Admissions—Appeal and Error.

The judgment against the principal on an indemnity bond being only *prima facie* evidence of the amount due by the surety for his alleged default thereunder, an instruction in this case is held for reversible error, that there was no controversy about the fact that this principal had defaulted in a certain sum, no such admission appearing, and the issue being contested.

(386) APPEAL by defendant from *Peebles, J.*, at January Term, 1912, of GUILFORD. Action tried upon these issues:

1. Did the defendant L. S. MacEnaney, while acting as general agent of the plaintiff, collect and receive as such agent for and on behalf of the plaintiff the sum of $5,007.21 between the first day of February, 1909, and the first day of February, 1910, and fraudulently convert the same to his own use, as alleged in the complaint? Answer: Yes.

2. Was the defendant L. S. MacEnaney guilty of larceny or embezzlement under the laws of the State of Illinois by reason of the acts and things alleged in the complaint? Answer: No.

3. Is the plaintiff's cause of action barred by the statute of limitations? Answer: No.

(387) 4. What amount, if any, is the plaintiff entitled to recover of the American Bonding Company of Baltimore on account of its general fidelity bond herein sued upon, executed and delivered to the plaintiff on 24 April, 1909? Answer: $5,007.21, and interest from 4 March, 1910.

From the judgment rendered the defendant American Bonding Company appealed.

A. L. Brooks and Sapp & Hall for plaintiffs.

Alfred S. Wyllie and Thomas J. Shaw for defendant.

BROWN, J. The facts, briefly stated, are that on 23 April, 1909, L. S. MacEnaney, a resident of the city of Chicago, entered into an agreement with the Dixie Fire Insurance Company of Greensboro, N. C., whereby he became the general agent for said company in the States of Illinois and Indiana for the purpose of writing and effecting fire insurance and collecting premiums and remitting same to the Dixie Fire Insurance Company at its home office in the city of Greensboro. In said written contract of agency it was provided that the agent MacEnaney furnish to the Dixie Fire Insurance Company a bond in the sum of $10,000 in some guaranty company acceptable to the said Dixie Fire Insurance Company for the faithful performance of his duties under the contract. MacEnaney applied to the American Bonding Company of Baltimore for a fidelity bond, and the same was

executed by said bonding company and delivered to MacEnaney to be transmitted to the Dixie Fire Insurance Company, at its home office in the city of Greensboro, for its approval, which said bond the Dixie received, inspected, and approved. The bond covered a period from 1 February, 1909, to 1 February, 1910, and provided, among other things, "that if the employee shall in the position of general agent in the employer's service make good to the employer within thirty days any loss sustained to the employer by larceny or emblezzlement committed by the employee during the term commencing on 1 February, 1909, at 12 o'clock, noon, and ending on 1 February, 1910, at 12 o'clock, noon, this obligation shall be null and void; otherwise, in full force and effect."

This action is brought to recover for a breach of the bond. We will not consider *seriatim* the thirty-five assignments of error, but only such as we regard as pertinent in determining the real (388) points of controversy.

1. There is no merit in the exception to the issues. Those submitted embrace the controverted facts set out in the pleadings, and under them the defendant had opportunity to make every possible defense. *McCall v. Galloway, ante,* 353; Clark's Code, sec. 391.

2. The indemnity bond is a contract solvable in North Carolina and is to be construed and enforced under the laws of that State. The bond was a species of indemnity insurance in which the plaintiff was the beneficiary, taken out for its benefit and not for the benefit of its agency. It may have been taken out by MacEnaney in Chicago, but it was intended by defendant that it should be transmitted and delivered to plaintiff at its general offices in Greensboro, North Carolina.

It is provided in the written contract creating MacEnaney an agent of the Dixie Fire Insurance Company, that MacEnaney shall furnish a general fidelity bond satisfactory to the company, and the evidence is undisputed that MacEnaney obtained the bond from defendant and sent it to the Dixie Fire Insurance Company, at its home office in the city of Greensboro, where and when it approved and accepted same.

This State is, therefore, the *locus pro solutione* and the *locus celebrationis* of the contract. *Pritchard v. Norton,* 106 U. S., 104; *Bell v. Packard,* 31 Am. Rep., 251; *Dickerson v. Edwards,* 33 Am. Rep., 671; *American Mortgage Co. v. Jefferson,* 69 Miss., 70; *Scott v. Perlee,* 48 Am. Rep., 421; *Millikan v. Pratt,* 125 Mass., 374; *Hill v. Chase,* 143 Mass., 129; *Bell v. Packard,* 69 Me., 105.

Millikan v. Pratt, supra, is a case which we think is directly in point, the facts in this case being that the plaintiff resided in Portland, Maine,

and the defendant was the wife of Daniel Pratt and resided with her husband in Massachusetts. He, Daniel Pratt, asked credit of the plaintiffs, and they required a guarantee, which he procured, and had the defendant, his wife, to execute the same at her home in Massachusetts, and there delivered it to her husband, who sent it by mail
(389) from Massachusetts to the plaintiffs in Portland. The plaintiffs received it from the postoffice in Portland. *Chief Justice Gray,* in discussing the *locus celebrationis,* used the following language:

"The contract between the defendant and plaintiff was complete when the guarantee had been received and acted upon by them while at Portland, and not before. It must therefore be treated as made and to be performed in the State of Maine," citing cases to sustain this position.

In Minor on Conflict of Laws, page 372, this rule is laid down:

"Notes, deeds, and other contracts of that character do not become completed and binding contracts merely by the fact of the promisor's signing them. They must also be delivered. Hence, if the signing occurs in one State, while the delivery takes place in another, the latter State, not the former, is the *locus celebrationis.*"

Having concluded that this State is the place where the contract is to be construed and performed according to the plain intention of the parties, it necessarily follows that it is immaterial to inquire whether under the laws of Illinois a breach of the bond has been proven.

There is evidence sufficient to be submitted to a jury that plaintiff's agent, MacEnaney, fraudulently and feloniously converted to his own use the sum of $5,007.21 of plaintiff's money, as found by the jury under the first issue. This constituted embezzlement under the law of this State. *S. v. MacDonald,* 133 N. C., 682.

3. The cause of action is not barred for failure to give notice to defendant under section 3 of the contract.

The evidence was undisputed that the first information plaintiff had of the defendant's having collected the amount in controversy for and on behalf of the company, and refused to make good to it the amount so collected, was on 20 January, 1910, and that on the 25th day of the same month the bonding company was notified by letter of the default of the agent MacEnaney. The facts being undisputed, it became a question of law to be passed upon by the court as to whether or not the delay of five days in notifying the bonding company was
(390) unreasonable. May on Insurance, sec. 462; Joyce on Insurance, 3229.

In *Building Co. v. Fidelity Co.,* 118 Iowa, 729, reported in 92 N. W., 686, it is held that "a delay of six or eight days in notifying a surety

company of an employee's defalcation, where no prejudice resulted, was not as a matter of law a violation of the condition of the bond requiring immediate notice." *Insurance Co. v. Hazen,* 110 Pa., 530.

This provision of the contract stating that the employer shall give the surety immediate notice is not of a character to avoid the entire contract unless performed literally. It is not in the form of a condition or an express warranty, and therefore failure to strictly comply will not always prevent a recovery.

An examination of this bond shows that by its express terms a failure to comply with some of its provisions renders it void. But failure to give immediate notice by telegraph is not expressly made a ground of forfeiture. The maxim *expressio unius est exclusio alterius* applies. Ostrander, sec. 223; *Gerringer v. Insurance Co.,* 133 N. C., 412; *Dixon v. Insurance Co.,* Ins. L. Journal, Dec., 1912, page 1863.

It is declared in Joyce on Insurance, sec. 3282, referred to in this opinion, "If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated. *Assurance Co. v. Hanna,* 60 Neb., 29; *Insurance Co. v. Downs,* 80 Ky., 336; *Steele v. Insurance Co.,* 93 Mich., 81.

4. This cause of action is not barred under section 9 of the contract, which provides that "no suit or proceeding at law or in equity shall be brought against the surety after the expiration of six months from the end of the time during which, under the terms of this bond, the employer's claim may be filed with the surety.

As this contract is governed by the laws of this State, it is subject to the statutes of North Carolina. Revisal, sec. 4809, forbidding the time for bringing suit on contracts of this character (391) to less than one year.

This bond contains a clause, "that if the employee shall in the position of general agent in the employer's service make good to the employer within thirty days any loss sustained by the employer by larceny or embezzlement committed by the employee," etc.

The undisputed evidence shows that the first intimation of loss as contemplated by the bond was on 20 January, 1910, and under the terms of said bond the agent, MacEnaney, had thirty days within which to make good to the company, to say nothing of the ninety days allowed the agent to make good under the contract of agency.

The action was commenced 1 February, 1911. His Honor correctly held that the action, according to all the evidence, was not barred by lapse of time before 20 February, 1911.

5. It is contended that the court erred in admitting in evidence the duly certified record of the municipal court of Chicago, a court of record, of the judgment of this plaintiff against the agent, L. S. MacEnaney, for $5,007.21. It must be admitted that the admission of this judgment record in an action against the surety company cannot be justified under our Revisal, 285. We must resort to the precedents, and we admit they are in hopeless discord. In a learned note to the case of *Charles v. Hoskins,* 83 Am. Dec., 380, the annotator, *Judge Freeman,* says:

"The question how far a judgment or decree is conclusive against a surety of a defendant, or against one who is liable over to a defendant, and who was not a party to the action, is involved in the greatest confusion. Between the intimate relations which exist between such a person and the defendant in the suit, on the one side, and the fundamental principle that no one ought to be bound by proceedings to which he was a stranger, on the other, the courts have found it difficult to steer."

It seems that our predecessors in office upon this Bench have intimated, and in one case held, that such judgments, unaided by
(392) the statute, are inadmissible in evidence against the surety. *Moore v. Alexander,* 96 N. C., 36.

But an examination of the question has convinced us that the decided trend of modern authority is to the effect that such a judgment against the principal *prima facie* only establishes the sum or amount of the liability against the sureties, although not parties to the action, but the sureties may impeach the judgment for fraud, collusion, or mistake, as well as set up an independent defense. *Charles v. Hoskins,* 83 Am. Dec., 379, and notes. In the notes to this case all the authorities are carefully reviewed.

In that case it is said: "When one is responsible by force of law, or by contract for the faithful performance of the duty of another, a judgment against that other for failure of the performance of such duty, if not collusive, is *prima facie* evidence in a suit against the party so responsible for that other."

6. His Honor erred in admitting the declarations of MacEnaney, as the defendant MacEnaney was no party to this action, and if he had been his declarations would be competent only against himself. They were made some time after his agency had been terminated, and were no part of the *res gestæ.*

The general rule is well settled that the admissions of the principal can only be received as evidence against the surety when they are made during the transaction of the business for which the surety is bound so as to become a part of the *res gestæ*. Admissions and declarations made after the employment has ceased are not competent to bind the surety. *Insurance Co. v. Bonding Co.*, 40 L. R. A. (N. S.), 662, and cases cited.

His Honor further erred in instructing the jury that "there is no controversy about the fact that he converted $5,007.21 of the plaintiff's money to his own use. The only question for you to decide upon is whether he did that with a fraudulent intent." We find no such admission in the record. The judgment of the Chicago court was only *prima facie* evidence of the amount. It remained still a contested issue.

New trial.

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(393)

J. FRANK BOGGS v. CULLOWHEE MINING COMPANY.

(Filed 28 May, 1913.)

1. Evidence—Depositions—Signing of Witness—Interpretation of Statutes.

Where a deposition is otherwise regular and identified, it should not be refused as evidence because it has not been signed by the witness whose testimony was being taken, this not being required by our statute, Revisal, sec. 1652.

2. Master and Servant—Safe Appliances—Subsequent Repairs—Duty to Repair—Conflicting Evidence—Competency.

While the subsequent strengthening and repair of an appliance furnished by the master to the servant to do the work required of him is not, as a rule, competent upon the question of the negligence of the master in furnishing a defective or inadequate one, for which damages are sought, it is held competent upon the question as to whether it was the duty of the master to make such repairs, where this question is presented, and is properly admitted for that purpose.

APPEAL by defendant from *Ferguson, J.*, at May Term, 1912, of JACKSON. Action to recover damages for personal injuries.

There was allegation, with evidence on the part of plaintiff tending to show that on 17 March, 1910, plaintiff, in the course of his duty as an employee of defendant, was engaged in operating a dump-car over defendant's tramroad, and received serious physical injuries by reason of a defective brake and brake rod on said car, and that the company had been notified that said brake and rod, etc., were defective and likely to cause injury.

There was evidence on the part of defendant tending to show that plaintiff, at the time, was doing the work by contract, and was charged with the duty of keeping the tools and implements in proper repair, and, further, that plaintiff had assumed the risk of the alleged defects, and, further, that he was guilty of contributory negligence in the way he did the work and operated the car.

On issues submitted, there was verdict for plaintiff. Judgment on the verdict, and defendant excepted and appealed.

(394) *Walter E. Moore, Alley & Buchanan, and S. B. Shepherd for plaintiff.*

Coleman C. Cowan for defendant.

HOKE, J. We have carefully examined the record, and find no reversible error. The charge of the court on the different questions presented is in accord with our decisions, and, the jury having accepted the plaintiff's version of the matter, an actionable wrong is clearly established.

It was contended that the judge committed error in admitting for plaintiff a deposition of the witness H. A. Hein, when the witness had not signed the same. It is desirable always that the witness should subscribe the deposition, but the statute does not seem to require this, and, on authority, this is held not to be an essential, if the deposition is otherwise regular and satisfactorily identified. Revisal, sec. 1652. *Murphy v. Work,* 2 N. C., 105; *Rutherford v. Nelson,* 2 N. C., 105; *Moulson v. Hargrave,* 1 Sergeant and Rawle, 201. It was further insisted that his Honor erroneously admitted evidence of "repairs done to the car by defendant after the occurrence, and, with a view of continuing the work, overhauling the car and putting in new and heavier brakes," etc.

Our decisions are to the effect that evidence of subsequent repairs are not, as a general rule, admissible as tending to establish negligence or an admission of it by the employer. *Tise v. Thomasville,* 151 N. C., 281; *Myers v. Lumber Co.,* 129 N. C., 252; *Lowe v. Elliott,* 109 N. C., 581. There are several recognized exceptions, however, one being when evidence of the kind in question is brought out in showing "conditions existent at the time of the accident," and another "when the evidence may become pertinent on the question of whose duty it is to make the repairs." 29 Cyc., p. 618; *Blevins v. Cotton Mills,* 150 N. C., 493.

In the present case the evidence offered was chiefly that of the witness Jesse Brown, who succeeded plaintiff in the work, and the testimony received, among other things, was to the effect that, just after the injury, the car was overhauled, the rod mended, in a way described,

and stronger brakes added, etc., and this work was done by the company's blacksmith and by direction of the superintendent and general manager.

On the record, there was direct issue made between these par- (395) ties as to whose duty it was to keep the car in proper repair, and, without deciding whether the conditions presented would make the evidence competent under the first of the exceptions above stated, we are clearly of opinion that it came within the second, and was therefore properly admitted.

There were a good many exceptions to the refusal of the court to give certain prayers for instructions by defendant, but to the extent justified by the facts in evidence they were sufficiently embodied in the general charge of the court, and, as heretofore stated, after careful examination, we find no error to defendant's prejudice that would justify us in disturbing the results of the trial.

No error.

Cited: *McMillan v. R. R.*, 172 N. C., 852, 857.

AMERICAN LUMBER COMPANY v. QUIETT MANUFACTURING COMPANY.

(Filed 28 May, 1913.)

1. Issues Submitted—Sufficiency.

The one issue submitted to the jury in this action for breach of contract for the sale, cutting, and delivery of lumber, to wit, "Are the defendants indebted to the plaintiff, and if so, in what amount?" embraced every issuable fact, and enabled the appellant to present fully its side of the case to the jury, and was sufficient; and it is *Held*, no error to reject numerous issues offered which would have tended to great prolixity.

2. Contracts, Interpretation of—Sale—Security for Advancements.

Where a written contract expresses upon its face that it is a sale of lumber upon certain lands, which the vendee agreed to cut and deliver to the vendor, the latter to make payments in advance thereon, it cannot be construed that the conveyance was merely to secure the advancements agreed to be made.

3. Contracts, Breach of—Sale and Delivery—Lumber—Measure of Damages.

Upon the breach of contract by the vendor for the sale and delivery of lumber, the measure of damages to the vendee is the difference between the price he had contracted for and the market value at the time and place fixed for delivery, such damages not being remote or speculative, but reasonably within the contemplation of the parties when entering into the agreement.

(396) APPEAL by plaintiff from *Foushee, J.*, at January Term, 1913, of HAYWOOD.

Action to recover damages for the breach of a contract to sell and deliver lumber. Defendant "bargained" with plaintiff to "sell, convey, and deliver to it at Eli and Epps Springs, by the Appalachian Railroad, 500,000 feet of poplar, oak, and basswood lumber" of certain grades stated in the contract, for $2,000 in cash and the advancement of $10 per thousand feet on or before the 15th day of each month for all lumber sawed and put on the sticks the preceding calendar month, the $2,000 to be deducted from the first estimate, and no further advance to be made until the manufacturing company had put on the sticks 200,000 feet to over the $2,000 advanced, deliveries of the lumber to be made as follows: 150,000 feet to be loaded at Cherokee, N. C., and delivered at Eli, N. C., and the remainder, or 350,000 feet, at Epps Springs, N. C., or Whittier, N. C. The following provisions are in the contract:

"Lumber is to remain on sticks until in shipping-dry condition, and is to be well manufactured, well edged and trimmed, and put up in piles not to exceed 6 feet in width, with at least four feet space between each pile.

"Lumber to be delivered at Epps Springs is to be cut from a tract of timber purchased by the parties of the first part from J. E. Bird, lying on the waters of Cane Brake Branch and Tuckaseigee River, consisting of 580 acres, more or less.

"That which is to be delivered at Eli is to be cut from what is known as the King and Wyatt land, lying on the waters of Couche's Creek, consisting of 168 acres, more or less.

"The said advance of $10 per thousand is to be deducted from settlement made to parties of the first part by party of the second part, from time to time as the lumber is shipped.

"All the above said lumber is to be delivered on or before 1 January, 1912. To be inspected by party of the second part, or one of their representatives, according to the National Hardwood Rules, and if inspected by parties of the first part, they shall guarantee said inspection.

(397) "It is estimated by the parties of the first part that there is now sawn and on sticks 100,000 feet cut from the King and Wyatt lands, which lumber is in shipping-dry condition, which they agree to begin to deliver at once to Cherokee, North Carolina, and finish sawing and put on sticks the balance of said timber within thirty days.

"The parties of the first part further agree to begin sawing the Bird timber on or before 1 May, and to cut at least 75 per cent of the oak 8-4; that there is now logged about 200,000 feet of said timber."

J. E. Coburn and William Quiett guaranteed the performance of the contract, and are defendants in this action. The court submitted this issue to the jury: "Are the defendants indebted to the plaintiff, and if so, in what amount?" The court charged the jury that if they believed the evidence, their answer to the issue would be $1,995.66, with interest at 6 per cent from 17 April, 1911, "it being the amount of money advanced by the plaintiff, less a credit for the lumber shipped to it." Plaintiff excepted to this charge, and from the judgment appealed, assigning the same as error.

W. T. Crawford and Alley & Gilmer for plaintiff.
Bryson & Black for defendant.

WALKER, J., after stating the case: Plaintiffs tendered numerous issues, but as the one submitted by the court embraced every issuable fact in the case, and enabled the plaintiff to present fully its side of the case to the jury, it was proper to reject plaintiff's tender and refuse to multiply the issues, which course, if it had been adopted, would have tended to great prolixity, and this should always be avoided. *Black v. Black,* 110 N. C., 398; *Hatcher v. Dabbs,* 133 N. C., 239; *Tuttle v. Tuttle,* 146 N. C., 484.

We were told on the argument that the judge construed the contract to mean that the lumber was not sold to the plaintiff but was intended to be a mere security for the advancements made by it to the defendant company. This construction is not permissible, as the language of the parties plainly expresses the contrary. It may be the court took the view that while it was a contract for a sale of the lumber by the defendant, the damages now claimed for its breach are specu- (398) lative. The plaintiff only seeks to recover the difference between the contract price and the market value of the lumber at the time and place fixed for its delivery, and to this it is clearly entitled. It is the usual rule by which to measure damages in such cases, and such a loss by the plaintiff was surely in the contemplation of the parties at the time they made the contract, as the one which would naturally and probably result from a breach by the defendant. We have held at this term that the correct rule for the assessment of damages, when there has been a breach in failing to deliver the goods bargained for, is the difference between the agreed price and the market value at the time and place of delivery. *Berbarry v. Tombacher, post,* 497, citing

many authorities. We were cited by defendant's counsel to *Machine Co. v. Tobacco Co.*, 141 N. C., 284, and *Wilkinson v. Dunbar*, 149 N. C., 20, but those cases in no degree conflict with the general rule now applied to this case. The first of them decides, as the syllabus shows:

"1. Where one violates his contract, he is liable for such damages, including gains prevented as well as losses sustained, as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed.

"2. The law seeks to give full compensation in damages for a breach of contract, and in pursuit of this end it allows profits to be considered when the contract itself, or any rule of law, or any other element in the case, furnishes a standard by which their amount may be determined with sufficient certainty.

"3. In an action for damages for a breach of contract, in the absence of some standard fixed by the parties when they made their contract, the law will not permit mere profits, depending upon the chances of business and other contingent circumstances, and which are perhaps merely fanciful, to be considered by the jury as part of the compensation."

In the second case, we said: "In an action for damages, the plaintiff must prove, as part of his case, both the amount and the cause of his loss. Absolute certainty, however, is not required; but both the (399) cause and the amount of the loss must be shown with reasonable certainty. Substantial damages may be recovered, though plaintiff can only give his loss approximately. A difficulty arises, however, where compensation is claimed for prospective losses in the nature of gains prevented; but absolute certainty is not required. Compensation for prospective losses may be recovered when they are such as in the ordinary course of things are reasonably certain to ensue. Reasonable means reasonable probability. Where the losses claimed are contingent, speculative, or merely possible, they cannot be allowed. . . . Profits which would certainly have been realized but for the defendant's fault are recoverable; those which are speculative and contingent, are not. The broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is,

must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed. It is not necessary that such damages shall be shown with mathematical accuracy." See Hale on Damages, pp. 70, 71; *Griffin v. Colver,* 16 N. Y., 489; *Masterton v. Mayor,* 7 Hill (N. Y.), 61. This statement of the rule is in substantial accord with *Machine Co. v. Tobacco Co., supra,* and the two cases collect the principal authorities upon the subject. If the damages are certain, and such as must have been reasonably contemplated by the parties, they are recoverable for the breach of the contract of sale, but if purely speculative or fanciful and subject to possible exigencies not likely to be foreseen, they are considered too remote and subtle in their influence to be reached or established by legal proof or judicial investigation, and are, therefore, rejected as an element of compensation. *Masterton v. Mayor, supra.* But the difference between the price and the market value at the time and place of the delivery fixed by the contract is not speculative, but furnishes a certain standard by which to estimate the loss in case of a breach, and is the one which the (400) very nature of the contract suggests was contemplated by the parties. "Damages are given as a compensation, recompense, or satisfaction to the plaintiff for an injury actually received by him from the defendant, and should be precisely commensurate with the injury, neither more nor less. 2 Greenleaf Ev., sec. 253. The amount should be what he would have received if the defendant had complied with the contract. *Alden v. Keighly,* 15 M. & W., 117." *Lumber Co. v. Iron Works,* 130 N. C., 584.

The court erred in not applying the proper rule to the case, whereby it excluded from the recovery substantial damages, to which the plaintiff was entitled, if the jury had found the facts according to his testimony.

New trial.

Cited: Lumber Co. v. Furniture Co., 167 N. C., 567.

A. I. ANDERSON v. EMLIS MEADOWS.

(Filed 28 May, 1913.)

1. Deeds and Conveyances—Invalid Grants—Adverse Possession—Color—Occupation—Constructive Possession.

The plaintiff claims the land in dispute under a grant from the State which has been declared invalid, and also sets up and relies on a deed to a part of these lands, with evidence only of possession of the lands described in the deeds, and contained within the larger boundaries of the grant: *Held*, the plaintiff's constructive possession will only extend to the outer lines of the deed, and could not ripen his title under "color" beyond them to the lands within the description of the grant; and title by adverse possession otherwise must be confined to the lands actually occupied.

2. Deeds and Conveyances — Color — Descriptions — Record — Appeal and Error.

In this case it is *Held*, that a will relied upon by plaintiff cannot be construed as color beyond the boundaries in his deed, also introduced in evidence, the description of the lands devised not appearing in the record.

(401) APPEAL by plaintiff from *Long, J.*, at Fall Term, 1912, of MACON. Action to recover a tract of land, and damages for trespasses alleged to have been committed thereon.

The plaintiff introduced State Grant No. 2596 to Jacob Shope, recorded in Book "J," page 290, dated 25 January, 1862, and recorded 2 December, 1862. Also the will of Jacob Shope, probated 18 September, 1876, and recorded in Book of Wills No. 2, page 29, which plaintiff claims conveys the property in question to the plaintiff.

Jacob Anderson for the plaintiff testified that the land embraced under State Grant No. 2596 came into the possession of A. I. Anderson, the plaintiff, who is the mother of witness, in the year 1881, at Grandmother Shope's death, and that the plaintiff in 1882 had cleared up a field upon the land embraced in that grant and had cultivated it in corn and wheat for about six years in succession, and had pastured it for eight or nine years thereafter, and it had been in cultivation by them ever since; that this field was within the boundary of State Grant No. 2596 and within the boundary of State Grant No. 2934, and entirely within the boundary of the land conveyed by J. S. Woodard to J. R. Anderson, and that they had had no possession outside of the boundary covered by the deed from Woodard to J. R. Anderson.

Mrs. A. I. Anderson, plaintiff, testified that she had had possession of the lands described in the complaint ever since 1882, when her grandmother died; that the land had been in corn, wheat, and pasture

ever since, and that she went into possession of that land under the will of Jacob Shope, and that her son, Bud Anderson, was living there now by her permission.

Jacob Anderson further testified that at the time the field was cleared on the land, his father had taken the boys upon the land and cleared the field, claiming under title that their grandfather, Jacob Shope, and grandmother, Isabella Shope, had left them.

The defendants introduced State Grant No. 2934, issued to (402) Clark Byrd in 1864, embracing Section No. 11, District No. 17, of Macon County, acquired by treaty from the Cherokee Indians and surveyed by the State in 1820, and a chain of mesne conveyances from Clark Byrd to the defendants.

The court charged the jury, among other things, as follows: "If the jury shall find from the evidence that in the year 1881, J. R. Anderson, husband of the plaintiff, bought from J. S. Woodard a portion of the land embraced in Section No. 11, and procured Woodard's deed therefor; that about the year following, viz., in 1882, J. R. Anderson and his boys entered upon the tract purchased from Woodard, cleared it, and have had it in actual possession since that time, but have had no actual possession on Section No. 11 outside of the deed from Woodard to Anderson, then the court charges you that the plaintiff is not the owner of the land in dispute, and you should answer the first issue 'No,' or 'No, except so much thereof as is covered by the Woodard deed to Anderson.'" The plaintiff excepted.

The will of Jacob Shope is not in the record, and no evidence was introduced to show what land was devised by it to the plaintiff.

There was a verdict in favor of the defendants, and a judgment rendered declaring the plaintiff the owner of the land in the Woodard deed, and the defendants the owners of the land in controversy outside of that deed. The plaintiff excepted and appealed.

Robertson & Benbow and J. F. Ray for plaintiff.
Johnston & Horn for defendant.

ALLEN, J., after stating the case: The grant under which the plaintiff claims was declared invalid on the facts appearing in the record, upon the former appeal in this action (*Anderson v. Meadows,* 159 N. C., 404), and therefore the plaintiff cannot recover any of the land outside of the Woodard deed upon a connected chain of title from the State.

She must then rely upon proof of title by adverse possession, with or without color.

If she relies upon adverse possession alone, her action must fail, because her actual possession has not extended beyond the Wood-
(403) ard deed, and title acquired by adverse possession, without color, is confined to the land occupied. Malone Real Prop., 280.

It is true that some of the witnesses speak of entering into possession of Grant 2596, but the Woodard tract is within the bounds of the grant, and when the evidence is considered as a whole, it is evident they referred to possession of the Woodard land, and it is so treated in the brief of appellant.

The last position left open to the plaintiff is that the will of Jacob Shope, which is the only paper title under which she claims, is color of title, and that her possession of the Woodard land extends to the boundaries of her color; but this contention cannot be maintained, for the reason that the description of the land devised does not appear in the record, and there is no evidence that the land in the will extends beyond the Woodard deed.

There is also no evidence of a claim by the plaintiff beyond the Woodard deed, and adverse possession does not extend beyond the claim, although this may fall short of the lines of a deed, under which one is in possession. *Haddock v. Leary,* 148 N. C., 382.

It also appears inferentially that the defendants have had possession for many years of the land outside of the Woodard deed.

We are, therefore, of opinion that the plaintiff could not, in any view of the evidence, recover more than the land in the Woodard deed, and this has been awarded to her.

No error.

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(404)

J. E. LATHAM v. J. D. SPRAGINS AND ELKHORN BANK AND TRUST COMPANY.

(Filed 28 May, 1913.)

1. Bills and Notes—Drafts, Bills of Lading Attached—Indorser for Value—Lien on Shipment—Purchaser's Rights.

When a vendor of goods consigns them to the purchaser, takes a bill of lading from the carrier, intends to resume control over them, and draws on the purchaser for the price, and delivers the bill of exchange with the bill of lading attached to an indorsee for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the rights of the holder of the bill of lading to demand payment of the bill of exchange, and cannot retain the price of the goods on account of a debt due to him from the consignor.

2. Bills and Notes—Drafts, Bill of Lading Attached—Banks and Banking—Overdrafts—Deposits—Purchaser for Value—Liens—Evidence—Questions for Jury.

A vendor of goods delivered them to the carrier, received a bill of lading therefor, drew on the purchaser with bill of lading attached to draft, indorsed the draft, deposited it in a bank, which credited his account with the amount. The payee failed or refused to pay the draft, and the bank charged back the draft to the drawer, retained the draft with the attached bill of lading, and claimed to be a purchaser of the draft, and to have a lien on the cotton shipped. There was evidence that at the time of the transaction the drawer's account was overdrawn at the bank, and the amount of the draft went to his credit in the bank in extinguishment of the debt; that there was no agreement between the drawer and the bank that the former would protect the draft in the event it was not paid, but to the contrary; also that the dishonored draft was charged back to the drawer as a matter of bookkeeping: *Held*, if the drawer owed the bank, and the draft was discounted by it and the proceeds applied in discharge of such balance, the bank became the owner of the draft, and a purchaser for value to that extent of the cotton described in the bill of lading; and, further, that charging the draft to the drawer's account was some evidence of the cancellation of the transaction, and payment by the drawer, open to explanation, which was also for the determination of the jury.

APPEAL by interpleader from *Peebles, J.*, at January Term, 1913, of GUILFORD.

Action tried upon these issues:

1. Is the Elkhorn Bank and Trust Company the owner and entitled to the possession of the property in controversy? An- (405) swer: No.

2. What damage, if any, is the plaintiff entitled to recover of J. D. Spragins, defendant? Answer: One thousand four hundred sixty-eight dollars and forty-four cents ($1,468.44), with interest from 31 October, 1910.

3. What was the value of the cotton seized and replevied in this action? Answer: Sixteen hundred and seventy-three dollars and twenty-two cents ($1,673.22).

From the judgment rendered, the interpleader, the Elkhorn Bank and Trust Company, appealed.

King & Kimball, Thomas S. Beall for plaintiff.
S. Clay Williams for defendant, interpleader.

BROWN, J. The plaintiff recovered judgment in this action against the defendant Spragins for damages in sale of cotton. Plaintiff also sued out in this action a writ of attachment and seized a lot of cotton at Greensboro. The Elkhorn Bank and Trust Company interpleaded,

claiming the cotton. Spragins shipped the cotton attached to plaintiff at Greensboro, and drew on him with bill of lading attached. The draft was payable to and discounted by the interpleader, and the net proceeds placed to Spragins' credit. This draft with bill of lading attached was duly presented, and payment being refused, it was protested and returned to the interpleader, and charged up to Spragins' account.

The interpleader requested the court to charge the jury as follows: "If you believe the evidence of the witnesses J. D. Spragins and W. E. Barkman, whose depositions have been read to you on behalf of the interpleader, you shall answer the first issue 'Yes.'" This was refused, and interpleader excepted.

His Honor charged as follows: "The bank has shown no evidence sufficient to show that they were the owners of that cotton. They were not out any money. Spragins owed them already, and they just took that draft and credited his account with it, and when it came back unpaid, they charged it back to him, and they were in the same fix after the transaction as before, and the Supreme Court has held (406) that don't constitute a bank a purchaser for consideration, and you will answer that issue 'No.'"

To this charge the interpleader excepted.

It is well settled that when the vendor of goods consigns them to the purchaser, taking a bill of lading from the carrier and intending to resume the right of control over them, at the same time draws upon the purchaser for the price and delivers the bill of exchange with the bill of lading attached, to an indorsee for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the rights of the holder of the bill of lading to demand payment of the bill of exchange, and cannot retain the price of the goods on account of a debt due to him from the consignor. *Manufacturing Co. v. Tierney,* 133 N. C., 636; *Mason v. Cotton Co.,* 148 N. C., 498.

It is contended, however, that in any view of the evidence the interpleader is not a *bona fide* purchaser for value, but that the transaction constituted merely a bailment for collection.

The cashier, Barkman, testifies as follows: "On 8 September, 1910, I had a transaction in my office at said bank with Mr. J. D. Spragins, in regard to a cotton draft drawn on J. E. Latham, at Greensboro, N. C., on that date. At that time the five bills of lading referred to by Mr. Spragins in his testimony and marked 'Exhibits A, B, C, D, and E,' were delivered to me by Mr. Spragins, attached to the draft for $1,793.35, drawn by said J. D. Spragins on J. E. Latham, Greensboro, N. C.

"The draft delivered to me was the same referred to by Mr. Spragins in his testimony and marked 'Exhibit F.' The bills of lading were assigned to me and delivered with the draft, and I paid J. D. Spragins the sum of $1,793.35, less the usual exchange for the same.

"We had no agreement of any kind. I took it as a cash item as any other bill of lading, and forwarded it. Neither the bank nor any one for it has received payment of the draft in question. It was protested and returned."

The same witness further testified: "At the time I paid Mr. (407) Spragins $1,793.35 (for the draft) with bills of lading attached, he was overdrawn $1,636.86, which was money which the bank furnished him to buy cotton with. When I received the draft from Mr. Spragins I credited his account with it, and when the draft was protested, I charged back to his account the amount of the draft."

The witness also stated that in recharging Mr. Spragins' account with the amount of the protested draft they were following out their system of bookkeeping. "It was recharged to Mr. Spragins' account to keep our records clear as to the transaction and make disposition of this item. It is still charged to Mr. Spragins' account, and has never been paid."

Defendant Spragins testified: "After drawing said draft and attaching the bills of lading thereto, I delivered the draft and bills of lading to Mr. W. E. Barkman, cashier of the Elkhorn Bank and Trust Company. The only terms were that Mr. Barkman either give me cash or credit for it. We had no agreement; it was taken as a cash transaction, and the Elkhorn Bank and Trust Company placed that amount of money to my credit."

The same witness further testified that he had no agreement to the effect that he would protect the bank in the event that the plaintiff is successful in asserting his claim against the property in controversy in this action. He also stated that when the bank accepted the draft and bills of lading he considered the deal closed so far as he was concerned, and that he did not regard himself under any legal obligation to pay the bank.

We are of opinion that his Honor was correct in refusing the interpleader's prayer for instruction, but that he was wrong in directing as a matter of law that the jury answer the first issue "No."

The evidence tends to prove that when Spragins drew the draft with bill of lading attached, payable to the interpleader, and discounted it, he was indebted to the interpleader, and that the net proceeds went to Spragins' credit in extinguishment of his debt.

If those facts are true, then the bank became a purchaser for value, and acquired title to the cotton as security for the bill of ex-
(408) change discounted. 6 A. and E., 298; 7 Cyc., 929; *Bank v. McNair,* 114 N. C., 342.

If at the time Spragins had owed the bank nothing, the case would be different, for the mere discounting and crediting of the amount on the depositor's account, without making payment or incurring any increased obligation, is not sufficient to make the bank a purchaser for value.

Nor do we think that the mere fact that when the draft was returned unpaid, the cashier had it charged up to Spragins' account, as a matter of law, necessarily deprives the bank of the security of the draft and bill of lading.

If at the time it was charged up, Spragins had a balance to his credit, sufficient to pay the draft, the charging it up would have satisfied the draft, and extinguished the lien on the cotton.

But Spragins had nothing to his credit with which to pay the draft, for the cashier testifies that the bank has never been paid, and that he charged up the draft simply as a matter of bookkeeping.

The draft and bill of lading attached has not been surrendered by the bank to Spragins or any one else.

We do not dispute the proposition that where there is a general agreement between the bank and its customer, that if drafts, deposited by the customer for his credit, are returned unpaid, they shall be charged back to the customer's account, and returned to him, this constitutes only an agency for collection. *Davis v. Lumber Co.,* 130 N. C., 176; *Cotton Mills v. Weil,* 129 N. C., 452. But the facts testified to in this case take it out of that general rule and differentiate it from those cases.

If Spragins was in debt to the bank, and the draft was discounted by it and the proceeds applied in discharge of such balance, the bank became the owner of the draft, and as a purchaser for value to that extent of the cotton described in the bills of lading.

The fact that upon return of the draft protested, the cashier charged it up to Spragins' account, is some evidence to the jury of a cancellation of the transaction, and of a payment of the protested draft
(409) by Spragins, but it is not conclusive evidence, and is open to explanation.

If Spragins had nothing to his credit with which to pay the draft, and the bank continued to hold, as its property, the draft and bills of lading, it would not be a payment of the draft or a cancellation of the original transaction.

In directing a verdict for the plaintiff upon the first issue, his Honor erred.

New trial.

Cited: *Bank v. Exum,* 163 N. C., 203; *Bank v. Roberts,* 168 N. C., 476; *Worth v. Feed Co.,* 172 N. C., 344.

WATSON HINES v. CITY OF ROCKY MOUNT.

(Filed 28 May, 1913.)

1. Cities and Towns—Nuisance—Governmental Functions—Health—Repair of Streets.

Where a municipality, acting in accordance with the authority conferred by its charter, and for sanitary purposes, organizes, through its proper officers, and directs a general cleaning up of the town, and in thus acting attempts to fill up a large hole in an unimportant street, partly to get trash and rubbish out of the way, and partly for the better use of the street, and a suit is brought for damages against the city for the creation of a nuisance, alleging that garbage refuse, causing foul stench and odors, was thrown into this hole, causing sickness, etc., to the plaintiff and his family residing near: *Held*, the acts complained of were governmental in their character.

2. Cities and Towns—Nuisance—Governmental Functions—Damages to Property—Compensation—Damages—Constitutional Law.

The principle that a city may not be held liable in damages for its authorized acts of a governmental character which create a nuisance is subject to the limitation that neither a municipality nor other governmental agency is allowed to establish and maintain a nuisance, causing appreciable damage to a private owner, without liability to the extent of the damage done to his property; for such is regarded and dealt with as a taking or appropriation of the property, to the extent of the damage thereto, and such an interference with the rights of ownership may not be made or authorized, except on compensation first made pursuant to law.

3. Cities and Towns—Nuisance—Governmental Functions—Injury to Health—Damages.

The principle upon which a recovery may be had of a municipality for damages arising from a nuisance caused by it in the exercise of a governmental function applying only to instances that amount to a taking of private property for a public use, the damages recoverable are restricted to the diminished value of the land, and does not include damages by reason of sickness, etc., caused by such nuisance to the owner or his family, considered as a direct element thereof.

4. Cities and Towns—Nuisance—Governmental Functions—Injury to Property—Character of Ownership—Nonsuit.

The damages for injury to real property for which a municipality is liable as the cause of a nuisance created by it in the exercise of its governmental functions is not confined to the ownership of the land, for at least nominal damages are recoverable if damages are caused to the proprietary rights of a plaintiff, whether owner or renter; and where the evidence tends to show the invasion of such rights by a municipality, thus acting, a judgment of nonsuit should be disallowed.

WALKER and ALLEN, JJ., dissenting.

(410) APPEAL by defendant from *Daniels, J.*, at November Term, 1912, of EDGECOMBE. Action to recover damages caused by alleged nuisance.

On the trial, it was made to appear that, in 1910, plaintiff and his family were occupying a house and lot in Rocky Mount, when the town authorities, professing to act under powers conferred by the charter, etc., and for sanitary purposes, etc., organized and directed a general cleaning up of the town; that plaintiff's house was built on a street which had been laid out by a land company, the street being through an old brickyard and in which there was a hole, 15 feet long by 12 feet wide and 2 or 3 feet in depth, and the agents and employees of the town, in carrying out the purpose, and acting under instructions, threw the trash, rubbish, etc., into this hole, partly to put the same out of the way and also with a view of filling the hole, that it might the better be used for the streets. The testimony on part of plaintiff tended to show that, in filling this hole, the employees threw garbage,

(411) refuse, etc., and caused foul stench and odors, resulting in great annoyance and inconvenience to plaintiff and his family and rendering several of them sick with fever, causing outlay for expense, loss of time, etc.

There was evidence on part of defendant tending to show that no nuisance had been created and that there were other sources of infection on or near the premises entirely sufficient to account for the alleged sickness and much more likely to cause it.

On issues submitted, the jury rendered the following verdict:

1. Did the defendant maintain or cause to exist on Holly Street a public nuisance by reason of filling up the hole in front of plaintiff's house, as alleged in the complaint? Answer: Yes.

2. Was the plaintiff damaged thereby? Answer: Yes.

3. If so, what damage did he sustain? Answer: $890.

Judgment on the verdict for plaintiff, and defendant excepted and appealed, assigning for error:

1. The refusal of the court to nonsuit plaintiff.
2. Allowing as a direct element of damages the sickness in plaintiff's family and costs incident to same, etc.

J. W. Keel and W. O. Howard for plaintiff.
T. T. Thorne and L. V. Bassett for defendant.

HOKE, J., after stating the case: The charter of the city of Rocky Mount, Private Laws 1907, ch. 209, sec. 21, provides, in general terms, that the board of aldermen shall have power to make proper regulations for the conservation of the public health, and may create and appoint a board of health to exercise and carry out such powers under the supervision and control of the first mentioned board. The acts complained of were chiefly in the exercise or attempted exercise of the powers there conferred, and should be considered governmental in character. *Insurance Co. v. Keeseville,* 148 N. Y., 46; *Love v. Atlanta,* 95 Ga., 129; 1 Abbott on Municipal Corporations, p. 304, sec. 147. This being the correct position, our decisions hold the general rule to be, and they are in accord with well considered authority elsewhere, that "unless a right of action is given by statute, (412) municipal corporations may not be held civilly liable to individuals for failure to perform or neglect in performing duties governmental in their nature, including generally all duties existent or imposed upon them by law for the public benefit." *Harrington v. Greenville,* 159 N. C., 634, citing and referring, among other cases, to *Hull v. Roxboro,* 142 N. C., 453; *Peterson v. Wilmington,* 130 N. C., 76; *McIlhenny v. Wilmington,* 127 N. C., 146; *Moffitt v. Asheville,* 103 N. C., 237; see, also, *Hill v. Boston,* 122 Mass., 344; *Commonwealth v. Kidder,* 107 Mass., 88; Smith's Modern Law on Municipal Corporations, sec. 780.

This general principle is subject to the limitation that neither a municipal corporation nor other governmental agency is allowed to establish and maintain a nuisance, causing appreciable damage to the property of a private owner, without being liable for it. To the extent of the damage done to such property, it is regarded and dealt with as a taking or appropriation of the property, and it is well understood that such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to the law of the land. *Little v. Lenoir,* 151 N. C., 415; *Nevins v. Peoria,* 41 Ill., 502; *Winchell v. Waukesha,* 110 Wis., 101; *Eaton v. R. R.,* 51 N. H., 504; *Bohan v. Port Jervis Co.,* 122 N. Y., 18; *Mining Co. v. Joplin,* 124 Mo., 129; *Fertilizer Co. v. Malone,* 73 Md., 268; *Wharf*

Co. v. Portland, 67 Me., 46; *Village of Dwight v. Hayes,* 150 Ill., 273; *Langley v. Augusta,* 118 Ga., 590; 3 Abbott Municipal Corporations, sec. 961; 1 Lewis Eminent Domain (3 Ed.), sec. 65.

In affording redress for wrongs of this character, injuries caused by a nuisance wrongfully created in the exercise of governmental functions, our decisions hold as the correct deduction from the above principle that the damages are confined to the diminished value of the property affected, and that sickness attributable to such nuisance may not be properly considered as a direct element of damage (*Metz v. Asheville,* 150 N. C., 748; *Williams v. Greenville,* 130 N. C., 93); a position which finds support in decisions of other courts of (413) recognized authority. *Hughes v. Auburn,* 161 N. Y., 96; *Folk v. Milwaukee,* 108 Wis., 359. The evidence, or some of it, may be relevant on the question of the diminished value of the property, and might, in given instances, present a case for injunctive relief, but may not be made the basis for a direct estimate and award of uncertain and unrestrained damages. Speaking to some of the underlying reasons for the position, *O'Brien, J.,* delivering the opinion in the *Hughes case,* among other things, said: "If an individual, injured by disease produced by the acts or neglect of a city, such as are stated in the complaint, can recover damages at all, it must be upon some principle of the common law; and had it been suggested half a century ago that such a principle existed, the assertion would have been received with surprise. In the form in which this case comes here, there is ample room to urge in argument elements of individual hardship well calculated to disturb the mind and divert it from the questions of law that underlie the action. On the principle that there can be no wrong without a remedy, courts are sometimes astute to discover grounds for relief in cases of this character, that, when applied as general principles to like cases, are found to be exceedingly inconvenient, if not untenable, and, hence, very frequently have to be distinguished, modified, or entirely abandoned. The principle upon which the judgment in this case rests is that an individual who has suffered from disease, caused by the neglect of a city to observe sanitary laws with reference to its sewer system, may recover damages from the city. This principle, if sanctioned and applied generally to all cases coming within its scope, cannot fail to produce evils much more intolerable than any that can possibly arise from such acts of omission or commission as the plaintiff states as the basis of this action. It must necessarily become the prolific parent of a vast mass of litigation which the municipality can respond to only by taxation, imposed alike upon the innocent and the guilty." And further: "In the construction and

maintenance of a sewer or drainage system, a municipal corporation exercises a part of the governmental powers of the State for the customary local convenience and benefit of all the people, and in the exercise of these discretionary functions the municipality (414) cannot be required to respond in damages to individuals for injury to health, resulting either from omissions to act or the mode of exercising the power conferred on it for public purposes to be used at discretion for the public good. I have attempted to state some of the reasons that underlie this principle and their application to this case, with the evil results that must follow any departure from it."

Applying the doctrine as it obtains with us, we must hold that there was error in allowing the jury to consider the testimony as to sickness of various members of the plaintiff's family as a direct element in estimating the damages. The motion to nonsuit was properly overruled, because there were facts in evidence tending to show the existence of an actionable nuisance, causing damage to the proprietary rights of the plaintiff and entitling him in any event to a recovery for nominal damages. It does not appear what was the nature of plaintiff's tenure, whether as owner or otherwise, but, whether as owner or renter, he is entitled to recover for wrongful injury, causing damage to his proprietary rights. *Smith v. Sedalia,* 182 Mo., 1; *Grantham v. Gibson,* 41 Wash., 125.

Downs v. High Point, 115 N. C., 182, chiefly concerned the framing and sufficiency of the issues, and the mind of the Court was not directly addressed to the question presented here. To the extent, however, that the *Downs case* sanctions the principle that damages for specific cases of sickness can be recovered at the suit of an individual citizen by reason of an injury occurring from the exercise of governmental functions, the case has been disapproved both in *Metz v. Asheville, supra,* and *Williams v. Greenville, supra,* and is no longer authoritative on that position.

Durham v. Cotton Mills, 141 N. C., 615, and *Vicker v. Durham,* 132 N. C., 880, are addressed to restraining the discharge of sewage by reason of apprehended injury, and the amount of damages for injuries committed and the proper rules which should prevail on such an issue were not directly presented or determined.

For the error indicated, defendant is entitled to a
New trial. (415)

WALKER, J., dissenting: While I agree with the majority of the Court that the defendant is liable for damage to the property of plaintiff, it is my opinion that it is also responsible for sickness caused by

its tortious act. It may be that the cases supporting the opposite view, which is now taken by this Court, may be numerically larger than those favoring my position, though I have not counted them, but I do not think it can safely be said that the weight of authority or the greater force of reasoning is on that side. It is held in numerous well considered decisions that a city is not absolved, even as a governmental agency, from liability for a nuisance caused in repairing or cleaning streets by dumping unhealthy refuse or rubbish near a plaintiff's house, on the theory that street cleaning is a duty and a public benefit in which the plaintiff shared, and even a prompt abatement by the city of the nuisance does not prevent a recovery for damages arising during its continuance. *Haag v. Vanderburg County,* 60 Ind., 511; *New Albany v. Slider,* 21 Ind. App., 392. In 28 Cyc., p. 1293, and note 42, *et seq.,* will be found many cases sustaining the principle upon which the proposition just stated rests, and which also supports this text, under the title, "Nuisance created or permitted by corporation." "If in the exercise of its corporate powers a municipal corporation creates or permits a nuisance by nonfeasance or misfeasance, it is guilty of tort, and like a private corporation or individual, and to the same extent, is liable to damages in a civil action to any person suffering special injury therefrom. So a municipal corporation has no more right to erect and maintain a nuisance on its own land than a private individual would have to maintain such a nuisance on his land; it is entitled to exercise the same rights in respect to the use of its property as an individual, and any lawful use thereof, or the doing of those things which the law authorizes, cannot, it is held, amount to a nuisance in itself, although the execution of the power may be in such a manner as to result in an actionable nuisance." The cases thus
(416) collected were decided by courts entitled to the highest respect and the greatest consideration, because of their admitted ability and learning. *Downs v. High Point,* 115 N. C., 182, is cited in the note to 28 Cyc., p. 1293, as sustaining the doctrine, and we think it does. It is said that the only question presented there related to the framing of the issues, but I think not. The judge charged the jury as follows: "The plaintiff alleges that his special damage consists in the fact that proximity to alleged nuisances caused illness of a serious nature to himself and family, much expense on account of such illness, and that the other parts of his neighborhood were not so affected. If this be true, it is special damage within the meaning of the law," and in that immediate connection, the Court, in its opinion by *Justice Avery,* said: "We think there was no error in refusing to instruct the jury upon the evidence that plaintiff could not recover. The instruc-

tion given was warranted by the evidence, and embodied the principle laid down by leading text-writers. Wood on Nuisances, secs. 561-574."

I do not think that *Asbury v. Albemarle* and *Sewerage Co. v. Monroe* have any direct bearing or decisive effect upon the question. The decisions in those cases may well be sustained upon grounds and for reasons not applicable to this case, and the same may be said of the cases cited in the opinion of the Court, such as *Hull v. Roxboro,* 142 N. C., 453; *Peterson v. Wilmington,* 150 N. C., 76; *Metz v. Asheville,* 150 N. C., 748.

It is said in 2 Wood on Nuisances (3d Ed.), sec. 561, p. 756, that "the right to have the air float over one's premises free from all unnatural or artificial impurities is a right as absolute as the right to the soil itself." We have held in *Fitzgerald v. Concord,* 140 N. C., 110; *Brewster v. Elizabeth City,* 142 N. C., 11; *Kinsey v. Kinston,* 145 N. C., 108; *Revis v. Raleigh,* 150 N. C., 352, and quite recently in *Bailey v. Winston,* 157 N. C. 252, and *Smith v. Winston, ante,* 50, that a municipality is under a positive duty to keep its streets in reasonably passable condition, and for any defects thereon, due to the neglect of its corporate duty or to its negligence, it is liable in damages to persons injured thereby. Where it permits an excavation or hole in the street to remain open and unguarded, after notice of its existence, it has been held liable to a per- (417) son falling therein and breaking his limb, with consequent injury to his health. I can perceive no substantial difference in law, or in fact, between an injury to health caused by digging a hole and the same general kind of injury caused by filling it up. The ground of action is the wrong to the citizen in the enjoyment of his health and property. It can make little or no difference to him whether his health is wrecked as the result of falling in a hole or by inhaling noxious odors and contaminated air thrown off from rubbish or refuse deposited in the hole for the purpose of closing it, and there can be no difference in principle between the two cases.

It is argued that it would produce a multiplicity of suits, "or become the parent of a vast mass of litigation," if a city was held liable in such a case as this one, and that taxation to pay the judgments would be "imposed alike upon the innocent and guilty." The last reason would apply whether we hold the city liable for injury to health or only for injury to property, and the former would apply to a case for a defect in the streets by which numerous persons may be injured in body and health, or where there are numerous defects in streets causing like injury. The reasons are, therefore, inadequate to overthrow the common-law principle that "where there is a wrong, there is also a

remedy." The duty of the municipality to keep its streets in good condition and proper repair is statutory. It is enjoined by the law, also, that it shall take such measures as are appropriate to prevent or abate nuisances and to preserve and safeguard the health of its citizens. The corporate authorities of a town are not only required to keep its streets in good condition and repair, but are indictable for not doing so. *S. v. Commissioners,* 6 N. C., 371, and are equally liable, civilly or criminally, for maintaining a nuisance upon its land within the corporate limits. 2 Wood on Nuisances, sec. 748, p. 1004.

In a well considered case it was held to be a "well recognized rule that municipal corporations are liable for torts in certain classes of cases, including nuisances, in the same manner as natural persons." *Haag v. Commissioners,* 60 Ind., 511, citing several text-writers, (418) among other authorities, and quoting this passage from 2 Addison on Torts (D. and R. Ed.), p. 1315: "A municipal corporation has no more right to maintain a nuisance than an individual would have, and for a nuisance maintained upon its property, the same liability attaches against a city as to an individual." In the *Haag case* defendant was charged with injuring the health of plaintiff's family, causing the death of her son by the erection of a pesthouse for the detention and treatment of smallpox patients. This elementary principle was applied in *Harper v. Milwaukee,* 30 Wis., 365, and thus stated: "The general rule of law is that a municipal corporation has no more right to erect and maintain a nuisance than a private individual possesses, and an action may be maintained against such corporation for injuries occasioned by a nuisance for which it is responsible, in any case in which, under like circumstances, an action could be maintained against an individual. *Pittsburgh v. Grier,* 22 Pa. St. (10 Harris), 54; *Brower v. New York,* 3 Barb., 254; *Young v. Leedom,* 67 Pa. St. 351; *Delmonico v. New York,* 1 Sandf., 222, are a few of the numerous cases which assert or recognize this principle." See, also, *Kolb v. Knoxville,* 111 Tenn., 311; *Stoddard v. Saratoga Springs,* 127 N. Y., 261; *Fort Worth v. Crawford,* 74 Texas, 404; *Clayton v. Henderson,* 103 Ky., 228; *Valparaiso v. Moffitt,* 12 Ind. App., 250.

I may remark here that not only does the case of *Harper v. Milwaukee, supra,* decide the very question before us, but it has been expressly recognized and approved by this Court as stating the law correctly in *Jones v. North Wilkesboro,* 150 N. C., 646. *Justice Connor* says in that case: "It is manifest that a municipal corporation has no legal right to establish and maintain a condition which creates a public nuisance, *per se*—that is, a condition which seriously endangers the health and lives of the people. *Harper v. Milwaukee,* 30 Wis., 365."

A municipal corporation is not exempt from responsibility when the injury is accomplished by a corporate act which is in the nature of a trespass upon the rights of another, and it cannot, by any means or in any manner, create with impunity a public or private nuisance, nor has it any more immunity from legal liability for causing or maintaining the same than an individual has under the law. (419) *Nooman v. Albany,* 79 N. Y., 470; *Seifert v. Brooklyn,* 101 N. Y., 136. The Court said in the case last cited, at p. 142, that, "Municipal corporations have quite invariably been held liable for damages occasioned by acts, resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another, whereby injury to his property has been occasioned." And again, at p. 144, speaking more directly to the question here involved, the Court said in that case: "The immunity which extends to the consequences, following the exercise of judicial or discretionary power, by a municipal body or other functionary, presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized. When such power can be exercised so as not to create a nuisance, and does not require the appropriation of private property to effectuate it, the power to make such an appropriation or create such nuisance will not be inferred from the grant." It was further decided in that case, with reference to the liability of the corporation for an act done under authority of its charter: "The rule that a municipal corporation acting under the authority of a statute cannot be subjected to a liability for damages arising from the exercise by it of the authority so conferred, is confined to such consequences as are the necessary and usual result of the proper exercise of the authority. It does not shield the corporation where injury results solely from the defective manner in which the authority was originally exercised and from continuance in wrong after notice of the injury." These principles are also approved in *Bolton v. New Rochelle,* 32 N. Y. Sup., 442. There is a distinction made in *Seifert's case* between the judicial and ministerial duties of a municipal corporation with reference to its streets, which it will be well to state here in the words of that Court: "It was held (in *Hines v. Lockport,* 50 N. Y., 236) that the duty resting upon the corporation of building, opening, and grading streets, sidewalks, sewers, etc., was judicial, but that after they were constructed the duty of keeping them in repair was ministerial, and from an omission to perform that duty liability arose." This harmonizes with our decisions upon the (420) subject. We hold such corporations liable for injuries from defects in their streets, as we have already seen, whether the defect

causes a broken limb or produces broken and shattered health directly, or as a consequence of some preceding injury to the body or limbs. It is a very shadowy distinction to make between an injury to the body and one to the health. I do not think that it can properly be said that in placing rubbish or other noxious or deleterious substances in a street, even to fill a hole, is the exercise of a judicial duty or a governmental function. These ideas find strong support in what is said by a recent text-writer, not only in regard to the right of a person who incurs special damage from a tort to sue, but to recover, in such a case, against a municipal corporation when he has sustained injury to his health. "While municipal corporations have no more right than a private person to create or maintain a common nuisance, nevertheless, so long as the injury suffered by each individual is the same in kind as that suffered by every other individual of the community affected by such a nuisance, none of them can maintain a private action against the corporate body. The only remedy available in such a case is by indictment. But if, even though the nuisance be a public one, a person can show that he has suffered therefrom some special and peculiar damage, differing in kind from that suffered by him in common with the rest of the community, he is entitled to recover in a civil action compensation therefor from the municipality that created or maintained such nuisance. Speaking generally, municipal corporations stand, in regard to the creation and maintenance of private nuisances, on substantially the same footing as private corporations and natural persons. Their rights are no greater; their civil responsibility is generally no less. As a rule, therefore, they are liable in a private action to any individual who suffers damage by reason of a private nuisance created and continued by them." Williams on Municipal Liability for Torts, pp. 305, 306. He supports his text by the citation of many cases, to a few of which I will refer specially, and to some striking passages (421) showing the ground and extent of the decision. "These and other facts well warranted the conclusion of the trial court that the act of the defendant, in thus emptying its sewers, constituted an offensive and dangerous nuisance. Moreover, the plaintiff is found to have sustained a special injury to his health and property from the same cause, and we find no reason to doubt that he is entitled, not only to compensation for damages thereby occasioned, but also to such a judgment as will prevent the further perpetration of the wrong complained of. *Goldsmid v. Commissioners,* 1 Eq. Cas., 161; 1 Ch. App. Cas., 348." *Chapman v. Rochester,* 110 N. Y., 273.

My neighbor has no right to excavate his soil in such a manner as to create a stagnant and offensive pond so near my premises as to be a

private nuisance by rendering my house unhealthy. He cannot use his property for a purpose that will prevent the enjoyment of mine. 3 Blackst. Com., 217. The same law that protects my right of property against invasion by private individuals must protect it from similar aggression on the part of municipal corporations. A city may elevate or depress its streets, as it thinks proper, but if in so doing it turns a stream of mud and water upon the grounds and into the cellars of one of its citizens, or creates in his neighborhood a stagnant pond that brings disease upon his household, upon what ground of reason can it be insisted that the city should be excused from paying for the injuries it has directly wrought? *Nevins v. Peoria,* 41 Ill., 502. It was held in *Jacksonville v. Doan,* 145 Ill., 23, that the city should not be excused from paying for injuries to health which it has directly wrought and which proceeded from a pond of stagnant water, caused by negligence in improving its streets. The case refers, with approval, to *Nevins v. Peoria, supra,* and cites other strong authorities.

It is against natural justice to allow the creation of a dangerous nuisance by a city, affecting the health of a citizen, and then hold the corporation immune from damages. There lurks in this principle of exemption the danger of arbitrary power, which may be oppressively exercised over the helpless and defenseless citizen. As well at once declare that no one can acquire any rights to his home which (422) the municipal corporation is bound to respect, for if he cannot live in it with comfort to himself and family, of what value is it to him? Can the corporation drive him from it by foul and offensive odors and a poisoned atmosphere, and then restrict him to mere property damage? There is something more valuable to him, but for which the law, as now declared, allows him nothing. The power of a corporation should be regarded as subject to the just limitation that it is forbidden to be exercised in such manner as to create nuisances injurious to private rights, health as well as property, especially where such a consequence is not a necessary result of properly exerting its power, and this I believe to be the common law of this country. *Edmondson v. Moberly,* 98 Mo., 523; *Hannibal v. Richards,* 82 *ibid.,* 330.

The charter of this corporation (Laws 1907, ch. 209, sec. 39) confers upon it the power to abate nuisances, not to create them, and requires the corporation to provide for the proper maintenance, repair, and regulation of the streets. It certainly cannot be argued from these provisions that the unnecessary creation of a nuisance is a legitimate exercise of government possessed by the corporation. If it is negligent in the performance of its ministerial duties, such as repairing its streets,

and injury results to others of whatsoever kind, we have held repeatedly that it commits a legal wrong, for which it must respond in damages.

ALLEN, J., dissenting: *Asbury v. Albemarle, ante,* 247, and the case now being considered, illustrate the difficulty of marking the line between the ministerial duties of a municipal corporation, in the performance of which it acts as a private corporation, and its governmental powers.

In the *Albemarle case* the Court said: "It is well settled that local conveniences, and public utilities, like water and lights, are not provided by municipal corporations in their political or governmental capacity, but in that *quasi*-private capacity in which they act for the benefit of their citizens exclusively," and upon this principle held an act of the Legislature unconstitutional because it interfered with (423) the discretion of the municipal corporation in the establishment of a system of waterworks, this being done in its private capacity; while in this case it is held that throwing garbage in a hole in the street is governmental.

I do not agree to the decision in either case. I think the act in the *Albemarle case* constitutional, and that it is just and wise, as it simply requires a municipal corporation, when it has induced another corporation to establish a private system of waterworks within its limits, to buy or condemn such system, paying only what it is worth, before it constructs a system of its own, and thereby confiscates property, devoted to a use within the corporation by its consent.

In the present case the Court admits that the defendant is liable, but restricts the recovery to damages to property, and denies the right to recover for sickness of the plaintiff or his family, or for expenses incurred in restoring them to health.

I admit that there is authority in favor of the opinion of the Court, but to my mind no good reason has been shown for the distinction, or for departing from the principle, well-nigh universal, that one who does a wrong is liable for all the damages caused naturally and proximately thereby.

The rule adopted by the Court is, as it appears to me, illogical, and has been arbitrarily established, because of the fear that if recoveries are allowed for sickness, municipal corporations may become bankrupt, and also because of the growing tendency to sacrifice the rights of the individual to some idea of public policy.

We are warned that "public policy is a dangerous guide in the discussion of a legal proposition," and that those who follow it far are apt "to bring back the means of error and delusion"; but if it should

be considered at all, I think it wiser and better for a loss to be distributed among all the citizens of a municipality than to leave it, where the municipality has placed it, on the shoulders of one man, and that the best public policy includes justice to the individual.

I cannot believe it is in accordance with law or justice that a municipal corporation may throw garbage, sewage, etc., on the land of a citizen, against his will, and bring death and sickness to his wife and children, and that the citizen may recover damages for injury to his land, but can recover nothing for injury to his wife and (424) children.

Cited: *Moser v. Burlington, ante,* 143; *Donnell v. Greensboro,* 164 N. C., 334; *Nichols v. Fountain,* 165 N. C., 169; *Rhodes v. Durham, ib.,* 685; *Snider v. High Point,* 168 N. C., 610; *Price v. Trustees,* 172 N. C., 85.

J. T. HORTON v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 28 May, 1913.)

1. Master and Servant—Federal Employers' Liability Act—Interpretation of Statutes—Words and Phrases.

The Federal Employers' Liability Act abolishes contributory negligence as a defense and introduces the doctrine of comparative negligence, and provides that an "employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee": *Held,* that the act should be construed by the State courts in accordance with the Federal decisions; and the use of the term "any statutes" refers to Federal statutes enacted for the safety of employees, etc.

2. Federal Employers' Liability Act—Intent—Interpretation of Statutes—Contributory Negligence—Assumption of Risks.

Statutes should be construed as a whole to effectuate the intent of the lawmaking powers, and as to whether the Federal Employers' Liability Act, which abolishes contributory negligence as a defense, would permit the defense of assumption of risk, *Quære.*

3. Same—Master and Servant—Negligence—Assumption of Risks—Safe Appliances—Notice—Continuing to Work—Reasonable Time.

An employer is negligent in failing to provide reasonably safe machinery and appliances for the employee to work with in the discharge of his duties, and to keep them in repair; the employee assumes the risk if he continues to work in the presence of a known defect without objection,

but not that of the negligence of the employer: *Held*, this apparent conflict is reconciled by imposing upon the employee, if he desires to be relieved from assumption of risk, the duty of making complaint when he knows a defect, or could discover it by the exercise of ordinary care, and by referring his conduct, when he does complain, to the principles of contributory negligence, at least for a reasonable time.

4. Same—Instructions—Harmless Error.

Where under the evidence the court correctly charged the jury as to the doctrine of assumption of risks, under the Federal Employers' Liability Act, if they found that the plaintiff had continued to work in the presence of a known danger from a defective appliance, furnished by defendant railroad company, without notifying it thereof, it is not error, of which the defendant can complain, that he also and erroneously charged them, as a distinct and separate proposition, that the plaintiff assumed the risk, although he objected, if he continued to work when a man of ordinary prudence would have seen that there was greater danger of being hurt than otherwise.

5. Instructions—Directed to Wrong Issues—Appeal and Error.

The refusal of prayers for instruction directed to issues inapplicable thereto are properly refused.

CLARK, C. J., concurs; BROWN, J., dissents.

(425) APPEAL by defendant from *Ferguson, J.*, at October Term, 1912, of WAKE. Action under the Federal Employers' Liability Act to recover damages for injury to the plaintiff's eye, caused by the explosion of a water glass on a locomotive engine.

The plaintiff, at the time of the injury, had been employed by the defendant as engineer for a period of six years, and as fireman for three or four years prior to this promotion.

The engine, No. 752, which plaintiff was operating, was equipped with a patented water glass, called the Buckner Water Glass, which was so constructed that a thick guard glass was placed over the front of the water glass to protect the eyes of the engineer in the event the inner glass should explode. The engine was also equipped with an alternative method of determining the amount of water in the boiler by means of gauge cocks.

The plaintiff was called on to take this engine 27 July, 1910, and on 4 August, 1910, while engaged in shifting cars at Apex, N. C., the water glass exploded and injured his eye. Immediately after the explosion the fireman cut off the guage glass at top and bottom, and
(426) the engine was operated to Raleigh with the gauge cocks as the means of determining the amount of water in the boiler.

The guard glass referred to as part of the Buckner equipment is a thick piece of glass 2 or 3 inches wide and 8 or 9 inches long, with a

thickness of a quarter or three-eighths of an inch, according to plaintiff's testimony, and is detached from the gauge, being placed in slots arranged for the purpose of holding it. The Buckner gauge is a brass tube, with an opening in front and containing a small glass tube.

The plaintiff testified that "the shield or guard glass is important as a protection to the engineer's eyes; that is all it is for." "I knew the shield was gone, and I knew it was put there for the safety of anybody in the engine."

The plaintiff also testified that after taking out the engine on 27 July, 1910, he returned on 28 July, 1910, and then told the roundhouse foreman of the defendant, to whom reports of defects ought to have been made, that the shield or guard glass was gone, and he wanted one, and that the foreman replied that they had none in stock; to run the engine as it was, and he would send to Portsmouth and get him one; that he knew there was some danger in operating without a shield or guard glass, but that he was told by the foreman to go ahead without it, and if he had not done so, he would have lost his job. The foreman denied that any objection or complaint was made to him.

There was evidence by the defendant tending to prove that it was the duty of the plaintiff to shut off the water glass, when he discovered the absence of the shield or guard glass, and to run with the gauge cocks, and that this could be done without danger and successfully.

The defendant requested the following instructions on the issue as to assumption of risk, and excepted to the refusal to give them as requested:

"1. The court charges you that if you believe the evidence the plaintiff assumed the risks of the injury from the explosion of the water glass, and you will answer the second issue 'Yes.'

"2. The right of the plaintiff to recover damages in this action (427) is to be determined by the provisions of the Federal Employers' Liability Act, enacted by Congress at the session of 1908, and the court charges you that if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes.'

"3. If you find by the greater weight of the evidence that the water glass was defective, and that the plaintiff knew of the condition of the water glass on the engine, and the danger incident to its use, and that there was open to him a safe way of operating the said engine by using

the gauge cocks, and that he voluntarily used the water glass in operating the engine, the court charges you that the plaintiff assumed the risk of injury from the use of the water glass, and you will answer the second issue 'Yes.'

"4. If you answer the first issue 'Yes,' then the court charges you that if you find by the preponderance of the evidence that the plaintiff knew of the condition of the water glass on the engine and that he could have shut off the glass and operated his engine with safety by using the gauge cocks on the said engine, and that the plaintiff, with such knowledge, failed to shut off the glass and use the gauge cocks, then the court charges you that the plaintiff assumed the risk of injury, and you will answer the second issue 'Yes.'

"5. If you answer the first issue 'Yes,' then the court charges you that if you find by a preponderance of the evidence that the absence of the guard to the glass water gauge was open and obvious and was fully known to the plaintiff, and he continued to use the said glass with such knowledge, and that the plaintiff reported the defect and was given a promise to repair, and you further find that the plaintiff knew and appreciated the danger incident thereto, and that the danger was so obvious that a man of ordinary prudence would not have continued to use the gauge without the guard glass, then the court
(428) charges you that the plaintiff assumed the risk, and you will answer the second issue 'Yes.'"

The jury returned the following verdict:

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

2. If so, did the plaintiff assume the risk of injury, as alleged in the answer? Answer: No.

3. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: Yes.

4. What damages, if any, is the plaintiff entitled to recover? Answer: $7,500.

Judgment was entered upon the verdict. The defendant appealed.

Douglass & Douglass, W. B. Snow, J. W. Bunn, and R. N. Simms for plaintiff.

Murray Allen for defendant.

ALLEN, J. This action is to recover damages under the Federal Employers' Liability Act, and the principal question raised by the appeal is as to the application of the doctrine of assumption of risk.

The act abolishes contributory negligence as a defense, and instead introduces the doctrine of comparative negligence, and it has the following provision as to assumption of risk:

"SEC. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

It is contended by the defendant, and may be conceded, that the term "any statute" in the section quoted means any Federal statute, and that the assumption of risk is to be applied by a construction of the whole statute and under the rules laid down by the Supreme Court of the United States.

Statutes should receive a construction as will accord with (429) the legislative intention as gathered from the whole act, (*McKee v. U. S.*, 164 U. S., 287), and when the act under consideration is so construed, it is at least debatable whether assumption of risk should be admitted as a defense in any action brought under its provisions. It says that contributory negligence on the part of the employee (that is, negligence which proximately causes the injury, because no other negligence is contributory) "shall not bar a recovery," and it would appear to be incongruous to admit as a defense assumption of risk which is based upon the fiction that the employee has assented to assume the risk of the particular injury, and when the facts relied on to prove assumption of risk generally enter into and are a part, but not all, of those necessary to sustain a plea of contributory negligence.

Mr. Justice Holmes considers the converse of this proposition in *Schlemmer v. R. R.*, 205 U. S., p. 1, in discussing a statute which abolished assumption of risk and admitted contributory negligence as a defense, and he points out the distinction between the two, and shows that the latter usually includes the former, and he also sounds the note of warning, which may well be applied here, that under statutes so framed one plea may be abolished by name and be reinstated under another name. He says: "Assumption of risk in this broad sense shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, athough it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. *R. R. v. McDade*, 191

U. S., 64, 68. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specified accident is called negligent. But the difference between the two is one of (430) degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory negligence still open to the master (a matter upon which we express no opinion), then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

In the case before us, to sustain the plea of assumption of risk, the defendant undertook to prove that the plaintiff continued at work, without objection, having a knowledge of the defect and apprehension of the danger, and to sustain the plea of contributory negligence it relied on the same facts, and the additional one that the plaintiff neglected to shut off the water glass and to use the gauge cocks.

But however this may be, we will consider the question presented from the standpoint of the defendant, and as we have not been referred to any Federal statute as to defective appliances, the violation of which contributed to the plaintiff's injury, we will assume that the defendant is entitled to the benefit of the doctrine of assumption of risk as declared by the Supreme Court of the United States, and will undertake to apply that doctrine to this case.

That Court enforces the rule that it is the duty of the employer to provide reasonably safe and adequate machinery and appliances for the use of the employee and to keep and maintain them in such condition, and that a failure to perform this duty is negligence. *Gardner v. R. R.*, 150 U. S., 349.

It also holds that the employee assumes the ordinary risks incident to his employment, and that if he continues to work, without objection, having knowledge of a defect and an apprehension of danger, and is injured, that this is one of the ordinary risks of his employment. *R. R. v. McDade*, 135 U. S., 570.

But it also holds that negligence of the employer is an extraordinary risk, which the employee does not assume, the Court saying in *R. R. v. McDade*, 191 U. S., 67: "The servant assumes the risk of dangers incident to the business of the master, but not of the latter's negligence. The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master

had used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the (431) employer's negligence in performing such duties."

We have it then established that the employer is negligent if he fails to provide reasonably safe machinery and appliances, and to keep them in repair; that the employee assumes the risk if he continues to work in the presence of a known defect without objection, and that the employee does not assume the risk of the negligence of the employer.

There is some difficulty in applying these rules to a given case, because if it is the duty of the employer to repair, and a breach of that duty is negligence, and if the employee does not assume the risk of the negligence of the employer, it would seem to be contradictory to say that the employee may assume the risk of an injury caused by a failure to repair.

This apparent conflict is reconciled by imposing upon the employee, if he wishes to be relieved from assumption of risk, the duty of making complaint when he knows of a defect, or could discover it by the exercise of ordinary care, and by referring his conduct, when he does complain, to the principles of contributory negligence, at least for a reasonable time.

The decision in the leading case of *Hough v. R. R.*, 100 U. S., 216, which discusses particularly the assumption of the risk of the negligence of a fellow-servant, rests upon this principle. In that case the evidence tended to show that the engine of which deceased had charge, coming in contact with an animal, was thrown from the track over an embankment, whereby the whistle fastened to the boiler was blown or knocked out, and from the opening thus made hot water and steam issued, scalding the deceased to death; that the engine was thrown from the track because the cowcatcher or pilot was defective, and the whistle blown or knocked out because it was insecurely fastened to the boiler; that these defects were owing to the negligence of the company's master mechanic, and of the foreman of the roundhouse at Marshall; that to the former was committed the exclusive management of the motive power of defendant's line, with full control over all engineers, and with unrestricted power to employ, direct, control, and dis- (432) charge them at pleasure; that all engineers were required to report for orders to those officers, and under their direction alone could engines go out upon the road; that deceased knew of the defective condition of the cowcatcher or pilot, and having complained thereof to both the master mechanic and foreman of the roundhouse, he was promised a number of times that the defect should be remedied, but such promises were not kept; that a new pilot was made, but by reason of

the negligence of those officers, it was not put on the engine; and the Court, after discussing *Farwell v. R. R.*, 4 Met., 49, and stating that there are well defined exceptions to the general rule as to assumption of risk, says: "One, and perhaps the most important, of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation, among which is the carelessness of those, at least in the same work or employment, with whose habits, conduct, and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant, who is to use the instrumentalities provided by the (433) master, has, ordinarily, no connection with their purchase in the first instance or with their preservation or maintenance in suitable condition after they have been supplied by the master. . . . If the engineer, after discovering or recognizing the defective condition of the cowcatcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition. But 'there can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept.'

Shearman and Redf. Negligence, sec. 96; *Conroy v. Iron Works,* 62 Mo., 35; *Patterson v. R. R.,* 76 Pa. St., 389; *Le Clair v. R. R.,* 20 Minn., 9; *Brabbitts v. R. R.,* 38 Mo., 289. 'If the servant,' says Mr. Cooley, in his work on Torts, 559, 'having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume the risks,'" and the Court adds, with reference to contributory negligence: "We may add that it was for the jury to say whether the defect in the cowcatcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contribu- (434) tory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part."

In *R. R. v. Ross,* 112 U. S., 382, after stating the rule as to assumption of risk by the employee, the Court says: "But however this may be, it is indispensable to the employer's exemption from liability to his servant for the consequences of risks thus incurred, that he should himself be free from negligence. He must furnish the servant the means and appliances which the service requires for its efficient and safe performance, unless otherwise stipulated; and if he fails in that respect, and an injury results, he is as liable to the servant as he would be to a stranger. In other words, whilst claiming such exemption, he must not himself be guilty of contributory negligence."

Again, in *R. R. v. Herbert,* 116 U. S., 652: "Where the employee is not guilty of contributory negligence no irresponsibility should be admitted for an injury to him caused by the defective condition of the machinery and instruments with which he is required to work, except it could not have been known or guarded against by proper care and vigilance on the part of his employer."

Running through all the cases is the idea that the employee assumes the risk, when he continues to work in the presence of a known defect, only when he fails to object.

The latest case we have found is *Brewery Co. v. Schmidt,* 226 U. S., 162, in which the Court says: "The first point argued is that the de-

fendant was entitled to judgment on the special findings, because the fourth was that the cooker at the time was not in such a bad condition that a man of ordinary prudence would not have used the same. But the eleventh was that the defendant did not use ordinary care in furnishing the cooker and in having it repaired, and the sixth, that the defendant promised the plaintiff that the cooker should be repaired as an inducement for him to continue using it. So it is evidence that the fourth finding meant only that the plaintiff was not negligent in remaining at work. Whatever the difficulties may be with the (435) theory of the exception (1 Labatt Master & Servant, ch. 22, sec. 423), it is the well settled law that for a certain time a master may remain liable for a failure to use reasonable care in furnishing a safe place in which to work, notwithstanding the servant's appreciation of the danger, if he induces the servant to keep on by a promise that the source of trouble shall be removed. *Hough v. R. R.*, 100 U. S., 213.

The text-books very generally declare the same doctrine.

"There is no longer any doubt that where a master has expressly promised to repair a defect, the servant does not assume the risk of any injury caused thereby within such a period of time after the promise as would be reasonably allowed for its performance, or, indeed, within any period which would not preclude all reasonable expectation that the promise might be kept." 1 Shearman & Redfield on Negligence, sec. 215, p. 372.

"It is also negligence for which the master may be held responsible, if, knowing of any peril, which is known to the servant also, he fails to remove it in accordance with the assurances made by him to the servant that he will do so. This case may also be planted on contract, but it is by no means essential to do so. If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume its risks. So far as the particular peril is concerned, the implication of law is rebutted by the giving and accepting of the assurance, for nothing is plainer or more reasonable than that parties may and should, where practicable, come to an understanding between themselves regarding matters of this nature." Cooley on Torts, p. 1156.

"An obvious corollary from the principles explained in sec. 424, subds. a, b, *supra,* is that, as long as the period is running which is conceived to be covered by the promise, the defense of an assumption of

the given risk cannot be relied upon by the master. This doctrine is affirmed or taken for granted in all the decisions cited at the (436) place referred to." Labatt Master & Servant, sec. 425.

In the note to *Miller v. Monument Co.,* 18 A. and E. Ann. Cases, 961, there is a very full citation of authority upon the distinction between assumption of risk and contributory negligence, which it is necessary for us to consider further, as the case is presented, and in the note to *Foster v. R. R.,* 4 A. and E. Ann. Cases, 153, the editor, in dealing with the effect of a promise to repair on assumption of risk, cites decisions from thirty-five States, and others from the Federal courts, including the *Hough case,* in support of the statement that, "It is a well settled general rule that the assumption of risk implied from a servant's knowledge that a tool, instrument, appliance, piece of machinery, or place of work is defective or dangerous, is suspended by the master's promise to repair, made in response to the servant's complaint, so that if the servant is induced by such promise to continue at work, he may recover for an injury which he sustains by reason of such defect within a reasonable time after the making of the promise, provided he exercises due care, unless the defect renders the appliance so imminently dangerous that a prudent person would decline to use it at all until it was repaired," and this last contingency is dealt with in the *Hough case, supra,* under contributory negligence.

Applying these principles to the evidence, we are of opinion that the charge of his Honor was favorable to the defendant, upon the issue of assumption of risk.

The plaintiff took charge of the engine on 27 July, 1910, and was injured while operating it on 4 August, 1910.

He testified, among other things, that he discovered the absence of the guard glass on his first trip out, and that upon his return on the next day he told the roundhouse foreman, to whom complaint ought to have been made, and whose duty it was to repair, that the guard glass was gone, and asked if he had one, and that the foreman replied, "they did not keep them in stock here; that they were made in Portsmouth, and he would have to send to Portsmouth to get one; to run her like she was. He said he would send to Portsmouth and get me one"; that he had the talk with the foreman between 3 and 5 o'clock, (437) and told him the shield or guard glass was gone, and he wanted one, and that the foreman said he had none in stock, and to run the engine as it was and he would send to Portsmouth and get him a shield or guard glass; that he knew there was some danger, but that he was told by the foreman to go ahead and operate without the shield, and if he had not done so, he would have lost his job.

The foreman denied that any complaint was made to him.

In this conflict of evidence it was for the jury to determine the fact, and upon this phase of the case his Honor, among other things, charged on the second issue as to assumption of risk as follows: "On the other hand, the employer has the right to assume that his employee will go about his work in a reasonably safe way and give due regard to the machinery and appliances which are in his hands and under his control, and if you should find from the evidence, by its greater weight (because the burden in this instance is on the defendant), that the plaintiff knew of the absence of the guard or shield to the water gauge, and failed to give notice to the defendant or to the agent whose duty it was to furnish the water gauge and appliance, and he continued to use it without giving that notice, it being furnished to him in a safe condition, then he assumed the risk incident to his work in the engine with the glass water gauge in that condition, although he might have handled his engine in every other respect with perfect care. If it was not received in good condition, and he failed to give notice, and if he did work with it in its present condition, without the shield or guard, he then assumed the risk. How was that? It is a question of evidence for you. Did he give the notice? Did he assume the risk by failing to give notice, keeping the knowledge of the absence of the guard glass within his own breast?

"But if you find that he gave notice to the foreman of the round-house, and if you should find that the use of the water gauge was not so obviously dangerous that a reasonably prudent man, careful of himself not to get hurt, while he was about his work, and went on and used it, he would not assume the risk; but if the danger was so
(438) apparent that a reasonably prudent man, careful of himself not to receive injury, would see that he was in imminent danger and would observe by the use of it that he was endangering himself by going on and working with it, and he continued to work with it, he would be assuming the risk and responsibility, and it would be your duty to answer that issue 'Yes.' If it was so obviously dangerous that a reasonably prudent man would not use it, and he continued to use it instead of using the other, he would assume the risk."

It therefore appears that the defendant not only had the benefit of the rule that the employee assumes the risk if he works in the presence of a known danger without objection, but in addition, and as a distinct and separate proposition, that the plaintiff assumed the risk, although he objected, if he continued to work when a man of ordinary prudence

would see that there was greater danger of being hurt than otherwise, which would not be assumption of risk, but evidence of contributory negligence.

The third, fourth, and fifth prayers for instructions were properly refused, because directed to the second issue, instead of to the third, to which they were applicable.

We have thus far considered the case under the decisions of the Federal court. If we applied the provisions of the Fellow-servant Act of this State, as construed by our Court, there could be no issue as to assumption of risk. *Coley v. R. R.*, 129 N. C., 407.

We have not been inadvertent to the other exceptions appearing in the record, seventy-two in number, but have examined them with care, and find no reversible error.

No error.

CLARK, C. J., concurs, on the further ground that the following paragraph in section 4 of the Federal Employers' Liability Act, "Such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee," merely emphasizes the fact that in such cases there is no assumption of risk. It cannot be construed, fairly, to be an implied provision that assumption of risk is a defense in all (439) other cases.

Besides, assumption of risk lies in contract, and under the provision of Revisal, 2646, "Any contract or agreement, expressed or implied, made by any employee of such company to waive the benefit of this section shall be null and void," it has been repeatedly held that the doctrine of assumption of risk has been eliminated by this section. *Biles v. R. R.*, 143 N. C., 78; *Thomas v. R. R.*, 129 N. C., 392; *Cogdell v. R. R.*, 129 N. C., 398; *Coley v. R. R.*, 128 N. C., 534. Such contract, therefore, being null and void under our statute, it cannot be a defense, which depends upon the validity of such contract.

BROWN, J., dissenting: The evidence in this case tended to establish the following facts:

The plaintiff, at the time of the injury, had been employed by the defendant as engineer for a period of six years, and as fireman for three or four years prior to his promotion. It appeared from the work reports, identified by the plaintiff, that he first made a report on this engine on 28 July, after his return from a round trip requiring two days. The explosion of the water glass, of which he complains, oc-

curred 4 August, upon his return from the third or fourth trip to Aberdeen. At the time of the explosion plaintiff was looking at the glass.

The engine, No. 752, which plaintiff was operating, was equipped with a patented water glass, which was so constructed that a thick guard glass was placed over the front of the water glass to protect the eyes of the engineer in the event the inner glass should explode. The engine was also equipped with an alternative method of determining the amount of water in the boiler by means of gauge cocks.

It was the plaintiff's duty, upon boarding the engine, to look at his water glass, and test his gauge cocks, the latter being three cocks placed at intervals on the front of the boiler, in order to see that both were in working order.

On the morning plaintiff was called to take this engine (he had prior to that time been operating a passenger train) and use it in operating a freight train from Raleigh, N. C., to Aberdeen, N. C., he
(440) noticed before leaving Raleigh that there was no shield or guard on the water glass. Without making complaint of the condition of the glass, plaintiff made the trip to Aberdeen and return. Upon his arrival in Raleigh at the end of his round trip, he made a written report of the condition of his engine upon forms provided for that purpose, and in accordance with the defendant's requirements he placed the reports on a file in the roundhouse or put them in a box there for that purpose. This, according to the plaintiff's evidence, was the way provided by the company for procuring repairs.

George Steele, plaintiff's witness, and a number of defendant's witnesses, said that these work reports were required to be in writing, that they were filed and distributed among the workmen for the purpose of making the required repairs.

It appears in evidence that plaintiff made a written report on this engine at the return of each round trip, and *noted every defect in his engine except the absence of the guard glass.* When asked by the superintendent of the division on which he was employed why he failed to report the absence of the guard, he said that *it was for reasons best known to himself.*

On 4 August, 1910, while engaged in shifting cars at Apex, N. C., the plaintiff testified that the water glass exploded and injured his eye. Immediately after the explosion he cut off the gauge glass at top and bottom, and the engine was operated to Raleigh with the gauge cocks as the means of determining the amount of water in the boiler.

The guard glass referred to as part of the Buckner equipment is a thick piece of glass 2 or 3 inches wide, and 8 or 9 inches long, with a

thickness of a quarter or three-eighths of an inch, and is detached from the gauge, being placed in slots arranged for the purpose of holding it. The Buckner gauge is not a complicated piece of machinery, but is a brass tube with an opening in front and containing a small glass tube. A thick piece of glass or two thin pieces of the proper size could be cut and placed in the slot and would serve the purpose of a guard glass.

Plaintiff testified that after he returned from the first trip to Aberdeen, he ran the engine to the coal-chute track, or track (441) opposite the turntable, and told Mr. Matthews, the roundhouse foreman, that the guard glass was gone, and asked him if he had one. "He said they did not keep them in stock here, but they were made in Portsmouth, and that he would have to send to Portsmouth to get one; to run her like she was. He said he would send to Portsmouth and get me one. After Mr. Matthews told me he did not have any, I went to Charlie Murray, the glass cutter for the Baker-Thompson Lumber Company, and told him I wanted him to make me a guard glass, and gave him the measurements."

The conversation with Matthews, testified to by plaintiff, occurred on 28 July. Plaintiff's work reports show that he made two round trips with this engine after that time and before his injury. The accident occurred 4 August, six days after the conversation with Matthews, and during that time plaintiff was aware of the defective condition of the water glass and knew that it had not been repaired.

Matthews denied that he told plaintiff the guard glasses were kept in Portsmouth, and to go ahead and run his engine and that he would send and get one. He said he had no recollection of having a conversation with Horton.

Plaintiff's testimony leaves no doubt of the fact that he was fully aware of the danger of using the water gauge without the protection of the guard glass.

George Steele, a witness for plaintiff, explained the duties of an engineer as follows: "I have been an engineer on the Seaboard six or eight years. I am familiar with the duties of an engineer. It is his duty to see that his engine is in proper working order and properly equipped. He reports thirty minutes beforehand for that purpose. He is paid for that time. He is paid until he gets off duty. He is allowed fifteen or twenty or twenty-five minutes from the time he cuts loose from his train.

"Engineers are supposed to inspect engines before they give them up, and make out a work report in writing. It is required by the company to be in writing and signed by the engineer. That work report is filed in the roundhouse, and the work distributed among

(442) different ones to have the defects remedied. It is the engineer's duty to report defects discovered in his cab and report them on his work report. When an engineer gets on his engine in the morning he tests the guage cocks to see that they are working. He tests his guage glass to see that it is in shape and in working order.

"The guage cocks indicate how much water is in the boiler. You could operate the engine with gauge cocks alone, without the water glass. The water glass is arranged so that if anything should happen you could cut it off, top and bottom; that cuts it clean out, so that it is impossible for it to explode. But with the steam on and the water on, and his guard glass gone, that inner tube is nothing but a thin tube of glass. Whatever pressure the engine carries is on there. Those glasses explode frequently. Nobody can tell when one is going to explode. One might last fifteen minutes and one thirty days. One has never exploded with me. They buzz a little when they are going to explode. The purpose of the guard glass is to protect anybody in the cab. It protects the engineer from explosion. Without the guard glass, he is liable to be injured by flying glass.

On the line of road, if I discovered the guard glass was gone, I would report it in writing on the work report when I got in. It could be gotten by requisition from the storeroom. My duty would be to notify the foreman. It is the engineers' duty to report any defects they can see on the engine in writing."

At the conclusion of the evidence, defendant moved for judgment of nonsuit upon the ground that plaintiff's evidence showed that he assumed the risk of injury from the explosion of the water glass. I think this motion should have been allowed. If it is true, as testified by plaintiff, that he reported the defect and was given a promise to repair, his testimony shows that he continued to use the defective water glass when the danger was so imminent that a man of ordinary prudence would not have used it, and in doing so he continued to assume the risk of injury.

The Federal questions in this case are properly raised, and in order to dispose of the appeal it is necessary that they should be passed upon by this Court. The construction of the National Employers' (443) Liability Act is involved, which is in itself sufficient to give jurisdiction to the Supreme Court of the United States if the case should be taken to that court. *R. R. v. Wolfe,* 187 U. S., 638. In an action brought by an employee against a carrier for an injury sustained while engaged in interstate commerce, the Federal act is supreme. Congress having acted, the competency of the State to regulate the matter is withdrawn, and all State legislation on the subject

is superseded. *Mondou v. R. R.*, 223 U. S., 1. The right of action created by this act is exclusive, and the employee has no right of action either at common law or under State statutes regulating the relation of master and servant. *R. R. v. Wolfe, supra.*

The plaintiff in the case before us brought his suit under the Federal act, and the defendant admitted that act to be controlling, and pleaded as a defense plaintiff's contributory negligence and assumption of risk. The defendant takes the position that assumption of risk as a defense is affected by the Federal act only to the extent of being abolished in cases where the violation by the carrier of some statute enacted for the safety of employees contributed to the injury; that in other respects the defense of assumption of risk is unaffected, and is to be determined by the principles of the common law as interpreted by the United States Supreme Court.

Section 4 of the act provides: "That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to or the death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the *violation by such common carrier of any statute enacted for the safety of employees* contributed to the injury or death of such employee."

The legislative history of this act, which is a proper aid to its construction (11 Enc. U. S. Supreme Court, 143), shows the clear intention of Congress to modify the common-law defense of assumption of risk only to the extent shown by this section. The act of 1906, which was held unconstitutional, contained no reference to assumption of risk. The act of 1908, as introduced in Congress, provided (444) in section 6 that the employee "shall not be held to have assumed the risk of his employment in any case where the violation of law by such common carrier contributed to the injury or death of such employee."

Before the passage of the act, this broad language was changed to read "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." By incorporating this section in the act, I think Congress indicated clearly that it did not regard the defense of assumption of risk as having been abolished by the other provisions of the act, and did not intend the act to have such effect.

In *Freeman v. Powell,* 144 S. W., 1033, it is expressly held that assumption of risk is a defense to an action brought under this act, and the language of the Supreme Court of the United States, 223 U. S., at pages 49 and 50, leads me to conclude that in the opinion of that Court

assumption of risk will bar the right of a plaintiff to recover unless the negligence of the master consists in the violation of a Federal statute enacted for the servant's safety. The fact that contributory negligence is abolished as a complete defense by section 3 of the act can have no effect on the defense of assumption of risk. The two defenses are separate and distinct. In the case of *Schlemmer v. R. R.*, 205 U. S., page 1, quoted by *Mr. Justice Allen* as sounding a note of warning that one plea may be abolished by name and reinstated under another name, four justices dissented, and when the case again came before the Court, *Mr. Justice Day,* who had formerly dissented, wrote the opinion of the Court, holding that a statute abolishing assumption of risk did not affect the defense of contributory negligence. The converse of this proposition sustains the view that a statute which abolishes contributory negligence has no effect upon the defense of assumption of risk.

It is not contended in this case that the defendant has violated any statute enacted for the safety of employees, and, therefore, assumption of risk, if established, would operate to defeat the plaintiff's (445) cause of action. The court below accepted this as a correct construction of the Federal act, and submitted the following issues:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?

2. If so, did the plaintiff assume the risk of injury, as alleged in the answer?

3. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer?

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

Having submitted an issue of assumption of risk, his Honor was confronted with the question whether such assumption of risk should be determined by the principles announced by this Court or by the decisions of the Supreme Court of the United States.

It is clear that the decisions of the two jurisdictions are in conflict. The trial judge followed the decisions of this Court, and however correct they may be when applied to a cause of action arising under the State law, I think our decisions are contrary to those of the Supreme Court of the United States and are not controlling in this action. The charge cannot be read without reaching the conclusion that his Honor regarded the law of North Carolina as controlling.

He said: "Plaintiff has brought this suit under the United States statute, and where Congress enacts a law within the limits of its power, that law should be enforced uniformly throughout the entire United

States. If it is in conflict with the State law, the State law is superseded, but where there is no conflict expressed by the statute of the United States, then the rule of the State prevails.

"And in this act under which this suit is brought, it is provided that any action brought against any common carrier under and by virtue of any of the provisions of this act to recover damages for injuries to or death of any of its employees, such employee shall not be held to have assumed the risk of his employment in any case where the violation by such a carrier of any statute enacted for the safety of employees contributed to the injury or death of such employees.

"There has been no statute provided as applies to this glass (446) water gauge which has been called to the attention of the Court, so that leaves it open to the rights which the plaintiff might have under the law of this State, and the question of assumed risk, as has been argued by one, if not more, of counsel, grows out of the contractual relations between plaintiff and defendant."

The following instructions, which are not quoted in the opinion of the Court, were given over defendant's objection and exception:

"A man assumes the risk, when he takes employment, incident to the class of work which he has to perform.

"Some classes of work are more dangerous than others. The position of a locomotive engineer might well be regarded as more hazardous than other employments; therefore, he assumes the risk of that character of employment; but he has the right when he enters into employment of that class of work to assume that his employer has done what the law requires it to do in providing him a reasonably safe place to work, with reasonably safe appliances with which to do his work, consistent with the character of the work which is to be performed.

"He does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work."

And in another part of the charge, this language is used:

"And the same rule applies, if the use of the glass without the shield was not so obviously dangerous as to cause a reasonably prudent man to stop the use of it, his going on and using it, of itself, would not be assuming the risk in the use of it.

"If it was so obviously dangerous that a reasonably prudent man would not use it, and he continued to use it instead of using the other, he would assume the risk."

The instructions quoted in the Court's opinion, which it is said properly present the defendant's contention that by continuing to work in

the face of a known danger plaintiff assumed the risk of injury, are made dependent upon a finding by the jury that the guard glass was furnished to the plaintiff *in a safe condition.*

(447) It will be found that the instructions read: "If it was received in good condition and he failed to give notice, and if he did work with it in its present condition without the shield or guard glass, he then assumed the risk." Such limitation is improper.

Whether the danger existed at the time plaintiff undertook the operation of the engine, or arose while he was engaged in its operation, is immaterial. If it was furnished him in a defective conditon, and he became aware of the exstence of the defect and continued to work without objection and a promise to repair, he assumed the risk.

The jury had been instructed positively that the servant does not assume the risk incident to the negligence of the master in providing machinery and appliances with which he has to work, and in carrying out this view the Court makes assumption of risk dependent upon the defendant's having furnished the glass in a safe condition. Plaintiff testified that when the engine was turned over to him the guard glass was defective. If the jury believed this evidence, it was impossible to find that he assumed the risk as set forth in his Honor's instructions.

The doctrine of assumed risk as adopted by this Court is stated in *Hicks v. Manufacturing Co.,* 138 N. C., 319, as follows: "An employee will not be deemed to have assumed the risk from the fact that he works on in the presence of a known defect, unless the danger be so imminent that no man of ordinary prudence and acting with such prudence would incur the risk which the conditions disclose." And this Court has repeatedly said that the servant never assumes the risk incident to the negligence of the master in providing machinery and appliances with which he has to work.

The jury in this case was instructed in practically the exact language of our decisions. The Supreme Court of the United States has held in a uniform line of decisions, which I shall refer to later, that the servant does assume the risk of injury resulting from the negligence of the master when the danger is known to the servant and appreciated by him, and he continues to work in the face of such danger without objection.

The defendant requested the following instructions:

(448) "The court charges you that if you believe the evidence, the plaintiff assumed the risk of injury from the explosion of the water glass, and you will answer the second issue 'Yes.'

"The court charges you that the statute of North Carolina, Revisal, sec. 2646, abolishing assumption of risk as defense to an action brought

against a railroad company by one of its employees, has no application in this case, and if you find that the plaintiff assumed the risk of injury from the explosion of the water glass, you will answer the second issue 'Yes.'

"The right of the plaintiff to recover damages in this action is to be determined by the provision of the Federal Employers' Liability Act, enacted by Congress at the session of 1908, and the court charges you that if you find by a preponderance of evidence that the water glass on the engine on which plaintiff was employed was not provided with a guard glass, and the condition of the glass was open and obvious and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and without objection, and that he knew the risk incident thereto, then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes.'"

The court gave this instruction as applicable to the issue of contributory negligence, and instead of the words, "then the court charges you that the plaintiff voluntarily assumed the risk incident to such use, and you will answer the second issue 'Yes,'" used the words, "then the court charges you that the plaintiff was guilty of contributory negligence, and you will answer the third issue 'Yes.'"

"If you find by the greater weight of the evidence that the water glass was defective, and that the plaintiff knew of the condition of the water glass on the engine and the danger incident to its use, and there was open to him a safe way of operating the said engine by using the gauge cocks, and that he voluntarily used the water glass in operating the engine, the court charges you that the plaintiff assumed the risk of injury from the use of the water glass, and you will answer the second issue 'Yes.'"

The court refused these requests for instruction.

His Honor's charge and the defendant's requests for instruction, particularly the second request quoted, present the conflicting views of the doctrine of assumption of risk. The defendant (449) contends that the requested instructions are in accord with, and the charge as given in conflict with, the decisions of the Supreme Court of the United States.

In this I think the defendant is correct. The common-law conception of assumption of risk is still the prevailing doctrine in the great majority of the State courts and in the United States court. Labatt on Master and Servant says:

"The doctrine applied in the older English cases and in all the American cases up to the present time, with a few possible unimportant

exceptions, is that, in the case of all adult servants, except seamen, the actions must be declared not to be maintainable, as a matter of law, if the evidence leaves no reasonable doubt that the servant comprehended the abnormal risk which caused his injury." (Page 7.)

"The doctrine that a servant who has no knowledge, actual or constructive, of an ordinary risk is not chargeable with its assumption, is implied in every jurisdiction in which the principles of the common law are recognized. The logical converse of this doctrine, viz., that a servant is to be regarded as having assumed extraordinary risk of which he had, or ought to have obtained, knowledge before his injury was received, was also applied universally until comparatively recent times, and is still the prevailing rule in the United States." (Sec. 274.)

In support of the above text, the author cites the English cases and decisions of the Supreme Court of the United States and the Federal circuit and district courts and the courts of Alabama, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey (North Carolina does not appear), Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas,
Utah, Vermont, Virginia, Washington, West Virginia, and Wis-
(450) consin. See, also, Labatt, secs. 271, 174a, 276, and 280, and pages 632, 633, 640, and 641.

"In all the English cases decided before the passage of the Employers' Liability Act, the courts proceeded upon the hypothesis that an assumption of an extraordinary risk was properly inferred, as a matter of law, from the mere fact that the servant accepted or continued in the employment with a knowledge of its existence and a full comprehension of the enhanced danger to which he was exposed." (Sec. 280.)

Judge Thompson in his work on Negligence says that if a servant, with knowledge of a defect in a machine which he is employed to operate, continues in the employment without objection or complaint, he is deemed to assume the risk of the danger; that this doctrine is so plain that it could hardly be made plainer by multiplying special statements and explanations. (Sections 4608, 4609.) "It is a part of this doctrine." Judge Thompson says in another section (4707), "that the servant assumes the risks of known defects in machinery, tools, appliances, etc., or of improper appliances furnished for the performance of a particular task, or where no proper appliances are furnished, although the defect or danger results from the negligence of the master, or from the violation of a statute or a municipal ordinance."

In *Butler v. Frazee,* 211 U. S., 459, it is held that "One understanding the condition of machinery and dangers arising therefrom, or who is capable of doing so, and voluntarily, in the course of employment, exposes himself thereto, assumed the risk thereof, and if injury results cannot recover against the empoyer."

In *R. R. v. Archibald,* 170 U. S., at pages 671 and 672, *Mr. Justice White* (now *Chief Justice*) says: "The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employee has a right to rely upon this duty being performed. Whilst in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employee with (451) respect to appliances furnished.

"An exception to this general rule is well established, which holds that where an employee receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used. . . . The employee is not compelled to pass judgment on the employer's methods of business or to conclude as to their adequacy. He has a right to assume that the employer will use reasonable care to make the appliances safe, and to deal with those furnished relying on this fact, subject, of course, to the exception which we have already stated, by which when an appliance is furnished an employee in which there exists a defect known to him, or plainly observable by him, he cannot recover for an injury caused by such defective appliance if, with the knowledge above stated, he negligently continues to use it."

The very case relied upon by the Court to sustain the statement that a servant does not assume the risk arising from the master's negligence refers to the well established exception that the servant does assume the risk of injury resulting from the negligence of the master when the conditions brought about by such negligence are known to the servant and the danger appreciated. *R. R. v. McDade,* 191 U. S., 67.

In *R. R. v. Shalstrom,* 195 Fed., 729, it is said: "Although the risk of the master's negligence and of its effect unknown to the servant is not one of the ordinary risks of the employment which he assumes, yet if the negligence of the master or its effect is known and appreciated by the servant, or is obvious, or 'so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence, and experience,' and he enters and continues in the employment

without objection, he elects to assume the risk of it, and he cannot recover for the damages it causes," citing *R. R. v. Archibald, supra.*

A very comprehensive review of the authorities on this question will be found in *Cordage Co. v. Miller,* 126 Fed., 508, in which *Judge*
(452) *Sanborn* says: "The authorities and opinions to which reference has now been made have forced our minds irresistibly to the conclusion that the following rules of law have become irrevocably settled by the great weight of authority in this country and by the opinions of the Supreme Court, which, upon well settled principles, must be permitted to control the opinions and actions of this Court:

"A servant by entering or continuing in the employment of a master assumes the risks and dangers of the employment which he knows and appreciates, and also those which an ordinarily prudent person of his capacity and intelligence would have known in his situation.

"A servant who knows, or who by the exercise of reasonable prudence and care would have known, of the risks and dangers which arose during his service, but who continues in the employment without complaint, assumes those risks and dangers to the same extent that he undertakes to assume those existing when he enters upon the employment.

"Among the risks and dangers thus assumed are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work and reasonably safe appliances and tools to use.

"Assumption of risk and contributory negligence are separate and distinct defenses. The one is based on contract, the other on tort. The former is not conditioned or limited by the existence of the latter, and is alike available whether the risk assumed is great or small, and whether the danger from it is imminent and certain or remote and improbable.

"The court below fell into an error when it instructed the jury that, although the plaintiff continued in the employment of the defendant by the side of the visible unguarded gearing, with full knowledge that the cogs which injured her were uncovered, still she could not be held to have assumed the risk of working by their side unless the danger from them was so imminent that persons of ordinary prudence would have declined to incur it under similar circumstances."

In Kyner v. Mining Co., 184 Fed., 43, *Mr. Justice Vandevanter,* who was then circuit judge, says: "As respects the first specification of negligence, it conclusively appeared that the absence of the guard
(453) about the drum and lower cable was so patent as to be readily observed; that the enhanced danger arising therefrom was so obvious that its appreciation by the plaintiff was unavoidable in view

of his years, intelligence, and experience, and that under those conditions he voluntarily continues to work about the drum and cable. So, even if the absence of the guard was a negligent omission on the part of the defendant, the court was bound to rule as a matter of law that the plaintiff assumed the risk," citing *Butler v. Frazee,* 211 U. S., 459. See, also, *Brick Co. v. Miller,* 181 Fed., 830; *Katalla v. Rones,* 186 Fed., 30.

It is useless to multiply authorities, because the standard by which assumption of risk will be measured in construing the Federal act is indicated by the language of *Mr. Justice Vandevanter* in *Mondou v. R. R.,* 223 U. S., pages 49 and 50.

In referring to the departures from the common law made by the act, he says: "The rule that an employee was deemed to assume the risk of injury, even if due to the employer's negligence, where the employee voluntarily entered or remained in the service with an actual or presumed knowledge of the conditions out of which the risk arose, is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributed to the injury."

I think his Honor clearly fell into error prejudicial to the defendant in his instruction on the issue of contributory negligence. It is true that issue was answered in favor of the defendant, but the court gave the jury the right to answer that issue in the affirmative upon the finding of facts that clearly entitled the defendant to have the second issue answered in its favor. His Honor confused contributory negligence and assumption of risk in such manner as to be misleading. Referring to the issue of contributory negligence, he says:

"That is governed largely by the same rules as applied to the question of assumption of risk. Did he continue to use the glass gauge when it was so obviously dangerous that a reasonably prudent man careful of himself would not do it? Was the danger so apparent that a reasonably prudent man would cease to use that, and use the other gauge? If so, it would be your duty to answer the third issue 'Yes.'

"But if the danger was not so obvious that a reasonably prudent man, careful of himself, would not realize the danger of using the water glass, and he continued to use it, he would not be guilty (454) of contributory negligence.

"If you find by the preponderance of the evidence that the water glass by which plaintiff was injured was not provided with a guard glass, and the condition of the water glass was open and obvious and was fully known to the plaintiff, and he continued to use such water glass with such knowledge and without objecting, and knew the risk incident

thereto, then the court charges you that the plaintiff was guilty of contributory negligence, and you should answer the third issue 'Yes.' "

In *Schlemmer v. R. R.*, 220 U. S., 590, it is held that: "There is a practical and clear distinction between assumption of risk and contributory negligence. By the former the employee assumes the risk of ordinary dangers of occupation and those dangers that are plainly observable; the latter is the omission of the employee to use those precautions for his own safety which ordinary prudence requires." *R. R. v. McDade,* 191 U. S., 64; Labatt on Master and Servant, pages 747, 749, 767, and 772.

I do not think the opinion of the Court in this case is sound in assuming that if plaintiff gave notice of the absence of the guard glass that alone would be sufficient to relieve him from the charge of assumption of risk. The authorities hold that there must be a complaint and promise to repair, and it must appear that the servant continued to work relying upon the promise. Labatt on Master and Servant, secs. 418-419, and cases cited; *Dailey v. Fiberloid Co.,* 186 Mass., 318; *Hood v. Packing Co.,* 133 S. W., 446.

In discussing the standard by which assumption of risk must be measured in our case, the Court starts out with the statement that a servant never assumes the risk of the negligence of the master, and ends with the authorities to the effect that "the assumption of risk implied from a servant's knowledge that a tool, instrument, appliance, piece of machinery, or place of work is defective or dangerous is suspended by the master's promise to repair.

(455) Without regard to a promise to repair, the court below instructed the jury that a servant does not assume the risk of injury from danger created by the negligence of the master, and he refused to instruct the jury that if plaintiff continued to use the water glass with knowledge of its defective condition and without objection, and knew the risk incident thereto, he assumed the risk of injury.

To say that the employee assumes the risk if he continues to work in the presence of a known danger without objection, and the employee does not assume the risk of the master's negligence, is to assert a proposition and deny it in the same sentence. Yet in the opinion of this Court these two propositions are said to be established by the decisions of the Supreme Court of the United States.

This conflict is noted and is said to be reconciled by imposing upon the employee, if he wishes to be relieved from assumption of risk, the duty of making complaint when he knows of a defect or could discover

it by the exercise of ordinary care, and by referring his conduct, when he does complain, to the principles of contributory negligence, at least for a reasonable time.

In my opinion, this does not reconcile the conflict, because if the servant does not assume the risk of the negligence of the master, it can make no difference whether he makes complaint of the defect or not. If the defect resulted from the negligence of the master, and the risk is not assumed, what is the necessity for making complaint?

The *Hough case,* which the Court says explains this anomaly, is based upon the assumption that there was a complaint by the employee and a promise to repair, and under such circumstances the burden of the risk is shifted to the master for a reasonable time, unless the danger is so obvious that a man of ordinary prudence would not continue to work in the face of it, in which event the assumption of the risk remains with the servant in spite of the complaint and promise.

In our case the evidence of the complaint and promise to repair was in direct conflict, and the instructions requested by the defendant were based upon the jury's finding that the plaintiff had not complained of the condition of the water glass.

In any view of the charge of the court, there are conflicting (456) instructions on material points, and under such circumstances this Court should direct another trial. *Williams v. Haid,* 118 N. C., 481; *Edwards v. R. R.,* 129 N. C., 78; *Westbrook v. Wilson,* 135 N. C., 402.

Cited: *Irvin v. R. R.,* 164 N. C., 19; *Renn v. R. R.,* 170 N. C., 150.

Reversed on writ of error, 233 U. S., 492.

MOODY & MORGAN v. CULLOWHEE MINING AND REDUCTION COMPANY.

(Filed 28 May, 1913.)

Contract—Breach—Measure of Damages—Evidence.

In this action for damages for breach of contract, it is held that the evidence was sufficiently definite to be submitted to the jury upon the admeasurement of damages.

APPEAL by defendants from *Ferguson, J.,* at May Term, 1912, of JACKSON.

Walter E. Moore, Alley & Buchanan, and S. Brown Shepherd for plaintiffs.

C. C. Cowan (by brief) for defendant.

CLARK, C. J. The plaintiffs claim damages by reason of defendant's failure to give them the hauling contracted for, the plaintiffs having gone to considerable expense to equip themselves with team for the work.

There are numerous exceptions, but the controverted matters are substantially as to the facts, and these were properly submitted to the jury. The defendant earnestly contended that there was not sufficient evidence or data from which the jury could find, with any certainty, the amount of damages sustained by the plaintiffs in consequence of the breach of contract, if the jury should find, as they did, that the contract was broken by the defendant, and that the plaintiff was ready and willing to perform his part of the contract. But upon examination of the evidence we find sufficient to go to the jury upon all the issues submitted. After full consideration of the record and the exceptions,

(457) and the very full brief filed by counsel for the defendant, we think the case has been fairly tried, and that the defendant has no cause to complain of error in any of the particulars assigned.

No error.

IN RE W. P. BLACK.

(Filed 28 May, 1913.)

1. Criminal Law—Imprisonment—Separate Convictions—Concurrent Terms—Judgments Void for Uncertainty.

Where a prisoner has been convicted and sentenced to imprisonment for two or several separate criminal offenses, a sentence of the court that each successive term shall commence from the expiration of the term next preceding is not void for uncertainty, but unless this is stated in the judgment, the sentences for the various terms will run concurrently.

2. Criminal Law—Imprisonment—Conditional Pardon—Concurrent Terms—Courts—Record—Habeas Corpus.

Where one convicted of a criminal offense appeals from the judgment, and subsequently withdraws his appeal in open court and commences to serve his sentence, the record made by the court will not prejudice his rights, when upon *habeas corpus* it appears that he had been taken into custody upon the violation of a conditional pardon granted by the Governor, and that the two terms of imprisonment having run concurrently, he had served them both.

In re BLACK.

APPEAL by defendant from order in *habeas corpus* proceedings rendered by *Carter, J.*, at chambers, 27 December, 1912; from BUNCOMBE.

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

Attorney-General and Assistant Attorney-General for the State.

W. P. Brown and J. Scroop Styles for appellant.

BROWN, J. The petitioner Black was brought before the judge, in obedience to a writ of *habeas corpus,* by the Sheriff of Buncombe County, to try the legality of the imprisonment of the petitioner, who was then in prison by virtue of an order of *Long, J.*, at the (458) December Special Term, 1912, of Buncombe.

At the November Term, 1908, of BUNCOMBE the petitioner was found guilty of a nuisance, and was sentenced to a term of 22 months on the public roads, from which judgment he took an appeal to this Court; the judgment was affirmed, and petitioner was taken in execution on said judgment on 2 June, 1909. On 18 January, 1910, petitioner was granted a conditional pardon.

At the July Special Term, 1911, and while petitioner was at large by virtue of said conditional pardon, he was tried for keeping liquor for sale in Buncombe County; was convicted and sentenced to a term of twelve months on the public roads of said county, from which judgment he gave due notice of appeal to the Supreme Court, and entered into the appearance bond required by the court pending such appeal; was released from custody, but the petitioner did not prosecute the appeal.

On 4 August, 1911, petitioner was taken in custody upon the Governor's revocation of the conditional pardon aforesaid, and entered upon the service of the remainder of his said original term of 22 months. At the criminal term of Superior Court of Buncombe which convened on 14 August, 1911, petitioner appeared in open court and gave due notice of the withdrawal of his appeal from the last conviction aforesaid and announced his readiness to serve the term imposed upon said conviction, petitioner being at the time in custody and serving the sentence in the other case.

The presiding judge had no entry made on the docket of August Term, 1911, of the withdrawal of the appeal and of the submission of the prisoner to the judgment and sentence rendered at July special term.

It is admitted, and the judge finds as a fact, that if the sentence in the two cases runs concurrently, the prisoner has served the full term in both cases.

It seems to be well settled by many decisions and with entire uniformity that where a defendant is sentenced to imprisonment on two or more indictments on which he has been found guilty, sentence (459) may be given against him on each successive conviction; in the case of the sentence of imprisonment each successive term to commence from the expiration of the term next preceding. It cannot be urged against a sentence of this kind that it is void for uncertainty; it is as certain as the nature of the matter will admit. But the sentence must state that the latter term is to begin at the expiration of the former one; otherwise, it will run concurrently with it. 25 A. & E. (2 Ed.), 307, 308.

It is absolutely essential that the last sentence shall state that the term of imprisonment is to begin at expiration of former sentence, in order to prevent the prisoner from serving the two sentences concurrently with each other. *U. S. v. Palterson,* 29 Fed., 775; *In re Jackson,* 3 MacArthur (D. C.), 24; *Fortson v. Elbert County,* 150 Ala., 344; *Ex parte Gafford,* 25 Nev., 101; *Ex parte Hunt,* 28 Texas App., 361.

The fact that no entry was made on the records of the court at August term of the withdrawal of the appeal is immaterial.

It is found as a fact that the prisoner appeared in court in person at said term, and through his counsel withdrew his appeal and submitted himself to the sentence of the court. It was the duty of the judge to have then directed the proper entries. The prisoner had no control over the records and did all the law required of him. The oversight of the judge cannot prejudice the prisoner's rights.

As the second sentence failed to state that it was to begin at the expiration of the first, the two sentences ran concurrently.

The prisoner is discharged.

Reversed.

Cited: *Hannah v. Hyatt,* 170 N. C., 638; *S. v. Cathey, ib.,* 796.

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(460)

YADKIN LUMBER CO. v. JOHN M. BERNHARDT.

(Filed 28 May, 1913.)

1. Deeds and Conveyances—Grants—Boundaries—Questions for Court—Questions for Jury.

What are the termini or boundaries of a grant or deed is a matter of law; but where they are is a question of fact. The court must determine the former question, and it is for the jury to ascertain the latter.

2. Same—Natural Objects—Course and Distance.

Where there is a call for natural objects, and course and distance are also given, the former are the boundaries, and the latter merely guides to them; and in applying the principles, where the line of another tract is called for and the same is identified, fixed, and established, such line is considered as a natural object.

3. Same.

Where the call in a conveyance of land is to the line of another tract which is identified, fixed, and established, it will ordinarily control the course and distance given, when in conflict, for they are considered merely as guides to the line called for.

4. Same—Parol Evidence—Questions.

The determination of an action to recover land was made to depend upon the interpretation of the calls in a grant to C., as follows: 100 acres, etc., beginning at a white pine, running thence 10 poles to a white pine, corner of 150-acre tract; thence 86 poles to white oaks, etc., "thence east to a stake in the line of a 50-acre tract"; thence south 96 poles to a stake, etc.; thence west, etc., to the beginning. There was evidence tending to show that C. owned two 50-acre tracts at the time, and to run the line to the corner of one of them would deflect it a little from the course called for in the grant, and extend the line from 167 poles to 308 poles, and by following the course and distance from the point in the remaining calls in the deed it would include the *locus in quo: Held*, the former calls in the grant having been fixed, it was a question for the jury to determine upon proper evidence what 50-acre grant was intended by the call, "east 167 poles to a stake in the line of a 50-acre tract," and they should consider on that question the evidence that C. had a 50-acre grant, to be reached by a slight deflection of the course and extension of the line; and also, as relevant to the inquiry in this case, that the warrant and entry of survey contained as a part of the description, that the grant began at or near the 150-acre grant of C., an admitted point, and included all the land between that and a 50-acre tract which sought to be identified as a line called for in the conveyance relied upon.

APPEAL by defendant from *Lyon, J.*, at November Term, 1911, (461) of CALDWELL.

Ejectment. Plaintiff introduced two grants covering the land in controversy, bearing date 29 December, 1875, and as to such land, connected itself by mesne conveyances with the grantees, and offered evidence further tending to show trespasses on the same by defendant.

"Plaintiff further adduced evidence tending to show that at the time the 100-acre grant, No. 566, was taken out by William Cottrell, James Cottrell had a 25-acre grant immediately east of the northern line of said grant; also a 50-acre grant immediately east of Grant No. 3390; also that William Cottrell had land south of No. 3390, and that the same William Cottrell had a 50-acre grant lying to the south of Grant No. 566. Evidence was also adduced tending to prove that an exten-

sion of the north line of Grant No. 566 from figure 2 by way of 5 east as called for in that grant would strike the James Cottrell 25-acre grant and not the William Cottrell 50-acre grant."

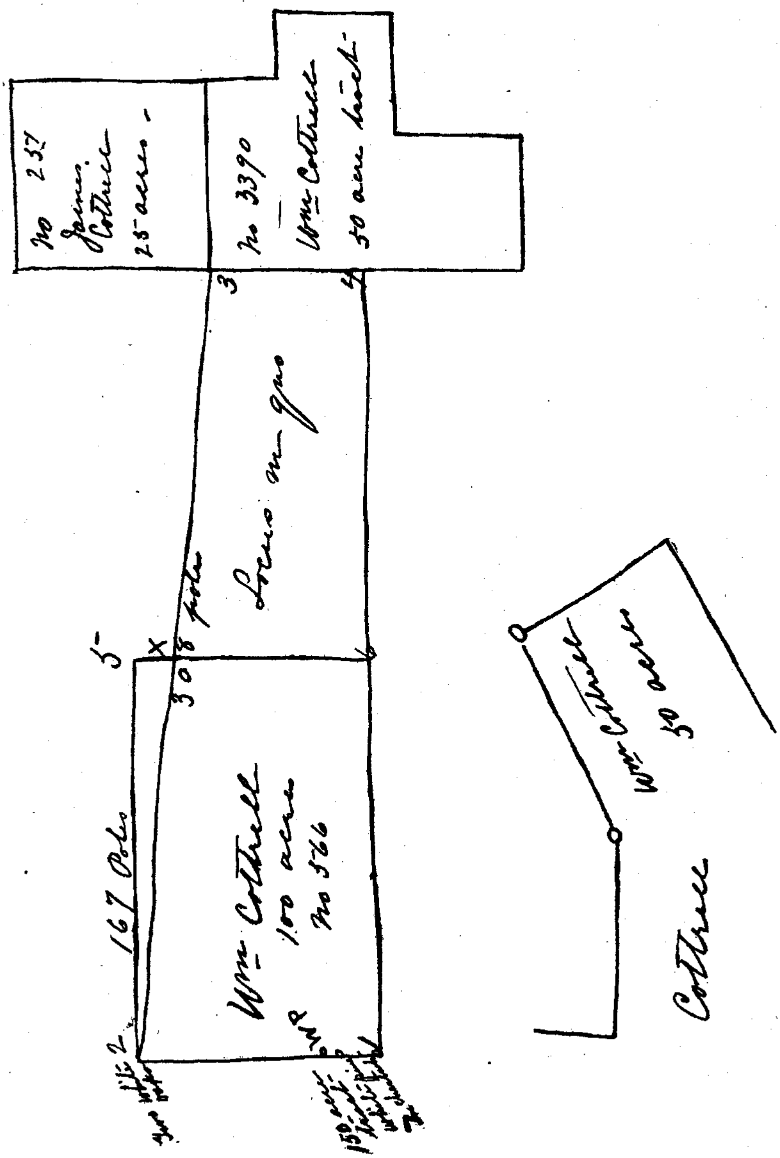
Defendant offered in evidence Entry No. 1333, as follows: "William Cottrell, Sr., enters and locates 100 acres of land on the Long Ridge Branch, waters of Buffalo Creek, beginning at or near his corner of his 150-acre tract, including all the land between the 150- and 50-acre tracts. November 6, 1854." And the warrant of survey on said entry formally stated and certified as follows: "You are hereby directed and required, so soon as may be, to lay off and survey for William Cottrell 100 acres of land on the Long Ridge Branch, waters of Buffalo Creek, beginning at or near his corner of his 150- and 50-acre tracts, entered 6 November, 1854." And the certificate of survey on said warrant, with plat attached to State's Grant No. 566, containing the description, "Begins at a white pine and two chestnut trees by the Falls of Pounding Mill Branch, and runs north 10 poles to a white pine, corner of a 150-acre tract, the same course with the line of said tract 86 poles to two white oaks on the east side of a hill, then east 167 poles to a stake in the line of a 50-acre tract, thence south with that line 96 poles
(462) to a stake in a line running east from the beginning, then with that line west to the beginning."

And Grant No. 566, containing the following calls: "One hundred acres lying and being in the county of Caldwell, on the waters of Buffalo. Begins at a white pine and two chestnut trees by the Falls of Pounding Mill Branch, and runs north 10 poles to a white pine, corner of 150-acre tract, the same course with the line said tract 86 poles to two white oaks on the east side of a hill (then east 167 poles to a stake in the line of a 50-acre tract), thence south with line 96 poles to a stake in a line running east from the beginning, then with that line west to the beginning. Entered 6 November, 1854."

Plaintiff then introduced a grant to William Cottrell for 50 acres, No. 3390, lying entirely from 566.

In order to a better understanding of the questions in controversy and the admissions of the parties, the plat is inserted on opposite page.

Admissions were then made as follows: "That the beginning corner of the grant, No. 566, is marked on the court map at the point 1 with the hand pointing towards it, and that such is the beginning corner of said grant. It is further admitted that the second corner in said grant is at the point marked W. P. on map, 10 poles north of 1, and that such point is a corner of a 150-acre tract. It is further admitted that the third corner of Grant No. 566 is at the point marked 2 W. O., with the hand pointing towards the figure 2, as shown on the court map, and


167 Poles
Wm Cottrell
100 acres
No 566
Wm Cottrell
50 acres
Cottrell

that such point is 86 poles north of the white pine and 96 poles north of the beginning corner—the white pine and two chestnuts by the Falls of 'Pounding Mill Branch'—and that the two white oaks at the figure 2 are on the east side of a hill."

And further: "That the William Cottrell, senior, who obtained a grant for lands represented on the map as Grant No. 566, was the same person as the William Cottrell who obtained a grant of lands shown on the map as Grant No. 3390, for 50 acres. Plaintiff further admits that Grant No. 3390 is correctly located as shown on the map. Plaintiff further admits that the defendant holds proper mesne conveyances from William Cottrell that constitute a good paper title, noth-
(464) ing else appearing, to such lands as are properly covered by Grant No. 566."

It will thus appear that *locus in quo* as represented on the above plat is included within the letter X and figures 3, 4, 6, and if Grant 566 under which defendant claims is "to be correctly located in exact accord with course and distance," it would be represented on the map by the figures 1, 2, 5, 6, and would not include this land, but if it may be and is properly extended to the William Cottrell 50-acre grant, No. 3390, making the northern line 308, instead of 167 poles, it would then include the land in controversy and be represented on the plat by the figures 1, 2, 3, 4. On the facts in evidence, the court held and so charged the jury, that in locating the defendant's Grant No. 566, the course and distance would control, and the defendant's title, more especially in reference to running the call east 167 poles under the same, would stop where the distance gave out and go where the course carried it, regardless of the additional call, "to the line of a 50-acre tract," the court holding that such addition to the call is too indefinite to affect the location, etc. There was verdict for plaintiff establishing the lines at 1, 2, 5, and 6. Judgment on the verdict, and defendant appealed.

Councill & Yount and Edmund Jones for plaintiff.
Lawrence Wakefield and Mark Squires for defendant.

HOKE, J., after stating the case: In *Tatem v. Paine,* 11 N. C., 64, it was held: "*What* are the termini or boundary of grant or deed is matter of law; *where* these termini are is matter of fact. The court must determine the first, and to the jury it belongs to ascertain the second. Where there is a call for natural objects, and course and distance are also given, the former are the termini, and the latter merely points or guides to it; and, therefore, when the natural object called for is unique, or has properties peculiar to itself, course and distance

are disregarded; but where there are several natural objects equally answering the description, course and distance may be examined to ascertain which is the true object; for in such case they do not control a natural boundary, but only serve to explain a latent (465) ambiguity."

The principles embodied in this statement have been frequently approved in our decisions, as in *Lumber Co. v. Hutton,* 159 N. C., 445; *Sherrod v. Battle.* 154 N. C., 346; *Mitchell v. Welborn,* 149 N. C., 347; *Whitaker v. Cover,* 140 N. C., 280; *Fincannon v. Sudderth,* 140 N. C., 246; *Bonaparte v. Carter,* 106 N. C., 534; *Murray v. Spence,* 88 N. C., 357; *Corn v. McCrary,* 48 N. C., 496; *Campbell v. Branch,* 49 N. C., 313. From these and many other cases on the subject, it will appear further that in reference to course and distance the call in deed for the line of another tract of land is to be considered and dealt with as a natural object, and, applying the doctrine, it may be taken as a fully established position in our law of boundary, "That where the line of another tract is definitely called for as one of the termini of a call in a grant or deed, and this line is fixed and established, it will control a call by course and distance." *Lumber Co. v. Hulton, supra; Whitaker v. Cover, supra; Fincannon v. Sudderth, supra.*

It will be noted that in order to the proper application of this principle, the line called for must be "identified, fixed and established," or the position does not govern; but when the conditions exist which call for its application, it is then not a question of whether the writer of the deed or the parties to it intended to take in so much land or to extend the line of the principal deed to so great a length, but, in the language of *Henderson, J.,* in *Tatem v. Sawyer, supra,* "Where there is a call for natural objects, and course and distance are also given, the former are the termini and the latter merely points or guides to it." And if the line is properly fixed and established pursuant to recognized rules it makes no difference whether it was marked or unmarked. *Corn v. McCrary,* 48 N. C., 496.

The learned judge who tried the cause was no doubt familiar with the principle to which we have referred, but held that it should not prevail in this case, being of opinion that the call of defendant's grant and deeds, to wit, "thence east 167 poles to a stake on the line of a *50-acre* tract," was too indefinite to permit the reception of (466) parol testimony either to identify or place the corner. But the authorities more directly relevant do not sustain this view. Thus in *Lawrence v. Hyman,* 79 N. C., 209, the call of the deed was, "Begin-

ning at the north corner of the store," the store standing equally east and west and having two north corners, held that the case presented a latent ambiguity, to be explained by parol testimony.

In *Graybeal v. Powers,* 76 N. C., 66, the call in dispute was, "thence S. 33 West 100 poles to a stake in Simeon Graybeal's line," and it was held, among other things:

1. A call for the line of another tract of land is "a natural boundary," and controls course and distance.

2. In running the call, the line must be run straight, so as to strike the line called for, making as small a departure as may be from the course and distance called for in the grant.

3. Where there are two lines answering the call, the jury, in determining which is meant, may consider the circumstance that lines were run by the surveyor and corners made at the time of the survey, leading to one of them.

And, speaking more directly to the facts, *Pearson, C. J.,* delivering the opinion, said: "In our case there is a natural boundary, 'Simeon Graybeal's line,' but it so happens that Simeon Graybeal owned two tracts, one a 30-acre tract, which I will call Tract No. 1, and another tract which I will call Tract No. 2, lying west of Tract No. 1, and distant from it some 30 or 40 poles. It is evident from that plat that 'the Simeon Graybeal line' called for is either the north or south line, bounding Tract No. 1 on the west and marked C D, or it is the north and south line, bounding Tract No. 2 on the east and marked F E. Which of these two lines is the one that is called for is 'the governing fact in the location of the defendant's grant,' and ought to have been distinctly left to the jury with instructions to consider all the evidence and the surroundings of the case, including the marked line and corners, etc."

Again, in *Topping v. Sadler,* 50 N. C., pp. 357-359, the call was, "thence southerly 80 poles to the patent line, thence with the patent line," etc., and it was held: "Where one of the calls in a deed was for a patent line, and there was one patent proved, a line of which (467) would be reached by extending the line in question beyond the distance called for, and no other patent was alleged to be near the premises, it was held that the call was sufficiently definite to allow the extension of the line to the patent line."

The former corners of the William Cottrell 100-acre Grant No. 566 having been fixed, a proper application of the principle of these decisions will require that on the call of said grant, "then east 167 poles to a stake in the line of a 50-acre tract," the question be submitted to a jury to determine what 50-acre grant was intended and where the same

is properly placed, and on considering the question, the fact that the same William Cottrell had a 50-acre grant to be reached by a slight deflection of the course and extending the line from 167 poles to 308 poles, and that both on the entry and warrant of survey of Grant 566 for 100 acres as part of the description, "beginning at or near the corner of his 150-acre tract, including all the land between the 150- and 50-acre tracts," are circumstances relevant to the inquiry. If the jury are unable to identify the 50-acre tract called for or to satisfactorily place the same, the courses and distances as given in the grant should prevail.

For the error in excluding the testimony, defendant is entitled to a new trial, and it is so ordered.

New trial.

CLARK, C. J., dissenting: Grant No. 566 contains the following calls: "100 acres lying and being in the county of Caldwell, on the waters of Buffalo. Begins at a white pine and two chestnut trees by the Falls of Pounding Mill Branch, and runs north 10 poles to a white pine, corner of 150-acre tract, the same course with the line of said tract 86 poles to two white oaks on the east side of a hill (then east 167 poles to a stake in the line of a 50-acre tract), thence south with line 96 poles to a stake in a line running east from the beginning, then with that line west to the beginning. Entered 6 November, 1854."

It was admitted that the beginning corner of Grant No. 566 (468) as marked on the map, at the point 1, is the true beginning, and that the second corner is at the point marked W. P. on the map, 10 poles north of 1, and that such point is the corner of 150-acre tract. It was further admitted that the third corner of Grant 566 is at the point marked 2 W. O., and that such point is 86 poles north of the white pine and 96 poles north of the beginning corner—the white pine and two chestnuts by the Falls of "Pounding Mill Branch"—and that the two white oaks at the figure 2 are on the east side of a hill.

There was no difficulty whatever in locating the grant according to course and distance, especially with these points admitted. The court properly charged that, under these circumstances, "course and distance control, and that the defendant's title to the 100-acre grant would stop wherever the distance gave out and would go where the course carried it, regardless of the additional call, 'to the line of a 50-acre tract'; the court holding that that addition to the call was too indefinite, and the jury should find as a fact on the evidence that the corner was where the distance gave out and where the course went to.

Surely this cannot be error, when to consider the additional call, "to the line of a 50-acre tract," would make the call indefinite and uncertain, and indeed render uncertain that which before was certain.

It has been universally held by this Court in a line of decisions beginning as far back as *Harry v. Graham,* 18 N. C., 76; and continuing to the present, that "the course and distance called for must control unless there is another call *more definite and certain than course and distance.*"

The additional call here is "to a stake in a 50-acre tract." This could not possibly be made more indefinite nor uncertain. It is a call for an unfixed and unmarked point and in no particular grant. The grant is not even designated by the name of a grantee. There is evidence that there are three 50-acre tracts near this grant. One is east, though it is marked 25 acres; another a little south of east, which the defendant wishes the jury to guess is the one intended, and an-
(469) other nearly southeast. Indeed, "50-acre" tracts in that section are known to be as thick as the traditional blackberry.

Besides, there is no evidence whatever that the lines of the 50-acre tract which the defendant "guesses" is the correct one had been surveyed at the time that Grant No. 566 was taken out. It was stated on the argument that in fact it had not been, but that merely the east line thereof had been laid down on a plat. As the first line of said grant was on the east side of it, the west line of that tract, which would be the line in which the "stake" would necessarily be, could not be designated, and there was nothing to show the shape of said tract or where the west line would be found.

It is impossible to find a more uncertain call than for a stake, in the unsurveyed west line, of *a* 50-acre tract, which is not identified, whose owner is not even known, and the shape of which was not indicated. The west line, when finally surveyed, might be nearer or farther from the east line of said tract. The owner of the tract is not named, the west line is not located, and *"a* 50-acre tract" is common in that section, and three of them are shown in this evidence to be somewhere more or less east of Grant No. 566.

It is true that in *Cherry v. Slade,* 7 N. C., 82, the Court held that when the boundary of another tract is called for it would be considered a natural boundary and more certain than course and distance, *"provided it be sufficiently established."* In *Lumber Co. v. Hutton,* 152 N. C., 537, the Court held that when the course, distance, number of acres, and plat are more definite, and the application of the call for the boundary of another tract was inconsistent, the latter must give place to the former, for "the reason for the rule had ceased." The rule in

Cherry v. Slade is not a statute, neither is there any sacredness attaching to it. It was simply a judicial expression of the opinion that when under the circumstances the boundary of another tract offered more certainty than the other descriptions, the call for the boundary should govern.

In *Lumber Co. v. Hutton,* 159 N. C., 445, it was held that the call for the boundary should govern, because additional evidence had been offered on the second trial, which showed that the boundary of another tract was "a well recognized and established line," and was so found to be by the jury. But even then there were two dissent- (470) ing opinions, for the result had been to give the grantee fourteen times the acreage named in his grant and plat. That surely should have been the *ultima thule* of the doctrine; but if we are now to hold that, notwithstanding definite courses and distances and admitted corners, the call for a stake in the unmarked boundary of an unlocated tract of an indefinite owner is to govern by the force of attraction, then indeed we are on a boundless and uncharted sea, without course and distance, and with the compass diverted from its direction by a power without limit and an attraction beyond calculation.

The general rule has always been that land must be located according to the primary calls of the deed, unless there are others more certain, and that an uncertain description should yield to one which is certain and less liable to disappoint the intention of the parties. In the case at bar the call for a stake unmarked in the line of *"a* 50-acre tract" is not a more certain call and does not bring this case within the exception to the well-known general rule that course and distance will govern, *unless* the line of another tract which is "known and established" is called for. To grant the defendant's contention gives him 200 acres instead of the 100 which the State granted him and which is all he paid for.

Cherry v. Slade is not a general rule, but it is *an exception to the general rule,* and is only to be applied in those cases in which such exception is called for by reason of its furnishing greater certainty. The exception should not destroy and swallow up the rule. The description about which there is the least liability of error should be adopted, to the exclusion of the other. *Campbell v. Branch,* 49 N. C., 313.

There was no evidence by which the jury could locate "a" 50-acre tract called for in the defendant's grant, nor any evidence that the west line of such tract, nor any line thereof, had been run and marked. The course and distance in Grant No. 566 were not only the most certain

means, but indeed the only means by which said grant could be (471) located, and his Honor properly told the jury to follow the definite courses and distances therein given.

BROWN, J., concurs in dissent.

Cited: Boyden v. Hagaman, 169 N. C., 203; *Power Co. v. Savage,* 170 N. C., 628, 633; *Gray v. Coleman,* 171 N. C., 347; *Nelson v. Lineker,* 172 N. C., 282.

BALL-THRASH & CO. v. A. H. McCORMICK.

(Filed 28 May, 1913.)

1. Judgments—Nonsuit—Evidence, How Considered.

The notes sued on in this action were indorsed to a bank, and there being evidence that the plaintiff had taken them up from the bank before the commencement of the action thereon, and also evidence *contra,* and plaintiff's appeal being from a judgment of nonsuit, it will be assumed that the plaintiff's evidence on that question is true.

2. Evidence—Book Entries—Nonsuit.

Book entries are generally incompetent except for the purpose of refreshing the memory of the one who made them; and where the appeal is from a judgment of nonsuit, and the entries are offered by the defendant with evidence *per contra* to disprove the transfer of a note before suit was brought, they become immaterial under the rule that, in such cases, the evidence is to be viewed in the light most favorable to the plaintiff.

3. Judgments—Nonsuit—Erroneous in Part—Practice.

Where a judgment of nonsuit has been entered in a suit to recover upon a certain note, also involving the question of a lien, it becomes unnecessary to consider the plaintiff's right to the lien when it appears that there was error committed in allowing the judgment of nonsuit regarding the recovery upon the debt.

4. Actions—Notes—Pledgor—Parties.

A holder of a note, who has deposited it at a bank as collateral security to his own note given for borrowed money, may sue and recover from the maker of the collateral note, if he pays his debt to the bank before the trial or judgment rendered, takes up the collateral note, and produces it at the trial so that it may be canceled for the protection of his debtor, without making the bank a party to the action.

5. Same—Judgments—Payments Into Court—Practice—Cancellation.

Where a holder of a note has pledged it as collateral to a note given by him for borrowed money, he still has at least a distinct beneficial or

equitable interest in the note pledged, and is a real party in interest (Revisal, sec. 400), and may sue thereon without making the pledgee a party, if he produces the note in court, so that a judgment may be so framed as to protect the rights of his debtor, if he pays the judgment; and for the protection of all the parties, the court should order the note in the hand of the plaintiff to be deposited with the clerk for cancellation upon its payment.

6. Parties, Defect of—Objections and Exceptions—Practice—Nonsuit.

Objection in a suit upon a note pledged by the payee as collateral, that the pledgee was a necessary party to the action, must be taken by demurrer when the defect of parties is apparent upon the face of the pleadings; and when not thus apparent, it must be taken by answer; and a judgment of nonsuit based upon defect of parties is erroneously granted.

APPEAL by plaintiff from *Bragaw, J.*, at January Term, 1913, (472) of BUNCOMBE.

Action upon promissory notes. The evidence tended to show that plaintiffs, at the request of defendants, installed a heating plant in their residence for the price of $684. When the work was completed, 10 January, 1911, the defendant A. H. McCormick gave to plaintiffs his three promissory notes, each in the sum of $288, and due, respectively, thirty, sixty, and ninety days after their date. Plaintiffs indorsed the notes for value to the American National Bank of Asheville, N. C., the bank discounting the same 11 January, 1911, and afterwards the first note was paid and $50 paid on the other two notes in December, 1911. The defendants, A. H. McCormick and wife, having refused to pay the other two notes, plaintiffs were notified by the bank that they would be expected to take care of them, and thereupon plaintiffs gave to the bank their notes for the full amount of the balance due, and the two notes of defendants to the plaintiffs were deposited with the bank as collateral security. The evidence was conflicting as to when this was done, whether in 1911, before this action was commenced, or in February, 1912, after it was commenced, the summons having been issued and served on 10 January, 1912. There was much evidence (473) taken as to the quality of the heating plant, but, in the view we take of the case, it is not necessary that it should be stated here. The court, at the close of the evidence, having intimated that plaintiffs could not recover, they submitted to a nonsuit and appealed.

Lee & Ford for plaintiffs.
James H. Merrimon for defendants.

WALKER, J., after stating the case: As the evidence was conflicting upon the question whether the two unpaid notes were taken up by

plaintiffs in 1911 or in February, 1912, after this suit was brought, we must assume, in favor of plaintiffs, that it was during the former year, as the evidence must be considered in the best light for them, drawing all reasonable inferences therefrom necessary to sustain their case, and rejecting the defendant's testimony, which is adverse to the plaintiffs. *Brittain v. Westhall,* 135 N. C., 492; *Freeman v. Brown,* 151 N. C., 111; *Deppe v. R. R.,* 152 N. C., 79; *Boddie v. Bond,* 154 N. C., 359. We do not think the learned judge could have rested his opinion upon the testimony of the defendant's witness, as to the entries in the bank books, as he did not make the entries, and the clerk, who did make them, was then in the bank and perfectly accessible as a witness. *Justice Reade* said in *Sloan v. McDowell,* 75 N. C., 29: "The entries of a merchant's clerk are not evidence against a third person. It would be very dangerous if they were. They are not under oath and are not subject to examination. The clerk himself must be produced. If his memory be at fault, it may be that he can refresh it by his entries—that is all." But we need not pass upon the competency of this testimony, for the court, as we have seen, could not force a nonsuit of the plaintiffs upon the defendant's evidence, even if it was competent. *Boddie v. Bond, supra.*

The question then is, and we presume this is the one the judge decided, Can the plaintiffs as pledgors of the notes to the bank, as collateral security, mantain this action without the presence of the bank as a party? We must premise that it appears from the evidence (474) that the note of plaintiffs to the bank was paid and the collaterals taken up before the trial of this case, that is, in November, 1912, the trial having occurred at January Term, 1913. It was not denied that plaintiffs had paid the notes and were the legal and equitable owners thereof at the time of the trial, and one of defendant's witnesses testified that they were paid in November, 1912.

We need not consider the question as to the validity of the lien, as the plaintiffs were, at least, entitled to a judgment for the debt, if entitled to recover at all, and the nonsuit deprived them of this right. Two issues were submitted: one as to the debt, and the other as to the lien, and plaintiffs must have failed in their proof as to both before we can hold that the opinion of the judge was correct and the nonsuit proper.

The bald question, therefore, is, Can a pledgor, who has deposited notes with a bank as collateral, sue and recover upon the same, if he pays his debt, takes up the collateral notes and produces them at the

trial, so that they can be canceled for the protection of the debtor? We will answer this question in the affirmative, as we think it is in accordance with principle and authority.

First, let us consider the nature of a pledge. It has been well defined in the leading case of *Doak v. Bank,* 28 N. C., 309, with reference to a transaction very much like the one presented in this case. "A mortgage of personal property in law differs from a pledge; the former is a conditional transfer or conveyance of the property itself; and if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in a mortgage of lands; the latter, a pledge, only passes the possession, or at most is a special property in the pledge, with the right of retainer, until the debt is paid. A mortgage is a pledge and more, for it is an absolute pledge, to become an absolute interest, if not redeemed in a certain time. A pledge is a deposit of personal effects, not to be taken back, but on payment of a certain sum, by express stipulation, to be a lien upon it. *Jones v. Smith,* 2 Ves. Jun., 378; 4 Kent Com., 138 (3 Ed.); 2 Story Eq., 227. Generally speaking, a bill in equity to redeem will not lie in behalf of a pledgor or his representatives, as his remedy is at (475) law, upon a tender of the money. 2 Story Eq., 298; 1 Ves., 298. We see that there is a very marked difference between a mortgage and a pledge of personal property." The pledgor, therefore, has a distinct interest in the thing he has pledged, and having it, there is no reason why he should not have a remedy in the court for its protection, for when there is a right, there is said to be always a remedy. It may be replied that if he is allowed to sue and recover, the debtor may be subjected to a double payment; but not at all, for reason tells us, and the cases show, that the court will so shape the judgment as to protect both the debtor and the pledgor, and this can the more easily be done under our reformed procedure. There are three ways by which the debtor and the pledgor can be protected: first, by making the pledgor a party plaintiff, if he is willing, or if not, then a party defendant; second, by providing in the judgment that the money collected under the process to enforce the judgment shall first be applied to the discharge of the debt due the pledgor; and, third, by the pledgor redeeming his pledge before the trial and judgment, as was done in this case. It will not do to answer that the pledgee was not made a party in this case, for that would be only an objection based upon a defect of parties, which cannot be taken by a nonsuit, but only by demurrer or answer, and if the defect appears, the court will order the proper party to be brought in by process. This was expressly held to be the result of the reformed procedure in *Carpenter v. Miles,* 56 Ky., 598, a case resembling this

one in its facts. There the Court said: "A defect of parties, apparent upon the face of the petition, is cause for demurrer; and when not thus apparent, is an objection to be taken in answer. (Civil Code, sec. 123.) An answer presenting such objection may be regarded as a dilatory plea; not, however, resulting, even when sustained by proof, in a dismissal or abatement of the action, but furnishing a ground for an order of court requiring the additional parties to be made on pain of dismissal without prejudice." It appears that the plaintiff had retained a valuable interest, as pledgor, in the collateral notes, and was a "real party in interest," within the meaning of Revisal, sec. 400, and (476) had at least an equitable or beneficial interest, if not the legal title, and such an interest may form the basis of an action to recover the property in which it is claimed. *Murray v. Blackledge,* 71 N. C., 492; *Farmer v. Daniel,* 82 N. C., 152; *Condry v. Cheshire,* 88 N. C., 375; *Taylor v. Eatman,* 92 N. C., 601, and other cases cited in Pell's Revisal, sec. 400.

But it has been expressly held that the pledgor may sue for the property before paying the debt. The plaintiff and pledgor, in *Wells v. Wells,* 53 Vermont, 1, brought a suit against defendant, pledgee, for equitable relief. The bill was dismissed because there was an adequate remedy at law by action for the property pledged, the Court saying: "And here it is to be remarked, that the fact that the note and mortgage were held by the defendants as collateral did not stand in the way of the orators proceeding, either by suit at law or the note or by foreclosure on the mortgage, if they deemed it for their interest to have the note or the mortgage, or both, enforced earlier than the defendants saw fit to proceed in that behalf. See Am. Law Review, Oct., 1880, p. 693. The court would see to it that the rights and interests of the pledgee were protected in reference to the collateral, at the same time that the pledgor was acting in regard to his own existing revisionary interest in the pledge, by the proceeding to enforce it, as against the debtor in the pledge."

The writer of the article in the American Law Review, referred to in that case, states the law to be that the pledgor has an interest in the thing deposited in pledge, and is not restricted to the remedy of tender or repayment, and the pledgee will be protected in his rights by an order that he shall be first paid out of the fund derived from the sale of the property pledged or its collection, if a note. So it was held in *Fisher v. Bradford,* 7 Me., 28, that the pledgor of a note might recover against his debtor, the maker, when he had sued upon it and had paid his debt to the pledgee before the judgment was entered. The case is directly in point, and the syllabus, which fairly states the point de-

cided, reads as follows: "The payee of a negotiable promissory note, having indorsed it in blank and delivered it in pledge to another, as collateral security for his own debt, has still the right to (477) negotiate it to a third person, who may maintain an action upon it in his own name as indorsee, the lien of the pledgee being discharged before judgment." *Elec. Ry. Co. v. Bank,* 65 Ark., 543, is a strong case against the action of the court in the case at bar, and there it is said: "Counsel insist that the receiver of the bank should not be allowed to recover in this action on certain notes embraced in the decree, because these notes at the commencement of the suit were, as the receiver admits, in the hands of a St. Louis bank which claimed to hold them as collateral security for a debt due the latter bank. It seems that, after the suit was commenced, the St. Louis bank and the receiver reached an agreement by which the notes were returned to the receiver, and the latter filed them in court for cancellation when the decree herein was taken. This defense, it must be agreed, is extremely technical, so much so that counsel seem to concede that, if all the parties were solvent, this plea would hardly merit attention, but the apology offered for the interposition of this defense is that the insolvency of the corporation destroyed the right to make a transfer of claims to be used as a set-off. Since we have determined, however, that the street car company is entitled to no affirmative relief against the receiver, it has nothing to lose on this score."

What should have been done here for the protection of all parties was to require the notes in the hands of the plaintiff to be deposited with the clerk of the court for cancellation, as is generally done in other actions upon such securities. *O'Kelly v. Ferguson,* 49 La. Ann., 1230, gives us the rule of the civil law: "Until the debtor be divested from his property (if it is the case), he remains the proprietor of the pledge, which is in the hands of the creditor only as a deposit to secure his privilege on it," and thus applies it: "They (pledgors) maintain that having placed the notes in the hands of the plaintiff, they were themselves either powerless to take out remedial process against their lessees, or that it was not their duty to do so. The fact that the defendant transferred the notes to the plaintiff as collateral did not, in our opinion, withdraw from them the power of protecting (478) their interests by proceedings against the makers of the notes. Notwithstanding the pledge, they were still owners of the notes. . . . We see no obstacle in the way of the lessor's (pledgor's) having recourse directly to conservatory proceedings to protect his interests. He could legally make all the allegations necessary to that end and procure the necessary proof on the trial. It would not be essentially necessary for

the purpose that he should be in actual possession of the notes." We see that rule of the civil law, in regard to the nature of a pledge and the interests of the respective parties, corresponds with our law as stated in *Doak v. Bank, supra.* The same objection as we are now considering to plaintiff's right to sue and recover upon the pledged notes was raised upon similar facts in the recent case of *Gilman v. Heitman,* 137 Iowa, 336; but the Court overruled it, and in doing so said that the pledgor never ceased to be equitable owner of the note given in pledge, and that the pledgee held the legal title and right to possession merely as security for the payment of his own debt. It followed, said the Court, that the pledgee and other lien holders would not be prejudiced by permitting the pledgor to sue and obtain judgment upon the note he had delivered to his creditor in pledge. The Court then held that the pledgor could maintain the action upon the note and mortgage which secured it, notwithstanding they had been pledged to another as security for a debt, especially in the absence of any valid objection by the pledgee. Under such circumstances, said the Court, the existence of the pledge is not a matter of which the appellee can avail himself to resist the enforcement of the lien against the mortgaged property (which had been pledged). The Court held in *Bank v. McKinster,* 11 Wend. (N. Y.), 473, that the pledgor of a note was still the general owner and the pledgee the special owner, and the former could maintain an action against a bank, with which the pledgee had deposited the note for collection, for a breach of its duty to collect, and that either the pledgor or pledgee might bring the suit. Other cases bearing more or less upon the question are *Greer v. Woolfalk,* 60 Ga., 623; *Hewitt v. Williams,* 47 La. Ann., 742, 746; *Insurance Co. v. Lozano,* 39
(479) *ibid.,* 321, 322; *Simon v. Wildt,* 84 Ky., 157; *Guest v. Rhine,* 16 Texas, 549.

If we consider the pledgee as the legal owner of the collateral, he holds it in trust, first, for himself, and then for the pledgor. If the debt for which the property is pledged be less than the value of the latter, the pledgor has not only a technical interest as a beneficiary, but a substantial one, and he is also a beneficiary in the sense that he will be entitled to the thing pledged upon payment of his debt. When he sues to preserve and protect his interest in the pledge, the court may so proceed or so mould its judgment or decree as to protect all parties concerned. Our present system of pleading and practice is elastic enough for this purpose. Its liberal procedure, it has been said, would in some respects shock a lawyer bred in the old school, but it is convenient, sensible, and in every way worthy of universal adoption. The common-law objection that its procedure and judgments are impossible

"is simply absurd; the thing *is* done, and is therefore possible." Pomeroy's Rem. and Remedial Rights (1876), p. 153, note 3, referring to the "divided" judgment in *Gradwohl v. Harris,* 28 Cal., 150.

The nonsuit taken in deference to an erroneous opinion as to the law of the case, is set aside.

New trial.

Cited: *Hodges v. Wilson,* 165 N. C., 327; *Lloyd v. R. R.,* 168 N. C., 649; *Ball v. McCormack,* 172 N. C., 678.

J. D. GREGG v. BOARD OF COMMISSIONERS OF RANDOLPH COUNTY.

(Filed 28 May, 1913.)

1. Bond Issues—School Districts—Separate Readings—"Aye and No" Vote—Amendments—Constitutional Law—Excluding Districts.

An act empowering special school districts of the State to issue bonds in accordance with a certain method, passed its various readings on separate days, upon "aye" and "no" vote, following the requirements of Article II, sec. 14, except that upon its last reading, by amendment, it was made to apply only to one district in the State: *Held,* the effect of the amendment being to exclude the other districts, and the act being regularly enacted as to the one district retained, is valid as to that district.

2. Bond Issues—Legislative Authority — Constitutional Law — Amendments Immaterial—Concurrence.

Where an act for the issuance of bonds has been passed in accordance with the provisions of Article II, sec. 14, of the Constitution by both branches of the Legislature, and the second branch thereof acting on the bill has passed an amendment which does not increase the amount of the bonds or tax to be levied, or otherwise materially change the bill, the amendment is valid when concurred in by both of the legislative branches, and it does not affect the constitutionality of the act.

3. Bond Issues—School Districts—Orders of County Commissioners—Petition—Voting Districts.

In accordance with legislative authority the commissioners of Randolph, upon petition made for the issuance of bonds for Liberty School District, in that county (Revisal, sec. 4115), ordered the election to be held in the town of Liberty, on a certain date, appointing a registrar and poll-holders. In construing the order of the commissioners in connection with the petition, it is *Held,* that the election was ordered for the district, the polling place being within the town of Liberty; and the election is held valid on this and the further ground that it does not appear that any citizen affected by the election was deprived of his right to vote therein.

4. Public Officers—Presumptions—School Districts—Bond Issues—Sufficiency of Petition—Interpretation of Statutes.

There is a presumption in favor of the legality and regularity of the acts of public officers, and where an election, authorized by statute, has been ordered by the board of county commissioners for a bond issue for a special school district therein upon a petition of its citizens (Revisal, sec. 4115), and the act itself provides that "the ordering of such election by the board of county commissioners shall conclusively presume that all precedent conditions of this act have been complied with," objection cannot be sustained that the petition was insufficient, in the absence of evidence rebutting the presumption.

5. Bond Issues—School Districts—Injunctions—Nonuser of Power—Interpretation of Statutes.

In this cause an injunction is sought against the issuance of certain bonds for a special school district, upon the ground that the lapse of time in proceeding to issue the bonds after the election was such as to forfeit the right. There was no provision of the act limiting the time for the issuance of the bonds, and in the absence of evidence of abuse of power, it is *Held*, that there is no valid reason for the issuance of the restraining order.

(481) APPEAL by plaintiff, from RANDOLPH, *Long, J.*, at chambers, 26 April, 1913, who refused to continue a restraining order to the hearing.

This is an action brought by the plaintiff, a resident taxpayer of Liberty School District in Randolph County, to restrain the issuance and sale of the bonds of said district, the defendants having prepared said bonds for issuance and offered the same for sale. The defendants claim the right to issue said bonds under the authority of chapter 465 of the Private Acts of 1911, and an election held pursuant to said act. The court denied plaintiff's motion for an injunction, and plaintiff appealed.

The act, as introduced in the House of Representatives, applied to the whole State, and provided for holding elections in special school districts on the question of issuing bonds for school purposes, the election to be ordered by the county commissioners upon petition of one-fourth of the freeholders of the district, indorsed by the county board of education.

The act passed the House of Representatives on three several days, and on the second and third readings there was an "aye" and "no" vote, which was entered on the Journal.

In the Senate, the act passed the three readings on separate days, and on the second and third readings the "ayes" and "noes" were called and entered on the Journal. On the third reading in the Senate an amendment was adopted, limiting the operation of the act to Liberty

School District in Randolph County, which amendment was concurred in by the House of Representatives, but without an "aye" and "no" vote.

At the meeting of the board of county commissioners of Randolph County, held on 7 August, 1911, the following petition was presented to the said board:

To the Board of County Commissioners of Randolph County:

We, the undersigned freeholders, within Liberty School District, in Randolph County, a special school district formed by the county board of education of said county, heretofore, as prescribed by section 4115 of the Revisal, respectively petition your board to grant (482) and provide an election to be held under and in accordance with an act of the General Assembly of North Carolina at its regular session in the year 1911, entitled "An act to authorize the issuance of bonds by Liberty School District in Randolph County," upon the question as to whether bonds shall be issued by said district for school purposes, as in said act provided, in the amount of eighty-five hundred dollars ($8,500), to bear interest at the rate of 5 per centum per annum, payable semi-annually, to mature twenty years from date of same, which said bonds shall not be sold for less than par value.

And your petitioners further ask that, in case the issuance of bonds be authorized at an election held in accordance herewith and actually issued, there be levied and collected an amount of tax sufficient to pay the interest on said bonds and provide a sinking fund to pay the same at maturity.

This 25 July, 1911.

Signatures: J. ROM SMITH (and others).

J. H. JOHNSON.

Said petition having been indorsed and approved by the board of education of Randolph County, the following order was made by the board of county commissioners, being indorsed on the petition itself, to wit:

Election granted and ordered to be held in the town of Liberty, on 12 September, 1911. C. R. Curtis is hereby appointed registrar and J. C. Kirkman and R. C. Troy poll-holders.

H. T. CAVINESS,

Chairman Board of County Commissioners.

And the said petition and order were recorded in the minutes of the said board of commissioners.

The town of Liberty is embraced within Liberty School District, though the town and the district are not coterminous. The usual polling place for the town was and is the place where the election was held under the aforesaid order, and also at the place where the polling or voting was done at the only election ever held in Liberty District prior to that time and the said election held in pursuance of said order
(483) aforesaid was in all respects conducted as an election for the said Liberty School District.

At the election held pursuant to said order of the board of county commissioners a majority of the qualified voters voted "For Bonds"; and on returns of said election being made to the said board of county commissioners, it was adjudged by said board that the election had been carried in favor of the issuance of the bonds, and it proceeded to make arrangements for the issuance thereof, and have prepared bonds in the sum of $8,500 of the said Liberty School District in Randolph County, for school purposes in said district, pursuant to the said act, petition, order, and election, and are now offering said bonds for sale.

The contentions of the plaintiff are:

1. That the act is void because not read three times in each House on separate days after the amendment was adopted in the Senate.

2. That the election is void because ordered for the town of Liberty and not for Liberty School District.

3. That the election is void because it does not appear that the petition was signed by the requisite number of freeholders.

4. That the election was held in September, 1911, and defendants have lost the right to issue bonds, if it ever existed, by nonuser.

Hammer & Kelly for plaintiff.
H. M. Robbins for defendant.

ALLEN, J., after stating the case: There is, in our opinion, no valid objection to issuing the bonds in controversy.

The act, as it passed the House, was not obligatory on any school district in the State, but simply gave the opportunity to all to hold an election as to issuing bonds, etc., and every provision now in the act was not only in it at that time, but it also applied to Liberty School District, as one of the districts of the State, and the effect of the
(484) amendment adopted in the Senate was not to include Liberty School District, but to exclude other districts.

As thus understood, the amendment falls within the principle declared in *Brown v. Stewart,* 134 N. C., 357; *Commissioners v. Stafford,* 138 N. C., 453; *Bank v. Lacy,* 151 N. C., 3.

It is equally well settled that, when the act has been passed in accordance with the provisions of Article II, sec. 14, of the Constitution, an amendment which does not increase the amount of the bonds or tax to be levied, or otherwise materially change the original bill, may be adopted by the concurrence of both houses of the General Assembly. *Commissioners v. Stafford,* 138 N. C., at p. 455.

The second objection would require serious consideration if the fact was as contended by the plaintiff, but when the petition is read with the order of the county commissioners, it is clear that the election was ordered for the district, and that it was to be held at the usual place in the district, which was in the town of Liberty, and it does not appear that any citizen affected by the election was deprived of the right to vote.

No evidence was offered in support of the allegation that the requisite number of freeholders did not sign the petition for the election, and in addition to the presumption in favor of the legality and regularity of the acts of public officers, the act provides, after the requirement as to the petition, that "The ordering of such election by the board of county commissioners shall conclusively presume that all precedent conditions and provisions of this act have been complied with."

There is nothing in the act which limits the time after the election within which the bonds may be issued, and in the absence of evidence of abuse of power, the delay is no valid reason for restraining the defendants from doing so.

It may be that the defendants have had trouble in selling the bonds, and that they have taken steps to issue them as soon as a sale could be made.

Upon a review of the whole record,

Affirmed.

Cited: LeRoy v. Elizabeth City, 166 N. C., 96.

(485)

W. L. LLOYD v. NORTH CAROLINA RAILROAD COMPANY AND SOUTHERN RAILROAD COMPANY.

(Filed 28 May, 1913.)

1. Railroads—Removal of Causes—Federal Employers' Liability Act—Concurrent Jurisdiction—Interpretation of Statutes—Writs of Error—Procedure.

The Federal Employers' Liability Act applies in favor of all employees of common carriers for railroads, while engaged in interstate commerce, and "when injured or killed by reason of the negligence of any officer or agent of the employee of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances," etc., and the amendment of 1910 provides that the jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and that "no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States," etc. The constitutionality of the act being declared valid by the United States Supreme Court, it is *Held*, the purpose and effect of the amendment of 1910 is to withdraw the right of removal to the Federal courts in cases arising under the statute when the action has been instituted in the State court, and the Federal questions thereunder arising are reviewable in the United States court upon a writ of error to the State court making final disposition of the cause in its jurisdiction.

2. Removal of Causes—Petition—Diversity of Citizenship—Fraudulent Joinder—Jurisdiction.

While ordinarily the State's courts have no jurisdiction to pass upon issues of fact raised by the filing of a sufficient petition and bond for removal to the Federal court for diversity of citizenship, it is necessary for this result, where a fraudulent joinder of a resident defendant is alleged, for the petitioner to set forth a full and direct statement of the facts and circumstances of the transaction sufficient, if true, to demonstrate "that the adverse party is making a fraudulent attempt to impose upon the court, and so deprive the defendant of his right of removal."

3. Interstate Commerce—Instrumentalities — Federal Statutes — Interpretation.

The term interstate commerce includes instrumentalities and agencies by which such commerce is conducted, and the power of Congress extends to the regulation of these instrumentalities, including the right to legislate for the welfare of persons operating the same.

4. Railroads—Removal of Cause—Defective Machinery—Personal Injury—Lessor and Lessee—Interstate Commerce—Fraudulent Joinder—Diversity of Citizenship—Allegations.

The plaintiff brings his action in the State court to recover damages, for a personal injury, against the Southern Railway Company, under the Federal Employers' Liability Act, and joins therein the North Carolina Railroad Company, its lessor, wherein a petition and bond for removal of the cause to the Federal court, for diversity of citizenship, is filed, upon the ground that the latter road was fraudulently joined for the

purpose of retaining the cause in the State court. It appears from the pleadings and admissions, that the plaintiff was a locomotive engineer of the petitioner; that the injury occurred at a repair shop of the petitioner, off of the leased premises, by reason of a defect in the machinery of the engine, not properly repaired, and while the plaintiff was preparing to test the engine, upon a trial trip within the State, for the further service of the company; that he had theretofore been operating this locomotive for the petitioner over a portion of the North Carolina road, used as a part of the petitioner's North and South trunk line, and on to Monroe, Virginia, in moving interstate trains: *Held*, that upon these allegations, construing the Federal Employers' Liability Acts in connection with the act of Congress entitled "Safety Appliance Act," the charge of fraud is not to be necessarily inferred, so as to give the petitioner the right of removal upon the filing of the petition and bond.

5. Evidence—Nonsuit—Railroads—Lessor and Lessee—Parties — Joinder—Personal Injuries.

Upon a motion for judgment of nonsuit, the allegations and evidence must be considered in the light most favorable to the plaintiff, and, applying this rule to the present case, it is *Held*, that the judgment as to the North Carolina Railroad was improperly allowed, it being alleged, with supporting evidence, in an action for damages for personal injury, wherein its lessee, the Southern Railway Company, was joined as a defendant, that the plaintiff was a locomotive engineer of the latter company, assigned for duty on an interstate train, including in the route a part of the leased road, and thereon operating under the franchise of the lessor road; that the injury complained of occurred on a siding off of the leased premises, by reason of a defect in the locomotive, this siding connecting with the main line of the lessee company at either end, and while the locomotive was being oiled and inspected by the plaintiff for the purpose of a trial run necessarily passing over a portion of the leased road; that the lessee company had just had the locomotive repaired at its shop, from which all engines necessarily had to pass over the leased road to get to the other lines of the lessee.

6. Removal of Causes—Diversity of Citizenship—Nonsuit—Resident Defendant—Exceptions—Appeal and Error.

Where a resident and nonresident defendant are joined in a cause of action, and the plaintiff elects to discontinue his suit as to the resident party, the rights of removal of the cause to the Federal court by reason of the diversity of citizenship will then arise to the other; but this will not obtain when the nonsuit has been taken in deference to an adverse intimation of the court, to which the plaintiff, insisting on his rights, excepts and the exception is properly presented as an assignment of error on appeal from an order removing the cause.

7. Same—Second Petition—Existing Conditions.

Where a cause of action is sought to be removed to the Federal court for diversity of citizenship, in which a resident defendant had been joined, but as to which a nonsuit had thereafter been ordered, under exception duly taken and properly presented on appeal, and the lower court has ordered the removal of the cause, upon the filing of a second petition

and bond, the order of nonsuit must be considered as having been taken *in invitum*, and the right of removal is made to depend upon conditions existent at the time of filing the first petition.

(487) APPEAL by defendant petitioner from *Peebles, J.*, at February Term, 1912, of GUILFORD.

This action was originally instituted against the North Carolina Railroad, a corporation of this State, having its franchise and owning a railroad property here, and the Southern Railroad, a corporation of the State of Virginia, operating the road of its codefendant under a 99-year lease, and which, among other things, provides "for the liability of the Southern Railway Company for all of its acts and defaults in the operation of said road" and for a deposit of "not less than $175,000 in cash, or its equivalent, to be applied" to the performance of the stipulations in the contract of lease to be performed by the lessee, and among them, "to pay any judgments recovered in any court of the State or of the United States when finally adjudicated for any tort, wrong, injury, negligence, default on contract done, made, or permitted by the parties of the second part, its successors, assigns, employees, agents or servants, for which the party of the first part shall be adjudged liable, whether the party of the first part is sued jointly with or separately from the party of the second part."

(488) The complaint alleged, and there was evidence on part of plaintiff tending to show, that a portion of the North Carolina Railroad included in the lease, to wit, from Greensboro through Spencer to Salisbury, N. C., was a part of the trunk line of the Southern Railroad from North to South, "along and over which it was and is engaged, by and with the consent of the North Carolina company, in transporting interstate commerce from Virginia and all points of North to South Carolina, Georgia, and other points south, etc."; that plaintiff, at the time, was a locomotive engineer, in the employment of the Southern Railroad, for the purpose of transporting freight trains containing interstate commerce from, to, and between "Spencer, N. C., and Monroe, Va., and along the main line of the Southern Railroad, a part of which said line included that portion of the North Carolina Railroad from Greensboro to Spencer," and had been for some time prior to the occurrence engaged on this run with an engine, No. 579; that the engine had been taken to the shops of the Southern at Spencer, and, having been overhauled and repaired, it was on a side-track near the shops of the company, steamed up and ready, and plaintiff was engaged in oiling and inspecting the same for the purpose of presently making a trial to Barber's Junction, a point in North Carolina on the Western North

Carolina Railroad, some distance beyond Salisbury, and thus to test the engine with a view of further service"; that while so engaged, he received serious physical injuries by reason of some defects in the structure or adjustments of the engine, the same being attributed to the negligence of the defendant, the Southern Railroad, the facts as to negligence and the nature and extent of the injury being given; that this particular engine had been for some time engaged in the through freight service from Spencer, N. C., to Monroe, Va., and since plaintiff was injured it had been doing the same work; that plaintiff was assigned to the work and had been engaged in it till his engine was taken to the shop for repairs, and during that time the plaintiff had no regular run.

On his cross-examination, and speaking to the circumstances of his employment and duties, the witness, in answer to questions, said:

Q. Where you were going, or whether you were to do work running inside or outside of the State, you did not know? A. I was marked on the division from Spencer to Monroe. I knew I was (489) to do any kind of work that I stood for—relief work for other men running on this line I was assigned to. I was not supposed to run to Barber's Junction. My assignment was not that way. If I had been called to go to Statesville under the supervision of a competent man, I would have gone, or to Wilkesboro. I would have gone anywhere in the State if they had sent a competent man to carry me there and bring me back. I didn't know the road. I went to Selma occasionally. I think I went to Goldsboro one trip and carried a switch engine; that is in North Carolina.

Q. I ask you if it was not your habit to go anywhere your call was indicated by the company as an extra engineer? A. I didn't belong to go there. It was left discretionary whether I did go.

Q. Wasn't it your habit to go wherever they called you to go as an extra engineer? No, sir.

Q. Did you ever refuse to go? A. Yes, sir.

Q. Where? A. A good many different places. I refused to go on the branch road. I refused to go to the western part of North Carolina, Asheville, and I refused to go to Charlotte. I have run on the road from Selma to Monroe. That is on this division. I run between Selma and Norfolk when the division extended there. All the men had to run into Virginia out of Selma. At the time I was hurt I was not a regular engineer with a regular run.

Speaking to the place of the injury, the witness said: "The engine was standing on a side-track, at or near the cinder pit of the company, about halfway between the shops and the main line of the North Carolina Railroad, and more than 100 feet from said main line and the side-

track connected with the North Carolina Railroad at the north end of the Spencer yards and with the double-track part of the North Carolina Railroad on the south part of the Spencer yard leading to Salisbury, and there was no way of getting off that side-track and onto the main line except over the North Carolina Railroad."

(490) In apt time, and accompanied by a proper bond, the defendant, the Southern Railway Company, filed its petition for removal, duly verified, setting forth its position as to the exact nature and proper place of the occurrence, and containing averment that plaintiff was an employee of the Southern Railroad, and not otherwise, as locomotive engineer, his duty being to engage in his work as directed and at any place on the lines of the company; that the exact place of the occurrence was on the yards of the company near its shops, the same having been purchased and owned by the company and the shops built and used for repair and other work for engines and cars used on all portions of the company's system; that it was entirely off the right of way of the North Carolina Railroad and formed no part of that company's property; that the engine in question was subject to be used on any of the roads of the Southern, and at the time of the injury it was on this company's property, preparatory to taking a trial trip by Salisbury and on to Barber's Junction, points entirely within the State of North Carolina, and that no freight was to be handled by said engine on said trip and no cars of any kind were to be attached thereto. That all these facts were well known to plaintiff when he instituted his suit and filed his complaint, and that said North Carolina Railroad Company had been fraudulently joined in said suit, and the allegation that plaintiff was at the time engaged in interstate commerce had been falsely and fraudulently made with the sole purpose of preventing a removal of the case to the Federal courts, and with no *bona fide* purpose of obtaining the relief against said North Carolina Company, as stated in the complaint. On this matter the express averment of the petition was as follows:

"Your petitioner says that the plaintiff, at the time he received the injuries complained of, was an employee of your petitioner, and not an employee of its codefendant, the North Carolina Railroad Company, and was not, and never had been, an employee of the said North Carolina Railroad Company, and that all the said facts herein set forth, with reference to the lease, the location and situation of the cinder pit and side-track, and the duties which plaintiff was to perform on the day in question, were well known to plaintiff when this action

(491) was brought and complaint filed. Your petitioner further says, that to avoid the removal of this case by it to the Federal court,

the plaintiff joined the North Carolina Railroad Company, a North Carolina corporation, and falsely and fraudulently alleged in his complaint that the side-track upon which the engine was located at the time he was injured was 'one of the side-tracks of the North Carolina Railroad Company's main line at Spencer,' and falsely and likewise fraudulently alleged in his complaint that he suffered injury while employed by your petitioner in interstate commerce, and falsely and fraudulently alleges that he was engaged in interstate commerce at the time of his injury, and that said engine was likewise so engaged, when, at the time said allegations were made, plaintiff well knew that they were untrue, or could by the exercise of the slightest diligence have ascertained the true facts in connection therewith; and your petitioner further states that plaintiff did not and does not expect to establish said allegations, and did not make them for the purpose of proving them at the trial or substantiating his cause of action therewith, but made them solely for the purpose of setting up a joint cause of action against the defendants, as lessor and lessee, and to state a cause under the Federal Employers' Liability Act in order to make a case which would not be removable to the Federal court."

The petition for removal having been denied at December Term, 1911, the petitioner excepted and appealed, but without prosecuting its appeal and reserving any and all exceptions to the rulings of the court, the defendants answered, again setting up the exact nature and place of the occurrence as claimed by them and denied any and all liability on the part of the North Carolina Railroad Company, and for both companies denied any and all negligence, setting up the defense of contributory negligence, etc.

The cause coming on for trial on the issues so raised, at February Term as stated, at the close of plaintiff's evidence and by reason chiefly of the place of the occurrence as described by plaintiff, the court having intimated "that there was no case made out against the North Carolina Railroad Company," the plaintiff takes a nonsuit as to (492) said North Carolina Railroad Company. See judgment. Thereupon, defendant, the Southern Railroad, filed its second petition for removal, accompanied by proper bond, on the ground of diversity of citizenship, and renewing its allegation of fraud in general terms and chiefly by reference to the former petition.

The court entered judgment removing the case, and plaintiff excepted and appealed, assigning errors as follows:

Plaintiff's Exception No. 1: For that the court permitted the defendant Southern Railway Company to file a new petition and bond for removal to the Federal court.

Plaintiff's Exception No. 2: For that the court entered an order removing the cause to the Federal court for trial.

Plaintiff's Exception No. 3: For that the court held that there was no sufficient evidence against the North Carolina Railroad Company to entitle the plaintiff to recover as against it, and for that the court dismissed the action as to the North Carolina Railroad Company and removed the cause to the Federal court for trial as against the other defendant, the Southern Railway Company.

A. L. Brooks, Sapp & Hall for plaintiff.
Manly, Hendren & Womble and Wilson & Ferguson for defendant.

HOKE, J., after stating the case: The plaintiff in express terms bases his cause of action on the Federal Employers' Liability Act of 1908 (35 U. S. St., 65 Ch., 149) as amended on 5 April, 1910 (36 U. S. St., 291 Fed., 143), and in his complaint makes allegation sufficient to establish liability on the part of both of defendant companies. The statute in question confers a right of action against all common carriers by railroad engaged in interstate commerce and in favor of all employees "while engaged in such commerce or their representatives when injured or killed by reason of the negligence of any officers or agents of the employee of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or walks."

(493) The law in question has received very full consideration by the Supreme Court of the United States in several cases reported in 223 U. S., p. 1, styled the *Second Employers' Liability cases,* and it was there held, among other things: "That the same is constitutional; that its provisions and regulations have superseded the laws of the several States in so far as the latter cover the same field; and that rights arising under the regulations prescribed by the act may be enforced as of right in the courts of the States where their jurisdiction as fixed by local laws is adequate." And the amendment of 1910 contains provision that "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and 'No case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States.'" 36 U. S. St., Ch. 143, p. 291.

It was no doubt the purpose and effect of this amendment, as its terms clearly import, to withdraw the right of removal in cases arising under the statute when the action has been instituted in the State court, and to require that litigants desiring to have the results of the trial re-

viewed by reason of the presence of the Federal question, etc., shall proceed by writ of error to the State court making final disposition of the cause in its jurisdiction. All the decisions to which we were referred upholding the right of removal in such cases (*Lemon v. R. R.*, 137 Ky., 276; *Calhoun v. R. R.*, 528, and others) were causes disposed of prior to the amendment, and which no doubt gave rise to its enactment.

And if, as defendants contend, the same right of removal exists as in cases of fraudulent joinder of a resident with a nonresident defendant, the application should be denied in this instance. On this question the authorities are to the effect that when viewed as a legal proposition the plaintiff is entitled to have his cause of action considered as he has presented it in his complaint (*R. R. v. Miller*, 217 U. S., 209; *R. R. v. Thompson*, 200 U. S., 206; *Dougherty v. R. R.*, 126 Fed., 239), and while a case may in proper instances be removed on the ground of false and fraudulent allegation of jurisdictional facts, the right does not exist, nor is the question raised by general allegations of bad faith, but only when, in addition to the positive allegation of (494) fraud, there is full and direct statement of the facts and circumstances of the transaction sufficient, if true, to demonstrate "that the adverse party is making a fraudulent attempt to impose upon the court and so deprive the applicant of his right of removal." *Rea v. Mirror Co.*, 158 N. C., 24-27, and authorities cited, notably, *R. R. v. Herman*, 187 U. S., 63; *Foster v. Gas and Electric Co.*, 185 Fed., 979; *Shane v. Electric Ry.*, 150 Fed., 801; *Knutts v. Electric Ry.*, 148 Fed., 73; *Thomas v. R. R.*, 147 Fed., 83; *Hough v. R. R.*, 144 N. C., 701; *Tobacco Co. v. Tobacco Co.*, 144 N. C., 352; *R. R. v. Houchins*, 121 Ky., 526; *R. R. v. Gruzzle*, 124 Ga., 735.

True, it is now uniformly held that when a verified petition for removal is filed, accompanied by a proper bond, and same contains facts sufficient to require a removal under the law, the jurisdiction of the State court is at an end. And in such case it is not for the State court to pass upon or decide the issues of fact so raised, but it may only consider and determine the sufficiency of the petition and the bond. *Herrick v. R. R.*, 158 N. C., 307; *Chesapeake v. McCabe*, 213 U. S., 207; *Wecker v. Natural Enameling Co.*, 204 U. S., 176, etc. But this position obtains only as to such issues of fact as control and determine the right of removal, and on an application for removal by reason of fraudulent joinder such an issue is not presented by merely stating the facts of the occurrence showing a right to remove, even though accompanied by general averment of fraud or bad faith, but, as heretofore stated, there must be full and direct statement of facts, sufficient, if true, to establish or demonstrate the fraudulent purpose. *Hough v.*

R. R., 144 N. C., 692; *Tobacco Co. v. Tobacco Co.*, 144 N. C., 352; *Shane v. R. R.*, 150 Fed., 801. In *Rea v. Mirror Co., supra,* the principle was applied where plaintiff had sued a nonresident corporation doing a manufacturing business in this State, to recover for physical injuries suffered by plaintiff and alleged to be by reason of some negligence of the company in the operation of its machinery, and a resident employee was joined as codefendant. The nonresident company, in apt time, filed its duly verified petition, accompanied by proper
(495) bond, setting forth the facts of the occurrence with great fullness of detail, charging a fraudulent joinder of the resident employee, and containing averment further that "said employee was a member of the company's clerical force in the office of the company, having nothing whatever to do with the machinery or its management, and that he was not present in the factory at the time of the injury." The petition for removal was allowed, the Court being of opinion that, if these facts were established, it would make out the charge of fraudulent joinder and bring the case within the principle of *Wecker v. Natural Enameling Co.*, 204 U. S., 176; but no such facts are presented here. While the petitioner alleges a fraudulent joinder of the North Carolina Railroad and denies that the plaintiff was engaged in interstate commerce, etc., it will appear from a perusal of the pleadings and the admissions of record not inconsistent therewith, that plaintiff, at the time of the injury, was an employee of the defendant as locomotive engineer; that he had been operating the engine in question over a portion of the North Carolina Railroad, used as a part of the north and south trunk line of the Southern Railway and on to Monroe in the State of Virginia, and engaged in moving interstate freight trains; that this engine, having been taken to the shops for repairs, was at the precise time of the injury on a side-track connecting with the North Carolina Railroad main line, ready for a trial trip to Barber Junction, and plaintiff was engaged in inspecting and oiling said engine for the purpose of taking said trip and with a view of further service for the company. It has long been understood that the term interstate commerce will include the instrumentalities and agencies by which the same is conducted, and that the power of Congress will extend to the regulation of these instrumentalities, including the right to legislate for the welfare of persons operating the same (*Employers' Liability cases,* 223 U. S., 1; *Interstate Commerce Commission v. R. R.*, 215 U. S., 452), and from the admitted facts of defendant's petition and some of the recent decisions construing this statute and that entitled "Safety Appliance Act," 27 U. S. Statutes, ch. 196, said by an intelligent
(496) writer to be of great aid to the proper construction of the former,

Thornton on Employers' Liability and Safety Appliance Act (2 Ed.), p. 40, there is grave reason to doubt if plaintiff's allegations as to the character of this transaction are not properly made (*R. R. v. U. S.*, 222 U. S., 20; *Johnson v. R. R.*, 196 U. S., 1; Thornton (2 Ed.), p. 50 *et seq.*), and assuredly it may not be said that the charge of fraud must be necessarily inferred.

As to the judgment of nonsuit, submitted to by plaintiff, in deference to an adverse intimation of his Honor, here we are required to consider the case as presented by the allegations and evidence of the plaintiff and interpret such evidence in the light most favorable to him (*Henderson v. R. R.*, 159 N. C., 581; and *Deppe v. R. R.*, 152 N. C., 79), and, considering the record in that respect, it will appear that plaintiff, at the time of the injury, was an employee of the defendant, the Southern Railroad, assigned for duty over that part of the line from Spencer, N. C., to Monroe, Va., and had for some time been engaged on Engine 579 in hauling interstate freight trains over this part of the Southern system, and which included that portion of the North Carolina Railroad between Spencer and Greensboro. That this was being done by the Southern road with the consent of the North Carolina Railroad, and while operating under the franchise of that company. That at the precise time of the injury, the engine was on a siding, and while off the right of way of the State road, the siding was connected with the main line of such road at either end and the engine was being oiled and inspected by plaintiff with the present purpose of making a trial trip from Spencer to Barber Junction, which could only be done by passing over a portion of the State road, and it was always necessary for engines repaired in said shops to pass over the lines of the North Carolina road in order to get on the other lines of the Southern.

Without present and final decision of the question thus presented, we are clearly of opinion that it is a permissible inference from these facts that, as to the North Carolina Railroad also, the plaintiff's cause of action is well laid, and the order of nonsuit must be reversed. *R. R. v. U. S.*, 222 U. S., 20; *Logan v. R. R.*, 116 N. C., 940.

Having held that the cause has been erroneously nonsuited as (497) to the North Carolina Railroad Company, the petition for removal on the ground of diversity of citizenship (the second petition) is necessarily denied; and in any event, this would be the correct view. It is true that when a suit has been instituted against a resident and a nonresident defendant, and pending the cause plaintiff elects to discontinue his suit as to the resident party, the right of removal by reason of diversity of citizenship will then arise to the other (*Powers v. R. R.*,

169 U. S., 92); but that is when the discontinuance is by voluntary action of the plaintiff, and does not obtain when the nonsuit has been taken in deference to an adverse intimation of the court and the plaintiff is insisting on his right to have the same reviewed on appeal, and is in a position to assert it. This we think is a fair interpretation of the record. The court having made the entry and entered same in the judgment that the nonsuit was taken in deference to an adverse intimation of the court, and plaintiff having made this as one of his assignments of error, in such case the order of nonsuit must be considered as having been taken *in invitum* (*Hayes v. R. R.*, 140 N. C., 131; *Mobley v. Watts*, 98 N. C., 284), bringing the case within the principle of *Whitecombe v. Southern*, 175 U. S., 635, and requiring that the right of removal should be made to depend upon conditions existent at the time of filing the first petition.

The order of removal and order of nonsuit will be set aside and the cause restored to the docket for trial as originally instituted.

Reversed.

Cited: *Smith v. Quarries Co.*, 164 N. C., 352; *Lloyd v. R. R.*, 166 N. C., 27; *Hollifield v. Telephone Co.*, 172 N. C., 720.

JOSEPH BERBARRY v. TOMBACHER & BANOV.

(Filed 12 March, 1913.)

1. Evidence Incompetent—Admissions by Witness—Subsequent Statement—Harmless Error.

Where a vendee seeks to recover damages from his vendor for failing to deliver goods of the quality he had bought, and introduces evidence tending to show that they were worth more to him than the price he had paid, testimony of a witness is incompetent which was offered for the purpose of showing that the defendant did not carry the line of goods which the plaintiff claimed he had bought, when it appears by his own admission that the witness did not have the requisite knowledge to make his evidence competent, and, further, in this case, the witness was afterwards permitted to state the kind of goods the defendant carried in stock, and if any error was committed in ruling out the evidence objected to, it was cured.

2. Evidence—Vendor and Vendee—Exhibits to Jury—Comparisons.

Where damages are sought by the buyer of clothing on the ground that the goods delivered were inferior in quality to those purchased, it is competent for the plaintiff to illustrate the difference in texture and quality, by exhibiting other suits to the jury.

3. Contracts—Vendor and Vendee—Damages—Measure of Damages.

Where damages are sought by a buyer of goods on the ground that the seller furnished goods of an inferior quality, a breach of the contract of sale would entitle the plaintiff to nominal damages, at least; and the measure of recovery of substantial damages is the market value of the goods at the time and place stipulated for the delivery, less the contract price.

APPEAL by defendant from *Carter, J.*, at September Term, (498) 1912, of NEW HANOVER.

Action to recover damages for the failure to deliver certain goods bought by plaintiff from defendant in New York, which was also the place of delivery fixed by the contract of sale. The goods bought by plaintiff consisted of men's and children's clothing: 165 pairs of pantaloons and 299 serge and cassimere suits for children, which had been damaged by water used in extinguishing a fire in defendant's store, the price being $237.05. The amount of damages claimed by plaintiff is $850. Verdict and judgment for plaintiff, and defendant appealed.

J. D. Bellamy & Son for plaintiff.
H. M. McClammy for defendants.

WALKER, J. There are several questions of evidence in the case. The plaintiff offered testimony as to the real value of the goods he bought, with the view of showing that they were worth a great deal more than he gave for them, and a witness, L. W. Davis, was introduced by the defendants to prove that he had seen the defendants' stock of goods but a short time before the sale to plaintiff. This testi- (499) mony was offered to show that defendants had not kept in their stock any goods of the character and value of those described by the plaintiff's witnesses. It is evident that the witness was not qualified to testify to the fact proposed to be established, because he had not seen the stock from which the sale of the goods was made, but he was afterwards permitted to state the kind of goods defendants carried in their stock, and to answer fully the excluded question. If, therefore, there was any error, it was cured. *Gossler v. Wood,* 120 N. C., 69; *Daniel v. Dixon,* 161 N. C., 377. Besides, when the witness did answer the question, or attempted to do so, it appeared by his own admission that he did not have the requisite knowledge of the fact involved.

There was some controversy between the parties as to whether plaintiff bought cassimere, serge, or cotton suits; and plaintiff, in order to identify and fix the quality of the goods he did buy, was permitted to exhibit to the court and the jury suits of the three kinds, and to show the difference in quality. It was not for the purpose of showing the

value of the goods he bought, but merely to illustrate the difference in texture and quality of different sorts, as a means of informing the jury of the kind and quality he purchased. We do not see why this was not competent. *S. v. Vann, post,* 534. The other exception to evidence is without merit, and requires no comment.

The last exception is to the instruction of the court, that if there had been a breach of the contract by defendant, the plaintiff was entitled to recover nominal damages, if no substantial damages had been shown; and this is true. *Chaffin v. Manufacturing Co.,* 135 N. C., 95; *Manufacturing Co. v. Machine Works,* 144 N. C., at p. 690. The court stated to the jury the correct rule as to actual damages, it being the difference between the agreed price and the market value at the time and place of delivery as fixed by the contract. *Coal Co. v. Ice Co.,* 134 N. C., 574; *Douglass v. McCallister,* 3 Cranch., 298; *Roberts v. Benjamin,* 124 U. S., 64; *Shepherd v. Hampton,* 3 Wheaton (U. S.), 209.

The standard, therefore, by which to estimate damages for non-
(500) delivery is the market value at the time and place stipulated for the delivery, less the contract price. *Grand Tower Co. v. Phillips,* 23 Wall., 471; *Homesley v. Elias,* 75 N. C., 564; *Oldham v. Kerchner,* 79 N. C., 106. This disposes of all the exceptions.

No error.

Cited: *Lumber Co. v. Mfg. Co., ante,* 398; *In re Smith,* 163 N. C., 466; *Lumber Co. v. Furniture Co.,* 167 N. C., 567.

J. E. FOWLER ET AL. v. D. F. COBLE ET AL.

(Filed 16 April, 1913.)

Deeds and Conveyances—Destruction of Former Call—"At or Near"—Certainty of Description—Instructions—Burden of Proof—Course and Distance.

In an action of trespass wherein the divisional line between the contesting parties is called in question, it appears that in the former deeds in plaintiff's chain of title, one of the calls is to a certain house, which had been destroyed subsequently to the making of the deed from the plaintiff's immediate grantor; and in the last deed the call is made to a stake "at or near the place where the house" formerly stood: *Held,* the destruction of this house could not affect the call or the description in the plaintiff's original deeds; and it was not error for the judge to instruct the jury to find for the plaintiff, if the line ran to the house, leav-

ing out the words "at or near the place," etc., with the burden on the plaintiff of showing its location; and upon his failing to do so, the course and distance would control.

APPEAL by defendants from *Ferguson, J.*, at May Term, 1912, of SAMPSON.

H. A. Grady for plaintiff.
Faison & Wright and J. D. Kerr for defendant.

WALKER, J. This was an action to recover damages for a trespass on land and to enjoin the cutting of timber. Verdict and judgment for plaintiffs, and defendants appealed. The land originally belonged to James Harrington, and was partitioned among his heirs. Plaintiffs claimed to have derived title to Lot No. 9 in the division by judicial proceedings and mesne conveyances. The point in controversy was the true location of the dividing line between the parties, (501) defendant owning the land adjoining Lot No. 9. The description of the line in the original partition of 1814 between Harrington's heirs was, "thence (that is, from C on map) south 60 east 180 poles to a stake at the (Harrington) house," which plaintiffs contended ran from letter C on map to letter H, the house being at H, but they were willing for the line to be run to letter G, thereby about equally dividing the *locus in quo* between the parties. The jury located the line C G as the true one. Some of the deeds in plaintiff's chain of title, subsequent to the Harrington partition in 1814, described the line as running "thence (that is, from C on map) south 60 east 180 poles to a stake at or near the place where the house of James Harrington, deceased, formerly stood," and defendant insisted that the last part of the call, "to or near the house," was too uncertain or indefinite to control, and the line should be run by course and distance, relying upon *Harry v. Graham,* 18 N. C., 76; *Cansler v. Fite,* 50 N. C., 428; *Mizzell v. Simmons,* 79 N. C., 183; *Brown v. House,* 118 N. C., 872. If this be so, there was no trespass, as the line would be from C to D on the map, the southern boundary of the *locus in quo*. Plaintiffs contended that the call for the house, though now gone, was sufficient to control course, as the place where the house once stood had been fully identified. The court charged the jury that if, upon the evidence, they found where the Harrington house, called for in the partition and deeds, stood, they would run the line to that place, the burden being upon the plaintiff to satisfy them where the house stood in 1814, at the time of the Harrington partition, when the lot was first described by metes and bounds; and if plaintiff had failed to so satisfy them, they would run the line

by course and distance, south 60 east 180 poles, to the other boundary. There was evidence to support this charge. We do not think the inadvertent change in the call, from "south 60 east 180 poles to the house" to "south 60 east 180 poles to or near the house," effected any change in the boundary. It was admitted, and if it had not been, it clearly appeared, that all the deeds conveyed Lot No. 9 of the Harrington
(502) partition, which had well-defined metes and bounds, the call on the disputed line being for the house. This was sufficient to control course and distance, and it made no difference that the house had been removed. How could this change the boundary? If the house controlled when it was there, it did so ever afterwards. It would be very strange if a call for a tree would be governed by course and distance merely because the tree had died and disappeared, if the place where it once grew could be ascertained. The call for a tree is a very common one, and if this rule prevailed, our boundaries would be constantly shifting. We find it stated by *Chief Justice Taylor,* in *Cherry v. Slade,* when giving the rules on questions of boundary and as a part of the fourth rule, that "where there are no natural boundaries called for, no marked trees or corners to be found, *nor the places where they once stood ascertained and identified by evidence* . . . we are of necessity confined to the courses and distances described in the patent or deed." (Italics ours.) This was approved in *Bowen v. Lumber Co.,* 153 N. C., 366. See *Guano Co. v. Lumber Co.,* 146 N. C., 187. It being, therefore, established that the original call must go to the house, or its site, the house having been removed, all the subsequent deeds conveying the same tract of land, that is, Lot No. 9, must have the same boundary in answer to the call, though the words "at or near" are used, for it is the same as if the boundaries of Lot No. 9, as contained in the report and judgment in the partition proceeding, had been inserted in the deeds. This doctrine is fully discussed in *Ipcock v. Gaskins,* 161 N. C., 673. The more certain description, as shown in the partition, will prevail over that which is less certain. The deed corrects itself, for it is Lot No. 9 which is conveyed, and the description of that is fixed by the language to be found in the partition proceeding. The following admission appears in defendants' brief: "It appeared from the evidence that all this land and the adjoining lands had once been the lands of the James Harrington estate, and had been divided in 1814, and that the land sold in the special proceeding to Owens (the plaintiff) was Lot No. 9 in this old division." Dock Owens claimed by assign-
(503) ment from John T. Fowler, who bought the lot from Butler and Kerr, commissioners, who sold it under a decree in a partition proceeding between the heirs and devisees of Daniel Melvin, who pur-

chased from Philip Harrington, to whom Lot No. 9 was assigned in the division of the lands of James Harrington. The reason for using the words "at or near" was that the house was gone, and the parties were, at that time, uncertain as to its true location; but whatever the reason may have been, it is manifest that it was intended to convey Lot No. 9, the boundaries of which were unchangeably fixed by the original partition. The other exceptions are untenable.

No error.

WADSWORTH LAND COMPANY v. PIEDMONT TRACTION COMPANY AND CHARLOTTE ELECTRIC RAILROAD COMPANY.

(Filed 28 May, 1913.)

1. **Public-service Corporations—Street Railways—Rights of Way—Use by Separate Corporations—Additional Burden—Damages.**

An electric street railway corporation having acquired a right of way for its own use over private lands, may not grant to another such corporation the right to likewise operate thereon, requiring the use of additional poles, etc.; for the use thereof by the second corporation imposes an additional burden upon the lands, for which the owner is entitled to compensation.

2. **Public-service Corporations — Street Railways — Rights of Way — Condemnation—Damages, Speculative—Evidence.**

In the admeasurement of damages to be awarded to the private owner of lands for the acquiring by a public-service corporation of a right of way thereon, the jury should consider the present condition of the property condemned and the uses to which it was then applied, and those for which it was naturally adapted, so as to arrive at the difference between the market value of the lands before and after the appropriation of the right of way; but so far as the same may not fall within this rule, damages are speculative and too remote which allow for intended or future improvements, such as laying off the property into lots and their development by the expenditure of money; the making of a park of unproductive lands, etc.; nor is it competent to show a comparison of values with lands of or near the same city which had already been developed, etc.

APPEAL by defendant from *Webb, J.*, at January Term, 1913, (504) of MECKLENBURG.

Burwell & Cansler, Tillett & Guthrie, and Maxwell & Keerans for plaintiff.

Osborne, Cocke & Robinson and Pharr & Bell for defendants.

CLARK, C. J. The defendant the Charlotte Electric Railroad Company had acquired from the grantors of the plaintiff the right of way to maintain and operate its street railway system. The Piedmont Traction Company, under contract with the Charlotte Electric Railroad Company, is operating its freight and passenger interurban cars over the right of way which had been acquired by said Electric Railroad Company, and has erected additional poles, wires, and other apparatus thereon for its own purposes, and, besides, since this action began has instituted a proceeding before the clerk to condemn said right of way for the additional burdens thus placed on it, and also to condemn 21 additional feet in width for its use. By consent, the two proceedings have been consolidated in this action.

Exception 1. The court properly held that the Electric Railroad Company could not convey to the Traction Company the right to impose the additional burdens, but that the plaintiff was entitled to compensation therefor. The Traction Company is imposing a new burden and service upon said right of way, and is clearly liable in damages therefor to the plaintiff for its use of the 24-foot right of way used by the Electric Railroad Company, as well as for the value of the additional 21 feet, which the Traction Company is now seeking to condemn. This has been very fully discussed and demonstrated in *Phillips v. Telegraph Co.*, 130 N. C., 520; *Hodges v. Telegraph Co.*, 133 N. C., 225; *Brown v. Power Co.*, 140 N. C., 334; *Beasley v. R. R.*, 145 N. C., 272. In *McCullock v. R. R.*, 146 N. C., 318, the Court said, upon facts very similar to these: "The plaintiffs are entitled in this action to have permanent damages assessed, in the nature of condemnation, for the additional burden placed upon the lot by its use for purposes (505) other than those for which defendant uses the lot purely as lessee of the North Carolina Railroad Company. *Hodges v. Telegraph Co.*, 133 N. C., 225, in which case this proposition is so clearly and fully reasoned out by *Connor, J.*, with full citation of authorities, that further discussion here would be idle repetition."

Passing by the other exceptions, we think, however, that his Honor erred in admitting evidence as to the speculative uses to which the owner intended to put the property and as to its contemplated improvement and in allowing the jury to consider these matters. The assignments of error presenting these points are Nos. 3, 5, 6, 11, 13, 16, 18, 34, 41, 48, 49, 50, and 60. Of these, 3, 5, 13, 16, 18, and 34 are exceptions to the admission of evidence, over objection by the Traction Company as to the intention of the owner to convert a part of its property, consisting of about 100 acres of bottom-land, into an artificial park. Nos. 6 and 11 are to the admission of evidence as to the probable value of

the lots into which the property might be subdivided. No. 34 is to the refusal of the court to instruct the jury, as requested, that they could not consider this intended development by the owner of the property. Nos. 48, 49, 50, and 60 are to the charge wherein the court instructed the jury that they should take into consideration the plans of the owner for the future improvement of the property and the uses to which it was intended to be put.

In *Brown v. Power Co.*, 140 N. C., 33, which we reaffirm, the Court held that it was proper for the jury to take into consideration, not only the present condition of the property condemned and the uses to which it was then applied, but also all other uses to which it might be applied for which it was naturally adapted. In the present case, the plaintiff was allowed to go beyond this rule, and show the uses to which the owner intended to put the property and its future improvement. The plaintiff proved, without objection, the capabilities of the property and all the uses for which it contended the property was adapted, its nearness to the city of Charlotte, and that the property as a whole was well situated for development as a residential section. To all this no objection was offered by the Traction Company. The error was in permitting the plaintiff to go further, and to show that 100 acres (506) of this property, consisting of bottom-land not suited for development as a residential property, but subject to overflow, the owner intended to make into a park and beautify it, by laying off walks and building summer houses and otherwise, and that such improvement would enhance in value the remaining portion of the property. We think this was too remote, and improperly enhanced the damages allowed. It was purely speculative, and should have been excluded.

In Elliott Roads and Streets, 273, it is said: "It is held that although it may be proper to show the location and surroundings and the uses to which the land is adapted, yet it is not competent to prove by the owner the use to which he intends to devote it." Among many cases to support that proposition are *R. R. v. R. R.*, 103 Va., 399; *Pinkham v. Chelmsford*, 109 Mass., 225.

In *R. R. v. Stocker*, 128 Pa., 233, it was held that the jury could not value a tract upon the theory of what it might bring when platted and divided up into building lots; but they could inquire what a present purchaser would be willing to pay for it in its present condition, and not what a speculator might be able to realize out of a resale in the future. To same purport, *R. R. v. Abell*, 18 Mo. App., 637; *R. R. v. Cleary*, 125 Pa., 451.

In 2 Lewis Em. Dom., 1056, 1057, it is said: "The conclusion from the authorities and reason of the matter seems to be that witnesses

should not be allowed to give their opinion as to the value of property for a particular purpose, but should state its market value in view of any purpose to which it is adapted. The condition of the property and all its surroundings may be shown and its availability for any particular use. If it has a peculiar adaptation for certain uses this may be shown; if such peculiar adaptation adds to its value, the owner is entitled to the benefit of it. But when all the facts and circumstances have been shown, the question at last is, What is it worth in the market?" To the same effect, *Boom Co. v. Patterson,* 98 U. S., 403; *R. R. v. Humphreys,* 90 Va., 436.

The court also erred in admitting the evidence as to the value of other property, and the sales of specific parts thereof, and in charging the jury that they might consider such evidence in arriving at their (507) verdict. Assignments of error Nos. 27, 28, 29, 31, and 33 were to the admission of evidence to the above effect, and No. 47 was to the charge to the jury on that point. Such evidence was held incompetent in *Warren v. Makeley,* 85 N. C., 12; *Bruner v. Threadgill,* 88 N. C., 365; *Cline v. Baker,* 118 N. C., 782; *Rice v. R. R.,* 130 N. C., 380; *R. R. v. Patterson,* 107 Pa. St., 463.

In *R. R. v. Patterson,* above cited, the Court said: "It is well settled by numerous decisions of this Court that the proper measure of damages where lands are taken for railroad purposes is the difference between the market value of the land before and after appropriation of the right of way. And it seems to be equally well settled under the law of this State that evidence of particular sales of alleged similar property, under special circumstances, is inadmissible to establish market value. . . . The selling price of lands in the neighborhood at the time is undoubtedly a test of value; but it is the general selling price, not the price paid for particular property. The location of the land, its uses and its products and the general selling price in the vicinity, may determine the market value. The price which, upon a consideration of the matters stated, the judgment of well informed and reasonable men will approve is the market value. A particular sale may be a sacrifice compelled by necessity, or it may be the result of mere caprice or folly. If it be given in evidence, it raises an issue collateral to the subject of inquiry, and these collateral issues are as numerous as the sales. . . . The introduction of evidence of particular sales, is therefore, not allowable under our decision to establish market value."

The evidence as to sales of other property was to sales of property in residential suburbs of Charlotte which had already been developed by the laying out of modern improvements, and had already been largely

settled as home sections. The plaintiff was erroneously permitted by this evidence to compare its property not similarly located with property already developed, upon the ground that it intended to develop this property by the expenditure of large sums of money.

These errors entitle the defendants to a new trial, and it is not necessary to consider the other assignments of error, though it may be said, without passing an authoritative opinion, that it does not (508) now seem to us that there are errors in the other exceptions.

Error.

Cited: *R. R. v. Armfield,* 167 N. C., 466; *McMahan v. R. R.,* 170 N. C., 459; *Land Co. v. Electric Co.,* 170 N. C., 675.

McD. PATE v. THE SNOW HILL BANKING AND TRUST COMPANY.

(Filed 26 February, 1913.)

1. Appeal and Error—Instructions—Omission to Charge—Special Prayers for Instruction.

An exception that the trial judge failed to charge the jury upon a certain phase of the case can only be taken advantage of on appeal by an exception to his failure to give a requested instruction thereon.

2. Same—Evidence of Deposit—Check Stubs—Prima Facie Case—Questions for Jury.

The plaintiff sued a bank for an alleged deposit therein which he claimed the defendant had failed to credit to him, and put in evidence his check book stubs whereon the proper officer of the bank had credited the plaintiff two sums in the same amount at different times on the same day, the plaintiff's bank book only showing one credit in that sum: *Held,* the entries on the stub were not so controlling or conclusive that the jury could not find as an independent fact that the second deposit was or was not made by the defendant, leaving both entries to their consideration; and the plaintiff was not entitled to an instruction that the entries made a *prima facie* case, especially as he had not requested it by a special prayer for instruction.

APPEAL by plaintiff from *Cline, J.,* at September Term, 1912, of GREENE.

George M. Lindsay for plaintiff.
L. V. Morrill for defendant.

PER CURIAM. This is an action to recover the balance of a deposit alleged by the plaintiff to have been made on 17 December, 1910, with

defendant, the balance which plaintiff claims being $1,105.59. Plaintiff alleges that he made two deposits on this date, each in the
(509) amount of $1,392.35, one in the morning and the other in the afternoon of the same day. Defendant denied this allegation, and alleged that plaintiff made only one deposit of $1,392.35, in the morning of 17 December, 1910. If this is true, plaintiff is indebted to defendant in the sum of $286.76, but if plaintiff's allegations be true, the defendant owes him $1,105.59, the difference between the amount of the second deposit and the said balance of $286.76, which he would owe the defendant if his allegation is not true and which was pleaded as a counterclaim. The jury returned the following verdict:

1. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: Nothing.

2. Is the plaintiff indebted to the defendant upon its counterclaim, and if so, in what amount? Answer: $286.76.

The court instructed the jury that it was largely a question of fact. If the jury found from the evidence according to plaintiff's allegations and his account of the transaction, then the first issue should be answered "Yes, $1,105.59," and the second issue "Nothing"; but if they found the other way, their answer to the first issue would be "No," and to the second issue "Yes, $286.76." The plaintiff excepted upon the ground that the presiding judge should have charged that the entry of both deposits on the stub of plaintiff's check book by the cashier was *prifa facie* evidence that the deposits were made. No such instruction was requested by the plaintiff, and, in the absence of a special prayer, the omission to so charge, there being no affirmative error, is not ground for reversal, even if plaintiff would have been entitled to the instruction. *McKinnon v. Morrison,* 104 N. C,. 354; *Simmons v. Davenport,* 140 N. C., 407. The instruction to which exception was taken merely meant that the entries were not so controlling or conclusive as to prevent the jury from finding, as an independent fact, that the second deposit was or was not made by the plaintiff, though the jury had the right to consider them. Plaintiff's pass book did not show the deposit, and did not correspond with the check book. A careful examination and analysis of the testimony impresses us with the belief that the two entries represented in fact but one deposit, and that, therefore,
(510) there was a mistake in the entries on the check book. It is a singular coincidence that the plaintiff, who had not counted the money before he carried it to the bank, should have had two parcels of

precisely the same amount—even to the cents. The verdict appears to be correct upon the merits, and the proceedings are free from error.

No error.

Cited: *S. v. Robertson,* 166 N. C., 365; *Webb v. Rosemond,* 172 N. C., 851.

L. C. CARROLL v. MARTHA JAMES ET AL.

(Filed 5 March, 1913.)

1. Appeal and Error—Costs.

A party to an action who has been successful on a former appeal to the Supreme Court is entitled to recover of the adverse party his costs thereon, whatever the final outcome of the litigation may be.

2. Mortgagor and Mortgagee—Sale—Expenses—Credits—Value of Property—Mortgagee's Liability.

A mortgagee seizing the mortgaged property under claim and delivery is held accountable for its reasonable value, and not merely for the price it may have brought at a sale; and in this case, the property seized being leaf tobacco, it is *Held,* that the plaintiff should be credited with the reasonable cost of grading and marketing the tobacco, and with certain rent which he has paid for the defendant.

3. Pleadings—Debtor and Creditor—Denial of Cause of Action.

Where in an action upon a mortgage note the answer denies the debt, it is, in effect, a denial of plaintiff's cause of action.

4. Actions—Costs—Mortgagor and Mortgagee—Possession—Sales.

The plaintiff mortgagee seized the defendant's leaf tobacco conveyed by the mortgage, under claim and delivery, and sold the same. The defendant alleged that the tobacco should have brought a sufficient price to have paid off the mortgage. Upon the question of taxing the cost, it is necessary to ascertain whether the plaintiff took possession before or after the commencement of the action; for if before, and anything was found to be due the plaintiff, the answer, in effect, denied the plaintiff's cause of action, and the costs should be taxed against the defendant; if afterwards, and the plaintiff does not recover the amount claimed, the cost should be taxed against him.

5. Costs—Judgments—Credits.

The court costs recovered in an action should not be applied in reducing the amount of the judgment obtained, for while the costs are taxed in the name of a successful litigant, they are to be paid to the officers of the court, witnesses, and for other expenses incident to the litigation, and should not be credited to the defendant, unless he has paid them.

APPEAL by plaintiff from *Foushee, J.,* at March Term, 1912, (511) of CARTERET.

This action was commenced on 5 November, 1908, to recover certain personal property, of which the plaintiff claims to be the owner under a chattel mortgage.

On the same day property was seized under proceedings in claim and delivery issued in the action, which was thereafter delivered to the plaintiff, upon the defendants failing to give the undertaking required by the statute.

The property was sold by the plaintiff under said mortgage, and a part of it was bought by the plaintiff.

The plaintiff filed his complaint at March Term of court, 1909, in which he alleged that he was the owner of the property; that it was seized under claim and delivery on 5 November, 1908, and had been sold under the mortgage; and that after applying the proceeds of sale, less reasonable expenses, there was a balance due on the mortgage debt of $42.

The defendants filed their answer in June, 1909, in which they denied that there was anything due on said debt on 5 November, 1908, and also denied that the plaintiff was the owner of the property.

They also allege, as a first defense and counterclaim, that the sale under the mortgage was invalid by reason of defect in the advertisement; that the property was bought at the sale by the plaintiff at a low valuation, and was reasonably worth at that time $400.

They also allege, as a second defense and counterclaim, that the debt secured in the chattel mortgage was originally $232.50; that $6 had been paid thereon; that in the year 1908 the plaintiff took from the possession of defendants and disposed of tobacco of the value of $500, out of the proceeds of which was paid $112 to one Newberry to the use of the defendants, leaving $338 due the defendants from the sale of tobacco, and that corn of the value of $225 was seized in the
(512) claim and delivery proceedings which was not embraced in said mortgage.

The plaintiff filed his reply, in which he denied the material allegations in the counterclaim, except he admitted that the original debt was $232.50, subject to the credit of $6, and alleged that out of the proceeds of tobacco, which he contended came rightfully into his possession, he paid W. L. Oglesby $15.50 rent.

There was a trial of the action in 1910, which resulted in favor of the defendants, and upon appeal, a new trial was ordered, and judgment was entered against the defendants for the costs of the appeal—$51.80.

The case again came on for trial at March Term, 1912, when the following verdict was found by the jury:

1. Is the plaintiff the owner of the property described in the complaint? Answer: Yes; to secure the debt.

2. What was the unpaid balance of the note secured by the mortgage given by Cæsar James to plaintiff at the time this suit was brought? Answer: $232.50, with interest thereon from 2 March, 1908, subject to a credit of $6 on the interest.

3. What was the value of the black mare mule, the mouse-colored blind horse mule, the top buggy and harness, and the corn seized under claim and delivery in this action, at the end of the seizure? Answer: $27.50.

4. What reasonable expenses were incurred by the plaintiff in paying the lien off the buggy and in keeping and selling the said property seized? Answer: $27.25.

5. Was the tobacco, after being seized by Meadows, turned over, by agreement with the defendant Isaac James, to plaintiff and Newberry, to be graded and sold at Kinston, with the agreement that the expenses of grading and marketing should first be taken out and the balance paid over to Newberry on the Meadows mortgage till it was paid? Answer: Yes.

6. What amount did plaintiff by agreement pay over from the proceeds of the tobacco to Newberry on the Meadows mortgage? Answer: $112.90.

7. What was the net amount received by the plaintiffs for the tobacco after paying the expenses of grading and marketing and (513) paying the warehouse charges *and rent?* Answer $128.80.

8. What was the value of the tobacco turned over to the plaintiff at the time it was turned over to the plaintiff? Answer: $240.

9. What was the reasonable cost of grading and marketing (including warehouse charges) the tobacco taken into his possession by plaintiff? Answer: $40.

Judgment was entered on the verdict, charging the plaintiff with the amounts found in answer to the third and eighth issues and crediting him with the amounts in answer to the second, fourth, and ninth issues.

His Honor refused to credit the plaintiff with the Supreme Court costs ($51.80) incurred on the former appeal, and adjudged that the plaintiff pay all cost of the Superior Court except the cost accrued up to the return term, and $1 for the final judgment.

The plaintiff tendered judgment according to his contentions, one of them being that he ought to be charged with $128.90, instead of $240, and excepted to the judgment rendered, and appealed.

A. D. Ward for plaintiff.
Abernethy & Davis for defendant.

PER CURIAM. It is admitted that the amounts found in answer to the second, fourth, and sixth issues are proper charges against the defendant, and that the plaintiff must account for the value of the property as found by the answer to the third issue.

The ruling of his Honor that the plaintiff is liable for $240, the value of the tobacco, instead of for $128.90, the net proceeds of its sale, is correct, because the plaintiff was at the time a mortgagee, and is, as such, accountable for its reasonable value.

The plaintiff is entitled to be credited with the reasonable cost of grading and marketing the tobacco, as found by the ninth issue, and the defendant ought not to complain of this, as the jury say, (514) in response to the fifth issue, they agreed to it, and in addition to the rent, paid out of the proceeds of the sale of tobacco, which is included in the seventh issue, and not in the ninth, and which the plaintiff alleges in his reply to be $15.50.

The plaintiff must also be credited with the amount of the Supreme Court cost ($51.80). *Smith v. French,* 141 N. C., 2; *Smith v. R. R.,* 148 N. C., 335.

No satisfactory adjudication can be made as to the cost of the Superior Court upon the record before us, as it does not appear whether the tobacco came to the possession of the plaintiff before or after the commencement of the action.

The execution of the note secured by the chattel mortgage and its amount are admitted, and the whole controversy in the Superior Court was as to the value of the property seized under the claim and delivery proceeding, and as to the value of the tobacco and the expenses incurred, and this controversy continued up to and including the last trial.

The defendants allege that the tobacco was worth $500, and that the plaintiff had paid $112 to their use out of the proceeds, leaving a balance of $388 due by the plaintiff to the defendant on this item.

If this allegation is true, and the tobacco came to the possession of the plaintiff prior to the commencement of the action, there was nothing due on the mortgage debt of $232.50 when the action was commenced, and as the plaintiff had to show some amount to be due, the allegation was in substance the denial of the right to maintain the action, which continued in issue up to the trial, and the verdict of the jury establishes the fact that this allegation is not true, and that some amount was due at the commencement of the action on the mortgage debt, to wit, $232, with interest from 2 March, 1908, subject to a credit of $6, less $200, the remainder of proceeds of sale of tobacco after deducting the reasonable cost of grading and marketing.

In this view of the case, the plaintiff would be entitled to a judgment against the defendants for the costs of the Superior Court, because the right to maintain the action has been denied and the (515) costs have been incurred in successfully maintaining it.

On the other hand, if the tobacco was delivered to the plaintiff after the commencement of the action, there was no denial of the right of the plaintiff, and defendants having successfuly maintained their contention as to the matters in controversy, and a balance being due them, they should recover their costs.

We are not inadvertent to the first paragraph of the defendants' answer, but construe that in connection with the other allegations.

In the event judgment should be entered in favor of the plaintiff for the cost of the Superior Court, he would not be entitled to have the amount thereof applied in reduction of the judgment in favor of the defendants, because he has not paid these costs, and while the recovery is in his name, the items entering into the judgment for costs will belong to officers and witnesses.

It is, therefore, ordered that the judgment of the Superior Court be modified by crediting the same with $51.80, the costs paid in the Supreme Court, without interest, and with $15.50 rent, if the defendants agree to that amount, and if they do not so agree, then with such amount for rent as a jury shall determine was paid by the plaintiff out of the proceeds of the sale of the tobacco.

It is further ordered that the time when the said tobacco was delivered to the plaintiff be ascertained by agreement of the parties or by the verdict of the jury, and that judgment for the costs of the Superior Court be entered in accordance with the facts and this opinion.

Let the costs of this appeal be divided.

Modified and affirmed.

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(516)

FIRST NATIONAL BANK OF WELDON v. H. H. FRIES.

(Filed 5 March, 1913.)

Appeal and Error—Evidence in Narrative—Waiver of Parties.

The requirements of the rule of the Supreme Court, that the evidence must appear in the case on appeal in narrative form, cannot be waived by the parties.

E. L. Travis, W. E. Daniel, and R. C. Dunn for plaintiff.
Albion Dunn for defendant.

PER CURIAM. This is a motion to reinstate an appeal which was dismissed at this term for failure to state the evidence in narrative form, and for other irregularities appearing in the record.

The principal reason urged in support of the motion is that counsel for appellee agreed to the case on appeal; but this also appeared in *Cressler v. Asheville,* 138 N. C., 483, and in *Bucken v. R. R.,* 157 N. C., 444, and while the appeals in those cases were not dismissed, it was stated in effect that counsel could not waive compliance with the rule, and that it would be enforced.

The motion must, therefore, be denied; but, while reaching this conclusion, we have examined all of the assignments of error, and find nothing which justifies a new trial.

Motion denied.

W. D. BOWEN ET AL. V. JOHN L. ROPER LUMBER COMPANY.

(Filed 19 February, 1913.)

1. Trespass—Boundaries—Declarations—Evidence.

In an action of trespass *quare clausum fregit,* testimony of the plaintiff as to certain lines and boundaries was objected to on the ground that it was based on information his deceased father had given him: *Held,* no error, as this evidence may have been competent, as the declarations of the father had been made before any controversy had arisen; and as the witness further testified that it was on information received from his father and others, and was also a matter of personal knowledge, and as the land in dispute adjoined that of the plaintiff, the evidence may have been competent under the principles announced in *Halstead v. Mullen,* 93 N. C., 252.

2. Trespass—Parties.

In an action of trespass *quare clausum fregit,* only those who owned the land at the time of the trespass, and have any interest in the recovery, are the necessary parties of record.

3. Trespass—Conflicting Evidence—Verdict.

When in an action of trespass, involving title to lands, the evidence is conflicting, the findings of the jury, under a proper charge of the court, are conclusive.

(517) APPEAL from *Bragaw, J.,* at February Term, 1913, of WASHINGTON.

Trespass, quare clausum fregit. On issues submitted, the jury rendered the following verdict:

1. Are the plaintiffs the owners of the swamp land described in the court map as "land in controversy" within the lines of Y, X, V, U, and east of the line 8, 9? Answer: Yes.

2. If so, did defendant trespass on said lands? Answer: Yes.

3. If so, is plaintiff's claim for damages barred by statute, as alleged? Answer: No.

4. What damages, if any, are plaintiffs entitled to recover? Answer: $1,500.

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

Ward & Grimes for plaintiff.

A. D. McLean, W. M. Bond, and W. M. Bond, Jr., for defendant.

CLARK, C. J. The Court has carefuly examined the record, and finds no exception to the proceedings which gives the defendant any just ground of complaint. The title to the land was shown to be out of the State, under a patent to Joseph Dwight, dated in 1758. See *Bowen v. Lumber Co.*, 153 N. C., 366. Plaintiff then exhibited a line of deeds, beginning in 1786 to 1892; three to his own family and himself, bearing date respectively in 1821, 1847, 1892, and offered evidence tending to show that these deeds, more especially those (518) of 1821, 1847, 1892, covered the land in controversy, and that within the boundaries on the highland the plaintiff and those under whom he claimed had lived continuously, to plaintiff's personal knowledge, for 44 years, 60 acres being under fence and cultivated, with house, barn, stables, etc., and that they exercised such dominion and control over the swamp land within the boundary as the same permitted, and that this occupation and control were continuous and exclusive. Under a correct charge, the jury have accepted this as the true version of the facts, and the question of title, therefore, has been properly determined in plaintiff's favor. The only objection seriously urged for error before us was that the court refused to strike out a portion of plaintiff's testimony relevant to the issue. The land having been surveyed and plats made and exhibited on the trial, the plaintiff, testifying in his own behalf, said, among other things, that the deeds of 1821, 1847, and 1892 covered the land in controversy, and proceeded to state more in detail as to certain lines and corners of the land, and more particularly as to the placing of the point of contact with the Ross patent, one of the termini called for in the deeds; the objection urged being that the testimony referred in part to deeds which were older than the witness, and that he testified only from what his de-

ceased father had told him about the boundary. Under the decisions and on the facts presented, this source of information may have been entirely legitimate, for it was based, in part, on a declaration of the deceased father, before any controversy and as to the boundary of the Ross patent, a tract adjoining his own, and thus may have been entirely competent under the principle illustrated and applied in *Halstead v. Mullen,* 93 N. C., 252; *Mason v. McCormack,* 85 N. C., 226, and other like cases. If, however, the contrary be conceded, the objection is not open to defendant, on the record, for the witness stated that in saying the deeds in question covered the land, he spoke from information received from his father and *others,* and he also said he had seen the land surveyed and knew of himself of the position of certain lines and corners marked and recognized as part of the boundary. The
(519) statement of the witness, therefore, did not rest alone on information derived from his deceased father, and the court made a correct ruling in refusing to strike out the testimony. Those who owned the land at the time of the trespass committed and all who have any interest in the recovery are parties of record, and the objection for defect of parties is without merit. *Daniels v. R. R.,* 158 N. C., 418. The evidence offered tending to show adverse occupation of the *locus in quo* on the part of the defendant or its grantors under the deed from Anne Blount, administratrix, was properly submitted to the jury, and rejected. The issue between the parties dependent, chiefly, on questions of fact, has been submitted to the jury under a correct and proper charge, and, as stated, we find no reason for disturbing the conclusion they have reached. There is

No error.

IN RE WILL OF J. M. PATRICK.

(Filed 12 March, 1913.)

Wills—Caveat—Mutual Capacity—Evidence—Burden of Proof.

In these proceedings to caveat a will for mental incapacity of the testator, it appeared that he signed the will in accordance with the statutory provisions obtaining here, at the house of a third person, in the presence of impartial witnesses, dictated the terms of the will, making an intelligent disposition of his property, and stating his reasons therefor; and it is *Held,* that the burden of proof was not shifted to the propounders.

APPEAL from *Cline, J.,* at September Term, 1912, of GREENE.

Issue of *devisavit vel non* on the last will and testament of J. M. Patrick, deceased.

On the issue submitted, the jury rendered the following verdict:

"Is the paper-writing propounded, and every part thereof, the last will and testament of J. M. Patrick, deceased? Answer: Yes."

Judgment on the verdict, and caveators excepted and appealed. (520)

C. L. Abernethy, G. M. Lindsay, and J. P. Frizzelle for caveators.

W. S. O'B. Robinson, Ashley Albritton, and O. H. Guion for propounders.

PER CURIAM. The case, not improperly determined on the single issue, was presented in the two aspects, of mental incapacity and undue influence. As to the first, we think his Honor in effect charged that there was no evidence of mental incapacity on the part of the testator, and on careful perusal of the entire record we fully concur in this view. All of the testimony is to the effect that the testator, at the time of executing the will, had a sound mind and a disposing memory, and there is no fact rising to the dignity of legal evidence which tends to show the contrary. In the second aspect the question was submitted to the jury under a charge which correctly placed the burden of proof upon the caveators, the evidence showing that the will was made at the home of a third person in the presence of impartial and disinterested witnesses, by a man of sound mind and memory, who dictated the terms of the will himself, making intelligent disposition of his property and giving intelligent reasons for the disposition made; and while there are facts in evidence requiring that the issue in this feature of the case should be referred to the jury, we find nothing in the testimony which would justify or permit that the burden of proof should be shifted to the propounders. The rulings of the court on questions of evidence and in the charge to the jury are in accord with our decisions. *In re Fowler,* 159 N. C., 203; *In re Everett,* 153 N. C., 83; *Linebarger v. Linebarger,* 143 N. C., 229; *Atkins v. Withers,* 94 N. C., 581. There is No error.

(521)

KATE L. HEILIG v. NATIONAL LIFE INSURANCE COMPANY.

(Filed 16 April, 1913.)

1. Insurance, Life—Valid Provisions—Suicide.

A provision in a life insurance policy declaring suicide of the insured within twelve months of its date an excepted risk, is valid.

2. Same—Application—Statements—Policy Contracts.

Where attached to a life insurance policy sued on is a paper-writing, over the signature of the insured, purporting to be the original application for the insurance, which states "that (among other things) if within one year from date of the policy I shall suicide or destroy myself, sane or insane, the policy hereby applied for shall be null and void"; and this application is made a part of the policy by express provision upon the face of the policy, it is *Held*, that the statement is a part of the application, and the application is a part of the contract of insurance, binding upon the beneficiaries thereunder.

APPEAL by plaintiff from *Whedbee, J.*, at February Term, 1913, of ROWAN.

Jerome & Price and Craig & Craig for plaintiff.
T. C. Linn and Stahle Linn for defendant.

PER CURIAM. The plaintiff seeks to recover upon a policy of insurance issued by the defendant on 26 April, 1910, alleging the death of the insured on or about 30 September, 1910. The defendant admitted the execution and delivery of the policy and the death of the insured, but denied liability, for that the insured had suicided or destroyed himself, while sane or insane, within twelve months after the issuance of the policy, in violation of the terms of the contract of insurance.

The plaintiff excepted to the submission of the issue as to suicide, upon the ground that the provision as to suicide is not properly made a part of the contract of insurance. The jury answered the issue as to suicide for the defendant, and, judgment having been entered accordingly, plaintiff excepted and appealed, the sole question presented to the Court being whether the provision as to suicide relied upon by the defendant is properly made a part of the contract of insurance.

(522) The policy contains the following provisions:

"(*a*) CONSIDERATION.—This policy is issued in consideration of the application therefor and a premium of two hundred ninety-four and 14-100 dollars.

"(*b*) POLICY THE ENTIRE CONTRACT.—This policy and its application, which is made a part hereof, and a copy of which is hereon indorsed, together with general provisions contained on the reverse of this paper, which are hereby made a part of this policy as fully as if they were recited at length over the signatures hereunto affixed, constitute the entire contract between the parties."

The original application, which is made a part of the policy, and which is indorsed in its entirety thereon, consists of two attached paper-writings.

The first sheet, designated as "Application Form A," contains the formal words of application, stating the character of policy applied for, the premium, age of applicant, name and relationship of the beneficiary, date and place of application, and concludes:

"I hereby agree that this application and the answers made to the medical examiner and the policy applied for shall constitute the entire contract between the parties hereto. Signature of applicant: L. E. Heilig. P. O. address: Salisbury, N. C."

The second sheet, designated as "Application Form B," has the following caption: "Answers Made to the Medical Examiner. (In continuation of my application to the National Life Insurance Company, dated 19 April, 1910)," and concludes: "I hereby certify that I have read all the statements and answers in this application, and agree, on behalf of myself and any person who shall have or claim any interest in any contract issued hereunder, that no material circumstances or information have been withheld or omitted touching my past and present state of health and habits of life, and that the said statements and answers, together with this declaration, as well as those made to the company's medical examiner, are true and shall be the basis of the policy hereby applied for; that there shall be no contract of insurance until a policy shall have been issued and delivered to me and the premium thereon paid to the company, or its authorized agent, during my lifetime and good health; *that if, within one year* (523) *from the date of the policy, I shall suicide or destroy myself, sane or insane, the policy hereby applied for shall be null and void;* or if, etc. Signature of applicant: L. E. Heilig. Witnessed by examiner: W. W. McKenzie."

The validity of a provision declaring suicide an excepted risk within twelve months after the date of the policy has been uniformly sustained by the Court. *Spruill v. Insurance Co.*, 120 N. C., 147.

The statement as to suicide appears above the signature of the applicant, and on the same paper with the formal application, and in that statement he speaks of "this application," and twice refers to the policy "hereby applied for."

We are, therefore, of opinion that the statement is a part of the application, and that the application is a part of the contract of insurance.

The Royal Circle v. Achterrath, 204 Ill., 549, and *Goodwin v. Insurance Co.*, 97 Iowa, 226, chiefly relied on by the plaintiff, do not sustain the position that the statement as to suicide is no part of the applica-

tion, but decide that a provision that the policy shall be void in the event of suicide yields to another provision in the policy that it shall be incontestable after a certain time.

No error.

D. H. HENDRICKS v. H. B. IRELAND.

(Filed 16 April, 1913.)

1. Claim and Delivery—Replevy—Final Judgment—Return of Property—Measure of Damages.

Where the recovery of personal property is sought, with the ancillary remedy of claim and delivery, and the defendant has replevied the property and judgment has been finally rendered in the plaintiff's favor, it is proper for the judgment to require the return of the property, if to be had, and, if not, for its value as assessed by the jury, with damages for its detention. Revisal, sec. 570.

2. Issues.

Where the issues submitted fully cover the issues tendered, it is not error for the trial judge to refuse to submit the latter.

3. Appeal and Error—Instructions—"Broadside" Exceptions.

Unless an exception to an instruction given by the trial court specify the errors therein, it will not be considered on appeal.

4. Claim and Delivery — Judgments — Costs and Expenses — Agreement of Parties—Appeal and Error.

Where the defendant in claim and delivery of crops has replevied the property, and the plaintiff has recovered final judgment, an additional item of expense or cost allowed by consent to the plaintiff will be held as binding upon the parties on appeal.

(524) APPEAL by plaintiff from *Cooke, J.*, at Fall Term, 1912, of DAVIE.

A. T. Grant and Jones & Patterson for plaintiff.
T. B. Bailey and Jacob Stewart for defendant.

PER CURIAM. This is an action for the recovery of personal property, with the ancillary proceeding of claim and delivery. The property was seized under the requisition, and replevied by defendant upon his giving bond. Plaintiff recovered in the action, and the usual judgment was entered for the return of the property, if to be had, and if not, then for its value, which the jury assessed at $400, and damages

for deterioration at $70, and for detention at $217. This was correct in form (Revisal, sec. 570), and it was for the jury to ascertain the amounts.

1. It was not error to reject the issues tendered by defendant, as they were fully covered by those submitted. *Albert v. Insurance Co.,* 122 N. C., 92; *Coal Co. v. Ice Co.,* 134 N. C., 574; *Deaver v. Deaver,* 137 N. C., 240.

2. The damage to the logs while in possession of the sheriff under the order of seizure was not recoverable by the defendant, as he failed in the action, and the logs were not his property, and consequently no loss was suffered by him. This testimony could not have been pertinent to the counterclaim, for if the property was injured while in the custody of the sheriff, it was something of which the owner alone could complain, and did not relate to the efficiency of the plant agreed to be sold according to defendant's allegations. If the defendant had established ownership of the property, the objection would have (525) had more force.

3. The objection "to the instruction given by the court to the jury" is too general, and for that reason cannot be considered. An exception to a charge must specify the error therein. *Leak v. Covington,* 99 N. C., 559; *McKinnon v. Morrison,* 104 N. C., 354. Besides, the charge was free from error.

4. The item of $10.31, which was allowed against defendant in the bill of costs, appears to have been so taxed by consent of the parties, and, therefore, is not subject to exception. The other item of $26, cost and expense of seizing and caring for the property, was properly allowed. Revisal, secs. 637 and 799; *R. R. v. Main,* 132 N. C., 445.

We have carefully examined the record and case on appeal, and are convinced that the case was properly tried.

No error.

Cited: Gray v. R. R., 167 N. C., 435.

D. B. BATTEN, ADMINISTRATOR OF JAMES BATTEN, v. TRYON P. BATTEN.

(Filed 16 April, 1913.)

APPEAL from *Cooke, J.*, at September Term, 1912, of MONTGOMERY.

Civil action to recover upon a breach of a contract to support plaintiff's intestate. Defendant appealed.

Charles A. Armstrong and J. A. Spence for plaintiff.
R. T. Poole and W. A. Cochran for defendant.

PER CURIAM. We have carefully examined the record and assignments of error on this appeal, and find no reversible error.

No error.

(526)

W. C. LINNEY v. W. D. MINTZ ET AL.

(Filed 7 May, 1913.)

Held, this case presented only issues of fact, determined by the verdict.

APPEAL by defendants from *Lyon, J.*, at Fall Term, 1912, of ALEXANDER.

F. A. Linney, J. H. Burke, and L. C. Caldwell for plaintiff.
J. L. Gulley and W. A. Self for defendants.

PER CURIAM. This was a special proceeding started before the Clerk of Alexander Superior Court to establish the boundary lines between the plaintiff and the defendants, and heard on appeal to the Superior Court upon the following issue: "Is the line from Black 4 to Black 5 the true dividing line between the plaintiff and the defendant."

We are of opinion that the question at issue is one of fact, and that it has been determined by the finding of the jury.

Upon a review of the record we find

No error.

R. H. SPRUILL ET AL. v. W. T. HOPKINS.

(Filed 28 May, 1913.)

Evidence—Boundaries—Declarations of a Living Person.

Testimony of the declarations of a living person as to the boundaries of land in dispute is incompetent.

APPEAL by defendants from *Webb, J.*, at Spring Term, 1912, of TYRRELL. Action to recover damages for cutting timber on a strip of land, claimed by the plaintiff to be a part of the Clayton tract of land.

The defendants admit that the plaintiffs are the owners of the Clayton tract, but they deny that the land in controversy is a part of that tract.

The Belgrade and Holly Grove tracts of land adjoin the Clayton tract. Both parties claim title under W. S. Pettigrew, who was the father of Charles Pettigrew. Charles Pettigrew is now (527) living, and there is no evidence in the record that he was at any time the owner of the land in dispute, or of the Belgrade land, or of the Holly Grove land.

Mr. Nooney testified for plaintiff: "Am 69 years old. I was overseer for Mr. Charles Pettigrew. I know the Clayton tract of land. Mr. Charles Pettigrew, while in possession of the Holly Grove and Belgrade tracts, told me not to cut on the land now in dispute. Said it was a part of the Noah Spruill's Clayton land." Defendants excepted.

There was a verdict and judgment for the plaintiffs, and defendants excepted and appealed.

M. Majette and W. M. Bond for plaintiff.
I. M. Meekins and Ward & Grimes for defendant.

PER CURIAM. The evidence of the witness Nooney was very important on the issue before the jury, and was clearly hearsay and incompetent.

It is not brought within the rule admitting the declarations of a deceased witness, as the declarant is living; nor does it appear that either party claims under him, or that he was more than an agent in possession of the Belgrade and Holly Grove lands. *Cansler v. Fite,* 50 N. C., 426; *Lawrence v. Hyman,* 79 N. C., 211; *Perkins v. Brinkley,* 133 N. C., 350.

The evidence also fails to show that Mr. Pettigrew had any knowledge of the boundaries, or that he was doing more than expressing an opinion that the land in dispute was a part of the Clayton tract. There must be a

New trial.

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(528)

W. R. HOPKINS ET AL. v. J. M. CRISP ET AL.

(Filed 28 May, 1913.)

Evidence—Issues of Fact—Questions for Jury.

This cause presenting a controversy of fact properly presented to the jury, no error is found.

APPEAL by plaintiff from *Lane, J.*, at Spring Term, 1912, of CHEROKEE. Action tried upon this issue:

(1) "Is the land claimed by plaintiffs, Tract No. 1949, located as shown on the plat, and as contended by plaintiffs? Answer: Yes.

From the judgment rendered, defendant appealed.

M. W. Bell, J. H. Dillard, and Zebulon Weaver for plaintiffs.

A. D. Raby, J. N. Moody, and R. L. Phillips for defendants.

PER CURIAM. We have examined the record in this case and considered the several assignments of error, and we find no reversible error. The controversy appears to be almost exclusively one of fact, and we think the court properly presented it to the jury.

No error.

NANCY LUNSFORD ET AL. v. FRED H. ALEXANDER ET AL.

(Filed 28 May, 1913.)

1. Appeal and Error—Appeal Bond—Laches—Motion to Dismiss—Motion to Reinstate.

It is necessary to comply with the requirement that the appellant give bond unless permitted to appeal *in forma pauperis;* and in this case, it appearing that the appellant had not given the required bond at the time the case was called, after several agreed continuances, in the Supreme Court, and that upon appellee's motion, the appellant did not

then offer to do so, the appeal was properly dismissed, and a motion to reinstate, thereafter made at the same term, should not be granted, as no legal excuse for appellant's laches has been shown.

2. Appeal and Error—Promise of Clerk to Notify—Appellant's Laches—Legal Excuse.

A request to the clerk of the Supreme Court to notify an appellant of the time when his case will be reached in the call of the district to which it belongs is a mere matter of personal courtesy, and not a legal obligation on the part of the clerk; and the appellant may not set up as an excuse for his laches in failing to be present, the failure of the clerk to reply.

3. Appeal Bond—Duty of Appellant—Laches—Attorney and Client—Principal and Agent.

Proving an appeal bond is the duty of the appellant and not of his attorney, and when the latter is authorized to act therein, he does so as the agent of the party appealing, who is, in the relation of principal, responsible for his laches.

APPEAL by caveator from *O. H. Allen, J.*, at July Term, 1912, (529) of ASHE.

N. Y. Gulley & Son, McNeill & McNeill for plaintiffs.
T. C. Bowie, R. A. Doughton, and R. L. Ballou for defendants.

CLARK, C. J. Motion to reinstate. When this case was reached in regular order for argument, on motion and by consent of counsel it was set for hearing for the end of the Fourteenth District. It was again reached under this order on 8 May, and at request of one of plaintiff's counsel it was laid over till an hour that would suit the convenience of said counsel. When reached, the defendant's counsel moved to dismiss because no appeal bond had been filed. Counsel for the plaintiff was present and showed no excuse for failure to file the bond, and did not then and there offer to make a deposit in lieu of bond which he would have been permitted to do. The case was then dismissed, as required by the rule.

The decision of the court below is presumed to be correct. Any party not satisfied with such decision has the right to appeal, but only upon compliance with the conditions required by the statute. Among these conditions is the execution of a bond, or making a deposit in lieu thereof, and if the party is unable to do either of these things, the law, in its liberality, permits him to appeal without giving bond, upon filing the affidavit and certificate and procuring leave to appeal (530) without bond, in the manner prescribed by law. The appellant

chose to do neither of these things. He might have filed the deposit even after motion was made to dismiss for want of a bond, but he did not offer to do so.

The appellant now moves on the last day of the term to reinstate the cause upon the ground that the clerk did not write him, upon application, the probable date at which the cause would be reached for argument. The clerk was absent from his office by illness, but the counsel making this affidavit, who is nonresident, had resident counsel who was present when the case was reached for argument, and dismissed, and he should have learned from him as to the date at which the cause would be reached. This Court has no daily calendar, and counsel must attend during the week for which the case is set under our rules. The clerk would probable have answered the letter, if he had been in his office; but this would have been merely a courtesy and not a right.

This Court has repeatedly said that "when a man has a case in court, the best thing he can do is to attend to it." *Pepper v. Clegg,* 132 N. C., 316. The appellant has not given this appeal such attention as entitles him to have this cause reinstated. Appellants are prone to forget that "appellees have rights" as well as themselves. The appellee has the right, if the appeal is not taken and prosecuted in the manner required by the statute, to have it dismissed, and the burden is upon the appellant to show that he has given the matter proper attention, and that failure to comply with the requirement of the statute and rules has been without laches on his part. If this motion, made on the last day of the term, were to be granted, it would result in keeping the appellee six months longer in litigation. The appellant has made out no case which entitles him to deprive the appellee of the final disposition of the case which the court has already made.

Providing appeal bond, if left to counsel, is a duty devolved on him not as counsel, but as agent of appellant, and his neglect is the neglect of the principal. *Churchill v. Insurance Co.,* 92 N. C., 485; *Griffin v. Nelson,* 106 N. C., 235. In *Cozart v. Assurance Co.,* 142 N. C., (531) 523, the Court says that compliance with the "regulations as to appeals is a *condition precedent* without which (unless waived) the right to appeal does not become potential." Hence it is no defense to say that the negligence is the "negligence of counsel, and not negligence of the party." This has been cited and approved, *Vivian v. Mitchell,* 144 N. C., 477, and in many other cases.

Motion denied.

Cited: Allen v. McPherson, 168 N. C., 437; *Queen v. Lumber Co.,* 170 N. C., 502.

MRS. F. C. FISHER ET AL. v. MONTVALE LUMBER COMPANY.

(Filed 28 May, 1913.)

Appeal and Error—Stenographer's Notes of Trial—Case Settled by Judge—Remanding Case—Procedure.

Where by the order of the trial judge in settling a case on appeal, the stenographer's notes of the trial are set out as part thereof, in violation of the rule of the Supreme Court, the cause will be remanded, that a case on appeal be correctly stated; and in this case the Court allows the appellant fifteen days after the case reaches the county from which it is appealed to serve his case, and the appellee ten days after such service to prepare and serve exceptions or counter-case.

APPEAL by plaintiff from *Long, J.*, at the October Term, 1912, of SWAIN.

The appellee moves to dismiss the appeal, or to affirm the judgment, for that the evidence in the case on appeal is not stated in narrative form, but by question and answer. An inspection of the record discloses that the evidence, as taken by the stenographer, by question and answer, is made a part of the case, but that this was done by order of the judge.

F. C. Fisher for plaintiff.

Frye, Gantt & Frye, W. L. Taylor, and Bryson & Black for defendant.

CLARK, C. J. On 19 February, 1913, this Court adopted the following rule:

"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 (532) exception.

"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."

The enforcement of the rule is a necessity. The use of the stenographer in trials in the Superior Court is increasing, and the temptation to incorporate all of his notes in the case, instead of taking the time to prepare a case on appeal, is great. If permitted, we will frequently be

required to read hundreds of pages of evidence that have no bearing on the points raised by the appeal, and the costs in this Court will become burdensome to litigants.

It is, therefore, ordered, in accordance with the rule (the stenographic notes having been incorporated in the case by order of the judge), that the cause be remanded, to the end that a case on appeal be stated.

The appellant will have fifteen days after this opinion reaches the Superior Court of Swain to prepare and serve his case on appeal, and the appellee ten days after such service to prepare and serve exceptions or counter-case.

Remanded.

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(533)

W. R. HOPKINS v. EMPIRE LUMBER COMPANY.

(Filed 28 May, 1913.)

Deeds and Conveyances—Ancient Deeds—Copies—Recitals—Seal—Presumptions—Evidence.

Where an ancient deed is not produced, but proved by a duly authenticated copy from the registration book, properly introduced in evidence, which recites that the grantor has thereunto subscribed his name and fixed his seal, there is a presumption, when the seal does not appear after the grantor's name, that it was properly affixed, arising from the recital in the instrument.

APPEAL by defendant from *Lane, J.*, at Spring Term, 1912, of CHEROKEE.

The plaintiff recovered judgment, and the defendant appealed.

M. W. Bell and Zebulon Weaver for plaintiff.
W. M. Axley for defendants.

PER CURIAM. This action is brought to recover damages for trespass upon three tracts of land. These three tracts have definite points called for, which are sufficient, when proven, to locate the lands conveyed.

We think the evidence amply sufficient for that purpose, and that the matter is largely one of fact, and was properly submitted to the jury.

The plaintiff introduced three grants and connected himself with them, but, in deraigning his title, introduced a copy from the registration books of a deed from Lyman W. Gilbert to W. H. Peet, dated 1861, March 1st. There is no seal after the grantor's name, but the instru-

ment concludes as follows: "In testimony whereof I have hereunto subscribed my name and affixed my seal, this the first day of March, 1861."

In case of an ancient deed which is not produced, but is proved from the record, which fails to indicate in any way that the deed was sealed, there is a presumption that the deed was sealed, arising from a recital in the instrument itself that it is sealed. Jones on Real Property, secs. 1073-1075; *Aycock v. R. R.*, 89 N. C., 323; *Heath v. Cotton Mills,* 115 N. C., 202; *Strain v. Fitzgerald,* 130 N. C., 601; *Smith v. Lumber Co.,* 144 N. C., 50; *Edwards v. Supply Co.,* 150 N. C., 176; (534) *Beardsly v. Day,* 52 Minn., 451; *Smith v. Dall,* 13 Cal., 510.

Upon a review of the record we find

No error.

STATE v. B. T. VANN.

(Filed 19 February, 1913.)

1. Murder—Jurors—Disqualification—Challenge Allowed—Power of Court—Practice.

When on a trial for murder a juror states, after he has been passed by the defendant, but before he has been sworn, that he was opposed to capital punishment, and that he would not agree to a verdict of guilty even if the evidence, under the court's instruction, should satisfy him beyond a reasonable doubt of the defendant's guilt, the court may, in its discretion, allow the State to challenge him for incompetency to serve in the case, and sustain the challenge; and it is competent for the court to discharge the juror on its own motion, if he appears to be disqualified.

2. Murder—Evidence—Identification—Premeditation.

On this trial for murder, evidence was competent, on behalf of the State, that the prisoner had several times sold liquors, in the presence of the deceased, at his place of business, it being confined to the purpose of identifying the prisoner, under the circumstances, and also for the purpose of showing premeditation, there being evidence of previous threats and of the prisoner's purchasing a pistol in order to carry them out, which was actually used.

3. Murder—Evidence—Premeditation—Verdict—Harmless Error.

On appeal from a conviction of murder in the second degree, evidence of premeditation, if erroneously admitted, is harmless, for the jury, by their verdict, have found in the prisoner's favor on that question.

4. Murder—Evidence—Identification—Exhibits.

On a trial for murder, the body of the deceased was found in a dense thicket, after the time of the alleged homicide, and there was evidence of

his identification by his clothes and certain articles found on his person: *Held*, no error in permitting these articles to be exhibited to the jury; and it not appearing to have prejudiced the prisoner, their exhibition was merely incidental, and it does not render the evidence incompetent.

5. Murder—Trial—Demonstrations—Appeal and Error—Court's Discretion.

A demonstration to the prisoner's prejudice, occurring during his trial for murder, which was promptly and severely rebuked by the trial judge, who immediately instructed and cautioned the jury not to be influenced by it in the slightest degree, will not be held for reversible error on appeal, the conduct of the trial being left to the presiding judge, without interference, except in extreme cases. *S. v. Wilcox*, 131 N. C., 707, cited and distinguished.

6. Witnesses—Interest—Evidence—Instructions.

The charge of the court in this case upon the weight to be given to the testimony of interested witnesses is approved under the rulings of *S. v. Byers*, 100 N. C., 512.

7. Murder — Evidence — Premeditation — Instructions, How Considered — Court's Expression of Opinion.

The court having charged the jury that they should consider all the evidence in the case, "both that of the State and that of the prisoner," another portion of the charge, that the law presumed malice from a killing with a deadly weapon, and the prisoner would be guilty of murder in the second degree, unless he had shown such facts and circumstances as would reduce the killing to manslaughter or excusable homicide, should be construed with the charge as a whole, and, thus construed, is not objectionable as requiring the jury to consider only the testimony introduced by the prisoner.

8. Murder—Judgments—Excessive Punishment—Appeal and Error.

Upon the evidence in this trial for a homicide, the objection that the punishment imposed is excessive is not sustained on appeal.

(535) APPEAL from *Lane, J.*, at September Term, 1912, of PASQUOTANK.

The prisoner was indicted for the murder of Oliver Layden, and was convicted of murder in the second degree. The testimony tended conclusively to show that the defendant had committed the murder. Oliver Layden left his home at 4 o'clock on the morning of 11 July, 1912, stating to his mother that he was going to Elizabeth City to have his watch mended, and never returned to his home. He was seen
(536) several times in Elizabeth City and at other places that day, in company with the defendant. They were riding together on bicycles, which were, on the same day, left at Cartwright's shop. The prisoner disappeared, and as he had been the last one seen with the deceased, several persons went to Norfolk in search of him. He was found at the home of his brother, Ebe Vann, in Berkley, a town in

Virginia near the city of Norfolk. When questioned as to the whereabouts of Oliver Layden, he seemed embarrassed, and he and his brother acted in a very suspicious manner. The prisoner ran from the house, jumped over a fence and attempted to escape. He was overtaken and arrested, but before his arrest, being asked where he had left Oliver, he stated, at first, that he had been with him at his brother's house in Berkley, but was not satisfied there, and had gone with him to Norfolk, though he would not say where he was in Norfolk. He afterwards said that he was not in Norfolk, but in Brooklyn, at 22 Catherine Street, and when further questioned, he said that he had left him in New York at the station; that Oliver had $11 and told him that he would not stop until he had crossed the ocean. The last of July or the first of August a dead human body was found about 4 miles from Elizabeth City, in a dense thicket, at a place called the "Desert," and also the clothing and picture of deceased, and other articles identified as his. A pistol of 38 caliber was also found with two empty chambers, and there were two holes made by the pistol shots in the coat and underclothing. The pistol belonged to the prisoner, and was found in the bushes nearby. The appearance of the place indicated that the body had been dragged from the railroad track to the place where it was lying concealed from the view of passers-by. The coat had been scorched by the fire from the pistol, showing that the person who killed the deceased was very close to him when he shot. There were facts and circumstances in evidence which tended to connect the prisoner with the homicide, but not necessary to be stated. He testified in his own behalf and admitted that he killed Layden, and that he acted in self-defense; Layden, after a quarrel between them, having advanced on him with a drawn knife, which put him in fear of his life, and that he shot and killed Layden believing, at the time, that his (537) life was in peril. He admitted having fled to Norfolk and then to New York by way of Cape Charles, but said he was badly frightened, and left on that account. He further stated that he dragged the body to the place where it was found and threw the bicycle, pistol, and knife in the bushes because he was "scared," and did not know what he was doing; and he gave the same reason for making the conflicting statements to the Laydens and the sheriff at Berkley about the matter. Mrs. Layden, mother of the deceased, testified that Oliver never carried a knife, except a small pocket-knife, which she found in his pocket after he had gone.

There was a judgment upon the verdict, from which the prisoner appealed, after duly excepting to certain rulings of the court, set out in the opinion.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Ward & Thompson, W. M. Bond, and P. W. McMullan for defendant.

WALKER, J., after stating the case: The prisoner's first exception relates to the exclusion of W. E. Hinton as a juror from the panel. It appears in the case that Hinton, one of the special venire, was passed by the State and accepted by the prisoner. He then voluntarily stated to the court that he was opposed to capital punishment, and that he would not agree to a verdict of guilty even if the evidence, under the court's instruction, should satisfy him beyond a reasonable doubt of the prisoner's guilt. The court, in the exercise of its discretion, permitted the State to challenge the juror, and upon said challenge, it being found that he was not indifferent or qualified to serve as a juror, the court sustained the challenge and he was excused. We do not perceive any error in this ruling. The precise question was raised in *S. v. Boon,* 80 N. C., 461. In that case, one of the jurors was called and passed without a challenge to the prisoner, who accepted him. When he was about to be sworn as a juror, he stated to the court that he was related to the deceased and the prisoner. At his own request, the court directed
(538) him to stand aside and declined to have him sworn as one of the jurors. The exception of the prisoner to this ruling was overruled. A similar decision was made in *S. v. Adair,* 66 N. C., 298, where twelve of the venire had been tendered and accepted by the prisoner, and duly sworn as jurors, but before they were impaneled it was found that one of the jurors was related to two of the prisoners, which fact was not known to counsel or the court when the juror was sworn. He was discharged, and the ruling was sustained by this Court on appeal, *Pearson, C. J.,* saying that, "as the jury was not impaneled and charged with the case, it was within the discretion of the court to allow the solicitor the benefit of a challenge for cause, so as to secure a jury indifferent as between the State and the prisoner." This rule of practice is well settled by the authorities. *S. v. Jones,* 80 N. C., 415; *S. v. Cunningham,* 72 N. C., 469; *S. v. Green,* 95 N. C., 614; *S. v. Ward,* 39 Ves., 225. The rule really goes beyond this, for it is the right and duty of the court to see that a competent, fair, and impartial jury are impaneled, subject to the right of peremptory challenge by the prisoner; and in the discharge of this duty, it may stand aside a juror at any time before the jury are impaneled and charged with the case. *S. v. Jones, supra; S. v. Boon, supra,* and cases therein cited. The court, therefore, may act of its own motion, in furtherance of justice, and need not wait for a formal challenge, if a juror appears to

be disqualified. Any other practice would be subversive of fair and impartial trials, and we do not understand the learned counsel of the prisoner to insist strenuously upon this exception. It may be added, that it does not appear that the prisoner had exhausted his peremptory challenges. His right to challenge is not one to select, but to reject, a juror, and, as was said in *S. v. Cunningham, supra,* "he obtained a jury of his own selection, and in no point of view was he prejudiced by the action of the court." Thompson on Trials (1889), sec. 120. He had no vested right to a particular juror.

It appears from the case that the State was permitted to prove that the prisoner had several times unlawfully sold liquor, in the presence of Oliver Layden, at his place of business. It is evident, we think, from the case and the charge of the court, that this evi- (539) dence was introduced to identify the prisoner as the one who had committed the homicide, and to show premeditation and deliberation in the killing. As the prisoner afterwards admitted that he killed Layden, and as the jury, by their verdict, negatived the existence of premeditation in doing the act, the testimony was harmless, if not, in itself, competent. *S. v. Brantley,* 84 N. C., 766, does not apply.

It appears from the evidence that the prisoner had threatened the deceased, and about the same time that some of the threats were made, he had prepared himself with a deadly weapon, a pistol of 38 caliber, to execute them, and he actually did use it for that purpose; and there was, in this case, direct evidence to connect the prisoner with the homicide—facts which did not exist in the *Brantley case.* Besides, the jury would hardly have acquitted the prisoner of the capital felony if they attached any importance whatever to this proof as showing a motive for the killing. They seemed to have clearly understood the case and the charge, and to have convicted the prisoner upon unobjectionable proof.

There was no error in permitting the articles found at the place of the homicide to be exhibited. This was, at least, competent for the purpose of identification, and if the prisoner was prejudiced thereby (and he does not appear to have been), it was merely incidental, and does not render the evidence incompetent. We find it stated in Underhill on Criminal Evidence, sec. 47, that "an article of personal property, the relevancy of which has been shown by its identification with the subject-matter of the crime, may be exhibited to the jury in the courtroom, either as direct evidence of a relevant fact or to enable them to understand the evidence, or to realize more completely its cogency and force."

The prisoner complains that, as stated in the case, "a ripple of laughter passed over the courtroom, and slightest applause—one or two hand-

claps by ladies who were present." This was caused by a question asked of the State's witness, Robert Winslow, as to what had passed between him and defendant's counsel, and the further question (540) by the solicitor as to whether he had been summoned by the prisoner's counsel. The judge rebuked this demonstration very promptly and severely, and immediately instructed and cautioned the jury not to be influenced by it in the slightest degree, and we must assume that they followed his directions. The court evidently concluded that the incident, in view of the caution given to the jury, was harmless. The conduct of the trial must be left largely to the discretion and control of the presiding judge, and it would have to be a very extreme case to induce interference by this Court with the exercise of his judgment. He would undoubtedly have ordered a mistrial if he had thought that any prejudice to the prisoner had resulted from misconduct of the bystanders. In the absence of any finding by the judge to the contrary, we must hold, in support of his ruling, that the unfortunate disturbance was not of such character or proportions as to disqualify the jurors for the proper and unbiased discharge of their duties. We see nothing ourselves in the circumstances, as they appear in the record, to impeach the integrity of the verdict. This case is not like *S. v. Wilcox,* 131 N. C., 707, for there the judge found as a fact that the prisoner had been prejudiced by the demonstration of the bystanders, which was of a very serious nature and plainly calculated to influence the jury. It is more like *S. v. Harrison,* 145 N. C., 408, in which it was said, at p. 414: "The defendant excepts because, during the argument of the solicitor, the defendant's counsel interrupted him to correct a statement. The solicitor made a sharp retort, whereupon a large part of the crowd in the courtroom broke into applause, which lasted several minutes. We find that the court reproved the audience in strong terms for the misconduct, required the solicitor to suspend his speech until it could be investigated, and called the officers before the court and inquired of them as to who engaged in the applause." The court did substantially the same thing in this case. In the *Harrison case* the exception of the prisoner, which was based upon the demonstration by the crowd, was overruled by this Court.

There is an exception to an instruction of the court upon the weight to be given to the testimony of interested witnesses, and to that of the defendant, but we think that the charge in this respect was very (541) full and explicit and conformed, at least, to the rulings in *S. v. Byers,* 100 N. C., 512, where the judge told the jury that "it was their duty to scrutinize the testimony (of certain witnesses) carefully, because of their interest in the result, but, notwithstanding such inter-

est, they might believe all they had said or only a part of it, or none of it, according to the conviction produced upon their minds of its truthfulness." This instruction was approved by this Court. Besides, the judge substantially charged in this case, as did the court in the *Byers case,* that if they believed the defendant's testimony, they should acquit him. What stronger language, in favor of the prisoner, could he have used?

The prisoner further excepts because, as he says, the court charged the jury that the law presumed malice from a killing with a deadly weapon, and he would be guilty of murder in the second degree, unless he had shown, merely to their satisfaction and not beyond a reasonable doubt, such facts and circumstances as would reduce the killing to manslaughter or excusable homicide. It is objected that this instruction required the jury to consider only testimony introduced by the prisoner, and *S. v. Castle,* 133 N. C., 769, is cited in support of the proposition. But we do not think the instruction, when considered, not by itself, but with the context, has that effect. The court had before expressly instructed the jury that, in passing upon the matters set up in mitigation or defense, they should consider all the evidence in the case, "both that of the State and that of the prisoner." The judge did in this case precisely what it was said in *Castle's case* he should have done, and which he failed to do in that case. So *Castle's case* supports the charge, which should be taken as a whole, and, as we have often said, construed, not textually, but contextually. It will not do to dismember the charge and consider the several parts without any reference to each other, but it must be viewed in its entirety. *S. v. Exum,* 138 N. C., 600; *Kornegay v. R. R.,* 154 N. C., 389; *S. v. Lewis,* 154 N. C., 632; *Jeffress v. R. R.,* 158 N. C., 215, and *S. v. Price,* 158 N. C., 642. The case last cited is very much like this in the particular question raised. The charge of the court, as a whole, was a full and clear statement of the law as applicable to the facts, and is sustained by numerous authorities. *S. v. Quick,* 150 N. C., 821; *S. v. Rowe,* 155 N. C., (542) 436; *S. v. Simonds,* 154 N. C., 197.

The prisoner, in the trial of this case, has had every advantage the law allows, and the jury, under the evidence and a clear and impartial statement of the law from the court, have rejected his version of the homicide. There was evidence of murder in the first degree, but the jury have taken a merciful view of the case and given the prisoner the benefit of the doubt, as between the two grades of felony, and convicted him of murder in the second degree. We find nothing in the record which should induce us to disturb the verdict or the sentence of the court. We cannot sustain the exception that the punishment imposed

by the court is, as matter of law, excessive, under the facts and circumstances of the case, for it is not so. If there are extenuating circumstances which do not now appear or of which the law takes no cognizance, relief must be sought from another source.

No error.

Cited: *Herndon v. R. R., ante,* 321, 324; *Berbarry v. Tombacher, ante,* 499; *In re Smith,* 163 N. C., 469; *S. v. Fogleman,* 164 N. C., 464; *Ferebee v. R. R.,* 167 N. C., 297; *S. v. Pollard,* 168 N. C., 121; *S. v. Foster,* 172 N. C., 964.

STATE v. JOHN MATTHEWS.

(Filed 5 March, 1913.)

1. Homicide—Murder—Circumstantial Evidence—Questions for Jury.

Where upon a trial for murder circumstantial evidence for a conviction is relied on, and the circumstances tend to show defendant's guilt, so that the deduction of guilt from the circumstances is not merely conjectural or probable, they should be submitted to the jury, for they are the judges of the force or weight of the evidence of the defendant's guilt.

2. Homicide — Murder — Circumstantial Evidence—Close Scrutiny—Instructions.

Where circumstantial evidence is relied on for a conviction of a criminal offense, the court should warn the jury that the evidence, from its character, should be closely and cautiously scanned by them before rendering a verdict of the defendant's guilt.

3. Homicide—Murder—Circumstantial Evidence — Motive — Instructions for Jury.

Upon a trial for murder, the evidence in this case of improper relations between the prisoner and the wife of deceased as to motive; threats made by the prisoner on the life of the deceased, one of which, that he would kill the deceased on a certain day, appeared to have been carried out by the murder of deceased on the day named; threats against deceased's wife should she disclose communications of this nature he had made to her; his unwillingness for deceased to visit his own wife, who was living on land the prisoner claimed to have rented; the finding of the body of the deceased at his own home with a gun-shot wound in his head, while his gun remained on a rack in the room, the circumstances tending to show that prisoner was in a position to have inflicted it, when made, with other circumstances tending to show the prisoner's guilt, is sufficient to be submitted to the jury, and for them to find thereon that the defendant was guilty.

S. *v.* MATTHEWS.

APPEAL by defendant from *Cline, J.*, at January Term, 1913, (543) of FRANKLIN.

The prisoner was indicted for the murder of one Will Clifton, and convicted of murder in the second degree. From the judgment rendered, he appealed.

The only question presented by the appeal is as to the legal sufficiency of the evidence. This question was presented by a prayer for instruction that, upon the whole evidence, it is the duty of the jury to render a verdict of not guilty. The evidence for the State tended to show that the home of the deceased, and his wife, Clarinda Clifton, was in Franklin County, and that a short time before the homicide the deceased Clifton had been working near Spring Hope, in Nash County, and on the Sunday before, the deceased returned home. On the morning of the homicide the deceased, his wife, and the defendant were at the house of a neighbor, about one-half of a mile away, and after Clifton and his wife left for their house, the defendant was seen going in that direction. The deceased left his house with his gun about 11 o'clock, and some time between 11 and 12 o'clock a shot was heard in the locality in which his body was afterwards found, near his home. About 20 minutes after the shot was heard, the defendant was seen about three-quarters of a mile from the house of the deceased. The evidence for the State further tended to show that, in the absence of the deceased, the defendant had been in the habit of visiting the wife of the deceased. This was admitted by Clarinda Clifton, (544) in her testimony as a State's witness.

Richard Alston testified: "I knew Will Clifton. He is dead. Clarinda Clifton was his wife. They lived at the same house in October last. I lived one-half mile away. They lived off the Halifax Road and public path from Gold Mine Road to Mr. Wood's store. I remember the Sunday Clifton was killed. He, his wife, and defendant were at my house about two hours by sun. Just came there. Stayed 15 or 20 minutes after I got there. I sent a man a gallon of wine by defendant; he was in a buggy. Clifton and wife were walking. Defendant left my house first, about 8 or 9 o'clock. Defendant went towards Clifton's house. I heard no conversation between them. Will Clifton left my house sober. I saw defendant again that evening, about half an hour or an hour by sun, near my garden; he was on his way home; his horse walking along. Defendant lived two miles from Will Clifton's. In the afternoon he came from the same direction he went in the morning. I live nearest to the Cliftons. I went to their house that night. Will Clifton was dead; lying on face and wound on back of his head. I could have put my fist in it. Clifton had been down

about Spring Hope. He went away in January, and I had not seen him since. Will Clifton and wife left my house about 9 or 10 o'clock that morning. When defendant left my house he took a road away from the Clifton's house; at least, he did so far as I saw him."

Clarinda Clifton testified: That on the Sunday before her husband came home, the defendant came to her house, and one William Alston came after him, and that the defendant said to Alston: "Hell is going to be to pay here. Ed Taylor and Ellerson Jefferson had gone to Spring Hope to get Will to come home. He phoned to Penny Mitchell yesterday that he was coming, and I came here last night and lay in the bushes until 2 o'clock with a double-barreled gun to kill him if he did come." She further testified that, "On Thursday before Will was killed on Sunday, the second Sunday in October, the defendant (545) came to the field where I was picking cotton, with his gun in his arms, and said, 'Will did not have any right there.' I said, 'Will says he has a right wheresoever I am.' He said, 'Well, N. C. Gupton says he's not got any right here, and he shan't stay. He may live to see the sun rise the third day, but he will never see it rise and set the fourth day.' We went on out to the end of the row, and he said: 'You may have to tell something—they may make you tell something. Don't you call my name; you put it on some one else. I don't want to kill you, but I will do it. I started to kill you once the year you stayed at Rufus Kearney's, but didn't.' I did not see defendant any more until that Sunday morning, the second Sunday in October, between 8 and 9 o'clock. Will and I went up to Richard Alston's; he and Richard were standing at the back of the house. Had horse hitched to the buggy, and jug in buggy. I went to the kitchen then, and saw him at the door drinking water. Did not see him any more until Monday night. My husband went over to camp. Came back, and he and I went home. This was about 11 a. m. Carried my little child with me. Will went into the house, got his coat and got his gun. Went out the path towards the Shocco Road. That was between 11 and 12 o'clock, and I never saw him alive again. I went over to Albert Alston's, and when I got back between 5 and 6 o'clock in the evening—me and the four children—Will was lying on the floor dead. He had his feet towards back of house; head towards fireplace; sort of between the beds, lying on face; arms rather under him. Saw blood only where he was lying. He lay on two quilts and a pillow. I tried to give alarm. Sent two little boys after Mr. Manning. He came. They reported it to the coroner. He came Monday morning. On the first day of the preceding January Will had gone to Spring Hope. Defendant visited me. He was there sometimes every day. Had 4 acres in cotton near there. I heard a gun about 4 o'clock that Sunday

evening in the direction of that house. Albert Alston and his wife also heard it. I said, 'There is some one shooting.' She said, 'Some one is always shooting. They don't regard Sunday.' When I got back, Will's gun was in the rack, and his coat hanging up. He (546) was in his shirt sleeves. On the day of the inquest, he (defendant) said to me, 'Mrs. Clifton, they is trying to put this murder case on me, and if you tells anything that I have said, I am going to do everything I can against you, to send you to Raleigh; and if you and I ever hits the ground together, there will be another day of it.' He went down the road and spoke to Sarah Alston. I was married to Will twelve years. Have six children. I am 34 years old. I was at Warrenton the second Sunday in October. Went with Albert Alston in his buggy. Left about 8 that morning. Got home an hour and a half by sun. I had not grown tired of Will. Did not offer $100 to have him killed. I was in jail a while after coroner's inquest. Albert Alston had been there in daytime and also at night. I had rented an ox from him. Yes, I said the gun fired in the direction of our house. Albert Alston never knew me but once in his life. That was about four weeks before Will came home. John Matthews came there often. No other men came there. I did not handle my husband's gun, but it was loaded. When I got there my husband's feet were cold, but he was not stiff."

A witness by the name of Van Burt testified: "I live in that section of the country. I know the defendant. He passed my house on Saturday before, about 1 o'clock. He asked me if I had seen Bill. I told him I had seen him one time. He said, 'What did he say?' I told him Bill said he had come home now, and was going to stay. Defendant said, 'Well, if he has come home, he is not going to rule that plantation this year. I rented it, and am going to rule it.' On Sunday, about 11 o'clock, I heard a gun fire right in direction of Bill's house. When I was called to Bill's house that night, he was dead. No. 4 shot killed him. Did not hear a gun shoot that afternoon. I live one mile or one mile and a half from there."

Ed. Alston testified: "I recollect the day of the killing. My wife and I were going down to my sister's marriage, between 10 and 11 o'clock, near Charles Alston's old storehouse. We heard a gun fire in the direction of Clarinda Clifton's house. I drove on and came to railroad crossing three-fourths of a mile further on. Defendant was coming down the railroad. He spoke to me, and said: 'I (547) am on a trade for a dog, and on my way down to Newsom's.' He was in a buggy by himself. It was about twenty minutes after the gun fired when I saw the defendant. The place was about three-fourths of a mile from Clarinda's."

Ed. Taylor testified: "Live in Gold Mine Township. Knew Will Clifton. He lived last year in Spring Hope. Saw him there. He came home 23 September, 1912. I went to Clarinda's house 6 August, 1912, in company with Penny Mitchell. About three days later I had a consultation with the defendant in the road in front of my door. He said to me, 'I suppose you went down to see Clarinda.' I said, 'Yes.' He asked me who went with me. I told him Penny Mitchell. He asked me, 'What did she say to Clarinda?' I told him that she told Clarinda she wanted to bring her up to the house to care for her while she was sick. He said, 'Well, she and no one else is going to bring her away from down there.' This was about 29 August, 1912."

This closed the testimony. The court refused the instruction requested by the prisoner as to the sufficiency of the evidence, to which he excepted.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. M. Person for defendant.

WALKER, J., after stating the case: We are again called upon to decide what is often a very perplexing question, whether there is any evidence for submission to the jury. It is not apt to be a difficult one when the evidence is direct, and especially when it is credible, for belief in that case is generally the immediate and necessary result; whereas, in cases of circumstantial evidence, processes of inference and deduction are essentially involved, frequently of a most delicate and embarrassing character, liable to numerous causes of fallacy, some of them inherent in the nature of the mind itself, "which has been profoundly compared to the disturbing power of an uneven mirror, imparting its own nature upon the true nature of things." Wills on Circumstantial Evidence, p. 33. So that *Baron Alderson said in Reg.* (548) *v. Hodges,* 2 Lewis Cr. Cases, 227, "it was necessary to warn the jury against the danger of being misled by a train of circumstantial evidence. The mind was apt to take pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, in considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." It has been concluded, therefore, that such evidence should always be closely and cautiously scanned. We cannot expect to introduce mathe-

matical precision into our reasonings and judgments, and consequently not into our deductions, and therefore the law regards it as sufficient if guilt is established to the exclusion of every reasonable doubt, or, as it is sometimes put, of every reasonable theory or hypothesis of innocence. If the facts and circumstances tend to show the prisoner's guilt, so that the deduction of it from them is not merely conjectural or probable, but a fairly logical and legitimate one, we cannot say that there is no evidence, but should submit the case to the jury to find whether, by them, they are convinced of the fact of guilt beyond any reasonable doubt, they being the judges of the force or weight of the evidence. *S. v. Vaughan,* 129 N. C., 502. The rule is well settled that if there be absolutely no evidence, if the evidence be so slight as not reasonably to warrant the inference of the fact in issue, or if it does not furnish more than material for a mere conjecture, or merely shows it possible for the fact to be as alleged, the court will not leave it to the jury for them to find the fact. This was held in *S. v. Vinson,* 63 N. C., 335; *S. v. Rhodes,* 111 N. C., 647; *Brown v. Kinsey,* 81 N. C., 245, and in the numerous cases cited in *Byrd v. Express Co.,* 139 N. C., 273, where the subject was fully discussed.

After a careful analysis of the testimony, we have reached the conclusion that the judge did not err in submitting it to the jury. The circumstances pointed with convincing force to the prisoner as the perpetrator of the crime. It was admitted that a homicide had been committed, and there was evidence from which the jury might well have found that the deceased could not have killed himself. (549) When found, his body was lying outstretched upon the floor, with an ugly and a mortal gun-shot wound in the head, and his gun was in the rack. There was no evidence connecting any one but the prisoner with the firing of the fatal shot. Shortly after the report of the gun was heard, he was seen riding from the direction of the house, and about as far from there as the distance that would be traversed in the time which had elapsed since the report of the gun was heard. It was shown that he was evidently angry with the deceased, and intended to take his life. He had made different threats that he would kill him, and actually named the day on which it would be done, and it happened just as he had foretold it. On the Thursday before the day of the homicide, he said, "He may live to see the sun rise the third day, but will never see it rise and set the fourth day," and his menacing words were verified with fatal accuracy. But this is not all, nor even the half of it. Just after he had uttered this threat to the wife of the deceased, on Thursday, in the cotton field, they walked to the end of the row where she had been picking cotton, and he warned her not to call his

name if they made her tell anything about what he had said or done, and threatened, if she implicated him in the homicide, that he would kill her, and advised her to charge some one else with it. He also stated in her hearing, and at her house, to Will Alston, when he heard that Will Clifton, the deceased, was coming home, that "hell would be to pay there." He added that two men had gone to Spring Hope to bring Will home, and Will had telephoned that he was coming, and that he had gone to Will's place and laid in the bushes until 2 o'clock with a double-barrel gun to kill him if he did come. On the day of the inquest, the prisoner also told the witness Clarinda Clifton, widow of the deceased, that they were trying "to put this murder case on him," and if she told on him, he would do everything against her to send her to Raleigh, meaning the penitentiary, and that if "they ever hit the ground together, there would be another day of it." The jury might reasonably have found that he meant by this language to admit the killing,

and that there would be another homicide if she told what he
(550) had said to her. There was also proven a strong motive for the killing, as the evidence shows that the prisoner was the paramour of deceased's wife, and not only that, but he denied the right of the deceased to occupy the land on which was his home, and was angry about it.

It would be useless to examine the evidence further in detail. Our conclusion is that it was sufficient in probative force for the jury to find, if they saw fit to do so, that the prisoner was guilty, and it is quite as strong as that which was submitted to the jury in *S. v. Wilcox,* 132 N. C., 1120, with the approval of this Court, and we may add that, in our opinion, it is of a much more convincing nature. *S. v. Brackville,* 106 N. C., 701; *S. v. Rhodes,* 111 N. C., 647, and *S. v. Goodson,* 107 N. C., 798, are distinguishable, as the decisions in them were based upon facts essentially different from those in this record. There are facts in this record which were not in those cases, and which the Court regarded as missing links necessary to forge a complete chain of circumstances, and emphasized the lack of them as being fatal to the successful prosecution of the case.

No error.

STATE v. J. H. FISHER AND MUTUAL AID BANKING COMPANY.

(Filed 19 February, 1913.)

1. Criminal Law—Verdict—Unanswered Counts—Acquittal.

Where a verdict of guilty is rendered on one count in an indictment, and is silent as to the others, it is equivalent to a verdict of not guilty as to these other counts.

2. Intoxicating Liquors—Sales to Minors—Draft, Bill Lading Attached—Payment—Dealers—Banks and Banking—Interpretation of Statutes.

To be guilty of the offense prohibited under the provisions of the Revisal, sec. 3524, the person selling or giving away intoxicating liquors "to any unmarried person under the age of 21 years, knowing the said person to be under that age," must be a dealer therein; and a bank or its officer, in the usual course of a banking business, who accepts money on a draft, bill of lading for such liquors attached, and surrenders the draft to the drawee, by which he is enabled to take the bill of lading to the carrier and get the shipment, is not a dealer, and hence, by the transaction, is not liable under the statute.

3. Intoxicating Liquors—Sales to Minors—Contracts—Orders and Acceptance—Lex Loci—Interstate Commerce—Banks and Banking—Interpretation of Statutes.

A shipment of intoxicating liquor from another State here, with bill of lading attached to draft, and put in course of collection through the banks, is interstate commerce until the delivery of the shipment to the consignee by the carrier; and where the sale of such liquor is made through a sales agent here, and sent on and accepted by the principal in another State, and shipment made, as indicated, the contract is made in another State, and the mere fact that the draft was paid here, and the bill of lading surrendered to the drawee, an unmarried person under 21 years of age, who thereby is enabled to get his bill of lading and receive the shipment from the carrier, does not affect the interstate character of the shipment, so as to make the bank or its officer thus surrendering the bill of lading guilty of violating section 3523 of the Revisal.

ALLEN and HOKE, JJ., concurring; CLARK, C. J., dissenting.

APPEAL by the State from *Foushee, J.*, at February Term, (551) 1912, of CRAVEN.

The three defendants, Mutual Aid Banking Company, John H. Fisher, and A. Hatke, were indicted in the court below for unlawfully selling liquor, the indictment containing two counts, one for selling intoxicating liquor to a person to the jurors unknown, and the other for selling such liquor to Carl Spencer, a person under the age of 21 years. The defendant A. Hatke, a member of the firm of A. Hatke & Co., of Richmond, Va., wholesale liquor dealers of that city, was not on trial, and the other defendants severally pleaded "not guilty" to the bill, when arraigned for trial. After the evidence was heard, the jury

rendered a lengthy special verdict, the material findings of which are as follows: The Mutual Aid Banking Company was, at the time stated in the bill, engaged in the ordinary business of banking in the city of New Bern, and John H. Fisher was its cashier. A short while before 29 March, 1911, Carl Spencer, who is a minor or person under 21 years of age, and unmarried, ordered from A. Hatke & Co. of Richmond,
(552) Va., through their agent, who was in New Bern, one case of whiskey, to be shipped over the connecting lines of the S. A. L. Railway Company and the Norfolk Southern Railway Company, to him at New Bern. Hatke & Co. delivered the one case of whiskey called for in the order to the S. A. L. Railway Company at Richmond for shipment to New Bern, consigning the same to the order of themselves, "destination New Bern, N. C., notify Carl Spencer at that place," and received from the agent of the S. A. L. Railway Company a bill of lading for the liquor in the usual form. They then drew a draft on Carl Spencer for $8.25, the price of the liquor, and attached it to the bill of lading, mailing the two papers to the Mutual Aid Banking Company for collection. The liquor was shipped over the lines of the two railroad companies, and the Norfolk Southern Railroad Company duly notified Carl Spencer at New Bern of its arrival there, and that it would be held subject to charges for storage and demurrage. On the day this notice was given, Carl Spencer called at the banking house of defendant, inquired for the draft and bill of lading, and was told by the cashier, John H. Fisher, or his assistant, that the papers were there. The bank and its officers knew that the draft was for the price of the liquor, and that the bill of lading had been given by the railroad company for the package containing it. With this knowledge, the bank and its cashier, John H. Fisher, received payment of the draft from Carl Spencer and delivered the papers to him, whereupon he handed the bill of lading to the Norfolk Southern Railway Company at New Bern and received the package of whiskey from it, in the usual manner of its other customers. Before Carl Spencer paid the draft to the bank, his uncle notified John H. Fisher that he was a minor and unmarried, and requested him not to receive payment of the draft from him, with which request he declined to comply. The Mutual Aid Banking Company was incorporated under the laws of this State and authorized to conduct in New Bern a general banking business, and was doing so at the time of this transaction. A. Hatke & Co. are regular wholesale dealers in liquor, having their home and place of business in Richmond, Va.

(553) The special verdict concludes as follows: "If from the foregoing facts the court shall be of opinion that in law the said

defendants, John H. Fisher and the Mutual Aid Banking Company, were dealers in intoxicating drinks and liquors, and that the said delivery of the said draft and bill of lading to said Carl Spencer was a sale of a quantity of such drinks and liquors, then we, the jury, do find the defendant John H. Fisher and the Mutual Aid Banking Company guilty in manner and form as charged in the bill of indictment; otherwise, we, the jury, find the defendants not guilty."

The court (*Judge Foushee* presiding) being of opinion, upon the verdict, that defendants were not dealers in liquors, and that the transaction described in the verdict did not constitute a sale to Carl Spencer, as charged in the indictment, directed a verdict of not guilty as to both defendants, upon the said indictment, and judgment being entered thereon for them, the State appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Guion & Guion for Fisher.

Moore & Dunn for Banking Company.

WALKER, J., after stating the case: It is conceded, as we understand, that the special verdict was returned upon the second count, and there is no verdict upon the first count. It was held in *S. v. Taylor,* 84 N. C., 773, that "where the jury find a defendant guilty on one count, and say nothing in their verdict concerning other counts, it will be equivalent to a verdict of acquittal as to them."

The second count of the indictment was framed on Revisal, sec. 3524, which provides that "if any dealer in intoxicating drinks or liquors sell, or in any manner part with for a compensation therefor, either directly or indirectly, or give away such drinks or liquors, to any unmarried person under the age of 21 years, knowing the said person to be under the age of 21 years, he shall be guilty of a misdemeanor; and such sale or giving away shall be *prima facie* evidence of such knowledge. Any person who keeps on hand intoxicating drinks or liquors for the purpose of sale or profit shall be considered a dealer within the meaning of the section." The jury, by their (554) verdict, after finding and stating certain facts, which we have already set out, submit to the court whether, upon those findings, the court is of the opinion that, in law, the defendants were dealers in intoxicating drinks and liquors, and that the acts of defendants constituted a sale of such drinks and liquors; and both questions the court decided in the negative. The verdict of the jury, therefore, was confined to the particular offense made criminal by Revisal, sec. 3524, and

they have not rendered a verdict for any other crime, nor have they considered the case in any other aspect. It follows that the defendants have been acquitted of the charge upon which the jury passed.

The section of the Revisal upon which the indictment was drawn not only describes the act of selling, which is unlawful, as one committed by a "dealer in intoxicating drinks or liquors," but also defines a "liquor dealer" as "a person who keeps on hand intoxicating drinks or liquors for the purpose of sale and profit." The business of the defendants is not embraced by these words. They were engaged in the business of banking, and were, in no sense, sellers of liquors or dealers therein. There is no finding of fact that they ever sold liquor of any kind or in any quantity, large or small, or that they, or either of them, ever kept "liquor on hand for sale or profit." *S. v. Lawrence,* 97 N. C., 492; *S. v. McBrayer,* 98 N. C., 619. When they received the money from Carl Spencer and delivered the draft and bill of lading for the package of liquor to him, they were engaged in the ordinary and usual business of banking. So that the State failed to show that the defendants were guilty of the specific offense charged against them. The court properly instructed the jury as to the law, and the verdict of acquittal, rendered by the jury in accordance therewith, cannot be disturbed.

But assuming that the defendants, upon the facts stated in the special verdict, must be regarded in law as having assisted in making or consummating the sale of the liquor by A. Hatke & Co. to Carl Spencer, we do not think the case is made any stronger for the State. The sale of the liquor to Carl Spencer by A. Hatke & Co. was interstate commerce, and could not be affected by the criminal laws of the
(555) State. With every disposition to enforce strictly and rigidly the laws of our State prohibiting the sale of liquor, in all cases to which they apply, we must, at the same time, give full force and effect to the provision of the Federal Constitution, which confides to Congress alone the regulation of interstate commerce. It has been enacted by Congress that liquor shipped from one State into another in the course of interstate commerce shall, after its "arrival" in the latter State, be subject to its laws. This law was passed 8 August, 1890, and is known as the Wilson Act (3 Fed. Statutes Anno., p. 853), and it has also forbidden a common carrier to collect, directly or indirectly, the purchase money for any liquor shipped over his line from one State to another, the carrier being restricted by the terms of the act of Congress to "the actual transportation and delivery of the same." Federal Penal Code (1910), sec. 239. It is not contended that either of these acts would sustain the conviction of the defendants under our law prohibit-

ing the sale of liquor in the State, except in so far as the Wilson Act allows the local law to operate after the arrival of liquor in the State, and withdraws from the protection of the Federal laws, to that extent, sales in original packages. The other act, Federal Penal Code, sec. 239, declared unlawful collections by the carrier, under c. o. d. shipments or otherwise. It is contended, though, that the defendants are guilty upon the special findings of the jury, because the package of liquor was shipped, and the bill of lading therefor was drawn to the order of A. Hatke & Co. of Richmond, Va., and reached its destination in this State, at New Bern, and that the sale was made here, when the draft was paid by Carl Spencer at the bank and the bill of lading was delivered to him, as the title then passed to him from Hatke & Co. But the argument leaves out of consideration the fact that the acceptance of the proposal to buy was made by them there, which acceptance was clearly evidenced by the shipment of the goods. But we need not further discuss this question, as it is one for final decision by the highest Federal court, which has said that, in determining what is interstate commerce in the transportation of liquor from one State to another, it will not attempt to reconcile conflicting deci- (556) sions of the State courts as to the time when the title passes in the case of a shipment c. o. d. or by draft and bill of lading attached, as in this case. A full and complete answer to the State's contention will be found in *Express Co. v. Iowa,* 196 U. S., 133. In that case, the present *Chief Justice,* writing the opinion as a justice of the Court, and referring to the very question we have before us, says that, if upheld, the doctrine would deprive a citizen of one State of his right to order merchandise from another State at the risk of the seller as to delivery, and it would prevent the citizen of one State from shipping into another State unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the State where made, to the laws of another State, and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. More to the point, and a more conclusive utterance, is this: "Besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof." He then reviews two cases (*Caldwell v. North Carolina,* 187 U. S., 422; *R. R. v. Sims,* 191 U. S., 441), which were taken from this Court by

writs of error upon what *Judge White* says is the identical question, and both reversed. Reviewing these cases, and after stating that they are direct authorities against the present contention, and that it makes no difference how the shipment is made, whether c. o. d. or by bill of lading to the shipper's order, he proceeded as follows: "In *R. R. v. Sims,* 191 U. S., 441, these were the facts: A resident of North Carolina ordered from a corporation in Chicago a sewing machine. The machine was shipped under a bill of lading to the order of the buyer, but this bill of lading was sent to the express agent at the point (557) of delivery in North Carolina, with instructions to surrender the bill on payment of a c. o. d. charge. The contention was that the consummation of the transaction by the express agent in transferring the bill of lading upon payment of the c. o. d. charge was a sale of the machine in North Carolina, which subjected the company to a license tax. The contention was held untenable. Calling attention to the fact that the contract of sale was completed as a contract in Chicago, and after reviewing some of the authorities on the subject of interstate commerce, the Court said, p. 450: "Indeed, the cases upon this subject are almost too numerous for citation, and the one under consideration is clearly controlled by them. The sewing machine was made and sold in another State, shipped to North Carolina in its original package for delivery to the consignee upon payment of its price. It had never become commingled with the general mass of property within the State. While technically the title of the machine may not have passed until the price was paid, the sale was actually made in Chicago, and the fact that the price was to be collected in North Carolina is too slender a thread upon which to hang an exception of the transaction from a rule which would otherwise declare the tax to be an interference with interstate commerce." He then shows the distinction between State laws interfering with the regulation of commerce which trench upon the domain exclusively occupied by the Congress under the Constitution, and those which do not so interfere, as in the case of a property tax laid on the article transported, when it has become at rest within the State, and, therefore, enjoys the protection of its laws, which is upheld upon the ground that the movement of merchandise from State to State, whilst constituting interstate commerce, is not an import in the technical sense of the Constitution, citing *Steel and Wire Co. v. Speed,* 192 U. S., 500. The State may act also where the particular transaction aids rather than obstructs commerce. We need not enter upon a discussion of this view of the matter. The whole subject was reviewed by us in *Range Co. v. Campen,* 135 N. C., 506; *Harrill v. R. R.,* 144 N. C., 532. Construing the Wilson Act, the Court

held in *Wilkerson v. Rahrer,* 140 U. S., 545, that it was competent for Congress to provide that certain designated subjects (558) of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, so as to subject them to the operation and effect of State laws, for instance, after delivery to the consignee of goods shipped to him from another State; and in *Rhodes v. Iowa,* 170 U. S., 412, approving the case of *Wilkerson v. Rahrer,* it was decided that, whilst the Wilson Act caused liquors shipped into Iowa from another State to be divested of their character as articles of interstate commerce after their delivery in Iowa to the person to whom consigned, nevertheless the act did not authorize the laws of Iowa to be applied to such merchandise whilst in transit from another State and before delivery in Iowa. The Court, in *Vance v. Vandercook Co.,* 170 U. S., 438, considering the Wilson Act and the previous decisions applying it, with reference to the validity of the dispensary law of South Carolina, held that it was not an interference with interstate commerce, in so far as it took charge, in behalf of the State, of the sale of liquor within its borders, and made such sale a source of revenue. In so far, however, as the State law imposed burdens on the right to ship liquor from another State to a resident of South Carolina intended for his own use, and not for sale within the State, the law was held to be repugnant to the Constitution, because the Wilson Act, whilst it delegated to the State plenary power to regulate the sale of liquors in South Carolina shipped into the State from other States, did not recognize the right of a State to prevent an individual from ordering liquors from outside of the State of his residence for his own consumption, and not for sale. The principle settled by these cases was also approved and applied in *Brewing Co. v. Crenshaw,* 198 U. S., 17, and in *Delamater v. South Dakota,* 205 U. S., 93. The cases we have just cited involved the validity of State liquor laws, and they adhere to the rulings in *Caldwell v. North Carolina,* 187 U. S., 622; *R. R. v. Sims,* 191 U. S., 441, that regardless of the method of collecting the purchase money for the liquor ordered in one State to be transported from another, whether by a c. o. d. shipment, by instructions to the carrier to collect, or (559) by draft with bill of lading attached, the contract, in determining the character of the transaction and its protection, under the Federal laws, against State interference, must be considered as made in the foreign State, although the consignee must pay the purchase money before receiving the package, the only change made by recent statutes being that by the Wilson Act the goods are subjected to the operation and effect of State laws on arrival, which includes delivery to the con-

signee, and not before, and under Federal Penal Code, sec. 239, the carrier is restricted in the sphere of his action to the "actual transportation and delivery" of the goods, and cannot act for the buyer or seller for the purpose of making or consummating the sale, nor can he collect the purchase money of the buyer or for the seller. In other respects, the principle of the *Caldwell* and *Sims cases* is still in force. It will be observed, on comparison of the two cases, that *R. R. v. Sims, supra,* and this case are substantially and in principle alike. In the *Sims case* the goods were shipped under a bill of lading to the order of the buyer and sent to the agent with instructions to surrender it on payment of the amount due by the buyer. In the present case, Carl Spencer, the consignee, was entitled to the delivery of the goods when he had paid the price for them and presented the bill of lading. The contract of sale was completed on acceptance of his offer to buy the liquor, and this was done at Richmond, Va. The Supreme Court of the United States, in the cases we have cited, and others, has so regarded the transaction and treated the remittance of the draft, with bill of lading attached, for collection, as a mere security for the purchase money. As the decision of this question is necessarily involved in determining whether this is interstate commerce, we must defer to the decisions of the highest Federal court as being authoritative and binding upon us, whether or not we agree in its reasoning or conclusion. It is the supreme law to us, under our Constitution, and because of our allegiance to the Federal Government, when acting within the legitimate scope of its powers and its own Constitution and laws. "Every
(560) citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force." Const. of North Carolina, Art. I, sec. 5. This Court has been twice reversed, as we have said, in passing upon this question (*Caldwell v. North Carolina, supra,* and *R. R. v. Sims, supra*), and we should, therefore, be careful that we do not depart from what we have thus learned, but follow the doctrine clearly established by the higher court.

It appears in this case that Carl Spencer bought the liquor for his own consumption, and there is no suggestion that he intended to resell. Under *Rhodes v. Iowa, supra,* he was entitled to receive the package of liquor upon tendering the bill of lading, and not until it had been delivered to him could it be subjected to the "operation and effect" of our laws, not even by force of the Wilson Act.

We have not laid any stress upon the fact that, in the cases we have cited, the Court has reserved the question, whether Congress has the

power to prohibit the transportation of an article of commerce, including liquor, and its delivery to the consignee, though it might forbid its sale thereafter, even in the original package. In this connection, we may appropriately quote what is said on this subject in *Delamater v. South Dakota,* 205 U. S., 93: "As we have stated, decisions of this Court interpreting the Wilson Act have held that that law did not authorize State power to attach to liquor shipped from one State into another before its arrival and delivery within the State to which destined. . . . The rulings in the previous cases to the effect that, under the Wilson Act, State authority did not extend over liquor shipped from one State into another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson Act, even if it lawfully could have done so, to authorize one State to exert its authority in another State by preventing the delivery of liquor embraced by transactions made in such other State." This but emphasizes the fact that where the shipment of the liquor is made by the seller, in one State, to the buyer in another, for his own use and consumption, (561) the transaction is interstate commerce, which no Federal law has permitted to be regulated or interfered with by State action, even though the purchase money may be collected through the medium of a draft with the bill of lading attached thereto.

Our conclusion is that, within the meaning of the commerce clause, the sale in this case was completed in Virginia, and not in this State; that the shipment and delivery of the liquor to Carl Spencer, including the dealing with respect to the draft and bill of lading, constituted interstate commerce, whatever our own decisions may be as to the state of the title, and, therefore, that our laws were not violated. We submit to the ruling of the Supreme Court of the United States, which compels us to so consider the question involved.

No error.

ALLEN, J., concurring: It is the duty of the State courts to follow the decisions of the Supreme Court of the United States on questions relating to interstate commerce, whether in accordance with their views or not, and that Court held, prior to the Wilson Act of 1890, that intoxicating liquors were the legitimate subject of commerce between the States, and that the owner of such had the right to ship into another State, and sell in the original package, and denied to the State into which it was shipped the power to control or regulate such shipment by taxation or under its police power. *Leisy v. Hardin,* 135 U. S., 100.

Because of this decision the Wilson Act was passed by Congress, which

provides: "That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." And it was said of this act, in *Delamater v. South Dakota*, 205 U. S.: "It is settled by a line of decisions of this Court, that the purpose of the Wilson Act, as a regulation by Congress of interstate commerce, was to allow the States, as to intoxicating liquors, when the subject of such commerce, to exert ampler power than could have been exercised before the enactment of the statute. In other words, that Congress, sedulous to prevent its exclusive right to regulate commerce from interfering with the power of the States over intoxicating liquor, by the Wilson Act adopted a special rule enabling the States to extend their authority as to such liquor shipped from other States before it became commingled with the mass of other property in the State by a sale in the original package."

(562)

The language of the act principally in debate were the words, "upon arrival in such State."

Did they mean, after the liquors passed the boundary line of the State, or after they reached the place in the State to which they were shipped, or after they were delivered to the person to whom they were shipped?

"It has been held that the liquor had not 'arrived' in the State, where it was seized in the State while being conveyed by the purchaser to his home from a point outside the State, where he had bought it for his personal use (*S. v. Holleyman*, 55 S. C., 207); where it was in a railroad car standing at a siding and was still in transit (*S. v. Intoxicating Liquors*, 94 Me., 335); or at any time before the arrival of the goods at their destination and their delivery to the consignee (*Rhodes v. Iowa*, 170 U. S., 412); 7 Cyc., 437n.

It was also held in *Delamater v. South Dakota, supra*, that under the Wilson Act the State could prevent an agent from soliciting orders for intoxicating liquors in the State, but the same Court held that c. o. d. shipments could not be regulated, controlled or prohibited by the State (*Express Co. v. Iowa*, 196 U. S., 133); and the injurious effects following this last decision induced Congress to pass the act of 1909, now section 239 of the Penal Code, which reads as follows: "Any railroad company, express company, or other common carrier, or any

other person who, in connection with the transportation of any spirituous, vinous, malted, fermented, or other intoxicating liquor (563) of any kind, from one State, Territory, or District of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to, but subject to the jurisdiction thereof, shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, or shall in any manner act as the agent of the buyer or seller of any such liquor, for the purpose of buying or selling or completing the sale thereof, saving only in the actual transportation and delivery of the same, shall be fined not more than $5,000."

When this last act is considered in connection with its history, which manifests a purpose on the part of Congress to aid in the enforcement of the prohibition laws of the States, and with the language in the *Express Company case* above cited, which was decided before its enactment, I think, upon the facts appearing in the special verdict, the defendants are liable to indictment in the Federal courts under the Federal statute, although the use of the words "in connection with the transportation" may admit of a different construction.

In the *Leisy case* the Court held that intoxicating liquor could be shipped into a prohibition State and sold in the original package, and Congress then passed the Wilson Act saying that such liquors should be subject to the police regulations of the State "upon arrival in the State." The Court then held that "arrival in the State" was not complete until delivery to the consignee, and that the State had no right under the act to regulate c. o. d. shipments, saying, in answer to the contention of the State: "If upheld, the doctrine would deprive a citizen of one State of his right to order merchandise from another State at the risk of the seller as to delivery; it would prevent the citizen of one State from shipping into another unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the State where made, to the laws of another State; and it would remove from the protection of the interstate commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the commerce (564) clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of interstate commerce, by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other

transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof." *Express Co. v. Iowa,* 196 U. S., 133.

Congress then passed the act, which is section 239 of the Penal Code, which provides that any company or person shall be liable to indictment who, in connection with the transportation of intoxicating liquor from one State to another, shall collect the purchase price or any part thereof, before, on, or after delivery to the consignee, etc., or shall act as the agent of the buyer or seller for the purpose of completing the sale thereof, and it seems to me to have been done to meet the objections raised in the *Express Company case,* and to cover the case of a shipment "To order of shipper, notify A. B.," when the bill of lading is sent to a bank with draft attached, and the cashier collects the draft and delivers the bill of lading with knowledge that it covers a shipment of intoxicating liquor, as he has collected the purchase price before delivery, and has acted as agent of the seller in completing the sale.

If it were not for the language of the decisions, and particularly that quoted from the *Express Company case,* which substantially says that the State cannot, under its police power, regulate or control shipments "to order, notify," and but for the obligation upon the State courts, under the Constitution of the United States, to adopt and recognize the decisions of the highest of the Federal courts upon questions affecting interstate commerce, I would also think the argument reasonable and sound that, upon this shipment "to order, notify," the liquors had arrived in this State, under the Wilson Act, when they reached New Bern, and were then the property of the seller; that the sale was made in New Bern by the Richmond firm, and was illegal, and that any one who aided and abetted in the sale was guilty as a principal.

If, however, this position was open to the State, I would con-
(565) cur in the conclusion that the special verdict is defective and will not support a conviction.

The difference between a general and a special verdict is well illustrated by *Kittelle's case,* 110 N. C., 560, and *Bradley's case,* 132 N. C., 1060.

In each case the indictment charges an illegal sale of intoxicating liquors.

In the *Kittelle case* there was a general verdict, and in the *Bradley case* a special verdict, as follows: "That the defendant sold one quart of whiskey to J. B. Constand, in Polk County, about one year prior to the finding of the bill, for which said Constand, in Polk County, paid

the defendant 30 cents. If, upon the above facts, the court be of the opinion that the defendant is guilty, the jury so find; otherwise, not guilty."

The general verdict was sustained on appeal, but the special verdict was set aside, the Court saying: "We are of the opinion that his Honor could not have adjudged the defendant guilty upon the special verdict, and that he could not render any judgment thereon. The offense charged is selling liquor without having a license to do so. It is true that it has been the settled law in this State for more than fifty years that 'proof of the existence of a license to retail must come from the defendant.' *S. v. Emery,* 98 N. C., 668, and upon proof of sale, in the absence of such proof, the jury must find the defendant guilty. If, however, the jury shall, instead of returning a general verdict, find a special verdict, they should find every fact, if it exists, either by proof or presumption, essential to the defendant's guilt; otherwise, the court should set the finding aside and direct a *venire de novo. S. v. Bloodworth,* 94 N. C., 918; *S. v. Corporation,* 111 N. C., 661; *S. v. Oakley,* 103 N. C., 408."

This declaration of the law is significant and bears directly upon the effect of the special verdict before us, because if a special verdict is fatally defective, which finds there was a sale, but fails to find there was no license, although it has been held for fifty years that the burden of proof is on the defendant to prove the existence of a license, and the jury must find him guilty, in the absence of such proof, there must be a finding as to knowledge, when that is a material ele- (566) ment of the offense.

Let us apply this principle. The special verdict is not based on the first count in the bill of indictment, charging a sale to some party to the jurors unknown, because it so says, and it was known from the beginning of the transaction, that the sale was to Carl Spencer.

He ordered the whiskey, his name was on the bill of lading, his uncle notified the defendant who Carl Spencer was, and Carl Spencer paid the draft and received the bill of lading and the whiskey.

The second count is drawn under section 3524 of the Revisal, which, by its terms, applies only to *dealers* in intoxicating liquors who sell to unmarried minors, *knowing* such person to be under the age of 21 years.

It is conceded that the defendant is not a *dealer,* and cannot be guilty under the second count, except as an aider and abettor. Can he be convicted on the special verdict as an aider and abettor of Hatke & Co. in making an illegal sale? This depends on the guilt of Hatke & Co., because if Hatke & Co. are not guilty on the findings of the special verdict, Fisher cannot be guilty of aiding and abetting Hatke

& Co. to violate the law, and when we turn to the special verdict, there is no finding that Hatke & Co. had knowledge that Spencer was under 21 years of age.

No question is raised by the appeal as to the sufficiency of the indictment, nor is the doctrine in the *Kittelle case* involved, and as was said by *Chief Justice Clark* in his concurring opinion in *S. v. Hanner,* 143 N. C., 637: "In a special verdict, the court is not at liberty to infer anything not found."

HOKE, J., concurring: I concur in the disposition made of this appeal, being of opinion that, under the decisions of the Supreme Court of the United States, the final arbiter in such matters, the transaction in question here must be regarded as interstate commerce, and, on the facts presented, is subject exclusively to Federal regulation. The further fact that Congress may have made conduct of this kind an indictable offense and has found it desirable to do so, only serves to
(567) emphasize the position that interference on the part of State authorities is no longer permissible.

CLARK, C. J., dissenting: The first count in the indictment charges a sale to "a person or persons to the jurors unknown." This was held valid by *Hoke, J.,* in a unanimous opinion in *S. v. Dowdy,* 145 N. C., 432, and has been long recognized as the settled practice of the courts. Besides, the special verdict in this case is based upon the second count, which charges the sale of intoxicating liquors to Carl Spencer, a minor.

The facts found in a special verdict are that an agent of the defendants, Hatke & Co., dealers in liquor in Richmond, Va., obtained from Carl Spencer in New Bern an order for the sale of the whiskey, which act our statute makes indictable, and which was held in *Delamater v. South Dakota,* 205 U. S., 93, to be within the jurisdiction of the State court. Hatke & Co. shipped the whiskey on a bill of lading to themselves at New Bern, N. C., and indorsing this bill of lading "notify Carl Spencer," attached thereto a draft on Carl Spencer, and sent it to the defendant bank in New Bern, who through its cashier, the defendant Fisher, received from Spencer the purchase money, $8.25, and thereupon delivered to him the bill of lading indorsed in blank as an order on the railroad company to deliver to him the whiskey. The whiskey was till then the property of Hatke & Co., and was in the warehouse at New Bern. Up to that time Spencer had neither title nor right of possession to the liquor. This transfer of the title and possession by Fisher to Spencer was a sale made in this State and indictable under our statutes.

In *Express Co. v. Iowa,* 196 U. S., 133, the Court held that interstate transportation was interstate commerce, but that owing to the custom of railroad companies and express companies when acting under c. o. d. authority to deliver goods to a purchaser, constructively interstate commerce extended beyond the arrival of the merchandise in the warehouse of the carrier at its destination and covered the action of the carrier up to the time of the actual delivery to the consignee and the receipt of the purchase money. In *Delamater v. South Dakota,* 205 U. S., 93, *Chief Justice White* again writing the opin- (568) ion of the Court, says that this doctrine did not cover the delivery to the consignee on c. o. d. shipment when it was intoxicating liquor in prohibition States, and had not been so held "except in those cases which had been decided prior to the Wilson Act."

Congress also passed section 239 of the Criminal Code, which made it indictable under a penalty of not more than $5,000 for any common carrier to deliver intoxicating liquors on c. o. d. delivery in a prohibition State. To evade this, Hatke & Co. did not ship the liquor to Spencer, but *to themselves* at New Bern, N. C., and therefore, as was held by this Court in *Manufacturing Co. v. R. R.,* 149 N. C., 261, no title to the liquor passed to Spencer until the subsequent transaction between Fisher and Spencer by which the title and right of possession passed to Spencer in consideration and on payment of the purchase money. This case has been cited with approval by *Walker, J., Gaskins v. R. R.,* 151 N. C., 20, and by *Hoke, J.,* in *Buggy Corporation v. R. R.,* 152 N. C., 121. In *Bank v. R. R.,* 153 N. C., 346, *Walker, J.,* holds that in a case like this, after the arrival of the goods and notice given, the railroad is merely a warehouseman for the consignor, who retains title to "a shipment of goods to consignor's order, notify, etc., until the draft is paid and the bill of lading is surrendered."

The action of Fisher was not as agent for the railroad company, and the railroad company cannot be indicted for his conduct. Fisher was acting as agent of Hatke & Co. Hatke & Co. had agreed to sell the whiskey to Spencer. They had shipped the whiskey to themselves at New Bern, and then through their agent, Fisher, they had perfected the sale to Spencer by delivery of the order upon the railroad company to deliver the goods to him upon the receipt by them, through Fisher, their agent, of the purchase money. This was a sale made in this State by Fisher as the agent of Hatke & Co., and not as the agent of the railroad company. Such act could not be interstate commerce under the Federal statute, which forbade c. o. d. delivery, even if Fisher had been the agent of the railroad company. It certainly could not be interstate commerce unless Fisher were the agent of the

(569) common carrier, doing some act to complete the transportation to the consignee. He was the agent of Hatke & Co., doing an act in their behalf, by their orders and for their benefit, after the delivery of the whiskey in New Bern, to Hatke & Co., who were the consignees, and where it was held subject to their disposal, as was held in *Bank v. R. R.*, 153 N. C., 346, and other cases above cited. "By such bill of lading, the seller does not reserve merely a lien, but the absolute right of disposal of the goods." 6 A. and E., 1066, note 1, which is quoted with approval in *Manufacturing Co. v. R. R.*, 149 N. C., 261.

The act of Fisher could not be interstate commerce unless he were a common carrier or the agent of the common carrier in perfecting the transportation of the goods. But the common carrier had fulfilled its whole duty when it placed the liquor in its warehouse at New Bern subject to the order of the consignee, Hatke & Co. It had no further interest in the matter and no further duty to discharge. The further disposition of the liquor by the transfer of the bill of lading to Spencer and the receipt of the purchase money would have subjected the railroad company to the fine of $5,000 if Fisher had been their agent, but he was not, for the carrier had no further duty to discharge. It simply held the liquor, as said in the authorities above, "at the absolute disposal of Hatke & Co." Its duty as an interstate carrier was at an end.

Our statute, Revisal, 3524, makes the sale to a minor presumptive evidence that Hatke & Co. knew of the minority of Spencer, and this presumption has not been rebutted by any evidence. Indeed, the knowledge of Fisher was its knowledge. *S. v. Kittelle*, 110 N. C., 560. This transaction by Fisher was a sale by him to a minor in this State, with full knowledge of that fact, and therefore *he* is responsible as coprincipal. Besides, it is utterly immaterial that the sale is charged to have been made to a minor. The facts charged and found show a sale of intoxicating liquors by Fisher to Spencer in this State. It is immaterial that he was an agent for another person. The allegation in the bill and in the facts found, that Spencer was a minor, is *mere*
(570) *surplusage*. Striking out the allegation that Hatke & Co. are dealers and that Spencer was a minor, sufficient remains both in the charge and the facts found to establish the violation of our statute which forbids the sale of intoxicating liquors in this State. It is both charged and shown that Fisher did the acts which constituted such offense.

Fisher was neither a common carrier nor an agent for a common carrier. The railroad company incurred no liability by reason of his conduct. He was doing nothing for them nor in the way of interstate commerce. He was simply transferring, by direction of Hatke & Co.,

to Spencer, an order for intoxicating liquors, of which they had the "absolute disposal" and which had been shipped to Hatke & Co. and which was then lying in the warehouse in New Bern subject to their order. In exchange for such order and the transfer of the title and the right to possession to Spencer he received as agent for Hatke & Co. the purchase money. There is no element of interstate commerce in the transaction, but the act was one performed entirely within this State. It had no reference to the transportation from Richmond to New Bern, which had been closed and perfected by the delivery of the liquor consigned to Hatke & Co. in the warehouse at New Bern.

To test this matter, suppose the liquor had been consigned to A. B., and A. B. had thereafter transferred the bill of lading to Spencer in consideration of purchase money. This would have been purely a North Carolina transaction, and in no sense an interstate dealing. It can make no difference that Hatke & Co. were consignors as well as consignees. They had full right to transfer their property, unless forbidden by statute, from Richmond to New Bern, and their ownership of it in New Bern was as complete as it was in Richmond until they transferred the title and possession thereto to a purchaser in consideration of the receipt of the purchase money.

It does not lessen the culpability of Fisher that the sale completed by Fisher had originally been an executory agreement made in New Bern between a former agent of Hatke & Co. and Spencer, which act is denounced by our laws by a statute (Pell's Revisal, 3524a), which is held valid as an exercise of State sovereignty, and not an interference with interstate commerce, in *Delamater v. South Da-* (571) *kota,* 205 U. S., 93.

If it is indictable in the State courts for the agent to make an agreement here to sell the liquor to Spencer, before shipment, for a stronger reason, after Hatke & Co. have transferred their liquor and put it in the warehouse at New Bern, it is an act in violation of the State law to perfect and complete such sale by the delivery of the whiskey and the receipt of the purchase money. The latter act cannot be an interference with interstate commerce, for Hatke & Co. were consignees. Their disposal of the liquor after its arrival here, through their agent, Fisher, was in violation of our law. Such act being a misdemeanor, Fisher is guilty on the special verdict, as a coprincipal.

Cited: Distilling Co. v. Bank, 163 N. C., 68; *S. v. Davis,* 168 N. C., 146.

STATE v. J. B. ANDERSON.

(Filed 19 February, 1913.)

1. Evidence—Recent Possession—Presumptions.

Where unexplained possession of stolen property is so recent as to make it extremely probable that the holder is the thief, there is a presumption of guilt justifying and perhaps requiring a conviction.

2. Same—Explanation.

Where the evidence fixes the possession of a stolen cow on the defendant thirty days prior to arrest, and there is evidence on behalf of defendant, explaining this possession, that he ran a freight boat and was in the habit of buying cattle or transporting them for sale in the open market, and could not explain from whom he had received the cow in question, on that account the possession of the cow should be considered only a relevant circumstance tending to show guilt, and in connection with the other circumstances is sufficient to justify a conviction, if in the opinion of the jury they establish such guilt beyond a reasonable doubt.

3. Same—Presumption of Fact.

The presumption of guilt arising from recent possession is one of fact, and not a presumption of law, in the strict sense of the term, and does not exclude all evidence to the contrary.

4. Same—Burden of Proof—Reasonable Doubt.

Where the evidence affords reasonable explanation of recent possession of stolen property, consistent with the defendant's innocence, and which, if accepted, explains it satisfactorily, the rule does not require the defendant to satisfy the jury that his evidence in explanation is true; and he is entitled to an instruction that if the testimony offered in explanation raises a reasonable doubt of guilt, he is entitled to acquittal.

(572) APPEAL from *Lane, J.*, at Fall Term, 1912, of HYDE.

Indictment for larceny. Among other things, the court charged the jury as follows: "The law is that whenever a person is found in possession of property which has been stolen and recently after the theft, the law presumes that the person so found in possession is the one who has stolen the property, and this presumption is strong or weak according to the length of time which has passed between the time of the stealing and the time the said property is found in his possession, and the burden then shifts to the person so found in possession to show, not beyond a reasonable doubt, but to the satisfaction of the jury, that he came by the property in a lawful manner, and thus rebut such presumption."

Defendant excepted. Verdict of guilty. Judgment on the verdict, and defendant excepted and appealed.

S. *v.* ANDERSON.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Ward & Grimes for defendant.

HOKE, J. There was evidence on the part of the State tending to show that the prosecutor, a resident of Hyde County, at or in said county had, within the past three months before the trial, lost several cattle by theft, an ox and six cows. About thirty days before the trial he had found the hide of one of the cows, recently killed and well identified, in possession of a dealer in Washington, N. C., and this hide had just been bought from A. A. Nichols, a butcher in Washington. There was other testimony tending to show a theft of the (573) cattle. Said A. A. Nichols, for the State, among other things, testified as follows: "I know Anderson, who was in command of the boat and had several men with him. I bought some cattle from Anderson in October. I buy cattle frequently from boat captains. A low colored man came to me and asked me if I had bought any cattle from Anderson; I told him yes. I sold the hides to Mr. Hudson and Mr. Cutler. I bought an old cow from Anderson; she was poor and I turned her out to fatten. I bought six or eight with that lot. I am not sure of the exact number. I kept her a month before I killed her. Anderson runs a boat regularly from Hyde County to Washington, and carries freight for the public for a toll. Boats go to Washington frequently with cattle and the captains of the boats sell them. Anderson sold these cattle in the open market, as is the custom with all boatmen who ship cattle. It has been about a month since I killed this cow. I bought her about two months ago and kept her about a month before killing." (Hide shown to witness at this point, and witness identified it as the hide of the cow last above referred to. Witness further stated he was able to do this positively by reason of the location and character of the bullet wound, as he killed the cow himself.)

The defendant, a witness in his own behalf, testified as follows: "I am the defendant; born and raised in Hyde County. I run a freight boat from Hyde County to Washington; live at Sladesville. I carry freight to Washington for public generally. I have been at it for four years. I carry a great many cattle to Washington. I may have carried the one from which the hide here shown was taken, and may have sold it to Mr. Nichols. Have never stolen any cattle nor received any on my boat, knowing they were stolen. I have no means of telling where I got this particular cow. I cannot tell the date she was shipped. I carry cattle for the public and sell them as other boatmen do, in the open market, and carry the owner his money. Both of the other de-

fendants were working for me on my boat the week before and the week of the Assembly. I carried cattle then for a number of
(574) persons (naming them), but I do not know for whom I carried this particular cow."

Upon this, the testimony chiefly relevant to the question presented, we do not think the court laid down the correct rule to guide the jury in their deliberations. Where a theft is established, the recent possession of the stolen property is very generally considered a relevant circumstance tending to establish guilt, and when the possession is so recent as to make it extremely probable that the holder is the thief, "that is, where in the absence of explanation he could not have reasonably gotten possession unless he had stolen them himself," there is a presumption of guilt justifying and, in the absence of such explanation, perhaps requiring a conviction; but on the facts in evidence no such presumption should obtain in this case. While the testimony does not fix the time with any great definiteness, there was, as we understand it, not less than thirty days from the loss of the cow till possession was shown to be in defendant, and this lapse of time, together with the denial of defendant and the facts and conditions under which the cow was carried to Washington and sold in open market, are such as to exclude the application of the principle, and require that the possession of the cow should be considered only a relevant circumstance tending to show guilt and in connection with other circumstances sufficient to justify a conviction, if in the opinion of the jury they establish such guilt beyond a reasonable doubt.

Again, while the recent possession of stolen goods may be of such a character as to raise a presumption of guilt on the part of the holder, in some of the cases expressed by the phrase, "The law presumes such holder to be the thief," by correct interpretation it is never a presumption of law in the strict sense of the term, shutting out all evidence to the contrary, but it is always a presumption of fact open to explanation, and when there are facts in evidence which would afford reasonable explanation of such possession, consistent with defendant's innocence, and which, if accepted, do explain it satisfactorily, the correct rule does not require the defendant to satisfy the jury that his evidence in
(575) explanation is true. But in such case, stating the law as to the presumption arising from recent possession, the court should tell the jury that if the testimony offered in explanation raises a reasonable doubt of guilt defendant is entitled to acquittal.

These views are in accord, we think, with the better considered cases here and elsewhere as applicable to the facts presented in the record.

S. v. Neville, 157 N. C., 591; *S. v. Record,* 151 N. C., 696; *S. v. Hullen,* 133 N. C., 656; *S. v. McRae,* 120 N. C., 608; *S. v. Rights,* 82 N. C., 675; *S. v. Smith,* 24 N. C., 402; I McClain Criminal Law, sec. 617.

For the error indicated, we are of opinion that defendant is entitled to have his cause heard before another jury,

New trial.

STATE v. R. Y. McADEN.

(Filed 5 March, 1913.)

1. Courts—Justice of the Peace—Jurisdiction—Words and Phrases—Interpretation of Statutes.

A statute making its violation a misdemeanor, and prescribing a punishment by a fine not exceeding $50 or imprisonment not exceeding twenty days, "or both," by the words "or both" takes away the final jurisdiction of a justice of the peace, and on appeal therefrom the motion of the defendant to quash should be granted in the Superior Court.

2. Courts—Jurisdiction—Justice of the Peace—Constitutional Law—Limitations—Practice.

A statute which attempts to confer on a justice of the peace final jurisdiction where the punishment prescribed therein exceeds the constitutional limitation, is inoperative as to the magistrate's jurisdiction, except to bind over to the Superior Court, which latter court may then proceed to try the case only upon a true bill of indictment returned by a grand jury.

CLARK, C. J., concurring.

APPEAL from *Carter, J.,* at January Term, 1912, of FRANKLIN.

The defendant was indicted for violating chapter 445, Laws of 1909, regulating the use of public highways by motor vehicles.

From the verdict of guilty and the judgment thereon, the defendant appealed. (576)

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. H. Yarborough, Jr., for the defendant.

BROWN, J. The defendant was tried and convicted in the justice of the peace court for violating section 18, chapter 445, Laws of 1909, which reads as follows:

"Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and any one who shall be convicted thereof,

or who shall plead guilty to any complaint for the violation thereof, shall be punished by a fine not exceeding $50 and costs of prosecution, or by imprisonment not exceeding twenty days, or both."

Section 19 provides that "All police justices of any city or justices of the peace of any township where any such violation shall occur shall have jurisdiction to hear, try, and pass sentence for any and all violations of any of the provisions of this act."

The warrant in this case was issued by a justice of the peace. The justice adjudged the defendant guilty and imposed a sentence of $10 and costs, from which judgment the defendant appealed to the Superior Court.

In the Superior Court the case was tried *de novo* upon an amended warrant, without a bill of indictment.

It is plain that under the Constitution the justice's court had no final jurisdiction, as the punishment prescribed for the offense exceeds the limit fixed by the organic law.

The attempt to give the justice of the peace final jurisdiction is rendered abortive by the addition of the words "or both" at the end of section 18 of the act.

The act conferring final jurisdiction is of no effect unless the punishment prescribed is within the constitutional limitation. The justice had no jurisdiction except to bind over, and the Superor Court could proceed to try only upon a true bill of indictment returned by (577) the grand jury. *S. v. Fesperman,* 108 N. C., 770; *S. v. Perry,* 71 N. C., 523; *S. v. Cherry,* 72 N. C., 123; *S. v. Heidelburg,* 70 N. C., 496; *S. v. Vermington,* 71 N. C., 264; *S. v. Hooker,* 145 N. C., 581; Connor and Cheshire on Const. of N. C., p. 581.

The point presented by this appeal has been so frequently decided that a further discussion of it is unnecessary.

The motion to quash the proceeding is allowed, and the proceeding dismissed.

Reversed.

CLARK, C. J., concurs that the use of the words giving the court power to impose "a fine not exceeding $50, or imprisonment not exceeding twenty days, *or both,*" deprived the justice of the peace of final jurisdiction, for the extent of the punishment permissible determines the jurisdiction. *S. v. Fesperman,* 108 N. C., 770.

In *S. v. Neal,* 120 N. C., 618, it is said: "The case was tried before a justice of the peace, and the defendant appealed. In the Superior Court, a bill of indictment was found by the grand jury and the defendant was tried thereon. Therefore, in any aspect, there was juris-

diction. Whether the court acquired it by the appeal, or had original jurisdiction by the indictment, it is immaterial to decide." In this case, on the trial in the Superior Court on appeal, the defendant did not raise the objection that there should be an indictment found, but, on the contrary, merely asked for a bill of particulars, which was furnished. This being merely a misdemeanor, there is no reason why a defendant should not be allowed to "waive a bill," as we know is not unusual practice on the circuit. If the defendant does not desire an indictment, and the offense is a petty misdemeanor, there can be no cause why he should be subjected to the costs and delay attendant thereon. It is not unusual nor reprehensible practice, and no good reason can be given against it.

The law is not beyond being modernized by a little every-day common sense. The insistent tendency of the age is to render law and its practice and procedure more an institution of today and give less heed to methods of procedure which, if ever founded upon good (578) cause, were based upon reasons which long since have ceased to exist.

In this connection, it may be well to observe that when there is an appeal from a justice in a criminal case, if an indictment is found, though the justice had no jurisdiction, the appeal is not dismissed, but the trial proceeds. There can be no reason why the same rule should not apply on appeals from the justice in civil actions of which he had no jurisdiction. In such case, in analogy to appeals in criminal actions, the complaint should be amended and the action proceed. There can be no reason to dismiss the party, who is already in court, and thereupon send the officer to bring him back into court. This has been discussed in *Unitype Co. v. Ashcraft,* 155 N. C., at p. 71, and in *Wilson v. Insurance Co., ib.,* at p. 177.

In *McMillan v. Reeves,* 102 N. C., 559, *Smith, C. J.,* says, on a similar proposition: "It is not material to inquire into the question of the jurisdiction invoked in initiating the suit, since any objection on this account is obviated by the removal of the cause into the Superior Court presided over by the judge."

In *Boing v. R. R.,* 87 N. C., 363, it was held that where the subject-matter of the action is one of which the court of the justice of the peace and the Superior Court have concurrent jurisdiction, and the case is carried by appeal to the Superior Court, the latter will retain jurisdiction, though the proceeding in the court of the justice of the peace was void for irregularity. The ground is that the case having gotten into the Superior Court, which has jurisdiction, the notice of appeal had the same efficacy as the service of a summons in bringing the defendant into court.

As far back as *West v. Kittrell,* 8 N. C., 493, it was held that where a cause was carried to the Superior Court from a lower court the former would retain jurisdiction if it were a subject-matter of which the Superior Court would have had jurisdiction, if the action had been originally instituted in that court.

The sole object in serving a summons is to give the defendant notice to come into court. When he has had a trial, on a *bona fide* mistake of jurisdiction by the plaintiff, before a justice of the peace, and (579) the case is tried on appeal in the Superior Court, the defendant has really had a more sufficient notice, and is better prepared to try, than if he had originally been served with summons to appear in the Superior Court. There can be no good end served by dismissing an action thus brought into the Superior Court by appeal, and requiring the defendant to be again brought into the same court by the service of a summons, to try the same case. Such restricted views of the function of a court have disappeared in all other like instances.

Formerly, if an action was brought in a wrong county, or erroneously at law when it should have been in equity, or *vice versa,* or if begun before the clerk when it should have been begun in the Superior Court, the action was dismissed. Now in all these cases the case proceeds to trial. In the first named case there is merely a transfer to the proper county, if objection is made, but not otherwise. In the last case, the Superior Court having jurisdiction of the subject-matter proceeds with the trial as if the cause had originally been instituted therein, though the other court wherein it began had no jurisdiction.

The same common-sense method should be applied to appeals from a justice of the peace in civil actions, at least whenever the judge is of opinion that through a *bona fide* mistake of the plaintiff as to jurisdiction it was erroneously begun before the justice. The object of the law is more and more clearly seen to be the administration of justice, without unnecessary regard to technicalities or fine distinctions as to matters of pleadings. We also certainly should not see the spectacle of parties being turned out of court to be brought back into the same court to litigate the same matter. The additional exaction of the added delay and cost being unnecessary, such methods cannot commend themselves to our judgment.

Cited: McIver v. R. R., 163 N. C., 547; *McLaurin v. McIntyre,* 167 N. C., 356.

(580)

STATE v. NORMAN KING.

(Filed 5 March, 1913.)

1. Evidence—Crimes—Voluntary Statements—Caution of Magistrate—Interpretation of Statutes—Substantial Compliance.

A voluntary statement made by one accused of a crime, before the committing magistrate, may be testified to in the Superior Court, when it appears that the prisoner expressed a desire to make it, in response to the magistrate's questions, who then cautioned him that he need not make the statement unless he wished, and that his refusal to do so or answer questions would not be taken against him, this being a substantial compliance with the statute, which is all that is required. Revisal, sec. 3194.

2. Evidence, Circumstantial—Crimes—Burnings—Questions for Jury.

Circumstantial evidence is sufficient to convict a defendant charged with the burning of a barn which uncontradictedly shows a motive, in being previously ordered off the premises; that after the burning he left the locality and passed under an assumed name; that he made false statements as to his being at a different place at the time; that upon his return to this location he asked a witness what had taken place in his absence, and upon seeing the foreman of the owner of the barn, said, "Hush! don't say anything"; these and other circumstances being insufficient when taken alone, but collectively sufficient for the jury to pass upon, determine its weight, and draw an inference of guilt.

APPEAL by defendant from *Cline, J.*, at August Term, 1912, of FRANKLIN.

Attorney-General for the State.
W. M. Person for defendant.

CLARK, C. J. The defendant and one Egerton were indicted for setting fire to a feed barn, the property of F. B. McKinne. A *nol. pros.* was entered as to Egerton during the trial. The voluntary statement of the defendant under Revisal, 3194, at the magistrate's trial, was offered, as to which the judge found the following facts: "The magistrate said to King, 'Do you wish to make a statement about the matter?' To which he replied, 'Yes, sir.' The magistrate then cautioned him: 'You need not make any statement, unless you wish. You need not answer any questions, and if you do not make a statement or answer any questions, it will not be taken against you.' King (581) still said he wanted to make a statement, and did so, and was questioned by counsel." His Honor properly held this evidence competent. It is sufficient if the statute is substantially complied with. *S. v. DeGraff*, 113 N. C., 688; *S. v. Rogers*, 112 N. C., 874. In *S. v.*

Parker, 132 N. C., 1017, relied on by the defendant, the defendant had been sworn, which was contrary to the requirement of this section, and hence it was held that the statement, being under the compulsion of an oath, was not competent under Revisal, 3194. Also, it did not appear, as it does in this case, how the accused was cautioned, but it was merely stated that he had been "cautioned." In *S. v. Simpson,* 133 N. C., 678, *S. v. Parker* is referred to, and the above distinction is pointed out.

The only other exception is that the evidence was not sufficient to be submitted to the jury. The evidence for the State tends to show that the feed barn of F. B. McKinne in Franklin County was burned between 7 and 8 o'clock on the evening of 9 March, 1912. This barn stood in the rear of the foreman's house about 200 yards. The defendant was employed on a place about one-half mile from the barn. The foreman testified that that afternoon both the defendants were present while he was engaged in running a fence to the barn; that they interfered with his hands, and he made them leave; that while milking that night he heard some persons talking coming up to the barn, and soon afterwards he found the barn on fire. On the next day he saw the tracks of two shoes, one 7 or 8 in size and the other a 9 or 10. The defendant, King, left the neighborhood shortly after the fire, and was not seen any more till the trial before the magistrate. F. B. McKinne, the owner of the property, testified that thereafter he saw the defendant in Nash County, going under the name of Bud Perry, and that before the magistrate King said that he was at Ellis's store, picking the guitar, 30 minutes before the fire broke out. Ellis, a witness for the State, testified that he was at his store that night, but King did not come there that night, and that he heard no music. Spivey, a witness for
(582) the State, testified that shortly after the fire King said to him that they were "accusing him of the fire, and he believed he would go off a little while." He left, and two weeks later came to the house of the witness and asked him "what had been stirring since he had been gone." The witness said that Mr. Harris, the foreman, came by the house just then and the defendant said: "Hush! don't say anything."

The above evidence, it is true, is not very strong, but it is very rarely so in cases of this kind, for the act is done stealthily, and direct evidence, or even strong circumstantial evidence, cannot ordinarily be procured. This evidence shows that the defendant was on the premises near the barn the afternoon of the fire; that he was ordered away because of some interference with the hands; that two people came up to the barn that evening after dusk, and soon afterwards the fire broke out; that the defendant said that they were "accusing him of the fire,

and that he would leave"; that he was afterwards seen in an adjoining county, passing under an assumed name; that at the trial before the magistrate he stated that he was at Ellis' store 30 minutes before the fire, picking a guitar, and Ellis testified that he was not there that evening, and there was no music.

All these are circumstances which, taken together and uncontradicted by any testimony of an alibi or otherwise, satisfied the jury that they were the actions of a guilty man. There was sufficient evidence to submit the case to the jury, and twelve impartial men have said that there was sufficient to satisfy them. We cannot say that there was no evidence beyond a scintilla. There was motive, being ordered off the premises; flight; passing under an assumed name; false statements as to being at Ellis's store just before the fire, at the very time when two persons, as shown by the talking and the tracks, came up to the barn just before the fire broke out, and defendant's inquiry on his return, and his caution, "Hush!" when the foreman passed. The jury believed this conduct, unexplained, proof of guilt.

There being some evidence, its weight and the inference to be drawn from it was a matter for the jury, and not to be determined as a question of law by the court. No one circumstance in this case would be sufficient for conviction, but it is not a case where there is a (583) chain of consecutive circumstances which would be no stronger than the weakest link therein. But it is rather like a bundle of sticks, each of which may be weak in itself, but when combined cannot easily be broken.

The case was fairly submitted to the jury by the judge in a charge to which there was no exception other than above stated, and we find

No error.

STATE AND LARRY EDMUNDSON v. BEN BAILEY.

(Filed 19 March, 1913.)

1. Appeal and Error—Failure to Work Roads—Judgments—Cost.

Proceedings for failure to work the public roads are of a civil nature, from which an appeal lies in favor of the prosecutor, who has been taxed with costs.

2. Same—Presumptions—Evidence.

Where the Superior Court affirms the judgment of a justice of the peace in proceedings for failure to work the public roads, and an appeal is taken to the Supreme Court, without a statement of the case on ap-

peal by the prosecutor, who has been taxed with the costs, the presumption is in favor of the judgment appealed from; and as the findings of fact of the Superior Court judge are conclusive, if there is evidence to support them, it must be shown by the appellant that there was no such evidence.

3. Appeal and Error—Justice's Court—Failure to Work Roads—Costs—Superior Court—Facts Reviewed.

On appeal from the judgment of a justice of the peace taxing the prosecutor with costs, in proceedings for failure to work the public roads, the findings of fact of the justice are reviewable by the Superior Court judge.

4. Appeal and Error—Superior Court—Failure to Work Roads—Judgment—Costs—Affirmance of Findings—Presumptions.

Where in proceedings for failure to work the public roads, the Superior Court judge affirms the judgment rendered before a justice of the peace in the defendant's favor, it is an approval of the findings of fact as well as the conclusions of law; and where the justice of the peace has taxed the prosecutor with costs upon findings that there was no reasonable ground for the prosecution, or that it was not required by the public interest, or that the prosecution was frivolous or malicious, it is not necessary that the Superior Court judge restate these findings in affirming the judgment.

(584) APPEAL from *Carter, J.*, at January Term, 1913, of WAYNE.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. C. Monroe and G. E. Hood for appellant.

CLARK, C. J. The defendant was tried before a justice of the peace upon complaint of Larry Edmundson, road overseer, for failure to work the public roads. The justice found the defendant not guilty and "adjudged that the plaintiff, Larry Edmundson, is guilty of malicious prosecution, and that he pay the costs." The prosecuting witness appealed. In the Superior Court it was adjudged, "Judgment of the justice of the peace affirmed." The prosecuting witness then appealed to this Court.

This proceeding is in the nature of a civil judgment, from which an appeal lay in behalf of the prosecutor from the justice of the peace to the Superior Court. *S. v. Morgan,* 120 N. C., 563; *S. v. Powell,* 86 N. C., 640. While the findings of fact by the justice of the peace are reviewable in the Superior Court, the findings of fact by the Superior Court are conclusive and not reviewable in this Court. *S. v. Morgan,* 120 N. C., 563; *S. v. Lance,* 109 N. C., 789; *In re Deaton,* 105 N. C., 59; *S. v. Dunn,* 95 N. C., 697.

There is no case on appeal, and upon the face of the record there is no error apparent, and the judgment must be affirmed. *Lumber Co. v. Branch,* 150 N. C., 110; *S. v. Lewis,* 145 N. C., 585; *Gaither v. Carpenter,* 143 N. C., 241. If there had been a case on appeal, and the evidence had been set out, the Court could not disturb the findings of fact by the judge below, unless it appeared that there was no evidence. In reference cases it has been often held that where the judge affirms the report of the referee it must be taken that he adopts (585) his finding of fact, and it is not necessary that he should set out the evidence again. *Dunavant v. R. R.,* 122 N. C., 999; *Morisey v. Swinson,* 104 N. C., 555; *Battle v. Mayo,* 102 N. C., 413.

The prosecutor relies upon *S. v. Roberts,* 106 N. C., 663, where it is held that the prosecutor cannot be taxed with the costs unless the court shall entertain and express the opinion that there was no reasonable ground for the prosecution, or it was not required by the public interest, or shall adjudge that the prosecution was frivolous or malicious. But here the justice of the peace so found, and the judge of the Superior Court, upon hearing the appeal, affirmed that judgment. This is making the same finding of fact and law, and it was not necessary to duplicate the words used by the justice. The meaning of the court is clear, and such finding is conclusive and not appealable. *S. v. Hamilton,* 106 N. C., 660, and cases cited in the Anno. Ed.

In *S. v. Morgan,* 120 N. C., 564, it was held that while the findings of fact by the justice of the peace in taxing the costs against the prosecutor are reviewable in the Superior Court the findings of the latter court are not reviewable here. In *S. v. Taylor,* 118 N. C., 1262, the same ruling is made, and the Court adds: "As the judge below does not set out the facts upon which he founded his judgment, we must take them as being sufficient to justify his judgment."

The judgment of the Superior Court affirming the judgment of the justice of the peace is an approval of the findings of fact as well as the judgment of law of the justice. We presume that the judge examined the evidence on the appeal. He could not well have entered judgment without doing so, and the presumption of law is in favor of the regularity of the proceedings below (*Graves v. R. R.,* 136 N. C., 7; *Felmet v. Express Co.,* 123 N. C., 499), and the burden is on the appellant to show error. *Bowers v. Lumber Co.,* 152 N. C., 604.

If the appellant had intended to present the point that the judge heard no evidence, or that there was no evidence to support his judgment, he should have presented that matter by stating a case on appeal.

He has not done so, and it was not denied in this Court that in
(586) fact the judge heard the evidence before pronouncing judgment.

No error.

State and Larry Edmundson v. Hadie Edmundson, No. 210, from WAYNE, presents the same state of facts, and is governed by the opinion in this case.

No error.

Cited: *S. v. Johnson,* 169 N. C., 311.

STATE v. ERNEST COOK.

(Filed 20 March, 1913.)

1. Jury — Evidence — Expression of Opinion by Court — Remarks in Jury's Hearing—Interpretation of Statutes—Appeal and Error.

Revisal, sec. 535, forbidding a judge in his charge to the petit jury in a criminal or civil case to express opinion on the facts involved, applies to any expression of opinion by the judge in the hearing of the jury at any time during the trial.

2. Same—Instructions Not Corrective.

Where self-defense is pleaded to a charge of murder, and there is evidence tending to show that the prisoner was unsuccessfully endeavoring to retreat from an attack made on him by the deceased and one P. with sticks, and that a third assailant, having made threats, had secured a gun and was returning with the gun, pointing it at the prisoner; and it appears that while the attorney for the prisoner was arguing to the jury that because of the advance on the prisoner by the deceased and P., both with sticks, the latter known by the prisoner to be a man of violent character, the prisoner had a good and lawful reason for firing the fatal shot, the court interrupted him by saying, "What difference does it make if P. was advancing on him with a stick? That would not give him a right to kill the deceased," the remark of the court, in the hearing of the jury, is an expression of his opinion on the evidence, which constitutes reversible error, and it is not cured by an instruction that the jury are the sole judges of the evidence.

APPEAL from *Ferguson, J.,* at August Term, 1912, of WAYNE.

Indictment for murder of one Ben. Coley. Prisoner was con-
(587) victed of manslaughter and from judgment on the verdict appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Dortch & Barham and Langston & Allen for defendant.

HOKE, J. It was admitted by the prisoner that he fired the shot which killed the deceased, and there was other evidence on the part of the State tending to establish guilt.

On the part of the prisoner there was evidence tending to show that the killing was in his necessary self-defense; that at the time the fatal shot was fired the deceased and one Frank Pittman, who had already struck prisoner a severe blow with a heavy stick, were advancing on prisoner, both with heavy sticks and pressing him so close that he was unable to get away; that prisoner was running at the time, and, not being able to escape the assault, that he turned and fired back as he ran, two shots, etc. When asked why he shot the second time, prisoner replied, "They were right at me, and I could not get over the fence." The prisoner also testified that at this time Alvin Coley, a brother of deceased, had started to the house, and with an oath said, "I'll get the gun," and was returning with it, pointing towards prisoner. While one of the prisoner's counsel was arguing this phase of the case to the jury, and contending that owing to the advance on him by deceased and Frank Pittman, both with sticks, and Pittman known to the prisoner to be a man of violent character, the prisoner had good and lawful reason for his act, his Honor interrupted counsel, saying, "What difference does it make if Pittman was advancing on him with a stick? That would not give him the right to kill Ben. Coley." This to our minds, was a clear expression of opinion on the part of his Honor as to the weight and sufficiency of an important part of testimony tending to establish his plea of self-defense, and is in violation of our statute regulating jury trial, Revisal, sec. 535, and in which a judge is forbidden, in giving a charge to the petit jury in a civil or criminal case, to express an opinion whether a fact is fully and sufficiently proved, "such matter being the true office and province of the (588) jury." While the statute refers in terms to the charge, it has always been the accepted construction that it applies to any such expression of opinion by the judge in the hearing of the jury at any time during the trial. Pell's Revisal, sec. 535; *Park v. Exum*, 156 N. C., 228; *Withers v. Lane*, 144 N. C., 184; *S. v. Dick*, 60 N. C., 440. The learned and usually careful judge was evidently conscious that he had probably and by inadvertence prejudiced the prisoner's case, for he added, "But the court has no right nor has it the inclination to express an opinion about the case"; but the forbidden impression had already been made, and as to the vital portion of prisoner's plea, and on authority, the attempted correction by his Honor must be held inefficient for the purpose. *S. v. Dick, supra; S. v. Caveness*, 78 N. C., 484.

In *S. v. Dick* the Court held: "Any remark made by a judge, on the trial of an issue by a jury, from which the jury may infer what his opinion is, as to the sufficiency or insufficiency of the evidence or any part of it pertinent to the issue, is error, and the error is not corrected by his telling the jury that it is their exclusive province to determine on the sufficiency or the insufficiency of evidence and that they are not bound by his opinion in regard thereto."

For the error indicated, the prisoner is entitled to have his cause heard before another jury, and it is so ordered.

New trial.

Cited: *S. v. Harris,* 166 N. C., 246; *Speed v. Perry,* 167 N. C., 128; *Medlin v. Board of Education, ib.,* 244; *Bank v. McArthur,* 168 N. C., 52; *Swain v. Clemmons,* 172 N. C., 279.

STATE EX REL. S. B. SPRUILL v. W. M. BATEMAN.

(Filed 26 March, 1913.)

1. Elections—Public Offices—Disqualifications to Office—Next Highest in Votes—Vacancy in Office—Appointive Power.

The one receiving the next highest number of votes for a public office at an election held by the people, is not elected to fill that office because of the ineligibility of the one receiving the highest number.

2. Public Offices—Qualifications—Constitutional Law—Legislative Powers—Recorders' Courts—Attorney.

The Constitution of North Carolina, Art. VI, provides who shall be voters, and by section 7 thereof, that "every voter in North Carolina, except in this article disqualified, shall be eligible to office," and the Legislature cannot add to the constitutional disqualifications to hold office by requiring candidates for the position of recorder in a municipal court to be "a licensed attorney at law." The difference between an "assurance" and a "qualification" to office pointed out and discussed by CLARK, C. J.

(589) APPEAL by defendant from *Long, J.,* at February Term, 1913, of WASHINGTON.

W. M. Bond, W. M. Bond, Jr., Ward & Grimes for relator.
A. D. McLean for defendant.

CLARK, C. J. At the election in November, 1912, Bateman was elected by the people of Washington County recorder of the "Recorder's

Court of Plymouth," which was created by chapter 343, Public-Local Laws 1911. Section 2 of said act prescribes that said recorder shall be "a qualified voter of Washington County and a man of good moral character and a licensed attorney at law." The defendant does not hold a license to practice law, and by this proceeding the relator seeks to oust him from the office on that ground, and to have himself inducted upon the ground that Bateman not having all the qualifications prescribed by that act, that the votes cast for him are to be disregarded and that therefore the relator, who received the next highest vote, is entitled to the office.

Taking up the second proposition first, Bateman having received the largest number of votes, Spruill was not elected. If Bateman is disqualified to act, there must be a resort to the process of filling the office, in case of a vacancy, as provided by section 16 of said act. When the candidate receiving the highest vote is ineligible, that cannot make his opponent, who has been rejected by them, the choice of the people.

In Throop on Public Officers, sec. 163, it is held: "In this country the great current of authorities sustains the doctrine that the ineligibility of the majority candidate does not elect the minority candidate. And this without reference to the question whether (590) the voters knew of the ineligibility of the candidate for whom they voted. It is considered that in such a case the votes for the ineligible candidate are not void."

In Mechem Public Officers, sec. 206, it is said that the doctrine in the United States, "supported by an undoubted preponderance of authority, is that the candidate receiving the highest number of votes may, because of his ineligibility, fail of election, yet the votes cast for him are so effectual as to prevent the election of other candidates, and there is no election at all." This is supported by numerous citations there given. Without citing them, it is sufficient to say that they hold that a candidate who receives fewer votes than are received by some other candidate cannot be said, under any circumstances, to be elected.

In 15 Cyc., 391, the point is thus clearly stated with abundant citation of authority: "According to the English rule, if a candidate who receives the highest number of votes is ineligible, and the electors had sufficient notice of his ineligibility at the time of voting for him, their votes are thrown away, and the candidate having the next highest number of votes, if he is eligible, must be declared elected; and in one American jurisdiction (Indiana) the English rule has been adopted. But it is a fundamental idea in American politics that the majority shall rule, and that no person can be elected to office unless he shall receive a majority, or at least a plurality, of all the votes. It has accordingly

been settled by the House of Representatives of the United States that the ineligibility of the candidate receiving the highest number of votes gives no title to the candidate receiving the next highest number, even though the election was held in a State where the contrary rule obtains. The same rule has been adopted by the United States Senate and has the support of the great weight of judicial authority in the United States. It may be well to add, in this connection, that it is not within the power of a State to add to the qualifications prescribed for Representatives in Congress and Senators of the United States by the Constitution of the United States so as to render ineligible candi-
(591) dates who would otherwise be eligible under the Federal Constitution."

To same effect *Com. v. Cluley*, Brightley on Elections, 144; *s. c.*, 56 Pa. St., 270. It has also been the settled practice as to contested elections in the General Assembly of this State that when the candidate receiving the majority vote has been found ineligible, the minority candidate has not been seated, but a new election has been ordered.

The English rule was formerly to the contrary, as above stated, but is not now so. When John Wilkes, the celebrated "Agitator," after being three times denied his seat in Parliament and expelled, was promptly a fourth time elected by the voters of Middlesex, Parliament ventured to seat his opponent, Col. Luttrell, who had received a minority. The storm of indignation that swept through the Kingdom came near to becoming a Revolution, and to Wilkes' consequent popularity we owe the fact that a great county in this State bears his name.

As to the other question: The Constitution of this State, Art. VI, prescribes who shall be "voters," and section 7 of that article provides: "*Every voter* in North Carolina, except as in this article disqualified, shall be eligible to office." The Legislature is therefore forbidden by the organic instrument to disqualify any voter, not disqualified by that article, from holding any office. The General Assembly cannot render any "voter" ineligible for office by exacting any additional qualifications, as by prescribing, in this instance, that the candidate shall be "a licensed attorney at law," any more than it could prescribe that he should own a specified quantity of property, or should be of a certain age, or race, or religious belief, or possess any other qualification not required to make him a voter.

It is true that where a Constitution provides that "no person shall be elected or appointed to any office unless he possesses the qualification of an elector," the Legislature can prescribe additional qualifications. 29 Cyc., 1376, and cases there cited. The reason is that where the Constitution requires only that the candidate shall be a voter, the

Legislature can add additional qualifications, providing only the candidate is a voter; but our Constitution is just the reverse of (592) this. It provides that *"Every voter* (unless as in this article disqualified) shall be *eligible to office."* It may be, therefore, that the General Assembly of this State could make eligible to office those who are not voters, as to which we express no opinion. The Constitution contains no prohibition, in terms, as to this. But it does forbid the disqualification of "any voter" for office, for it says that *"every* voter" is eligible to "office," which takes in every office.

The purpose of this peculiar phraseology in the North Carolina Constitution is well known by every one. A newly emancipated element had been admitted to suffrage, and it was rightly anticipated that at some future day there might be a majority in the General Assembly unfavorable to their holding office, so the provision was made that "every voter," except as disqualified by the Constitution, should be eligible "to office." The broadest word is used, showing that the eligibility was to any and every office.

The convention that formed the Constitution seems to have had the most implicit faith that the people were competent to select their own officers, and therefore Article VI imposes no disqualification upon voters except those named in section 8 of that article. The Amendment of 1900, while imposing some restriction upon suffrage, left intact the provision that all who continued to be "voters" remained eligible to office. Indeed, the Constitution does not require even that judges of the Supreme and Superior Courts shall be "licensed attorneys at law," presuming that the people would select those who are competent for such positions. It would be strange indeed if the General Assembly could add this restriction in the selection of this recorder, which office is now filled in North Carolina by many most competent men who are not lawyers, when the organic instrument does not require that the members of the Supreme and Superior Courts shall possess any other qualification than that of being voters. Neither does the United States Constitution nor any act of Congress require such qualification for Federal judges.

In *Lee v. Dunn,* 73 N. C., 595, this subject was fully gone into, (593) and it was held that the General Assembly could not impose any additional qualification upon eligibility to office other than that the officer should be a voter as required by Constitution, Art. VI, sec. 7, above quoted, but a mere *assurance* for the faithful discharge of the duties of the office, such as a bond to answer for money intrusted to his care, and, when an official has been in office already, a receipt for the money paid over as evidence of his integrity is not an added "quali-

fication." The Court goes on to say that even the requirement of an oath by the Constitution itself does not affect eligibility, because that is required after election, and is only an assurance that the officer will faithfully discharge the duties of the office. The Court added that any legislation which directly or indirectly denies or abridges the right of a citizen to vote as specified in the Constitution is invalid, and that "what is true of the right to vote is also true of the right to hold office." Brightly on Elections, 44; *s. c.*, 59 Pa. St., 109. Whoever is entitled under our Constitution to vote is entitled to hold office, except where restricted by that instrument. The constitutional provision in these matters cannot be abridged by requiring any qualifications whatever in addition to those set out in the Constitution. A requirement that a man shall be a lawyer is not an "assurance" like a bond, but additional "qualification."

The requirements as to age of certain officers, and the disqualification of the Governor for reëlection are in the Constitution and cannot be changed, nor applied to other officers, by the Legislature. The ordinary provision that election officers shall not be all of the same political party is not an additional "qualification," but a mere regulation or "assurance" as recognized in *Lee v. Dunn.* Besides, it may well be that such positions are not "offices," but mere "places of trust or of profit" whose qualifications may be prescribed by legislation. But as to this last point we need not now decide. The Constitution recognizes the clear distinction between "offices" (Art. VI, sec. 7) and "places of trust or of profit" (Art. XIV, sec. 7). *Worthy v. Barrett,* 63 N. C., 199; *Doyle v. Raleigh,* 89 N. C., 136. But the line has not been
(594) clearly marked, and we are not called upon to do so in this case, for it is clear that the recorder's position is an office.

It follows, therefore, (1) That the defendant, a duly qualified voter of Washington County, was eligible to the office of recorder and is entitled to fill it, having received the majority of the votes of the electors of that county. (2) That having received a majority of the votes cast, even if he were ousted because ineligible, the relator would not be entitled to be inducted into office, but the vacancy would be filled in the manner prescribed by the act creating the court.

Reversed.

WALKER and ALLEN, JJ., concurring in result.

Cited: S. v. Knight, 169 N. C., 336, 351; *Bank v. Redwine,* 171 N. C., 571, 572.

STATE v. STERLING FREEMAN.

(Filed 26 March, 1913.)

Intoxicating Liquor—Pleas—Former Conviction—"Same Offense."

The defendant was indicted for selling one pint of spirituous liquor, contrary to our statute, on 15 November. It was admitted on the trial that he had been acquitted at a prior term of selling one pint of spirituous liquor charged to have been made to the same person within two months of the time charged in the second indictment. The evidence on behalf of the State tended to show that the defendant continuously for several months procured liquor for the witness, for which he received payment, and that it was obtained locally. Upon cross-examination this witness testified that he had given the same evidence against the defendant on the former trial, as he was then testifying to, and that he could not remember the exact date of any particular sale: *Held*, (1) the allegation as to the time of sale is immaterial, and the accused may be convicted upon proof of an unlawful sale to the person named at any time within two years prior to the finding of the presentment, etc.; (2) while the burden is on the defendant to sustain his plea of a former acquittal by the preponderance of the evidence, he may rely on the State's evidence for this purpose; (3) it was for the jury to decide, under this evidence and by its preponderance, if the offense charged was the same as that of which the defendant had formerly been acquitted, and if it was, the defendant should be acquitted. Seven principles of law applicable to the defense of former acquittal laid down, and the meaning of the term, "same offense," discussed by ALLEN, J.

CLARK, C. J., dissenting.

APPEAL by defendant from *Cooke, J.*, at the Spring Term, (595) 1912, of FRANKLIN.

The defendant is indicted for selling one pint of spirituous liquor on or about 15 November, 1911, to B. H. Meadows.

It was admitted on the trial that the defendant had been acquitted at a prior term of court upon an indictment for selling one pint of spirituous liquor to B. H. Meadows on or about 5 December, 1911.

B. H. Meadows, witness for the State, and the only witness examined, testified "that he knew the defendant, Sterling Freeman; that they worked at the same livery stable during the fall of 1910 and the spring of 1911; that the defendant would frequently, at request of witness, go out and buy a bottle of whiskey for witness; that he would give him the money and defendant would bring him back the bottle of whiskey; that he did not know where defendant got the whiskey; that this continued the whole time they worked together at the stable; that it was almost an everyday occurrence; that witness did not know of the source from which defendant secured the whiskey."

On cross-examination he stated "that he was a witness at last January court against defendant, when the defendant was acquitted; that he testified to the same state of facts at that time that he testified in this trial; that he cannot remember the exact date of any particular sale, but that the defendant, a colored man, usually drank out of the same bottle with the witness."

The defendant asked the court to charge that if the defendant was tried at January term of this court upon the same state of facts as at this term, that his plea of former trial and acquittal was good.

The court refused to give this charge, and defendant excepted.

There was a verdict of guilty, and from the judgment pro- (596) nounced thereon, the defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. M. Person for defendant.

ALLEN, J. A single question is presented by this appeal, and that is as to the right of the defendant to have the instruction prayed for given upon the plea of former acquittal. There are certain principles bearing upon this question upon which there is no difference of opinion:

1. That a person cannot be tried twice for the same offense.

2. That the offenses are not the same if, upon the trial of one, proof of an additional fact is required which is not necessary to be proven in the trial of the other, although some of the same acts may be necessary to be proven in the trial of each.

3. That if the violation of law is not continuous in its nature, separate indictments may be maintained for each violation, and under indictment for selling intoxicating liquors one may be prosecuted and convicted for each separate sale made to the same person and whether made on the same or different days.

4. That upon the trial of such indictment, the State may offer evidence of more than one sale to the same person, and the defendant cannot compel an election, and that it is within the discretion of the court to deny or allow the motion to elect.

5. That the allegation in the indictment as to the time of sale is immaterial, and a conviction may be sustained upon proof of a sale to the person named at any time within two years prior to the finding of the presentment, if there is one, and if not, then within two years prior to the finding of the indictment.

6. That the burden is on the defendant to sustain his plea of former acquittal or former conviction by the preponderance of the evidence.

7. That the defendant may introduce evidence to prove his plea, or he may rely on the evidence introduced by the State.

The point of divergence is as to the meaning of the term, (597) "same offense," and as to what must be proven to sustain the plea.

"The true criterion," said *Nash, J.*, in *S. v. Birmingham,* 44 N. C., 122, "by which the question is to be decided is, whether the evidence necessary to support the second indictment would have been sufficient to convict the defendant on the first," and *Ruffin, J.*, says, in *S. v. Nash,* 86 N. C., 651: "The true test is as stated in *Rex v. Vandercomb.* Could the defendant have been convicted upon the first indictment upon proof of the fact, not as brought forward in evidence, but as alleged in the record of the second?"

This principle is quoted by *Justice Walker* in *S. v. Hawkins,* 136 N. C., 622, and he proceeds to show that it unjustly restricts the rights of the defendant. He says: "The true principle by which to test the sufficiency of the plea of former acquittal as a bar is said to be this: Unless the first indictment was such as the defendant might have been convicted upon it by proof of facts contained in the second, an acquittal on the first can be no bar to the second. *Rex v. Vandercomb,* 2 Leach, 716; *S. v. Birmingham,* 44 N. C., 120; *S. v. Williams,* 94 N. C., 891. This statement of the principle (which was taken from the opinion of *Justice Buller* in *Rex v. Vandercomb*) has, we think, been justly criticised, as it may exclude the right of the defendant, by proof of facts other than those alleged in the second indictment, to show the identity of the two offenses, and it has been suggested that the rule should be that, unless the evidence as brought forward to prove the allegations of the second indictment would be sufficient to convict upon the first, the plea of former acquittal or conviction should not avail the defendant (*S. v. Nash,* 86 N. C., at p. 656), but this would not remove the fault unless the rule is further extended so as, in terms, to include the right of the defendant to prove the identity of the offenses charged in the two indictments, which might otherwise appear to be different. In order to support a plea of former acquittal, it is not always sufficient that the two prosecutions shall grow out of the same transactions; but they must be for the same offense, the same both in (598) law and fact."

In 12 Cyc., 280, the author says that "a test almost universally applied to determine the identity of the offenses is to ascertain the identity in character and effect of the evidence in both cases."

If we adopt either rule, the defendant was entitled to the instruction prayed for.

Tested by the first, and keeping in mind, as said in *S. v. White,* 146 N. C., 609, "that the date charged in the bill is immaterial," and that each indictment charges the sale of one pint of spirituous liquor to B. H. Meadows, it cannot be questioned that "the evidence necessary to support the second indictment would have been sufficient to convict the defendant on the first."

Tested by the second, which requires identity of the offense "in law and in fact," or by the third, which requires identity of evidence, and the same result follows, as the law was the same under both indictments, the indictments identical and the only witness introduced by the State said, "that he testified to the same state of facts at that time (the former trial) as he testified in this trial."

It may be that the defendant is guilty of one hundred violations of law. If so, he ought to have been convicted on the first trial, but in fact only one transaction was proven, as the witness for the State testified that he could not remember the date of any sale.

The State has had the advantage of offering all the evidence in its possession against the defendant, has not been required to give dates of sales so that the defendant might be able to defend, and this evidence has been passed upon by twelve "good and lawful men," and the State ought not now to be permitted to try the same defendant on another indictment charging the same offense and on the same evidence.

The case of *Olmstead v. State,* 92 Ala., 64, is so much like this that we quote from it at some length: "Appellant was convicted under an indictment which charged him with selling vinous, spirituous, (599) and malt liquors without a license and contrary to law. The evidence was that of one witness, to the effect that he had often, within twelve months before the finding of the indictment, bought a quart of beer from the defendant at the latter's place of business in Anniston, and drank it on the premises; that he could not recall any particular time that he made such a purchase, or who was present, though he usually went there with a friend, but that he had made such purchases during every month in the year, and did not remember about any particular sale, and that he did not and had not testified to any particular sale, but he remembered that he had so bought beer, which he drank on the premises, at some one time within twelve months before the finding of the indictment. At defendant's request, the court charged the jury that 'if the evidence is so uncertain that the jury cannot find beyond a reasonable doubt a particular sale by the defendant, they must acquit the defendant.' Having given this charge, the court further told the jury, by way of explanation, that 'If they believed

from the evidence that the defendant sold beer within twelve months before the finding of this indictment, this would be such a particular sale as would authorize a verdict of guilty,'" and the Court, among other things, said: "While the evidence is not limited to any one sale, yet if believed by the jury, it showed at least one sale, within the year. . . . If defendant should be again indicted, no conviction could be had on evidence that he sold a quart of beer to this witness, the same being drunk on the premises, at any time within a year before the finding of the present indictment. This is the broadest protection to him, and demonstrates the fallacy of the charge requested. *S. v. Sterrenberg,* 69 Iowa, 544; *S. v. Nunnelly,* 43 Ark., 68."

In the *Pienfetti case,* 79 Vt., 236, there were six counts in the first indictment, charging illegal sales on 20, 21, 22, 23, 24 May, 1904, and on 1 June, 1904, and two counts charging keeping for sale on 1 January and 1 June, 1904.

In the second indictment there were four counts charging illegal sale on 1, 10, 15 February and 1 April, 1905, and a fifth count charging illegal sales at different times. To this last indictment the defendant pleaded guilty of two offenses and paid the fine imposed, and when put on trial on the first indictment he entered the plea of (600) former conviction.

He introduced no evidence as to the identity of the offenses, but relied on the record, and the court properly held that the plea was not sustained.

The Court, however, cites *S. v. Brown,* 49 Vt., 437, and says: "That a conviction or acquittal only bars such offenses as were put in issue on the former trial, is abundantly shown by *S. v. Brown,* 49 Vt., 437. In that case the respondent offered in evidence a certified copy of the record of his acquittal, and requested the court to charge that the acquittal shown thereby was a bar to a conviction for the same offense as tried and determined in that case, and for all offenses committed prior to the day of the exhibition of the complaint in that case. It was held that the acquittal barred all the offenses put in issue in the former case, but did not bar such offenses as might have been, but were not shown by the record or otherwise to have been put in issue in the former case."

The proposition discussed seems to us so clear upon principles of right and reason and upon authority that we would have thought it sufficient to state it, if it had not been questioned by the *Chief Justice* of this Court.

If the conclusion we have reached is not sound, the defendant can be tried indefinitely on the same evidence, upon successive bills, until a jury can be found who will convict.

A new trial is ordered for refusal to give the instructions set out.

New trial.

CLARK, C. J., dissenting: The defendant was convicted of the illegal sale of intoxicating liquor. This is not a continuous offense, but each sale is a separate and distinct violation of law. The uncontradicted evidence was that the defendant sold intoxicating liquor during the fall of 1910 and the spring of 1911; that it was "an almost everyday occurrence."

(601) A former jury found the defendant "not guilty" on a charge of selling "on or about 5 December, 1910." This jury have found him "guilty" on a charge of selling "on or about 15 November, 1910." The Court is now asked to hold as a matter of law, without any evidence to support it, that the sale which the jury found the defendant did not make, on 5 December, is the *identical* one (out of the 100 which the defendant made) which this jury finds the defendant did make, on 15 November. Two juries have said that the two sales alleged were not on the same occasion, for the first jury found he did not make it at the time for which he was then tried, and the last jury said he was guilty on the occasion for which they tried him. How can this Court say otherwise? There is no evidence to justify such conclusion.

The defendant offered no evidence to show that the acquittal was for the same time, *i. e.*, for the "same transaction" of which he is now convicted. The true rule is as stated in *S. v. Brown,* 49 Vermont, 437, cited in the opinion of *Allen, J.,* in this case, that "an acquittal bars all offenses put in issue in the former case, but does not bar such offenses as might have been put in issue in the former case." There was but one sale in issue in the former indictment against Freeman, and it is not shown by the record that it was for any other occasion than the one charged in the bill of indictment to have been made "on or about 5 December, 1910." It is true that if some other time than that charged had been put in issue it would have been sufficient, notwithstanding the date charged in the indictment. But the defendant, *upon whom rests the burden of proof,* has not shown that the occasion for which he was acquitted occurred on any other date than that charged, and the only thing that appears of record is the charge of that date and a verdict of guilty thereon.

This is probably the first time that a defendant in any court has contended that because the evidence shows that he has broken the law on probably 100 separate occasions and has been acquitted as to one occasion, that therefore he is pardoned as to all the rest, unless the State shall show for which particular sale he was acquitted. All the authorities as well as the reason of the thing are to the contrary, and that the burden is on the defendant to show that the charge (602) on which he is tried was the identical one for which he was convicted or acquitted before. *S. v. Ellsworth,* 131 N. C., 773; *S. v. White,* 146 N. C., 608; *S. v. Cale,* 150 N. C., 805; Cyc., 368.

The offense is not a continuous one, and the burden is upon him, and not upon the State, to show that he has been twice charged for the identical offense—identical in fact and not merely identical in the nature of the offense. The "multitude of his sins" does not change the burden of the proof in such case to the State. Their number cannot be "imputed to him for righteousness."

"An acquittal or conviction of crime is no bar to a subsequent indictment for the same offense or the same species of crime, on a different date from that previously tried, unless the offense is continuous." Criminal Law, 12 Cyc., 281.

The general rule, that, in a criminal prosecution where the respondent relies upon a plea of former conviction for the same offense, "if the same evidence required to support the crime charged in the one case will warrant a conviction in the other, the identity of the offenses is established," does not apply in prosecutions for offenses which, by their nature, are capable of repetition, each specific act being a distinct offense, as the illegal selling of intoxicating liquor. In prosecutions for such crimes, no presumption of identity will arise from the fact that evidence sufficient to convict under one will warrant a conviction under another. *S. v. Pienfetti,* 79 Vt., 236. In that case the Court said: "But it is held that in prosecutions of offenses which, from their nature are capable of repetition, and it might be added, in common experience are usually many times repeated, each being a distinct and substantive offense, this test is not applicable, and no presumption of identity will arise from the fact that evidence sufficient to convict under one would warrant a conviction under the other. In such cases the respondent must show affirmatively by proof outside the record that the offenses are one and the same." No proof whatever to that effect has been offered in this case.

The State herein charged a different date of the offense from (603) that charged in the record as the date of the sale for which the defendant was acquitted. The jury has convicted the defendant of the

sale herein charged. He has offered no proof tending to show that the two charged were for sales on the same occasion, and the judge properly refused to charge, as requested, that the burden was on the State to negative the identity of the two sales. The plea of "former acquittal" or of "former conviction" is a defense, the burden of proving which always rests on the defendant.

The proposition that the more guilty an offender is shown to be the more absolutely innocent he is, is a paradox that cannot be sustained either in logic, in law, or in morals. Proof of 100 offenses cannot be turned into proof of innocence by showing one acquittal for the offense on one occasion which the defendant does not identify.

Cited: *S. v. Cardwell,* 166 N. C., 313.

STATE v. C. J. MARSH.

(Filed 2 April, 1913.)

1. Railroads—Principal and Agent—False Pretense—Indictment Sufficient—Evidence—Interpretation of Statutes.

Where a railroad agent is charged with obtaining money under false pretense by falsely representing to his company that it was necessary for him to employ a hand at his station at $25 per month, and who, in order to get the money, signed the company's check in the name of the supposed hand, sending it on to the bank for collection and taknig the money from his cash receipts, proof of these allegations is sufficient to sustain the charge in the indictment and convict of the offense, under Revisal, sec. 3432, for the charge is sufficiently stated if it is expressed in a plain, intelligible, and explicit manner, and sufficient matter appear to enable the court to proceed to judgment. Revisal, sec. 3254.

2. Principal and Agent—False Pretense—Extra Work—Evidence—Ability to Repay—Felonious Intent.

Where an agent falsely represents to his principal that he had employed another in his service at a certain price, and obtains money on a check sent for his payment, it is no defense that the agent did the required work himself, after hours, and took the money in compensation for his own services; nor is evidence of the value of this extra work or of the agent's ability to repay, competent.

(604) APPEAL by defendant from *Peebles, J.,* at July Term, 1912, of UNION.

Attorney-General Bickett and Assistant Attorney-General Calvert, John D. Shaw, and Murray Allen for the State.

Osborne, Cocke & Robinson, Williams, Love & McNeeley, Lemmond & Vann, J. J. Parker, J. C. Brooks, for defendant.

CLARK, C. J. The defendant was convicted of obtaining money under false pretenses. He was railroad station agent at Marshville, N. C. In October, 1907, he wrote to the superintendent of the railroad company, asking for additional help and in November, 1907, the superintendent replied, authorizing him to put in a station hand at $25 per month. The defendant as station agent sent in a report for the month of July, 1908, of the persons employed at that station which showed that George Thomas, station hand, had been employed for that month, and that $25 was due him by the railroad. On 5 August the railroad company sent defendant its check, payable to the order of George Thomas, for $25 in full for services rendered as porter during the month of July, 1908. This check the defendant returned to the railroad company, indorsed by "George Thomas, his mark, J. C. Marsh, witness," and further indorsed, "Indorsement guaranteed. J. C. Marsh, agent A. C. L. R. R." Across the face of the check is perforated the word "Paid."

The testimony of the officers and the employees of the railroad is that they relied on the report of the defendant, as agent at Marshville station, that Thomas had been employed there as a laborer for the month of July, and on the genuineness of the indorsement of the check as guaranteed by the defendant. It was further in evidence, and was also admitted by the defendant, that George Thomas was not regularly employed as a laborer at Marshville station during July, 1908, and that no station hand was regularly employed there at that time.

George Thomas testified that he was not a station hand at (605) Marshville in July, 1908, nor at any other time; that he did not make his mark on the check and did not authorize the defendant to do so, nor to witness it. He further testified that the defendant never gave him a check to pay for his services; that sometimes he carted for Marsh a day at a time, cannot say exactly how many days in a month, but not many; that his work during a month amounted probably to two or three dollars; that he did not unload freight and never swept out the depot or carried mail. The defendant testified that he did not deliver the check to Thomas; that Thomas did not sign the check nor put his mark there. He admitted that he had sent in a report that Thomas had earned $25 for the month of July. From his testimony his excuse seems to be that he and one Davis, the telegraph operator,

did some extra work for the company, and he took the pay which he had falsely reported that Thomas was earning and divided it between them. This, if true, is no defense.

Revisal, 3432, eliminating duplicating words and stating the kind of false pretense charged in this case, provides: "If any person shall knowingly, designedly, by . . . any false pretense whatever obtain from any person or corporation . . . any money, property, or check . . . with intent to cheat and defraud any person . . . he shall be guilty of a felony." The evidence fully sustained a conviction of this offense.

The defendant took 49 exceptions, which in his brief counsel reduces to 10 points, by grouping exceptions which embrace the same propositions and by omitting others. The defendant's first proposition is that the obtaining of the check by virtue of false pretenses was not embraced in the allegations of the bill. The allegations of the bill are that the defendant, being station agent for the railroad company and authorized by them to employ a laborer at his station, feloniously, wickedly, etc., intending to cheat and defraud, did falsely pretend to said railroad company that George Thomas was employed as a laborer at Marshville station by him under the authority of the railroad company, and that Thomas had labored at Marshville station during July, 1908, (606) and that there was due said George Thomas for said month of July for his services $25, and that the defendant had paid the said George Thomas $25, and that the check issued by the railroad company, payable to said Thomas for the month of July, 1908, had been indorsed by George Thomas, and that the defendant had witnessed the indorsement by him of the said check, which pretenses were false, calculated and intended to deceive the said railroad company, and did deceive them; that in truth Thomas was not employed as a laborer at that station during the month of July; that there was not due him the sum of $25 for services rendered; that defendant did not pay him the $25; that the check had not been indorsed by Thomas; that Marsh had not witnessed it, and by color and means of said false pretense the defendant received money, property, and credit in the sum of $25 by collecting the said check, which he appropriated to his own use, with the intent to cheat and defraud the said railroad company. This in substance is the charge in the bill of indictment, rejecting surplusage and formal expressions. The check was property. Its proceeds were money. If defendant had money of the railroad in his hands, the retention of $25 to pay to himself was obtaining credit or "a thing of value." The allegations of the bill sufficiently and fully charged "false pretense."

Revisal, 3254, provides: "Every criminal proceeding, by warrant, indictment, information, or impeachment, shall be sufficient in form, for all intents and purposes, if it express the charge against the defendant in a plain, intelligible, and explicit manner, and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill of proceeding sufficient matter appear to enable the court to proceed to judgment." This indictment, however, is not informal, but is well drawn under Revisal, 3432. It may be that, taking certain portions of the evidence and omitting other portions, that the evidence would sustain an indictment for embezzlement. But that is immaterial to be considered. False pretense is sufficiently charged, and the evidence fully supported the verdict of the jury. Indeed, if the facts proven had shown that the defendant was also guilty of larceny, Revisal, 3432, provides that the defendant shall not on that account be acquitted. (607) Whether the facts charged and proven constitute larceny, false pretense, or embezzlement, the punishment is the same. The only material question is, Did the defendant commit the acts charged, and if so, was it a violation of law, and is the sentence within the punishment prescribed for such violation?

The chief clerk in the pay department of the railroad company testified that he paid this check in cash 21 August; that defendant had placed the check in bank at Wilmington to his individual credit, and, in corroboration, produced the check with the indorsement of the bank. The defendant testified he sent the check to the bank for credit of the railroad company, and retained in lieu thereof $25 of cash he had collected for freight. The difference is immaterial. In either event there was the same false pretense by which he obtaind $25 of the railroad's money, whether the check was cashed by the pay clerk, by the bank, or by the defendant out of the funds of the railroad company in his hands.

We cannot sustain the defendant's contention that he "did not obtain anything whatever" by his false pretense. Nor his proposition that the failure of the defendant to keep his manner of dealing hidden from the railroad company tended strongly to prove the absence of any felonious intent. The evidence is that the officials of the company were not aware of the facts, except the detective, and when or how he obtained information does not appear. There is no evidence that he condoned the offense or was authorized to do so. It may well be that the detective procured his information when he unearthed and exposed the fraud.

The question of intent was correctly submitted to the jury. The question of the defendant's solvency could not be pertinent upon the

facts as charged in this case. Nor did the judge err in excluding evidence of the value of the amount of extra work done by the defendant, if any. The false pretense consisted in the false representations that George Thomas had been employed, that he had rendered one (608) month's full service for which there was due him the sum of $25, and obtaining thereupon the check of the company in favor of Thomas, whose mark was falsely asserted to have been made by him on the back of the check, and the collection by this means, for the use of the defendant, of said $25.

We have examined very fully the indictment, the evidence, the admissions of the defendant, and the charge of the court and the exceptions. We find

No error.

STATE v. MOORE GRAY.

(Filed 2 April, 1913.)

Murder—Self-defense—Reasonable Apprehension of Danger—Intruder Upon Home—Instructions—Appeal and Error.

Where it is shown by the evidence, on a trial for murder, that the deceased and two others came to the prisoner's home during the night, and with threats and curses endeavored to force an entrance through the door and windows, terrifying the prisoner and the members of his family; and there is evidence that the deceased began the attack by firing a pistol, to establish the plea of necessary defense in firing through the door and killing the deceased, it is only required that the defendant show the existence of a reasonable apprehension on his part that he or some member of his family was about to suffer great bodily harm; or his reasonable belief that it was necessary to kill in order to prevent the violent and forceful entry of an intruder into his home; and where upon conflicting evidence this principle is charged with the modification that the jury should also find, in order to acquit the defendant, that one of the intruders was armed with a pistol, it is reversible error.

APPEAL by defendant from *Peebles, J.*, at November Term, 1912, of UNION.

This was an indictment for murder. At the commencement of the trial, the solicitor stated that he would not ask for a verdict of murder in the first degree, but for murder in the second degree or manslaughter, as the jury might find the facts to be. The defendant admitted killing the deceased with a deadly weapon, but pleaded that the killing (609) was done in the necessary defense of himself, his family, and his habitation.

The defendant testified in his own behalf as follows: "My name is J. Moore Gray. I am 57 years old. I am defendant in this case. Deceased was killed at my house on the night of Saturday, 28 September. I had been at work that day at Mr. Myers' lumber shop. I went home about dark, and went to bed between 9 and 10 o'clock. My wife, my two daughters, Minnie Gray and Ethel Knight, were there. My two little girls, Belle and Lila, 5 and 7 years old, were there. Mr. William Tarlton was there, too. He had come to call on my daughter Minnie. Deceased and three other men came to my door between 11 and 12 o'clock. I have since learned that the other three men were Glenn Wolfe, Earl Helms, and John West. They came to the door and tried to get in. They began cursing and kicking at the door. Minnie came and woke me up. She said get up, that there were some men trying to break in. I got up and started to the door. I could see deceased through the glass of the front door. He was taller than the rest and had a rag tied around his head. As I stepped out into the hall, I saw the flash of a pistol and heard it shoot. Deceased shot the pistol. I could see it in his hand. I went to the door and told the men to leave. I had no gun at that time. Deceased said that he was coming in. I said go on away. He said, 'Stick your old soap gourd out here, and I'll put light holes through it.' He said, 'G— d— you, I'm coming in there after you.' He had been kicking at the door. He was out there cursing. He said, 'I'm coming in at the G— d— window.' He ran towards the window in direction of Charlotte, and I heard glass fall. Some of my folks pushed bed against window. He said, 'G— d— you, you have darkened that hole, but I'll come in another.' He then started towards the other window, the one towards Monroe. As he passed the front door he kicked it. I had stepped back and got my shotgun when he went to kick out the window toward Charlotte. He then went to the other window (towards Monroe) and was raising his foot to kick it out, and I threw up my gun and shot. I didn't take aim. I cracked front door open to shoot. He was cursing and raising his foot to kick out the window when I shot. (610) This was the window on the east end of porch. I had no ill feeling against deceased. I did not know him, and had never seen him before. I shot him to keep him from coming in my house and killing me. He was out there cursing and swearing that he was coming in, and was going to shoot light holes through my head if I poked it out. There were three other men with him. My little children were crying and screaming. I had ordered these men to leave a number of times. I asked them to leave before I got the gun. I was afraid they would kill me or some of my folks, or do us some bad harm. I was not mad

at deceased. I was fraid of him and the other men with him. I saw four men standing at the door when I got up. I could tell deceased was the man doing the cursing, for he was taller than the rest and had a rag tied around his head. Deceased was not running when I shot. He was raising his foot to kick out the window. I did not shoot deceased because I was mad. I was too scared to be mad. After I shot I went back in the front room. I loaded my gun and laid it on the bed. The other fellows ran when I shot, but I didn't know but that they would come back and try to do something to me. I have never been in court before in my life."

There was other evidence corroborating the defendant, and evidence on the part of the State contradicting him.

The defendant, among other things, requested his Honor to charge the jury as follows: "If the jury find from the evidence that the defendant shot the deceased while the deceased was manifestly intending and endeavoring, in a violent manner, to enter the habitation of defendant, for the purpose of assaulting or offering personal violence to him, or to any member of his family being therein, then the killing would be justifiable, and the jury should find the defendant not guilty." "The court charges you that when a man is in his own home and has done nothing to provoke assault, and a trespasser enters upon his premises with a high hand and attempts to force an entrance into the house in such a manner as is calculated to lead a reasonably prudent man (611) to believe that he or some member of his family is in grave danger of being killed or receiving some serious bodily harm, the law does not require such householder to flee or to remain in his house until his assailant is upon him, but he may open his door and shoot his assailant, if such course is apparently necessary for the protection of himself or family."

The trial judge modified this instruction by adding at the end thereof the following words: "But the jury must be the judge of the reasonableness of defendant's apprehension."

The judge also stated that the instruction as modified would be law in this case only in the event that the jury should find that one of the men outside was armed with a pistol. To this limitation of the rule by the judge, defendant excepted.

"The court charges you that if you find from the evidence that the deceased came with three other young men to the home of the defendant and began shooting and cursing on the porch of defendant's house, and threatened defendant, and refused to leave when ordered, and was attempting with violence to force an entrance into defendant's home, and that defendant had reasonable grounds to believe and did believe

that he or some member of his family was in danger of losing their lives or suffering great bodily harm at the hands of the deceased, then defendant had a right to defend his house even to the extent of taking the life of the deceased; and if you further find from the evidence that defendant shot deceased, believing from the surrounding circumstances and the conduct of deceased that it was necessary to do so to protect himself or his family, then you should find the defendant not guilty."

His honor read this instruction to the jury, but stated that it was given and should be considered by the jury *only in the event that they should find that one of the men on the porch was armed with a pistol. "If one was not armed with a pistol, you should not consider this; for the court charges you that if one was not armed with a pistol, there is no evidence of the use of gentle means by defendant."* Defendant excepted to the limitation of rule stated in the prayer by the remark of his Honor; also to his Honor's statement at the same time that there was no evidence of the use of gentle means by de- (612) fendant.

The defendant was convicted of manslaughter and was sentenced to a term of three years in the State's prison, and he excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

J. J. Parker and W. O. Lemmond for defendant.

ALLEN, J. If the evidence of the defendant is true, he was awakened by his daughter between 11 and 12 o'clock at night, and was told that there were some men outside trying to break in his home; he did not know the deceased; his wife and children were in the house; the deceased and three other men were outside; as the defendant went to the door the deceased fired a pistol; the deceased said he was going in the house, and threatened to shoot the defendant; he was told to leave, but persisted in his conduct; the children of the defendant were crying and screaming; the deceased had been kicking at the door and cursing the defendant, and said he was going in after him; he ran to the window and said he was going in at the G— d— window; he broke the glass in the window, and when some member of the family pushed a bed in front of that window, he ran to another window, and as he was raising his foot to kick it out, the defendant cracked open the door and shot.

These circumstances were substantially embodied in the instructions requested by the defendant, and he was entitled to have them given to the jury without modification.

The guilt or innocence of the defendant does not depend upon the presence of a pistol in the hands of the deceased, as stated by his Honor, but in the existence of a reasonable apprehension that he or some member of his family was about to suffer great bodily harm, or of the reasonable belief that it was necessary to kill in order to prevent the violent and forceful entry of an intruder into his home.

One may kill when necessary in defense of himself, his family, or his home, and he has the same right when not actually neces-
(613) sary, if he believes it to be so, and has a reasonable ground for the belief.

The latter ground of self-defense was denied the defendant by the modification of the instruction prayed for.

Mr. Wharton, in his work on Criminal Law, 9th Ed., vol. 1, sec. 503, says: "An attack on the house or its inmates may be resisted by taking life. The occupant of a house has a right to resist even to the death the entrance of persons attempting to force themselves into it against his will, when no action less than killing is sufficient to defend the house from entrance. A man's house, however humble, is his castle, and his castle he is entitled to protect against invasion," and the same doctrine is enunciated in Bishop's New Criminal Law, vol. 1, sec. 858; Hale's Pleas of the Crown, vol. 1, sec. 458.

The facts in *S. v. Nash,* 88 N. C., 621, were not as strong in behalf of the defendant as the facts in this case, and yet the Court gave the defendant the benefit of the principle we have declared, and said: "If the defendant had reason to believe and did believe in the danger, he had the right to act as though the danger actually existed and was imminent."

The defendant is clearly entitled to have another jury consider his case.

New trial.

Cited: S. v. Blackwell, post, 683; *S. v. Johnson,* 166 N. C., 395; *S. v. Pollard,* 168 N. C., 121.

STATE v. S. S. BURNEY.

(Filed 2 April, 1913.)

1. Criminal Law—Motion for Continuance—Discretion of Court—Appeal and Error.

Where a motion for a continuance of the trial of a criminal offense is made by the defendant upon the ground that he is not prepared for trial, and refused, the refusal is within the discretion of the trial judge, and not reviewable on appeal except where it appears that this discretion has been abused.

2. Criminal Law—Jurors — Challenge After Passing Juror—Discretion of Court—Appeal and Error.

It is within the sound discretion of the trial judge to allow the solicitor, in a criminal case, to challenge a juror for cause and stand him aside, after he had once passed the juror and before the jury had been sworn in or impaneled; and his action therein is not reviewable on appeal.

APPEAL by defendant from *Bragaw, J.,* at September Term, (614) 1912, of BRUNSWICK.

Indictment for selling liquor. The defendant was convicted, and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

C. Ed. Taylor for defendant.

BROWN, J. The case on appeal states: "The bill of indictment was returned by the grand jury at September Term, 1912, and defendant moved for a continuance upon the ground that he was not ready to go to trial. The solicitor for the State opposed the motion for continuance, and after hearing argument for both sides, the motion for continuance was denied, and defendant excepted."

A motion for a continuance is a matter in the discretion of the trial court. *S. v. Hunter,* 143 N. C., 607; *S. v. Sultan,* 142 N. C., 569; *S. v. Pankney,* 104 N. C., 840; *S. v. Scott,* 80 N. C., 356.

The ruling is not reviewable except where there has been an abuse of discretion. *S. v. Lindsey,* 78 N. C., 499.

No abuse of discretion is shown by the record. Nothing appears but the fact that the motion was made, argument was heard, and the motion denied.

The defendant assigns error in that the court permitted the solicitor to challenge Juror Smith for cause.

The facts are that before the jury was sworn or impaneled, and after the juror had been once passed, the solicitor asked permission to challenge the juror for cause, which was allowed. The juror was stood aside for cause. Defendant excepted.

This was a matter within the sound discretion of the trial (615) judge, and is not reviewable. *S. v. Vick,* 132 N. C., 995, and cases cited.

No error.

STATE v. MOSES WHITE.

(Filed 16 April, 1913.)

1. Evidence, Insufficiency of—Motion for New Trial After Verdict—Practice—Appeal and Error.

Where the sufficiency of the evidence is for the first time objected to after the verdict has been rendered, it comes too late upon a motion for a new trial on that ground.

2. Criminal Law—Larceny—Evidence — Recent Possession — Instructions—Questions for Jury.

Upon a trial for larceny of money left in an office in a desk drawer, the evidence tended to show that the defendant had seen the prosecutor with the purse, containing $70 in $10 and $5 bills, and had remarked on the money the prosecutor had; that the defendant saw the prosecutor leave the purse in the drawer before going off for several hours, and when the prosecutor returned the purse was empty, and the defendant thereafter made contradictory statements of the amount of money he had on his person and where he had gotten it; that the defendant remained in the office after the prosecutor left, and no one else was seen to go in while the prosecutor was away: *Held,* sufficient to be submitted to the jury upon the question of defendant's guilt, and the judge properly instructed the jury that there was no presumption of guilt arising upon the doctrine of recent possession, the money not being identified, but it was for them to decide thereon under the evidence.

APPEAL by defendant from *Cooke, J.,* at October Term, 1912, of IREDELL.

The defendant is indicted for the larceny of money, and from a judgment rendered on a verdict of guilty, he appealed.

The principal witness for the State testified that on the day the money was missed she was a stenographer in a lawyer's office at Statesville, and that the defendant was janitor of the building. On that morning she had $70 in greenbacks, four $10 bills and six $5 bills, in a purse in a hand-bag. That she had counted the money about 11 o'clock (616) the night before, and noticed that the purse was stuffed out with

the bills the next morning. That the defendant was in the office painting the radiator, and was there when the witness left the office to go to dinner. She left no one in the office but the defendant. Just before leaving, she put the hand-bag containing the money in the drawer of her desk, and as she was closing the drawer the defendant looked around and saw her shut it. A few days prior thereto he saw her have this roll of bills, and remarked, "Miss Annie, you got a lot of money." The witness was absent from the office until 2 o'clock, and left again about 4 o'clock. Upon her return to the office about 6 o'clock, she began to make ready to go home, and opened the drawer where she had put her bag and purse, and found that the position of the bag had been changed from the corner of the drawer, where she placed it, to the middle of the drawer, and that it was unfastened. She looked for the money, but it was gone.

No other persons than the defendant were seen in or around the office while the prosecuting witness was absent, by the occupants of the other offices on that floor.

A policeman testified that he went to the defendant's house just after 6 o'clock that afternoon and saw the defendant. He told the defendant that the prosecuting witness had lost $70. "Thereupon defendant said he did not have her money and had not taken it, but said, 'I will go to town with you and get Miss Annie her money.' Then he said, 'I will have to wait and see Mr. Ausley; he has my money on deposit.' Mr. Ausley was cashier of the Commercial National Bank. Defendant said he did not have any money on him except $1 or $1.25. There was found on his person $7 in greenbacks, a $5 bill and two $1 bills. He then said it was his wife's money."

Another witness for the State testified that he saw the defendant the next day and told him that he would have to tell another tale about that money, and he then said $2 of it belonged to his wife, and Mr. Ausley gave him the $5 on Saturday before.

The court charged the jury the law applicable to cases of this kind, defining larceny and what evidence was necessary to constitute the offense; that where property was stolen and was found in (617) possession of a person, the law raises the presumption of guilt, if the property was identified; and that the more recent the possession after the larceny, the stronger the presumption. That the money found on the defendant's person would not raise a presumption of his guilt, because of its unidentification; (that the jury could take into consideration, in passing upon the guilt of the defendant,) all the evidence in the case; the opportunity the defendant had to take the money, (the fact that some money was found upon his person unidentified); the state-

ment made by him; and also charged the jury that the burden was upon the State to satisfy the jury beyond a reasonable doubt of his guilt from all the evidence, and if not so satisfied, it would be the duty of the jury to acquit the defendant.

After the verdict the defendant moved for a new trial, because—

(1) There was not sufficient evidence to go to the jury to justify a verdict.

(2) Because his Honor charged the jury that the jury should take into consideration all the evidence in the case; (the fact that money was found upon his person unidentified); the opportunity that he had to take the money; his statement to the policeman, was evidence for the jury to consider before passing upon the defendant's guilt.

Motion overruled, and defendant excepted.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

R. B. McLaughlin and W. D. Turner for defendant.

ALLEN, J. The objection that there is not sufficient evidence to sustain a conviction cannot be entertained when made, as in this case, for the first time after verdict. *S. v. Leak,* 156 N. C., 646. We have, however, examined the evidence, and think his Honor was justified in submitting it to the jury.

If the evidence of the State is accepted, the defendant knew that the prosecuting witnes had money, and that she kept it in her purse; he had seen the roll of bills, alleged to have been stolen, a few days (618) before, and had said to the witness that she had a lot of money; he saw her place the purse with the money in it in a drawer when she left the room; he remained in the room for some time alone; no one else was seen to go to the room; after it was found that the money had been stolen, a policeman went to see him, when he denied taking the money, but said he would go to town and get Miss Annie (the prosecutrix) her money; he told the policeman he had no money on his person except $1 or $1.25, and when he was searched it was found that he had a $5 bill and two $1 bills; he then said the money belonged to his wife, and that Mr. Ausley had given him the $5 bill.

The exception to the charge cannot be sustained. His Honor told the jury that the money found on the defendant had not been identified, and that there was no presumption of guilt, and he properly left to their consideration the circumstance of his possession of some money in connection with the contradictory statements of the defendant.

No error.

(619)

STATE v. JOHN WILL TROLLINGER.

(Filed 16 April, 1913.)

1. Murder—Firearms—Accidental Discharge—Instructions — Manslaughter—Culpable Negligence—Questions for Jury.

Where on a trial for murder the evidence of the State, the defendant not introducing any, tends only to show that the prisoner was with several others going along a road in a good humor, when a pistol shot was heard, followed by exclamations of members of the party, "You shot that boy!" which the prisoner denied; that the prisoner had out his pistol, "fooling with it, and it went off"; that the shot killed the deceased, who was on the side of the road, an instruction is held reversible error which tells the jury that the prisoner would be guilty of manslaughter if they were satisfied beyond a reasonable doubt that the prisoner killed the deceased with a deadly weapon, with the burden on the prisoner to show excusable homicide; for there being no evidence that the prisoner was intentionally pointing the pistol at the deceased at the time of its discharge, it was for the jury to say, upon the question of manslaughter, whether the prisoner was culpably negligent in handling the pistol at that time.

2. Murder—Firearms—Accidental Discharge—Carrying Concealed Weapons—Interpretation of Statutes—Culpable Negligence.

The carrying of concealed weapons is "*malum prohibitum*," and the mere fact that one who was carrying a pistol in a manner prohibited by the statute, killed another by its accidental discharge, does not make him guilty of manslaughter, unless his culpable negligence in the way he was handling it produced the injury from its discharge or had a necessary tendency to bring about that result.

APPEAL by defendant from *Peebles, J.*, at March Term, 1913, of ALAMANCE.

Indictment for murder. The testimony on the part of the State tended to show that on 18 January, 1913, Nash Lane was killed by a discharge of a pistol in the hands of the prisoner and under circumstances as follows:

Bob Tarpley, for the State, testified: "That he was 5 to 10 feet behind a group of persons, seven in number, in which were included the deceased and the defendant. That he heard the crowd talking and laughing. He heard a pistol shot, and heard a person named Trollinger (not defendant) say, 'You shot that boy!' and heard defendant say, 'I never shot the boy.' That he caught up with the crowd and found Nash Lane shot. Did not see pistol. Heard no fuss of any kind and heard only talking and laughing."

William Crawford, another witness for State, testified: "That he was walking in front of the group referred to. That he never saw

pistol, but heard it fire, and heard some one exclaim, 'You shot that boy.' That there had been no fuss of any kind. The crowd was laughing and talking."

John Ed. McBroom, for the State, testified: "That he was in the group, walking next to defendant. That he and defendant were going home and the others in group were going to a store. That they were in public road and that defendant had a pistol 'fooling with it, and it went off.' That the defendant 'had it out, messing with it, (620) pulling the cartridges out.' That the defendant had had the pistol in his hands three or four minutes before it fired. That deceased was on the left side of road. That there was not a fuss at all. Not a cross word."

Defendant introduced no testimony.

The court in effect charged the jury that if they were satisfied beyond reasonable doubt that the prisoner killed deceased with a deadly weapon the burden was on defendant to show it was excusable homicide, and there was no evidence in case sufficient to go to the jury to show that defendant was not guilty of the crime of manslaughter, and it would be their duty to convict of that crime.

Verdict, guilty of manslaughter. Judgment, and prisoner excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

J. Dolph Long and Parker & Parker for defendant.

HOKE, J. On the facts as they now appear of record, this case, in our opinion, is controlled by that of *S. v. Limerick*, reported in 146 N. C., 649. In *Limerick's case* the only eye witness of the homicide testified in effect that deceased and defendant prisoner, two young boys, good friends, were coming through a field, and deceased had a gun. That witness heard one say to the other, "I will shoot you;" the other replied, "No, I will shoot you"; they were laughing. Witness turned around, and, as he did so, the gun fired and deceased fell. That prisoner held the gun when it fired. They were standing close together, and about 18 steps from witness. Don't know which one had the gun when they walked off from witness. Don't know which one had it when they were talking about shooting each other. On cross-examination, the witness further said: "The deceased and prisoner seemed to be great friends. That witness was hunting and came up with them; they seemed to be laughing," etc. This was the only witness who testified directly to the facts of the occurrence, and the court below

ruled, as in this case, that in any aspect of the evidence the prisoner was at least guilty of the crime of manslaughter. Speaking to this position, the Supreme Court, in granting a new trial, said: "Undoubtedly, if the prisoner intentionally pointed the gun at the deceased and it was then discharged, inflicting the wound of which he died, or if the prisoner was at the time guilty of culpable negligence in the way he handled and dealt with the gun, and by reason of such negligence the gun was discharged, causing the death of deceased, in either event the prisoner would be guilty of manslaughter, and this whether the discharge of the gun was intentional or accidental. We have so held at the present term, in *S. v. Stitt,* and other authorities are to like effect. *S. v. Turnage,* 138 N. C., 566; *Commonwealth v. Matthews,* 89 Ky., 393. But neither of these positions necessarily or as a matter of law arises from the testimony, and the question of the prisoner's guilt or innocence must be left for the jury to determine on the facts as they shall find them. *S. v. Turnage, supra.*" (621)

In the present case there is no evidence that the parties were angry with each other. It is not admitted nor has it thus far been established that the prisoner intentionally pointed the pistol towards the deceased, and the testimony as now given in seems to present the prisoner's case on the question whether he was guilty of culpable negligence in the way he was handling the weapon at the time of its discharge. Negligence of a kind not unlikely to cause injury to the deceased or any of the by-standers; and a proper application of the principles announced in *Limerick's case* requires that the issue be submitted to the jury as to defendant's guilt or innocence of the crime of manslaughter. See *S. v. Turnage,* 138 N. C., 566.

We are referred by counsel to *S. v. Stitt,* 146 N. C., 643, as an authority sustaining the charge; but in that case the facts showed that the prisoner intentionally pointed the gun at the deceased, with some evidence that he snapped it, an act not only of the highest negligence, but in breach of the statute laws making prisoner's act an unlawful assault on the person.

It was further urged that the prisoner at the time was engaged in an unlawful act, to wit, carrying concealed weapons when not on his own premises. This is not conclusively established by the evidence, and if it were, the defendant's guilt would not follow as a matter of law. The unlawful act being only *malum prohibitum,* and the act itself, unless accompanied with negligence or further wrong, having no necessary tendency to bring about the result. (622)

In *S. v. Horton,* 139 N. C., 591, the following citation was made with approval from Foster's Crim. Law: "A. shooteth at the poultry of B. and by accident killeth a man; if his intention was to steal the poultry,

which must be collected from circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly and without that intention, it will be barely manslaughter. The rule I have laid down supposeth that the act from which death ensued was *malum in se.* For if it was barely *malum prohibitum,* as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game under certain penalties will not, in a question of this kind, enhance the accident beyond its intrinsic moment." And this principle is fully sustained in *Potter v. State,* 162 Indiana, 213, and other cases of like purport.

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

New trial.

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(623)

STATE AND CITY OF CHARLOTTE v. SAM WALLACE AND LULU WALLACE.

(Filed 7 May, 1913.)

1. Criminal Law—Husband and Wife—Letters—Evidence of Third Persons.

Upon a trial of a husband for a criminal offense, it is competent for a third person as a witness to introduce in evidence a letter written by the prisoner to his wife relevant and pertinent upon the question of his guilt, and procured without the consent or privity of the wife; and such evidence is not against the policy of the common law that the wife should not be permitted to testify against or offer in evidence communications to her from her husband with incriminating effect upon the latter.

2. Same—Unlawful Search.

It is held that the unlawful procurement, by searching his home in his absence, of a letter pertinent and relevant to the prisoner's guilt upon the charge of a criminal offense, will not affect its introduction in evidence upon the trial.

3. Criminal Law—Larceny—Circumstantial Evidence—Questions for Jury.

Upon a trial of larceny of a package of money from an express company, there was evidence tending to show that while it was being delivered by one express messenger to another in a car, the prisoner came to the car door and left; that the package containing the money could not thereafter be found; that the prisoner had theretofore declared he was without money, and thereafter changed and spent several bills of the denomination of $20, there having been a number of $20 bills in the lost package, one of which was identified as one which the defendant had; that the prisoner had made contradictory or untruthful statements of where he had received the bills found in his possession, had asked a

witness to make a false statement of where he had gotten a bill which he had given him, and fled from town upon the approach of the express messengers with an officer of the law: *Held*, circumstantial evidence of guilt sufficient to sustain a conviction.

4. Same—Advertisement—Evidence of Flight.

Where the flight of the accused charged with larceny, with other relevant circumstantial evidence, is sufficient upon the question of his guilt, evidence that he was advertised for is competent as a circumstance to show he had fled from the officer of the law; and in this case immaterial, as the prisoner had admitted his absence.

5. Appeal and Error—Objections and Exceptions—Unanswered Questions.

Where the materiality of an excluded unanswered question does not appear of record, it will not be considered on appeal.

6. Appeal and Error—Instructions—Favorable to Appellant.

Where appellant's prayer for special instructions have been given by the court, with additions favorable to him, he cannot complain for alleged error therein.

APPEAL by defendant from *Webb, J.*, at December Term, 1912, of MECKLENBURG.

The defendants, Sam Wallace and Lula Wallace, were indicted for the larceny of $1,650 in money, the property of the Southern Express Company, a corporation, and were tried together. (624)

After hearing the evidence, his Honor charged the jury that there was insufficient evidence to pass upon the guilt of Lula Wallace, and instructed the jury to return a verdict of "not guilty" as to her.

The State introduced evidence that a package containing $1,650, which was being shipped by the Southern Express Company from the Treasury Department at Washington, D. C., to the First National Bank of Shelby, N. C., was lost on 27 May, 1912, in the city of Charlotte. This was what was called by Miss Martin, a witness for the State, who held a position in the Treasury Department at Washington, "fit money," that is, money fit to go back into circulation, this witness testifying that on 23 May, 1912, she approved a package of money, $1,650, fifty 20's and sixty-five 10's, the First National Bank notes of Shelby, this money having been once put in circulation and having gone back into the Treasury Department and rendered again fit for circulation. The witness testified that she placed this money in a particular kind of envelope and sealed it, the same kind of package which was introduced in evidence, and that the money in the package was of the same class and character of the bill introduced and marked "Exhibit A."

William Marsh testified that he was night money clerk; that his records show that he received a package containing $1,650, which was being shipped to the First National Bank of Shelby, N. C.; that this

package was the one that was lost; that he got the package from the express messenger on train No. 35, the train which came from Washington to Charlotte; that he received the package on Saturday night, 25 May, at 7:15 o'clock, when he turned it over to J. H. Massey, the day money clerk.

J. H. Massey, the day money clerk, testified that he remembered receiving the package from Marsh on the morning of 27 May, and that his records also show an entry of receipt of this package, which entry he made himself; Marsh took the packages from the safe that morning just before he turned them over to him; that he receipted for (625) them and placed them in his safe, and about 9 or 10 o'clock Mr. E. W. Plexico, the transfer clerk, whose business it was to transfer the money to the Seaboard station, came, and he turned the packages over to Plexico; he gave it to Plexico and Plexico took it and carried it towards his safe; that Plexico walked around the radiator to the door.

E. W. Plexico testified that he was transfer clerk; that he received a sealed package of money, $1,650, from Washington to the First National Bank of Shelby; that he was just inside of Mr. Massey's office when he received it; that when he got the packages he went to the safe with them and dropped the packages down into the safe; that Sam Wallace, the defendant, was standing behind him, waiting to get the packages to take them to the wagon; that he dropped the packages into the safe and then locked it and stepped inside the room; that after the safe was locked, which was a portable safe, Sam Wallace, the defendant, was told to get it, and defendant carried the safe to the wagon, and Van Grier drove the wagon to the Seaboard depot; that when the witness got to the Seaboard depot, the train from Rutherfordton came in; he opened the safe, took out the contents and put them in his book, and had the driver, Van Grier, to drive him across to the car; the defendant, Sam Wallace, was standing near the car door, and witness stepped right out of the truck into the car door; that the witness then gave the messenger on the Seaboard train his book to sign for, and he found that the package of money was gone; that the witness looked in the car, went back to his safe, and also followed over the route to see if he had dropped it; he didn't find it, and has never found it.

Mamie Crawford testified that on 8 August, 1912, she saw Sam Wallace at the house of a woman named Rose Chestnut, and asked Sam for a nickel for street car fare; that Sam Wallace gave her a $20 bill and told her to get it changed and she could have the nickel; that she took it to Beulah Carpenter, who was on her way uptown, and asked her to get it changed; that Beulah came from uptown and gave her the

change, and then they took it up to the house where Sam Wallace was; Beulah went with her to where Sam Wallace was, and told (626) Sam that she got the money changed uptown at the express office; that the man questioned her about it and looked like he didn't want to give her the change; Sam asked her what they said, and she said they asked her where she got this money; Sam said: "Why didn't you tell him that your husband give it to you?" That nothing more was said until some one said, "Here comes the expressman and the police"; that Sam further cautioned her, "If they ask you where you got this money, tell them that your husband gave it to you." Beulah said, "I can't tell them that, because I haven't got no husband." Sam got up and went out of the room, and didn't come back while witness was there.

Beulah Carpenter saw the witness, Mamie Crawford, on 8 August, 1912, receive the $20 bill which she had changed at the Southern Express office. This was the bill which was identified by John W. Hatley as the bill that he changed; the witness said that the man at the express office asked her where she got the bill, and she told him that a man gave it to her. She also testified that she "came about getting into trouble about it," and Sam asked her why she didn't say that her husband gave it to her; that two men came down the railroad, and that Sam went out the door, and afterwards she didn't see him until the trial at the recorder's court.

Beulah Pressly testified that she was at the same place, and corroborated Beulah as to what Sam said, and further stated that some one said, "The police is coming," and Sam went out the door.

William Young testified that he was at Rose Chestnut's house on the same day that Sam was there; that a girl asked Sam for a nickel; that he went out on the porch and took the money out and went in the house; that there were three $20 bills; he took one of them off and gave it to the girl; that he, the witness, was in the yard when the girl got back with the change; he saw Sam leaving the house, going a trot; that at that time the policeman was coming in at the back.

Tom Brown, a colored porter who is running on the Southern (627) Railroad, about 1 August, 1912, said that Sam Wallace got on the train at Griffiths, about four miles from Charlotte, at 6:40 or 6:50 in the morning. This was the time that Sam left Charlotte. That he went through Chester to Cornwallis.

John W. Hatley said that Beulah Carpenter brought a $20 bank note issued by the First National Bank of Shelby to the express office to get it changed; that he took the number and asked where she got it; he gave her the change for it and turned it over to the cashier.

There was evidence that Lula Wallace, wife of Sam Wallace, paid W. C. McDonald, furniture collector, about 11 June, 1912, a $20 bill when he went to collect $1.

There was evidence that on 23 July, 1912, Lula Wallace gave Mrs. W. B. Moore a $20 bill in payment of a bill for $4.98.

There was evidence that the defendant Sam Wallace had a $20 bill on an excursion which went to Mooresville, about the 26th of June.

There was evidence that the defendant was arrested twice prior to his arrest in September; that he was arrested once or twice after the excursion to Mooresville; that the witness Johnson talked to Sam about the money business, and he denied having but "75 cents to his name." After he had been arrested in October and asked to account for the $20 bill which he gave Mamie Crawford, he stated that he got this bill on an excursion train to Mooresville.

There was evidence that the defendant had three front teeth crowned with gold before he left Charlotte, and that after he was found the crowns had been taken off.

For the purpose of showing the rigid business methods of the express company, and for all other purposes for which the question may be competent, the defendant asked the State's witness, Marsh: "Do you know what bond Plexico was under?" Upon objection by the State, this question was excluded, and defendant excepted.

A policeman testified that, acting under a search warrant he searched the home of the defendant, and found there a letter which the
(628) State identified as a letter written by the defendant to his wife. This letter was admitted in evidence, the defendant excepting.

The letter was material as impeachng evidence, the defendant having denied on the witness stand that he went to Tampa, Florida, after he left Charlotte, and the letter containing the statement that he had done so.

The State introduced evidence that after the defendant left Charlotte advertisement was made for him, and that post-cards were written to different points, describing him, and defendant excepted.

The defendant requested his Honor to charge the jury that, "taking all the evidence into consideration, it would not warrant the conviction of the defendant Sam Wallace, and you are therefore instructed to return a verdict of 'Not guilty.'" "That although the evidence may excite suspicion, even strong suspicion, in your mind that the male defendant is a guilty person, still, if it is a rational concluson that some other person may have committed the crime, it is your duty to acquit him."

These requests were denied, and defendant excepted.

His Honor charged the jury, among other things: "I am going to use the language as given by the attorneys for the State and the defendant. The State, as I have stated, relies upon circumstantial evidence in this case, and the court instructs you that each fact proving a necessary link in the chain must point to the guilt of the accused and must be as clearly and as distinctly proven as if the whole question depended upon it. The court further instructs you that in cases of this kind, where the State relies upon circumstantial evidence, that in order to convict the defendant the evidence must be clear, convincing, and conclusive; it must be natural, clear, and satisfactory. If the facts proven could all be true, and still not inconsistent with the innocence of the defendant, your verdict should be 'Not guilty.' In order to convict the defendant, the evidence must naturally and necessarily imply his guilt, and it must exclude the probability that some one else might be the guilty party. If you should find that the evidence only raises in your minds a strong suspicion of the defendant Sam Wallace's guilt, or that it is not inconsistent with his innocence, the court (629) instructs you that it would be your duty to acquit him."

There was a verdict of guilty as to Sam Wallace, and from the judgment pronounced thereon, he appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Walter R. Henry, T. L. Kirkpatrick, and Stewart & McRae for defendant.

ALLEN, J., after stating the case: The exceptions chiefly relied on by the defendant are to the admissibility of the letter alleged to have been written by the defendant to his wife, and to the refusal to instruct the jury that the evidence was not sufficient to sustain a conviction. The objection to the introduction of the letter is upon two grounds:

1. That it is a confidential communication between husband and wife, which is excluded by the rules of the common law upon grounds of public policy.

2. That the letter was obtained by an illegal search of his premises, and to admit it in evidence is violative of the constitutional protection against unlawful searches and seizures, and of the principle that he cannot be compelled to incriminate himself.

1. The authorities seem to be uniform that a third person may testify to an oral communication between husband and wife, although his presence was not known, but there is much diversity of opinion as to the right to introduce a writing from one to the other in the hands of a third person.

The cases are collected in the notes to *Gross v. State,* 33 L. R. A. (N. S.), 478, and *Hammons v. State,* 3 A. & E. Ann. Cases, 915.

It is difficult to find a satisfactory reason for the distinction. The rule of the common law is based on the confidential relationship existing between husband and wife, and the importance to the public of maintaining this relationship, deeming it wiser and to the public interest for some particular evidence to be suppressed than to require (630) the husband or wife to disclose a communication between them, as to do so "might be a cause of implacable discord and dissension between the husband and wife, and a means of great inconvenience" (*S. v. Brittain,* 117 N. C., 785); but the inhibition is as to the husband or wife and not to a third person, and if the communication by the husband is in writing, and is procured by a third person, without the consent or privity of the wife, the reason for the exclusion of communications at common law no longer exists.

In our opinion, the rule is stated correctly in Whar. Cr. Ev., sec. 398: "Confidential communications between husband and wife are so far privileged that the law refuses to permit either to be interrogated as to what occurred in their confidential intercourse during their marital relations, covering, therefore, admissions by silence as well as admissions by words. The privilege, however, is personal to the parties; a third person who happened to overhear a confidential conversation between husband and wife may be examined as to such conversation. A letter, also, written confidentially by husband to wife is admissible against the husband, when brought into court by a third party."

2. The second objection is fully met by *Adams v. New York,* 192 U. S., 595. In that case the defendant was convicted of the crime of having in his possession certain gambling paraphernalia, and one of the assignments of error was:

"First. That the court erred in holding that by the reception in evidence of the defendant's private papers, seized in the raid of his premises, against his protest and without his consent, which had no relation whatsoever to the game of policy, for the possession of papers used in connection with which said game he was convicted, his constitutional right to be secure in his person, papers, and effects against unreasonable searches and seizures was not violated, and that he was also thereby not compelled to be a witness against himself in contravention of the fourth, fifth, and fourteenth articles of amendment to the Constitution of the United States."

The Court, in passing on this assignment, says: "We think there was no violation of the constitutional guaranty of privileges from (631) unlawful search or seizure in the admission of this testimony.

Nor do we think the accused was compelled to incriminate himself," and 1 Greenleaf Ev., sec. 254a, is quoted with approval, as follows: "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question."

The Court also discusses *Boyd v. U. S.,* 116 U. S., 616, and shows that that decision is confined to the consideration of the constitutionality of an act compelling a party to produce papers in an action to enforce a forfeiture.

The same section from Greenleaf, taken from the *Adams case,* is approved in *People v. Adams,* 176 N. Y., 359; *Com. v. Tibbetts,* 157 Mass., 519; *S. v. Griswold,* 67 Conn., 306, and the same doctrine is declared in *S. v. Fuller,* 34 Mont., 26; *Jacobs v. People,* 117 Ill., 206; *Hartman v. U. S.,* 168 Fed., 33; *Imboden v. People,* 40 Colo., 142, and in other cases.

We are, therefore, of opinion there was no error in admitting the letter.

The evidence was sufficient to sustain a verdict of guilty. If true, the defendant had the opportunity to steal the money as charged; he was found in possession of at least one bill of the Shelby Bank of the same denomination as that stolen; he and his wife had no other bills of that denomination; he made false statements about the money and tried to induce another witness to make a false statement, and he fled.

We see no materiality in the question asked the witness Marsh, and there is nothing to indicate what answer the witness would have made.

The evidence as to advertising for defendant was competent on the question of flight, but in any event it had no relevancy except to prove that the defendant was absent from Charlotte, and this he admitted.

His Honor charged the jury as favorably as the defendant was entitled to. The first prayer for instructions could not have been given, as there was evidence of guilt sufficient to be submitted to the jury, and the second was embodied in the charge given, with (632) additions favorable to the defendant.

No error.

Cited: Whitford v. Ins. Co., 163 N. C., 229; *S. v. Randall,* 170 N. C., 760.

STATE v. FRED HEMPHILL.

(Filed 13 May, 1913.)

1. Assault and Battery—Intent.

To constitute the offense of assault and battery by taking hold of another, there must be an intention to hurt or injure, and where the act complained of is done with a kind intent, and so understood, unaccompanied by any injury, it is not indictable.

2. Same—Conflicting Evidence—Instructions.

Where it appears from the prisoner's evidence that in order to save the prosecutrix from being led astray by designing men, he took hold of her for the purpose of carrying her to her relatives, she freed herself from his hold, and he did nothing further except to inform her relative of the circumstances, and there is also evidence tending to establish assault and battery, it is error for the court to charge the jury that upon the defendant's own evidence he was guilty of the assault.

3. Assault and Battery—Intent Presumed—Questions for Jury.

The intent with which the act of laying hold of another is done may be inferred by the jury from the act itself, under the surrounding circumstances, upon a trial for assault and battery; and when the act itself is unlawful, the intent is immaterial, or will be presumed.

APPEAL by defendant from *Lyon, J.*, at March Term, 1913, of BURKE.

The defendant was indicted for an assault on Cleo Moore. In view of the judge's charge to the jury, it is necessary to state only the defendant's testimony, which was as follows: "At the time of the alleged assault, I saw the prosecutrix, Cleo Moore, down in the woods near a spring with two white men. I took hold of her to carry her to
(633) her grandmother. She jerked loose from me, and I went and told her grandmother where she was and what she was doing. Her grandmother cried. I never did strike her with anything. I only took hold of her to carry her to her grandmother, and when she broke loose, I did nothing more than to go and tell her grandmother."

The court charged the jury that, if they believed the defendant's own testimony, they should find the defendant guilty, to which the defendant excepted, and from the judgment, upon the verdict of guilty, he appealed. The sentence was twelve months on the roads.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

R. L. Huffman and Avery & Ervin for defendant.

WALKER, J. It may be that the defendant should have been convicted upon the testimony of the State, but this was not submitted to

the jury. The instruction of the court confined the jury to a consideration of the defendant's evidence. We do not think that this evidence was susceptible of only one construction or was so conclusively against the defendant as to warrant a direction to return a verdict of guilty, if the jury believed it. The jury might well have found from the circumstances surrounding the parties at the time, if left untrammeled by this peremptory instruction, but the prosecutrix was about to be led astray, and defendant intervened, at the request of her grandmother, her natural guardian and protector, for the innocent and laudable purpose of leading her away from the danger which threatened her, and that he placed his hand upon her, not with the intent of committing an assault upon her, and not in anger, but in kindness, for the purpose of protecting her. It may be true that every touching of the person of another, however slight or trifling the force may be, if done in an angry, rude, or hostile manner, will constitute an assault and battery; but not so if there was no intention to hurt or injure, and it was so understood by the other party, and there was in fact no injury. Whether it was done in anger or against the consent of the prosecutrix, was a question for the jury. There must be an intent to injure (3 Cyc., 1024; *S. v. Reavis,* 113 N. C., 679), though this intent may (634) be inferred by the jury from the act, and when the act itself is unlawful, the intent is immaterial or will be presumed. 1 McClain's Cr. Law, secs. 239 and 240, where the subject is fully discussed. Clark's Cr. Law (2 Ed.), p. 223, secs. 81-83 *et seq.* and notes. *Judge Gaston* said in *S. v. Davis,* 23 N. C., 126, that "an assault is an intentional attempt, by violence, to do an injury to the person of another. It must be *intentional,* for if it can be collected, notwithstanding appearances to the contrary, that there is not a present purpose to do an injury, there is no assault." And again: "The intention as well as the act makes an assault." If we are restricted to the defendant's testimony, it would appear, or at least there is reason for saying, that he did not intend to injure the prosecutrix, or to do any violence to her person, or to restrain her of her liberty against her will. The jury may reasonably conclude that his object was one of persuasion rather than coercion. He saw her plight—perhaps had been informed of it by her grandmother—and wished to relieve her of its evil consequences. If so, it was an act of kindness and mercy to her, rather than one of hostility. If he laid his hand upon her gently for the purpose of inducing her to return to her home and quit the company or association of designing men, and did not seize her with anger or rudeness, it surely would not be an assault in law. This might have been fairly deduced from his testimony. When she refused to go with him, he did not persist in

his effort to persuade her, nor did he offer her any violence or utter any threat. He simply desisted, returned to the house, told her grandmother what had occurred, and she cried, presumably because she knew that the safety of her child was imperiled. This made no more than a case for the jury upon the question whether there had been an assault.

New trial.

(635)

STATE v. F. L. TONEY.

(Filed 13 May, 1913.)

Husband and Wife—Nonsupport of Wife—Criminal Law—Interpretation of Statutes.

In order to convict under an indictment for abandonment and nonsupport of the wife, it is essential to show a failure of the husband to provide an adequate support for his wife, as well as the act of abandonment; and in this case the evidence is held insufficient.

APPEAL by defendant from *Ferguson, J.*, at January Special Term, 1913, of RUTHERFORD.

Indictment for abandonment and nonsupport, under Revisal, sec. 3355.

The prosecutrix and the defendant were married in January, 1912, and kept house for three months, when the defendant told his wife that he was going away on a visit of a few days. He left with his trunk and remained away about a month. His wife went to her father's home and lived with him until she returned to her husband, who was then at Blacksburg, S. C. Defendant wrote to his wife about two weeks after he left, and sent her some money. He sent for her and she went to him in South Carolina, and they lived at Drayton, S. C., for two weeks. She then left him and returned to her father's home. She was not driven away by her husband, but left of her own accord. He told her if she wished to go, he would not object, but left it to her. When she left, he bought her a ticket, gave her $10, and accompanied her on her journey as far as Chesney, S. C., where she kissed him and they parted. They have been living apart ever since. He told her while they lived in South Carolina that he did not care any more for her than he did for any other respectable woman. He paid for her board and clothing while they were at Drayton, and when he left Caroleen, in this State, she received $23.50, and he sent her, before he left the State for Drayton, S. C., $22.50. The warrant was issued 15 June, 1912. Defendant offered to live with her, but she refused to do so. The court left the

case to the jury upon the question whether there had been an abandonment in this State and a failure to provide adequate support. Defendant was convicted and appealed. (636)

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Quinn, Hamrick & McRorie for defendant.

WALKER, J., after stating the case: We have examined the record in this case very carefully, and have failed to find any evidence that defendant failed to provide his wife with adequate support, even if the evidence is sufficient to show an abandonment. The crime denounced by the statute consists of two elements: first, abandonment; second, failure to provide adequate support. If either is wanting, there is no criminal offense. This is clear; but it is also so decided in *S. v. May,* 132 N. C., 1020. The failure to establish this essential ingredient of the crime is fatal to the prosecution. It does not appear what was an adequate support for the wife, and, for all that does appear, she received from her husband all that was required to meet her expenses. There was evidence in the case that he supplied all of her wants and treated her kindly while they lived in South Carolina, and when she prepared to leave him, stating that she did not care to come back, he said to her that, if she stayed there with him, "he would do his best for her." He proved a good character by the State's witness, and there was no testimony tending to disparage him, except the bare circumstances of the case. A witness testified that, after she had left him and returned to her father's home and refused to come back and live with him, and after he was indicted, he heard defendant say that "he did not propose to live with an aggravating woman." This was not a very nice, but a very rude and indelicate speech. It was morally reprehensible, and the same may be said of his offensive remark to his wife in South Carolina. He is not, though, indicted for mere rudeness of speech or unseemly conduct, but for a violation of the criminal law, and what he thus said has no direct or material bearing upon the legal question involved. All things considered, we conclude that the State failed in its proof as to inadequacy of support, if not as to the abandonment. It may seriously be doubted if the facts, as now (637) presented, bring this case within the intent and meaning of the statute. *Witty v. Barham,* 147 N. C., 479. But we may say more confidently, that defendant is not criminally liable in this State for any marital delinquency in South Carolina. If any offense was committed in that State, he can be made to answer only in her courts. Whether

he can be successfully prosecuted there, is not a part of our inquiry. We are concerned only with the enforcement of our own laws, and, therefore, merely decide that there was no evidence of the charge in the indictment that defendant did not provide his wife with an adequate support. This point is sufficiently raised by the exceptions.

New trial.

Cited: *S. v. Smith,* 164 N. C., 479.

STATE v. W. P. BLACK, OLLIE BIRD, AND ALGIE RICE.

(Filed 22 May, 1913.)

1. Instructions Requested to be Written—Omission of Judge—Procedure—Interpretation of Statutes.

The requirements of Revisal, sec. 536, are mandatory in criminal as well as in civil cases, and where a party has requested the judge to put his charge in writing, at or before the close of the evidence, and an exception is duly noted for his failure or refusal to do so, a new trial will be granted to the appellant.

2. Appeal and Error—Service of Case—Extension of Time to Serve—Written Agreement—Rules of Practice.

Any agreement for extension of time to serve case or counter-case on appeal must be in writing, or an agreement to that effect must appear of record, to be recognized in the Supreme Court; and where an appellee has waived any irregularity in the time for appellant to serve his case, he may not claim an extension of time, by an oral agreement, for service of his counter-case, when it is denied by the appellant that such an agreement was made. Rule 39, Supreme Court, 140 N. C., 499.

APPEAL by defendants from *Long, J.,* at December Special Term, 1912, of BUNCOMBE.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

J. Scroop Styles, W. P. Brown, and H. B. Carter for de-
(638) *fendants.*

WALKER, J. The defendants were charged in the court below with conspiracy. The prosecution originated in the police court of Asheville, by affidavit of C. G. Lanning and a warrant based thereon. De-

fendants were convicted in that court, and appealed to the Superior Court, where they were again convicted, and from the last judgment they have appealed to this Court.

It is unnecessary to consider the numerous exceptions in the case, as it appears therefrom that at the close of the evidence the defendants requested the judge to put his charge to the jury in writing, which he refused to do. Exception was duly taken to this ruling, and the same is assigned as error.

We are compelled by the statute and the decisions of this Court to sustain this exception. Revisal, sec. 536, provides: "Every judge, at request of any party to an action on trial, made at or before the close of the evidence, before charging the jury on the law, shall put his instructions in writing and read them to the jury; he shall then sign and file them with the clerk as a part of the record of the action." We have held that this provision of the law is mandatory, and if the judge fails to comply with a request duly made that he reduce his charge to writing, a new trial will be ordered, if proper exception is noted in the case on appeal. *Currie v. Clark,* 90 N. C., 355; *Drake v. Connelly,* 107 N. C., 463; *S. v. Young,* 111 N. C., 715; *S. v. Dewey,* 139 N. C., 564; *Sawyer v. Lumber Co.,* 142 N. C., 162. The question is not whether the record contains the instructions as actually delivered, there being no admission in regard to it, but whether the request was duly made and refused, and the refusal followed by an exception. The judge *must* comply with the request.

S. v. Young, 111 N. C., 715, is much like this case, and there *Justice Burwell* said: "In *Drake v. Connelly,* 107 N. C., 463, it was decided that the refusal to put the charge in writing and read it to the jury, if the request that this should be done was made in apt (639) time, entitled a party in a civil suit to a new trial, for the reason that such refusal would be plainly a violation of The Code, sec. 414. If this is true in a civil suit, much more is it true in a criminal action, where life and liberty are involved. The question, then, is, Did his Honor fail or refuse to comply with this request?" And again: "The case made out by the prisoner's counsel, and duly served on the representative of the State in this prosecution, and not excepted to, states that the prisoner's counsel entered an exception when this oral supplemental charge was so given. Whatever may be the facts, we must consider the case as it is presented to us in the record, and are not at liberty to assume that no such exception was *then* made, because we may feel sure that the learned judge would certainly have put his supplemental instruction in writing if his attention had been called to the matter by an exception entered at the time." And in *Sawyer v. Lum-*

ber Co., supra, Chief Justice Clark thus referred to the mandatory character of the statute: "It is but just to the learned judge who tried this case to add that he states that through inadvertence, in the haste of the trial, he did not observe that the prayer was to put his charge in writing, as well as to give the prayers subjoined. But as the statute gives a party a right to have the whole charge, as to the law, put in writing if asked 'at or before the close of the evidence,' we must direct a new trial."

We are satisfied that the careful and learned judge who presided at the trial must from some cause have been inadvertent to the request of counsel; but, as we have shown by the decided cases, even this is fatal to the verdict and judgment.

The State asked for a *certiorari,* so that the solicitor could file a counter-case on appeal, upon the ground that the defendants had filed their case with him after the time fixed by the agreement of the solicitor, who had waived this irregularity. It is alleged that there was an express agreement, and if not, then an implied agreement, that the solicitor should have more time to file a counter-case, but this is
(640) denied by the defendant's counsel. Rule 39 (140 N. C., 499) provides that, "The Court will not recognize any agreement of counsel in any case, unless the same shall appear in the record, or in writing filed in the cause in this Court." We have repeatedly held that we will not undertake to settle disputes between counsel as to their oral agreements. *Mirror Co. v. Casualty Co.,* 157 N. C., 28. The defendants prepared and tendered their case, and service thereof was accepted. The solicitor filed no exception thereto, and did not serve any counter-case. We are, therefore, confined to the defendant's case on appeal as it appears in the record, and which was duly served and filed as required by law. *S. v. Young, supra.*

There is a question raised by defendants as to the final jurisdiction of the police court in this case, and as to the power of the Superior Court to try the case merely upon the affidavit and warrant. This objection, if tenable, may be obviated, perhaps, by requiring a bill to be sent to the grand jury and an indictment returned. But this is only a suggestion, to be followed or not, as may be deemed proper.

The error in refusing to write the charge and read it to the jury requires a

New trial.

STATE v. WALLACE GREER AND WATTIE GREER.

(Filed 22 May, 1913.)

1. Instructions—Erroneous in Part—Regarded as a Whole.

A requested prayer for special instructions is regarded as a whole, and when erroneous in part, the refusal of the trial judge to instruct the jury in accordance with such parts as are correct will not be held for reversible error.

2. Homicide—Preventing a Felony—Relative Rights—Justifiable Relationship.

One charged with murder who seeks to justify his act on the ground that it was reasonably necessary to prevent the deceased from inflicting great bodily harm, etc., with an uplifted knife, upon his brother, with whom the deceased, at the time, was fighting, has only such right as his brother may have had to commit the homicide, and the defense is unavailing if his brother was in the wrong in bringing on the fight or continuing to participate in it.

3. Homicide — Affray — Independent Intervention — Evidence — Questions of Law.

Where A and B are tried for the murder of C, and it appears that while B and C were fighting, A, acting independently and without conspiracy or a common purpose with B, struck the blow with a deadly weapon from which the death of C resulted, B is not responsible for the death of C, though he may have been at fault in bringing on the fight and continuing to participate in it.

BROWN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL by defendants from *O. H. Allen, J.*, at October Term, (641) 1912, of FORSYTH.

The defendants, Wattie Greer and Wallace Greer, were indicted for the murder of one Will Finney, and from judgments rendered on a verdict of manslaughter, they appealed.

The first witness for the State, Delia Causer, testified as follows: "I live on Bath Street in Winston, and in the afternoon of the day when Will Finney was killed, I saw for the first time in my life Will Finney and Wattie Greer. They passed right up side of my house. They were coming up the street, both of them cursing each other. Will Finney was asking Wattie Greer for what he had snatched. Wattie Greer refused, and said: 'I will give you a quarter,' and cursed him to his mother, and he cursed Wattie to his sister. Will Finney went right behind him, sorter to one side, and Wattie was ahead of him, but not in a direct route. Wattie got to his buggy, grabbed his whip, took it out of the socket to change ends, but before he got it straight, Finney was too close on him to hit, and they went together. There was a little wash where it rained, and that made Wattie's feet slip, and that threw

him some way and made his head fall near the horse, and the horse ran. They were down there scrambling, trying to get up. Will Finney had his left arm over Wattie. Wattie had his right over Will Fin-
(642) ney. I saw this man, Wallace Greer, coming running up, and hit him somewhere with the axe. I had not seen Wallace Greer until he came up with the axe and struck Will Finney somewhere about his head. Will Finney dropped sorter on the side of Wattie, and when he did, Wattie just whirled right there and began to mend him in the face with his fist. This was after he was struck with the axe. He also grabbed the whip and began to beat Will Finney in the face. I never saw Will Finney move any more after he was struck with the axe. Wattie hit him twice in the face with the butt end of the whip."

The husband of the above witness testified substantially to the same facts, but added that the deceased had a knife in his hand. It appears from the other testimony in the case that the dispute and quarrel between the deceased and Wattie Greer began shortly before, and while they were at the house of one Arthur Green. It appears that the deceased asked Wattie Greer for 25 cents, which Wattie owed him; that Wattie then had 75 cents in his possession, but that he refused to pay the deceased the 25 cents. Both were angry and profane, and vulgar words passed between them, in the course of which, as testified to by the defendant Wallace Greer, the defendant Wattie Greer said to the deceased: "If I had a match, I would strike it on your face."

Wallace Greer testified as follows:

"Q. You are charged with the killing of a man by the name of Finney. Go on and tell his Honor what took place that morning after you got in the neighborhood of where this thing happened, without any suggestion from me. A. Me and my brother went down there on Sunday evening between 4 and 5 o'clock; John Sheeks was with me and John Allen was with my brother, and we goes in Kid Green's house; I believe that's his name; after we had been in there about five minutes, Finney come in; I went back in the back room, and when I come out Finney had on my brother's hat; Wattie says, 'Give me my hat,' and Finney says, 'I ain't going to do nothing of the kind,' and Wattie reached up and grabbed his hat off of Finney's head. Finney
(643) says, 'You owe me a quarter for going away for you, and I got to have it.' Wattie says, 'I ain't got but six bits, and you can't have them.' Finney says, 'I am broke, and I want it.' Wattie says, 'You can't get none of this.' Finney says, 'I am going to have it before the sun goes down or kill you, one.' Wattie says, 'If I had a match, I would strike it on your face,' and Finney says, 'No, you won't do nothing.'

"Q. Well, did they get to cursing each other? A. Yes, sir; and Kid Green asked them to get out of his house, and they went on the porch and stood out there and cursed, and the other gentleman in the other end told Finney to quit so much cursing there; he had some children, and he didn't want the cursing there. I pushed my brother Watt and told him to go down off of the porch and quit fussing; he went on the ground, and Finney steps behind him, and kept cursing, and Finney cursed him to his mother and his sister, and I says, 'If you fuss with my brother Watt, you just fuss; but you leave my mother out of it.' He cursed me and cursed Watt, and I pushed Watt this way and Finney that way (indicating). I says, 'Come on, now, and let's go to the pond.' Watt says, 'All right.' I turned around and Watt started towards his buggy, and I goes on to King's; in front of this house was my buggy, and Watt goes to his buggy. I told John Sheeks to turn the buggy around, and I got up in the buggy; they were still walking on and I just got up in the buggy and set down like this, and went to pull my lines this way with the horse (illustrating); I just took my eyes off of my brother a minute when I went to get in my buggy, and just then I heard somebody holler, 'Don't let him kill Wattie,' and I turned around and jumped out of the buggy, and I didn't know where the axe was, but I started on, and the axe was about as far as to that man (indicating), and when I heard them say, 'Don't let him kill Wattie,' I jumped out and grabbed the axe and ran that way—just went on hard as I could and grabbed the axe (illustrating).

"Q. What was the position of Finney and Watt? A. My brother was laying back this way, and Finney had his hand this way, and I reckon his hand was going on down to cut him; Finney was on top of him, and had his hand up this way when I got there (644) (illustrating). Finney was on top.

"Q. What did he have in his hand? A. Knife.

"Q. Is this the knife? Or do you know? A. That looked like the same knife; I didn't pay much attention to the knife.

"Q. At the time you struck him, you say Finney had his hand back this way, raised over Wattie? A. When I jumped out and ran and grabbed the axe, Finney was fixing to hit him, and I struck him, and Finney fell back this way (illustrating); my brother gets up and he says, 'He cut me,' and I says, 'Let's see,' and he turned around, and I see where he cut him and where it got hung in the coat there, and I say, 'He got you there, didn't he?' and he showed me, and I say, 'Well, let's go home.'

"Q. Did you or your brother hit him outside of that one blow you gave him? A. Didn't hit but once; when I hit him and he fell over

like that (indicating), Wattie he got up and showed me where he was cut; he say, 'I wonder where we can get something to put on it.' I says, 'Get in my buggy and let's go.'

"Q. You left there? A. Yes, sir.

"Q. Next morning did you surrender, or were you arrested? A. Yes, sir; next morning I surrendered."

Cross-examination:

"I surrendered the next morning after the killing. I did not hide that night, but come in the next morning and gave myself up. I do not know whether Arthur Green's house is a regular gambling place or not. I never gambled there. I had been there about five or ten times before the deceased come up. I went over in the buggy with John Sheeks. I might have met the deceased at the corner of King's house; but if I did, I did not pay any attention to it. I did not see Finney and Wattie discussing the quarter. We all just went down to visit Kid Green. I have gambled and have been indicted for gambling, but I was not gambling that afternoon. I never saw my brother borrow three quarters from John Sheeks, as I was in the other room, where I went to get a drink of water. When I come out, Finney had (645) my brother's hat, and my brother was asking for it. They started to cursing, and Kid Green asked them out of the house; they went out and they cursed on the porch and they cursed after they stepped on the ground. They both then started towards the buggy; I went off and got in my buggy. I heard the people screaming, and looked around, and I jumped right out, and grabbed the axe as I was on my way to where they were fighting. I was sitting in my buggy when I heard somebody scream. I was running towards my brother, and I saw the axe and grabbed it up. I did not see the axe when I jumped out of my buggy. I did not see anything to hit the deceased with when I jumped out of the buggy. I hit him as quick as I could get there. Wattie did not hit the deceased in the head or face either with his fist or the whip. After it was over, I told Wattie to get in the buggy and let's go. I stayed at my sister's house. The officers did not go to my house to look for me. I was not at home that night, but stayed with my sister. I am under indictment now for keeping a disorderly house, and I was also indicted for breaking into Brown-Rogers' store, and served a term on the roads. I went in there with a white man about 7 o'clock in the evening. There was a man in the store who caught me. I went in the front door of the store. I have been in jail here for gambling."

There was other evidence tending to corroborate the defendant.

At the close of the evidence the defendants requested the court to charge as follows:

"1. That whenever there is a reasonable ground to believe that there is a design to destroy life, to rob, or commit felony, the killing of the offender to arrest such design is justifiable in law, and if you find from the evidence in this case that Will Finney had the defendant Wattie Greer on the ground, and had the knife which has been offered in evidence drawn and in a position to strike, that in order to prevent the destruction of life or the commission of a felony or the infliction of great bodily harm upon Wattie Greer, the defendant Wallace Greer rushed up with an axe and inflicted the wound which resulted in death, that such killing, under such circumstances, would be (646) justifiable, and you should so find."

The court refused to give this instruction, and the defendants excepted.

"2. The court charges you that one not engaged in a fight may oppose another attempting the perpetration of a felony, if need be, to the taking of the felon's life, as in the case of a person attacked by another, intending to murder him, who thereupon kills his assailant; and if you find from the evidence in this case that the deceased and the defendant Wattie Greer were on the ground, with the defendant on the bottom, or even by the side of the deceased, unarmed, and that the deceased had already inflicted a wound on the defendant and had his knife drawn in a striking position, that under such circumstances, if you so find, the defendant's brother, Wallace Greer, had a right, if the danger of death or great bodily harm was about to be inflicted on his brother, the defendant Wattie Greer, to strike with the axe in order to prevent the commission of a felony or the infliction of great bodily harm, and the killing of Will Finney, under such circumstances, would be justifiable, and your verdict should be for the defendants."

The court refused to give this instruction, and the defendants excepted.

"3. You are instructed, if you find from the evidence that Wattie and Wallace Greer are brothers, and that Wattie Greer was down on the ground with the deceased on top of him, or by his side, and the deceased had his knife drawn and had stabbed Wattie Greer, and was attempting to stab him again, that the relationship between the defendants Wallace Greer and Wattie Greer gave to the defendant Wallace Greer the right to interfere; and if it was reasonably apparent to Wallace Greer that his brother, Wattie Greer, was in imminent peril of death or great bodily harm, and that it was necessary for him to use the means or force which resulted in the death of Will Finney in order

to prevent the same, such killing, under such circumstances, on the part of Wallace Greer, was justifiable, and it will be your duty to give a verdict of not guilty as to the defendants."

(647) The court refused to give this instruction, and the defendants excepted.

His Honor charged the jury, among other things, as follows:

"Now, the rule is that where one is attacked he may defend himself, even to the extent of killing his adversary, on the principle that what one may do for himself another may do for him, if this other believes life to be in immediate danger; and if so, he may use such force as is apparently necessary to him to repel the attack of the aggressor, provided the party in whose defense he acts was not at fault; and so, if you find from the evidence in this case that the defendant Wattie Greer left Arthur Green's house, telling the deceased that he did not wish to have any trouble with him, or words to that effect, and went over towards his buggy, intending thereby to avoid the difficulty, and while at his buggy the deceased ran up to him with a drawn knife and struck at him, and the defendant Wattie Greer and the deceased fell to the ground, and while they were on the ground the deceased was making an attempt to stab the defendant Wattie Greer with his knife, and had the knife uplifted in a position to stab, and the defendant's brother, Wallace Greer, had reasonable grounds to believe that his brother, Wattie Greer, was in danger of death, or great bodily harm was about to be inflicted on him by the deceased, and he rushed up with an axe and struck the deceased the blow that caused his death, under such circumstances the defendant Wallace Greer had the right to use such force as was apparently necessary to prevent the commission of a felony or the infliction of great bodily harm, and a killing under such circumstances, if you so find the facts to be, would be justifiable, and your verdict would be 'Not guilty.' Now, that involves the idea that Wattie Greer was not at fault; it is presenting that view of it if the jury should find that he left and told the deceased that he did not wish to have any trouble with him, or words of that character, and went over towards his buggy, intending thereby to avoid a difficulty."

And defendants excepted.

"So an important question for you to decide is as to whether Wattie Greer is guilty of willingly fighting or using language calculated

(648) to bring on a fight, and a fight did follow accordingly. Would Wattie Greer and Finney have been guilty of an affray, of fighting together, if no killing had occurred? Would they both have been guilty? If they would, and you are satisfied of that beyond a reasonable doubt, then if Wallace killed to protect Wattie, they would both

be guilty at least of manslaughter, and of murder in the second degree if it was a malicious killing—killing with malice as well as an unlawful killing. So that your verdict can be murder in the second degree, or manslaughter, or not guilty, according as you shall find from the evidence."

And defendant excepted.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Louis M. Swink and Jones & Patterson for defendants.

ALLEN, J. It will be noted that while the abstract proposition as to the right to prevent the commission of a felony is stated in the instructions prayed for, when it is attempted to apply the law to the facts several alternative propositions are stated, as "to prevent the destruction of life," *or* "the commission of a felony," *or* "the infliction of great bodily harm upon Wattie Greer."

The presiding judge is not required to dissect a prayer for instruction, but may consider it as a whole (*Harris v. R. R.*, 132 N. C., 164), and neither of those requested could have been given unless Wallace Greer had the right to kill, if it was reasonably necessary to do so to avoid great bodily harm to Wattie Greer; and under the authorities here and elsewhere, he did not have this right if Wattie Greer was himself in the wrong.

This has been decided to be the law three times in this Court: *S. v. Johnson,* 75 N. C., 174; *S. v. Brittain,* 89 N. C., 504; *S. v. Cox,* 153 N. C., 645.

In the *Johnson case* the Court says: "The proposition is true that the wife has the right to fight in the necessary defense of the husband, the child in defense of his parent, the servant in defense of his master, and reciprocally; but the act of the assistant must have (649) the same construction in such cases as the act of the assisted party should have had if it had been done by himself; for they are in a mutual relation one to another." And in the *Brittain case,* in which father and son were indicted, after discussing the case of the father: "Our conclusions are equally applicable to the cause of J. W. Brittain as to that of his father, S. P. Brittain, for although a son may fight in the necessary defense of his father, yet in such cases the act of the son must have the same construction as the act of the father should have had if it had been done by himself; for they are in mutual relations to one another. *S. v. Johnson,* 75 N. C., 174; 1 Hale P. C., 484." And in *Cox's case:* "In the oral argument here the prisoner's counsel

earnestly contended that the prisoner had the right to enter the fight to protect his father; but he only had that right to same extent and under the same circumstances under which the father himself could have used force. If the father entered the fight willingly, and had not afterwards withdrawn from the fight and retreated to the wall, or if he had used excessive force, he would have been guilty if he had slain his assailant. The same principle would apply to the conduct of the son, fighting in defense of a father who had not retreated to the wall or if the prisoner used excessive force."

And the weight of authority elsewhere is in support of this principle. In 1 Hale's Pl. Cr., 484, the author says: "The like law had been for a master killing in the necessary defense of his servant, the husband in the defense of the wife, the wife of the husband, the child of the parent, or the parent of the child; for the act of the assistant shall have the same construction in such cases as the act of the party assisted should have made if it had been done by himself, for they are in a mutual relation one to another." And in Whar. Hom., sec. 521: "The general rule, as ordinarily stated, is that a brother or other relative assisting another in resisting a wrongful act directed against the latter can use no more force than the person he assists would (650) be entitled to use, and that interference to protect a relative is not justified where the relative was the aggressor in the original difficulty. A person has a right to use violence in defense of another only when the imperiled person would have been justified in using it in his own defense. Both must have been free from fault in bringing on the difficulty."

In *Stanly v. Com.,* 9 Am. St., 306; 86 Ky., 440, the Court, after discussing the right of one to defend himself, says: "Not only, however, may he do this, but another may do it for him. This other person, in such a case, steps into the place of the assailed, and there attaches to him not only the rights, but also the responsibilities of the one whose cause he espouses. If the life of such person be in immediate danger and its protection requires life for life, or if such danger and necessity be reasonably apparent, then the volunteer may defend against it, even to the extent of taking life, provided the party in whose defense he acts was not in fault."

In *Wood v. State,* 86 Am. St., 72; 128 Ala., 27: "One who intervenes in a pending difficulty in behalf of a brother and takes the life of the other original combatant, stands in the shoes of the brother, in respect of fault in bringing on the difficulty, and he cannot defend upon the ground that his brother was in imminent and deadly peril and could not retreat, unless the latter could have defended upon that ground

had he killed his assailant. Hence, in such cases it is a material inquiry whether defendant's brother was in fault in bringing on the difficulty with the deceased."

In *S. v. Giroux,* 26 La. Ann., 582: "The next exception was to the ruling of the judge refusing to charge the jury 'that if from the nature of the assault Giroux had reasonable grounds to believe that the life of his wife was in danger, or some felony was about to be committed upon the person of his wife, and was at the time of the killing being inflicted upon her person, then the killing was done in self-defense.' This would have required the judge to assume the fact that the assault upon the wife was without provocation, for, if the wife was the aggressor, the killing would not be excusable in self-defense."

In *Surginer v. State,* 134 Ala., 125: "The right of one to use (651) violence in defense of another is recognized by the law only where the imperiled person would have been legally justifiable in using like violence in his own defense, and in no case is a necessity for acting in self-defense regarded as ground for an acquittal unless the person seeking shelter thereunder was free from fault in bringing on the difficulty or had retired therefrom and was thereafter assailed."

In *S. v. Cook,* 78 S. C., 254, the circuit judge charged the jury: "But if your brother or one near and dear to you provokes a difficulty or puts himself in the wrong and brings it on, the law does not allow you to go there, take his place and kill that man and say you are guilty of neither murder nor manslaughter. The law does not give the person who is near and dear to you the right to provoke a difficulty and then let you come in and kill some one, when he has brought it on himself, and get out of it by your saying he was near and dear to you, and you did the killing on that account. But if he was without fault in bringing on the difficulty, and the law would justify him in defending himself, you have a right to go in and defend him. But if he brings on the difficulty and you take part, you do it at your own risk; and if he took life under similar circumstances and would have been guilty of murder or manslaughter, and you go in, take his place, and take life under those circumstances, then you are guilty of murder or manslaughter." This charge was sustained by the Supreme Court, and the Court says, after quoting from Hale and Wharton and citing other authorities in support of the principle: "We have endeavored to show the law as laid down by the circuit judge is firmly established. It is true, the rule may in exceptional cases work hardship; but the opposite rule would allow the innocent man who had been forced to strike in self-defense to be killed with impunity merely because appearances happened to be against him at the moment a partisan of his antagonist

reached the scene of conflict. The duty seems urgent to enforce rather than relax the rule which admits of no excuse for taking human life except necessity."

We are, therefore, of opinion that his Honor properly refused the instructions of the defendant, and that there is no error as to
(652) Wallace Greer in the charge given. There are other exceptions, which we have considered and which require no discussion.

As to Wattie Greer, the court was requested and refused to charge, "that if you believe the evidence in this case, the defendant Wattie Greer is not guilty of homicide, and you are instructed to return a verdict of not guilty as to Wattie Greer." This prayer should have been given.

There is evidence that Wattie and the deceased were engaged in a voluntary fight, but Wattie did not strike the fatal blow, and there is no evidence that he instigated it. The Attorney-General says in his brief: "We have not found in the record that Wattie Greer had a deadly weapon; any evidence of a conspiracy between Wattie and Wallace, or an understanding or common purpose between them, or any testimony from which the act of Wallace could be imputed to Wattie."

Although one may have had some difficulty with the deceased, he is not liable for a homicide committed at or about the same time by a third person who was acting independently, without any conspiracy or common design, even though the altercation brought on the fatal encounter, and the third person interfered to aid him. Title "Homicide," 21 Cyc., 692; see, also, Wharton on Homicide, secs. 50, 51; *S. v. Kendall,* 143 N. C.,659; *S. v. Goode,* 132 N. C., 982; *S. v. Finley,* 118 N. C., 1161; *S. v. Howard,* 112 N. C., 859; *S. v. Scates,* 50 N. C., 420.

There is no error as to Wallace Greer, and a new trial is ordered as to Wattie Greer.

BROWN, J., dissenting: There is evidence tending to prove that the defendant Wattie Greer and the deceased, Will Finney, engaged in an affray, and that both fought willingly, and that during the affray they clinched and fell, Finney on top, and that Finney drew his knife and stabbed Wattie and had his arm drawn back to stab him again, when defendant Wallace Greer rushed up and struck Finney on the head with an axe and killed him. Wattie was unarmed, and at the
(653) time was flat on the ground with Finney on top of him. The evidence of defendant Wallace tended to prove that Wattie and Finney were having some words about a quarter of a dollar; that Wallace separated them and stopped the quarrel; that Wallace turned away and went to his buggy and started to drive off; that he heard some one

exclaim, "Don't let Finney kill Wattie!"; that he turned and saw that Finney was astride of Wattie and had stabbed him and had his arm drawn back to stab him again; that Wallace grabbed an axe and struck Finney on the head before Finney could stab Wattie again.

In his charge his Honor made the guilt of Wallace depend exclusively upon the guilt of Wattie, saying: "His guilt or innocence would depend upon the question as to whether Wattie was at fault or not; that is, as to whether Wattie engaged in the fight willingly or used language calculated or intended to bring on a fight."

This charge is sustained by our precedents in case the jury should find that Wallace entered into the fight for the purpose of aiding Wattie and defending him in the affray with Finney.

It is well settled that "though a son may fight in the necessary defense of his father, yet the act of the son must receive the same construction as the act of the father." *S. v. Brittain,* 89 N. C., 482; *S. v. Johnson,* 75 N. C., 175. This is upon the ground that these relatives stand in mutual relation one to the other, and where one enters into the fight to assist in defending the other he becomes his confederate, and his act must have the same construction as the act of the assisted party. 1 Hale P. C., 484; 3 Blackstone, 3, and note; *S. v. Medlin,* 126 N. C., 1127.

Although this doctrine has been severely criticised by some courts, I am not disposed to abrogate or qualify it.

But there is a phase of this case which his Honor did not present to the jury, and which is not obnoxious to the authorities I have quoted.

By several appropriate prayers for instruction the defendant Wallace Greer substantially requested the court to instruct the jury that if he, Wallace Greer, did not enter into the fight for the purpose of assisting and defending Wattie in his contest with Finney, but (654) struck the blow which killed Finney on a sudden emergency with the *sole* purpose of preventing Finney from committing a felonious homicide, and such blow was necessary for that purpose, then defendant Wallace was justified, and the jury, if they so find, should acquit.

I think this view of the evidence should have been presented to the jury.

The evidence tends to prove that had Finney succeeded in stabbing Wattie the second time, and had killed him, he would have been guilty of a fenonious homicide, and that the blow administered by Wallace prevented such result. Wharton on Homicide, sec. 533, thus states the law:

In section 533 it is said: "*Bona fide* belief by the defendant that a felony is in process of commission, which can only be averted by the death of the supposed felon, makes the killing excusable homicide, though if such belief be negligently adopted by the defendant, then the killing is manslaughter. . . . If A honestly and without negligence on his part believes that B is in the process of committing a felony, which can only be arrested by B's death, A is excused in killing B." See, also, sections 537 and 539.

"It is the duty of every man, whether an officer of justice or private citizen, who sees a felony attempted by violence, to prevent it if possible, and in the performance of his duty such person has the legal right to use all means which appear to him as a reasonable man to be necessary to make the resistance and interference effectual, and if the felony cannot be prevented by other means, he is justified in taking life." 21 Enc. of Law, 207.

"A homicide is justifiable when committed by necessity and in good faith in order to prevent a felony attempted by force or surprise, such as murder . . . To justify the killing, however, it must be done in good faith and under an honest and reasonable belief that such felony is about to be committed, and that the killing is necessary in order to prevent its accomplishment, and must be done while the person is in the act of committing the offense, or after some act done by (655) him showing an evident intent to commit such an offense." 21 Cyc., 798, 799.

These authorities show that if it *appears* that a person is about to commit a felony upon another, a third party has the right to take the life of the one about to commit the felony, if he believes it is necessary in order to prevent the felony, and a man of ordinary firmness and intelligence would have reached the same conclusion.

I think there is a well marked distinction between the case where there is *only* an intention to prevent a felony and that in which the third party, whether related or not, espouses the cause of one of the participants to defend him in the contest. In the latter case the parties, in law, become confederates and their relation becomes mutual. In the former case a third party is excused, even in taking human life, if the sole motive which prompted him to interfere was to prevent the perpetration of a felonious homicide, and the jury should also be satisfied that the facts, as they appeared to him, were such as might reasonably have convinced a man of ordinary firmness and intelligence that such a felony was about to be committed.

The distinction is recognized by the Supreme Court of Michigan in *People v. Curtis,* 52 Mich., 617, in which it is held that a dangerous felony may be forcibly prevented by *any one* who is not himself in the wrong directly or by complicity.

Under the common law the right of mutual defense was given to nearly all the domestic relations, but there is no principle of the common law which denies to a relative the right to prevent the commission of a felonious homicide to the same extent and under the same circumstances as one not related may prevent it.

When one intervenes in a fight for the sole and only purpose to prevent the commission of a felonious homicide, and uses no more force than is reasonably necessary, he is not considered as fighting in defense of any one, but only to uphold the law of the land and to prevent the destruction of human life. The principle of justification in such case is broader than the mere idea of self-defense. It is founded upon duty to the State and not to an individual. Upon the same principle private citizens may arrest felons to prevent escapes, without war- (656) rants. *S. v. Bryant,* 65 N. C., 327. There can be no doubt that this defense would be open to the defendant Wallace Greer upon the evidence in this case, had he not been the brother of Wattie. The fact that he is his brother ought not to deprive him of the benefit of it.

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

Cited: *S. v. Gaddy,* 166 N. C., 347.

STATE v. ROBINSON ROGERS AND WALDO McCRACKEN.

(Filed 28 May, 1913.)

1. Constitutional Law—Trial by Jury—Twelve Men.

Under the common law and the State and Federal Constitutions the word jury signifies twelve men duly impaneled in the case to be tried.

2. Same—Attempted Waiver—Judgment, Motion in Arrest of—Procedure—Another Panel.

A trial by jury in a criminal action cannot be waived by the accused, and though by express agreement and his conduct, and that of his attorneys, he may have agreed that his case should be tried by only eleven men, or have attempted to waive his right to have twelve, his subsequent motion on the trial in arrest of judgment on the ground that the jury, being composed of eleven men, was not lawfully constituted, should be granted, the procedure then being to impanel another and lawful jury.

CLARK, C. J., dissenting.

S. *v.* ROGERS.

APPEAL by defendant from *Foushee, J.,* at Spring Term, 1913, of HAYWOOD.

Indictment for murder. Before impaneling the jury the solicitor announced that he would not ask for a verdict of murder in first degree.

One of the jurors was taken ill, and the trial proceeded with eleven jurors.

The defendants were convicted of manslaughter and sentenced to the penitentiary.

In apt time they moved in arrest of judgment as well as for a new trial, upon the ground that they were not tried by a lawful jury
(657) of twelve men. His Honor, upon such motion, rendered the following judgment:

FINDING OF FACT.

As the ground for a new trial contained in said two affidavits of defendants, to wit, that they were tried by a jury composed only of eleven men, the court is of the opinion that the defendants are not entitled to any finding of fact on this matter, and so holds; but if the Supreme Court is of a contrary opinion, then he makes the following findings of fact:

That this case was called for trial on Wednesday morning of the first week, when the solicitor moved for a continuance on the ground of the absence of two witnesses to the shooting—one being sick in bed in Canton and the other in South Carolina. Defendants resisted the continuance and insisted on a trial at this term, and the court denied the motion for continuance; that the entire afternoon was consumed before a jury was selected; that the defendants did not exhaust their peremptory challenges; that the jury, after being impaneled, was in charge of an officer for the night who was duly sworn; that Thursday morning, before any evidence had been offered, the solicitor asked that the jury be excused, and in the absence of the jury stated to the court that since the adjournment he and counsel for the defendant had discovered that one of the jurors selected was subject to fits; that he had recently been in Johns Hopkins Hospital and a part of his brain removed, and that he was liable to lose his mental balance if subjected to much mental strain, and that in the opinion of counsel he was not mentally competent to sit on the jury; that the State was willing to call in another juror or to make a mistrial or to get an entirely new panel; that counsel for defendants insisted on proceeding with eleven men, and thereupon it was agreed in open court by the defendants, speaking in open court through their counsel, and the solicitor for the State, that the case would proceed with eleven jurors, and that the clerk should make

no record of the fact that one of the jury had been excused by (658) consent; that defendants waived their right to have a full panel, and that no point should ever be raised that only eleven men were in the jury box; and thereupon the court excused said juror and directed the trial to proceed; that the two defendants are men of more than ordinary intelligence; that McCracken is about 27 or 28 years of age and the defendant Rogers about 40 years of age, and their families are prominent and wealthy; that both these defendants are possessed of sufficient mental capacity to understand and did understand that both they and their counsel were entering into said agreement, and they having elected and consented to proceed with eleven jurors, the court consented to this course.

These defendants were represented by four able and experienced counsel, one of whom has filled the office of solicitor for two terms.

That the trial proceeded through Thursday, Friday, Saturday, and on Monday the court delivered the charge to the jury; that the defendants were present during this time, during the sessions of court (being under good bonds, the court did not order them in custody during the progress of the trial); that the jury returned their verdict Monday afternoon.

At the request of defendants' counsel, the court gave them until Wednesday of the second week before pronouncing the judgment of the court, and on Wednesday the defendants again stated that they were not ready, and asked for another day, so the court gave them until Thursday a. m.

On Thursday the defendants filed said affidavits, and this was the first time it was suggested that they would attempt to repudiate their solemn agreement; that the defendants were represented by the same counsel throughout the entire term of court; that the defendants did not ask to discharge their original counsel nor did said counsel ask to withdraw from the case, but the same counsel who made the agreement made the motions aforesaid for a new trial.

Wherefore the court is of the opinion that by their conduct (659) defendants are estopped to set up the claim that there were only eleven men in the jury box, and the court denies the motion, and the defendants except.

Wherefore the court denies the motion and the defendants except.

H. A. FOUSHEE,
Judge Presiding.

The defendants appealed.

Attorney-General and Assistant Attorney-General for the State.

W. T. Crawford, Bryson & Black, J. M. Queen, and J. W. Stamey for defendants.

BROWN, J., after stating the case: It is elementary that a jury, as understood at common law and as used in our constitutions, Federal and State, signifies twelve men duly impaneled in the case to be tried. A less number is not a jury. *Traction Co. v. Hof,* 174 U. S., 91.

In *Lamb v. Lamb,* 4 Ohio St., 167, *Chief Justice Thurman* said: "That the term 'jury' without addition or prefix imports a body of twelve men in a court of justice, is as well settled as any legal proposition can be." *Opinion of the Justices,* 41 N. H., 550; *United States v. 1363 Bags of Merchandise,* 2 Sprague, 85; *United States v. R. R.,* 123 U. S., 113.

In *S. v. Scruggs,* 115 N. C., 805, it is held that, "The jury provided by law for the trial of indictments is composed of twelve men; a less number is not a jury, and a trial by a jury in a criminal action cannot be waived by the accused."

In *S. v. Stewart,* an indictment for assault and battery, *Justice Ashe* says: "It is a fundamental principle of the common law, declared in Magna Carta, and again in our Bill of Rights, that no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. Art. I, sec. 13. The only exception to this is where the Legislature may provide other means of trial for petty misdemeanors, with the right of appeal.

"The court here has undertaken to serve in the double capacity of judge and jury, and try the defendant without a jury, which it (660) had no authority to do, even with the consent of the prisoner." Citing 1 Bish. Cr. Law, 759.

In *S. v. Holt,* 90 N. C., 750, an indictment for cruelty to animals, it is held that a jury trial cannot be waived by the defendant in a criminal action.

The defendant may plead guilty, or *nolo contendere,* or *autrefois convict,* and of course the impaneling of a jury is unnecessary; but when he pleads not guilty in cases, such as this, where a trial by jury is guaranteed by the organic law, he must be tried by a jury of twelve men, and he cannot waive it. *S. v. Moss,* 47 N. C., 66; *Cancemi v. People,* 18 N. Y., 128.

It would have been much safer for his Honor to have followed the settled precedents of this Court, and have discharged the jury and impaneled another.

Innovations in settled methods of procedure are generally unwise, especially in criminal cases. In this connection it is well to remember the words of *Chief Justice Merrimon,* "A great danger arises from practices and precedents that insidiously gain foothold and power in courts of justice by inadvertence and lack of due consideration. . . . In the economy of time, the hurry of business, lack of attention, hasty consideration, irregular methods of trial are adopted, allowed, and tolerated, and thus vicious practices spring up, creating sources of danger to constitutional right." *S. v. Holt, supra.*

New trial.

CLARK, C. J., dissenting: The Constitution, Art. I, sec. 13, provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court." Section 19 of the same article provides: "In all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." The right to trial by jury is beyond controversy, both in civil and criminal cases.

There can be no controversy either that the jury here referred (661) to means "twelve men," not because there is any reference to trial by jury in Magna Carta, or that it would have any authority if there was, but because our Constitution, made by our people for our own government, provides for a jury, and the word "jury" must be given the signification which it had when the Constitution was adopted, which was a jury of "twelve men." In some States a jury now may consist of less than twelve, and in several a unanimous verdict is not required. The Supreme Court of the United States in passing upon this matter has held, in several cases, that the number that should compose a jury, and whether unanimity should be required or not, is entirely a matter for the people of each State, and that the Fourteenth amendment does not impose any restrictions upon the States in this regard. The requirement in the Fifth and Sixth amendments to the Federal Constitution of a jury trial is held also to apply only to the Federal courts. This matter has been fully discussed and has been settled in *Hurtado v. California,* 110 U. S., 516; *Caldwell v. Texas,* 137 U. S., 692; *Leeper v. Texas,* 139 U. S., 462; *Brown v. New Jersey,* 175 U. S., 172, and many other cases.

In *Maxwell v. Dow,* 176 U. S., 581, in sustaining a conviction by a jury of eight, as provided by the Constitution of Utah, *Mr. Justice Peckham* reviews the authorities to the above effect, approves them, and says, among other things: "It is emphatically the case of the

people by their organic law providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than any one else can be. The reasons given in the learned and most able opinion of *Mr. Justice Mathews* in the *Hurtado case* for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be proceeded against only by indictment and the right to a trial by twelve jurors are of the same nature and are subject to the same judgment and the people in the several States have the same right to provide by their organic law for the change of both or either." See, also, Cooley Const. Lim. (7 Ed.), 455 *et seq.*

(662) Neither the Federal Constitution nor Magna Carta has any bearing upon the subject. There have been law writers and judges who have stated that Magna Carta, ch. 39, guaranteed the right of trial by jury; but this view originated at a time when historical statements were received with less investigation than at present. Magna Carta was but one of several agreements made between King John (and later by his son Henry III) on the one side and the insurgent barons on the other. Magna Carta was sealed (not signed) on Friday, 19 June, 1215, in the meadow of Runnymede (then a little island) on the river Thames, 3 miles below Windsor Castle, and in sight from its towers. It was an agreement between the King on the one hand and the great barons on the other. The words therein, *"judicium suorum parium,"* had no reference to a trial by jury. McKechnie Magna Carta, 158, 456, 457; 1 Pollock and Maitland Hist. Eng. Law, 392. 581. About 50 years before, at the Assizes of Clarendon, 1166, Henry II instituted the germ of the grand jury, which at first consisted of twelve men (1 Pollock and Maitland, 131), but thorough investigation has shown that the petty jury was not known in England till nearly 150 years after Magna Carta. At first the verdict was rendered by a majority; that is, seven was a valid verdict. Britton I, 31. There had been, further back, in remoter times, instances in which the witnesses were called upon to aid the judicial officer in passing upon a criminal offense. But that cannot be mistaken for the jury which when gradually instituted soon became of the fixed number of twelve, and from which witnesses are excluded. Magna Carta could not refer to the "jury," which was then unknown.

Besides, the word *"judicium"* does not mean "jury," but "judgment." McKechnie Magna Carta, 407. What the barons meant in Magna Carta was not that every one should have the right to an impartial trial by jury, for at that time juries were unknown, and the common people had indeed less consideration from the mail-clad barons than

from the King. What the barons did stipulate for was a "special privilege" for themselves. The King, when in need of money, had been in the habit of sending his officials and judges to try charges, most often trumped up, against wealthy barons, and extorting large supplies out of them. Therefore this stipulation in Magna (663) Carta granted them the special privilege that when the King had any charge against one of their order he should not send his judges against them, but the charge should be tried by men of their own order, *i. e.*, by barons. They were to be convicted and sentenced, not by the King's judges, as the common people were, but they were subject only to *"judicium suorum parium," i. e.*, to the "judgment of their equals." The common people might be tried by the judges, who were all appointed by the King and removable at his pleasure. But the barons and bishops made him agree that when he had any charge against them they should be tried and judged "by their peers," that is, by men of their own order. The judges were commoners, and not the peers or equals of the barons, who would have scorned the idea of being tried by them. 1 Pollock and Maitland Hist. Eng. Law, 152, 539, 581. The judges were the equals of other freemen, and could try them. As to the vast masses of the people, the majority of whom were not even freemen, they were guaranteed no trial except in the barons' courts, who were practically their owners. The barons, therefore, in stipulating for a trial of "every freeman" by their peers, were stipulating for a special pivilege exempting them from the jurisdiction of the King's courts. This privilege under the circumstances may have been very necessary for their protection, for the judges were the King's agents. But the provision cannot be lauded as guaranteeing to us "trial by jury," which was then an unheard of institution, and to which the barons would under no circumstances have submitted. In McKechnie on Magna Carta the original sources of information are marshaled and interestingly discussed.

King John possessed no power he could confer upon or withhold from the people of this State. No agreements made between him and his barons, which were constantly broken, can restrict or bind us. Magna Carta and other similar contracts between them are of interest as historical documents of a stage far below ours in the development of human rights. They confer no rights upon us, still less do they restrict our right to self-government. We base our right to this, not upon a grant from any king, but upon the inherent power to (664) govern ourselves, restricted only by the Constitution and laws which we ourselves have made. These old documents are useful only to explain the meaning of words which we have used.

Some one with small knowledge of history has spoken of "the great lawyers who drafted Magna Carta." But there were no professional lawyers in England till the statute of Edward I in 1291—76 years later. Indeed no one could represent another in Court even as a friend till the statute of Merton in 1236, 21 years after Magna Carta. And until long after Magna Carta all the judges were ecclesiastics, except very rarely a layman, not a lawyer.

It is universally held that in civil cases trial by jury is simply a right or privilege, and can be waived, unless there is some statute forbidding it. 24 Cyc., 149; 17 A. and E. (2 Ed.), 1097, and numerous cases cited by both. Embraced in these decisions is also, as a corollary, the proposition that in civil cases, by consent, less than twelve may find a verdict.

In criminal cases there is a wide diversity in the courts. In some States it is held that a jury can be waived in all criminal cases, as in civil cases, and in others it is held that a jury cannot be waived except in misdemeanors, and in still others it has been held that a jury cannot be waived in any criminal case. There is nearly the same diversity as to the right in criminal cases of the defendant to agree that the verdict may be rendered by less than twelve men or dispensing with unanimity, except that there are two or three States which, while holding that a jury cannot be waived, yet hold that by consent of the defendant the jury may consist of less than twelve men, as in this case, otherwise there would be a mistrial. The authorities on these propositions may be found, 24 Cyc., 150, 153; 17 A. and E. (2 Ed.), 1098, in numerous cases there cited. For centuries in criminal cases a defendant retained his right to the ancient mode of "trial by battel," and could not be tried by a jury except by his consent. Hence the formula we still retain, "How will you be tried?" and the reply, "By God and my country," *i. e.*, by a jury. 1 Legal Hist. Essays, 657.

As the right to a trial by jury is guaranteed equally by the Constitution in civil and in criminal cases alike, it is difficult to understand why if it is a requirement and not merely a privilege, it can be waived in one class of cases and not in the other. This distinction is not based upon the constitutional phraseology, but upon the view which has happened to be taken by the incumbents of the bench in each State. Among the States which hold that a jury trial can be waived in criminal cases
(665) are Arkansas, Connecticut, Iowa, Kentucky, Louisiana, Nevada, New Jersey, Massachusetts, Michigan, Missouri, Minnesota, Pennsylvania. Among the cases on the point whose reasoning is most worthy of consideration are *S. v. Kaufman,* 51 Iowa, 579;

Com. v. Dailey, 66 Mass. (12 Cush.), 80; *Murphy v. Com.,* 58 Ky. (Met.), 365; *S. v. Sackett,* 39 Minn., 69; *Com. v. Sweet,* 4 Pa. Dist., 136; *S. v. White,* 33 La. Ann., 1219; and there are others.

In this State it has been held that while in civil cases a jury trial can be waived, this cannot be done in criminal cases. *S. v. Stewart,* 89 N. C., 564; *S. v. Holt,* 90 N. C., 573. *S. v. Scruggs,* 115 N. C., 805, holds, as in *S. v. Holt,* that a jury trial cannot be waived, but it does not directly pass on the point whether by consent a verdict may not be rendered by a lesser number, though that is a reasonable inference.

There can be no reason shown upon the face of the Constitution why a jury trial should be held to be a privilege in civil cases, but an iron-clad requirement in criminal. We, however, have, as just said, no case in which it has been expressly held that the trial, at the request of the defendant, cannot proceed with eleven jurors. It would seem that it could, as the Constitution also guarantees the defendant a right to a "speedy trial." Among able opinions to this effect are *Shaw, C. J.,* in *Com. v. Dailey,* 66 Mass. (12 Cush.), 80; *S. v. Sackett,* 39 Minn., 69; *Simpson, C. J.,* in *Murphy v. Com.,* 58 Ky. (1 Met.), 365. To similar purport, *S. v. Borowsky,* 11 Nev., 119; *Conally v. State,* 60 Ala., 89; *S. v. Kaufman,* 51 Iowa, 578. The following cases also hold valid the waiver of any jury in criminal cases. *S. v. Worden,* 46 Conn., 349; *Dillingham v. State,* 5 Ohio State, 280; *Edwards v. State,* 45 N. J. L., 419; *Ward v. People,* 30 Mich., 116; *S. v. Mansfield,* 41 Mo., 470; *S. v. Cox,* 8 Ark. (3 Eng.), 436; and there are others.

It was at the instance and by the request of the defendants in this case that, one of the jurors becoming incapacitated, no mistrial was entered, and it was agreed that the case should proceed with eleven jurors and that no entry should be made. The judge finds that "the solicitor moved for a continuance on ground of the absence of two witnesses to the shooting, one being ill and in bed and the (666) other in South Carolina. The defendants resisted the continuance, and insisted on a trial at that term, and the court denied the motion for continuance. The defendants did not exhaust their peremptory challenges. The jury was impaneled and an officer sworn, Wednesday. The next morning, before any evidence had been offered, the solicitor asked for the withdrawal of a juror because since the adjournment he and the counsel for the defendants had ascertained that one of the jurors was subject to fits, and that counsel did not think he was mentally competent to sit on the jury; that the State was willing to call in another juror or to make a mistrial or to get an entirely new panel. Counsel for defendants insisted on proceeding with eleven men, and thereupon it was agreed in open court, the defendants speaking in

open court, through their counsel, and the solicitor for the State, that the case would proceed with eleven jurors, and that the clerk should make no record of the fact that one of the jury had been excused by consent; the defendants waived their right to have a full panel, and stated that no point should ever be raised that only eleven men were in the jury box; and thereupon the court excused said juror and directed the trial to proceed; the two defendants are men of more than ordinary intelligence, McCracken being 27 or 28 years of age and the defendant Rogers about 40 years of age, and their families are prominent and wealthy; both these defendants are possessed of sufficient mental capacity to understand and did understand that both they and their counsel were entering into said agreement and electing to proceed with eleven jurors by their assent, and that the court consented to this course. These defendants were represented by four able and experienced counsel, one of whom has filled the office of solicitor for two terms." The trial occupied four days. No objection was made as to the juror being excused until two days after the verdict. The defendants did not ask to discharge their counsel nor did counsel ask to withdraw, and the same counsel who made the agreement made the motion in arrest of judgment upon the ground that it was invalid.

(667) The prisoners have had every right and privilege which is guaranteed them by the Constitution. They thought it was to their benefit to proceed with eleven jurors, and asked that it should be done. The courts may well scrutinize closely all offers to waive a jury trial in criminal cases, because the defendants may act unadvisedly in some cases, and the consequences may be serious. But this should not cause the Constitution to be construed differently as to the trial by jury in civil cases and in criminal cases.

In the present case the court finds as facts that the prisoners were men of intelligence and means and were represented by several able counsel, one of whom was formerly solicitor for that district for eight years. The prisoners do not show that they suffered any detriment in the course of the trial. They have had a fair trial and they have been deprived of no constitutional right.

A defendant has a constitutional right to a speedy trial by jury. Yet he waives this provision by obtaining a continuance. A plea of guilty dispenses with a jury trial altogether. Why, therefore, cannot a defendant agree to accept a verdict by eleven jurors when he has competent counsel and is himself intelligent, and both his counsel and himself think it for his interest to do so? Especially when this is done with the consent of the court and the solicitor representing the State.

There is nothing to indicate that the prisoners suffered any prejudice from the absence of the other juror, and they ought not to obtain any benefit by their breach of good faith.

Cited: *S. c.*, 166 N. C., 389.

STATE v. MOSES DRAKEFORD.

(Filed 28 May, 1913.)

1. Indictment—Assault—Proof Variance—Interpretation of Statutes—Former Jeopardy—Defenses.

Where the indictment charged an assault, etc., upon "Lila" Hatcher, and the evidence tended to show that it was made upon "Liza" Hatcher, and upon defendant's motion the court directed an acquittal for the reason that the names were not *idem sonans*, but held the defendant to appear and answer at the next term of the court to the charge of assault, etc., upon "Liza" Hatcher, it is *Held*, (1) that the variance between the charge in the indictment and the proof was immaterial (Revisal, sec. 3254); (2) that, notwithstanding, the plea of "former jeopardy" on the second trial could not be sustained, as the instruction in the former action was at the prisoner's request, and had not the effect of placing him in jeopardy.

2. Criminal Law—Jurors—Expression of Opinion—Grand Jurors.

Where a petty juror had sat upon the grand jury at a former term of the court, when a true bill for assault, etc., had been found against the defendant, upon which the action was dismissed at the instance of defendant for defect in the indictment, and the present trial is upon an indictment correcting this error, objection thereto cannot be sustained when the juror, on his *voir dire*, has stated that he had not formed or expressed an opinion, and it does not appear that he was present as a grand juror, or had then voted upon the indictment.

3. Jurors—Motion to Set Aside—Court's Discretion—Appeal and Error.

A motion to set aside a verdict because of a defect as to one of the jurors is addressed to the discretion of the trial court, from which no appeal lies.

4. Criminal Law—Prisoner's Statements—Custody—Duress—Evidence.

Where a criminal offense is charged, statements made to an officer of the law by the prisoner are not incompetent because the defendant was in custody or jail at the time, unless there was duress, threats, or inducements.

APPEAL by defendant from *Bragaw, J.*, at January Term, (668) 1913, of RICHMOND.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

D. J. Cashwell and J. R. McLendon for prisoner.

CLARK, C. J. The prisoner was indicted for rape upon "Lila" Hatcher. On the trial the evidence showed that it had been committed on "Liza" Hatcher. The prisoner's counsel insisting that the names were not *idem sonans,* and that there was a fatal variance between the charge and the proof, the court granted the motion of the pris-
(669) oner and instructed the jury to find the defendant not guilty of rape upon "Lila" Hatcher, but held him to appear at the next term of court to answer the charge of committing rape upon "Liza" Hatcher. This bill was so found, and when the prisoner was put upon trial his counsel pleaded "former jeopardy."

The court properly overruled the plea of former jeopardy. The names might well have been held *idem sonans,* or, at the most, an immaterial variance, and the former trial should have proceeded. *S. v. Lane,* 80 N. C., 407; *S. v. Collins,* 115 N. C., 716, and numerous instances there collected; 29 Cyc., 272-277; 21 A. and E. (2d Ed.), 313-316.

But the prisoner having been discharged on the former trial at his own instance, cannot now avail himself of this defense. In 12 Cyc., 266, it is said: "Where the accused has secured a decision that an indictment is void, or has procured its being quashed, or has been granted an instruction based on its defective character, directing the jury to acquit, he is estopped, when subsequently indicted, to assert that the former indictment was valid," citing *U. S. v. Jones,* 31 Fed., 725; *Joy v. State,* 14 Ind., 139; *S. v. Meekins,* 41 La. Ann., 543.

On the same page, 12 Cyc., 266, it is further said: "If the accused is acquitted by the direction of the court on the ground of material variance, he cannot plead the acquittal as a bar, for he has never been in jeopardy, and when tried on a new indictment, the crime then alleged is not the same as in former indictment. And it has been held that if the accused on the prior trial maintained that the variance was material, and the court directed a verdict of acquittal on that ground, he cannot subsequently on his plea of former acquittal allege or prove that it was not material," citing very many cases which sustain this proposition; among them, *S. v. Birmingham,* 44 N. C., 120; *S. v. Revels, ib.,* 200; *S. v. Sherrill,* 82 N. C., 694.

Where a verdict of acquittal is directed at the request of defendant upon the ground that the indictment is fatally defective, he cannot, on

being again prosecuted, claim that the former indictment was in fact good, and that he has been in jeopardy under it." 17 A. (670) & E. (2 Ed.), 615, and cases there cited.

Clark Criminal Law, sec. 174, says that a defendant may waive his right to plead former jeopardy, either expressly or impliedly, in many cases, citing instances, and among them specifies, "where he procures a verdict or judgment to be set aside on his motion in arrest or for a new trial." In 2 Russell Crimes, 61, the same is held as to this same offense, citing numerous authorities. In 1 Archbold Pleading (8 Ed.), 344, are many decisions to the same effect. Among the cases there cited are *Com. v. Mortimer,* 2 Virg. Cases, 325, which holds that where "a prisoner is acquitted of burning the barn of Josiah Thompson, he cannot plead this acquittal in bar of indictment for burning the barn of Josias Thompson, the real owner, when the acquittal was on the ground that the name of the true owner was not set out properly on the first indictment."

While, as we have said, the court on the first trial should have held that the names were *idem sonans,* or certainly should have held that the variance was immaterial under Revisal, 3254, yet, as the defendant insisted upon the alleged defect in the bill, and procured the judge to direct the verdict of not guilty upon the ground of that variance, upon all the authorities as well as upon the reason of the thing, he cannot now insist that he was in jeopardy on the former trial. The judge having held, at his instance, that there was no evidence to connect him with an assault upon Lila Hatcher, he cannot now contend that he was in jeopardy on a trial for an assault upon Liza Hatcher. This would be trifling with the administration of justice. Of course, counsel are at liberty to ascertain how any proposition of law that is respectfully made and urged "will strike the court." But the court cannot be impressed with the suggestion that the prisoner was put in jeopardy on a former trial when the court held, at the instance of the prisoner himself, that he was not charged with the offense for which the judge bound him over to the succeeding term, at which this indictment was signed and upon which he has now been convicted.

The other exceptions do not require discussion except the (671) seventh, which is that one of the jurors who tried the prisoner was on the grand jury which found the first bill, on which the defendant was acquitted. Aside from the fact that it was not this bill, it does not appear, even if it were this bill, that he voted in passing upon it. He may not have been present when the bill was found. On his *voir dire* the juror stated that he had not formed nor expressed an opinion

as to the guilt or innocence of the prisoner. There is nothing to show to the contrary. Certainly we cannot presume that the juror answered untruly.

It has always been held by us that a motion to set aside the verdict because of a defect as to one of the jurors comes too late after verdict, and addresses itself only to the discretion of the court. *Walker, J.*, in *S. v. Lipscomb*, 134 N. C., 697. In that case it was shown that the juror was under 21 years of age. In *S. v. Maultsby*, 130 N. C., 664, the same ruling was made where a relationship was discovered after verdict between the prosecuting witness and a juror, and the court there cited many other cases where a disqualification of a juror on divers grounds had been found after verdict, and in all which cases the court held that the matter rested in the discretion of the trial judge, and that the refusal of the motion was not reviewable on appeal.

We will merely mention as to exception 5, that statements made to an officer are not incompetent simply because the defendant was at the time in custody or jail, unless there was duress, threats, or inducements. *S. v. Jones*, 145 N. C., 471; *S. v. Bohanon*, 142 N. C., 695; *S. v. Horner*, 139 N. C., 603; *S. v. Exum*, 138 N. C., 600.

No error.

Cited: *S. v. Christy*, 170 N. C., 783.

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(672)

STATE v. CLAUDE BLACKWELL.

(Filed 28 May, 1913.)

1. Murder—Self-defense—Reasonable Apprehension—Deceased's Dangerous Character—Evidence.

Upon a trial for murder, where self-defense is relied on, the violent or dangerous character of the deceased may be shown in evidence when there is proof that the deceased knew thereof at the time of the homicide, and there is direct evidence of the facts showing, or tending to show, that the prisoner acted under a reasonable apprehension that his life was in danger or that he was in danger of great bodily harm; or when, owing to the circumstantial character of the evidence, the nature of the occurrence is left in doubt.

2. Instructions—If the Jury Believe the Evidence—Incorrect Expressions—Words and Phrases—Appeal and Error.

An expression in a prayer for special instruction, "if the jury believe the evidence," preliminary to a direction to the jury as to how they should find upon stated phases of the evidence, is not exact, and a refusal

to give an instruction thus worded will not be held as reversible error, though when adopted by the court it is not ground for a new trial unless clearly prejudicial.

3. Murder—Self-defense—Reasonable Apprehension—Instructions for Jury.

Where the defense to a charge of murder relied on is that the prisoner, in committing the homicide, was in reasonable apprehension of his life, or of receiving great bodily harm from the deceased, and that the act was committed in self-defense, the reasonableness of this apprehension must be decided by the jury in view of the facts, circumstances, and surroundings as they appeared to the prisoner at the time.

4. Murder—Instructions—Verdict—Harmless Error.

The refusal to give a prayer for special instruction upon the question of murder in the second degree is held not to be reversible error when a verdict for manslaughter is rendered, the error, if any, being rendered harmless by the verdict.

5. Instructions—Contentions of Fact—Statements—Corrections—Notice—Appeal and Error—Practice.

An assignment of error on the ground that the trial judge incorrectly stated to the jury the contentions of fact of the parties will not be considered when it does not appear that it was called to the attention of the court in time for him to have corrected it.

6. Instructions Substantially Given—Appeal and Error.

Where the trial judge has fully and properly instructed the jury upon the law applicable to the facts, it will not be held as reversible error that he did not adopt the language of substantially correct instructions tendered by the appellant.

7. Murder—Self-defense—Instructions—Burden of Proof.

In this trial for murder, the judge correctly instructed the jury upon the question of self-defense, placing the burden on the defendant to satisfy the jury of every matter of excuse or mitigation, the killing with a deadly weapon having been admitted.

8. Verdict—Against Weight of Evidence—Motions—Court's Discretion—Practice—Appeal and Error.

Where under proper instructions and competent evidence the jury have returned a verdict contrary to the truth of the matter, the only remedy is by motion in the court below to set aside the verdict, and the action of the judge thereon is not reviewable on appeal.

HOKE, J., concurring.

APPEAL by defendant from *Webb, J.*, at September Term, (673) 1912, of MECKLENBURG.

The defendant was indicted in the court below for the murder of Dr. Fred Misenheimer, and was convicted of manslaughter. The evidence taken at the trial is very voluminous, covering nearly a hundred closely printed pages, and it will serve no useful purpose even to give a

full synopsis of it. The prisoner surely cannot complain if, for the purpose of passing upon his exceptions, we adopt his statement of the facts, as contained in the brief of his counsel. It is a fair and full statement for him, and while it omits reference to some of the evidence, which strengthens the case for the State, it is sufficiently accurate to present the essential facts and the contentions of the respective parties. We may add, though, that it did not appear that, if Dr. Misenheimer had earned a reputation for violence, when drinking, or under the influence of liquor, the prisoner knew of it, but the evidence tended to show the contrary, as his first acquaintance with him was on the night before the altercation in the room took place. The statement of the facts by the prisoner's counsel is as follows: "The defendant, together with W. L. Langley and C. B. Skipper, were, on 25 May, 1912,
(674) occupying a room in the Buford Hotel. Skipper, Porter, Beckman, and Langley had registered for the room. Porter and Beckman left before the trouble started, and were not witnesses to the fight. Skipper had been drinking hard for several days, and was in a very weak condition. Blackwell came into the room on Friday afternoon about 5 o'clock. His room at the Buford Hotel had been assigned by the clerk to some one else, and upon the invitation of Skipper and Langley he went into their room about 6 o'clock that evening. Langley and Blackwell went to the Elks Club, where they met Dr. Misenheimer, who inquired as to the condition of Skipper, who was sick, and volunteered to walk back to the hotel with them. They all came back to the room which Skipper occupied and went to bed about 10 o'clock that night. Langley waked up about 5 o'clock in the morning and waked Misenheimer and Skipper. Blackwell waked up and said he would have to go home, which was Lancaster, S. C., as had been planned the night before. Misenheimer and Skipper took another drink and went back to sleep. Langley stated that he hated to go away and leave Skipper in such a bad condition, and suggested that they wait until the afternoon train. Blackwell agreed to this, and they went back to bed. About 9:30 or 10 o'clock on Saturday morning, Skipper and all of the remainder of the party woke up, and Langley ordered breakfast for all, to be sent to the room. During breakfast, Misenheimer began to abuse Langley. He then asked Langley for $2 to get a quart of whiskey. Langley replied that he had no money of his own except a $50 bill, and the remaining money he had belonged to Skipper. Whereupon Skipper directed Langly to give Misenheimer $2, and Misenheimer wrote a prescription and Langley sent out for a quart of liquor. When the liquor came Misenheimer borrowed a knife from Blackwell to open the bottle with, took a drink, went into the bathroom and got a stick

about 2 feet 8¾ inches long and about 1⅜ inches at one end and 1 inch at the other, weighing about 1¼ pounds. This stick is what is commonly known as a 'plumber's churn.' Misenheimer took this stick and began beating around the room, chasing Langley and hitting at Skipper. Then Misenheimer took the electric cord and pulled (675) it down and told Langley he was going to lynch him. He then began to pay attention to Blackwell. At first Blackwell did not at all reply to his attacks except to state, 'Quit that, Doc.; it hurts.' Langley went into the bathroom then to stop his bleeding nose, which had resulted from the encounter with Misenheimer. He states that while he was there he heard three or four licks and heard an oath used. He looked around and Misenheimer was staggering, saying that he was stabbed. The doctor was sent for, and he was taken to the hospital. Blackwell testified that after Misenheimer had finished his attack on Skipper and Langley and had beaten up the room pretty thoroughly with the stick he came over to the bed where he lay and pulled it down, and then Blackwell arose and got his shirt, and Misenheimer asked him where he was going, using an oath. Blackwell said he was going to dress and get out of the room, and Misenheimer then locked the door and threw the key under the bed and stated, with an oath, that he would knock the block off the first man that went out of the door. Blackwell then took up his shirt and got his knife off the bed, where Misenheimer had thrown it after using it to open the bottle of whiskey, and put it in his shirt pocket. Later he went after his slippers which were under the bed. Misenheimer thought he was going to get the key, and said if he did get it he would kill him, and began beating him over the head. He continued to beat him over the head until Blackwell picked up the knife off the floor where it had fallen from his shirt pocket, and struck him with it. Misenheimer was taken to the hospital, and died after lingering several weeks. The defendant then went to Lancaster under the belief that Misenheimer was not seriously hurt, but came back voluntarily when requested by the police. The defendant offered abundant evidence as to his good character, and also showed that he was not the C. C. Blackwell upon whom the State endeavored to fix a bad character. The only eye-witnesses who testified as to the transaction were the defendant, Claud Blackwell, and the witness W. L. Langley. The defendant offered evidence tending to show that (676) the wound could not be caused by the knife introduced by the State. Upon this point experts disagreed, and there is positive evidence that the knife shown to the jury was the one used."

The following errors were assigned by the prisoner:

"1. The court erred in refusing to admit evidence of the violent and dangerous character of the deceased while under the influence of whiskey. The error in this is that there was evidence of self-defense, and violent and dangerous character in cases of homicide is admissible when there is evidence of self-defense.

"2. The court refused the prayer of the defendant to instruct the jury as follows: 'If you believe the evidence, the deceased did beat the defendant with a stick and without provocation from him, and was about to strike him again when the defendant stabbed him. And the defendant had a right to resist the assault of the deceased upon him by force, and had a further right to use a weapon to repel the assault, and he was not required to confine himself to his natural force and strength or to retreat, and the only question before you is whether or not he reasonably thought such force was necessary to repel the assault, and if he so thought, you ought to acquit him.'

"3. The court refused the prayer of the defendant to instruct the jury as follows: 'If you believe the evidence, the deceased struck the defendant severe blows several times with a stick, and was attempting to strike him again when defendant stabbed him, and the defendant had a right to stab the deceased at the time if he reasonably thought such stabbing was necessary to prevent the deceased from killing him or inflicting severe bodily harm upon him; such stabbing would not be excessive force under these circumstances, and you should acquit the defendant.'

"4. The court, in its charge, stated the contentions of the defendant erroneously, as follows: 'And the defendant says that he went to the bed to get his shirt, and while he was putting it on, the penknife fell to the floor, and while he was in the act of getting his knife and
(677) putting on the shirt, the deceased again struck him and told him he was going to kill him.'

"5. Among other requests, defendant asked the court to charge: 'If you believe the evidence, the defendant is not guilty of murder in the second degree, and you will so find.' The court refused this charge, and fully defined murder in the second degree to the jury, and left the question to the jury of the guilt or innocence of the defendant of the charge."

The court gave a very clear and elaborate charge to the jury, explaining fully and correctly the different degrees of homicide with reference to the particular facts of the case, and also the contentions of the State and the prisoner, and among other instructions were the following:

"1. The inquiry in this case is whether the defendant is guilty of murder in the second degree or manslaughter, or killed the deceased

in self-defense, and, therefore, is not guilty. Although the law raises a presumption that the defendant is guilty of manslaughter, that presumption can be removed by evidence in the case. It is not necessary that the evidence should remove the presumption beyond a reasonable doubt, in order that you should acquit the defendant, but you must be satisfied only that the defendant struck the fatal blow in self-defense. In other words, such satisfaction need not be established beyond a reasonable doubt nor by the greater weight of the evidence, but through and by means of any evidence in the case that causes such satisfaction.

"2. The defendant contends that, at the time the fatal blow was given, he apprehended or believed that the deceased was about to take his life or do him great bodily harm. If that apprehension or belief was a reasonable one, and the defendant acted under the apprehension or belief that he was going to suffer death or great bodily harm, he was justified in killing the deceased, as it would be a case of self-defense, and you will acquit the defendant.

"3. In passing upon the reasonableness of his belief or apprehension, it is not proper or just to the defendant that you should judge him by the circumstances, as you are now sitting and looking coolly back upon the transaction, in the light of the evidence; but you (678) should put yourselves in the situation of the defendant and surround yourselves with the same circumstances that surrounded him, and then determine whether or not his apprehension was reasonable, if you find that he had such apprehension.

"4. The defendant contends that when he stabbed the deceased, the deceased had stricken him several times with the stick introduced in evidence. He contends that he had requested the deceased to stop beating or striking him, and had made an effort to leave the room in order to escape from the deceased; that he was sitting upon the bed putting on his shoes; that the deceased had locked the door and thrown the key under the bed and threatened to kill any one who went out. Defendant contends that, while he was sitting on the bed, the deceased struck him several times with the stick, against his protest, and while he was in the act of striking him again, he picked up the knife from the floor and stabbed the deceased, and at the time of such stabbing, he (the defendant) had reasonable grounds to believe and did believe, had reasonable grounds to apprehend and did apprehend, that the deceaseed was about to kill him or inflict great bodily injury upon him. The court charges you that, if you believe these contentions to be true, as heretofore it has charged you, the defendant was justified in stabbing the deceased, and you should render a verdict of not guilty.

"5. So, gentlemen, coming back to the main proposition—what oc-

curred at the time of the stabbing, and what was going on at that time? What was the character of the assault, if any, by the deceased upon the defendant, and what kind of weapon was he using? I repeat, if the defendant has satisfied you that, at the time the defendant struck this fatal blow, he had reasonable grounds to apprehend and did apprehend, reasonable grounds to believe and did believe—taking into consideration the character of the assault and the weapon used—that he was then in imminent danger of death or great bodily harm, and struck under those circumstances, it would be your duty to acquit him and find him 'Not guilty.' If he has failed to so satisfy you, or if you find that he struck the deceased because he was irritated and mad (679) at him; struck him at a time when he did not have reason to apprehend and did not apprehend, nor reasonable grounds to believe and did not believe, that he was in imminent danger of death or great bodily harm, but struck him because, as I said, he was mad at him; because he wasn't going to take any more from him; struck him because he had been previously stricken with a stick by the deceased, and not because he was in imminent danger of suffering death or great bodily harm, then it would be your duty to find him guilty of manslaughter; and if he struck him with malice, it would be your duty to find him guilty of murder in the second degree."

The court gave these further instructions:

"6. There must be a present impending peril to life, or great bodily harm, either real or so apparent as to create the honest belief in the mind of the defendant that there is an existing necessity to take the life of the person intended to be killed at the time that he attempts to take it.

"7. As I have stated to you, the burden is upon the defendant, he having admitted that he slew the deceased, to satisfy you, not beyond a reasonable doubt, not by the greater weight of the evidence or the preponderance of the evidence, but to satisfy you that at the time he struck this fatal blow that took the life of Dr. Misenheimer, that he was excusable for doing so.

"8. Now, gentlemen of the jury, give this matter your serious consideration. It is important to the State and to the defendant. Take the case and make up your verdict."

As already stated, the defendant was convicted of manslaughter, and after reserving his exceptions, brought the case here by appeal.

Attorney-General Bickett, Assistant Attorney-General Calvert, and Clarkson & Duls for the State.

Caudle & Delaney, Osborne, Cocke & Robinson, and R. S. Stewart for defendant.

WALKER, J., after stating the case: The plea in this case was self-defense. The prisoner offered evidence to show that the deceased was a violent and dangerous man when under the influence of liquor, and there was evidence tending to show that he had been drink- (680) ing just before he was cut with the knife by the prisoner. For the purpose of testing the competency of the proposed evidence, we will, therefore, assume that he was under the influence of liquor at the time he assaulted the prisoner with the stick. There was no offer to show that the prisoner, at the time of the altercation, knew of the alleged character of deceased as a violent and dangerous man. Upon this question, the law of this State is well settled by numerous decisions, however it may be in other jurisdictions, though we believe that the great weight of authority sustains the view of this Court. The general rule prevailing in most of the jurisdictions is that such evidence is not admissible, and in this State such a general rule is well settled, but it is subject to exceptions depending upon the peculiar facts and circumstances of each case. It has been said that these exceptions are now so well defined and established by the current of the more recent decisions that they have assumed a specific formula, and have themselves become a general rule subordinate to the principal one. *S. v. Turpin,* 77 N. C., 473. As at present understood and formulated, the rule may be thus stated: As a general rule, evidence of the character of the deceased is not relevant to the issue in a trial for homicide, and consequently it is not permissible to show his general reputation as a dangerous or violent man; but when there is evidence showing, or tending to show, that the prisoner acted in self-defense, under a reasonable apprehension that his life was in danger, or that he was in danger of great bodily harm, evidence of the character of the deceased as a violent and dangerous man is admissible, provided the prisoner, at the time of the homicide, knew of such character, or the nature of the transaction is in doubt. 25 A. and E. Enc. (2 Ed.), 281; 5 *ibid.,* pp. 872 and 873, where many cases are collected in the note which supports the text, and among them are cited *S. v. Turpin, supra; S. v. Hensley,* 94 N. C., 1022, and *S. v. Rollins,* 113 N. C., 722.

The reason why it is necessary for the prisoner to have known of the character of the deceased as a violent and dangerous man is well stated by *Justice Bynum* in *Turpin's case, supra,* at p. 477: (681) "Where one is drawn into combat of this nature by the very instinct and constitution of his being, he is obliged to estimate the danger in which he has been placed, and the kind and degree of resistance necessary to his defense. To do this he must consider, not only the size and strength of his foe, how he is armed, and his threats, but

also his character as a violent and dangerous man. It is sound sense, and we think sound law, that before a jury shall be required to say whether the defendant did anything more than a reasonable man should have done under the circumstances, it should, as far as can, be placed in the defendant's situation, surrounded with the same appearances of danger, with the same degree of knowledge of the deceased's probable purpose which the defendant possessed. If the prisoner was ignorant of the character of the deceased, then the proof of it would have been inadmissible, because his action could not have been influenced by the dangerous character of a man of which he had no knowledge." In *Hensley's case,* at p. 1032, the Court said on this point: "If the prisoner did not have knowledge of such character of the deceased (for violence), then such evidence would not be competent, because it could not be inferred that he acted upon facts of which he was ignorant." The present *Chief Justice* said in *Rollins' case:* "The evidence of the homicide was not circumstantial, and though the plea of self-defense was set up, it did not appear that the prisoner knew the character of the deceased for violence. Evidence to show such character was, therefore, properly excluded." It is also competent to show the character of the deceased as a violent and dangerous man when the evidence is wholly circumstantial and the character of the encounter is in doubt. The difference in the two kinds of cases is pointed out in *S. v. Byrd,* 121 N. C., 684: "Evidence of the general character of the deceased as a violent and dangerous man is admissible where there is evidence tending to show that the killing may have been done from a principle of self-preservation and, also, where the evidence is wholly circumstantial, and the character of the transaction is in doubt. We think that threats made by the deceased against the prisoner come under the same
(682) rule. If the threats are not communicated to the prisoner, and the character of the deceased is unknown to him, such evidence is not admissible, when offered only to show self-defense, because facts of which the prisoner had no knowledge could have no effect upon his mind. *S. v. Turpin, supra; S. v. Hensley, supra; S. v. Rollins, supra.* But where the evidence is wholly circumstantial, testimony of the violent character and threats of the deceased, even if unknown to the prisoner, are admissible as tending to show the inherent probabilities of the transaction. *S. v. Turpin, supra; S. v. Hensley, supra.* In the latter case the syllabus appears to differ from the opinion. While this principle has been doubted in some cases, we think it is correct and its adoption the only way of reconciling apparently conflicting opinions." See, also, *S. v. Gooch,* 94 N. C., 987; *S. v. Sumner,* 130 N. C., 718; *S. v. Exum,* 138 N. C., 600; *S. v. Baldwin,* 155 N. C., 494; *S. v. Price,* 158 N. C., 641.

Our reference to *S. v. Byrd,* and to the language quoted therefrom, must not be taken as an authoritative statement by us now of the rule where the evidence is circumstantial, for in this case the testimony is not of that character, as the details of the encounter were given in evidence by eye-witnesses, who testified substantially to the same facts. The present case has not been brought within either branch of the rule, for although there was evidence of self-defense, the character of the deceased for violence, if established, was not known to the prisoner, nor was the evidence circumstantial, nor was the nature of the transaction sufficiently in doubt. In no view, therefore, was it relevant to show the character of the deceased.

The instructions requested by the defendant, and the subjects of his second and third assignments of error, were properly refused. We have said that the expression, "if the jury believe the evidence," preliminary to a direction as to how they should find upon such belief, is "inexact" and should be "eschewed" by the judges, though when used it is not ground for a new trial, unless clearly prejudicial. *Sossaman v. Cruse,* 133 N. C., 470; *Merrell v. Dudley,* 139 N. C., 57. But a judge should not be required to use that form of expression, (683) especially if it will mislead the jury as to their province in passing upon the facts or restrict them in the exercise of their proper function as triers of the facts. The prayers were too strongly worded, and they are further objectionable as leaving the question of reasonable apprehension as to the prisoner's danger entirely too much to him, when it is one for the jury to decide, though in view of the facts, circumstances, and surroundings as they appeared to the prisoner at the time of the homicide. *S. v. Turpin, supra; S. v. Barrett,* 132 N. C., 1005. We thus stated the principle in *Barrett's case:* "The reasonableness of his apprehension must always be for the jury, and not the defendant, to pass upon; but the jury must form their conclusion from the facts and circumstances as they appeared to the defendant at the time he committed the alleged criminal act. If his adversary does anything which is calculated to excite in his mind, while in the exercise of ordinary firmness, a reasonable apprehension that he is about to assail him and take his life, or to inflict great bodily harm, it would seem that the law should permit him to act in obedience to the natural impulse of self-preservation and to defend himself against what he supposes to be a threatened attack, even though it may turn out afterwards that he was misled; provided, always, as we have said, the jury find that his apprehension was a reasonable one and that he acted with ordinary firmness." The prisoner must not only have thought that he was in danger of his life or of receiving great bodily harm, but his apprehen-

sion must be based on reasonable grounds, to be found by the jury in the manner we have stated, and not by the prisoner. *S. v. Cox,* 153 N. C., 638; *S. v. Kimbrell,* 151 N. C., 702; *S. v. Dixon,* 75 N. C., 275. The law is sufficiently lenient to him when it requires that he should be judged by the facts and circumstances as they reasonably appeared to him. *S. v. Nash,* 88 N. C., 621; *S. v. Gray, ante,* 608. But the principle of law attempted to be invoked in behalf of the prisoner was fully and correctly stated to the jury by the court in its charge. The prayer for instruction as to murder in the second degree, contained in
(684) the fifth assignment of error, is erroneous in itself, in view of the facts; but if it had been correct, the error in refusing it would have been harmless, as the jury did not convict of murder in the second degree, but of manslaughter. *S. v. Yates,* 155 N. C., 450; *S. v. Watkins,* 159 N. C., 480.

The fourth assignment of error is without merit, as there is no substantial difference between the statement of counsel and the charge of the court in respect to the matter. If, by inadvertence, the judge states any contention of counsel erroneously, it should be called to his attention, so that the mistake can be corrected. *Jeffress v. R. R.,* 158 N. C., at p. 223; *S. v. Cox, supra.*

In this case, the judge charged the jury clearly and exhaustively upon every phase of the evidence. He was not bound to adopt the language of the defendant's prayers for instruction, if they had been correct, but could select his own words, provided they correctly expressed the legal principles applicable to the facts. He properly placed the burden upon the defendant to *satisfy* the jury of every matter of excuse or mitigation, the killing with a deadly weapon being admitted. *S. v. Quick,* 150 N. C., 820; *S. v. Yates, supra; S. v. Rowe,* 155 N. C., 436; *S. v. Simonds,* 154 N. C., 197; *S. v. Bradley,* 161 N. C., 290. If the jury have returned a verdict contrary to the very truth of the matter, the only remedy was by motion in the court below to set it aside. We have no jurisdiction to reverse it, or to modify it, for that reason. The jury evidently found that the defendant did not act in self-defense, as explained by the court, when he struck the fatal blow, and therefore convicted him of manslaughter, upon the ground of legal provocation and the sudden heat of passion.

A careful review of the record and case on appeal has disclosed no error in the trial of the case.

No error.

HOKE, J., concurring: I concur in the disposition made of this appeal on the ground that all the eye-witnesses having been examined, there

is substantial agreement as to the objective facts of the occurrence, and their evidence, to my mind, presents an instance where the character of the deceased was only relevant as bearing on the (685) reasonableness of the prisoner's apprehension. In such case, evidence as to the character of the deceased as a violent, dangerous man, or threats of injury towards the prisoner, can only be received when such character is known or the threats have been communicated. But I do not assent to the proposition in so far as embodied in the principal opinion, and expressed in several of the authorities cited, that the testimony as to the character of the deceased or of previous threats towards the prisoner, when not made known to him, is only competent in cases which rest upon circumstantial evidence. On the contrary, I am clearly of the opinion that when there is evidence which tends to make out a case of self-defense, from the testimony of eye-witnesses, and the character of the transaction is in doubt, evidence of the character of the deceased as a violent, dangerous man, or of threats by him, importing serious menace to the prisoner, are both competent when it may tend to throw light on the occurrence and reveal the same in its true nature. To illustrate: if A and B have an altercation, and A kills B, on the trial, prisoner offers the evidence of eye-witnesses tending to show a homicide in his necessary self-defense, and that B was in the act of committing a felonious assault with a deadly weapon and with intent to kill; evidence from eye-witnesses, on the part of the State, that no such assault was being made nor any demonstration with a deadly weapon. In such case, testimony that the deceased was a desperado, one who was in the habit of using deadly weapons, or that, a short time before, he had threatened to kill A, would be evidence of the first importance tending to establish the facts of the occurrence.

Speaking to this question, in *S. v. Baldwin,* 155 N. C., at page 496, the writer, in a *per curiam* opinion, said: "It was insisted, further, that his Honor made an erroneous ruling in excluding evidence of certain uncommunicated threats of the deceased uttered shortly before the homicide, tending to show animosity towards the prisoner and a purpose to do him serious bodily harm. It is now generally recognized that in trials for homicide uncommunicated threats (686) are admissible (1) where they tend to corroborate threats which have been communicated to the prisoner; (2) where they tend to throw light on the occurrence and aid the jury to a correct interpretation of the same, and there is testimony *ultra* sufficient to carry the case to the jury tending to show that the killing may have been done from a principle of self-preservation, or the evidence is wholly circumstantial and the character of the transaction is in doubt. *Turpin's case,* 77

N. C., 473; *S. v. McIver,* 125 N. C., 645; Hornigan and Thompson Self-defense, p. 927; *Stokes' case,* 53 N. Y.; *Holler v. State,* Ind., 57; *Cornelius v. Commonwealth,* 54 Ky., 539. In the present case, while there was evidence on the part of the State tending to show that the prisoner fought wrongfully and killed without necessity, there is testimony on his part tending to show a homicide in his necessary self-defense, and the proposed evidence, tending as it did to throw light upon the occurrence, should have been received."

I take this to be the correct and permissible deduction from *Turpin's case, supra,* and the position, in my judgment, is supported by the great weight of authority, many of the decisions being cited in the well prepared brief of the prisoner's counsel, notably *Wiggins v. The People,* 93 U. S., 567; *S. v. Thompson,* 94 Oregon, 46; *S. v. Kelly,* 194 Mo., 300; *S. v. Keener,* 18 Ga., 194; *Williams v. State,* 48 Amer. Rep. (Texas), 239.

Cited: Alexander v. Statesville, 165 N. C., 531; *S. v. Cameron,* 166 N. C., 384; *S. v. Johnson, ib.,* 396; *S. v. Pollard,* 168 N. C., 121; *S. v. Williams, ib.,* 197; *Nevins v. Hughes, ib.,* 478; *Lloyd v. Venable, ib.,* 536; *S. v. Wade,* 169 N. C., 308; *Ball v. McCormack,* 172 N. C., 682; *S. v. Merrick, ib.,* 872; *S. v. Johnson, ib.,* 925; *S. v. Burton, ib.,* 942; *S. v. Foster, ib.,* 964.

INDEX

NOTE.—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are called. It is hoped that in this manner, and by the emboyding of the sketch words in *italics* in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and, if so, where.

ABANDONMENT. See Criminal Law, 16.

ABATEMENT. See Actions, 1.

ACTIONS. See Parent and Child; Assistance, Writ of; Parties.

1. *Contracts, Written—Breach—Support of Another—Death of Obligee—Abatement—Executors and Administrators—Parties—Courts—Rules.* Where the obligor on a bond given for the support of another for life, and for a valuable consideration, has failed to comply therewith, and the obligee has since died, leaving the obligor responsible under the terms of the bond for moneys due for the former's reasonable support, the action upon the bond, brought by the obligee, does not abate upon his death, and the Superior Court clerk has the authority to make his administrator a party (Revisal, sec. 417); or he could be made a party under Supreme Court Rule No. 46. *Martin v. Martin*, 41.

2. *Actions—Wrongful Death—Interpretation of Statutes—Executors and Administrators—Parties—Trespass—Damages.*—The right of recovery of a defendant for wrongful death rests entirely by statute, and the right of action thereunder is only given to the executor or administrator (Revisal, sec. 59); and hence a husband may not recover damages therefor in his action against the defendant in aggravation of damages caused by the defendant's tortious acts while trespassing on his lands. *Hood v. Telegraph Co.*, 70.

3. *Demurrer — Misjoinder — Multiplicity of Actions — Interpretation of Statutes.*—Where it is alleged that the officers and chief stockholders of a bank, in order to merge with another bank, procured the indorsement of the papers in bank by the plaintiffs upon the agreement that the defendants would also indorse them, all assuming a pro rata liability therein, and that the defendants delivered these papers, many of which were worthless, to the other bank for the purpose of merger, but without having indorsed them as agreed; that the plaintiffs have been forced by judgment to pay off some of these indorsed papers in a large amount: it is *Held* that a demurrer for misjoinder of parties and causes of action is bad; for the subject-matter of the action and the parties being the same, a multiplicity of suits was prevented. Revisal, sec. 469 (2). *Ayers v. Bailey*, 209.

4. *Demurrer — Misjoinder — Same Subject-matter and Parties — Torts—Equity.*—Where the stockholders of a corporation sue its officers for damages for their mismanagement and negligence in accepting worthless paper, and inducing the plaintiffs to become indorsee thereon to their loss and damage, and in failing to indorse these papers themselves under an agreement to do so, the causes of action are properly

ACTIONS—*Continued.*

joined, one sounding in tort and the other being to enforce an equitable right arising out of transactions connected with the same subject-mattter. *Ibid.*

5. *Demurrer—Cause of Action—Misjoinder—Motion to Divide—Procedure.* A demurrer for misjoinder of causes of action in a complaint is bad, the procedure being by motion to divide them. *Ibid.*

6. *Demurrer—Good Faith—Answer Over—Procedure—Interpretation of Statutes.*—Where a demurrer to a complaint is interposed in good faith, and overruled, the defendant is entitled to answer over. Revisal, sec. 506. *Ibid.*

AFFIDAVITS. See Attorney and Client.

AFFRAY. See Homicide.

AGREEMENTS. See Motions; Appeal and Error; Costs.

AMENDMENT. See Constitutional Law.

APPEAL AND ERROR. See Reference; Practice; Trials; Costs; Jurors.

1. *Judgment by Default—Undertaking—Inquiry—Harmless Error.*—Where, in an action of ejectment, plaintiff has obtained a judgment for the failure of defendant to give the undertaking required by Revisal, sec. 453, the judgment is conclusive as to all matters therein determined; and where the judgment omits the inquiry as to damages, but is rendered only as to the plaintiff's title or right of possession, the defendant cannot be heard to complain that a final judgment had been entered. *Patrick v. Dunn*, 19.

2. *Appeal and Error—Instructions—Presumptions.*—Where the charge of the trial judge to the jury is not set out in the record on appeal to the Supreme Court, it will be presumed to have been correctly given. *Smith v. R. R.*, 29.

3. *Motions—Exceptions—Assignments of Error.*—It is the duty of the party appealing from an adverse ruling of the trial court, upon his motion to set aside a judgment for excusable neglect, to have requested the court to find the facts upon which the ruling was based, or his exception aptly taken of record to a refusal to have done so at the appellant's request; and an assignment of error, which is no part of the record, but of the attorney in grouping the exceptions noted in the case on appeal, which merely states that the request was made and refused, unsupported by an exception of record, will not be considered on appeal. However, the Court has examined the appellant's affidavits upon which his motion was based, and holds that therefrom excusable neglect is not shown. *McLeod v. Gooch*, 122.

4. *Appeal and Error—Two Appellants—When Two Records Are Unnecessary—Practice.*—Where there are two appeals by different parties in the same cause and on the same side, presenting exactly the same question, and they are not antagonistic to each other, only one record is required. Though separate records are sent up, it is, however, immaterial except as to the unnecessary expense. *Pope v Lumber Co.*, 208.

5. *Appeal and Error—Trial—Presumptions of Correctness—Objections and Exceptions.*—There being evidence in this case which would

APPEAL AND ERROR—*Continued.*

justify damages for an entire breach of contract by reason of defendant's act in preventing the plaintiff from fulfilling his part, the Supreme Court, on appeal, will presume that the feature of the case relating to the measure of damages has been correctly tried, in the absence of error assigned therein. *Westerman v. Fiber Co.*, 294.

6. *Tax Sales—Tender as Agent—Equitable Owner—Appeal and Error—Regularity of Trial—Presumptions.*—The plaintiff purchased certain lands with the erroneous understanding that taxes for that year had been paid. The lands were sold for these taxes, and he testified that he had made a proper tender to the purchaser within the year, as required by the statute, in his own name and in the name of his grantor, which had been refused. The jury having found on this issue for the plaintiff, it is *Held*, that the question whether the plaintiff, as equitable owner, could make a legal tender of the taxes does not arise, the presumption being that the jury was correctly instructed, when no exception to the charge is taken and the charge does not appear in the record. *Green v. Dunn*, 340.

7. *Appeal and Error—Stenographic Notes—Record.*—Transcribed stenographer's notes of the evidence taken at the trial should not be sent up as a part of the case on appeal, nor will they be accepted as such when tendered in the Supreme Court for the first time. *Ibid.*

8. *Instructions—Appeal and Error—Favorable to Appellant—Harmless Error.*—The appealing party cannot complain of error in a charge of the court which is in his own favor. *Smathers v. Hotel Co.*, 346.

9. *Appeal and Error—Agreements of Record—Instructions.*—Where the parties to an action entered into an agreement in the trial court, which appears of record on appeal, that the judge should direct a verdict according to his ruling on the law, as in this case, and should he hold a judgment relating to the land or certain conveyances thereof to be color of title, the jury should find that the party claiming under them had held adverse possession sufficient to ripen his title, the agreement entered into will be held as binding upon the parties, leaving only the ruling as to color to be passed upon on appeal. *Burns v. Stewart*, 360.

10. *Appeal and Error—Appeal by Two Parties—One Record.*—Where both defendants appeal to the Supreme Court on exceptions which are not antagonistic to each other, it is an unnecessary expense to send up separate records. *Hagaman v. Bernhardt*, 381.

11. *Appeal and Error—Evidence in Narrative—Waiver of Parties.*—The requirements of the rule of the Supreme Court, that the evidence must appear in the case on appeal in narrative form, cannot be waived by the parties. *Bank v. Fries*, 516.

12. *Appeal and Error—Appeal Bond—Laches—Motion to Dismiss—Motion to Reinstate.*—It is necessary to comply with the requirement that the appellant give bond unless permitted to appeal *in forma pauperis;* and in this case, it appearing that the appellant had not given the required bond at the time the case was called, after several agreed continuances, in the Supreme Court, and that upon appellee's motion, the appellant did not then offer to do so, the

appeal was properly dismissed, and a motion to reinstate, thereafter made at the same term, should not be granted, as no legal excuse for appellant's laches has been shown. *Lunsford v. Alexander*, 528.

13. *Appeal and Error—Promise of Clerk to Notify—Appellant's Laches—Legal Excuse.*—A request to the clerk of the Supreme Court to notify an appellant of the time when his case will be reached in the call of the district to which it belongs is a mere matter of personal courtesy, and not a legal obligation on the part of the clerk; and the appellant may not set up as an excuse for his laches in failing to be present, the failure of the clerk to reply. *Ibid.*

14. *Appeal Bond—Duty of Appellant—Laches—Attorney and Client—Principal and Agent.*—Providing an appeal bond is the duty of the appellant and not of his attorney, and when the latter is authorized to act therein, he does so as the agent of the party appealing, who is, in the relation of principal, responsible for his laches. *Ibid.*

15. *Appeal and Error—Stenographer's Notes of Trial—Case Settled by Judge—Remanding Case—Procedure.*—Where by the order of the trial judge in settling a case on appeal, the stenographer's notes of the trial are set out as part thereof, in violation of the rule of the Supreme Court, the cause will be remanded, that a case on appeal be correctly stated; and in this case the Court allows the appellant fifteen days after the case reaches the county from which it is appealed to serve his case, and the appellee ten days after such service to prepare and serve exceptions or counter-case. *Fisher v. Lumber Co.*, 531.

16. *Appeal and Error—Failure to Work Roads—Judgment—Cost.*—Proceedings for failure to work the public roads are of a civil nature, from which an appeal lies in favor of the prosecutor, who has been taxed with costs. *S. v. Bailey*, 583.

17. *Same—Presumptions—Evidence.*—Where the Superior Court affirms the judgment of a justice of the peace in proceedings for failure to work the public roads, and an appeal is taken to the Supreme Court, without a statement of the case on appeal by the prosecutor, who has been taxed with the costs, the presumption is in favor of the judgment appealed from; and as the findings of fact of the Superior Court judge are conclusive, if there is evidence to support them, it must be shown by the appellant that there was no such evidence. *Ibid.*

18. *Appeal and Error—Justice's Court—Failure to Work Roads—Costs—Superior Court—Facts Reviewed.*—On appeal from the judgment of a justice of the peace taxing the prosecutor with costs, in proceedings for failure to work the public roads, the findings of fact of the justice are reviewable by the Superior Court judge. *Ibid.*

19. *Appeal and Error—Superior Court—Failure to Work Roads—Judgment—Costs—Affirmance of Findings—Presumptions.*—Where in proceedings for failure to work the public roads, the Superior Court judge affirms the judgment rendered before a justice of the peace in the defendant's favor, it is an approval of the findings of fact as well as the conclusions of law; and where the justice of the peace has taxed the prosecutor with costs upon findings that

APPEAL AND ERROR—*Continued.*

there was no reasonable ground for the prosecution, or that it was not required by the public interest, or that the prosecution was frivolous or malicious, it is not necessary that the Superior Court judge restate these findings in affirming the judgment. *Ibid.*

20. *Appeal and Error—Objections and Exceptions—Unanswered Questions.*—Where the materiality of an excluded unanswered question does not appear of record, it will not be considered on appeal. *S. v. Wallace*, 622.

21. *Appeal and Error—Service of Case—Extension of Time to Serve—Written Agreement—Rules of Practice.*—Any agreement for extension of time to serve case or counter-case on appeal must be in writing, or an agreement to that effect must appear of record, to be recognized in the Supreme Court; and where an appellee has waived any irregularity in the time for appellant to serve his case, he may not claim an extension of time, by an oral agreement, for service of his counter-case, when it is denied by the appellant that such an agreement was made. Rule 39, Supreme Court, 140 N. C., 499. *S. v. Black*, 637.

22. *Instructions—Erroneous in Part—Regarded as a Whole.*—A requested prayer for special instructions is regarded as a whole, and when erroneous in part, the refusal of the trial judge to instruct the jury in accordance with such parts as are correct will not be held for reversible error. *S. v. Greer*, 640.

23. *Instructions—Contentions of Fact—Statements—Corrections—Notice—Appeal and Error—Practice.*—An assignment of error on the ground that the trial judge incorrectly stated to the jury the contentions of fact of the parties will not be considered when it does not appear that it was called to the attention of the court in time for him to have corrected it. *S. v. Blackwell*, 672.

24. *Instructions Substantially Given—Appeal and Error.*—Where the trial judge has fully and properly instructed the jury upon the law applicable to the facts, it will not be held as reversible error that he did not adopt the language of substantially correct instructions tendered by the appellant. *Ibid.*

25. *Verdict—Against Weight of Evidence—Motions—Court's Discretion—Practice—Appeal and Error.*—Where under proper instructions and competent evidence the jury have returned a verdict contrary to the truth of the matter, the only remedy is by motion in the court below to set aside the verdict, and the action of the judge thereon is not reviewable on appeal. *Ibid.*

ASSAULT AND BATTERY.

1. *Assault and Battery—Intent.*—To constitute the offense of assault and battery by taking hold of another, there must be an intention to hurt or injure, and where the act complained of is done with a kind intent, and so understood, unaccompanied by any injury, it is not indictable. *S. v. Hemphill*, 632.

2. *Same—Conflicting Evidence—Instructions.*—Where it appears from the prisoner's evidence that in order to save the prosecutrix from being led astray by designing men, he took hold of her for the purpose of carrying her to her relative, she freed herself from his

ASSAULT AND BATTERY—*Continued.*

hold, and he did nothing further except to inform her relative of the circumstances, and there is also evidence tending to establish assault and battery, it is error for the court to charge the jury that upon the defendant's own evidence he was guilty of the assault. *Ibid.*

3. *Assault and Battery—Intent Presumed—Questions for Jury.*—The intent with which the act of laying hold of another is done may be inferred by the jury from the act itself, under the surrounding circumstances, upon a trial for assault and battery; and when the act itself is unlawful, the intent is immaterial, or will be presumed. *Ibid.*

ASSIGNMENTS OF ERROR. See Appeal and Error.

ASSISTANCE, WRIT OF.

1. *Writ of Assistance—Motions—Notice—Procedure — Equity — Possession.*—A writ of assistance is one issuing from a court having equitable jurisdiction for the enforcement of decrees or orders, conferring a right to the present possession or enjoyment of property, usually upon motion after notice duly served, when the right thereto is clear; and, as a rule, only against parties or persons bound by the terms of the decree. *Clark v. Aldridge*, 326.

2. *Partition—Issues—Superior Court—Writ of Assistance—Original Action—Procedure—Appeal and Error.*—These proceedings to partition land were transferred to the Superior Court in term, to try equitable issues as to the title therein arising, when the defendant intervened and claimed title under independent deeds, which proceeded to final judgment in his favor. Upon motion properly made for a writ of assistance to put him in possession, a trial was had as if in an original action: *Held*, though a writ of assistance appears to have been the proper method, the Supreme Court takes the view adopted by the parties and decides the case accordingly. *Ibid.*

ASSUMPTION OF RISKS. See Master and Servant.

ATTORNEY. See Constitutional Law.

ATTORNEY AND CLIENT. See Appeal and Error.

1. *Pleadings—Verification—Attorney—Principal and Agent—Interpretation of Statutes—Substantial Compliance.*—An attorney of a party may verify the pleading if the action or defense be founded upon a written instrument for the payment of money only, which is in the attorney's possession, or if all the allegations of the pleadings be within his personal knowledge; but when so verified, the statute requires (which requirements must be substantially complied with) that the attorney set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reason it is not made by the party. Revisal, secs. 488, 489, 490. *Miller v. Curl*, 1.

2. *Same—Defective Affidavits.*—A verification of a complaint made by an attorney of the plaintiff, setting forth in the affidavit "that the facts set forth . . . as of his own knowledge are true, and those stated on information and belief he believes to be true . . . ; that the action is based on a written instrument for the payment

ATTORNEY AND CLIENT—*Continued.*

of money, and that said instrument is in his possession, and he therefore makes this verification pursuant to the provisions of the Revisal of 1905," does not comply with the requisites of the statute, and is defective in not stating the grounds of his belief and the reason why the party himself did not make the verification. *Ibid.*

3. *Same—Attorney's Fees—Correction of Judgment—Harmless Error.*—Where the Superior Court judge has refused to vacate an irregular judgment by default for the want of an answer, and the moving party has shown no meritorious defense, etc., and therefrom an appeal is taken by the defendant, the error of the lower court in reviewing the judgment and correcting it so as to exclude attorney's fees from the amount of the recovery is in favor of the appellant, of which he will not be heard to complain. *Ibid.*

4. *Attorney and Client—Duty of Client—Laches—Judgment by Default.* A party litigant should bestow upon his case that degree of care and attention which a man of ordinary business prudence usually gives to his important business, and the laches of his attorneys in permitting a judgment by default to be taken therein against him is imputable to the client. *McLeod v. Gooch*, 122.

AUTOMOBILES. See Negligence.

BANKS AND BANKING. See Evidence, 25; Intoxicating Liquors, 1, 2.

Bills and Notes—Drafts, Bill of Lading Attached—Banks and Banking—Overdrafts — Deposits — Purchaser for Value — Liens — Evidence—Questions for Jury.—A vendor of goods delivered them to the carrier, received a bill of lading therefor, drew on the purchaser with bill of lading attached to draft, indorsed the draft, deposited it in a bank, which credited his account with the amount. The payee failed or refused to pay the draft, and the bank charged back the draft to the drawer, retained the draft with the attached bill of lading, and claimed to be a purchaser of the draft, and to have a lien on the cotton shipped. There was evidence that at the time of the transaction the drawer's account was overdrawn at the bank, and the amount of the draft went to his credit in the bank in extinguishment of the debt; that there was no agreement between the drawer and the bank that the former would protect the draft in the event it was not paid, but to the contrary; also that the dishonored draft was charged back to the drawer as a matter of bookkeeping: *Held*, if the drawer owed the bank, and the draft was discounted by it and the proceeds applied in discharge of such balance, the bank became the owner of the draft, and a purchaser for value to that extent of the cotton described in the bill of lading; and, further, that charging the draft to the drawer's account was some evidence of the cancellation of the transaction, and payment by the drawer, open to explanation, which was also for the determination of the jury. *Latham v. Spragins*, 404.

BILLS AND NOTES. See Actions, 5, 6; Receivers; Intoxicating Liquors, 1.

1. *Notes—Defenses—Fraud and Misrepresentations — Warranty — Damages—Pleadings—Counterclaim.*—The defense to an action upon a note for fraud and misrepresentation is essentially different to that

of breach of warranty, for in the latter case the instrument itself is not sought to be invalidated, and the remedy is for damages by way of counterclaim arising under the warranty. *Bank v. Walser*, 53.

2. *Notes—Warranty—Compromise—New Note—Consideration—Interpretation of Statutes.*—Where one of several makers of a note agree with the payee that they shall be released from their obligations by giving a new note in a smaller sum, subject to the same conditions of warranty as the old one, the giving of a new note is valid as a compromise under the Revisal, sec. 859, and the warranty in the former transaction is a part of the consideration for the new one, and is enforcible. *Ibid.*

3. *Notes—Contracts—Warranty, Breach of—Counterclaim—Evidence—Fraud and Misrepresentations.*—Where a note is given in the purchase of a horse, and in an action thereon the defense is set up that by a collateral written agreement the horse was warranted to be a reasonably sure foal getter, and if otherwise, the maker of the note was to deliver him to the payee in good condition and receive in return one of the same breed, etc., evidence only that the animal sold was not as represented in being a good foal getter is irrelevant upon the question of fraud in the procurement of the note; and is alone competent, when properly pleaded, to show a breach of warranty that would entitle the defendant to recover damages upon his counterclaim. *Ibid.*

4. *Notes—Holder in Due Course—Contracts—Warranty—Performances—Indorsements—Guarantor of Payment.*—Where a horse is sold upon the warranty that he is a reasonably sure foal getter, and if not as warranted, he was to be exchanged for one of like breed, etc., it is *Held*, in an action upon a note given for the horse, and held by one claiming to be a holder in due course, for value, that the maker of the note must show a refusal on the part of the seller of the horse to comply with the conditions of the warranty in order to defeat a recovery thereunder, and this doctrine applies whether the plaintiff is an indorsee or a guarantor of payment. *Ibid.*

5. *Bills and Notes—Conditional—Reference to Other Papers—Nonnegotiable—Equity—Interpretation of Statutes.*—Where a promissory note given for the purchase price of timber refers to a deed and recites that it is "subject to the provisions of said deed," it is conditional in form, and being dependent in its provisions upon an outside paper, it is nonnegotiable and subject to the equities existing between the original parties, in the hands of a purchaser. Revisal, sec. 2151. *Pope v. Lumber Co.*, 209.

6. *Negotiable Instruments—"Value"—Interpretation of Statutes.*—A holder of a negotiable instrument for value is one who acquired the instrument for a consideration sufficient to support a simple contract, such as an antecedent or preëxisting debt; or a lien on the instrument arising either from contract or by implication of law, to the extent of the lien. Revisal, secs. 2173, 2175. *Smathers v. Hotel Co.*, 346.

7. *Negotiable Instruments—Infirmity—"Notice"—Interpretation of Statutes—Instructions—Appeal and Error.*—To constitute notice of infirmity of a negotiable instrument, the holder or transferee for value

BILLS AND NOTES—*Continued.*

before maturity must have had actual knowledge thereof or of such facts that his action in taking it amounted to bad faith; and notice that would put a reasonably prudent man upon inquiry is insufficient (Revisal, sec. 2205); and a charge to the jury will be held for reversible error that lays down for the guidance of the jury the incorrect as well as the statutory rule of the sufficiency of the notice required. *Ibid.*

8. *Bills and Notes—Drafts, Bills of Lading Attached—Indorser for Value—Lien on Shipment—Purchaser's Rights.*—When a vendor of goods consigns them to the purchaser, takes a bill of lading from the carrier, intends to resume control over them, and draws on the purchaser for the price, and delivers the bill of exchange with the bill of lading attached to an indorsee for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the rights of the holder of the bill of lading to demand payment of the bill of exchange, and cannot retain the price of the goods on account of a debt due to him from the consignor. *Latham v. Spragins*, 404.

BOND ISSUES. See School Districts.

BOUNDARIES. See Deeds and Conveyances; Trespass; Evidence.

BURDEN OF PROOF. See Wills; Trials.

BURNINGS. See Criminal Law.

CARRIERS OF GOODS.

1. *Carriers of Goods—Dangerous Shipments—Corporation Commission's Powers—Interpretation of Statutes.*—The Corporation Commission is given statutory powers in making orders and regulations for the safety, etc., of shippers or patrons of any public-service corporation, and particularly to regulate the shipment of articles rendering transportation dangerous, such as inflammable articles of freight. Chapter 471, Laws 1907; Revisal, secs. 1066, 1099, and 1112. *Tillery v. R. R.*, 37.

2. *Same—Refusing Shipments—Penalty Statutes.*—Where the Corporation Commission has authorized and fixed and approved the charges for the transportation of baled hay, without expressly requiring its acceptance by the carrier when unbaled or loose, and by express provision it does not require the carrier to receive "cotton or other merchandise and warehouse the same unless the articles offered are in good shipping condition," etc., the carrier is not liable, under the ruling of the Commission, for the penalty prescribed by Revisal, sec. 2631, for refusing to receive for shipment a carload of loose hay, such shipments evidently being of such a character as to endanger the property, not only of the carrier, but that of others received by the carrier for shipment. *Ibid.*

3. *Same—Bills of Lading—Loading by Shipper—Acceptance—Principal and Agent.*—Where the agent of a railroad company has permitted a shipper to load loose hay in its car, and has immediately wired for instructions, which are received, refusing the shipment, and consequently the shipment is refused by him before issuing the bill of lading, the refusal to issue the bill of lading is a refusal to receive

CARRIERS OF GOODS—*Continued.*

the shipment, and the carrier is not liable for the penalty prescribed by Revisal, sec. 2631, upon the theory that the rules of the Commission, while not requiring the acceptance of the shipment, do not forbid its acceptance by the carrier, and having accepted the shipment, the carrier is liable. *Ibid.*

4. *Carriers of Goods—Principal and Agent—Acceptance of Shipment—Scope of Agent's Authority.*—An agent of the carrier is without authority from his principal to receive goods for shipment in a condition prohibited by law. *Ibid.*

5. *Carriers of Goods—Cars Requested—Cars Furnished—Agreed Rate—Interstate Commerce Commission's Rules—Interstate Commerce.*—A consignor of an interstate shipment requested two cars of certain dimensions from the carrier, sufficient for the purpose, which the carrier was unable to furnish, though of a size constantly used; and it furnished for the shipment smaller cars, requiring four, upon which the freight rate was greater. These smaller cars were, under the circumstances, billed at the rate of the larger cars, and the consignee was charged the greater rate, which the shipper had to pay under his contract of delivery: *Held*, that while the rates fixed by the Commission should prevail against the other carriers, as to the one charged with the duty of supplying the cars at the point of shipment, or taking part in such initial arrangement, the shipper could recover, this being a case expressly provided for by the rule of the Interstate Commerce Commission, and coming directly within its terms. *Furniture Co. v. R. R.*, 138.

6. *Bills and Notes—Drafts, Bills of Lading Attached—Indorser for Value—Lien on Shipment—Purchaser's Rights.*—When a vendor of goods consigns them to the purchaser, takes a bill of lading from the carrier, intends to resume control over them, and draws on the purchaser for the price, and delivers the bill of exchange with the bill of lading attached to an indorsee for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the rights of the holder of the bill of lading to demand payment of the bill of exchange, and cannot retain the price of the goods on account of a debt due to him from the consignor. *Latham v. Spragins*, 404.

7. *Bills and Notes—Drafts, Bill of Lading Attached—Banks and Banking—Overdrafts—Deposits—Purchaser for Value—Liens—Evidence—Questions for Jury.*—A vendor of goods delivered them to the carrier, received a bill of lading therefor, drew on the purchaser with bill of lading attached to draft, indorsed the draft, deposited it in a bank, which credited his account with the amount. The payee failed or refused to pay the draft, and the bank charged back the draft to the drawer, retained the draft with the attached bill of lading, and claimed to be a purchaser of the draft, and to have a lien on the cotton shipped. There was evidence that at the time of the transaction the drawer's account was overdrawn at the bank, and the amount of the draft went to his credit in the bank in extinguishment of the debt; that there was no agreement between the drawer and the bank that the former would protect the draft in the event it was not paid, but to the contrary; also that the dishonored draft was charged back to the drawer as a matter of bookkeeping: *Held*, if the drawer owed the bank, and the draft was

CARRIERS OF GOODS—*Continued.*

discounted by it and the proceeds applied in discharge of such balance, the bank became the owner of the draft, and a purchaser for value to that extent of the cotton described in the bill of lading; and, further, that charging the draft to the drawer's account was some evidence of the cancellation of the transaction, and payment by the drawer, open to explanation, which was also for the determination of the jury. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers—Ejecting Passenger—Allegations—Proof—Variance—Interpretation of Statutes.*—A variance between the allegation and the proof must be of such a character as to mislead the adverse party to the action; and where a railroad company is sued by a passenger for a wrongful ejection from its train alleged to have been at a certain one of its stations, and upon the trial the evidence of both parties relates with unanimity to a certain other of its stations, the variation will not be deemed as material. Revisal, sec. 515. *Edwards v. R. R.*, 279.

CHARTER. See Constitutional Law, 3.

CITIES AND TOWNS. See Municipal Corporations.

CLAIM AND DELIVERY.

1. *Claim and Delivery—Replevy—Final Judgment—Return of Property—Measure of Damages.*—Where the recovery of personal property is sought, with the ancillary remedy of claim and delivery, and the defendant has replevied the property and judgment has been finally rendered in the plaintiff's favor, it is proper for the judgment to require the return of the property, if to be had, and, if not, for its value as assessed by the jury, with damages for its detention. Revisal, sec. 570. *Hendricks v. Ireland*, 523.

2. *Claim and Delivery—Judgments—Costs and Expenses—Agreement of Parties—Appeal and Error.*—Where the defendant in claim and delivery of crops has replevied the property, and the plaintiff has recovered final judgment, an additional item of expense or cost allowed by consent to the plaintiff will be held as binding upon the parties on appeal. *Ibid.*

CLAIMS. See Municipal Corporations.

CLERKS OF COURT. See Appeal and Error; Partition.

CLOUD UPON TITLE. See Equity.

1. *Equity—Cloud Upon Title—Possession—Interpretation of Statutes.*—A suit can now be maintained to remove a cloud upon the title to lands by one who is not in possession thereof. Revisal, sec. 1589. *Spears v. Woodhouse*, 66.

COLOR OF TITLE. See Deeds and Conveyances, 6, 16, 17; Judgments, 14.

COMMERCE. See Railroads; Removal of Causes; Intoxicating Liquors; Carriers of Goods.

Interstate Commerce—Federal Employers' Liability Act—Local Employment—Interpretation of Statutes.—The Federal Employers' Liability

COMMERCE—*Continued.*

Act applies only when the employee of a railroad company receives the injury complained of while in some way engaged on trains connected with interstate commerce, and in this case it is held not to apply where the plaintiff was employed by the defendant railroad company to work on its roadbed, and was injured while obeying an order of his superior in boarding an interstate train to go to a near-by point, also situated within the State, for mail. *Myers v. R. R.*, 343.

CONDEMNATION. See Railroads; Street Railways.

CONSTITUTION OF NORTH CAROLINA.

ART.

I, sec. 7. A charter to a railroad company is in consideration of public service, and the Legislature may authorize a merger. *Reid v. R. R.*, 355.

II, sec. 14. Where an act of the Legislature has been passed in accordance with the requirements of this article, except as to an amendment which only reduces the amount of the issue, the bonds are valid. *Gregg v. Commissioners*, 479.

VI. It is not required that a recorder of a municipal court be a lawyer. *S. v. Bateman*, 588.

VIII, sec. 1. This act construed with Art. I, sec. 7, authorizes the Legislature to grant a charter consolidating railroad companies. *Reid v. R. R.*, 355.

X. sec. 6. Revisal, sec. 952, as to the privy examination of the wife in conveyances of land, is constitutional. *Jackson v. Beard*, 105.

CONSTITUTIONAL LAW. See Drainage Districts.

1. *Corporations—Franchises—Special Privileges—Exceptions—Constitutional Law—Legislative Acts—Ratification of Merger—Subsequent Acts.*—The grant of a special charter to a railroad or other like corporation is not in conflict with the Constitution, Art. I, sec. 7, providing that no man or set of men are entitled to exclusive emoluments or privileges but on consideration of public services, our decisions being to the effect that the charters of public-service corporations come directly within the exception contained in the constitutional provision; and especially in view of Article VIII, sec. 1, authorizing the formation of corporations by general laws and special acts which may be altered or repealed by the Legislature. *Reid v. R. R.*, 356.

2. *Bond Issues — Legislative Authority — Constitutional Law — Amendments Immaterial—Concurrence.*—Where an act for the issuance of bonds has been passed in accordance with the provisions of Article II, sec. 14, of the Constitution by both branches of the Legislature, and the second branch thereof acting on the bill has passed an amendment which does not increase the amount of the bonds or tax to be levied, or otherwise materially change the bill, the amendment is valid when concurred in by both of the legislative branches, and it does not affect the constitutionality of the act. *Gregg v. Comrs*, 479.

3. *Public Offices—Qualifications—Constitutional Law—Legislative Powers—Recorders' Courts—Attorney.*—The Constitution of North Caro-

CONSTITUTIONAL LAW—*Continued.*

lina, Art. VI, provides who shall be voters, and by section 7 thereof, that "every voter in North Carolina, except in this article disqualified, shall be eligible to office," and the Legislature cannot add to the constitutional disqualifications to hold office by requiring candidates for the position of recorder in a municipal court to be "a licensed attorney at law." The difference between an "assurance" and a "qualification" to office pointed out and discussed by CLARK, C. J. *S. v. Bateman*, 588.

4. *Constitutional Law—Trial by Jury—Twelve Men.*—Under the common law and the State and Federal Constitutions the word jury signifies twelve men duly impaneled in the case to be tried. *S. v. Rogers*, 656.

CONTRACTS. See Bills and Notes; Husband and Wife; Corporations; Indemnity; Intoxicating Liquors.

1. *Contracts, Written—Interpretation—Intent.*—A written contract should be so construed as to effectuate the intent of the parties as gathered from the entire instrument, in accordance with the language used therein, in proper instances taking into consideration the condition of the parties and the purpose for which it was entered into. *Martin v. Martin*, 41.

2. *Same — Reasonable Interpretation — Existing Conditions.*—Where a written contract is susceptible of two meanings, one of which will render it valid and the other invalid, or if one is reasonable and the other unreasonable, the construction will be adopted which will give life and force to the writing. *Ibid.*

3. *Same—Acts of the Parties.*—The words of a written instrument or bond for the support of another is generally construed most strongly against the party using them, and in cases of doubt the construction adopted by the parties will have weight. *Ibid.*

4. *Same—Support of Another—Breach of Contract—Payee—Beneficiaries' Rights of Action.*—Where a conveyance of lands is made in consideration of the support of the grantors, expressed in a separate instrument of writing or bond, which was done for a while and discontinued by the act and fault of the obligor, in violation of its terms, the obligees thereunder may recover such sum or sums of money necessary for a reasonable support, though the bond may not specify to whom it was to be payable, the plain intent of the instrument being that those for whose benefit the instrument was made are those to whom the money should be paid. *Ibid.*

5. *Contracts—Cutting Timber—Breach—Counterclaim—Evidence of Damages—Increased Cost—Foreign Issues.*—Where the plaintiff and defendant had entered into a contract for the former to cut and deliver wood from a large body of the latter's timber land, at a certain price per cord, and the damages are laid for the plaintiff's profit therein which was alleged to have been prevented by the acts of the defendant, the latter contending for damages by way of counterclaim for an increased price it was forced to pay by reason of the plaintiff having abandoned its contract, testimony of defendant's witnesses as to the cost of cutting the wood from other parts of the lands and under contracts with other parties is incompetent, as it involves the capacity of these persons for management, the

CONTRACTS—*Continued.*

price paid for hands, without reference to or description of the methods pursued or conditions under which the work was done by them, or their manner of doing it. *Westerman v. Fiber Co.*, 294.

6. *Account and Settlement—Fraud—Evidence—Questions for Jury—Principal and Agent.*—The plaintiff had contracted with the defendant for the latter to cut, haul, and deliver a large quantity of timber at a certain place, and after the expiration of several years it appeared that the plaintiff had overpaid the defendant. An agreement as to the amount was made by the parties, and to secure to the plaintiff the payment thereof a certain quantity of lumber was placed in the hands of a trustee. In his action to set aside this agreement there was allegation and evidence tending to show that the lumber pledged by the plaintiffs was some which the defendant had delivered and the plaintiff had paid for; that this fact was peculiarly within the defendant's knowledge; that upon investigation the overpayment was found to be greater than the sum agreed upon, which fact was also, under the circumstances, peculiarly within the defendant's knowledge: *Held*, evidence sufficient to be submitted to the jury upon the question of defendant's fraud in procuring the agreement of settlement; and further *Held*, under the circumstances of this case, there was evidence of fraud and collusion between the plaintiff's agent, who received the lumber, and the defendant. *Lumber Co. v. Atkinson*, 298.

7. *Contracts, Interpretation of—Sale—Security for Advancements.*—Where a written contract expresses upon its face that it is a sale of lumber upon certain lands, which the vendee agreed to cut and deliver to the vendor, the latter to make payments in advance thereon, it cannot be construed that the conveyance was merely to secure the advancements agreed to be made. *Lumber Co. v. Manufacturing Co.*, 395.

8. *Contracts, Breach of—Sale and Delivery—Lumber—Measure of Damages.*—Upon the breach of contract by the vendor for the sale and delivery of lumber, the measure of damages to the vendee is the difference between the price he had contracted for and the market value at the time and place fixed for delivery, such damages not being remote or speculative, but reasonably within the contemplation of the parties when entering into the agreement. *Ibid.*

9. *Contract—Breach—Measure of Damages—Evidence.*—In this action for damages for breach of contract, it is held that the evidence was sufficiently definite to be submitted to the jury upon the admeasurement of damages. *Moody v. Mining Co.*, 456.

10. *Contracts—Vendor and Vendee—Damages—Measure of Damages.*—Where damages are sought by a buyer of goods on the ground that the seller furnished goods of an inferior quality, a breach of the contract of sale would entitle the plaintiff to nominal damages, at least; and the measure of recovery of substantial damages is the market value of the goods at the time and place stipulated for the delivery, less the contract price. *Berbarry v. Tombacher*, 498.

CORPORATIONS. See Statutes; Street Railways; Receivers.

1. *Corporations—Stockholders' Meetings—Resolution—Consent.*—A stockholder in a private corporation is bound by a resolution regularly

CORPORATIONS—*Continued.*

passed at a stockholders' meeting in accordance with its charter and by-laws, and when he is present at the time a measure is formally passed, and votes or fails to vote thereon, he is ordinarily concluded. *Meisenheimer v. Alexander*, 226.

2. *Same—Diminishing Holdings of Stock—Contracts—Consideration—Benefits Received.*—The plaintiff and P., one of the defendants, secured an option on a city lot for the purpose of forming a corporation to erect an office building with a capitalization in a certain sum deemed necessary for the purpose, for which stock subscriptions were received in a certain smaller amount in accordance with the plan proposed, and the corporation was accordingly chartered and organized. The corporation then agreed to issue 33 shares of its stock to plaintiff in consideration of the purchase price of his part of the option on the lands, and for services performed and to be performed by him, and a similar arrangement was made with the defendant P. Thereafter, the stockholders of the corporation, finding the requisite amount of stock could not be sold, and to ascertain the liability of each subscriber and to arrange for deferred payments about to become due on the purchase price of the lands, held a meeting, the plaintiff being present, and, either with his consent or without his protest, passed a resolution to the effect that shares should be issued to the subscribers only in the amount each had paid in cash, and that as no services were required of plaintiff and P., all certificates issued to them in excess of the cash paid by them were to be invalidated or canceled; and, further, to meet the deferred payments on the purchase price of the land, the corporate charter be amended so as to permit an issuance of common and preferred stock in certain amounts: *Held*, (1) the plaintiff was concluded by the resolution from claiming the ownership of the 33 shares, and from voting them in relation to the proposed amendment to the charter; (2) if his right to these shares be regarded as contractual, their withdrawal was supported by the considerations (*a*) that plaintiff would not be called upon to perform the services required of him; (*b*) the consent of the other stockholders affecting his individual liability for the debts of the concern; (*c*) the benefits he has received, in common with the other stockholders, from the surrender by P. of his stock, similarly issued. *Ibid.*

3. *Same — Annulment of Shares — Specific Performance — Damages.*— Where a corporation formed for a certain purpose requiring the sale of its stock in a certain amount, fails to sell the requisite amount thereof, and finding it necessary to meet certain of its obligations, its stockholders provide by resolution for the issuance of certificates only for money actually paid in, and withdraws certain certificates issued to plaintiff for an option on certain lands to be used in the enterprise, and for certain services to be rendered by him, to which the plaintiff, being present, does not object, and receives the benefits of the resolution: *Held*, as between the parties, the resolution had the force and effect of annuling the shares of plaintiff referred to, which is not the stock itself, but only *prima facie* evidence of ownership; and the question as to whether the plaintiff's remedy was for specific performance of a contract or agreement, based upon the resolution, or one sounding in damages, is not relevant to the inquiry. *Ibid.*.

CORPORATIONS—*Continued.*

4. *Corporations—Decrease of Capital Stock—Notice—Resolutions Binding Between Parties—Creditors—Interpretation of Statutes.*—Revisal, sec. 1164, providing the method by which a domestic corporation may decrease its capital stock, requiring the publication of proper notices, etc., is for the protection of the stockholders of a corporation against its creditors; and as between the stockholders, a resolution for such purpose, if otherwise lawful and valid, will bind the members, and may be enforced by corporate action. *Ibid.*

5. *Foreign Corporations—Internal Management—Power of Court.*—Our courts have not the power and will not undertake to administer or control the internal affairs of a foreign corporation. *Reid v. R. R.*, 355.

CORPORATION COMMISSION. See Carriers of Goods.

COSTS. See Appeal and Error.

1. *Appeal and Error—Costs.*—A party to an action who has been successful on a former appeal to the Supreme Court is entitled to recover of the adverse party his costs thereon, whatever the final outcome of the litigation may be. *Carroll v. James*, 510.

2. *Costs—Judgments—Credits.*—The court costs recovered in an action should not be applied in reducing the amount of the judgment obtained, for while the costs are taxed in the name of a successful litigant, they are to be paid to the officers of the court, witnesses, and for other expenses incident to the litigation, and should not be credited to the defendant, unless he has paid them. *Ibid.*

3. *Claim and Delivery—Judgments—Costs and Expenses—Agreement of Parties—Appeal and Error.*—Where the defendant in claim and delivery of crops has replevied the property, and the plaintiff has recovered final judgment, an additional item of expense or cost allowed by consent to the plaintiff will be held as binding upon the parties on appeal. *Hendricks v. Ireland*, 523.

COUNTERCLAIMS. See Bills and Notes.

COUNTY COMMISSIONERS. See School Districts.

COURSE AND DISTANCE. See Deeds and Conveyances.

COURTS. See Trials; Assistance, Writ of; Corporations; Statutes; Criminal Law; Habeas Corpus; Jurors; Appeal and Error; Parties; Partition.

Courts—Justice of the Peace—Jurisdiction—Words and Phrases—Interpretation of Statutes.—A statute making its violation a misdemeanor, and prescribing a punishment by a fine not exceeding $50 or imprisonment not exceeding twenty days, "or both," by the words "or both" takes away the final jurisdiction of a justice of the peace, and on appeal therefrom the motion of the defendant to quash should be granted in the Superior Court. *S. v. McAden*, 575.

CRIMINAL LAW.

1. *Criminal Law — Imprisonment — Separate Convictions — Concurrent Terms—Judgments Void for Uncertainty.*—Where a prisoner has been convicted and sentenced to imprisonment for two or several separate criminal offenses, a sentence of the court that each succes-

CRIMINAL LAW—*Continued.*

sive term shall commence from the expiration of the term next preceding is not void for uncertainty, but unless this is stated in the judgment, the sentences for the various terms will run concurrently. *In re Black*, 457.

2. *Criminal Law—Verdict—Unanswered Counts—Acquittal.*—Where a verdict of guilty is rendered on one count in an indictment, and is silent as to the others, it is equivalent to a verdict of not guilty as to these other counts. *S. v. Fisher*, 550.

3. *Evidence—Crimes—Voluntary Statements—Caution of Magistrate—Interpretation of Statutes—Substantial Compliance.*—A voluntary statement made by one accused of a crime, before the committing magistrate, may be testified to in the Superior Court, when it appears that the prisoner expressed a desire to make it, in response to the magistrate's questions, who then cautioned him that he need not make the statement unless he wished, and that his refusal to do so or answer questions would not be taken against him, this being a substantial compliance with the statute, which is all that is required. Revisal, sec. 3194. *S. v. King*, 580.

4. *Evidence, Circumstantial—Crimes—Burnings—Questions for Jury.*—Circumstantial evidence is sufficient to convict a defendant charged with the burning of a barn which uncontradictedly shows a motive, in being previously ordered off the premises; that after the burning he left the locality and passed under an assumed name; that he made false statements as to his being at a different place at the time; that upon his return to this location he asked a witness what had taken place in his absence, and upon seeing the foreman of the owner of the barn, said, "Hush! don't say anything"; these and other circumstances being insufficient when taken alone, but collectively sufficient for the jury to pass upon, determine its weight, and draw an inference of guilt. *Ibid.*

5. *Instructions Not Corrective.*—Where self-defense is pleaded to a charge of murder, and there is evidence tending to show that the prisoner was unsuccessfully endeavoring to retreat from an attack made on him by the deceased and one P. with sticks, and that a third assailant, having made threats, had secured a gun and was returning with the gun, pointing it at the prisoner; and it appears that while the attorney for the prisoner was arguing to the jury that because of the advance on the prisoner by the deceased and P., both with sticks, the latter known by the prisoner to be a man of violent character, the prisoner had a good and lawful reason for firing the fatal shot, the court interrupted him by saying, "What difference does it make if P. was advancing on him with a stick? That would not give him a right to kill the deceased," the remark of the court, in the hearing of the jury, is an expression of his opinion on the evidence, which constitutes reversible error, and it is not cured by an instruction that the jury are the sole judges of the evidence. *S. v. Cook*, 586.

6. *Railroads—Principal and Agent—False Pretense—Indictment Sufficient—Evidence—Interpretation of Statutes.*—Where a railroad agent is charged with obtaining money under false pretense by falsely representing to his company that it was necessary for him to employ a

CRIMINAL LAW—*Continued.*

hand at his station at $25 per month, and who, in order to get the money, signed the company's check in the name of the supposed hand, sending it on to the bank for collection and taking the money from his cash receipts, proof of these allegations is sufficient to sustain the charge in the indictment and convict of the offense, under Revisal, sec. 3432, for the charge is sufficiently stated if it is expressed in a plain, intelligible, and explicit manner, and sufficient matter appear to enable the court to proceed to judgment. Revisal, sec. 3254. *S. v. Marsh*, 603.

7. *Principal and Agent—False Pretense—Extra Work—Evidence—Ability to Repay—Felonious Intent.*—Where an agent falsely represents to his principal that he had employed another in his service at a certain price, and obtains money on a check sent for his payment, it is no defense that the agent did the required work himself, after hours, and took the money in compensation for his own services; nor is evidence of the value of this extra work or of the agent's ability to repay, competent. *Ibid.*

8. *Criminal Law—Motion for Continuance—Discretion of Court—Appeal and Error.*—Where a motion for a continuance of the trial of a criminal offense is made by the defendant upon the ground that he is not prepared for trial, and refused, the refusal is within the discretion of the trial judge, and not reviewable on appeal, except where it appears that this discretion has been abused. *S. v. Burney*, 613.

9. *Criminal Law—Husband and Wife—Letters—Evidence of Third Persons.*—Upon a trial of a husband for a criminal offense, it is competent for a third person as a witness to introduce in evidence a letter written by the prisoner to his wife relevant and pertinent upon the question of his guilt, and procured without the consent or privity of the wife; and such evidence is not against the policy of the common law that the wife should not be permitted to testify against or offer in evidence communications to her from her husband with incriminating effect upon the latter. *S. v. Wallace*, 622.

10. *Same—Unlawful Search.*—It is held that the unlawful procurement, by searching his home in his absence, of a letter pertinent and relevant to the prisoner's guilt upon the charge of a criminal offense, will not affect its introduction in evidence upon the trial. *Ibid.*

DAMAGES. See Telegraph and Telephone; Municipal Corporations; Contracts; Street Railways; Mortgages; Corporations.

1. *Carriers of Passengers—Ejecting Passenger—Good Faith of Conductor — Punitive Damages — Evidence.*—Where a railroad company has wrongfully ejected a passenger from its train, evidence tending to show the good faith of the conductor in his belief that the passenger had not given him his ticket is not relevant except where punitive damages are recoverable. *Edwards v. R. R.*, 281.

2. *Carriers of Passengers — Ejecting Passenger — Actual Damages — Instructions—Punitive Damages—Appeal and Error.*—Where a recovery of punitive damages in an action against a railroad company for wrongfully ejecting a passenger from its train is denied by the trial court, the refusal of the court to give certain of defendant's prayers for instruction on the issue of punitive damages is not erroneous. *Ibid.*

DAMAGES—*Continued.*

3. *Contracts—Cutting Timber — Abandonment — Damages in Part — Instructions.*—The plaintiff and defendant contracted for the former to cut and deliver from the latter's lands timber estimated at 50,000 cords, the plaintiff to build eight or ten shacks on the land for the accommodation of the defendant's hands, which the plaintiff had to build for the prosecution of the work. There was evidence tending to show that defendant prevented the plaintiff from fulfilling his contract by having others to cut the timber on the lands in violation of the contract: *Held*, the plaintiff was entitled to recover such damages as he may have sustained in building the shacks, though this would not in itself have justified the abandonment of a contract of this magnitude, and a charge is held correct that if the jury should find that the defendant agreed to build the shacks for plaintiff's use, and that such agreement was a material part of the contract, which defendant violated, the defendant would be liable. *Westerman v. Fiber Co.*, 295.

DEEDS AND CONVEYANCES. See Husband and Wife; Estates; Judgments.

1. *Deeds and Conveyances — Description Sufficient — Parol Evidence.*—A description of lands in a deed "being one acre of land adjoining L., in one corner of the field now turned out, and lies near and including the spring, it being a portion of the H. tract, conveyed by D. to M., and others, public school committee of District No. 10, Stanly County, deed bearing a certain date, giving book and page in register of deeds' office, being the property formerly owned by District No. 13, changed by redistricting the schools of the township," etc.: *Held*, sufficiently definite to admit of parol evidence in fitting the description in this case, it appearing that the land had been known as the "schoolhouse lot" for twenty or thirty years, etc.; and it is further held that a variance was immaterial, that the lot did not adjoin the L. lot, but cornered on it in an old field. *Hudson v. Morton*, 6.

2. *Railroads—Easements — Rights of Way — Increase of Widths — Prospective Use — Deeds and Conveyances — Interpretation of Deeds.*— Where a railroad company acquires from the owner a conveyance of a right of way for its road across his land, to so much thereof as may be occupied, etc., for the consideration of $1, reciting in the premises of the deed that it will materially add to the value of the lands along its lines, etc., the easement granted should not always be confined to the width of the right of way presently used, for it was in the contemplation of the parties that the business of the railroad would increase, and that changed conditions would require a greater width for the successful operation of increased traffic, for which the grantor would be compensated in the increased value of his land; and it is *Held*, that while the right of way of defendant is confined to the lands occupied for its tracks, banks, ditches, and works, not extending beyond the width provided for in its charter, it will not, in the proper exercise of this use, be liable in damages caused by widening its right of way and taking additional and necessary land, nor for damages caused by the elevating or lowering of its tracks or other necessary purposes, nor for the increased inconvenience to the plaintiff and his family from smoke from the locomotive or from other matters necessary to the operation of its trains. *Hendrix v. R. R.*, 9.

DEEDS AND CONVEYANCES—*Continued.*

3. *Deeds and Conveyances — Married Women — Separate Examination— Joinder of Husband—Interpretation of Statutes—Constitutional Law.* Revisal, sec. 952, requiring the privy examination of a married woman, separate and apart from her husband, etc., to her conveyances of realty, is constitutional and valid (Art. X, sec. 6); and unless the formalities of this statute are complied with the deed of the married woman is absolutely void. *Jackson v. Beard*, 105.

4. *Deeds and Conveyances—Married Women—Statutory Requirements— Joinder of Husband — Pares Initiate — Valuable Rights — Infants— Voidable Contracts—Ratification.*—After a child of the marriage has been born alive and capable of inheriting, the husband is tenant by curtesy initiate in his wife's lands, and as such has a valuable right; the requirements of the statute, Revisal, sec. 952, where the wife's lands are conveyed, are of a contractual nature on his part; and hence when the husband, being a minor, joins in the deed to lands of his wife, the conveyance is voidable, subject to his affirmance or ratification when he becomes of age; and where the deed has been disapproved in apt time by him, the conveyance, requiring his valid or statutory consent, is void. *Ibid.*

5. *Deeds and Conveyances—Married Women—Statutory Requirements— Husband's Estate — Interpretation of Statutes—Pari Materia.*—Upon construing the Revisal, sec. 952, as to the contractual nature of the husband in joining in the wife's conveyance of land, and as to his parting with a valuable interest therein when issue of the marriage has been born alive capable of inheriting, other sections of the Revisal should be considered, to wit, sections 2109-2111, regarding him as a freeholder, which estate may be lost by decree of divorce, in certain cases; that because of this interest in his wife's land he must become a party to her action concerning her title thereto (Revisal, sec. 2102). Nor does section 2108 affect this construction, its provisions relating to contracts between husband and wife, and not to such as made between them and third parties. *Ibid.*

6. *Deeds and Conveyances—Common Source—Unregistered Deeds—Color of Title.*—Where the parties to an action to recover land claim from a common source, an unregistered deed of one of them is not color of title as against the other, a grantee for value, under a registered deed; it only becomes so from the time of its registration, and ripens the title after seven years adverse possession therefrom. *Moore v. Johnson*, 266.

7. *Deeds and Conveyances—Common Source of Title.*—A common source of title is one appearing somewhere in the chain of paper title relied on by each party in an action to recover lands, and is not affected by the fact that title theretofore was claimed from different sources. *Ibid.*

8. *Deeds and Conveyances—Coverture—Joinder of Husband — Privy Examination.*—A deed made by a married woman, without taking her privy examination and the joinder of her husband, is void. *Ibid.*

9. *Deeds and Conveyances—Registration—Notice—Bona Fide Purchasers —Interpretation of Statutes.*—Where in an action to recover lands it appears that both parties are purchasers in good faith for value, one claiming by adverse possession under an unregistered deed as color, and the other under a prior registered deed, and both under a com-

DEEDS AND CONVEYANCES—*Continued.*

mon source, no notice, however full and formal, will supply the place of registration, and the party claiming under the registered deed has the better title. *Ibid.*

10. *Deeds and Conveyances—Survey—Location for Description—Erroneous Description—Parol Evidence.*—Where the parties, with the view of making a deed, go upon the land and make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed, though a different and erroneous description may appear upon the face of the deed, the land thus ascertained and intended will pass as between the parties or voluntary claimants who hold in privity, this being an exception to the general rule that parol evidence may not vary or contradict the written instrument. *Clarke v. Aldridge*, 326.

11. *Deeds and Conveyances — Evidence — Maps Unidentified.*—Where boundaries to lands are in dispute, a map is incompetent as evidence when there is nothing thereon to identify it, and it is not attached to any muniment of title. *Hagaman v. Bernhardt*, 381.

12. *Deeds and Conveyances—Boundaries—Admitted Corners—Evidence.*—In an action involving a disputed boundary to lands, *Held*, testimony of a witness that in surveying the land he had commenced at a spanish oak marked as a corner, etc., was competent, as the spanish oak was admitted to be the corner by both parties to the controversy. *Ibid.*

13. *Deeds and Conveyances—Boundaries—Disputed Corners—Declarations—Interests—Evidence.*—Declarations of one as to a disputed corner of lands in controversy, as the one he claimed at that time as a corner of his own lands, is incompetent, being in his own interest. *Ibid.*

14. *Deeds and Conveyances—Boundaries—Disputed Corners—General Reputation—Evidence.*—The reputation of the marking of a disputed corner to lands in controversy is incompetent as evidence, it being necessary to show its general reputation as such. *Ibid.*

15. *Deeds and Conveyances—Invalid Grants—Adverse Possession—Color—Occupation—Constructive Possession.*—The plaintiff claims the land in dispute under a grant from the State which has been declared invalid, and also sets up and relies on a deed to a part of these lands, with evidence only of possession of the lands described in the deeds, and contained within the larger boundaries of the grant: *Held*, the plaintiff's constructive possession will only extend to the outer lines of the deed, and could not ripen his title under "color" beyond them to the lands within the description of the grant; and title by adverse possession otherwise must be confined to the lands actually occupied. *Anderson v. Meadows*, 400.

16. *Deeds and Conveyances—"Color"—Descriptions—Record—Appeal and Error.*—In this case it is *Held*, that a will relied upon by plaintiff cannot be construed as color beyond the boundaries in his deed, also introduced in evidence, the description of the lands devised not appearing in the record. *Ibid.*

17. *Deeds and Conveyances—Grants—Boundaries—Questions for Court—Questions for Jury.*—What are the termini or boundaries of a grant

DEEDS AND CONVEYANCES—*Continued.*

or deed is a matter of law; but where they are is a question of fact. The court must determine the former question, and it is for the jury to ascertain the latter. *Lumber Co. v. Bernhardt*, 460.

18. *Same—Natural Objects—Course and Distance.*—Where there is a call for natural objects, and course and distance are also given, the former are the boundaries, and the latter merely guides to them; and in applying the principles, where the line of another tract is called for and the same is identified, fixed, and established, such line is considered as a natural object. *Ibid.*

19. *Same.*—Where the call in a conveyance of land is to the line of another tract which is identified, fixed, and established, it will ordinarily control the course and distance given, when in conflict, for they are considered merely as guides to the line called for. *Ibid.*

20. *Same—Parol Evidence—Questions.*—The determination of an action to recover land was made to depend upon the interpretation of the calls in a grant to C., as follows: 100 acres, etc., beginning at a white pine, running thence 10 poles to a white pine, corner of 150-acre tract; thence 86 poles to two white oaks, etc., "thence east to a stake in the line of a 50-acre tract"; thence south 96 poles to a stake, etc.; thence west, etc., to the beginning. There was evidence tending to show that C. owned two 50-acre tracts at the time, and to run the line to the corner of one of them would deflect it a little from the course called for in the grant, and extend the line from 167 poles to 308 poles, and by following the course and distance from the point in the remaining calls in the deed it would include the *locus in quo: Held*, the former calls in the grant having been fixed, it was a question for the jury to determine upon proper evidence what 50-acre grant was intended by the call, "east 167 poles to a stake in the line of a 50-acre tract," and they should consider on that question the evidence that C. had a 50-acre grant, to be reached by a slight deflection of the course and extension of the line, and also, as relevant to the inquiry in this case, that the warrant and entry of survey contained as a part of the description, that the grant began at or near the 150-acre grant of C., an admitted point, and included all the land between that and a 50-acre tract which sought to be identified as a line called for in the conveyance relied upon. *Ibid.*

21. *Deeds and Conveyances—Destruction of Former Call—"At or Near"—Certainty of Description — Instructions — Burden of Proof — Course and Distance.*—In an action of trespass wherein the divisional line between the contesting parties is called in question, it appears that in the former deeds in plaintiff's chain of title, one of the calls is to a certain house, which had been destroyed subsequently to the making of the deed from the plaintiff's immediate grantor; and in the last deed the call is made to a stake "at or near the place where the house" formerly stood: *Held*, the destruction of this house could not affect the call or the description in the plaintiff's original deeds; and it was not error for the judge to instruct the jury to find for the plaintiff, if the line ran to the house, leaving out the words "at or near the place," etc., with the burden on the plaintiff of showing its location; and upon his failing to do so, the course and distance would control. *Fowler v. Coble*, 500.

DEEDS AND CONVEYANCES—*Continued.*

22. *Deeds and Conveyances—Ancient Deeds—Copies—Recitals—Seal—Presumptions—Evidence.*—Where an ancient deed is not produced, but proved by a duly authenticated copy from the registration book, properly introduced in evidence, which recites that the grantor has thereunto subscribed his name and affixed his seal, there is a presumption, when the seal does not appear after the grantor's name, that it was properly affixed, arising from the recital in the instrument. *Hopkins v. Lumber Co.*, 533.

DEMURRER. See Pleadings; Actions; Municipal Corporations; Partition.

DEPOSITIONS. See Evidence.

DISQUALIFICATIONS. See Public Offices.

DIVORCE. See Parent and Child.

DOMESTIC CORPORATIONS. See Removal of Causes.

DRAINAGE DISTRICTS.

1. *Drainage Districts—Constitutional Law.*—Chapter 442, Laws 1909, providing for the laying off of drainage districts, is constitutional and valid. *In re Drainage District*, 127.

2. *Drainage Districts — Instructions, How Construed — Benefits to the Proposed District—Health—Interpretation of Statutes.*—Where detached portions of a charge are erroneous, when considered alone, but correct when considered with the other parts, as a whole, the charge will not be held for error; and when it appears, in proceedings to lay off a drainage district under chapter 442, Laws 1909, that the jury were instructed to consider "not only the increased facilities of the land for producing crops, but the benefit to the health of the people who live in the district," it will not be construed as erroneous because other parts of the charge, taken singly, did not appear to confine the question of health to those living in the proposed district. *Ibid.*

3. *Drainage Districts—Findings of Fact by Clerk—Sufficiency—Exceptions—Trial de Novo.*—On appeal from the clerk, proceedings to lay off a drainage district are heard *de novo* in the Superior Court, upon exceptions taken before the clerk, and only these exceptions may be considered (amendments to Drainage Act. sec. 3, ch. 67, Laws 1911), and it is sufficient that the clerk has found as a fact that the allegations set out in the petition are true, if these allegations are sufficient, and distinctly and clearly made. *Ibid.*

4. *Drainage Districts—Interpretation of Statutes—Repealing Clauses—Purview of Act.*—Chapter 20, Laws 1895, authorizing adjacent owners on Cold Water Creek to clean out and straighten the channel thereof, under a certain method, does not come within the purview of the Drainage District Act, ch. 442, Laws 1909, and hence the exception in the latter act as to "any local drainage law already enacted," etc., does not apply. *Ibid.*

EASEMENTS. See Railroads; Nuisance.

EMBEZZLEMENT.

Principal and Agent—Embezzlement.—Where an agent intrusted by the principal to collect moneys has fraudulently and feloniously converted moneys thus collected to his own use, he is guilty of embezzlement. *Insurance Co. v. Bonding Co.*, 384.

EMPLOYER AND EMPLOYEE. See Master and Servant.

ESTATES. See Husband and Wife.

1. *Estates—Deeds and Conveyances—Trusts and Trustees—Sales—Proceeds Held in Trust—Equity.*—Where an estate is granted for life, then to the children of the first taker, the children of such of them as may then be dead taking *per stirpes*, in trust to be held until the youngest child of the tenant for life shall become 21 years old, after the death of the first taker, all the parties at interest being before the court, equity may decree a sale, subjecting the proceeds in the hands of the trustee to the conditions originally imposed, and the purchaser will acquire a perfect title. *Springs v. Scott*, 132 N. C., 563, cited and applied. *Trust Co. v. Nicholson*, 257.

2. *Estates—Deeds and Conveyances—Restraint Upon Alienation—Sales—Proceeds—Trusts and Trustees—Partition.*—An estate in remainder, with the provision "that no partition of said land or sale thereof shall be made by any" of the remaindermen until the youngest child of the tenant for life "shall arrive at the age of 21 years": *Held*, that part of the provision prohibiting a sale, regarded as a restraint upon alienating, is void; nor is that part which prohibits a partition of the lands violated by a decree of court for a sale which further orders that the trustee retain the whole proceeds, subject to the terms and conditions of the written instrument, for reinvestment. *Ibid.*

3. *Estates in Remainder—Deeds and Conveyances—Trusts and Trustees—Changed Conditions—Hardship on Beneficiaries—Equity.*—Where the donor has created an estate in remainder for the benefit of his grandchildren, etc., to be held in trust until the youngest one shall have become 21 years of age, and it is made to appear to the court that to preserve the estate in its then condition, owing to changed conditions, would work a hardship upon the beneficiaries, and that to preserve their interest a sale should be decreed and the proceeds invested and held subject to the terms imposed: *Semble*, a court of equity may act accordingly, and the purchaser at the sale will acquire a good title. *Ibid.*

ESTOPPEL. See Partition; Judgments.

EVIDENCE. See Wills; Deeds and Conveyances; Trials; Witnesses; Principal and Agent; Husband and Wife; Indemnity; Homicide; Criminal Law; Appeal and Error; New Trials.

1. *Evidence—Collateral Matters—Appeal and Error.*—In an action to recover damages of a railroad company for ponding water upon plaintiff's lands, to its injury, by filling up the original bed of a stream and diverting the water thereof into an inadequate channel, and the evidence tends to show an actionable wrong, testimony is properly excluded that lands of the same character as that of plaintiff some distance below and above his location had been turned out before the construction of the railroad and its cultivation no longer at

EVIDENCE—*Continued.*

tempted, as being more likely to distract than aid the jury in their deliberation upon the issues involved in the case. *Carpenter v. R. R.*, 277.

2. *Account and Settlement—Fraud—Evidence—Questions for Jury—Principal and Agent.*—The plaintiff had contracted with the defendant for the latter to cut, haul, and deliver a large quantity of timber at a certain place, and after the expiration of several years it appeared that the plaintiff had overpaid the defendant. An agreement as to the amount was made by the parties, and to secure to the plaintiff the payment thereof a certain quantity of lumber was placed in the hands of a trustee. In his action to set aside this agreement there was allegation and evidence tending to show that the lumber pledged by the plaintiffs was some which the defendant had delivered and the plaintiff had paid for; that this fact was peculiarly within the defendant's knowledge; that upon investigation the overpayment was found to be greater than the sum agreed upon, which fact was also, under the circumstances, peculiarly within the defendant's knowledge: *Held*, evidence sufficient to be submitted to the jury upon the question of defendant's fraud in procuring the agreement of settlement; and further *Held*, under the circumstances of this case, there was evidence of fraud and collusion between the plaintiff's agent, who received the lumber, and the defendant. *Lumber Co. v. Atkinson*, 299.

3. *Fraud—Character Witness—Corroborative Evidence—Instructions—Substantive Evidence—Appeal and Error.*—Where an action is of a civil nature to set aside an agreement for fraud in its procurement, and the party against whom the fraud is alleged has testified, evidence as to his good character is permissible only to corroborate his testimony, and an instruction that the jury may consider it as substantive evdience on the issue of fraud is erroneous. *Ibid.*

4. *Deeds and Conveyances—Evidence—Maps Unidentified.*—Where boundaries to lands are in dispute, a map is incompetent as evidence when there is nothing thereon to identify it, and it is not attached to any muniment of title. *Hagaman v. Bernhardt*, 381.

5. *Evidence—Depositions—Signing of Witness—Interpretation of Statutes.*—Where a deposition is otherwise regular and identified, it should not be refused as evidence because it has not been signed by the witness whose testimony was being taken, this not being required by our statute, Revisal, sec. 1652. *Boggs v. Mining Co.*, 393.

6. *Judgments—Nonsuit—Evidence, How Considered.*—The notes sued on in this action were indorsed to a bank, and there being evidence that the plaintiff had taken them up from the bank before the commencement of the action thereon, and also evidence *contra*, and plaintiff's appeal being from a judgment of nonsuit, it will be assumed that the plaintiff's evidence on that question is true. *Ball-Thrash v. McCormick*, 471.

7. *Evidence—Book Entries—Nonsuit.*—Book entries are generally incompetent except for the purpose of refreshing the memory of the one who made them; and where the appeal is from a judgment of nonsuit, and the entries are offered by the defendant with evidence *per contra* to disprove the transfer of a note before suit was brought,

EVIDENCE—*Continued.*

they become immaterial under the rule that, in such cases, the evidence is to be viewed in the light most favorable to the plaintiff. *Ibid.*

8. *Evidence—Nonsuit—Railroads—Lessor and Lessee—Parties—Joinder—Personal Injuries.*—Upon a motion for judgment of nonsuit, the allegations and evidence must be considered in the light most favorable to the plaintiff, and, applying this rule to the present case, it is *Held*, that the judgment as to the North Carolina Railroad was improperly allowed, it being alleged, with supporting evidence, in an action for damages for personal injury, wherein its lessee, the Southern Railway Company, was joined as a defendant, that the plaintiff was a locomotive engineer of the latter company, assigned for duty on an interstate train, including in the route a part of the leased road, and thereon operating under the franchise of the lessor road; that the injury complained of occurred on a siding off of the leased premises, by reason of a defect in the locomotive, this siding connecting with the main line of the lessee company at either end, and while the locomotive was being oiled and inspected by the plaintiff for the purpose of a trial run necessarily passing over a portion of the leased road; that the lessee company had just had the locomotive repaired at its shop, from which all engines necessarily had to pass over the leased road to get to the other lines of the lessee. *Lloyd v. R. R.*, 485.

9. *Evidence Incompetent—Admissions by Witness—Subsequent Statement—Harmless Error.*—Where a vendee seeks to recover damages from his vendor for failing to deliver goods of the quality he had bought, and introduces evidence tending to show that they were worth more to him than the price he had paid, testimony of a witness is incompetent which was offered for the purpose of showing that the defendant did not carry the line of goods which the plaintiff claimed he had bought, when it appears by his own admission that the witness did not have the requisite knowledge to make his evidence competent, and, further, in this case, the witness was afterwards permitted to state the kind of goods the defendant carried in stock, and if any error was committed in ruling out the evidence objected to, it was cured. *Berbarry v. Tombacher*, 498.

10. *Evidence—Vendor and Vendee—Exhibits to Jury—Comparisons.*—Where damages are sought by the buyer of clothing on the ground that the goods delivered were inferior in quality to those purchased, it is competent for the plaintiff to illustrate the difference in texture and quality, by exhibiting other suits to the jury. *Ibid.*

11. *Public-service Corporations—Street Railways—Rights of Way—Condemnation—Damages, Speculative—Evidence.*—In the admeasurement of damages to be awarded to the private owner of lands for the acquiring by a public-service corporation of a right of way thereon, the jury should consider the present condition of the property condemned and the uses to which it was then applied, and those for which it was naturally adapted, so as to arrive at the difference between the market value of the lands before and after the appropriation of the right of way; but so far as the same may not fall within this rule, damages are speculative and too remote which allow for intended or future improvements, such as laying

EVIDENCE—*Continued.*

off the property into lots and their development by the expenditure of money; the making of a park of unproductive lands, etc.; nor is it competent to show a comparison of values with lands of or near the same city which had already been developed, etc. *Land Co. v. Traction Co.*, 503.

12. *Banks—Evidence of Deposit—Check Stubs—Prima Facie Case—Questions for Jury.*—The plaintiff sued a bank for an alleged deposit therein which he claimed the defendant had failed to credit to him, and put in evidence his check book stubs whereon the proper officer of the bank had credited the plaintiff two sums in the same amount at different times on the same day, the plaintiff's bank book only showing one credit in that sum: *Held*, the entries on the stub were not so controlling or conclusive that the jury could not find as an independent fact that the second deposit was or was not made by the defendant, leaving both entries to their consideration; and the plaintiff was not entitled to an instruction that the entries made a *prima facie* case, especially as he had not requested it by a special prayer for instruction. *Pate v. Bank*, 508.

13. *Evidence—Boundaries—Declarations of a Living Person.*—Testimony of the declarations of a living person as to the boundaries of land in dispute is incompetent. *Spruill v. Hopkins*, 526.

14. *Evidence—Recent Possession—Presumptions.*—Where unexplained possession of stolen property is so recent as to make it extremely probable that the holder is the thief, there is a presumption of guilt justifying and perhaps requiring a conviction. *S. v. Anderson*, 571.

15. *Same—Explanation.*—Where the evidence fixes the possession of a stolen cow on the defendant thirty days prior to arrest, and there is evidence on behalf of defendant, explaining this possession, that he ran a freight boat and was in the habit of buying cattle or transporting them for sale in the open market, and could not explain from whom he had received the cow in question, on that account the possession of the cow should be considered only a relevant circumstance tending to show guilt, and in connection with the other circumstances is sufficient to justify a conviction, if in the opinion of the jury they establish such guilt beyond a reasonable doubt. *Ibid.*

16. *Same—Presumption of Fact.*—The presumption of guilt arising from recent possession is one of fact, and not a presumption of law, in the strict sense of the term, and does not exclude all evidence to the contrary. *Ibid.*

17. *Criminal Law—Prisoner's Statements—Custody—Duress—Evidence.*—Where a criminal offense is charged, statements made to an officer of the law by the prisoner are not incompetent because the defendant was in custody or jail at the time, unless there was duress, threats, or inducements. *S. v. Drakeford*, 667.

EVIDENCE, PAROL. See Deeds and Conveyances.

EXCUSABLE NEGLECT. See Appeal and Error.

EXCEPTIONS. See Appeal and Error; Trials.

EXECUTORS AND ADMINISTRATORS. See Parties; Removal of Causes; Actions; Wills.

1. *Executors and Administrators—Wills—Personal Assets—Wrongful Death—Damages—Interpretation of Statutes.*—The right to recover damages for wrongful death rests entirely on statute, Revisal, sec. 59, and when a recovery is had therefor it is not a part of the personal assets of the deceased; and the husband of deceased who left a will disposing of all of her property and naming another as executor, may not qualify as her administrator upon the theory that his wife had died partially intestate as to such damages, and as such maintain an action to recover them. Revisal, sec. 4. *Hood v. Telegraph Co.*, 92.

2. *Same—Parties.*—Where a deceased has left a will disposing of all his property and therein naming an executor, the right of action against a defendant for his wrongful death must be by the executor named; for the right of action being purely statutory, the one entitled to sue is governed by the provision of the statute, which gives it to the executor, when one is named, and not to the one who would have had the right of administration in case of intestacy. Revisal, sec. 59. *Ibid.*

3. *Executors and Administrators—Heirs at Law—Notes—Security—Orders on Administrator—Venue—Removal of Causes—Interpretation of Statutes.*—Where a maker of a note, jurisdictional as to the amount in a court of a justice of the peace, is sued in the Superior Court thereon, and it appears from the complaint that it was given for a stock of goods which had been entirely disposed of; and that the action was to enforce an order, given as security to the note, on the interest of the maker, as heir at law of a deceased person, in the hands of the administrator, who was made a party for the purpose, the action involves an account and settlement by the administrator, and should be brought where he has qualified, and when brought elsewhere, should be removed thereto on motion aptly and formally made. Revisal, sec. 421. *Thomas v. Ellington*, 131.

FEDERAL EMPLOYERS' LIABILITY ACT. See Commerce; Master and Servant; Removal of Causes.

FELONIOUS INTENT. See Criminal Law.

FIRE. See Railroads.

FORMER CONVICTIONS. See Criminal Law.

FORMER JEOPARDY. See Criminal Law.

FRANCHISES. See Constitutional Law.

FRAUD. See Bills and Notes; Equity; Principal and Agent; Mortgages; Removal of Causes.

GRAND JURORS. See Jurors.

GRANTS. See Deeds and Conveyances.

GUARANTOR OF PAYMENT. See Bills and Notes.

HABEAS CORPUS.

Criminal Law—Imprisonment—Conditional Pardon—Concurrent Terms—Courts—Record—Habeas Corpus.—Where one convicted of a criminal offense appeals from the judgment, and subsequently withdraws his appeal in open court and commences to serve his sentence, the record made by the court will not prejudice his rights, when upon *habeas corpus* it appears that he had been taken into custody upon the violation of a conditional pardon granted by the Governor, and that the two terms of imprisonment having run concurrently, he had served them both. *In re Black*, 457.

HARMLESS ERROR. See Appeal and Error; Homicide.

HEALTH. See Drainage Districts; Municipal Corporations.

HOMICIDE.

1. *Murder—Evidence—Identification—Premeditation.*—On this trial for murder, evidence was competent, on behalf of the State, that the prisoner had several times sold liquors, in the presence of the deceased, at his place of business, it being confined to the purpose of identifying the prisoner, under the circumstances, and also for the purpose of showing premeditation, there being evidence of previous threats and of the prisoner's purchasing a pistol in order to carry them out, which was actually used. *S. v. Vann*, 534.

2. *Murder—Evidence—Premeditation—Verdict—Harmless Error.*—On appeal from a conviction of murder in the second degree, evidence of premeditation, if erroneously admitted, is harmless, for the jury, by their verdict, have found in the prisoner's favor on that question. *Ibid.*

3. *Homicide—Murder—Circumstantial Evidence—Questions for Jury.*—Where upon a trial for murder circumstantial evidence for a conviction is relied on, and the circumstances tend to show defendant's guilt, so that the deduction of guilt from the circumstances is not merely conjectural or probable, they should be submitted to the jury, for they are the judges of the force or weight of the evidence of the defendant's guilt. *S. v. Matthews*, 542.

4. *Homicide—Murder—Circumstantial Evidence — Motive—Instructions for Jury.*—Upon a trial for murder, the evidence in this case of improper relations between the prisoner and the wife of deceased as to motive; threats made by the prisoner on the life of the deceased, one of which, that he would kill the deceased on a day certain, appeared to have been carried out by the murder of deceased on the day named; threats against deceased's wife should she disclose communications of this nature he had made to her; his unwillingness for deceased to visit his own wife, who was living on land the prisoner claimed to have rented; the finding of the body of the deceased at his own home with a gun-shot wound in his head, while his gun remained on a rack in the room, the circumstances tending to show that prisoner was in a position to have inflicted it, when made, with other circumstances tending to show the prisoner's guilt, is sufficient to be submitted to the jury, and for them to find thereon that the defendant was guilty. *Ibid.*

5. *Murder—Self-defense—Reasonable Apprehension of Danger—Intruder Upon Home—Instructions—Appeal and Error.*—Where it is shown

HOMICIDE—*Continued.*

by the evidence, on a trial for murder, that the deceased and two others came to the prisoner's home during the night, and with threats and curses endeavored to force an entrance through the door and windows, terrifying the prisoner and the members of his family; and there is evidence that the deceased began the attack by firing a pistol, to establish the plea of necessary defense in firing through the door and killing the deceased, it is only required that the defendant show the existence of a reasonable apprehension on his part that he or some member of his family was about to suffer great bodily harm; or his reasonable belief that it was necessary to kill in order to prevent the violent and forceful entry of an intruder into his home; and where upon conflicting evidence this principle is charged with the modification that the jury should also find, in order to acquit the defendant, that one of the intruders was armed with a pistol, it is reversible error. *S. v. Gray*, 608.

6. *Murder—Firearms—Accidental Discharge—Instructions — Manslaughter—Culpable Negligence—Questions for Jury.*—Where on a trial for murder the evidence of the State, the defendant not introducing any, tends only to show that the prisoner was with several others going along a road in a good humor, when a pistol shot was heard, followed by exclamations of members of the party, "You shot that boy!" which the prisoner denied; that the prisoner had out his pistol, "fooling with it, and it went off"; that the shot killed the deceased, who was on the side of the road, an instruction is held reversible error which tells the jury that the prisoner would be guilty of manslaughter if they were satisfied beyond a reasonable doubt that the prisoner killed the deceased with a deadly weapon, with the burden on the prisoner to show excusable homicide; for there being no evidence that the prisoner was intentionally pointing the pistol at the deceased at the time of its discharge, it was for the jury to say, upon the question of manslaughter, whether the prisoner was culpably negligent in handling the pistol at that time. *S. v. Trollinger*, 618.

7. *Murder—Firearms—Accidental Discharge—Carrying Concealed Weapons—Interpretation of Statutes—Culpable Negligence.*—The carrying of concealed weapons is "*malum prohibitum*," and the mere fact that one who was carrying a pistol in a manner prohibited by the statute, killed another by its accidental discharge, does not make him guilty of manslaughter, unless his culpable negligence in the way he was handling it produced the injury from its discharge or had a necessary tendency to bring about that result. *Ibid.*

8. *Homicide—Preventing a Felony—Relative Rights—Justifiable Relationship.*—One charged with murder who seeks to justify his act on the ground that it was reasonably necessary to prevent the deceased from inflicting great bodily harm, etc., with an uplifted knife, upon his brother, with whom the deceased, at the time, was fighting, has only such right as his brother may have had to commit the homicide, and the defense is unavailing if his brother was in the wrong in bringing on the fight or continuing to participate in it. *S. v. Greer*, 640.

9. *Homicide—Affray—Independent Intervention—Evidence—Questions of Law.*—Where A and B are tried for the murder of C, and it appears

HOMICIDE—*Continued.*

that while B and C were fighting, A, acting independently and without conspiracy or a common purpose with B, struck the blow with a deadly weapon from which the death of C resulted, B is not responsible for the death of C, though he may have been at fault in bringing on the fight and continuing to participate in it. *Ibid.*

10. *Murder—Self-defense—Reasonable Apprehension—Deceased's Dangerous Character—Evidence.*—Upon a trial for murder, where self-defense is relied on, the violent or dangerous character of the deceased may be shown in evidence when there is proof that the prisoner knew thereof at the time of the homicide, and there is direct evidence of the facts showing, or tending to show, that the prisoner acted under a reasonable apprehension that his life was in danger or that he was in danger of great bodily harm; or when, owing to the circumstantial character of the evidence, the nature of the occurrence is left in doubt. *S. v. Blackwell*, 672.

11. *Murder—Self-defense—Instructions — Burden of Proof.*—In this trial for murder, the judge correctly instructed the jury upon the question of self-defense, placing the burden on the defendant to satisfy the jury of every matter of excuse or mitigation, the killing with a deadly weapon having been admitted. *Ibid.*

HUSBAND AND WIFE. See Executors and Administrators; Deeds and Conveyances; Criminal Law.

1. *Estates by Entireties—Husband and Wife—Wife's Separate Estate—Tenants in Common—Deeds and Conveyances.*—Where a brother and sister have inherited lands as tenants in common from their father, and in an interchange of deeds for a division the conveyance is made to the sister and her husband "and their heirs," etc., in entireties, and the wife dies leaving her husband surviving her, without children of the marriage, the husband acquires no right of title by survivorship, and the lands descend to the heirs at law of the wife. *Sprinkle v. Spainhour*, 149 N. C., 223, cited and applied. *Speas v. Woodhouse*, 66.

2. *Same—Wife's Consent—Evidence—Contract.*—Where a deed in dividing lands held in common conveys the interest therein of a wife to her and her husband in entireties, the fact that the wife assented thereto cannot change the construction that the right of survivorship does not lie in the husband upon her death, and evidence thereof is immaterial; for she could only be deprived of her title thereto by contract having the formal legal requirements. *Ibid.*

3. *Husband and Wife—Enticing Wife—Criminal Conversation—Declarations of Wife—Evidence—Interpretation of Statutes.*—In an action brought by the husband against the defendant for unlawfully enticing the plaintiff's wife from him, etc., declarations of the wife as to improper relations with the defendant are incompetent as evidence. Revisal, sec. 1636. *McCall v. Galloway*, 353.

4. *Husband and Wife—Nonsupport of Wife—Criminal Law—Interpretation of Statutes.*—In order to convict under an indictment for abandonment and nonsupport of the wife, it is essential to show a failure of the husband to provide an adequate support for his wife, as well as the act of abandonment; and in this case the evidence is held insufficient. *S. v. Toney*, 635.

IDEM SONANS. See Indictment.

INDEMNITY.

1. *Contracts—Indemnity Bonds — Acceptance — Lex Loci Contractus.*—Where a foreign corporation has issued a bond indemnifying a North Carolina concern against loss under a contract with an agency, located in another State, established to collect moneys, etc., as in this case, for insurance premiums, which bond was delivered to the agent to be sent to the indemnified here for approval and acceptance, the contract of indemnity is to be construed and enforced in accordance with our own laws. *Insurance Co. v. Bonding Co.*, 384.

2. *Principal and Agent—Surety—Indemnity Bond—Notice of Default—Reasonable Notice.*—Where a contract of indemnity only provides that the indemnified give immediate notice of the default of an agent in accounting for moneys, for which the indemnifying company is liable under its bond, a failure of strict compliance in giving the notice will not always prevent a recovery, the provision not being in the form of a condition, or an express warranty. *Ibid.*

3. *Same—Questions of Law—Notice Sufficient.*—The plaintiff sues the defendant on its bond indemnifying against loss by reason of an agent's defalcation in failing to account for moneys collected, wherein it was provided that immediate notice be given the indemnifying company of such default. It was not disputed that this notice was given five days after the knowledge thereof of the plaintiff: *Held*, the reasonableness of the notice is a question of law, and the time thereof in this case is sufficient. *Ibid.*

4. *Principal and Surety—Indemnity Bond—Limitations of Actions—Interpretation of Statutes.*—Suits upon an employee's indemnity bond are regulated by Revisal, sec. 4809, forbidding the time for bringing suits on contracts of this character to less than one year; and a provision therein is void which required that no suits "or proceedings at law or in equity shall be brought against the surety after the expiration of six months from the end of the time during which, under the terms of this bond, the employer's claim may be filed with the surety." *Ibid.*

5. *Principal and Surety—Indemnity Bonds—Judgment Against Principal—Prima Facie Case—Rebuttal Evidence—Defenses—Interpretation of Statutes.*—In an independent action against a surety on its indemnity bond, a judgment against the principal is *prima facie* evidence of the sum or amount which the surety is thereon obligated to pay, although the surety is not a party, which the surety may impeach for fraud, collusion, or mistake, or he may also set up an independent defense. Revisal, sec. 285, has no application. *Ibid.*

6. *Principal and Agent—Surety—Declarations of Agent—Evidence.*—In an independent action against a surety on a bond indemnifying against an agent's default, the declarations of the agent, the principal on the bond, are incompetent. *Ibid.*

7. *Principal and Surety—Judgments—Prima Facie Case—Instructions—Admissions—Appeal and Error.*—The judgment against the principal on an indemnity bond being only *prima facie* evidence of the amount due by the surety for his alleged default thereunder, an instruction in this case is held for reversible error, that there was no con-

INDEMNITY—*Continued.*

troversy about the fact that this principal had defaulted in a certain sum, no such admission appearing, and the issue being contested. *Ibid.*

INDICTMENT.

1. *Railroads—Principal and Agent—False Pretense—Indictment Sufficient—Evidence—Interpretation of Statutes.*—Where a railroad agent is charged with obtaining money under false pretense by falsely representing to his company that it was necessary for him to employ a hand at his station at $25 per month, and who, in order to get the money, signed the company's check in the name of the supposed hand, sending it on to the bank for collection and taking the money from his cash receipts, proof of these allegations is sufficient to sustain the charge in the indictment and convict of the offense, under Revisal, sec. 3432, for the charge is sufficiently stated if it is expressed in a plain, intelligible, and explicit manner, and sufficient matter appear to enable the court to proceed to judgment. Revisal, sec. 3254. *S. v. Marsh*, 603.

2. *Indictment—Assault—Proof Variance—Interpretation of Statutes—Former Jeopardy—Defenses.*—Where the indictment charged an assault, etc., upon "Lila" Hatcher, and the evidence tended to show that it was made upon "Liza" Hatcher, and upon defendant's motion the court directed an acquittal for the reason that the names were not *idem sonans*, but held the defendant to appear and answer at the next term of the court to the charge of assault, etc., upon "Liza" Hatcher, it is *Held*, (1) that the variance between the charge in the indictment and the proof was immaterial (Revisal, sec. 3254); (2) that, notwithstanding the plea of "former jeopardy" on the second trial could not be sustained, as the instruction in the former action was at the prisoner's request, and had not the effect of placing him in jeopardy. *S. v. Drakeford*, 667.

INJUNCTIONS. See Municipal Corporations; Equity; School Districts.

1. *Injunctions, Mandatory—In Personam—Residence—Jurisdiction.*—A mandatory injunction to restrain an action upon the same subject-matter in a foreign jurisdiction is *in personam*, and will be issued only where both parties are residents of this State and the defendant is within our jurisdiction; and not where his residence and citizenship is in another State, and he is only constructively here, as by being plaintiff in the action wherein the restraining order is sought. *Carpenter v. Hanes*, 46.

2. *Same—Injunction.*—Where there are a first and second mortgage on lands and several junior judgments for materials furnished for a building thereon, and one of these junior judgment creditors has bought in the lands at an execution sale of another of the junior judgment creditors, and in pursuance of a scheme to get the lands, has procured the assignment of the first mortgage to a trustee, whom he controls, and under his instructions the mortgaged premises were sold, bid in by another of his agents at the foreclosure sale, so that the result of the scheme is to have obtained the land at a grossly inadequate price, the second mortgagee having offered to pay off the first mortgage debt and given notice of his rights at the sale; it is *Held*, that the evidence of fraud is sufficient to be submitted to

INJUNCTIONS—*Continued.*

the jury, and that equity will enjoin the making of the deeds to the purchaser at the sale, and preserve the equities to the hearing of the second mortgagee and the other junior judgment lienors for materials furnished. *Hayes v. Pace*, 288.

INSTRUCTIONS. See Appeal and Error; Trial.

INSURANCE.

1. *Insurance, Life—Valid Provisions—Suicide.*—A provision in a life insurance policy declaring suicide of the insured within twelve months of its date an excepted risk, is valid. *Heilig v. Insurance Co.*, 521.

2. *Same—Application—Statements — Policy Contracts.*—Where attached to a life insurance policy sued on is a paper-writing, over the signature of the insured, purporting to be the original application for the insurance, which states "that (among other things) if within one year from date of the policy I shall suicide or destroy myself, sane or insane, the policy hereby applied for shall be null and void," and this application is made a part of the policy by express provision upon the face of the policy, it is *Held*, that the statement is a part of the application, and the application is a part of the contract of insurance, binding upon the beneficiaries thereunder. *Ibid.*

INTENT. See Assault and Battery.

INTERSTATE COMMERCE. See Carriers of Goods; Commerce; Removal of Causes.

INTOXICATING LIQUORS.

1. *Intoxicating Liquors—Sales to Minors—Draft, Bill Lading Attached—Payment—Dealers—Banks and Banking—Interpretation of Statutes.*—To be guilty of the offense prohibited under the provisions of the Revisal, sec. 3524, the person selling or giving away intoxicating liquors "to any unmarried person under the age of 21 years, knowing the said person to be under that age," must be a dealer therein; and a bank or its officer, in the usual course of a banking business, who accepts money on a draft, bill of lading for such liquors attached, and surrenders the draft to the drawee, by which he is enabled to take the bill of lading to the carrier and get the shipment, is not a dealer, and hence, by the transaction, is not liable under the statute. *S. v. Fisher*, 550.

2. *Intoxicating Liquors—Sales to Minors—Contracts—Orders and Acceptance—Lex Loci—Interstate Commerce—Banks and Banking—Interpretation of Statutes.*—A shipment of intoxicating liquor from another State here, with bill of lading attached to a draft, and put in course of collection through the banks, is interstate commerce until the delivery of the shipment to the consignee by the carrier; and where the sale of such liquor is made through a sale agent here, and sent on and accepted by the principal in another State, and shipment made, as indicated, the contract is made in another State, and the mere fact that the draft was paid here, and the bill of lading surrendered to the drawee, an unmarried person under 21 years of age, who thereby is enabled to get his bill of lading and receive the shipment from the carrier, does not affect the interstate char-

INTOXICATING LIQUORS—*Continued.*

acter of the shipment, so as to make the bank or its officer thus surrendering the bill of lading guilty of violating section 3523 of the Revisal. *Ibid.*

3. *Intoxicating Liquor — Pleas — Former Conviction—"Same Offense."*— The defendant was indicted for selling one pint of spirituous liquor, contrary to our statute, on 15 November. It was admitted on the trial that he had been acquitted at a prior term of selling one pint of spirituous liquor charged to have been made to the same person within two months of the time charged in the second indictment. The evidence on behalf of the State tended to show that the defendant continuously for several months procured liquor for the witness, for which he received payment, and that it was obtained locally. Upon cross-examination this witness testified that he had given the same evidence against the defendant on the former trial, as he was then testifying to, and that he could not remember the exact date of any particular sale: *Held,* (1) the allegation as to the time of sale is immaterial, and the accused may be convicted upon proof of an unlawful sale to the person named at any time within two years prior to the finding of the presentment, etc.; (2) while the burden is on the defendant to sustain his plea of a former acquittal by the preponderance of the evidence, he may rely on the State's evidence for this purpose; (3) it was for the jury to decide, under this evidence and by its preponderance, if the offense charged was the same as that of which the defendant had formerly been acquitted, and if it was, the defendant should be acquitted. Seven principles of law applicable to the defense of former acquittal laid down, and the meaning of the term, "same offense," discussed by ALLEN, J. *S. v. Freeman,* 594.

ISSUES. See Pleadings; Appeal and Error.

1. *Issues.*—Where the issues submitted fully cover the issues tendered, it is not error for the trial judge to refuse to submit the latter. *Hendricks v. Ireland,* 523; *Ins. Co. v. Bonding Co.,* 384.

2. *Issues—Objections and Exceptions—Appeal and Error—Issues Sufficient.*—When the appellant fails to tender issues which he considers necessary and proper to present his case to the jury, he may not take advantage of the failure of the court to give them, by an exception to the issues submitted by the court. He must point out at the time the errors therein complained of. *McCall v. Galloway,* 353.

3. *Issues Submitted—Sufficiency.*—The one issue submitted to the jury in this action for breach of contract for the sale, cutting, and delivery of lumber, to wit, "Are the defendants indebted to the plaintiff, and if so, in what amount?" embraced every issuable fact, and enabled the appellant to present fully its side of the case to the jury, and was sufficient; and it is *Held,* no error to reject numerous issues offered which would have tended to great prolixity. *Lumber Co. v. Manufacturing Co.,* 395.

JUDGMENTS. See Partition; Indemnity; Criminal Law; Liens; Costs; Claim and Delivery; Appeal and Error; Constitutional Law.

1. *Pleadings—Verification — Attorney and Client — Judgments.*—A judgment by default for the want of an answer should not be entered

JUDGMENTS—*Continued.*

in an action upon a note for the payment of money when the complaint, verified by the plaintiff's attorney, does not substantially comply with the provisions of the statute respecting such verifications. *Miller v. Curl*, 1.

2. *Same—Irregular Judgments—Defenses.*—A judgment by default entered in an action on a note for the recovery of money where there is a defective verification made by the plaintiff's attorney, is not void, but irregular; and upon motion made to set it aside, the moving party must show he has a meritorious defense. *Ibid.*

3. *Pleadings—Return Term—Criminal Courts—Ejectment — Defendant's Failure to Give Bond—Answer Stricken Out—Judgment by Default—Interpretation of Statutes.*—Chapter 678, Laws 1909, permits process to be returnable and pleadings to be filed at criminal terms of the court, and where a defendant in ejectment fails to file the undertaking required by Revisal, sec. 453, or procure leave to defend without bond (Revisal, 454), the court, at such term, may strike out the answer and render judgment by default. *Patrick v. Dunn*, 19.

4. *Judgments—Motions in Term—Notice.*—It is unnecessary to serve notice of a motion for a judgment made during a term of court at which such judgment may properly be rendered. *Ibid.*

5. *Same—Inquiry—Harmless Error.*—Where, in an action of ejectment, plaintiff has obtained a judgment for the failure of defendant to give the undertaking required by Revisal, sec. 453, the judgment is conclusive as to all matters therein determined; and where the judgment omits the inquiry as to damages, but is rendered only as to the plaintiff's title or right of possession, the defendant cannot be heard to complain that a final judgment had been entered. *Ibid.*

6. *Motions—Judgments—Excusable Neglect—Findings of Fact—Record—Presumptions—Appeal and Error.*—Upon appeal from the refusal of a motion to set aside a judgment for excusable neglect, the ruling of the Superior Court will be sustained when no facts are found by the judge upon which his ruling was based, the burden being upon the appellant to show error, and the presumption being in favor of the validity of the action of the lower court. *McLeod v. Gooch*, 122.

7. *Same—Exceptions—Assignments of Error.*—It is the duty of the party appealing from an adverse ruling of the trial court, upon his motion to set aside a judgment for excusable neglect, to have requested the court to find the facts upon which the ruling was based, or his exception aptly taken of record to a refusal to have done so at the appellant's request; and an assignment of error, which is no part of the record, but of the attorney in grouping the exceptions noted in the case on appeal, which merely states that the request was made and refused, unsupported by an exception of record, will not be considered on appeal. However, the Court has examined the appellant's affidavits upon which his motion was based, and holds that therefrom excusable neglect is not shown. *Ibid.*

8. *Parties—Motions—Agreements Upon Condition—Hearings — Notice—Court Officers—Laches.*—Where the parties to an action have agreed that a motion to set aside a judgment for excusable neglect be heard on a specified day of a term of court, provided that the term held

JUDGMENTS—*Continued.*

until then, and acting on this agreement the movant appeared after the adjournment of the court for the term, before which time and during the term the court had refused to grant his motion, it is his own fault that he took the chances of the court's holding until the day thus specified; and his neglect will not be held as excusable on appeal; neither will it avail him that he relied upon notice from the officers of the court, for they are under no legal obligations in such matters. *Ibid.*

9. *Judgments—Effect—Title to Lands—Estoppel.*—Where the disputed title to lands sufficiently described in a grant, under which a party claims, has been finally adjudicated, and the decree, by its terms, has the force and effect in law either of confirming or of vesting the title in that tract, the losing party to the record or those claiming under him are afterwards estopped from claiming any interest in the land as against the successful litigant or those claiming under him. *Burns v. Stewart*, 360.

10. *Judgments—Color of Title.*—A judgment of a court of competent jurisdiction in an action involving title to land in dispute, declaring that a certain party is the owner and entitled to the possession thereof, vests the title in the successful party as fully as if a deed had been required therein to be made, and constitutes color of title in his favor. *Ibid.*

11. *Same—Lands—Sufficiency of Description.*—In this case it is held that the judgment relied upon as color of title adjudicated the title to lands in dispute with sufficient certainty, as they were definitely described therein by metes and bounds, and it also referred to a certain grant in evidence; and objection to the judgment not being color on the ground of a defect in the description of the lands, cannot be sustained. *Ibid.*

12. *Actions—Notes—Parties—Judgments—Payments Into Court—Practice —Cancellation.*—Where a holder of a note has pledged it as collateral to a note given by him for borrowed money, he still has at least a distince beneficial or equitable interest in the note pledged, and is a real party in interest (Revisal, sec. 400), and may sue thereon without making the pledgee a party, if he produces the note in court, so that a judgment may be so framed as to protect the rights of his debtor, if he pays the judgment; and for the protection of all the parties, the court should order the note in the hand of the plaintiff to be deposited with the clerk for cancellation upon its payment. *Ball-Thrash v. McCormick*, 471.

13. *Murder — Judgments — Excessive Punishment — Appeal and Error.*— Upon the evidence in this trial for a homicide, the objection that the punishment imposed is excessive is not sustained on appeal. *S. v. Vann*, 534.

JUDICIAL NOTICE. See Statutes.

JURISDICTION. See Injunction; Partition; Removal of Causes; Courts.

JURORS.

1. *Murder—Jurors—Disqualification—Challenge Allowed—Power of Court —Practice.*—When on a trial for murder a juror states, after he has

JURORS—*Continued.*

been passed by the defendant, but before he has been sworn, that he was opposed to capital punishment, and that he would not agree to a verdict of guilty even if the evidence, under the court's instruction, should satisfy him beyond a reasonable doubt of the defendant's guilt, the court may, in its discretion, allow the State to challenge him for incompetency to serve in the case, and sustain the challenge; and it is competent for the court to discharge the juror on its own motion, if he appears to be disqualified. *S. v. Vann*, 534.

2. *Jury—Evidence—Expression of Opinion by Court—Remarks in Jury's Hearing—Interpretation of Statutes—Appeal and Error.*—Revisal, sec. 535, forbidding a judge in his charge to the petit jury in a criminal or civil case to express opinion on the facts involved, applies to any expression of opinion by the judge in the hearing of the jury at any time during the trial. *S. v. Cook*, 586.

3. *Criminal Law—Jurors—Challenge After Passing Juror—Discretion of Court—Appeal and Error.*—It is within the sound discretion of the trial judge to allow the solicitor, in a criminal case, to challenge a juror for cause and stand him aside, after he had once passed the juror and before the jury had been sworn in or impaneled; and his action therein is not reviewable on appeal. *S. v. Burney*, 613.

4. *Constitutional Law—Jury—Attempted Waiver—Judgment, Motion in Arrest of—Procedure—Another Panel.*—A trial by jury in a criminal action cannot be waived by the accused, and though by express agreement and his conduct, and that of his attorneys, he may have agreed that his case should be tried by only eleven men, or have attempted to waive his right to have twelve, his subsequent motion on the trial in arrest of judgment on the ground that the jury, being composed of eleven men, was not lawfully constituted, should be granted, the procedure then being to impanel another and lawful jury. *S. v. Rogers*, 656.

5. *Criminal Law — Jurors — Expression of Opinion — Grand Jurors.*— Where a petty juror had sat upon the grand jury at a former term of the court, when a true bill for assault, etc., had been found against the defendant, upon which the action was dismissed at the instance of defendant for defect in the indictment, and the present trial is upon an indictment correcting this error, objection thereto cannot be sustained when the juror, on his *voir dire*, has stated he had not formed or expressed an opinion, and it does not appear that he was present as a grand juror, or had then voted upon the indictment. *S. v. Drakeford*, 668.

6. *Jurors—Motion to Set Aside—Court's Discretion—Appeal and Error.*— A motion to set aside a verdict because of a defect as to one of the jurors is addressed to the discretion of the trial court, from which no appeal lies. *Ibid.*

JUSTICE OF THE PEACE. See Courts.

LACHES. See Attorney and Client; Judgments; Appeal and Error.

LANDLORD AND TENANT.

1. *Landlord and Tenant—Written Leases—Interpretation.*—Where there is ambiguity in the wording of a written lease of lands, the doubt must be settled against the lessor. *Temple Co. v. Guano Co.*, 87.

LANDLORD AND TENANT—*Continued.*

2. *Same—Lessee's Option—Continuance of Term—Period of Time of Lease.*—A written lease of land providing that it shall be "for a term of six months" and that the lessee "may have the privilege of continuing this lease for a term of four years on the same terms and conditions," is construed, from the language employed, to give the lessee either one or two options; a lease for a term of six months or one for four years; and if the latter option is exercised, it will include the six months period, making in all a period of four years from its commencement. *Ibid.*

3. *Landlord and Tenant—Written Leases—Interpretation—Words and Phrases.*—Where a written lease of lands is for six months, with the privilege or option of "continuing this lease for a term of four years," the words "this lease" refer to the term already created, the words "lease" and "term" being often treated by conveyancers as convertible, and the word "lease" as descriptive of the estate and interest conveyed by the instrument. *Ibid.*

4. *Landlord and Tenant—Written Leases—Interpretation—Intent.*—In construing written leases of land the words employed should be taken in their ordinary sense, unless forbidden by the context, so as to arrive at the intent of the parties to be gathered therefrom. *Ibid.*

5. *Landlord and Tenant—Option to Continue—Occupancy—Payment of Rent—Exercise of Option—Evidence.*—Where a written lease of lands provides for an extension of the term, at the option of the lessee, his continued occupancy of the premises and the payment of rent constitute sufficient notice of his election to extend the term. *Ibid.*

LAST CLEAR CHANCE. See Trials.

LEGISLATIVE POWER. See Constitutional Law.

LESSOR AND LESSEE. See Removal of Causes; Evidence.

LIENS. See Equity; Bills and Notes.

Judgments—Nonsuit—Erroneous in Part—Practice.—Where a judgment of nonsuit has been entered in a suit to recover upon a certain note, also involving the question of a lien, it becomes unnecessary to consider the plaintiff's right to the lien when it appears that there was error committed in allowing the judgment of nonsuit regarding the recovery upon the debt. *Ball-Thrash v. McCormick*, 471.

LIMITATION OF ACTIONS. See Statutes; Receiver; Indemnity.

MALICE. See Evidence.

MAPS. See Evidence.

MARRIED WOMEN. See Deeds and Conveyances.

MASTER AND SERVANT.

1. *Automobiles—Parent and Child—Master and Servant—Negligence—Respondent Superior.*—A parent is not liable for the torts of his minor son done without his knowledge and consent; and where under such circumstances the son has taken an automobile owned by his

MASTER AND SERVANT—*Continued.*

father, and by his negligent or reckless driving has caused damages, the father is not responsible therefor by reason of the relationship; and to make him so it must appear that the son was in some way acting in a representative capacity, such as would make the master responsible for the servant's torts. *Linville v. Nissen*, 96.

2. *Same—Scope of Employment.*—To hold the master responsible for the tort of his servant it must be shown that the tort complained of occurred while the servant was acting within the scope of his duties and while in pursuance of them, and the driving of an automobile comes within this principle; and where it is shown that at times a father used the services of his son as a chauffeur, as in taking the family for a pleasure ride, etc., the tort of the son while taking a party of his friends to ride without the knowledge and against the commands of his father cannot be considered an act done for or in behalf of the latter, and as no negligence can therein be imputed to the father, he cannot be held liable, though he knew the son to be a reckless driver and had not locked up the automobile to prevent his having access to it. *Ibid.*

3. *Master and Servant—Negligence—Safe Appliances—Defects—Ordinary Care—Duty of Master.*—While it is the duty of the master to furnish his servant reasonably safe machinery and appliances with which to do his work, including under certain conditions the peremptory obligation of supplying such as are "known, approved, and are in general use," the responsibility of the master is not that of an insurer, for the requirement is only made of him to provide such as are reasonably safe, with the burden on the servant, in his action for damages for an injury alleged to have been thus negligently inflicted, to show the defective condition of the machine at which he was at work; that it was the proximate cause of the injury; and that the defendant knew of this defect, or could have discovered it by the exercise of ordinary care. *Kiger v. Scales Co.*, 133.

4. *Same—Instructions.*—Where the servant sues for damages for a personal injury caused by the alleged negligence of the master in furnishing him a defective machine with which to do his work, an instruction is erroneous which makes the defendant's liability depend only on whether the machine was defective at the time the servant received the injury, the evidence being conflicting upon whether the defective condition was brought to the master's notice or he should have known thereof in the exercise of ordinary care. *Ibid.*

5. *Same—Res Ipsa Loquitur—Questions for Jury.*—Where there is conflicting evidence upon the question of the master's negligence in not furnishing his servant a proper machine with which to do his work, as the proximate cause of the injury complained of, the doctrine of *res ipsa loquitur*, a question for the jury, does not relieve of the requirement that, in charging the jury upon the issue, the constituent features of the law of negligence as applicable to the facts in evidence should be correctly given. *Ibid.*

6. *Master and Servant—Negligence—Safe Place to Work—Cause Removed Since Injury — Contradictory Evidence — Instructions.*—The plaintiff was employed by the defendant to go upon a trestle of a railroad, which it was building, to dump dirt, and his evidence tended

MASTER AND SERVANT—*Continued.*

to show that while so engaged he went upon a plank, put there for the purpose, which gave way with him, and he thereby received the injury complained of in his action to recover damages. There was also evidence that this plank was defective, and *per contra*, and defendant resisted recovery on the ground of an accident: *Held*, evidence was competent that the plank had been replaced and nailed down since the injury, as contradictory of the defendant's contention that the injury could not have occurred as plaintiff claimed, and the court having restricted its application to this phase of the case, and excluded its consideration upon the issue as to negligence, in the charge to the jury, there was no error. *Pearson v. Clay Co.*, 224.

7. *Master and Servant—Safe Appliances—Subsequent Repairs—Duty to Repair—Conflicting Evidence—Competency.*—While the subsequent strengthening and repair of an appliance furnished by the master to the servant to do the work required of him is not, as a rule, competent upon the question of the negligence of the master in furnishing a defective or inadequate one, for which damages are sought, it is held competent upon the question as to whether it was the duty of the master to make such repairs, where this question is presented, and is properly admitted for that purpose. *Boggs v. Mining Co.*, 393.

8. *Master and Servant—Federal Employers' Liability Act—Interpretation of Statutes—Words and Phrases.*—The Federal Employers' Liability Act abolishes contributory negligence as a defense and introduces the doctrine of comparative negligence, and provides that an "employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee": *Held*, that the act should be construed by the State courts in accordance with the Federal decisions; and the use of the term "any statutes" refers to Federal statutes enacted for the safety of employees, etc. *Horton v. R. R.*, 424.

9. *Federal Employers' Liability Act—Intent—Interpretation of Statutes—Contributory Negligence — Assumption of Risks.*—Statutes should be construed as a whole to effectuate the intent of the lawmaking powers, and as to whether the Federal Employers' Liability Act, which abolishes contributory negligence as a defense, would permit the defense of assumption of risk, *Quære. Ibid.*

10. *Same — Master and Servant — Negligence—Assumption of Risks—Safe Appliances—Notice—Continuing to Work—Reasonable Time.*—An employer is negligent in failing to provide reasonably safe machinery and appliances for the employee to work with in the discharge of his duties, and to keep them in repair; the employee assumes the risk if he continues to work in the presence of a known defect without objection, but not that of the negligence of the employer: *Held*, this apparent conflict is reconciled by imposing upon the employee, if he desires to be relieved from assumption of risk, the duty of making complaint when he knows of a defect, or could discover it by the exercise of ordinary care, and by referring his conduct, when he does complain, to the principles of contributory negligence, at least for a reasonable time. *Ibid.*

MASTER AND SERVANT—*Continued.*

11. *Same—Instructions—Harmless Error.*—Where under the evidence the court correctly charged the jury as to the doctrine of assumption of risks, under the Federal Employers' Liability Act, if they found that the plaintiff had continued to work in the presence of a known danger from a defective appliance, furnished by defendant railroad company, without notifying it thereof, it is not error, of which the defendant can complain, that he also and erroneously charged them, as a distinct and separate proposition, that the plaintiff assumed the risk, although he objected, if he continued to work when a man of ordinary prudence would have seen that there was greater danger of being hurt than otherwise. *Ibid.*

MEASURE OF DAMAGES. See Nuisance; Trials; Contracts; Claim and Delivery.

MINORS. See Partition; Intoxicating Liquors.

MISJOINDER. See Actions.

MORTGAGES. See Equity; Trusts and Trustees.

1. *Mortgages—Notice of Sale—Hour of Sale — Fraud — Evidence—Injunction—Equity—Sale Vacated.*—The failure of the notice of a foreclosure sale under a mortgage to have stated the hour thereof is sufficient evidence of fraud for an order to issue restraining its consummation to the hearing and to preserve the equities of the parties thereunder arising; and should it then appear that the hour was not thus stated, the sale should be set aside. *Hayes v. Pace*, 289.

2. *Mortgages — Stock of Goods — Debtor and Creditor—Fraud—Presumptions.*—A mortgage upon a stock of goods, the possession of which is left with the mortgagor, to secure a debt maturing in the future, which contains no provision for an account of sales and the application of the proceeds to the debt, is presumptively fraudulent as to existing creditors. *Grocery Co. v. Taylor*, 307.

3. *Same—Rebuttal Evidence—Intent.*—Where there is a presumption of fraud as to existing creditors arising from a mortgage of a stock of goods, it cannot be rebutted by proving the absence of an actual intent to defraud, the motive being immaterial. *Ibid.*

4. *Mortgages — Stock of Goods — Debtor and Creditor—Fraud—Rebuttal Evidence—Property Sufficient.*—The presumption of fraud as to existing creditors in a mortgage of a stock of goods may be rebutted by proving that there was no other creditor of the mortgagor at the time of the registration of the mortgage, or if there was such creditor, that the mortgagor owned other property at that time, which could be subjected to the payment of the debt, sufficient to pay such creditor. *Ibid.*

5. *Mortgages—Debtor and Creditor—Fraud — Registration — Subsequent Creditors.*—In the absence of actual or presumptive fraud, a mortgage on a stock of goods is valid as to debts contracted subsequent to its registration. *Ibid.*

6. *Mortgagor and Mortgagee — Sale — Expenses—Credits—Value of Property — Mortgagee's Liability.*—A mortgagee seizing the mortgaged property under claim and delivery is held accountable for its reasonable value, and not merely for the price it may have brought at a

MORTGAGES—*Continued.*

sale; and in this case, the property seized being leaf tobacco, it is *Held*, that the plaintiff should be credited with the reasonable cost of grading and marketing the tobacco, and with certain rent which he has paid for the defendant. *Carroll v. James*, 510.

7. *Actions—Costs—Mortgagor and Mortgagee — Possession — Sales.*—The plaintiff mortgagee seized the defendant's leaf tobacco conveyed by the mortgage, under claim and delivery, and sold the same. The defendant alleged that the tobacco should have brought a sufficient price to have paid off the mortgage. Upon the question of taxing the cost, it is necessary to ascertain whether the plaintiff took possession before or after the commencement of the action; for if before, and anything was found to be due the plaintiff, the answer, in effect, denied the plaintiff's cause of action, and the costs should be taxed against the defendant; if afterwards, and the plaintiff does not recover the amount claimed, the cost should be taxed against him. *Ibid.*

8. *Mortgages—Sales—Fraud—Equity.*—A court of equity has power to vacate a foreclosure sale which is shown to have been tainted with fraud or deceit, or to have been made in pursuance of a corrupt scheme to gain possession of the premises inequitably. *Hayes v. Pace*, 288.

9. *Same—Assignment of Mortgage—Transfer of Title.*—The difference between a mere assignment of a mortgage of lands and the substitution of a trustee is, that the terms of the former do not profess to act upon the lands, or pass the mortgaged estate thereto, but only the security it affords to the holder of the debt; and where a foreclosure sale of the lands had been brought about by collusion and fraud of the holder of the security for the purpose of acquiring the land at the sale, courts of equity will intervene, whether there has been only an assignment of the security or a transfer of the title to the lands to another trustee. *Ibid.*

10. *Mortgages—Fraud—Collusive Sales—Liens—Junior Judgment Creditors—Equity.*—Where fraud and collusion is shown between the holder of a first mortgage debt in the foreclosure sale of the mortgaged premises, junior mortgagees or lien creditors will be protected by the courts to the same extent as the mortgagor. *Ibid.*

MOTIONS. See Partition; Actions; Assistance, Writ of; Appeal and Error; New Trials; Judgments.

Parties—Motions—Agreements Upon Condition—Hearings—Notice—Court Officers—Laches.—Where the parties to an action have agreed that a motion to set aside a judgment for excusable neglect be heard on a specified day of a term of court, provided that the term held until then, and acting on this agreement the movant appeared after the adjournment of the court for the term, before which time and during the term the court had refused to grant his motion, it is his own fault that he took the chances of the court's holding until the day thus specified; and his neglect will not be held as excusable on appeal; neither will it avail him that he relied upon notice from the officers of the court, for they are under no legal obligations in such matters. *McLeod v. Gooch*, 122.

MOTION IN ARREST. See Constitutional Law.

MUNICIPAL CORPORATIONS.

1. *Cities and Towns—Streets and Sidewalks—Negligence—Reasonable Care—Instructions—Appeal and Error.*—A city is required to maintain its streets and sidewalks in a reasonably safe condition for the safety of the public, and to exercise ordinary care and due diligence to see that they are so kept and maintained, and a charge which in effect requires the city to keep its streets and sidewalks in safe condition, and holds it responsible in damages to a pedestrian injured by a defect therein, without negligence on his part, makes the city insure or warrant the safe condition of its streets, and is *Held* for reversible error. *Smith v. Winston*, 50.

2. *Cities and Towns—Presenting Claims—Period Allowed—Complaint—Demurrer—Interpretation of Statutes.*—Where upon the face of a complaint, in an action against a town, etc., to recover for services rendered, it does not appear that claim was made upon its officers as the statute (Revisal, sec. 396) provides, within two years after its maturity, the claim is barred by the express provision of the statute, and demurrer, that it states no cause of action, should be sustained. *Dockery v. Hamlet*, 118.

3. *Cities and Towns—Presenting Claims—Period Allowed—Condition Precedent—Interpretation of Statutes.*—Revisal, sec. 396, requiring a claim against a city to be presented, etc., within two years after its maturity, is not strictly a statute of limitation, for it imposes this as a duty on the claimant as a condition upon which he may successfully maintain his action. *Ibid.*

4. *Same—Maturity—Evidence.*—Where a claim has been made on the city for services rendered, and it nowhere therein appears when the services were rendered, in an action to recover therefor the plaintiff must not only show that the claim had been presented in the statutory period, but that the amount claimed had matured within that time; and when he has failed to make this necessary allegation in his complaint, a demurrer thereto should be sustained. *Ibid.*

5. *Cities and Towns—Presenting Claim—Period Allowed—Demurrer—Defective Statement—Repleading.*—The complaint in this action on a claim against a town, etc., for services rendered, not stating a cause of action under the requirements of Revisal, sec. 396, is demurrable; but as the complaint is a defective statement of a cause of action, it was error to dismiss the action, and the plaintiff may amend by setting out the matters required by the statute. *Ibid.*

6. *Cities and Towns—Governmental Functions—Liability — Nuisance—Damages.*—A city or town is liable in damages, notwithstanding its being a governmental agency, for creating or maintaining a nuisance causing appreciable damage to the property of a private owner. *Moser v. Burlington*, 141.

7. *Same—Sewerage—Permanent Damages—Constitutional Law.*—The operation and maintenance of a disposal plant by a city or town, with septic tank for treatment of sewage before discharging it into a stream upon which the plaintiff lived and owned his home near-by, in a manner that creates a nuisance, causing damages to his health and property, is, to the extent of the damages, regarded and dealt

MUNICIPAL CORPORATIONS—*Continued.*

with as a taking or appropriation of his property, and cannot be done except on compensation to the owner and pursuant to some of the recognized methods, and as required by the "law of the land." *Ibid.*

8. *Same—Improper Use—Additional Acts of Nuisance—Measure of Damages—Instructions—Appeal and Error.*—Where in an action for permanent damages against a city or town caused by emptying sewage into a stream on which the defendant owns his home and other realty, to its damage, etc., there is some evidence of negligence in the operation of a disposal plant, etc., for the treatment of the sewage, an instruction is erroneous which charges the jury that an adverse verdict would vest a perpetual right in the defendant to continue to operate as they were then doing; and it appearing in this case that the charge influenced the verdict by increasing the amount of damages to include improper as well as a proper maintenance of the plant, it is held to be prejudicial to defendant's rights and erroneous; for the right to recover damages for each further and injurious act of defendant amounting to an additional nuisance is still open to the plaintiff in the future. *Ibid.*

9. *Cities and Towns—Waterworks—Legislative Restrictions—Derogation of Rights—Interpretation of Statutes.*—A statute which is mandatory, and is in derogation of the usual and common rights of a municipality to construct or purchase, as well as to manage, its public utilities in the exercise of a sound discretion by the municipal authority, must be construed liberally in favor of the public and strictly against those specifically favored. *Asbury v. Albemarle*, 247.

10. *Same—Words and Phrases.*—When words are used in the expressions of a statute which have a well known legal meaning, and nothing appears therein which would show that a different meaning was intended by the use of these words, there is no ambiguity of expression for the courts to construe, the presumption being that the lawmaking power had expressed its intent according to the legal significance of the words it had employed. *Ibid.*

11. *Same—"Corporations."*—Chapter 86, Public Laws of 1911, provides that a municipal corporation, before undertaking to build "any public system of waterworks, shall . . . first acquire, either by condemnation or purchase, the property of such system already laid, operated, and maintained" by a "private, or *quasi*-public corporation," within the municipality, etc.: *Held*, the word "corporation" has a definite legal meaning, and will not be construed to embrace an unincorporated company of individuals, or a partnership, operating and maintaining a waterworks plant within the limits of the municipality. *Efland's case*, 146 N. C., 135, cited and distinguished. *Ibid.*

12. *Cities and Towns—Waterworks—Acquisition of Plant—Discretion—Private Plants—Constitutional Law—Legislative Restrictions.*—A water plant is a necessity which a municipal corporation may, in its discretion, acquire for the benefit of its own citizens, and the exercise of this discretion is local in its nature, not governmental in character, and is subject to the constitutional legislative restraints upon private corporations; hence an act of the Legislature which

MUNICIPAL CORPORATIONS—*Continued.*

provides that before constructing its water plant the municipality shall acquire by purchase or condemnation a system maintained in its corporate limits by a private corporation, etc., is an unconstitutional interference by the Legislature in attempting to control the municipality in the exercise of its discretion in the management of its local affairs, and is an undue limitation upon the right of local self-government. *Ibid.*

13. *Cities and Towns — Sewerage — Private System — Injunction.*—This case, involving the right of an injunction against a city in constructing a sewerage system without first acquiring that of the plaintiff existing within the corporate limits of the town, is controlled by the decision in *Asbury v. Albemarle, ante,* p. 247. *Sewerage Co. v. Monroe,* 275.

14. *Cities and Towns—Nuisance—Governmental Functions—Health—Repair of Streets.*—Where a municipality, acting in accordance with the authority conferred by its charter, and for sanitary purposes, organizes, through its proper officers, and directs a general cleaning up of the town, and in thus acting attempts to fill up a large hole in an unimportant street, partly to get trash and rubbish out of the way, and partly for the better use of the street, and a suit is brought for damages against the city for the creation of a nuisance, alleging that garbage refuse, causing foul stench and odors, was thrown into this hole, causing sickness, etc., to the plaintiff and his family residing near: *Held,* the acts complained of were governmental in their character. *Hines v. Rocky Mount,* 409.

15. *Cities and Towns—Nuisance—Governmental Functions—Damages to Property—Compensation—Damages—Constitutional Law.*—The principle that a city may not be held liable in damages for its authorized acts of a governmental character which create a nuisance is subject to the limitation that neither a municipality nor other governmental agency is allowed to establish and maintain a nuisance, causing appreciable damage to a private owner, without liability to the extent of the damage done to his property; for such is regarded and dealt with as a taking or appropriation of the property, to the extent of the damage thereto, and such an interference with the rights of ownership may not be made or authorized, except on compensation first made pursuant to law. *Ibid.*

16. *Cities and Towns—Nuisance — Governmental Functions — Injury to Health—Damages.*—The principle upon which a recovery may be had of a municipality for damages arising from a nuisance by it in the exercise of a governmental function applying only to instances that amount to a taking of private property for a public use, the damages recoverable are restricted to the diminished value of the land, and does not include damages by reason of sickness, etc., caused by such nuisance to the owner or his family, considered as a direct element thereof. *Ibid.*

17. *Cities and Towns—Nuisance — Governmental Functions — Injury to Property—Character of Ownership—Nonsuit.*—The damages for injury to real property for which a municipality is liable as the cause of a nuisance created by it in the exercise of its governmental functions is not confined to the ownership of the land, for at least nom-

MUNICIPAL CORPORATIONS—*Continued.*

inal damages are recoverable if damages are caused to the proprietary rights of a plaintiff, whether owner or renter; and where the evidence tends to show the invasion of such rights by a municipality, thus acting, a judgment of nonsuit should be disallowed. *Ibid.*

MURDER. See Homicide.

NEGLIGENCE. See Trials; Municipal Corporations; Master and Servant; Contracts; Homicide.

1. *Street Railways — Trespasser — Contributory Negligence — Ordinary Care.*—The mere fact that a person on an electric railway right of way is a trespasser and has placed himself on the track in a dangerous position, of which he is apparently insensible, does not relieve the company of its duty to avoid running over him with its car, if this can be done by the exercise of ordinary care in the use of the means at the motorman's command, after he should have observed the danger to the pedestrian. *Smith v. R. R.*, 29.

2. *Same—Definition of Ordinary Care.*—In the exercise and enjoyment of its franchise, an electric railway company is bound to recognize the rights of others, and the ordinary care required of them is to be measured in each case by the apparent situation, and the dangers incident to their exercise of the privilege of prosecuting their business. *Ibid.*

3. *Electric Railways—Persons on Track—Apparent Insensibility to Danger—Presumptions.*—Where a person is seen by the motorman down on defendant electric company's track, in a dangerous position, of which he is apparently unaware, in front of a running car, the motorman cannot assume that he will leave the track before the car overtakes him, and, free from negligence, continue to run the car until it is too late to avoid an injury. *Ibid.*

4. *Automobiles—Negligence Per Se—Liability of Owner.*—An automobile is not inherently a dangerous machine so as to render the owner liable for damages caused by the unauthorized acts of another, by virtue of the fact that he is the owner *Linville v. Nissen*, 95.

NEGOTIABLE INSTRUMENTS. See Bills and Notes.

NEW TRIALS.

Evidence, Insufficiency of—Motion for New Trial After Verdict—Practice—Appeal and Error.—Where the sufficiency of the evidence is for the first time objected to after the verdict has been rendered, it coms too late upon a motion for a new trial on that ground. *S. v. White*, 615.

NONSUITS. See Trials; Pleadings; Evidence; Liens; Removal of Causes.

NOTICE. See Landlord and Tenant; Motions; Corporations; Deeds and Conveyances; Trials.

NUISANCE. See Municipal Corporations.

1. *Nuisance—Fertilizer Plant—Increased Value of Property—Diminution of Value—Measure of Damages—Commencement of Nuisance—Instructions.*—Where the plaintiff is suing for permanent damages to his land caused by the erection of an addition by defendant to its

NUISANCE—*Continued.*

fertilizer plant, about a year before the commencement of the action, including the manufacture of sulphuric acid, which is alleged to have caused the injury complained of, and it appearing that as formerly constructed it had existed for four or five years before the enlargements, without damage done or threatened to the plaintiff's property, the latter is entitled to have his damages assessed as of the later date when the injury commenced; and a charge of the court which instructed the jury that no recovery could be had by reason of the increased value of the plaintiff's property by the location of defendant's plant, and at the same time charge for diminution in value by the presence of gases and odors, is erroneous; for the plaintiff is entitled to damages caused by the enlargement of the plant, upon the value of his property as increased theretofore by reason of the location of that part of the plant which caused no injury. *Brown v. Chemical Co.*, 83.

2. *Nuisance—Permanent Damages—Easement—Measure of Damages.*—Where permanent damages to contiguous lands are sought by the owner for the operation of a fertilizer plant of such character as to be a nuisance, the suit amounts to the partial taking of another's property, and it becomes, in effect, proceedings to condemn the complainant's land, an easement to operate the plant for all time in a specified way; and the measure of damages is the difference in value of the property with and without the existence of the wrong, diminished by the incidental benefits especial and peculiar to the property by reason of the plant, but not by any benefits which are common to property of like kind similarly situated in that immediate neighborhood. *Ibid.*

OPTIONS. See Landlord and Tenant.

PARDONS. See Habeas Corpus.

PARENT AND CHILD. See Master and Servant.

Parent and Child—Divorce—Concealment of Child—Abettor—Damages—Pleadings—Cause of Action.—Where a divorce absolute has been obtained by the husband, leaving open the matter of awarding the custody of a minor child, which remained with the wife, the judge of the Superior Court, at the suit of the father, alleging the concealment of the child by the wife and her father, may order the production of the child, if it is within the State, and award its custody; and a civil action for damages will lie against the father of the wife in aiding and abetting her in concealing the child, sending it beyond the borders of the State; and an allegation of the complaint that the defendant procured, aided, assisted, and advised (the wife) in the taking off the child and concealing its whereabouts, "causing plaintiff great and agonizing distress both of mind and body," states a good cause of action against the person thus acting. *Howell v. Howell*, 283.

PAROL EVIDENCE. See Deeds and Conveyances.

PARTIES. See Executors and Administrators; Actions; Trials; Removal of Causes; Evidence; Trespass.

1. *Contracts, Written—Breach—Support of Another—Death of Obligee—Abatement—Executors and Administrators—Parties—Courts—Rules.*

PARTIES—*Continued.*

Where the obligor on a bond given for the support of another for life, and for a valuable consideration, has failed to comply therewith, and the obligee has since died, leaving the obligor responsible under the terms of the bond for moneys due for the former's reasonable support, the action upon the bond, brought by the obligee, does not abate upon his death, and the Superior Court clerk has the authority to make his administrator a party (Revisal, sec. 417); or he could be made a party under Supreme Court Rule No. 46. *Martin v. Martin*, 41.

2. *Evidence—Depositions—Personal Injury — Wrongful Death — Negligence—Same Issue—Executors and Administrators — Parties.*—The difference between hearsay evidence and that obtained by deposition is that in the latter instance testimony is taken before one who is empowered to administer oaths, and the adverse party is given full opportunity to cross-examine; and where depositions have been regularly taken of a deceased person in his action for damages for negligence alleged of the defendant in causing a personal injury, his administrator, in his action against the same defendant for death alleged as resulting from that same injury, involving the same subject-matter and the same issue of negligence, may avail himself of the testimony in the present action by introducing the deposition taken in the former one, notwithstanding his right of action rests by statute only, and that therefore the parties plaintiff in the two actions are technically not the same. *Hartis v. Electric Railway Co.*, 236.

3. *Actions—Notes—Pledgor—Parties.*—A holder of a note, who has deposited it at a bank as collateral security to his own note given for borrowed money, may sue and recover from the maker of the collateral note, if he pays his debt to the bank before the trial or judgment rendered, takes up the collateral note, and produces it at the trial so that it may be canceled for the protection of his debtor, without making the bank a party to the action. *Ball-Thrash v McCormick*, 471.

PARTITION. See Estates; Assistance, Writ of.

1. *Partition—Demurrer—Appeal from Clerk—Superior Court's Jurisdiction.*—An appeal by a guardian *ad litem* in proceedings for partitioning lands from an order of the clerk overruling his demurrer to the cause of action stated carries the entire case into the Superior Court, which, being a court of general jurisdiction in law and equity, is vested with full authority to proceed therewith. *Thompson v. Rospigliosi*, 145.

2. *Partition—Sales—Superior Courts—Discretion—Minors—Private Sale—Power of Court.*—The Superior Court may, in the exercise of its discretion, order a sale of lands in proceedings for partition, where minors are interested and represented by guardian *ad litem*, either to be publicly or privately made, and where no abuse of this discretion is shown on appeal, the action of the lower court will not be reviewed. *Ibid.*

3. *Same—Confirmation—Increased Bid—Interpretation of Statutes.*—Revisal, sec. 2513, applies to public sales, and not to a sale decreed by the court of lands held in common, for the purpose of partition;

PARTITION—*Continued.*

it is therefore not required that the report of such sale remain on file ten days, or that the court wait twenty days before confirmation; but the matter of confirmation being in the sound legal discretion of the court, the court may confirm it at once, or at any time during the continuance of the term to which the report of sale is made; and this may be done notwithstanding there is an increased bid offered of 10 per cent subsequently to the confirmation of the sale, if in the exercise of this discretion it seems best to the court to do so in the interest of the parties, under existing conditions. *Ibid.*

4. *Same—Motions—Parties—Reasonable Discretion.*—A commissioner to sell lands at private sale for partitioning the proceeds among tenants in common, received and recommended an unconditional bid of $130,000, and reported it to the court, where it was confirmed; one who was not a party, and represented as acting for another, made an offer of $145,000 for the property, provided its title was good, moved for a resale and to be made a party by reason of certain deeds to a part interest in the lands, which, it appeared, were procured by him, without consideration paid, for the purposes of his motion: *Held*, it having been found as a fact by the lower court that it was to the best interest of the real parties, who were not objecting, that the confirmation of the sale be not disturbed, its refusal to grant the motion and order a resale was not an abuse of the court's discretion. *Ibid.*

5. *Partition—Motion to Make Parties—Parties at Interest—Appeal and Error.*—Upon the facts presented in this case, the Superior Court properly refused the motion of the petitioner to be made a party in proceedings to sell lands for partition, it appearing that he was not a real party at interest, and his only purpose being to set aside a sale confirmed by the court, satisfactory to those actually interested therein. *Ibid.*

6. *Partition—Tenants in Common—Judgments—Title—Severalty of Possession.*—Where the title to lands is not put in controversy, in partitioning lands among tenants in common, the effect of the proceeding is to designate the shares of the tenants in common, allotted in severalty to each, which cannot have the effect of creating any title that the tenants had not formerly held. *Weston v. Lumber Co.*, 165.

7. *Same—Estoppel.*—A judgment in proceedings for partition does not estop a grantee of one of the parties, who has purchased the lands allotted in severalty to his grantor, to deny the title of another party to a different part of the lands divided in proceedings wherein the title to lands had not been raised or adjudicated. *Ibid.*

8. *Partition—Clerk of Court—Reference—Findings—Sale for Division—Exceptions—Questions for Court—Appeal and Error.*—Where under a reference ordered by the clerk in proceedings for partition the referee has found that actual partition cannot be made of the lands without serious injustice to the various and numerous owners, an exception thereto by one of the parties does not involve an issue of title; and the question presented being confined to the exception taken, is one to be passed on by the clerk, and by the judge of the

PARTITION—*Continued.*

Superior Court on appeal; and the judge's ruling that the matter was one for the jury is held reversible error. *Vanderbilt v. Roberts*, 273.

PAYMENTS. See Judgments.

PENALTY STATUTES. See Carriers of Goods; Pleadings.

PERMANENT DAMAGES. See Municipal Corporations.

PLEADINGS. See Attorney and Client; Bills and Notes; Municipal Corporations; Statutes; Trials.

1. *Pleadings—Interpretation—Demurrer.*—A demurrer to a complaint admits all of its allegations, and if any part of the complaint presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it, under a liberal construction of its terms, the pleading will be sustained. *Hendrix v. R. R.*, 9.

2. *Pleadings—Inconsistent Proof—Penalty Statutes — Interpretation of Statutes.*—In a suit for the penalty against the carrier for the refusal to accept a shipment (Revisal, sec. 2631), the plaintiff, necessarily alleging the refusal of the carrier, cannot contradict this averment by seeking a recovery upon the ground that the company had received this shipment, as it had a right to do, though under the law it may have refused to do so in the condition in which it was offered. *Tilley v. R. R.*, 37.

3. *Pleadings—Defective Cause — Demurrer — Practice.*—Objection to a statement of a defective cause of action must be taken advantage of by demurrer, or it will be deemed waived. *Dockery v. Hamlet*, 118.

4. *Demurrer — Misjoinder — Multiplicity of Actions — Interpretation of Statutes.*—Where it is alleged that the officers and chief stockholders of a bank, in order to merge with another bank, procured the indorsement of the papers in bank by the plaintiffs upon the agreement that the defendants would also indorse them, all assuming a pro rata liability therein, and that the defendants delivered these papers, many of which were worthless, to the other bank for the purpose of merger, but without having indorsed them as agreed; that the plaintiffs have been forced by judgments to pay off some of these indorsed papers in a large amount: it is *Held* that a demurrer for misjoinder of parties and causes of action is bad; for the subject-matter of the action and the parties being the same, a multiplicity of suits was prevented. Revisal, sec. 469 (2). *Ayers v. Bailey*, 209.

5. *Pleadings—Nonsuit—Averments; How Construed.*—Where an action has been dismissed upon the allegations of the complaint, these allegations will be taken as true upon the plaintiff's appeal. *Howell v. Howell*, 283.

6. *Pleadings—Demurrer—Answer.*—A demurrer to a complaint is overruled by the filing of an answer. *Green v. Dunn*, 340.

7. *Issues—Objections and Exceptions—Appeal and Error—Issues Sufficient.*—When the appellant fails to tender issues which he con-

PLEADINGS—*Continued.*

siders necessary and proper to present his case to the jury, he may not take advantage of the failure of the court to give them, by an exception to the issues submitted by the court. He must point out at the time the errors therein complained of. The issues submitted in this case presented every phase of the controversy, and no error therein is found. *McCall v. Galloway*, 353.

8. *Pleadings—Debtor and Creditor—Denial of Cause of Action.*—Where in an action upon a mortgage note the answer denies the debt, it is, in effect, a denial of plaintiff's cause of action. *Carroll v. James*, 510.

POSSESSION, CONSTRUCTIVE. See Deeds and Conveyances.

POWERS. See Wills.

PRACTICE. See Pleadings; Appeal and Error; Assistance, Writ of.

1. *Actions and Defenses — Pendency of Another Action — Demurrer—Jurisdiction—Practice.*—The defense that another action is pending between the same parties on the same subject-matter is by demurrer (Revisal, sec. 474, 3); and it must appear that the other action is pending in this State. *Carpenter v. Hanes*, 46.

2. *Pleadings—Forcible Trespass—Demurrer — Appeal and Error — Practice—Repleading.*—Where the complaint alleges that defendant trespassed on the home and lands of the plaintiff and his wife, in their possession, without regard to their resistance and rights, and at that time offered them indignities by demonstrations and by force and violence, which were willful and wanton and accompanied by acts of oppression, a cause of action for damages for forcible trespass is stated, to which a demurrer is bad; and, in this case, the trial judge having erroneously sustained the demurrer, and it not specifically appearing whether the lands are owned by the plaintiff or his wife, the Superior Court should order a repleader so as to present more clearly the acts of trespass, the ownership of the land, and eliminate the objectionable features in the pleadings. *Hood v. Telegraph Co.*, 70.

PRINCIPAL AND AGENT. See Attorney and Client; Carriers of Goods; Taxation; Embezzlement; Appeal and Error; Criminal Law.

1. *Principal and Agent—Adverse Interests—Fraud—Knowledge Imputed.* Where an agent acts in his own behalf and in a manner antagonistic to the interest of his principal in dealing with another, as in fraud and collusion against the principal, knowledge of the agent of the facts involved in the transaction will not be imputed to the principal, and will not be binding upon him in the absence of other knowledge thereof, express or implied. *Lumber Co. v. Atkinson*, 298.

2. *Principal and Agent—Surety—Declarations of Agent—Evidence.*—In an independent action against a surety on a bond indemnifying against an agent's default, the declarations of the agent, the principal on the bond, are incompetent. *Insurance Co. v. Bonding Co.*, 385.

PRINCIPAL AND SURETY. See Indemnity.

PROBATE. See Wills.

PUBLIC OFFICERS. See School Districts.

1. *Elections—Public Officers—Disqualifications to Office—Next Highest in Votes—Vacancy in Office—Appointive Power.*—The one receiving the next highest number of votes for a public office at an election held by the people, is not elected to fill that office because of the ineligibility of the one receiving the highest number. *S. v. Bateman*, 588.

2. *Public Officers—Qualifications—Constitutional Law—Legislative Powers—Recorders' Courts—Attorney.*—The Constitution of North Carolina, Art. VI, provides who shall be voters, and by section 7 thereof, that "every voter in North Carolina, except in this article disqualified, shall be eligible to office," and the Legislature cannot add to the constitutional disqualifications to hold office by requiring candidates for the position of recorder in a municipal court to be "a licensed attorney at law." The difference between an "assurance" and a "qualification" to office pointed out and discussed by CLARK, C. J. *Ibid.*

PUBLIC POLICY. See Statutes.

PUNITIVE DAMAGES. See Damages; Telegraph and Telephone.

PURCHASER FOR VALUE. See Deeds and Conveyances; Removal of Causes; Bills and Notes.

QUO WARRANTO. See Railroads.

RAILROADS. See Statutes; Removal of Causes; Evidence; Criminal Law.

1. *Pleadings—Railroads—Easements — Rights of Way — Unlawful Use.*—The grant by the owner of the lands in this action of a right of way to a railroad company thereon does not include the right of the latter to go upon the lands except for the necessary porposes of constructing and maintaining the road according to the right granted; and where a demurrer is filed by the company to a complaint alleging that the company had taken dirt from the plaintiff's lands to his damage, for the purpose of making fills along other portions of the road, the allegation states a good cause of action for damages to the land arising from an invasion of the plaintiff's rights, and the demurrer should be overruled. *Hendrix v. R. R.*, 9.

2. *Railroads—Negligence—Fire Damages—Evidence—Nonsuit—Questions for Jury.*—In an action to recover damages from a railroad for negligently setting fire to the plaintiff's sawmill, there was evidence tending to show, and *per contra*, that the passing locomotive at that point put on its exhaust, throwing out a great deal of smoke and cinders, which the wind carried to and enveloped the mill situated near; that from three to five minutes thereafter the ignition appeared on the side of the roof sloping nearest to the track; that no fire was there before the train passed, or within the building which could have caused the fire; and it is *Held*, that the evidence, construed as required in such motions, was sufficient upon the defendant's negligence, and a motion to nonsuit should not be sustained; and further *Held*, it was competent for a witness to testify that on this same trip at a trestle below the mill the same locomotive had set fire to the grass along its route. *Armfield v. R. R.*, 24.

RAILROADS—*Continued.*

3. *Electric Railways—"Practical Fenders"—Negligence—Evidence—Questions for Jury.*—The failure of an electric railway company to furnish its car with "practical fenders" to prevent injuries to those using the track, as required by Revisal, secs. 2616, 3801, is some evidence of negligence, in an action to recover damages for personal injury inflicted by one of them in a collision with a pedestrian, and actionable when it is the proximate cause of the injury. *Smith v. R. R.*, 29.

4. *Electric Railways — Outlook — Ordinary Care — Negligence.*—It is the duty of a motorman on a moving electric railway car to keep a careful, constant, and continuous outlook for persons or obstructions on the track, such as is reasonable and practicable, and required in the observance of ordinary care. *Ibid.*

5. *Same—Persons on Track—Last Clear Chance—Nonsuit.*—The defendant electric railway company being sued for damages for the negligent killing of plaintiff's intestate by one of its cars, while he was sitting, at night, on the defendant's track, his elbows on his knees and his head in his hands, introduced as a witness the motorman on the car, who testified that he was "looking forward" at the time, and failed to see the intestate, because the night was dark and foggy. There was evidence that the car was equipped with an electric headlight, that the track was straight and level where the killing occurred, that the deceased could have been seen at a distance of 400 feet, and that, at the speed the car was then going, it could have been stopped in about 35 feet: *Held*, the fact that the motorman was keeping a careful lookout, under the circumstances, was evidence that he saw the deceased in time to have stopped the car and avoided the injury; and a motion for a judgment of nonsuit on the evidence should not be granted, there being more than a scintilla of evidence that the defendant was negligent upon the issue of the last clear chance. *Ibid.*

6. *Same — Trespasser — Contributory Negligence — Ordinary Care.*—The mere fact that a person on an electric railway right of way is a trespasser and has placed himself on the track in a dangerous position, of which he is apparently insensible, does not relieve the company of its duty to avoid running over him with its car, if this can be done by the exercise of ordinary care in the use of the means at the motorman's command, after he should have observed the danger to the pedestrian. *Ibid.*

7. *Same—Definition of Ordinary Care.*—In the exercise and enjoyment of its franchise, an electric railway company is bound to recognize the rights of others, and the ordinary care required of them is to be measured in each case by the apparent situation, and the dangers incident to their exercise of the privilege of prosecuting their business. *Ibid.*

8. *Street Railways — Quasi-public Corporations — Private Business—Condemnation—Easements.*—Where a corporation is authorized to conduct the *quasi*-public business of operating a street railway, it may exercise the right of eminent domain in respect to this business given to it by its charter and Revisal, secs. 1138, 2575, notwithstanding it is also authorized to conduct business of a private nature. *Land Co. v. Traction Co.*, 314.

9. *Same—Petition—Presumption of Good Faith—Use for Private Purposes —Remedies—Quo Warranto.*—Where an electric street railway com-

RAILROADS—*Continued.*

pany, also authorized to conduct business of a private nature, sets forth in its petition to condemn lands that it desires the lands in connection with its works for production of power "to generate electricity for the use and benefit of the public," and it does not appear that the lands are to be used for other purposes, it will not be presumed that the corporation is acting in bad faith; and should it afterwards appear that the land thus acquired was for private purpose, the remedy would be by *quo warranto*, etc. *Ibid.*

10. *Street Railways—Radius of Operation—Interstate Connections—Charter Rights—Interpretation of Statutes.*—A corporation chartered under Revisal, 1138, may operate a "street railway," which includes railways operated by steam or electricity, between points in the same municipality, or between points in different municipalities within a radius of 50 miles, and may haul and deliver freight, etc.; and a violation of its charter is not effected by the fact that the railway thus operated interchanges traffic with other carriers doing an interstate business. *Ibid.*

11. *Street Railways—Condemnation—Petition—"Commercial Railways"—"Words and Phrases"—Private Purposes.*—A *quasi*-public corporation operating a street railway, also having the authority to engage in business of a private nature, in its petition to condemn land stated that the land was to be used in generating power for public purposes, etc.: *Held*, the use of the words "commercial railway" in the petition did not indicate that the land was to be used for private purposes, for the company engages in commerce when it carries articles of merchandise for the public. *Ibid.*

REASONABLE APPREHENSION. See Homicide.

RECEIVERS.

Corporations—Receivers — Notes — Payments — Limitation of Actions.—Payments made on a note, given by a corporation with individuals as sureties, by a receiver of the corporation are not such as will repel the bar of the statute of limitations. *Bank v. Hamrick*, 216.

RECENT POSSESSION. See Evidence.

REFERENCE. See Appeal and Error.

Reference — Findings of Fact — Confirmation — Appeal and Error.—The findings of fact of a referee, confirmed by the trial judge, are conclusive on appeal if there is any evidence to support them. *Hudson v. Morton*, 6.

REGISTRATION. See Deeds and Conveyances; Mortgages.

REMOVAL OF CAUSES. See Executors and Administrators.

1. *Removal of Causes—Executors and Administrators—Answer—Waiver—Interpretation of Statutes.*—A motion to remove an action brought in the wrong county against an executor must be formally made at the term of court for filing pleadings and before answer filed; and where answer has been filed and withdrawn for the purpose of the motion, at the proper term, the right to remove will be taken as waived. Revisal, sec. 425. *Trustees v. Fetzer*, 245.

REMOVAL OF CAUSES—*Continued.*

2. *Foreign Corporations—Purchaser at Foreclosure Sale—Domestic Corporations—Removal of Causes—Diversity of Citizenship—Interpretation of Statutes—Jurisdiction.*—A railroad corporation of another State purchasing the property of a railroad corporation of this State at a foreclosure sale under a mortgage or deed in trust becomes a new corporation of this State to the extent of the franchise, etc., of the domestic corporation thus acquired (Code, sec. 679), and may not remove a cause of action against it to the Federal court upon the ground of diversity of citizenship, brought by a citizen of North Carolina; and this being so, as a matter of law, the State courts, upon petition and bond for removal filed, are not deprived of their jurisdiction to pass upon this question when the uncontradicted facts are made to appear upon the face of the proceedings. *Hurst v. R. R.*, 368.

3. *Railroads — Removal of Causes — Federal Employers' Liability Act—Concurrent Jurisdiction—Interpretation of Statutes—Writs of Error —Procedure.*—The Federal Employers' Liability Act applies in favor of all employees of common carriers for railroads, while engaged in interstate commerce, and, "when injured or killed by reason of the negligence of any officer or agent of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances," etc., and the amendment of 1910 provides that the jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several States, and that "no case arising under this act and brought in any State court of competent jurisdiction shall be removed to any court of the United States," etc. The constitutionality of the act being declared valid by the United States Supreme Court, it is *Held*, the purpose and effect of the amendment of 1910 is to withdraw the right of removal to the Federal courts in cases arising under the statute when the action has been instituted in the State court, and the Federal questions thereunder arising are reviewable in the United States court upon a writ of error to the State court making final disposition of the cause in its jurisdiction. *Lloyd v. R. R.*, 485.

4. *Removal of Causes—Petition—Diversity of Citizenship—Fraudulent Joinder—Jurisdiction.*—While ordinarily the State's courts have no jurisdiction to pass upon issues of fact raised by the filing of a sufficient petition and bond for removal to the Federal court for diversity of citizenship, it is necessary for this result, where a fraudulent joinder of a resident defendant is alleged, for the petitioner to set forth a full and direct statement of the facts and circumstances of the transaction sufficient, if true, to demonstrate "that the adverse party is making a fraudulent attempt to impose upon the court, and so deprive the defendant of his right of removal." *Ibid.*

5. *Railroads—Removal of Causes—Defective Machinery—Personal Injury—Lessor and Lessee—Interstate Commerce—Fraudulent Joinder —Diversity of Citizenship—Allegations.*—The plaintiff brings his action in the State court to recover damages, for a personal injury, against the Southern Railway Company, under the Federal Employers' Liability Act, and joins therein the North Carolina Railroad Company, its lessor, wherein a petition and bond for removal

REMOVAL OF CAUSES—*Continued.*

of the cause to the Federal court, for diversity of citizenship, is filed, upon the ground that the latter road was fraudulently joined for the purpose of retaining the cause in the State court. It appears from the pleadings and admissions, that the plaintiff was a locomotive engineer of the petitioner; that the injury occurred at a repair shop of the petitioner, off of the leased premises, by reason of a defect in the machinery of the engine, not properly repaired, and while the plaintiff was preparing to test the engine, upon a trial trip within the State, for the further service of the company; that he had theretofore been operating this locomotive for the petitioner over a portion of the North Carolina road, used as a part of the petitioner's North and South trunk line, and on to Monroe, Virginia, in moving interstate trains: *Held*, that upon these allegations, construing the Federal Employers' Liability Act in connection with the act of Congress entitled "Safety Appliance Act," the charge of fraud is not to be necessarily inferred, so as to give the petitioner the right of removal upon the filing of the petition and bond. *Ibid.*

6. *Removal of Causes—Diversity of Citizenship—Nonsuit—Resident Defendant—Exceptions—Appeal and Error.*—Where a resident and nonresident defendant are joined in a cause of action, and the plaintiff elects to discontinue his suit as to the resident party, the rights of removal of the cause to the Federal court by reason of the diversity of citizenship will then arise to the other; but this will not obtain when the nonsuit has been taken in deference to an adverse intimation of the court, to which the plaintiff, insisting on his rights, excepts and the exception is properly presented as an assignment of error on appeal from an order removing the cause. *Ibid.*

7. *Same — Second Petition — Existing Conditions.* — Where a cause of action is sought to be removed to the Federal court for diversity of citizenship, in which a resident defendant had been joined, but as to which a nonsuit had thereafter been ordered, under exception duly taken and properly presented on appeal, and the lower court has ordered the removal of the cause, upon the filing of a second petition and bond, the order of nonsuit must be considered as having been taken *in invitum*, and the right of removal is made to depend upon conditions existent at the time of filing the first petition.—*Ibid.*

RES IPSA LOQUITUR. See Trials.

RESTRAINT UPON ALIENATION. See Estates.

REVISAL.

SEC.

4. The husband of testatrix may not recover damages for her wrongful death upon the idea of partial intestacy, another having been appointed as executor. *Hood v. Telegraph Co.*, 92.

59. Executor or administrator is only party who may maintain action for damages for wrongful death. *Hood v. Telegraph Co.*, 70.

59. Testatrix having appointed her executor by will, her husband may not maintain action for her wrongful death upon the idea of her partial intestacy. *Hood v. Telegraph Co.*, 92.

REVISAL—*Continued.*

SEC.

285. This section is held inapplicable in an action by the principal against the surety of an indemnity bond against damages to employees. *Insurance Co. v. Bonding Co.*, 385.

396. To maintain an action against a town for claim for services rendered, the claim must have been made on the proper officers within two years. *Dockery v. Hamlet*, 118.

400. The pledgor of a negotiable instrument has a beneficial interest and may maintain an action thereon in his own name. *Ball-Thrash v. McCormick*, 471.

417. Superior Court clerk may make administrator of deceased a party to an action to recover upon a breach of contract to support deceased during life. *Martin v. Martin*, 41.

421. An action brought to recover upon a paper-writing made by the deceased in the nature of a surety, involves an accounting, and should be brought in the county in which the administrator qualified. *Thomas v. Ellington*, 131.

425. Motion to remove to right county an action against executor is not aptly made, when answer has been filed, and withdrawn for the purpose of the motion. *Trustees v. Fetzer*, 245.

453. Judgment by default upon striking out answer in ejectment for failure to give bond may be rendered at criminal term of court. Chapter 678, Laws 1909. *Patrick v. Dunn*, 19.

454. Defendant in ejectment failing to give bond or procure leave to defend without one, court may strike out answer and render judgment by default at criminal term. Laws 1909, ch. 678. *Patrick v. Dunn*, 19.

469. (2). A demurrer to misjoinder of actions is bad, when it appears that the joinder of the parties plaintiff prevents a multiplicity of suits. *Ayers v. Bailey*, 209.

474. The defense of the pendency of another action between the same parties on the same subject is by demurrer. *Carpenter v. Hanes*, 46.

488. Requisites for verification of pleadings by attorney. *Miller v. Curl*, 1.

489. Requisites for verification of pleadings by attorney. *Miller v. Curl*, 1.

490. Requisites for verification of pleadings by attorney. *Miller v. Curl*, 1.

500. Where a private statute settles the controversy, the Supreme Court, upon due notice, will take judicial knowledge thereof, though not specially pleaded, when formally presented. *Reid v. R. R.* 355.

515. In an action for wrongful ejection of passenger from train, where the proof is as to a certain station, and the allegation as to a different one, there is no fatal variance between allegation and proof. *Edwards v. R. R.*, 278.

535. Any expression by the judge of his opinion upon the evidence, in the hearing of the jury, is objectionable. *S. v. Cook*, 586.

536. The trial judge, upon request aptly made, is required to put his charge in writing in criminal as well as in civil cases. *S. v. Black*, 637.

570. In action for claim and delivery, defendant having replevied, judgment may require return of the property, or its value with damages for detention. *Hendricks v. Ireland*, 523.

859. An agreement to give new note in compromise of settlement of old one is valid. *Bank v. Walser*, 53.

REVISAL—*Continued.*

SEC.

952. Unless privy examination is taken as required by this section, it is void. *Jackson v. Beard*, 105.

1066. Corporation Commission may regulate shipments of inflammable freight. *Tilley v. R. R.*, 37.

1099. Corporation Commission may regulate shipments of inflammable freight. *Tilley v. R. R.*, 37.

1112. Corporation Commission may regulate shipments of inflammable freight. *Tilley v. R. R.*, 37.

1138. A corporation authorized to conduct business of a private nature may exercise its right of eminent domain, when it is a *quasi*-public corporation. *Land Co. v. Traction Co.*, 314.

1164. A resolution of the stockholders to decrease the amount of the capital stock, if otherwise lawful, is binding upon the stockholders. *Meisenheimer v. Alexander*, 228.

1589. Possession of lands is not necessary to maintain suit to remove cloud upon title. *Speas v. Woodhouse*, 66.

1636. Declarations of wife as to improper relations with defendant are incompetent evidence in an action for unlawfully enticing the wife away from plaintiff, etc. *McCall v. Galloway*, 353.

1652. This section does not require the signature by the witness to his testimony taken by deposition. *Boggs v. Mining Co.*, 393.

2102. Construed in connection with section 952. *Jackson v. Beard*, 105.

2108. Construed in connection with section 952. *Jackson v. Beard*, 105.

2109. Construed in connection with section 952. *Jackson v. Beard*, 105.

2173. A holder for value of a negotiable instrument is one for a consideration sufficient to support a simple contract, a preëxisting debt, or a lien on the instrument. *Smathers v. Hotel Co.*, 246.

2513. This section does not apply to sale of lands decreed by court for partition. *Thompson v. Rospigliosi*, 145.

2575. A corporation authorized to conduct a private business may exercise its right of eminent domain, when it is a *quasi*-public corporation. *Land Co. v. Traction Co.*, 314.

2616. Failure of street railway companies to comply with this section and section 3801 of the Revisal is some evidence of negligence. *Smith v. Salisbury*, 29.

2631. The penalty of this section is not recoverable for refusal of carrier to accept shipment of inflammable freight contrary to Commission's rules. *Tilley v. R. R.*, 37.

3113. Manual signature of testator to will in presence of witness is unnecessary, nor is it necessary that witnesses sign in presence of each other. *Watson v. Hinson*, 72.

3127. Proof of testator's handwriting is unnecessary when he has signed the will by his mark. *Watson v. Hinson*, 72.

3194. Voluntary statement made by accused, properly warned, is held in this case competent as evidence against him. *S. v. King*, 580.

3254. Upon an indictment for assault upon "Lila" Hatcher, it was shown that the assault was made upon "Liza" Hatcher: *Held*, this variance was immaterial. *S. v. Drakeford*, 667.

3254. Where a charge of false pretense is intelligible, plain, and explicit, and upon sufficient allegation to proceed to judgment, it is sufficient. *S. v. Marsh*, 603.

REVISAL—*Continued.*

SEC.

3432. The charge, in this case, of false pretense of a railroad agent in getting from his principal money upon a receipt for payment to a subemployee he has led the latter to believe he has employed in its behalf, is held sufficient. *S. v. Marsh*, 603.

3523. The surrender of bill of lading for spirituous liquors, subject of interstate commerce, by a bank, upon drawee's payment of draft attached, does not render the bank liable under this section. *S. v. Fisher*, 550.

3801. Failure of street car companies to comply with Rev., secs. 3801 and 2616 is evidence of negligence. *Smith v. Salisbury*, 29.

4115. The election for issuance of bonds by a school district held valid in this case by correct interpretation of the order of the commissioners in connection with the petition, as to the polling place, etc. *Gregg v. Commissioners*, 479.

4809. A provision in an employee's indemnity bond requiring suit to be brought within six months is void. *Insurance Co. v. Bonding Co.*, 385.

RIGHT OF WAY. See Railroads; Street Railways.

RULES. See Appeal and Error.

SAFE APPLIANCES. See Master and Servant.

SAFE PLACE TO WORK. See Master and Servant.

SALES. See Partition; Trusts and Trustees; Taxation; Contracts; Mortgages; Intoxicating Liquors.

SCHOOL DISTRICTS.

1. *Bond Issues—School Districts—Separate Readings—"Aye and No" Vote—Amendments—Constitutional Law—Excluding Districts.*—An act empowering special school districts of the State to issue bonds in accordance with a certain method, passed its various readings on separate days, upon "aye" and "no" vote, following the requirements of Article II, sec. 14, except that upon its last reading, by amendment, it was made to apply only to one district in the State: *Held*, the effect of the amendment being to exclude the other districts, and the act being regularly enacted as to the one district retained, is valid as to that district. *Gregg v. Commissioners*, 480.

2. *Bond Issues—School Districts—Orders of County Commissioners—Petition—Voting Districts.*—In accordance with legislative authority the commissioners of Randolph County, upon petition made for the issuance of bonds for Liberty School District, in that county (Revisal, sec. 4115), ordered the election to be held in the town of Liberty, on a certain date, appointing a registrar and poll-holders. In construing the order of the commissioners in connection with the petition, it is *Held*, that the election was ordered for the district, the polling place being within the town of Liberty; and the election is held valid on this and the further ground that it does not appear that any citizen affected by the election was deprived of his right to vote therein. *Ibid.*

3. *Public Officers—Presumptions—School Districts—Bond Issues—Sufficiency of Petition—Interpretation of Statutes.*—There is a pre-

SCHOOL DISTRICTS—*Continued.*

sumption in favor of the legality and regularity of the acts of public officers, and where an election, authorized by statute, has been ordered by the board of county commissioners for a bond issue for a special school district therein upon a petition of its citizens (Revisal, sec. 4115), and the act itself provides that "the ordering of such election by the board of county commissioners shall conclusively presume that all precedent conditions of this act have been complied with," objection cannot be sustained that the petition was insufficient, in the absence of evidence rebutting the presumption. *Ibid.*

4. *Public Officers—Presumptions—School Districts—Bond Issues—Sufficiency of Petition—Interpretation of Statutes.*—There is a presumption in favor of the legality and regularity of the acts of public officers, and where an election, authorized by statute, has been ordered by the board of county commissioners for a bond issue for a special school district therein upon a petition of its citizens (Revisal, sec. 4115), and the act itself provides that "the ordering of such election by the board of county commissioners shall conclusively presume that all precedent conditions of this act have been complied with," objection cannot be sustained that the petition was insufficient, in the absence of evidence rebutting the presumption. *Ibid.*

5. *Bond Issues—School Districts—Injunctions—Nonuser of Power—Interpretation of Statutes.*—In this cause an injunction is sought against the issuance of certain bonds for a special school district, upon the ground that the lapse of time in proceeding to issue the bonds after the election was such as to forfeit the right. There was no provision of the act limiting the time for the issuance of the bonds, and in the absence of evidence of abuse of power, it is *Held*, there is no valid reason for the issuance of the restraining order. *Ibid.*

SEWERAGE. See Municipal Corporations.

SPECIAL PRIVILEGES. See Constitutional Law.

SPECIFIC PERFORMANCE. See Corporations.

STATEMENTS. See Criminal Law.

STATUTES. See Wills; Attorney and Client; Carriers of Goods; Pleadings; Drainage Districts; Bills and Notes; Actions; Removal of Causes; Deeds and Conveyances; Railroads; Trials; Commerce; Husband and Wife; Indemnity; Evidence; Master and Servant; School Districts; Intoxicating Liquors; Courts; Criminal Law.

STENOGRAPHER'S NOTES. See Appeal and Error.

STREET RAILWAYS. See Railroads.

1. *Public-service Corporations—Street Railways—Rights of Way—Use by Separate Corporations—Additional Burden—Damages.*—An electric street railway corporation having acquired a right of way for its own use over private lands, may not grant to another such corporation the right to likewise operate thereon, requiring the use of additional poles, etc.; for the use thereof by the second corporation imposes an additional burden upon the lands, for which the owner is entitled to compensation. *Land Co. v. Traction Co.*, 503.

STREET RAILWAYS—*Continued.*

2. *Public-service Corporations—Street Railways—Rights of Way—Condemnation — Damages, Speculative — Evidence.*—In the admeasurement of damages to be awarded to the private owner of lands for the acquiring by a public-service corporation of a right of way thereon, the jury should consider the present condition of the property condemned and the uses to which it was then applied, and those for which it was naturally adapted, so as to arrive at the difference between the market value of the lands before and after the appropriation of the right of way; but so far as the same may not fall within this rule, damages are speculative and too remote which allow for intended or future improvements, such as laying off the property into lots and their development by the expenditure of money; the making of a park of unproductive lands, etc.; nor is it competent to show a comparison of values with lands of or near the same city which had already been developed, etc. *Ibid.*

STREETS AND SIDEWALKS. See Municipal Corporations.

SUICIDE. See Insurance.

TAXATION.

1. *Tax Sales—Tender—Issues Sufficient.*—The issue in this case being sufficient as to a tender by the owner of amount of taxes, costs, and 20 per cent interest to the purchaser of lands at a sale for taxes, and as to the ownership, etc., of the lands, it was not error for the court to refuse to submit the issues tendered by the defendant. *Green v. Dunn,* 340.

2. *Tax Sales—Tender as Agent—Equitable Owner—Appeal and Error—Regularity of Trial—Presumptions.*—The plaintiff purchased certain lands with the erroneous understanding that taxes for that year had been paid. The lands were sold for these taxes, and he testified that he had made a proper tender to the purchaser within the year, as required by the statute, in his own name and in the name of his grantor, which had been refused. The jury having found on this issue for the plaintiff, it is *Held,* that the question whether the plaintiff, as equitable owner, could make a legal tender of the taxes does not arise, the presumption being that the jury was correctly instructed, when no exception to the charge is taken and the charge does not appear in the record. *Ibid.*

TELEGRAPH AND TELEPHONE.

1. *Telephone Companies — Cutting Out Phones — Malice—Evidence.* — In this action for damages against a telephone company for maliciously taking plaintiff's phone from his residence for nonpayment for its service, when the service had in fact been paid for, the testimony of the plaintiff's daughter that the defendant's collector, in plaintiff's absence, presented the bill at his residence in a rude manner, is held competent as a part of the transaction complained of. *Carmichael v. Telephone Co.,* 333.

2. *Telephone Companies—Cutting Out Phones—Malice—Tort—Punitive Damages—Unforeseeable Results.*—Where it is established that a subscriber to a telephone exchange has paid the sum demanded for his service, and the company maliciously cuts out his phone for its

TELEGRAPH AND TELEPHONE—*Continued.*

alleged nonpayment, the defendant is guilty of a tort, and is liable for all damages flowing naturally and proximately from the wrongful act, although not foreseen. *Ibid.*

3. *Telephone Companies—Duty to Patrons—Instructions.*—In this action against a telephone company for damages caused the plaintiff for wrongfully cutting out a telephone from his residence, a charge is held correct that defendant's business is affected with a public use, that it is a public-service corporation, and among its duties is to give its patrons courteous and prompt service, and that the defendant must be sure it is within its rights before depriving a patron of its service. *Ibid.*

TENANTS IN COMMON. See Husband and Wife; Partition.

TENANT BY THE CURTESY. See Deeds and Conveyances.

TITLE. See Partition; Deeds and Conveyances; Equity; Judgments.

TORT. See Actions.

TRANSFER OF CAUSES. See Removal of Causes.

TRESPASS. See Actions.

1. *Trespass—Boundaries—Declarations—Evidence.*—In an action of trespass *quare clausum fregit*, testimony of the plaintiff as to certain lines and boundaries was objected to on the ground that it was based on information his deceased father had given him: *Held*, no error, as this evidence may have been competent, as the declarations of the father had been made before any controversy had arisen; and as the witness further testified that it was on information received from his father and others, and was also a matter of personal knowledge, and as the land in dispute adjoined that of the plaintiff, the evidence may have been competent under the principles announced in *Halstead v. Mullen*, 93 N. C., 252; *Bowen v, Lumber Co.*, 516.

2. *Trespass—Parties.*—In an action of trespass *quare clausum fregit*, only those who owned the land at the time of the trespass, and have any interest in the recovery, are the necessary parties of record. *Ibid.*

3. *Trespass—Conflicting Evidence—Verdict.*—When in an action of trespass, involving title to lands, the evidence is conflicting, the findings of the jury, under a proper charge of the court, are conclusive. *Ibid.*

TRIALS. See New Trials.

1. *Electric Railways — "Practical Fenders" — Negligence — Evidence — Questions for Jury.*—The failure of an electric railway company to furnish its cars with "practical fenders" to prevent injuries to those using the track, as required by Revisal, secs. 2616, 3801, is some evidence of negligence, in an action to recover damages for personal injury inflicted by one of them in a collision with a pedestrian, and actionable when it is the proximate cause of the injury. *Smith v. R. R.*, 29.

2. *Evidence—"Scintilla"—Nonsuit.*—Where there is more than a scintilla of evidence, and such as rises above the plane of mere conjecture, and is sufficient to prove the essential facts making for the plaintiff's contention in his action, a judgment for nonsuit should be refused. *Ibid.*

TRIALS—*Continued.*

3. *Street Railways—Negligence—Persons on Track—Last Clear Chance—Nonsuit.*—The defendant electric railway company being sued for damages for the negligent killing of plaintiff's intestate by one of its cars, while he was sitting, at night, on the defendant's track, his elbows on his knees and his head in his hands, introduced as a witness the motorman on the car, who testified that he was "looking forward" at the time, and failed to see the intestate, because the night was dark and foggy. There was evidence that the car was equipped with an electric headlight, that the track was straight and level where the killing occurred, that the deceased could have been seen at a distance of 400 feet, and that at the speed the car was then going it could have been stopped in about 35 feet: *Held*, the fact that the motorman was keeping a careful lookout, under the circumstances, was evidence that he saw the deceased in time to have stopped the car and avoided the injury; and a motion for a judgment of nonsuit on the evidence should not be granted, there being more than a scintilla of evidence that the defendant was negligent upon the issue of the last clear chance. *Ibid.*

4. *Improper Use—Additional Acts of Nuisance—Measure of Damages—Instructions—Appeal and Error*—Where in an action for permanent damages against a city or town caused by emptying sewage into a stream on which the defendant owns his home and other realty, to its damage, etc., there is some evidence of negligence in the operation of a disposal plant, etc., for the treatment of the sewage, an instruction is erroneous which charges the jury that an adverse verdict would vest a perpetual right in the defendant to continue to operate as they were then doing; and it appearing in this case that the charge influenced the verdict by increasing the amount of damages to include improper as well as a proper maintenance of the plant, it is held to be prejudicial to defendant's rights and erroneous; for the right to recover damages for each further and injurious act of defendant amounting to an additional nuisance is still open to the plaintiff in the future. *Moser v. Burlington*, 141.

5. *Mortgages—Stock of Goods — Fraud — Instructions Inconsistent—Appeal and Error.*—The plaintiff, mortgagee of a stock of goods, brings his action against the mortgagor and his assignee for the benefit of his creditors and takes the goods under claim and delivery. The character of the transaction of the mortgage was such as to raise an issue of fraud as to the other creditors of the mortgagor. A charge held to be inconsistent and for reversible error, which instructed the jury, one part thereof, that the issue was to be determined by the greater weight of the evidence, and in another part, without correcting this error, that the evidence must be clear, strong, and convincing. *Grocery Co. v. Taylor*, 307.

6. *Instructions—Interest of Witnesses—Courts—Expression of Opinion—Interpretation of Statutes.*—A charge in an action for damages for a personal injury alleged to have been negligently inflicted, wherein the plaintiff as well as other witnesses, both for the plaintiff and defendant, had testified, some in the latter's employment, that in weighing the conflicting evidence the jury had the right to consider the interest the parties had in the result, the conduct of the witnesses upon the stand, their demeanor or bias upon the stand, their

TRIALS—*Continued.*

means of knowledge of what they had testified to, their character and reputation, etc., is not an intimation from the judge upon the weight of the evidence prohibited by statute, Revisal, sec. 535, as it applies equally to all witnesses testifying, both those of the plaintiff and defendant, and is not prejudicial as to either the one or the other. *Herndon v. R. R.*, 317.

7. *Instructions—Construed as a Whole—Erroneous in Part—Burden of Proof.*—Where in a charge in an action for damages alleged to have been wrongfully inflicted, it appears that the burden of proof is put on plaintiff to establish his cause by the greater weight of the evidence, when considered as a whole, a detached portion thereof which fails to require this will not be held for reversible error. *Carmichael v. Telephone Co.*, 333.

8. *Deeds and Conveyances—Boundaries—Course and Distance—Evidence—Instructions.*—The lands in dispute in this case involve the location of a boundary line which in part reads "south to and with C.'s line 145 poles to a stake," the next call being "east 135 poles to a stake in M. C.'s line": *Held*, a requested prayer for instruction should be refused, under all the circumstances, that "the call in said grant is 'south to and with said C.'s line 145 poles to a stake,' which would follow the C. line from the point E. 145 poles, *irrespective of course*, and at the end of the 145 poles, wherever that line would be, the line should turn east and continue that course until it struck the next line called for," it appearing that to run this line south in the direction and in the number of poles called for and then to run it in the direction and extent of the next call, would close the calls to the deed, and that the charge of the court in this respect was correctly given. In such case the course (S.) and the distance (145 poles) should control, and not the various courses of C.'s line. *Hagaman v. Bernhardt*, 381.

9. *Bills and Notes—Drafts, Bill of Lading Attached—Banks and Banking—Overdrafts—Deposits—Purchaser for Value—Liens—Evidence—Questions for Jury.*—A vendor of goods delivered them to the carrier, received a bill of lading therefor, drew on the purchaser with bill of lading attached to draft, indorsed the draft, deposited it in a bank, which credited his account with the amount. The payee failed or refused to pay the draft, and the bank charged back the draft to the drawer, retained the draft with the attached bill of lading, and claimed to be a purchaser of the draft, and to have a lien on the cotton shipped. There was evidence that at the time of the transaction the drawer's account was overdrawn at the bank, and the amount of the draft went to his credit in the bank in extinguishment of the debt; that there was no agreement between the drawer and the bank that the former would protect the draft in the event it was not paid, but to the contrary; also that the dishonored draft was charged back to the drawer as a matter of bookkeeping: *Held*, if the drawer owed the bank, and the draft was discounted by it and the proceeds applied in discharge of such balance, the bank became the owner of the draft, and a purchaser for value to that extent of the cotton described in the bill of lading; and, further, that charging the draft to the drawer's account was some evidence of the cancellation

TRIALS—*Continued.*

of the transaction, and payment by the drawer, open to explanation, which was also for the determination of the jury. *Latham v. Spragins*, 404.

10. *Parties, Defect of—Objections and Exceptions—Practice—Nonsuit.*—Objection in a suit upon a note pledged by the payee as collateral, that the pledgee was a necessary party to the action, must be taken by demurrer when the defect of parties is apparent upon the face of the pleadings; and when not thus apparent, it must be taken by answer; and a judgment of nonsuit based upon defect of parties is erroneously granted. *Ball-Thrash v. McCormick*, 473.

11. *Appeal and Error — Instructions — Omissions to Charge — Special Prayers for Instruction.*—An exception that the trial judge failed to charge the jury upon a certain phase of the case can only be taken advantage of on appeal by an exception to his failure to give a requested instruction thereon. *Pate v. Bank*, 508.

12. *Same—Evidence of Deposit—Check Stubs—Prima Facie Case—Questions for Jury.*—The plaintiff sued a bank for an alleged deposit therein which he claimed the defendant had failed to credit to him, and put in evidence his check book stubs whereon the proper officer of the bank had credited the plaintiff two sums in the same amount at different times on the same day, the plaintiff's bank book only showing one credit in that sum: *Held*, the entries on the stub were not so controlling or conclusive that the jury could not find as an independent fact that the second deposit was or was not made by the defendant, leaving both entries to their consideration; and the plaintiff was not entitled to an instruction that the entries made a *prima facie* case, especially as he had not requested it by a special prayer for instruction. *Ibid.*

13. *Appeal and Error—Instructions—"Broadside" Exceptions.*—Unless an exception to an instruction given by the trial court specify the errors therein, it will not be considered on appeal. *Hendricks v. Ireland*, 524.

14. *Evidence—Issues of Fact—Questions for Jury.*—This cause presenting a controversy of fact properly presented to the jury, no error is found. *Hopkins v. Crisp*, 528.

15. *Murder—Evidence—Identification—Exhibits.*—On a trial for murder, the body of the deceased was found in a dense thicket, after the time of the alleged homicide, and there was evidence of his identification by his clothes and certain articles found on his person: *Held*, no error in permitting these articles to be exhibited to the jury; and it not appearing to have prejudiced the prisoner, their exhibition was merely incidental, and it does not render the evidence incompetent. *S. v. Vann*, 534.

16. *Murder—Trial—Demonstrations—Appeal and Error—Court's Discretion.*—A demonstration to the prisoner's prejudice, occurring during his trial for murder, which was promptly and severely rebuked by the trial judge, who immediately instructed and cautioned the jury not to be influenced by it in the slightest degree, will not be held for reversible error on appeal, the conduct of the trial being left to the presiding judge, without interference, except in extreme cases. *S. v. Wilcox*, 131 N. C., 707, cited and distinguished. *Ibid.*

TRIALS—*Continued.*

17. *Murder — Evidence — Premeditation—Instructions, How Considered—Court's Expression of Opinion.*—The court having charged the jury that they should consider all the evidence in the case, "both that of the State and that of the prisoner," another portion of the charge, that the law presumed malice from a killing with a deadly weapon, and the prisoner would be guilty of murder in the second degree, unless he had shown such facts and circumstances as would reduce the killing to manslaughter or excusable homicide, should be construed with the charge as a whole, and, thus construed, is not objectionable as requiring the jury to consider only the testimony introduced by the prisoner. *Ibid.*

18. *Homicide—Murder—Circumstantial Evidence — Questions for Jury.*—Where upon a trial for murder circumstantial evidence for a conviction is relied on, and the circumstances tend to show defendant's guilt, so that the deduction of guilt from the circumstances is not merely conjectural or probable, they should be submitted to the jury, for they are the judges of the force or weight of the evidence of the defendant's guilt. *S. v. Matthews*, 542.

19. *Evidence—Recent Possession—Burden of Proof—Reasonable Doubt.*—Where the evidence affords reasonable explanation of recent possession of stolen property, consistent with the defendant's innocence, and which, if accepted, explains it satisfactorily, the rule does not require the defendant to satisfy the jury that his evidence in explanation is true; and he is entitled to an instruction that if the testimony offered in explanation raises a reasonable doubt of guilt, he is entitled to acquittal. *S. v. Anderson*, 571.

20. *Evidence, Circumstantial—Crimes—Burnings—Questions for Jury.*—Circumstantial evidence is sufficient to convict a defendant charged with the burning of a barn which uncontradictedly shows a motive, in being previously ordered off the premises; that after the burning he left the locality and passed under an assumed name; that he made false statements as to his being at a different place at the time; that upon his return to this location he asked a witness what had taken place in his absence, and upon seeing the foreman of the owner of the barn, said, "Hush don't say anything"; these and other circumstances being insufficient when taken alone, but collectively sufficient for the jury to pass upon, determine its weight, and draw an inference of guilt. *S. v. King*, 580.

21. *Jury—Evidence—Expression of Opinion by Court—Remarks in Jury's Hearing — Interpretation of Statutes — Appeal and Error.*—Revisal, sec. 535, forbidding a judge in his charge to the petit jury in a criminal or civil case to express opinion on the facts involved, applies to any expression of opinion by the judge in the hearing of the jury at any time during the trial. *S. v. Cook*, 586.

22. *Same—Instructions Not Corrective.*—Where self-defense is pleaded to a charge of murder, and there is evidence tending to show that the prisoner was unsuccessfully endeavoring to retreat from an attack made on him by the deceased and one P. with sticks, and that a third assailant, having made threats, had secured a gun and was returning with the gun, pointing it at the prisoner; and it appears that while the attorney for the prisoner was arguing to the jury that because

TRIALS—*Continued.*

of the advance on the prisoner by the deceased and P., both with sticks, the latter known by the prisoner to be a man of violent character, the prisoner had a good and lawful reason for firing the fatal shot, the court interrupted him by saying, "What difference does it make if P. was advancing on him with a stick? That would not give him a right to kill the deceased," the remark of the court, in the hearing of the jury, is an expression of his opinion on the evidence, which constitutes reversible error, and it is not cured by an instruction that the jury are the sole judges of the evidence. *Ibid.*

23. *Criminal Law—Larceny—Evidence—Recent Possession—Instructions—Questions for Jury.*—Upon a trial for larceny of money left in an office in a desk drawer, the evidence tended to show that the defendant had seen the prosecutor with the purse, containing $70 in $10 and $5 bills, and had remarked on the money the prosecutor had; that the defendant saw the prosecutor leave the purse in the drawer before going off for several hours, and when the prosecutor returned the purse was empty, and the defendant thereafter made contradictory statements of the amount of money he had on his person and where he had gotten it; that the defendant remained in the office after the prosecutor left, and no one else was seen to go in while the prosecutor was away: *Held*, sufficient to be submitted to the jury upon the question of defendant's guilt, and the judge properly instructed the jury that there was no presumption of guilt arising upon the doctrine of recent possession, the money not being identified, but it was for them to decide thereon under the evidence. *S. v. White*, 615.

24. *Instructions Requested to be Written—Omission of Judge—Procedure—Interpretation of Statutes.*—The requirements of Revisal, sec. 536, are mandotory in criminal as well as in civil cases, and where a party has requested the judge to put his charge in writing, at or before the close of the evidence, and an exception is duly noted for his failure or refusal to do so, a new trial will be granted to the appellant. *S. v. Black*, 637.

25. *Instructions—Erroneous in Part—Regarded as a Whole.*—A requested prayer for special instructions is regarded as a whole, and when erroneous in part, the refusal of the trial judge to instruct the jury in accordance with such parts as are correct will not be held for reversible error. *S. v. Greer*, 640.

26. *Instructions—If the Jury Believe the Evidence—Incorrect Expressions—Words and Phrases—Appeal and Error.*—An expression in a prayer for special instruction, "if the jury believe the evidence," preliminary to a direction to the jury as to how they should find upon stated phases of the evidence, is not exact, and a refusal to give an instruction thus worded will not be held as reversible error, though when adopted by the court it is not ground for a new trial unless clearly prejudicial. *S. v. Blackwell*, 672.

27. *Murder — Self-defense — Reasonable Apprehension—Instructions for Jury.*—Where the defense to a charge of murder relied on is that the prisoner, in committing the homicide, was in reasonable apprehension of his life, or of receiving great bodily harm from the deceased, and that the act was committed in self-defense, the reasonableness of his

TRIALS—*Continued.*

apprehension must be decided by the jury in view of the facts, circumstances, and surroundings as they appeared to the prisoner at the time. *Ibid.*

28. *Murder—Instructions—Verdict—Harmless Error.*—The refusal to give a prayer for special instruction upon the question of murder in the second degree is held not to be reversible error when a verdict for manslaughter is rendered, the error, if any, being rendered harmless by the verdict. *Ibid.*

29. *Instructions—Contentions of Fact—Statements—Corrections—Notice—Appeal and Error—Practice.*—An assignment of error on the ground that the trial judge incorrectly stated to the jury the contentions of fact of the parties will not be considered when it does not appear that it was called to the attention of the court in time for him to have corrected it. *Ibid.*

30. *Instructions Substantially Given—Appeal and Error.*—Where the trial judge has fully and properly instructed the jury upon the law applicable to the facts, it will not be held as reversible error that he did not adopt the language of substantially correct instructions tendered by the appellant. *Ibid.*

TRUSTS AND TRUSTEES. See Estates, 1, 2, 3.

Mortgages—Sales—Trusts and Trustees.—The owner of a debt secured in a deed in trust made to a third party as trustee, with power of sale, may lawfully bid and purchase at the sale, where there is no fraud or collusion between the creditor and the trustee. *Hayes v. Pace*, 288.

VENUE. See Executors and Administrators.

VERDICT. See Evidence; Homicide; Appeal and Error.

WATERWORKS. See Municipal Corporations.

WILLS.

1. *Wills—Subscribing Witnesses—Interpretation of Statutes.*—Revisal, sec. 3113, does not require the testator to manually sign his will in the presence of the subscribing witnesses, and the validity of the written instrument in this respect will be upheld if the testator produces the will itself, and acknowledges and identifies it and his signature thereto, at the time the witnesses subscribe their names as such. *Watson v. Hinson*, 72.

2. *Same—Signing of Will—Presence of Witnesses.*—In order to a valid written will with witnesses, the same should be signed or his signature identified by the testator, or signed by some other person in his presence and by his direction, and subscribed in his presence by at least two witnesses; and it is not required that the subscribing witnesses sign the will in the presence of each other. Revisal, sec. 3113. *Ibid.*

3. *Wills—Subscribing Witnesses—Witness Dead—Proof of Handwriting—Testator—Interpretation of Statutes.*—Where one of the subscribing witnesses to a will survives and is competent to testify upon its

WILLS—*Continued.*

offer for probate, proof may be taken both of the handwriting of the testator and the other witness or witnesses, and of such other circumstances as shall satisfy the clerk of the Superior Court of the genuineness and the due execution of such will; with the proviso that when the testator has signed by making his mark, proof of his handwriting is not necessary. Revisal, sec. 3127. *Ibid.*

4. *Wills—Devisavit Vel Non—Propounders—Burden of Proof—Trials de Novo—Record, Evidence—Handwriting—Testator.*—Upon an issue of *devisavit vel non*, purporting to be signed by testator himself, it is necessary for the propounders to show, in the Superior Court, the handwriting of the testator and his signature to the will, where only one of the subscribing witnesses to the will is alive, the matter of probate being *de novo*, and the record of the clerk not being competent evidence in this respect. *Ibid.*

5. *Wills—Interpretation—Separate Papers—Incorporation by Inference.*—A will properly executed may so refer to another unattested will or other written paper or document as to incorporate the defective instrument and make the same a part of the perfect will, the condition being that the paper referred to shall be in existence at the time the second will is executed, and the reference to it shall be in terms so clear and distinct that from a perusal of the second will, or with the aid of parol or other proper testimony, full assurance is given that the identity of the extrinsic paper has been correctly ascertained. *Ibid.*

6. *Same—Evidence.*—Where after the testator has executed his will and thereafter duly executes another paper-writing purporting to be, and therein mentioned by the testator to be, his last will and testament, with the statement therein expressed that "this addition is in no wise to affect my former will," which was duly signed, witnessed, and admitted to probate, upon the issue of *devisavit vel non* tried in the Superior Court, evidence was competent tending to show that the "addition" or second will referred to and incorporated in the will first made, that the testator had previously made only one will, with which the testator did not want the second will to "interfere," this being proper under the principle sometimes referred to as "the doctrine of incorporation by reference." *Ibid.*

7. *Wills—Executors and Administrators—Erasures—Legal Execution—Subscribing Witnesses.*—Where a testator has intentionally erased the name of an executor, who has died, from a paper-writing purporting to be his will, and substituted another executor without observing the statutory requirements as to the witnessing, etc., of the paper, the substitution of the executor is inoperative, and without any effect on the instrument, and the result is that the testator died testate of the property therein disposed of, but without naming an executor. *Ibid.*

8. *Wills—Interpretation—Detached Sheets—Subscribing Witnesses—Evidence of Authenticity as a Whole.*—It is not necessarily required for the validity of a will that several sheets of paper purporting to be one are physically attached together at the time the witnesses subscribe; and it is sufficient if it appears that the several sheets were

WILLS—*Continued.*

written by the same person at the same time, were all read to the testator as his will, and were present at the time of the execution, and the papers themselves, by coherence and adaptation, and by their internal sense, bear evidence that, while separate, they were connected in the mind of the testator as a whole. *In re Swaim's Will*, 213.

9. *Wills—Interpretation—Powers of Disposition—Limitations.*—Where a testator has bequeathed and devised all of his property, personal and real, to his wife, "with the power of disposing of the same as she may deem best," with the direction that all of the undisposed of real and personal property at her death be equally divided among the testator's children, the conveyance of any part of the land carries an absolute fee-simple title thereto to her grantee in the exercise of her power of disposition under the terms of the will. As to whether the widow acquired a fee-simple absolute title to the lands under the will, it is not necessary to decide, for the exercise of the power cuts off all limitations, if any, so far as the title of her grantee is concerned. *Mabry v. Brown*, 217.

10. *Same—Executors and Administrators—Debts.*—Where an absolute and valid power of disposition is given in a will to a devisee, who is also named as one of the leading executors, and there is a subsequent clause authorizing and empowering the executors to sell or otherwise dispose of any part of the estate to effectuate the testator's intent and to make a good and sufficient conveyance of the same, it is held that the latter clause referred to the payment of the testator's debts, etc., which he had required to be paid, and not to a deed to lands made by the devisee and executor under the absolute power of disposition; and that her deed conveyed an absolute fee-simple title to the grantee, subject to the testator's debts, etc., without the necessity of the other executors joining therein. *Ibid.*

11. *Wills — Caveat — Mutual Capacity — Evidence—Burden of Proof.*—In these proceedings to caveat a will for mental incapacity of the testator, it appeared that he signed the will in accordance with the statutory provisions obtaining here, at the house of a third person, in the presence of impartial witnesses, dictated the terms of the will, making an intelligent disposition of his property, and stating his reasons therefor; and it is *Held*, that the burden of proof was not shifted to the propounders. *In re Patrick's Will*, 519.

WITNESSES. See Wills; Trials; Evidence, 17.

1. *Appeal and Error—Witnesses—Impeachment—Contradictory Statements—Record—Presumptions.*—Where the testimony of a witness is sought to be impeached by his contradictory conversations held with others on the subject-matter of his evidence, it must appear of record on appeal, either by proof or proper suggestions, the substance or tenor of the conversations excluded, so the Supreme Court may see their pertinence or materiality; for otherwise the correctness of the ruling of the trial judge will be presumed. *Armfield v. R. R.*, 24.

2. *Character Witnesses—Impeaching Evidence—Admissibility.*—A witness introduced to impeach the character of a party who has testi-

WITNESSES—*Continued.*

fied may only be asked as to the general character of that party by the one introducing him; but after affirmatively answering the question the witness may qualify his own testimony by stating that his knowledge thereof extends to certain localities and for certain stated qualities. Testimony as to specific acts is not admissible for the purpose of impeachment of character witness. The rule as to the admissibility of this character of evidence stated by CLARK, C. J. *Edwards v. Price*, 243.

3. *Witnesses—Interest—Evidence—Instructions.*—The charge of the court in this case upon the weight to be given to the testimony of interested witnesses is approved under the rulings of *S. v. Byers*, 100 N. C., 512. *S. v. Vann*, 534.

WORDS AND PHRASES.

1. *Landlord and Tenant—Written Leases—Interpretation—Words and Phrases.*—Where a written lease of lands is for six months, with the privilege or option of "continuing this lease for a term of four years," the words "this lease" refer to the term already created, the words "lease" and "term" being often treated by conveyancers as convertible, and the word "lease" as descriptive of the estate and interest conveyed by the instrument. *Temple Co. v. Guano Co.*, 87.

2. *Municipal Corporations—Words and Phrases.*—When words are used in the expressions of a statute which have a well known legal meaning, and nothing appears therein which would show that a different meaning was intended by the use of these words, there is no ambiguity of expression for the courts to construe, the presumption being that the lawmaking power had expressed its intent according to the legal significance of the words it had employed. *Asbury v. Albemarle*, 247.

3. *Same—"Corporations."*—Chapter 8, Public Laws of 1911, provides that a municipal corporation, before undertaking to build "any public system of waterworks, shall . . . first acquire, either by condemnation or purchase, the property of such system already laid, operated and maintained" by a "private or *quasi*-public corporation," within the municipality, etc.: *Held*, the word "corporation" has a definite legal meaning, and will not be construed to embrace an unincorporated company of individuals, or a partnership, operating and maintaining a waterworks plant within the limits of the municipality. *Efland's case*, 146 N. C., 135, cited and distinguished. *Ibid.*

4. *Street Railways—Condemnation—Petition—"Commercial Railways"—"Words and Phrases"—Private Purposes.*—A *quasi*-public corporation operating a street railway, also having the authority to engage in business of a private nature, in its petition to condemn land stated that the land was to be used in generating power for public purposes, etc.: *Held*, the use of the words "commercial railway" in the petition did not indicate that the land was to be used for private purposes, for the company engages in commerce when it carries articles of merchandise for the public. *Land Co. v. Traction Co.*, 314.

WRONGFUL DEATH. See Executors and Administrators; Abatement and Revival.