ANNOTATIONS INCLUDE 174 N. C.

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VOL. 163

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1913
(IN PART)

ROBERT C. STRONG
REPORTER

ANNOTATED BY
WALTER CLARK

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HISTORY OF THE SUPREME COURT REPORTS OF NORTH CAROLINA AND OF THE ANNOTATED REPRINTS

BY THE ANNOTATOR

The annotated reprint of our Reports has been made under the authority conferred on the Secretary of State by Laws 1885, ch. 309, and subsequent statutes, now Revisal, 5361, which has been further amended by Laws 1917, chapters 201 and 292.

It may be of interest to the profession and to the public to give some data as to our original Reports and the Annotated Edition.

One hundred sixty-three volumes have been reprinted with annotations, these being all the volumes from 1 to 164, inclusive, excepting only volume 148.

The first 7 volumes of N. C. Reports were not official, but, as in England till 1865, reporting was a private enterprise. When the N. C. Supreme Court as a separate tribunal was created in November, 1818, to take effect from 1 January, 1819, the Court was authorized to appoint a Reporter with a salary of $500 on condition that he should furnish free to the State 80 copies of the Reports and one to each of the 62 counties then in the State, and it seems that he was entitled to the copyright. Later this was changed to 101 copies for the State and counties and a salary of $300 and the copyright. In 1852 the salary was raised to $600 and the number of free copies to the State and counties and for exchange with the other States was increased, 103 N. C., 487.

The price charged by the Reporter to lawyers and others was 1 cent a page, so that the 63 N. C. was sold at $7 per volume, the 64 N. C. at $9.50, and the 65 N. C. at $8. Being sold by the page, it was more profitable and much less labor to the Reporter to print the record and the briefs of counsel very fully without compression in the statement of facts. These prices being prohibitive, the Official Reporter was abolished, Laws 1871, ch. 112, and the duties were put on the Attorney-General, who was allowed therefor an increase of $1,000 in salary, and the State assumed all the expense of printing and distributing and selling, 5 per cent commission being allowed for selling. Code, 3363, 3728.

In 1893, ch. 379, the system was again changed and the Court was allowed to employ a Reporter for $750. This has been amended by subsequent acts, so that now the Reporter is allowed a salary of $1,500 and a clerk at $600 per annum.

When the small editions originally printed were exhausted many volumes of the Reports could not be had at all and others brought $20 per volume. To meet this condition, Laws 1885, ch. 309, with the amendments above referred to, being now Revisal, 5361, was passed to authorize the Secretary of State to reprint the volumes already out of print and such others as from time to time should become out of print, with a provision that no money should be used for the purpose except that derived from the sale of the Reports. As the price of the Reports had been reduced to $2 per volume, and later to $1.50, this work of reprinting could be done only by omitting briefs and by cutting out all the unnecessary matter in the statements of facts, as had been done by Judge Curtis of the U. S. Supreme Court when he reprinted the first 58 volumes of that Court in 21 volumes. In our Reports, these statements of cases (until a very recent date) were always made by the Reporters, and not by the judges, and the briefs were already omitted in our current volumes.

The Secretary of State at first tried the experiment of reprinting a few volumes without eliminating the unnecessary matter and without annotations, and without correcting the numerous typographical errors; but this proving unsatisfactory to the Profession, and the expense entirely too great, after consultation with the Governor and Attorney-General, the then Secretary of State requested the writer to annotate the volumes in order to make them more salable and to reduce the expense of the work (which was necessary) by condensing prolix statements and omitting briefs of counsel. This has been done ever since. The annotations have been made, for the most part without any aid, as Shepard's Annotations (which, besides, required to be checked for possible errors) were not issued until 1913, after most of these reprints had been annotated. Besides this, in the first four volumes, as issued, there was no index of Reported Cases, and there was no reverse index to the Reported Cases till 84 N. C. There was no table of Cited Cases until 92 N. C., and no reverse Index of Cited Cases till 143 N. C. The Annotator had therefore to correct these defects by putting in full indices and reverse indices of Reported Cases and Cited Cases and has supervised the revised proof of all 163 volumes. For these labors, the payment at first was $25 per volume, including annotations, condensing the Reporter's statements of fact when unnecessarily prolix, and all work of every kind. But the later volumes being larger and the annotations more numerous, $50 per volume was allowed. Any lawyer will see that this work was undertaken in the interest of the profession and the State, and not for the compensation.

Owing to the fact that as to these Reprints there was no reporter to be paid, either by profits of sale as formerly, or by salary as now, the re-

prints have all been issued at a considerable profit to the State. It is probably the only work of any kind from which the State has received any pecuniary profit. In November, 1915, the State lost by fire 47,000 of the Reports then stored in Uzzell's Bindery, with the result that many additional volumes were required to be reprinted, and others that had already been annotated and reprinted were reprinted a second time, the annotations, however, being brought down to date.

The current Reports are sold at $1.50, from which the commission of 12½ per cent for selling is deducted, *i. e.*, about 19 cents, making the net return to the State $1.31 per volume, while, owing largely to the increase in the cost of typesetting, presswork, paper and binding, the cost to the State of the 174 N. C. is $1.94 per copy, without charging into the cost of production any part of the compensation of the Reporter and his clerk. The next Legislature will doubtless raise the price of the current Reports, if not of the Reprints also.

In all the more recent volumes the statement of the cases has been made by the judges themselves in each case, and hence in reprinting those volumes there has been no abbreviation in the statement of the case. In the earlier volumes there has been a saving often of 50 per cent by condensation of the prolix statement, or of the record, which was often used instead of a statement, and by the omission of the briefs. Even in using the original reports, notwithstanding the prolix matters printed therein, it has sometimes been found useful by the Court to refer to the original record.

In England there was no official reporter till 1865. Prior to that time all the reporters were volunteers without any supervision. As a result many of the English Reports were very inaccurate, as has been shown from investigations made in the Year Books and the Court Records by Professor Vinogradoff and others. See Holdworth's "Year Books"; Pollock & Maitland's History of English Law. These reporters were sometimes incompetent and more often careless, which is to be regretted, as the opinions of the English judges were usually, if not always, delivered orally from the bench, and the reporters were not always careful to correct themselves by examination of pleadings and records. And as the common law is made up of these decisions of the judges, under the guise, it is true, of "declaring the law," it has been often changed from what was announced by the Bench. See Veeder's "English Reports." Besides, down till Blackstone's time, the pleadings and records were kept in dog Latin (and he strongly censured the change to English), and for several hundred years the oral pleadings and the decisions of the judges were in Norman French.

Nowhere outside of the English-speaking countries are the opinions of the courts allowed to be quoted as precedents. In France and all other

countries, the Court makes a succinct statement of the facts, numbered under headings, and then merely cites the section of the Code applicable, without comment. In English-speaking countries, in which alone the Reports of decisions are allowed to be cited, the number of the volumes of the Reports in 1890 were 8,000. These have now increased to 30,000 volumes. This system is breaking down under its own weight. No private library and few public libraries can possibly keep up with the rapidly rising flood of Reports. It is only by the aid of compilations like "Cyc." and its second edition, the "Corpus Juris," A. & E., and R. C. L., and the like, that we can have any access to the vast quantity of reported decisions.

In those countries where citations of former decisions are not allowed, the argument is that the courts of the present day are more likely to be right than those in the past, and that to cite former decisions is simply a race of diligence in counting conflicting opinions, a precedent being readily found to sustain any proposition. We have been accustomed to the present system and are still able to wade through by use of the compilations cited; but this relief, in view of the steadily increasing output of Reports, is only temporary, and the profession and the courts must inevitably be submerged beneath the flood. What the remedy will be is a matter engaging the attention and arousing discussion among the ablest men of the Bench and Bar.

On an average, the opinions of this Court now require three volumes a year. If the briefs and redundant statements were still inserted as in the earlier Reports, it would require ten volumes per year, taxing the shelf-room and purses of lawyers. It was therefore eminently proper in reprinting to cut out the briefs and reduce the superfluous records. This required the exercise of judgment and much labor, but it was absolutely necessary in order that the receipts might furnish funds for other Reprints as required by the statute. Many of the Reprints are consequently from a third to a half the size of the former volumes. The American Bar Association, voicing the general sentiment, has passed resolutions requesting all courts to reduce the size of current Reports by the judges shortening their opinions, a request which has been presented to this Court through a distinguished member of the Association and of the Bar of this Court. The General Assembly had already given a similar intimation by providing that "The justices shall not be required to write their opinions in full, except in cases in which they deem it necessary." Rev., 1548.

Walter Clark

RALEIGH, N. C., 1 May, 1918.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1913

D. D. BONNER v. W. C. RODMAN, TRUSTEE.

(Filed 10 September, 1913.)

1. Injunction—Foreclosure—Admitted Debt—Equity.

In an action for an accounting by a trustee in a deed of trust, given on lands to secure a debt, the court may issue an order restraining the trustee from selling the land under the instrument upon condition that he pay into court the amount of money he admits to be due by him, upon the principle that he who asks equity must do equity.

2. Injunction—Appeal and Error—Subsequent Motion—Court's Jurisdiction.

Where in an action by a trustor in a deed of trust given on lands to secure a debt, the court has granted an order restraining the sale of the lands upon condition that the plaintiff pay into court the amount he admits to be due, and he fails to perform the condition imposed and appeals to the Supreme Court, he may not thereafter renew the motion for the order in the Superior Court upon the same state of facts, for the appeal carries with it all questions incident to and necessarily involved in the ruling to the appellate court.

BROWN, J., did not sit.

FROM BEAUFORT. Motion for injunction, heard by *Bragaw, J.*, at chambers, 3 July, 1913.

This is an action for an accounting to ascertain the amount due under a deed of trust, executed by the plaintiff to the defendant Rodman, on 19 April, 1905.

The trustee advertised the property conveyed in the deed of trust for sale, under the power in the deed, and the plaintiff (2)

on 15 May, 1913, applied for a restraining order, which was granted by *Judge Whedbee,* but he required the plaintiff to pay into court, on or before 15 June, 1913, the amount he admitted to be due.

The plaintiff excepted and appealed to the Supreme Court.

The plaintiff failed to pay said amount, as provided in the order of *Judge Whedbee,* and the trustee again advertised the property for sale, and the plaintiff again applied for a restraining order before *Judge Bragaw,* upon substantially the same facts presented before *Judge Whedbee.*

Judge Bragaw granted the restraining order, but upon condition that the plaintiff pay into court the amount admitted to be due, by 1 October, 1913.

The defendants excepted and appealed.

Harry McMullan for plaintiff.
W. B. Rodman, Jr., for defendant.

PLAINTIFF'S APPEAL.

ALLEN, J. The plaintiff admitted that he owed the defendants $436, and it was therefore within the power of the court, upon the facts appearing in this record, to require the payment of this sum within a reasonable time before granting equitable relief, upon the familiar principle that he who asks equity must do equity, although a case might arise in which the court could refuse to impose such a condition.

An order similar to the one appealed from was approved in *Pritchard v. Sanderson,* 84 N. C., 299.

Affirmed.

BROWN, J., did not sit.

DEFENDANTS' APPEAL.

ALLEN, J. The appeal from the order of *Judge Bragaw* presents the question of the right of a party to renew his motion for a restraining order, upon substantially the same facts presented on his first application, and after he has appealed from the first order.

(3) The denial of a motion for a restraining order for want of some material averment or because the evidence is insufficient does not prevent the renewal of the motion (*Halcombe v. Commissioners,* 89 N. C., 346), but it has been uniformly held in this Court that the motion cannot be made on the same facts after an appeal from the first order. *Jones v. Thorne,* 80 N. C., 72; *Pasour v. Lineberger,* 90 N. C., 161; *Penniman v. Daniel,* 91 N. C., 431; *Green v. Griffin,* 95 N. C., 50; *Henry v. Hilliard,* 120 N. C., 487; *Combes v. Adams,* 150 N. C., 70.

In the last case cited, which was an appeal from an order denying a second motion for a restraining order, after an appeal from the first order, *Justice Hoke* says: "While the Court has held that an appeal from an interlocutory order leaves the action for all other purposes in the court below, the decision is also to the effect that the disposition of the interlocutory order and all questions incident to and necessarily involved in the ruling thereon are carried by the appeal to the appellate court, and the judge below therefore had no power to entertain or act upon appellant's motion."

We are, therefore, of opinion there is error.

Reversed.

BROWN, J., did not sit.

V. BEASLEY v. O. C. BYRUM.

(Filed 10 September, 1913.)

Forcible Trespass—Killing of Dog—Damages.

It is forcible trespass for one to enter the premises of another, armed with a shotgun, and unnecessarily shoot and kill the dog of the latter while it was tied to the piazza of his home, in the presence of his wife and against her protest, and damages may be recovered in the suit by the man and his wife for the injury thereby caused to the wife owing to her age and her affliction with heart disease. In this case there was no evidence to bringe it within the purview of Revisal, sec. 3305, relating to the killing of mad dogs.

APPEAL by plaintiff from *Long, J.*, at February Special Term, (4) 1913, of CHOWAN.

Action tried upon these issues:

1. Did defendant Byrum wrongfully and unlawfully enter on the premises of the plaintiffs and trespass, as alleged in complaint? Answer: No.

2. What damages, if any, is plaintiff entitled to recover on account of said alleged trespass? Answer: .....

The plaintiffs appealed.

E. F. Aydlett and Bond & Bond for plaintiffs.

Pruden & Pruden, S. Brown Shepherd, and W. S. Privott for defendant.

BROWN, J. The plaintiffs requested the court to charge the jury that if the evidence is believed, to answer the first issue "Yes." To the refusal to so charge, plaintiffs excepted and duly assigned error.

We think that upon the evidence as presented the prayer should have been given.

The action is brought to recover damages for a forcible and high-handed invasion of plaintiffs' home. The evidence, if believed, establishes a forcible trespass, an indictable offense.

The defendant entered upon plaintiffs' premises armed with a shotgun, and shot and killed the plaintiffs' dog when chained to the piazza and in the wife's presence and against her protest. She offered evidence tending to prove that she was old, afflicted with heart disease, and that the alarm and shock caused by defendant's conduct had caused her great suffering.

There is no evidence in the record that the dog was a mad dog or had been bitten by one, within the purview of section 3305 of Revisal, and there is no evidence that his immediate destruction was necessary. 2 Cyc., 416. If such was the case, the owner could be compelled to destroy the dog, or subject himself to the possibility of fine and imprisonment, and under such conditions the dog could be destroyed by order of the justice issuing the warrant under said section.

The dog at the time was safely chained up, and for the defendant to enter the home of plaintiffs with a shotgun and kill the dog al-
(5) most at the wife's feet is not only a trespass, but well calculated to bring on very serious consequences. *Perry v. Phipps,* 32 N. C., 259; *Wallace v. Douglass, ibid.,* 79.

New trial.

ALINE ELLISON v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 10 September, 1913.)

1. Telegraphs and Telephones—Delay in Message—Trials—Presumptions.

Where an unusual delay in the delivery of a telegram by a telegraph company is shown, the burden of proof is on the company to account for the delay; and a presumption of negligence is raised in the absence of sufficient or satisfactory explanation.

2. Telegraphs and Telephones—Office Hours—Trials—Rebuttal Evidence.

Where in an action to recover damages against a telegraph company for a negligent delay in the delivery of a death message, the defendant seeks to excuse itself for an unusual delay in delivery by showing that

it was occasioned by the observance of reasonable office hours, and, to sustain this defense, its agent testifies that he repeatedly called the terminal office and failed to get any response, and there was testimony that both agents were in their respective offices at the time, the testimony of the agent is not conclusive upon the jury, and it is for them to find, upon all the facts and circumstances, whether the agent attempted to transmit the message as testified by him, and the failure of the defendant to introduce the terminal operator in corroboration is a circumstance which the jury may consider upon the question.

3. Telegraphs and Telephones—Mental Anguish—Measure of Damages.

In this action to recover damages of a telegraph company for negligently delaying the transmission and delivery of a death message, it is held that the damages were properly confined by the trial court to the mental anguish consequently suffered by the plaintiff after the time of delivery of the message.

4. Telegraphs and Telephones—Death Message—Notice of Importance.

Where a telegraph company has received a message for transmission and delivery, announcing a death, the character of the message is sufficient to inform the defendant of its great importance, and that mental anguish would probably result from its negligence in failing to transmit it with reasonable promptness.

5. Telegraphs and Telephones—Mental Anguish — Relationship — Presumptions—Evidence.

While no presumption of mental anguish is raised from the negligence of a telegraph company in the transmission or delivery of a message announcing a death to one not related by blood to the deceased, yet such may be shown and damages recovered by the plaintiff, as, in this case, that she had been taken by the deceased into her family at a tender age, and regarded as a daughter by her, and that she actually suffered mental anguish.

6. Telegraphs and Telephones—Charges Prepaid—Waiver.

Where the agent of a telegraph company does not require the prepayment of the charges for the transmission or delivery of a telegram, but accepts it with charges to be collected at destination, it is a waiver by the company of its right to demand its charges in advance, and does not bar a recovery in a suit to recover damages for the negligence of the defendant in the failure to perform its duty respecting it.

7. Telegraphs and Telephones — Office Hours — Acceptance of Message — Waiver.

When the agent of a telegraph company receives a message for transmission and delivery after its office has closed for the day, it is a waiver by the company of its right to the observance of reasonable hours there; and should the company fail to transmit the message to the terminal office for the reason that the office was closed there also, it is his duty to notify the defendant thereof, and his negligent failure to do so is actionable, if the proximate cause of the injury.

8. Telegraphs and Telephones—Joint Offices—Sufficient Employees—Negligence.

It is the duty of a telegraph company to have a sufficient number of employees to discharge properly the duties it contracts to do, and it is no defense to an action to recover damages for its negligent failure to transmit and deliver a message it had accepted for that purpose, that the offices handling the message were joint offices with the railroad company, and its employees there were engaged, at the time, in their duties to the railroad company.

9. Telegraphs and Telephones—Trials—Office Hours—Messages—Conditional Acceptance—Questions for Jury.

It is for the jury to decide, upon conflicting evidence, whether the agent of a telegraph company accepted conditionally, after office hours, a message for transmission, when that defense is relied on in an action to recover damages for the defendant's negligence in its transmission and delivery.

10. Telegraphs and Telephones—Death Message—Measure of Damages—Grief—Mental Anguish.

In this action to recover damages for mental anguish for the alleged negligent delay in the transmission and delivery by the telegraph company of a message announcing a death, the charge of the court that the jury should distinguish between mental anguish and mere grief and regret at the death of the deceased is approved.

11. Telegraphs and Telephones—Agreement by Sender and Sendee—Evidence Corroborative.

Where damages for mental anguish are sought in an action against a telegraph company for its alleged negligence in the transmission and delivery of a message announcing a death, it is competent, to sustain the plaintiff's evidence that she would have gone on the next train to the place where the body of deceased was then lying, to show a previous arrangement and understanding between the plaintiff and the sender of the message that the latter would notify the former should the condition of the subject of the message become worse.

12. Trials—Evidence—Instructions—Harmless Error.

The erroneous admission of evidence on the trial in this case was cured by the charge of the court.

(7) APPEAL by defendant from *Long, J.*, at Spring Term, 1913, of WASHINGTON.

This and the case of *Harrison v. Telegraph Co.*, involving practically the same questions and arising out of the same transaction, were consolidated in this Court and argued together.

There was evidence for the plaintiffs, Aline Ellison and Annie Harrison, that they were adopted by Sue Wright as her daughters, and
(8) reared and educated by her, Annie being her niece and Aline her

husband's niece. They lived in her home from a very tender age—3 and 7 years respectively—and were treated as her children and lived there as sisters. In January, 1911, Sue Wright became very ill, and Aline went from her home in Jamesville to her foster mother's home in Plymouth to see her. As her condition was improved on 25 January, 1911, Aline returned to her home in the afternoon of that day, and arrived at Plymouth about 4:30 o'clock the same day, the two places being only 15 miles apart. Shortly after she left, Sue Wright grew worse, and died about 5 o'clock. A little after 5 o'clock p. m. Annie Harrison asked Bettie Ellis, wife of Henry Ellis, to go to the defendant's office and send this message to Aline Ellison: "Sue Wright is dead. Come on the night train." Bettie Ellis asked her husband, who was employed at the railroad station, to give the message to the operator, who was also agent of the railroad company, and he did so at once. This was about 5:30 p. m. The message was not sent that evening, and not until after 10 o'clock the next morning, and was not received by Aline Ellison until 12 o'clock, at the time she heard the mill whistle blow for that hour. She left by the first train, but did not reach Plymouth until 4:30 p. m. If the message had been sent when it was received by the operator, on that afternoon, she would have received it in time to have taken the 7 o'clock p. m. train, and would have reached Plymouth at 7:30 p. m. on 25 January, and she would have taken that train if she had received the message in time. There was an understanding and arrangement between Annie and Aline that the former would wire the latter if their foster mother's condition grew worse, and that Aline would come to Plymouth, but there was no evidence that this was known to the defendant's operator, except such notice of it as he could derive from the message. The agent knew that Annie Harrison lived with Sue Wright.

The agent, J. A. Griffin, testified that he accepted the message after office hours, promised to send it as a matter of accommodation if he found that it could be sent that evening, but that the office at Plymouth closed at 6 o'clock p. m., and he might not be able to (9) get an answer from the operator, though he would try to do so. He tried the wires and the telephone connecting the two places, but failed to get any response. The next morning he told Henry Ellis that he would destroy that message and send a new one, which he did, it being the one received by Aline Ellison at 12 o'clock the next day. He was both agent of the railroad company and operator of the telegraph company, but as operator he was not required to be in his office after 6 o'clock p. m., though as agent of the railroad company he was required to be in his office until 7:30 o'clock p. m., when the train arrived from Plymouth, and the agent of the railroad company at Plymouth, who was also telegraph operator, was required to be in his office until 7

o'clock p. m., when the train from Rocky Mount leaves Plymouth for Jamesville. J. A. Griffin denied that he knew where Annie Harrison lived. This witness was not corroborated by Henry Ellis, though the latter did not positively contradict him, but merely stated that he did not recollect that the transaction was as related by the operator. The railroad and telegraph offices were the same.

The defendant read in evidence the seventh section of the Harrison complaint, in which it is alleged that the plaintiff sent the message after 4 o'clock p. m. on 25 January, and told the defendant's agent of the facts and agreement between her and Aline Ellison, and requested the agent to send the message to her at Jamesville, notifying her of the death of Sue Wright, and that she paid the toll for the same. But this is not important, as the case is viewed by the Court.

It is stated in the record, "that the court charged the jury fully on the law of the case, and no exception was taken to the charge." At defendant's request, the court gave the following instructions:

"1. The plaintiff is not entitled to recover any damages because of any delay in getting the coffin, or casket, from Jamesville, and the jury will not consider this in making up their verdict on the second issue.

"2. The plaintiff cannot recover any damages because of the
(10) offensive condition of the corpse at or before the burial, and the jury will not consider this in making up their verdict as to damages.

"3. There is no evidence that the defendant had any notice of any arrangement between plaintiffs that Aline Ellison should furnish coffin, and no damages can be given by the jury on account of that.

"4. Henry Ellis, in having the message prepared and offered for transmission, if you find he did so, was the agent of the plaintiff, and not of the defendant, and defendant cannot be held responsible because of any damage or hurt suffered by his negligence, if you find he was negligent.

"5. The jury can give no damages by way of punishment to the defendant."

The defendant, also in writing, further requested the court to charge the jury as follows:

"6. Upon all the evidence introduced, the jury should answer the issues in favor of defendant."

This instruction the court declined to give, and defendant excepted.

There was a verdict for the plaintiff in each case, and judgment having been entered thereon, defendant appealed.

Winston & Matthews for plaintiff.
Pruden & Pruden and S. B. Shepherd for defendant.

WALKER, J., after stating the case: It appears that there was sufficient evidence of negligence on the part of the defendant in failing to send the message on the afternoon of 25 January. It was shown that both agents were in their offices until 7 o'clock p. m., and while the operator at Plymouth testified that he called the office at Jamesville and failed to get any response, this was not conclusive upon the jury, and they could find upon all the facts and circumstances that no effort was made to send the message. It is a suspicious circumstance, which they might consider, that the agent at Jamesville was not called by the defendant to corroborate the Plymouth operator. The burden was upon the defendant to account for the delay, after the receipt of (11) the message for transmission was shown. It was solely within its power to do so, and there must be a presumption of negligence raised by so long a delay, in the absence of any sufficient or satisfactory explanation. *Hoaglin v. Telegraph Co.*, 161 N. C., 390. It was held in *Sherrill v. Telegraph Co*, 116 N. C., 655, that, "When the plaintiff shows the delivery of a message to the telegraph company, with the charges prepaid (and it would have been the same if the defendant had accepted the message with charges to be collected), and the failure to deliver the message, a *prima facie* case was made out, and the burden rested on the defendant to show matter to excuse its failure." citing Thompson on Electricity, sec. 274, and cases; *Bartlett v. Telegraph Co.*, 16 Am. St. Rep., 447; *Pearsall v. Telegraph Co.*, 21 Am. Rep., 662.

It is not necessary that we should discuss the evidence, as there was plainly enough to satisfy the jury, if they accepted it as true, that the defendant had negligently delayed to send the message, and that this prevented the plaintiff, Aline Ellison, from leaving on the earlier train.

The court properly confined the assessment of damages to mental anguish suffered after the message was actually delivered to her. There was affirmative evidence that mental anguish had been caused to both palintiffs by the negligence of the defendant.

In *Harrison v. Telegraph Co.*, 143 N. C., 147, we stated the rule to be that there can be no recovery of damages for mental suffering in such cases, unless it is shown "that the defendant could reasonably have foreseen from the face of the message that such damages would result from a breach of its contract or duty to transmit correctly, or that it had extraneous information which should have caused it to anticipate just such a consequence from a neglect of its duty towards the plaintiff."

The message in this case was of a character sufficient to inform the defendant of its great importance, and that mental anguish would probably result from its negligence in failing to transmit it with reasonable promptness. "It has repeatedly been decided by this Court, in cases where the relationship of the parties was not disclosed (12)

and the special purport of the message could not possibly have been understood, that it was not necessary for the company to know the relation between the sender and sendee from the terms of the message, or to know anything more than that the message is one of importance, and that this should always be inferred from the fact that it relates to the illness or death of a person. When this is the case, it is sufficient to put the company on notice that a failure to deliver will result in mental suffering, for which damages may be recovered. *Lyne v. Telegraph Co.*, 123 N. C., 129; *Sherrill v. Telegraph Co.*, 109 N. C., 527; *Hendricks v. Telegraph Co.*, 126 N. C., 310." We further said in the *Bright case:* "The law does not regard so much the technical relation between the parties, or their legal status in respect to each other, as it does the actual relation that exists and the state of feeling between them. It does not raise any presumption of mental anguish when there is no relation by blood, but if mental suffering does actually result from the failure to deliver a message where there is only affinity between the parties, it may be shown and damages recovered." But here, as we have shown, there was actual proof of mental anguish, and the case was submitted to the jury upon that proof. Not only is the *Bright case* an authority sustaining the validity of the rulings in regard to mental anguish, but *Harrison v. Telegraph Co.*, 143 N. C., 147, is directly in point, and there we said: "There is no presumption of mental anguish growing out of the relation of stepmother and son; but under our decisions it is a fact the plaintiff may prove, if she can, to the satisfaction of the jury, for the state of the mind is as much susceptible of proof as the condition of the stomach." See, also, *Cashion v. Telegraph Co.*, 123 N. C., 267. In our case there was blood relationship between the plaintiff Annie Harrison and the deceased, but none between the latter and Aline Ellison, and if the relation the parties actually sustained did not raise any presumption of mental anguish, the proof supplied its place.

We have seen in *Sherrill v. Telegraph Co, supra,* cited already for another purpose, that the prepayment of the charge for sending
(13) the message is not a condition precedent to the right of recovery. The agent could have demanded payment of the toll in advance, but not having done so, and electing to trust the sendee for the payment of it, the defendant cannot now avail itself of his failure to do so as a defense to the action.

The right to prepayment was clearly waived. *Miller v. Telegraph Co.*, 159 N. C., 502.

The defense that the message was not tendered to the defendant's agent during office hours is equally untenable. The agent received it and undertook, and actually attempted, as he testified, to send it over the wires and by telephone. It did not occur to him, at the time he was

doing so, that the office hours had closed and he was not bound to transmit the message. If the provision as to office hours was available to defendant, under the circumstances of this case, it was waived by the conduct of its agent. *Bright v. Telegraph Co., supra; Hood v. Telegraph Co.*, 135 N. C., 622; *Carter v. Telegraph Co.*, 141 N. C., 374. We held in *Carter's case, supra:* "Where a message on its face appears to be urgent, the fact that it is offered for transmission after office hours will be no defense to the company if the agent accepted it without reserve," or, in other words, without insisting on the exemption from the service at the time. And in the *Suttle case* it was said: "When the agent of a telegraph company receives a message for transmission, and undertakes with the sender to deliver it at a time not within its reasonable office hours at its destination, the benefit of the office hours is waived."

If the agent was not able to transmit the message, it was his plain duty, under the law, as we have so often declared it, to notify the sender, Annie Harrison, of the fact, so that she could have taken steps to communicate to her foster sister in some other way. Its failure to do so was evidence of negligence. *Hendricks v. Telegraph Co.*, 126 N. C., 311; *Hood v. Telegraph Co.*, 135 N. C., 622; *Cogdell v. Telegraph Co., ibid.*, 431; *Woods v. Telegraph Co.*, 148 N. C., 61; *Hoaglin v. Telegraph Co.*, 161 N. C., 395.

It was no excuse for the delay in sending the message that its operator was also agent of the railroad company and had other duties to perform for it. If the defendant employs an agent on joint ac- (14) count with the railroad company, it must abide the consequences of a conflict of duty upon the part of the agent. The contract of the telegraph company is for prompt delivery. It is no defense that its agent had other duties to attend to as agent for another company, any more than it would be an excuse that it had so much business of its own that one agent or the messengers it had could not promptly and properly handle it. In both cases the defendant is negligent if it does not have sufficient employees to discharge properly the duty it contracts to do and is chartered and paid to do. *Kernodle v. Telegraph Co.*, 141 N. C., 438; *Mott v. Telegraph Co.*, 142 N. C., 532; *Carter v. Telegraph Co., supra; Dowdy v. Telegraph Co.*, 124 N. C., 522.

We cannot assent to the position that there was no evidence of the agent's acceptance of the message for transmission—even his unconditional acceptance of it for that purpose. It was for the jury to settle any conflict in the evidence, and they have done so in this instance favorably to the plaintiffs. Nor can we sustain the motion for nonsuit, for there was ample evidence, if found to be true, upon which to base the verdict.

The court carefully distinguished, in its charge, between mental anguish and mere grief or regret at the death of plaintiffs' relative and foster mother, and its instructions are fully supported, in this respect, by *Davis v. Telegraph Co.*, 139 N. C., 83, and *Hancock v. Telegraph Co.*, 137 N. C., 497, cases relied on by the defendant.

The evidence as to the ability of Annie Harrison to purchase a coffin, and all the testimony on that subject, if it was erroneously admitted, was fully eliminated by the court in its charge, and the error, if any, was cured.

It was competent to show the arrangement between Annie Harrison and Aline Ellison before the latter left Plymouth, that she should be notified by wire if Sue Wright should become worse, not as charging defendant with any knowledge of it, for there was no such evidence, but as tending to show that Aline Ellison would have come to Plymouth on the 25th of January if she had received the message.

(15) The charge is not in the record, and we must presume, in the absence of it, that it correctly stated the law.

Upon a review of the entire case and a careful consideration of the several exceptions, we have not been able to discover any error in the trial.

No error.

BROWN, J., did not sit.

Cited: Harrison v. Tel. Co., post, 18; *Griswold v. Tel. Co., post,* 175; *Betts v. Tel. Co.*, 167 N. C., 79; *Miller v. Tel. Co., ib.*, 316; *Webb v. Tel. Co., ib.*, 486; *Medlin v. Tel. Co.*, 169 N. C., 505; *Howard v. Tel. Co.*, 170 N. C., 499.

W. B. BASNIGHT ET AL. V. P. H. SMALL.

(Filed 10 September, 1913.)

1. Fixtures—Logging Roads.

An ordinary logging road affixed to the land by the owner of the land is a fixture which goes with the conveyance of the title thereto.

2. Same—Deeds and Conveyances—Vendor and Vendee—Reservation of Timber—Expressio Unius, Etc.—Intent.

A deed to land whereon is laid and affixed an ordinary logging road, which reserves a part of the timber growing on the land, and does not reserve the logging road, passes the title to the latter, under the doctrine of *expressio unius exclusio alterius;* and the contention that the logging

road was not intended as a fixture and should not be considered as such, for that it was for the purpose of removing the timber reserved in the deed, cannot be maintained.

APPEAL by plaintiffs from *Whedbee, J.*, at Fall Term, 1912, of PERQUIMANS.

This is an action to recover damages for entering upon the land of the plaintiff and removing a logging road therefrom.

On 31 December, 1910, the defendant conveyed the land to the plaintiffs, reserving all the pine timber that would measure 10 inches across the stump when cut, provided the same was cut within ten years.

The plaintiff W. B. Basnight testified as follows: "I am one of the plaintiffs. Cason and I bought the land described in deed from Small for $10,000. About one-third of it was woodland. Besides the pine reserved by Small, there was some poplar and a good bit of (16) gum and oak. At the time the bargain for the land was made, and when the deed was made, both, there was a logging road upon the land. This road started at the sound and ran back, through the woods, on edge of the pasture and into the swamp, for about a mile. All of the road was on this tract of land and was built for the purpose of getting out the timber on this tract. This road was just an ordinary logging road. First the ties were laid and then the rails. A few of the ties were entirely underground, others filled in with dirt, so as to make the road level. Road was made level enough for mules to walk upon. There were two trestles, one 30 and one 40 yards in length. The 30-yard one was about 4 feet high. On these trestles the ties were laid on posts or piling, right close together, joining so as to make it solid. The rails were 12-pound rails, and were fastened to the ties with spikes. Ties were pine —sap pine, I think—and would have lasted four or five years. At the time of Small's deed to Cason and me, there was timber upon this tract, other than the pine reserved by Small, large enough to cut, and we could have used this road beneficially in getting out this other timber.

"Small moved this road. This after his deed to plaintiffs was made. Tore up the road and hauled the rails away. The land was worth $1,500 less, after the road was removed, than it was with the road there as it was when plaintiffs bought it.

"Small moved but a few pines after plaintiffs bought land. Don't know whether he hauled them over road or in wagons. He used road for hauling pines before he sold land to me.

"After Small moved road, he sold me the pine timber (reserved in his first deed) for $2,000. Don't remember whether this was before or after this suit was brought—some time in July or August last year."

Plaintiffs then introduced the following admissions:

"It is admitted that Miles Goodwin, if present, subject to competency and relevancy, would swear that he has had much experience in cutting out rights of way through woods, similar to that spoken of in complaint, and that the cost of cutting out such right of way
(17) and laying ties and iron on it, in making a timber road, would be from 25 cents to 30 cents per yard, in making a mile of road."

Plaintiffs rested.

At the conclusion of the plaintiffs' evidence, the defendant moved for judgment as of nonsuit, which was allowed. Plaintiffs excepted and appealed to the Supreme Court.

Bond & Bond and P. W. McMullan for plaintiffs.
Ward & Thompson and Charles Whedbee for defendant.

ALLEN, J., after stating the case: If there is any evidence that the logging road was a fixture, there was error in entering the judgment of nonsuit, because, if a fixture, it passed to the plaintiff by a conveyance of the land, and he would be entitled to recover damages for its removal and we are of opinion there is such evidence.

The logging road was annexed to the soil, and if the testimony of the plaintiff is true, it was built for the better enjoyment of the land, and was adapted to that purpose, thus meeting the rule stated by *Justice Walker* in *S. v. Martin,* 141 N. C., 832, which, while correct as applied to the facts then being considered, is more favorable than the one adopted by our Court as applicable between vendor and vendee, which is the relationship of the plaintiffs and the defendant.

In *Overman v. Sasser,* 107 N. C., 435, substantially all of the cases bearing directly on this question are collected by the present *Chief Justice,* and the Court there adopts the rule laid down by *Lord Ellenborough* in *Elwes v. Mawe,* 3 East, 38, that as between vendor and vendee "the common-law rule, that whatever is affixed to the freehold becomes a part of it and passes with it, is observed in full vigor."

The defendant contends, however, that although this may be the rule usually applied between vendor and vendee, that the fact that the logging road was built for the removal of the timber, and that the pine timber is excepted in the deed, take this case out of the rule, and that when the character of the road is considered, it appears that it was not the intention of the parties that the logging road should pass by the deed.

(18) The answer is, that if he built the road for the sole purpose of removing the timber, he was at that time the owner of the timber, and if he then made the road a part of the land by annexation, he could not afterwards change its character by selling the land, reserving the timber.

It also appears from the evidence of the plaintiff that there was other timber on the land, not reserved, large enough to cut, and that the plaintiffs could have used the road beneficially in getting out this timber.

The reservation in the deed, instead of strengthening the contention of the defendant, refutes it, upon the familiar maxim, *expressio unius exclusio alterius.*

The conclusion is almost irresistible, that when the attention of the defendant was called to the reservations he wished to make by mentioning the pine timber, he would have also included the logging road if he had not intended it to pass by the deed. There is error.

Reversed.

Cited: S. c., 168 N. C., 80; *Pritchard v. Steamboat Co.,* 169 N. C., 461.

ANNIE HARRISON v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 10 September, 1913.)

For digest, see *Ellison v. Telegraph Co., ante,* 5.

APPEAL by defendant from *Long, J.,* at Spring Term, 1913, of WASHINGTON.

Winston & Matthews for plaintiff.
Pruden & Pruden and S. Brown Shepherd for defendant.

WALKER, J. This case is governed by *Ellison v. Telegraph Co., ante,* 5. They were argued and considered together, and the facts and principles presented in the two cases are substantially the same. It follows that there was no error in this appeal.

No error.

BROWN, J., did not sit.

(19)

J. R. LASSITER, ADMINISTRATOR, v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 10 September, 1913.)

1. Courts—Jurisdiction—Federal Receivers—Permission to Sue—Purchasing Corporations.

It is unnecessary, under the United States statutes, to get permission from the Federal courts to sue its receivers of an insolvent corporation, in the courts of a State, and *a fortiori* such consent is unnecessary to sue in the State court a purchasing railroad corporation under a Federal foreclosure sale, for the wrongful death of an intestate inflicted while the property was being operated by the receivers, after confirmation had been decreed and the purchasing corporation had been put into possession; and it is further held in this case that the decree of the Federal court retaining the cause for the protection of the purchaser and others interested was not intended to have a contrary effect.

2. Railroads—Federal Receivers—Purchasing Corporations—Torts—Liability—State's Courts—Jurisdiction.

The liability of a purchasing railroad corporation of the property of an insolvent railroad corporation at a foreclosure sale in the Federal court, after confirmation by the court and possession given, for the wrongful death of an intestate, inflicted while the property was being operated by the receivers, is a question of law which may be resolved by the State court in an action there begun; and it is held that such purchasing corporation is liable, for that the earnings of the property in the receiver's hands are first applicable under the law to liabilities of this character, and its application otherwise would be a wrongful diversion which would render the purchasing company equitably liable.

3. Railroads—Removal of Causes—Nonsuit—Purchasing Corporations—Actions.

Where an action for the negligent killing of plaintiff's intestate was originally brought against the Federal receivers of a railroad company, in the courts of this State, removed by the defendants to the Federal courts, where the plaintiff took a nonsuit, and subsequently the corporate property has been foreclosed and decree confirming the sale has been made and thereunder the possession of the property has been given to the railroad corporation which purchased at the foreclosure sale, the plaintiff may again bring his action for the same cause, in the State court, against the purchaser, within a year from the time of his taking the nonsuit.

(20) APPEAL by defendant from *Long, J.*, at June Special Term, 1913, of GATES.

Ward & Grimes, Bond & Bond, and A. P. Godwin for plaintiff.
W. B. Rodman for defendant.

CLARK, C. J. This is an action for the negligent killing of Mattie Taylor by an engine operated by the employees of the receivers of the Norfolk and Southern Railroad Company, the plaintiff alleging that the defendant the Norfolk Southern Railroad Company is liable therefor. The action was originally brought against the receivers of the Norfolk and Southern Railroad Company in Gates Superior Court. It was removed to the Federal court, where a nonsuit was taken. Within one year thereafter and after confirmation of the purchase of the property by, and its delivery to, defendant, this action was begun in the Superior Court of Gates against the purchaser of the property, the present defendant.

Upon the issues submitted, the jury found that the death of plaintiff's intestate was caused by the negligence of the receivers of the Norfolk and Southern Railroad Company, as alleged in the complaint; that she did not contribute by her own negligence to cause said injury and death, and that the receivers by the use of reasonable care could have prevented said injury and death, and assessed the damages at $1,000. As to these issues there is no exception.

The fourth issue was, "Is the defendant the Norfolk Southern Railroad Company liable for the tort alleged to have been committed by the Norfolk and Southern Railroad Company, while operated by the receivers, as alleged in the complaint?" This issue was answered by the court, as a matter of law, "Yes," and the defendant excepted.

The Norfolk and Southern Railroad Company was sold under foreclosure in the Federal court. Paragraph 11 of said decree provided: "The purchaser or purchasers shall as a part of the con- (21) sideration for such sale, and in addition to the purchase price bid, take the property purchased:" Here follow several conditions, among them, "(3) And upon the express condition that such purchaser or purchasers, his or their successors and assigns, shall pay, satisfy, and discharge any unpaid indebtedness and obligation or liabilities which shall have been contracted or incurred by the receivers in respect thereto, before the delivery or possession of the property sold." The decree of confirmation, after reciting and adopting as a part of the decree of confirmation the decree of foreclosure, contained, among other things, the following: "It is further ordered, adjudged, and decreed that this court reserves the exclusive jurisdiction of this cause, for the purpose of enforcing and executing the provisions of the said decree of foreclosure and sale entered 14 October, 1909, and for the purpose at all times of protecting said grantee or grantees, their successors or assigns, in the enjoyment of the property, assets, and franchises purchased under the said decree of foreclosure and sale, and to determine any and all controversies as to the character, extent, and validity of the

possession of said grantee or grantees, their successors and assigns, acquired under the execution of said decree and hereunder, and for the purpose of enforcing all the obligations and rights assumed by said grantee or grantees, their successors and assigns, under and by virtue of the said decree of foreclosure and sale or any subsequent decree including this decree."

The defendant earnestly contends that under this provision in the decree the plaintiff could not maintain this action in the Superior Court of Gates. We do not understand that the right which the plaintiff has under the Federal and State statutes to bring this action in the State court can be impaired by this decree of the Federal court, nor do we think that such decree was intended to have that effect.

Inasmuch as an action can be brought in the State court against the receivers in the Federal court, without obtaining permission of that court (U. S. Compiled Statutes, 721 (3), Act 3 March, 1887, (22) ch. 373, sec. 3), *a fortiori* an action can be brought in the State court against the purchaser, after confirmation of the sale and delivery of the property to such purchaser, without permission of the Federal court. The liability of the purchaser is a matter of law which can be adjudicated in the State court. The earnings of the road, while in the hands of the receivers, are first applicable to the tort and contract liabilities incurred during their operation, even in preference to prior mortgage liens (which doctrine as to torts is a provision of the North Carolina statute also), and their application to improvements would be a wrongful diversion of the fund, and the purchasing company is liable to the plaintiff on equitable principles as fully as if it had been the original owner.

This matter is fully discussed in *R. R. v. Johnson*, 151 U. S., 81, in which case *Chief Justice Fuller* says, at p. 88: "The company was held liable upon the distinct ground that the earnings of the road were subject to the payment of claims for damages, and as in this instance such earnings had been diverted into betterments of which the company had the benefit, it must respond directly for the claim. This was so by reason of the statute, and, irrespective of the statute, on equitable principles applicable under the facts." That case is a full discussion of the points involved in this, and holds that the State court is authorized to try actions against the receivers or the purchasing company upon facts very similar to those in this case. It was further held therein that where such plaintiff did not intervene in the Federal court and collect its judgment before the property was turned over to the purchasing company, he is not precluded from bringing his action in the State court. That decision has been approved in numerous cases cited in 12 Rose's Notes, 479. To same effect, *R. R. v. Manton*, 164 U. S., 636, which holds

that an action for damages for personal injuries, brought against the receiver and the railroad company and pending after the restoration of the property, is not cut off by failure to prosecute the claim by intervention in the receiver's proceedings because of an order of the court requiring such claims to be presented by a specified date or be barred. For cases citing and approving this decision, 12 Rose's (23) Notes, 916.

In *R. R. v. Crawford,* 53 Am. St., 752, it is held: "If a railroad in the hands of a receiver appointed by United States Circuit Court is sold by order of that court, but possession is retained by the receiver, one who claims damages for injuries received while the railroad was in the hands of the receiver may sue the receiver in the State court without the consent of the United States court, and after the Circuit Court has discharged the receiver and turned the property over, the jurisdiction of the Federal court ceases, and the State court, though the suit was commenced prior to such delivery, has the power to proceed to adjudicate the rights of the parties and to enforce its own judgment according to the laws of the State." This case is there copiously annotated, and among others has the following citation: "The discharge of the receiver, and return of the property to the owner, leaves the property subject to any claim or charge legally resting upon it; and this may be enforced by any court having jurisdiction. *R. R. v. Johnson,* 76 Texas, 421; 18 Am. St., 60." This was the case which was taken by writ of error to the United States Supreme Court in which the opinion of *Fuller, C. J.,* 151 U. S., 81, above cited, was rendered, affirming the action of the Texas court, and holding:

1. Whether there was actionable negligence committed while the receiver was in charge is a question of general law for the State court to pass upon.

2. That a provision in the order of the United States court reserving the proceedings for the disposition of pending intervention, and such as might be filed within a time fixed, does not preclude one having a cause of action for the negligence of the receivers from bringing his action in any court of competent jurisdiction.

Our conclusion is that the Superior Court of Gates had jurisdiction of this cause of action under the statutes, State and Federal, and that the provision of the decree of confirmation of the sale in (24) the Federal court did not have the effect, and was not intended to have the effect, to deprive the plaintiff of his right to maintain this action in the State court.

No error.

Cited: Bell v. R. R., post, 184.

NEWBY & WHITE v. DRAINAGE DISTRICT.

(Filed 10 September, 1913.)

1. Drainage Districts—Constitutional Law.

The Drainage Act of 1909 is constitutional.

2. Drainage District—Judgments—Collateral Attack.

A drainage district laid off under the provisions of the act of 1909 is a *quasi*-municipal corporation, partaking to some extent of the character of a governmental agency, and neither its existence nor the regularity of its proceedings can be collaterally impeached, in an action for trespass for cutting down trees in constructing the drainage canal.

3. Drainage Districts—Damages—Interpretation of Statutes—Proceedings—Judgments—Estoppel.

The Drainage Act of 1909 affords ample opportunity and machinery for the landowner in a district laid off thereunder to assert his rights, including those of damages to his land, with the right of appeal to the Superior Court; and he is concluded, by the express provision of the statute, by the order of the court confirming the final report of the viewers, unless he has preserved his rights in accordance with the statutory requirements.

4. Drainage Districts—Lis Pendens—Notice—Subsequent Purchasers.

The pendency of a proceeding to lay off a drainage district under the provisions of the act of 1909 is notice as to all the lands embraced in the district, and the grantees thereof are bound by the statutory requirements as to the procedure to recover damages to the lands, as were their grantors who were parties to the proceedings and who owned the lands at that time.

APPEAL by defendant from *Whedbee, J.*, at Spring Term, 1913, of PERQUIMANS.

In 1909 sundry landowners in Chowan and Perquimans counties filed before the Clerk of the Superior Court of Chowan County a
(25) petition for the establishment of a drainage district under chapter 442 of the Public Laws of 1909. J. P. and L. A. Goodwin were signers of this petition. Proceedings were had conformable to the provisions of the Drainage Act, and a preliminary report of the board of viewers was considered on 11 September, 1909, and the decree entered establishing the district, to be known as Bear Swamp Drainage District.

The final report of the board of viewers was considered on 30 November, 1909, and duly confirmed. On 3 January, 1910, the petitioners, J. P. and L. A. Goodwin, sold and conveyed to the plaintiffs herein the land described in the complaint, which land was embraced in the

Bear Swamp Drainage District. Subsequently the commissioners of the drainage district proceeded through a contractor to construct the canals and ditches called for in the survey and report of the board of viewers, and plaintiffs allege that in the construction of the main canal a large amount of valuable timber on the lands of plaintiffs described in the complaint was wrongfully and unlawfully destroyed, and that the cost of removing the balance of the timber had been greatly enhanced, and that by reason of these things the plaintiffs had been endamaged in a large sum.

Evidence was introduced by the plaintiffs tending to support these allegations, and at the close of the plaintiffs' testimony the defendant moved for a nonsuit. This motion was overruled, and the defendant board introduced in evidence the entire record in the proceedings for the establishment of the drainage district, and also evidence tending to show that plaintiffs had, in fact, sustained no damage. There was a verdict and judgment against the defendant board, from which judgment the board appeals to this Court.

Pruden & Pruden, S. Brown Shepherd, and W. S. Privott for defendants.

Bond & Bond and P. W. McMullan for plaintiffs.

BROWN, J., after stating the case: Upon the foregoing facts we are of opinion that this action was improvidently brought, and should be dismissed. There is no contention that the drainage Act of (26) 1909 is obnoxious to either the State or the Federal Constitution. This question was settled by our decision in *Sanderlin v. Luken,* 152 N. C., 738. But conceding the validity of the law, plaintiffs maintain that there has been no compliance with its provisions, and that the board of drainage commissioners were trespassers upon their lands. If, by this charge, plaintiffs mean to challenge the existence of a lawful drainage district, then they are in the anomalous position of insisting upon a judgment against a body corporate that does not, in fact, exist. If the defendant board was without authority in entering upon the lands of plaintiffs, it is equally without authority to levy assessments for any purpose, and the judgment plaintiffs recovered below would be a thing of no value. But the conclusive answer to this suggestion is that a drainage district is a *quasi*-municipal corporation, and neither its existence nor the regularity of its proceedings can be collaterally impeached.

In *Sanderlin v. Luken, supra,* it is held that these drainage districts are regarded as *quasi*-public corporations, partaking to some extent of the character of a governmental agency. They are not unlike special road and school districts, and it is elementary that the validity of such districts cannot be collaterally attacked.

In 14 Cyc., 1029, it is said in the text that the legality of the organization of a drainage district cannot be attacked collaterally, as in an action by it to enforce assessment. This must be equally true in an action against it for damages for assuming to exercise the rights and powers of a lawfully constituted drainage district.

In *Parker v Drainage District,* 148 S. W., 351, the Texas Court of Civil Appeals says: "There can, we think, be no question that drainage districts organized under the act in question are public or *quasi*-public corporations." *Fallbrook v. Bradley,* 164 U. S., 112; *People v. La-Rue,* 67 Cal., 526. And continuing, the Court says: "It is a firmly established doctrine that when the law provides for the creation of
(27) such districts by the action of any public body, as the commissioners' court, in the present drainage law, the validity of such action in the creation or organization of such districts cannot be questioned, except by direct proceedings in *quo warranto* at the suit of the State, for mere irregularity in the failure to comply with the prescribed procedure."

A case much in point is *Smith v. Drainage District,* 229 Ill., 155. In this case the Court says: "The question whether the appellee drainage district had been legally organized did not, and could not, arise in the proceeding for the condemnation for the right of way for the ditch across the lands of the appellant company. Whether it (the district) correctly exercised such power or jurisdiction cannot be considered in this, a collateral proceeding. The legality of the organization of the drainage and levee district can be attacked and brought under judicial review only in a direct proceeding by *quo warranto.*"

If plaintiffs concede that the defendant is a lawfully constituted drainage district, but attack the regularity of its proceedings, again both reason and authority block the way.

The statute affords ample opportunity to every party in interest to assert his rights, and adequate machinery for maintaining them. Like a general practitioner of the olden time, the Drainage Act carries its remedies in its own saddle-bags, and advertises that there are none other.

"The remedies provided for in this act shall exclude all other remedies." Drainage Act, sec. 37.

Section 11 of the act makes it the duty of the engineer and viewers to assess the damages claimed by any one for lands taken or for inconvenience imposed. It will be seen, therefore, that the grantors of plaintiffs had abundant opportunity to set up the very claims which they attempt to assert in this action. They were before the court; they were moving parties in the cause. If they had claimed damages and had been dissatisfied with the amount awarded, they had their right of appeal to the Superior Court. They have had their day in court, and

"not having spoken when they could have been heard, they cannot now be heard when they should be silent." *White v. Lane,* 153 N. C., 16.

In courts of justice there comes a time when a man is called upon to speak or else forever thereafter hold his peace. The (28) statute, in terms, declares that the order of the court confirming the final report of the viewers "shall be conclusive and final that all prior proceedings were regular and according to law, unless they were appealed from." And this statutory declaration that the regularity of the proceedings shall not be subject to collateral attack is in the line with the decisions of the courts and text-writers of good repute.

In discussing these drainage districts, Farnham, in his work on Water and Water Rights, says: "An adjudication by the proper tribunal that the proceedings conform to the statute cannot be inquired into in a collateral proceeding; nor can the various steps which are taken in proceedings after jurisdiction has been acquired be questioned. That the lands in a reclamation district were swamp and overflowed, and that lands assessed for reclamation purposes would be benefited thereby, being jurisdictional facts, which the board of supervisors necessarily determine in approving the petition for the formation of the district, its judgment on those questions, where all the parties were brought before it by proper notice, is conclusive, and cannot be collaterally attacked." *People v. Wassoon,* 64 N. Y., 167; *R. R. v. Drainage District,* 134 Ill., 384; 10 L. R. A., 285; *Auditor General v. Melze,* 124 Mich., 285; *Barker v. Vernon Twp.,* 63 Mich., 516; *Oliver v. Monona County,* 117 Iowa, 43; *Ithaca v. Babcock,* 36 Misc., 49; 72 N. Y. Supp., 519; *Jebb v. Sexton,* 84 Ill. App., 45; *Reclamation District v. Turner,* 104 Cal., 334.

A case directly in point is *Oliver v. Monona County, supra,* where it is held that the failure of a board of supervisors in proceedings to establish a ditch for the drainage of a tract of land to award and pay the damages to the property through which the ditch was to pass, before locating it, is not jurisdictional, and cannot be made the basis of a collateral attack.

The plaintiffs, of course, stand in the shoes of their grantors, (29) who were parties to the proceeding for the establishment of the district, as a pendency of the proceeding is notice with respect to all lands embraced in the district.

Upon consideration of the whole case, we think the action should be dismissed. This disposes of both appeals.

Action dismissed.

Cited: Griffin v. Comrs., 169 N. C., 644, 647; *Lang v. Development Co., ib.,* 664; *Banks v. Lane,* 170 N. C., 17; *S. c.,* 171 N. C., 506; *Leary v. Comrs.,* 172 N. C., 27; *Lumber Co. v. Drainage Comrs.,* 174 N. C., 649.

WILLIAM O. WINSLOW v. T. W. WHITE.

(Filed 10 September, 1913.)

1. Contracts to Convey—Marriage—Consideration.

An obligation made to convey lands upon condition that the obligee marry the daughter of the obligor, which he accordingly does, is supported by a valuable consideration, to wit, marriage.

2. Same—Statute of Frauds.

The plaintiff and defendant agreed by parol that if the former married the daughter of the latter, the defendant would pay him a certain sum of money, which was subsequently by mutual agreement changed to a certain strip of the defendant's land. The plaintiff married the defendant's daughter thereafter, and a written agreement, dated as of the date of the marriage, was given by the defendant to the plaintiff, that if the plaintiff "will marry my daughter Lily, I hereby agree to give him all that strip of land," definitely describing it: *Held*, the paper-writing was sufficient under the statute of frauds, and specific performance thereof should be decreed.

3. Same—Equity—Specific Performance—Conditions Subsequent—Deeds and Conveyances.

The plaintiff sued for the specific performance of a written contract that if he would marry the defendant's daughter, "and would be good and kind to her," the defendant would give him a certain definitely described tract of land. The plaintiff complied with the conditions imposed, and it is held that so much of them as related to the treatment of the daughter were conditions subsequent and properly decreed to be written into the deed, and were not too indefinite or uncertain to permit the remedy sought.

(30) APPEAL by defendant from *Whedbee, J.*, at December Special Term, 1913, of PERQUIMANS.

The suit, instituted in 1912, was to enforce the specific performance of an agreement to convey a tract of land, the instrument being in terms as follows:

STATE OF NORTH CAROLINA—PERQUIMANS COUNTY.

10 February, 1904.

This is to certify that if Oscar Winslow will marry my daughter Lily, and be good and kind to her, I hereby agree to give him all that strip of land lying between the lane running through the farm and the lead ditch running through the J. P. Winslow farm, known as the middle slipe, beginning at the main road and running parallel lines to the back line, estimated at valuation of 2,000 (two thousand). To have and to hold.

Witness my hand. T. W. WHITE [SEAL].

Plaintiff, a witness in his own behalf, testified as follows: "That he married the daughter of the defendant in 1904; that the agreement set out in the complaint was made before the marriage in 1904, but that the paper-writing was actually written and delivered in the spring of 1912; that the parol bargain was that the defendant would give the plaintiff $1,500 if he would marry his daughter, and later it was changed, defendant saying he would give plaintiff the middle slipe of land and build a house on it. The marriage took place about three or four weeks after the bargain was made, and after the marriage a house was built upon the piece of land. That since the marriage plaintiff and his wife have lived together as man and wife, and that he has always been kind to her." Upon this, the evidence chiefly relevant, the court charged the jury, if they believed the evidence, they would answer the first issue "Yes," and the second issue "Yes, by marrying the daughter of defendant and living with her and treating her good and kind."

Defendant excepted.

Verdict was rendered as follows:

1. Did the defendant, the.....day of April, 1912, execute and deliver to plaintiff the paper-writing dated 10 February, 1904, marked Exhibit A, in accordance with a parol contract made in 1904, as alleged? Answer: Yes. (31)

2. Has the plaintiff complied with the terms of said contract? Answer: Yes, by marrying the daughter of defendant and living with her and treating her good and kind up to the present date.

3. What damages is plaintiff entitled to recover of defendant for rent of said land? Answer: Nothing, for that plaintiff admits that he is indebted to defendant in a sum equal to the rent of said land for the year 1912.

Judgment on verdict that defendant convey the land subject to condition that plaintiff will support the wife and always be good and kind to her, etc.

Defendant excepted and appealed.

E. F. Aydlett for plaintiff.

Charles Whedbee and Ward & Thompson for defendant.

HOKE, J., after stating the case: It is well recognized that marriage is to be regarded and dealt with as a valuable consideration. *Garvin v. Cromartie,* 33 N. C., 174; Page on Contracts, sec. 299; 1 Bishop on the Law of Married Women, sec. 775. In this last citation the author quotes from *Johnston v. Dillard,* 1 S.C. (Bay), 232, in which marriage was said to be "the highest consideration known in law," and in the case it was further said to be "a consideration good against creditors, un-

less done with fraudulent intent." And also from *my Lord Coke* as follows: "If a man had given land to a man with his daughter in frank marriage, generally a fee simple would pass without the word 'heirs,' for there is no consideration so much respected in law as the consideration of marriage in respect of alliance and posterity."

2. The instrument contains an agreement on such a consideration to convey a tract of land sufficiently described.

3. The written agreement, though executed long after the contract between the parties, which had been made by parol, is a sufficient memorandum to meet the provisions of our statute of frauds requiring contracts concerning land to be in writing. *Magee v. Blankenship,* 95 N. C., 563; 29 A. & E., 854.

On the verdict, therefore, and under our decisions, the record
(32) presents a case calling for a decree for specific performance, the judgment entered in the cause. *Combes v. Adams,* 150 N. C., 64; *Whitted v. Fuquay,* 127 N. C., 68; *Price v. Price,* 133 N. C., 494; *Boles v. Caudle,* 133 N. C., 528.

It was chiefly objected for defendant that this relief was not open to plaintiff by reason of the stipulation also appearing in the instrument that plaintiff, the obligee, should be good and kind to the daughter. The position being that this stipulation rendered the agreement too indefinite and uncertain to permit the remedy sought in this case and in any court; second, that the same should be construed, as a condition precedent covering the entire period of the married life of the parties.

We would be most reluctant to adopt either of these views, tending as they do in the one case to invalidate the instrument and in the other to defeat its evident and controlling purpose; and having due regard to the language of this stipulation, the relationship and evident purpose of the obligor, to provide for the support and kind treatment of his daughter in her married life, and the attendant circumstances of the transaction, all of them proper to be considered in arriving at the intent of the parties as expressed in the entire instrument (*R. R. v. R. R.,* 147 N. C., 368-382; *Merriam v. U. S.,* 107 U. S., 441), we are of opinion that the learned judge who tried the cause has given the correct construction to the agreement in holding this feature of it to be a condition subsequent, and as such directing that the same be incorporated in the deed to be made by defendant. Such an interpretation sufficiently satisfies the language of the provision, will best effectuate the purpose of the parties, and is in accord with our decisions more directly relevant to the question presented. *Helms v. Helms,* 137 N. C., 206.

We find no reversible error in the record, and the judgment as entered is affirmed.

No error.

(33)

G. V. LEWIS *v.* NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 10 September, 1913.)

Railroads—Signals—Negligence—Natural Characteristics of Animals—Judicial Notice—Proximate Cause—Questions for Jury.

A flock of turkeys are not as alert to danger as cattle, horses, or other more intelligent creatures, though more quickly alarmed by a sudden sharp sound, as the whistle of an approaching railroad locomotive. Hence, the failure of the engineer to blow the whistle of the locomotive when he sees turkeys feeding on or across the track, or should have seen them by a proper lookout, is actionable negligence. The jury may consider the known characteristic of a turkey to run or fly at a sudden sound upon the question as to whether the failure to blow the whistle, under these circumstances, was the proximate cause of the damage inflicted by the train running into them.

APPEAL by plaintiff from *Whedbee, J.*, at April Term, 1913, of WASHINGTON.

Gaylord & Gaylord for plaintiffs.
W. M. Bond, Jr., for defendant.

CLARK, C. J. It was in evidence that "about midday the defendant's train passed plaintiff's house, which was about 60 yards from the track. The train was twenty minutes late and going extra fast. The engine ran over and killed six of plaintiff's turkeys which were 250 yards further down the track. Those in charge of the train could have seen the turkeys a distance of 500 yards. No whistles were blown and the train made no other noise than that usually made in running. The engine did not let off any steam. There were no obstructions on the track to prevent the turkeys being seen."

Upon this evidence it was error to grant a nonsuit. From the known characteristics of turkeys, a flock of them feeding on or crossing a track might not notice that the train was approaching or attempt to fly. But as when a gun is discharged close by, if there had been the sharp blow of the whistle the turkeys would doubtless have taken to wing, or have run. They are very timid, if alarmed, but they are not alert to perceive danger.

It has been repeatedly held that it is error not to sound the whistle when cattle or horses are on the track, which are seen by the engineer in time, or which should have been seen by him in time, (34) to give warning by the whistle. Turkeys would be much less likely to notice the approach of a train than cattle or horses, and would be more likely to save themselves by flight when a whistle is sounded. As already said, they have less intelligence to perceive the danger of an

approaching train, and would be more easily frightened by the sudden sharp blow of the whistle. They can escape, too, more quickly by the use of wings.

It cannot be denied that there was evidence of negligence in failing to sound the whistle, when the turkeys were seen, or should have been seen. It is true, it is necessary for the jury to find, not only negligence on the part of the defendant, but further that such negligence was the proximate cause of the injury, and that if the whistle had been blown the turkeys would probably have flown in time.

From the well known characteristics of these fowls, the jury would have been justified in inferring from this evidence that the failure to blow the whistle was the proximate cause of their being killed, and that they would have removed themselves promptly by flight if the whistle had been sharply blown. Upon a nonsuit, the evidence must be taken in the light most favorable to the plaintiff and with all the inferences which may be reasonably drawn therefrom in his favor.

In *R. R. v. Wilson,* 28 Kan., 641, it is said: "The idea is not tolerable that an injury may be inflicted which by ordinary care and diligence may be avoided. This is the rule in the ordinary affairs of life, and is as applicable to corporations as to individuals. *R. R. v. Caffman,* 38 Ill., 425; *R. R. v. Lewis,* 58 Ill., 49; *R. R. v. Phillips,* 20 Kan., 9; *R. R. v. Rice,* 10 Kan., 426. Although the drove of cattle could have been seen from the train approaching the crossing, no attempt was made by sounding the whistle to frighten the cattle and make them run away, and no attempt was made to slacken the speed of the train or prevent it from running into the drove. Therefore, there was evidence to go before the jury as to the negligence and careless operation of the train by
(35) the railroad company, and also evidence that the heifer was thrown from the track through the result of such negligence." This and many other cases to same effect are cited, 3 Elliott R. R., sec. 1207.

In *Moore v. Electric Co.,* 136 N. C., 554, relied upon by the defendant, it was held that "the killing of a dog by a street railroad is not *prima facie* evidence of negligence," the Court saying that dogs are of superior intelligence, and "are known to be able ordinarily to take care of themselves amidst the dangers incident to their surroundings. Where a horse or a cow or a hog or any of the lower animals would be killed or injured by dangerous agencies, the dog would extricate himself with safety." The use of a whistle is more necessary, and would be more effective, with a drove of turkeys than with a drove of cattle or hogs.

The case should have been submitted to the jury, together with such evidence, if any, as the defendant may see fit to offer in rebuttal.

Reversed.

Cited: James v. R. R., 166 N. C., 573.

A. W. COOPER AND WIFE v. FOSBURG LUMBER COMPANY.

(Filed 10 September, 1913.)

For digest, see *Powell v. Fosburg Lumber Co.*, next case.

APPEAL by defendant from order granted by *Lane, J.*, by consent, at Halifax, 13 June, 1913; from NASH.

Finch & Vaughan and Jacob Battle for plaintiffs.
W. E. Daniel, Joseph P. Pippin, and E. L. Travis for defendant.

CLARK, C. J. The facts in this case are substantially the same as in *Powell v. Lumber Co., post.*, 36, and this case is governed by the decision in that. The injunction must be set aside.

Reversed.

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(36)

SAMUEL POWELL v. FOSBURG LUMBER COMPANY.

(Filed 10 September, 1913.)

Timber Deeds—Extension Period—Conditions Performed—Grantee of Lands—Notice.

Where standing timber on land is granted to one and his assigns, to cut within a certain period of time, with a certain extension period to the grantee upon previous notice given and a consideration paid to the grantor, and subsequently the owner conveys the land itself, and in his deed refers to the timber deed, the purchaser of the land takes with notice of the provisions of the timber deed, and the grantee therein and his assigns acquire the right to cut the timber during the extension period upon giving the notice and paying the consideration required to the original owner of the land.

APPEAL by defendant from *Cline, J.*, at chambers; from NASH.

Finch & Vaughan and Jacob Battle for plaintiff.
W. E. Daniel, Joseph P. Pippin, and E. L. Travis for defendant.

CLARK, C. J. Mary E. Sumner, 3 July, 1901, conveyed to W. W. Cummer all the pine, oak, and poplar timber on a certain tract of land (duly described) measuring 10 inches in diameter when cut, with right to enter, etc., within ten years from that date, with the privilege of an extension of five more years, if desired by the grantee, upon payment of a specified sum. Cummer conveyed his interest in said contract to the defendant. On 29 November, 1901, Mary E. Sumner conveyed a part of said land to Solomon Arrington and the balance to Lewis Foreman,

the deeds containing the following: "Excepting from this conveyance the timber sold by said Mary E. Sumner on said land and by her conveyed to W. W. Cummer by deed recorded, book 122, page 21, Nash County Registry, to which reference is made." By mesne conveyances the plaintiff became the owner of the lands thus conveyed by Mary E. Sumner to Arrington and Foreman. Mary E. Sumner, before the expiration of the ten years which was allowed W. W. Cummer in which
(37) to cut and remove the timber, granted to the defendant, Cummer's assignee, an extension of five years from 3 July, 1911, in which to cut said timber, in consideration of the amount stipulated for in the deed to Cummer.

Upon these facts the continuance of the injunction to the hearing was improvidently granted. Mary E. Sumner in her conveyance of the land reserved the right to Cummer to have the timber for five additional years, and her grant thereof to the defendant, the assignee of Cummer, was valid. The cases relied upon by the plaintiff are not in point. In *Bateman v. Lumber Co.,* 154 N. C., 248, it was held that timber not cut within the time prescribed goes with the land, and that on expiration of the time limited the subsequent purchaser and owner in fee of the land becomes the owner of the timber. In that case the grantee of the timber did not procure an extension of time under his option nor offer payment till after his lease had expired.

In *Hornthal v. Howcutt,* 154 N. C., 228, there was no extension clause or option reserved in the deed by the grantor, and it was held that the grantee of the land became the owner of the timber remaining uncut at the termination of the lease. In *Kelly v. Lumber Co.,* 157 N. C., 175, it was held that when the conveyance reserves to the grantor the timber, without specifying in what time it is to be removed, the grantor must cut and remove it within a reasonable time after notice to do so given by the grantee of the land. And his grantee of the timber holds such reservation of the timber in the same plight as the grantor held it. But here the conveyance of the land reserved the timber in accordance with the terms of the deed to Cummer for the timber, which deed is specifically referred to. That reservation was for ten years, with the option in Cummer of an extension for five years. This five years the grantor, Mary E. Sumner, granted to Cummer's assignee before the expiration of the ten years. The grantee of the land had full notice of the terms of this reservation by his deed, and the plaintiff, holding by mesne conveyances under said grantee, holds the land in the same plight. The injunction should be set aside.

Reversed.

Cited: Cooper v. Lumber Co., ante, 35.

WILEY T. TURNER v. MARTHA ANN DAVIS.

(Filed 10 September, 1913.)

1. Clerks of Court—Partition—Reversal of Judgment—Fraud—Record—Motion for Judgment—Statutes.

Where it appears of record that the clerk of the Superior Court in proceedings to partition lands had rendered a judgment in plaintiff's favor, and had set it aside on defendant's motion made before him seventeen months thereafter upon allegation of fraud in its procurement, and likewise that he had fraudulently prevented them from appearing and defending, to which plaintiff did not except, his motion in the Superior Court, in the cause transferred, for judgment in his favor upon the whole record cannot be allowed; and it is held that the clerk was within the provisions of Revisal, sec. 2494, in setting aside his former order, in plaintiff's favor, on defendant's motion, at the time it was made before him.

2. Fraud—Judgment—Questions for Jury—Evidence.

Evidence is sufficient to sustain a verdict of the jury establishing fraud in the procurement of a deed which tends to show that while the plaintiff was employed by the defendants to obtain for them a deed to the lands, he obtained from them, without consideration, a paper-writing which turned out to be the deed under which he claims, assuring them, at the time, that it was to their interest to sign the paper, and that it was unnecessary for him to comply with their request to read it to them, as he would not wrong them; and that after the deed had been executed to him he claimed no interest in the lands.

APPEAL by plaintiff from *Cline, J.*, at April Term, 1913, of (38) NASH:

This is a proceeding for partition of land, the plaintiff claiming to be the owner of an undivided one-fifth interest under a deed executed by Martha Ann Davis and her children, all of whom are defendants.

The summons was served on 10 February, 1910, and within ten days thereafter the plaintiff filed his complaint. The defendants filed no answer or demurrer to the complaint, nor did they enter an appearance in the proceeding until 17 July, 1911, or about seventeen months after the judgment had been entered adjudging the plaintiff to be the owner of one-fifth undivided interest in the land and appointing commissioners to make partition thereof.

On 17 July, 1911, the defendants made a motion before the (39) clerk of the Superior Court to set aside the decree adjudging the plaintiff to be the owner of an undivided one-fifth interest in the land and appointing commissioners to assign to him the same, alleging that the plaintiff had procured the deed from them by fraud, and that they were prevented by the fraud of the plaintiff from appearing and defending in said proceeding.

The clerk allowed the motion as to the one-fifth of the land allotted to the plaintiff, and said defendants filed an answer alleging that the deed to the plaintiff was procured by fraud, to which no exception was taken.

The proceeding was then transferred to the civil-issue docket, and when called for trial the plaintiff moved for judgment on the whole record, for that the court was without jurisdiction or power by a motion in the cause to set aside the order of the clerk fixing the rights of the plaintiff in the land after the expiration of more than one year from date of the decree.

The motion was overruled, and the plaintiff excepted.

At the conclusion of the evidence the plaintiff requested his Honor to charge the jury that there was no evidence of fraud, which was refused, and the plaintiff excepted.

The jury answered the issue of fraud in favor of the defendants, and from the judgment rendered the plaintiff appealed.

T. T. Thorne for plaintiff.

M. V. Barnhill and Jacob Battle for defendant.

ALLEN, J. The court could not, in any event, have granted the motion of the plaintiff for judgment upon the whole record, because an order had been made, to which no exception was taken, setting aside all orders in the proceeding affecting the rights of the defendants, and an answer was on file raising an issue of fraud; but we are also of opinion that the order of the clerk was fully authorized by Revisal, sec 2494, which, after providing for confirmation of the report of commissioners appointed to divide land in partition proceedings, says: *"Provided,* that any party, after confirmation, may impeach the proceedings and decrees for mistake, fraud, or collusion by petition in the cause."

(40) The exception that there is no evidence of fraud in procuring the execution of the deed under which the plaintiff claims is without merit. There is evidence that the defendants had employed the plaintiff to get them a deed for the land; that he came to them and asked them to sign a paper, which he said it was necessary for them to sign before they could get a deed and which was the deed under which the plaintiff claims; that he was asked to read the paper, and he said it was not necessary, and that he would not wrong the defendants out of anything; that the defendants did not know they were signing a deed; that the plaintiff paid nothing for the land, and that he denied to the defendants claiming any interest in the land after the execution of the deed.

There was evidence to the contrary, but we cannot pass on the weight of the evidence.

No error.

M. H. WHITE & CO. v. WINSLOW & WHITE.

(Filed 10 September, 1913.)

1. Landlord and Tenant—Liens—Release—Trover and Conversion.

The plaintiff made advancements to the tenant, and the latter, in order to purchase a horse on credit from the defendant, obtained from his landlord a release on one of a number of bales of cotton raised on the land. The plaintiff, who held a mortgage on the crop subject to the landlord's lien, brings this action to recover the value of the bale, alleging unlawful conversion by the defendant, who had received it: *Held*, the transaction between the tenant and the landlord, resulting in the latter's releasing his prior lien on the one bale of cotton, gave the plaintiff, who had held the second lien, a first lien on the bale of cotton delivered to the defendant, and this action will lie. *Powell v. Perry*, 127 N. C., 22, cited and distinguished.

2. Landlord and Tenant—Liens—Release—Assignment—Vendor and Vendee.

Where a landlord merely releases a part of the crop raised on his land in favor of a vendor of his tenant, without transferring the debt or any part thereof, the vendor does not acquire in his transaction with the tenant any lien upon the crop released which is superior to that of the one furnishing supplies for the making of the crop, for which he takes a mortgage, the lien being so far an incident to the debt which it secures that it cannot be assigned without at the same time transferring the debt, or at least some part thereof. The Court does not consider the question whether the landlord may by agreement defer his prior lien to those which may be subsequent.

APPEAL by plaintiffs from *Whedbee, J.*, at December Special (41) Term, 1912, of PERQUIMANS.

This action was brought to recover the value of a bale of cotton, alleged to have been unlawfully converted by the defendant. These are the facts: William Maddrey leased a piece of land to Ferdinand Gregory for the year 1911, reserving a certain rent. The tenant mortgaged his crop to the plaintiff, M. H. White & Co., to secure advances made by them to him, and which constituted a second lien upon the crop, or, in other words, a lien subject to the rights of the landlord. The tenant then applied to the defendants, Winslow & White, to purchase a horse from them, and they agreed to sell him the horse, if the landlord would sign the following release: "I hereby release to Winslow & White my claim under landlord and tenant act on the crops of Ferdinand Gregory, to be grown in the year 1911 on my lands, to the amount of one bale of cotton weighing not less than 500 pounds." The release was executed by the landlord, William Maddrey, and the horse delivered to the tenant, Ferdinand Gregory. The latter made thirteen bales of cotton on the

land, and in the fall he and his landlord had a full settlement, whereupon Maddrey directed his tenant to deliver one bale of cotton to the defendants, which was done. The court held that plaintiffs could not recover, and they appealed.

P. W. McMullan for plaintiffs.
Charles Whedbee for defendants.

WALKER, J., after stating the case: It will be seen that the landlord never relinquished any part of his rent, nor did he assume any liability for the price of the horse as an advancement to his tenant. He merely released his lien to the extent of one bale of cotton, without specifying which one of the thirteen. The defendants looked solely to the
(42) tenant for payment of the price, though they may have relied upon any lien acquired by the transaction, but this lien was manifestly subject to the prior right of the plaintiffs. No title to the bale of cotton passed to defendants by virtue of the release of the landlord, nor did it vest any lien in them. Their lien, if any, was given by the tenant, and the landlord simply released his prior lien, transferring it to the remaining twelve bales of cotton. This is the legal and actual nature of the transaction. It is perfectly evident that the landlord did not intend to part with any of his rent in favor of the denfendants. All he did was to withdraw his lien from the one bale and accept the twelve remaining bales as the only security for his rent. He did not impair the next prior right of plaintiffs, as second lienees, by merely removing his lien from the one bale of cotton, but, on the contrary, made it the first lien thereon. The principle of *Powell v. Perry,* 127 N. C., 22, therefore, does not apply. In that case it was held that a lien may accrue for supplies, either paid for by the landlord or advanced at his request and upon his credit. The whole theory of the defendant is based upon the wrong assumption, that the landlord became in any way responsible for the price of the horse, so as to bring the case within the above decision. The distinction between releasing a lien and giving one must be very clear. Defendants acquired a lien by the delivery of the bale of cotton, but their right was derived from the tenant, and the landlord's release merely discharged his prior encumbrance, thereby making the second lien of plaintiffs effective.

There is another view which occurs to us. A lien is so far an incident of the debt which it secures that it cannot be assigned without at the same time transferring the debt, or at least some part of it, which was not done here. 25 Cyc., 678. It was held in *Buckner v. McIlroy,* 31 Ark., 631, that "while a party holding a debt secured by lien cannot convey the lien to a stranger, without also assigning the debt, he may

release the lien upon the property to one claiming an interest or junior lien on the property." The landlord surely has assigned (43) no part of his debt for the rent.

It follows that defendant took the bale of cotton subject to plaintiffs' prior lien, and the court erred in not so holding.

Reversed.

JULIAN SPRUILL v. BANK OF PLYMOUTH.

(Filed 10 September, 1913.)

1. Banks and Banking—Notice Not to Pay Check—Parties.

When sued for the payment of a check drawn on it, upon allegation that the drawer gave previous notice not to do so, a bank defends upon the ground that no such notice was given, the issue raised is only upon the question of notice, and the payee of the check is not a necessary party.

2. Trials—Parties, Proper—Court's Discretion.

The question as to whether one who is not a necessary party to the action is a proper party is one within the discretion of the trial judge, and from his decision thereof no appeal lies.

3. Appeal and Error—Parties—Premature Appeal.

In this action against a bank for payment of a check after notice from the drawer not to do so, the payee thereof having been made a party defendant, also, an appeal from the judgment of the court dismissing the action as to the payee is premature.

APPEAL by defendants from *Whedbee, J.*, at April Term, 1913, of WASHINGTON.

This action was commenced against the Bank of Plymouth and Clarence Latham, before a justice of the peace, to recover the sum of $200.

On the return day of the summons the defendant bank and Latham moved that U. S. Jackson be made a party, and that summons issue to Pitt County, the residence of said Jackson. The motion was granted and the case continued. On the return day the defendant Jackson, through his counsel, entered a special appearance and moved to dismiss the action, for that the justice did not have jurisdiction over the defendant Jackson and the joining of Jackson was a fraud (44) upon the jurisdiction. The justice reserved his ruling upon the motion until he heard the evidence. After hearing the evidence, he

overruled the defendant Jackson's motion, but dismissd the action upon the merits. Thereupon the plaintiff gave notice of appeal, and the case was heard by his Honor, *H. W. Whedbee,* at the April Term, 1913, of the Superior Court. Upon the calling of the case the defendant Jackson, through his counsel, renewed the motion to dismiss the action as to him, and thereupon his Honor stated that he would hear the pleadings and the evidence before ruling upon the motion.

Thereupon the pleadings were read, except the answer of U. S. Jackson.

The plaintiff alleged that he had drawn a check for $200 on the defendant bank in favor of U. S. Jackson, and that the bank paid the same, after notice to its cashier, the defendant Latham, not to do so. The plaintiff stated in open court that he did not demand any relief against Jackson, and the defendants, the bank and Latham, denied liability to the plaintiff, upon the ground that the plaintiff had not given the notice to refuse payment of the check.

The court held that no relief was demanded or cause of action stated against the said Jackson, and thereupon dismissed the action as to Jackson, and signed the judgment set out in the record. To which ruling and judgment the defendants bank and Latham excepted and appealed to the Supreme Court.

W. M. Bond, Jr., for defendant bank, appellant.
Albion Dunn for defendant Jackson, appellee.

ALLEN, J., after stating the case: The settlement of the controversy between the plaintiff and the defendants the bank and Latham is dependent upon one fact, and that is, whether the plaintiff notified the defendants to refuse payment of the check before it was paid, and the presence of Jackson in this action is not necessary to its determination.

It also appears that the plaintiff stated in open court that
(45) he demanded no relief against Jackson, and neither the bank nor Latham can recover against him upon the facts now presented, because they allege that they paid the check to him rightfully before notice not to pay, which, if true, would exonerate them from liability.

We are, therefore, of opinion that Jackson is not a necessary party, and if a proper and not necessary party, which is doubtful in view of the fact that the plaintiff makes no demand against him, and that the defendants cannot claim a liability on his part to them, except upon the ground that they wrongfully paid the check after notice not to do so, which they deny, it was discretionary with the judge to make him a party, and his action is not reviewable. *Aiken v. Manufacturing Co.,* 141 N. C., 339.

We are also of the opinion that the appeal is premature and must be dismissed. *Lane v. Richardson,* 101 N. C., 181; *Emry v. Parker,* 111 N. C., 261; *Bennett v. Shelton,* 117 N. C., 103; *Gammon v. Johnson,* 126 N. C., 64.

Appeal dismissed.

Cited: Dailey v. Fertilizer Works, 165 N. C., 63.

FIDELITY TRUST COMPANY v. C. F. ELLEN ET ALS.

(Filed 10 September, 1913.)

1. Bills and Notes—Fraud—Evidence—Holder in Due Course—Burden of Proof.

When there is allegation and evidence that a negotiable note sued on was obtained by fraud, it is not error to refuse plaintiff's special request for instruction that he is presumed to be the holder in due course without notice of any equities or defenses existing between the original parties, for the burden of proof is then on him.

2. Appeal and Error—Instructions—Harmless Error.

Where in a plaintiff's appeal it appears that the trial judge erroneously instructed the jury against the rights of the defendant upon the evidence, no error prejudicial to the appellant has been committed, and the jury having accepted the defendant's version, the verdict will stand.

3. Appeal and Error—Motions—Verdict Set Aside—Court's Discretion.

A motion to set aside a verdict as being against the weight of the evidence is in the discretion of the trial judge, and from his refusal there is no appeal.

APPEAL by plaintiff from *Justice, J.,* at November Term, (46) 1912, of NASH.

J. B. Ramsey and E. B. Grantham for plaintiff.
Bunn & Spruill, T. T. Thorne, and Jacob Battle for defendants.

CLARK, C. J. This is one of the numerous actions upon notes given to McLaughlin Brothers for the purchase of an "imported French coach horse," of which so many others are to be found in the Reports of this State and also in those of other States. Attention is called to this in *Winter v. Nobs,* 19 Idaho, at page 28. Only one issue was submitted, "Are the defendants indebted to the plaintiff, and if so, in what amount?" The plaintiff did not tender any issues, nor except to this issue for failure to submit other issues.

There were exceptions to evidence, but they do not require consideration, and indeed were not argued here. The plaintiff requested the court to charge that there was no evidence that the note was procured by fraud, and if there was any, none that the plaintiff had notice of such fraud. These were properly refused upon the evidence.

The plaintiff further requested the court to charge that the action being upon a negotiable instrument, he is presumed to be the holder thereof in due course, without notice of any equities or defenses of the defendants. This the court properly refused to give. There was allegation and proof tending to show that the execution of the note was procured by fraud, and hence the burden was thrown upon the plaintiff to show that it was a holder in due course, the credibility of the evidence being for the jury. *Manufacturing Co. v. Summers,* 143 N. C., 102; *Bank v. Fountain,* 148 N. C., 590; *Park v. Exum,* 156 N. C., 231; *Bank v. Walser,* 162 N. C., 63; Pell's Revisal, sec. 2208.

(47) The plaintiff further requested the court to charge the jury, "If you find the facts to be as testified to by all the witnesses, you will answer the issue as to the plaintiff being a *bona fide* holder for value and without notice in favor of the plaintiff." This instruction the court could not give upon the evidence. The court, however, did instruct the jury as follows: "The court instructs you, gentlemen, that if you believe all the evidence and find the facts to be as testified by the witnesses, you should answer the issue 'Yes; the amount of the note and interest after deducting the credits.' Otherwise, you should answer the issue 'Nothing.'" The jury answered the issue "No." Whatever objections the defendants might have raised to this charge need not be considered. It is the plaintiff who appeals, and we do not see how this Court can help him. The jury evidently did not believe the testimony upon which the plaintiff relied, and of its credibility the jury were the sole judges. The presiding judge had the power, and it was his duty, if he thought the interest of justice required it, to set aside the verdict because "against the weight of the evidence." He did not do so, and it is not in the power of this Court to review his action in that respect. *Brink v. Black,* 74 N. C., 329; *Edwards v. Phifer,* 120 N. C., 405, citing many cases, and citations to latter case in Anno. Ed.

No error.

Cited: Bank v. Exum, post, 201; *Trust Co. v. Whitehead,* 165 N. C., 75; *Bank v. Branson, ib.,* 349; *Bank v. Drug Co.,* 166 N. C., 100.

EUREKA LUMBER COMPANY v. MAJOR WHITLEY.

(Filed 10 September, 1913.

1. Contracts — Options — Timber Deed — Extension of Time — Conditions — Strict Compliance.

Where a timber deed provides that, upon payment of a stated consideration and prior notice given, the grantee shall have an extension of time beyond that originally granted in which to cut the timber, the extension clause is merely an option and is strictly construed, requiring an exact compliance with its terms, and in order to be available to the grantee, he must give the notice before the expiration of the original period for cutting and pay or make a proper tender of the consideration named.

2. Same—Due Diligence—Trial—Questions for Jury.

The plaintiff in this case, having failed to give the prior notice of his intention to avail himself of his option for an extension of the original period of time for cutting the timber upon the lands, or to pay the consideration expressly provided for in his deed to the standing timber, the question of due diligence, and excusable delay, upon the evidence, if admissible, was one to be determined by the jury, under proper instructions, and the fact that the plaintiff gave the cash consideration to the sheriff with direction to deliver it to the defendant does not, in itself, constitute due diligence.

APPEAL by plaintiff from *Whedbee, J.*, at May Term, 1913, of (48) BEAUFORT.

This action was brought to compel the defendant to execute a deed for the renewal of a timber contract, which had expired.

On 2 January, 1905, William J. Cutlar, being the owner of a tract of land, conveyed to the plaintiff the timber thereon, with the privilege of cutting and removing the same within seven years from the date of the deed, that is, on or before 2 January, 1912. There was a clause for the extension of the time, at the option of plaintiff, for the term of three years, provided notice of the intention to extend it should be given to vendor or his assigns before the expiration of the seven years fixed by the original contract for cutting and removing the timber. Notice was not given until 5 January, 1912, or three days after the last day allowed for giving it. Plaintiff alleges that he was excused from a strict compliance with the contract, because defendant had left Beaufort County, the place of his former residence, in November, 1911, and he could not find him to serve the notice. The defendant went to Rocky Mount, N. C., and made a short visit to Florence, S. C., returning to Rocky Mount about the middle of December, 1912. Horton Cutlar, agent of plaintiff, having charge of the matter, had a deed of extension

prepared for execution by defendant, and afterwards, in November, 1912, met the defendant, on a Sunday, but said nothing to him about executing the deed. On 15 December, 1912, this agent was told by defendant's brother, B. H. Shepherd, that defendant was in Rocky Mount, but it does not appear that any steps were taken to have the con-
(49) tract renewed or the time for cutting the timber extended. There was other evidence in the case. The jury returned the following verdict:

1. Was the plaintiff ready, able, and willing to pay the defendant the sum provided in the contract introduced in evidence for the extension of time in which to cut said timber, on 2 January, 1912. Answer: Yes.

2. If so, was plaintiff's failure to do so, until 5 January, 1912, due to its inability to find the defendant, after using due diligence? Answer: No.

The judge charged the jury fully as to what, in law, was due diligence, and left it to the jury as an open question of fact to decide, upon the issues, whether the plaintiff had exercised proper care and diligence, under the circumstances. Plaintiff appealed from the judgment upon the verdict.

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

WALKER, J., after stating the case: There can be no doubt now that the plaintiff, in order to avail itself of the privilege to extend the time of cutting, must have given notice and made a proper tender of the consideration therefor before the expiration of the first period allowed for cutting and removing the timber, and this is recently so decided in *Rountree v. Cohn-Bock Co.*, 158 N. C., 153. See *Bateman v. Lumber Co.*, 154 N. C., 248; *Powers v. Lumber Co., ibid.*, 405; *Product Co. v. Dunn*, 142 N. C., 471. A unilateral contract of this kind, binding the owner of the land without any corresponding or correlative obligation or duty of the other party to him, and regarded in its essence as a mere option, is strictly construed, and exact compliance will be required. *Alston v. Connell*, 140 N. C., 486. The only question, therefore, is whether there has been such compliance. The court instructed the jury correctly as to what constituted due diligence, and the jury have found, upon the evidence, that there was not such diligence, and we think the verdict was the only one the jury could well have rendered in the face of the facts and circumstances. The plaintiff not only
(50) failed to show due diligence, but the evidence rather tended to prove the contrary. It is singular that the plaintiff should have been so remiss in caring for its interests, if it really intended to renew

the contract for the extended period. Placing the money in the hands of the sheriff, with instructions to deliver it to defendant, does not alter the case, and was not, in itself, diligence as matter of law. The judge allowed it to be considered by the jury as a circumstance on the question of due diligence. There is nothing in the case, we thiak, but a pure question of fact, which the jury have settled against the plaintiff.

No error.

T. C. MANN ET ALS. v. J. M. HALL ET ALS.

(Filed 24 September, 1913.)

1. Appeal and Error—Judgment—"Mistake"—Interpretation of Statutes.

On appeal from an order setting aside a judgment for mistake, etc., under Revisal, 513, the court can review only the question whether the facts found by the lower court constitute such mistake, etc., as would authorize him to set aside the judgment.

2. Same—Verdict.

Where on appeal from an order setting aside a judgment and verdict for mistake, etc., rendered under provisions of section 513, Revisal, the judge of the lower court has found that by mistake in describing the lands sued for the attorney has demanded judgment in his complaint for a fractional part of the fractional part of lands contended for, and not the whole of such fractional part, mistaking the description of one for that of the other; that during the progress of the trial the testimony of the witnesses reasonably confirmed him in this mistake, and it appears that the judgment entered conformed thereto, it is *Held*, that the order setting aside the judgment and verdict comes within the purview of the statute, and will be sustained, the rights of third persons not having intervened.

3. Judgments—"Mistake," Etc.—Words and Phrases—Interpretation of Statutes.

Revisal, 513, authorizing the judge to set aside a judgment and verdict, or other proceedings within one year after notice, is not restricted to cases of excusable neglect, but embraces also those taken "through his mistake, inadvertence, or surprise," the meaning of each being distinct from the other, and the right applying as to each separate from the other, as, in this case, for "mistake" alone.

4. Judgment, Adverse—"Mistake," Etc.

Where a successful party litigant has, through his mistake in the description of lands, recovered less than he should be entitled to, he may

move the court, under the provisions of Revisal, sec. 513, to set aside the verdict and judgment, the judgment being adverse to him to the extent of the diminution of his recovery through his mistake.

BROWN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

(51) APPEAL by defendant from *Whedbee, J.*, at Spring Term, 1913, of HYDE.

Ward & Grimes for plaintiffs.
Bond & Bond for defendants.

CLARK, C. J. This is a motion to set aside a verdict and judgment for *mistake*. Revisal, 513, empowers the judge "upon such terms as may be just, at any time within one year after notice thereof, to relieve a party from a judgment, order, verdict, or other proceedings taken against him through his mistake, inadvertence, surprise, or excusable neglect." On such motion the facts found by the judge are conclusive. This court can review only the question whether the facts so found constitute such mistake, or inadvertence, or surprise, or excusable neglect which would authorize setting aside the judgment or verdict. *Norton v. McLaurin*, 125 N. C., 185. The mistake must be one of fact, not one of law. *Phifer v. Insurance Co.*, 123 N. C., 405; *Skinner v. Terry*, 107 N. C., 103.

The facts found by the judge are those set out in the affidavit of H. S. Ward, which are in substance that several years ago one B. B. Sanderson owned a large tract of land in Hyde County and conveyed
(52) eleven-sixteenths thereof to his children, and conveyed the other five-sixteenths, which had been surveyed and set off by metes and bounds as a separate tract, to his sister Josephine Jones; that after her death her husband, who was tenant by the curtesy, conveyed said last named tract in fee simple to the defendants in this action. After his death the plaintiffs, who are the heirs at law of Josephine Jones, instituted this action. They knew nothing of the bounds of the said tract, and their lawyer, said H. S. Ward, drew the complaint from the description given him by B. B. Sanderson. Said Sanderson in giving him the boundaries for the complaint and in his testimony at the trial spoke of the "five-sixteenths interest," to which plaintiffs were entitled, and their counsel did not understand that he meant to give or was giving the boundaries of the new tract of five-sixteenths of the original tract which had been cut off and conveyed to Josephine Jones, but understood that Sanderson was giving the boundaries of the whole of the original tract, and that plaintiffs were entitled to an undivided five-sixteenths interest therein. Said counsel being without other information as to the boundaries, asked in the complaint for a partition of said tract and

an allotment of five-sixteenths to his clients. The issues were submitted to the jury under this mistake, the defendants made only a formal defense, and with the assent of the plaintiffs the verdict was rendered and judgment entered that plaintiffs were entitled to five-sixteenths and that the defendants were entitled to eleven-sixteenths in said tract. An interlocutory decree was entered in accordance therewith, appointing H. S. Ward commissioner to sell the premises for partition and report the sale. The affidavit of H. S. Ward, which the judge finds to be true, further avers that in drawing the complaint he thought he had described the whole of the original Sanderson tract, and that his clients were entitled to an undivided five-sixteenths therein, whereas under this mistake of fact he only described in the complaint the boundaries of the "five-sixteenths tract" which has been cut off and conveyed as an entire tract to Josephine Jones, the whole of which tract his clients were entitled to recover and for which this action was brought. (53)

The judge found as a fact that the complaint was thus drawn by mistake, and that the verdict and judgment had been taken under the same mistake of fact, and ordered that the verdict and judgment should be set aside. It would be difficult to find any case in which the facts would authorize setting aside any verdict and judgment for "mistake" if the facts found by his Honor in this instance are insufficient.

Prior to chapter 81, Laws 1893, the word "verdict" was not in this section (now revisal, 513), and there were decisions that the subsequent judge could not relieve in such cases when there had been the verdict of a jury. But it has now been held that a verdict can be set aside in cases of mistake or excusable neglect if the verdict has been rendered since the passage of that act. *Morrison v. McDonald,* 113 N. C., 327; *Brown v. Rhinehart,* 112 N. C., 772.

In this case the interlocutory judgment directing a sale for partition and a report thereof and retaining the cause for further directions was made at fall term of Hyde, which began 18 November, 1912. The plaintiff's attorney discovered the mistake before any rights of third parties had intervened, and promptly made this motion to set aside the judgment and verdict in January, 1913. Such verdict and judgment were against the plaintiffs, in that it was adjudged that the defendants were entitled to eleven-sixteenths of this tract, and on the facts found the judge properly held that there was mistake which entitled the plaintiffs to the relief sought.

Revisal, 513, authorizing the judge to set aside the judgment and verdict or other proceedings within one year after notice, is not restricted to cases of "excusable neglect," but embraces cases where the judgment or other proceeding has been taken "through his mistake, inadvertence, or surprise." These words are not mere surplusage, but

mean entirely different things, though of course, the most common instance in which this section has been invoked has been in cases of excusable neglect. In *Skinner v. Terry,* 107 N. C., 107, it is held that it embraces cases where the party "was reasonably misled or sur-
(54) prised by matters of fact," but that it does not embrace ignorance or mistake as to the law.

In this case the counsel was misled by a mistake of fact, in understanding the witness, on whose information he drew the complaint and tried the cause, to give the boundaries of the larger tract and that his clients were entitled to five-sixteenths therein (neither the counsel nor his other clients having any knowledge of said boundaries) whereas the witness in fact was giving him the boundaries of the smaller tract, which was five-sixteenths of the larger tract, but which had been cut off, and of which, if his contention is right, the plaintiffs were entitled to the whole. If this judgment is not set aside, the plaintiffs will be deprived by such mistake, purely of fact, of eleven-sixteenths of land which is theirs (if their contention is right as to the law), whereas if the judgment is set aside the defendants can lose nothing of their right and the controversy will be decided on its merits.

This is not the invocation of the doctrine of mutual mistake in equity, but a statutory provision for correcting a "mistake or inadvertence" in legal proceedings whereby an injustice would accrue to a party. In *Lutz v. Alkazin,* (N. J.) 55 Atl., 1041, which was a suit to reform a contract for sale of land and for specific performance so as to include 10 feet not in the description of the contract, the counsel overlooked the prayer to include the 10 feet, and took judgment omitting it. The Court held that this was a case of surprise, and that the decree should be opened to allow that matter to be litigated. This case is much stronger, because here, as a matter of fact, the counsel misunderstood the description as embracing the whole tract and understood that his clients had an *undivided* five-sixteenths therein by reason of such mistake and inadvertence. The defendants, who put in a mere formal defense, have not been prejudiced, and cannot in good conscience claim to hold the land for which they have obtained judgment by such mistake.

If they have a good claim to said property, there ought to be
(55) opportunity to have it understandingly passed upon by the court and jury.

The party who has obtained judgment for an amount less than his claim is nevertheless entitled to prosecute an appeal therefrom. This is equally true on a motion to set aside a judgment under this section where the judgment by reason of mistake, etc., is for less than it should have been otherwise. This has been held in *Montgomery v. Ellis,* 6 Howard (Pr.), 326, in New York, in which this section of the Code

is the same as ours. It is there said: "A party who has judgment *in his favor* may, on application to the court under section 174 (our section 513) of the Code, have redress or be relieved the same as if the judgment was *against* him." This case is much stronger, for here not only the judgment was for less than the plaintiff was entitled, being for five-sixteenths of the tract when he was seeking to recover the whole tract, but the verdict and judgment go further and adjudge that the defendants are entitled to eleven-sixteenths of the land. This certainly is *against* the plaintiffs.

His Honor properly set aside the verdict and judgment by reason of the palpable mistake made, on the facts as found by the judge, and directed that the real controversy should be tried out on its merits. If the defendants are not entitled to the eleven-sixteenths, they ought not to obtain it by such mistake and inadvertence. Revisal, 513. If the plaintiffs are not entitled to recover said eleven-sixteenths, they are not entitled to recover anything. The ready assent of defendants to the judgment, therefore, is significant.

The motion was properly granted.

Affirmed.

BROWN, J., dissenting: I regret I cannot agree to the conclusion of my brethren. I will state the case as I understand it.

This is a motion made by plaintiff to set aside a verdict and judgment rendered at the Fall Term, 1912, by Lane, judge of the Superior Court of Hyde County, in favor of the plaintiff against the defendant, and on the ground of *excusable* neglect.

The motion was made before Whedbee, judge, Spring Term, 1913, and based upon the affidavit of H. S. Ward, the allegations (56) of which were controverted in an affidavit by the defendant.

The complaint reads as follows:

Plaintiffs complain of defendants and allege:

1. That the plaintiff B. B. Sanderson, on the.....day of ....., 1881, conveyed a five-sixteenths (5-16) undivided interest in the land hereinafter described, then being the owner of same in fee simple, to one Josephine Jones, *née* Sanderson.

2. That said Josephine Jones died intestate and without lineal descendants surviving.

3. That the plaintiffs are the owners of said five-sixteenth (5-16) interest in said land, referred to in section 1, aforesaid, and defined and described as follows:

Lying in Hyde County, bounded on the north by the lands of Charlie Jennette, on the east by the Pamlico Sound, and the south by the lands of

the heirs of R. E. Carter, and on the west by the public road from Englehard to Middletown.

4. That defendants are in the possession of the entire tract and assert title to same, including the five-sixteenth (5-16) interest, adversely to the title of the plaintiffs, and refuse plaintiffs the right of possession.

5. That the annual rental value of said land is $.....

Wherefore, plaintiffs pray judgment that they be adjudged the owners of the five-sixteenth (5-16) interest in said land, and that they be let in possession of same, and for $..... for rents, and for costs and general relief.

WARD & GRIMES,
Attorneys for Plaintiffs.

This complaint is duly verified.

The defendants answered under oath, denying the several allegations of the complaint alleging title in plaintiff, and admitting possession of the land described in the complaint.

Upon such pleadings, these issues were submitted by consent as the issues raised by the pleadings:

(57) Are the plaintiffs owners of an undivided five-sixteenths interest as tenants in common with defendants in that part of land described in complaint conveyed by W. H. Jones to J. M. Hall? Answer: Yes.

Are plaintiffs owners of an undivided five-sixteenth interest as tenants in common with defendants in that part of land described in complaint, conveyed by W. H. Jones to Redmond Turner? Answer: Yes.

Are plaintiffs owners of an undivided five-sixteenth interest as tenants in common with defendants in that part of land described in complaint, conveyed by W. H. Jones to heirs of Arnold Whitfield? Answer: Yes.

Do defendants, according to their respective interests, own the other eleven-sixteenths of said pieces of land? Answer: Yes.

Upon those issues this judgment was rendered *upon motion* of Ward & Grimes, plaintiff's attorneys:

Present: Hon. Henry P. Lane, judge presiding.

This cause coming on for trial at this term, and the jury having answered the issues as appears in the record, it is on motion of Ward & Grimes, counsel for plaintiffs, ordered, adjudged, and decreed that the plaintiffs are the owners of a five-sixteenth undivided interest in the lands descibed in the complaint, as tenants in common with defendants, who, according to their respective interests, own the other eleven-sixteenths, plaintiffs' interests in said five-sixteenths being as follows:

B. B. Sanderson, one-half thereof; T. C. Mann, one-tenth thereof; J. E. Mann, one-eighteenth thereof; Preston Gibbs, Seth Gibbs, Ella G.

and Florence O'Neal, one-tenth; Carroll Mann and Clyde Wade, one-tenth; Mary Carter, Isabelle Carter, D. M. Carter, Jr., John Carter, and Rufus Carter, one-tenth.

(Then follows a clause appointing H. S. Ward commissioner (58) to sell the land described in the complaint, and by *consent* the motion to confirm report of sale may be heard at chambers, and—) It is adjudged that plaintiffs recover the costs of this action up to and including recording this judgment. It is further adjudged that plaintiffs recover of defendant J. M. Hall, $12.50; of defendant Riley Midgette, $62.50; of the other defendant, $19.74.

HENRY P. LANE,
Judge Presiding.

It must be admitted that the plaintiff obtained a sweeping victory, and recovered judgment against the defendants for every foot of land and every dollar he claimed.

I have stated this case very fully, so it can be seen how extraordinary this proceeding is, and how utterly destructive of all stability in judicial procedure it will be if established as a precedent.

The ground upon which the plaintiff bases his motion is, that in drawing the complaint in the case his attorney did not claim enough. This is undoubtedly a very novel and unusual accusation to make against a member of our profession; but whose fault was it that he did not claim enough? It was either the fault of the attorney or of the client (it is immaterial which) that they did not describe the entire land conveyed by Jones to the defendants.

The affidavit states:

"This affiant all the time believed he had described in his complaint the entire original Sanderson tract, and did not know he had described only the tract conveyed by Jones to the defendants. That he was entitled to recover the land described in his complaint, and not a five-sixteenths (5-16) interest therein; and this he is informed and believes the defendants knew at the time he wrote the judgment.

"That he saw the defendant Hall smiling at his attorney when the judgment was written and read, and did not know the meaning of it, and by reason of his mistake in drawing the judgment and in thinking that his complaint described the entire Sanderson tract, as aforesaid, he has failed to have his clients adjudged the owner of the eleven-sixteenths (11-16) interest to which they are as justly entitled as to (59) the five-sixteenths (5-16) interest recovered.

"That the said judgment is erroneous by reason of the mistake of the draftsman and the mistake of B. B. Sanderson, who, as above stated, was all the time referring to the land as a five-sixteenths (5-16) interest."

It is true that if the judgment did not conform to the pleadings and issues, it could be corrected as an irregular judgment, but it is a carefully drawn decree and conforms closely to the pleadings and issues.

It is unnecessary to consider the question as to whether there is any excusable neglect shown in the affidavit. In my view, the statute does not cover the case, and it must be admitted that words should not be read into the statute to make it cover it.

The language of the statute is as follows:

Revisal, 513. *"Mistake, Surprise, Excusable Neglect.* The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict, or other proceedings taken against him through mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding."

The decisions under this section are too numerous to cite, but they all agree that the only party who can avail himself of such relief under the section must be *one against whom a judgment* is rendered, and no party who has had a trial in court and recovered all he claimed can appeal to this section because he did not claim enough.

The decisions are collected in Pell's Revisal, 513.

Prior to the amendment of the statute as now contained in Revisal, sec. 513, it was held that the statute applied only to judgments by default, and then only for the relief of a defendant against whom judgment had been taken, and that the statute did not apply to a judgment rendered conformable to a verdict. *Morrison v. McDonald,* 113
(60) N. C., 327; *Brown v. Rhinehart,* 112 N. C., 772; *Beck v. Bellamy,* 93 N. C., 129; *Clemmons v. Field,* 99 N. C., 400.

Afterwards, the statute was amended so as to relieve the party from "a judgment, order, verdict, or other proceeding" as now set out in Revisal, 513; but the words, *"taken against him* through his mistake, surprise, or excusable neglect," are now, and always have been, in the statute since it was first enacted. Code, sec. 274; Acts 1893, ch. 8; C. C. P., sec. 133.

In this case, as appears from the record, no judgment or verdict has ever been rendered *against* the plaintiffs. The issues were formulated and submitted at instance of plaintiffs' counsel, the verdict on each issue was in favor of the plaintiff, the judgment was drawn by plaintiffs' counsel and entered up as the court's decree upon their motion.

It is well settled that "a judgment entered by consent of counsel of record in a matter coming within the scope of his authority is regular

and binding on the client, and will not be set aside on the ground of excusable neglect." *Hairston v. Garwood,* 123 N. C., 345; *Westhall v. Hoyle,* 141 N. C., 338; *Harrill v. R. R.,* 144 N. C., 544.

The judgment in this case is neither an irregular nor an erroneous judgment. It was rendered after a trial, upon the verdict and pleadings, and is strictly conformable to both. It cannot be set aside under this statute. *May v. Lumber Co.,* 119 N. C., 97.

Had it been an erroneous judgment, and rendered for too much or too little, but according to the course of the court, the only remedy is by appeal. *Wolfe v. Davis,* 74 N. C., 597.

So far as the plaintiff is concerned, this is a consent judgment, as it was entered upon his motion and at his request. Therefore, it cannot be set aside except for fraud, or the mistake of *both parties,* and then only by a civil action brought for the purpose, except in a partition proceeding it may be done by petition in the cause; but that does not change the elementary principles governing such cases. *Vaughan v. Gooch,* 92 N. C., 524; *Kerchner v. McEachern,* 93 N. C., 447.

This subject is forcibly discussed by *Justice Reade* in *Simmons v. Dowd,* 77 N. C., 156, in a case practically on all-fours with (61) this, in which he says:

"The motion of defendant, and the action of the court below, were evidently based upon the idea that C. C. P., sec. 133, now Revisal, 513, applied to the case; but was a mistake. . . . It is common learning that all judgments and proceedings of the court are in the breast of the court during the term, and may be vacated and amended in any way; but after the term closes, they are sealed forever.

"This applies to all proceedings of the court which are regular and according to the course and practice of the court, however *erroneous* the same may be. And *note,* that an erroneous judgment may be just as regular as one which is free from error.

"If I sue a man and recover $100, my judgment is regular. If I *ought* to have recovered $200, or ought to have recovered only $50, my judgment for $100 is erroneous, but still it is regular. And after the term of the court when it is rendered, I cannot have it increased, and the defendant cannot have it diminished. If this were not so, there would be no end to litigation."

MR. JUSTICE WALKER concurs in this dissenting opinion.

Cited: *Schiele v. Ins. Co.,* 171 N. C., 432.

D. H. McCULLERS ET AL. v. CLAUDE CHEATHAM ET AL.

(Filed 24 September, 1913.)

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

When there is evidence to support the referee's findings of fact, and they are approved by the trial judge, the findings are conclusive on appeal.

2. Landlord and Tenant—Cropper's Liens—Contracts—Election—Seizure of Crop—Damages—Repudiation of Contract—Consent of Parties.

The plaintiff made advances to a cropper on defendant's land, and took a mortgage to secure him therein, and thereafter the cropper's interest was assigned to him. The defendant bought, at an agreed price with the cropper ($400), one-half of the crop so raised on the land, which was seized by the plaintiff under process while in the possession of the cropper, but afterwards turned over by the plaintiff to the defendant at his request and solicitation: *Held*, (1) that the title to the tenant's share of the crop did not vest in the defendant, under his contract of purchase, as he had neither paid for nor taken possession of the crop until given him by the plaintiff, it being a cash transaction; (2) when he received the crop he exercised his right of election to take under the contract at the price therein named, and he could not thereafter disaffirm, or claim as landlord; (3) the tenant having paid his rent, the seizure of the crop by the plaintiff was not, under the circumstances, unlawful, and hence could not subject him to damages therefor; (4) the plaintiff's action to recover the crop could not work a repudiation of the defendant's contract of purchase, it requiring the consent of all parties to unmake it, which defendant refused to give.

(62) APPEAL by defendants from *Carter, J.*, at March Term, 1913, of JOHNSTON.

This was originally an action for the recovery of a lot of leaf tobacco raised by E. T. Parham on defendant's farm, known as the "Widow Whitley's place." Parham was the tenant of defendants in 1910, cultivating the farm on shares. Plaintiff D. H. McCullers made advances to him in money and supplies under a contract between them. Defendants bought Parham's one-half share of the tobacco raised on the farm for $400, but never took possession of it. Plaintiff seized it under the process, but surrendered it to defendants in a short while, and the latter accepted it. Parham had given plaintiff D. H. McCullers a mortgage on the crop for the advances, and afterwards assigned his interest in the crop to him. This action was finally turned into one for an accounting between the parties, and was referred for that purpose. The referee found the facts in favor of plaintiffs, and reported that defendants were indebted to plaintiff D. H. McCullers in the sum of $270.88. This report was approved and confirmed by the court, upon exceptions

thereto filed by the defendants, save as to two items allowed the (63) plaintiff by the referee, which were stricken from the amount found by the referee to be due, and reduced the said amount to $196.39. There was judgment for this amount and costs, including one-half of the referee's fee. Defendants appealed.

Abell & Ward and James H. Pou for plaintiff.
T. T. Hicks for defendants.

WALKER, J., after stating the case: The misfortune of the defendants in this case is that the referee has found all the essential facts against them, and when these findings were reviewed and approved by the judge, upon consideration of the report and the exceptions, there being evidence to warrant them, we are precluded from changing the report in this respect, but must decide the case upon the findings of fact as made by the referee and approved by the court. We recently stated the rule of practice in this respect: "We will not review the referee's findings of fact, which are settled, upon a consideration of the evidence, and approved by the judge, when exceptions are filed thereto, if there is some evidence to support them. *Boyle v. Stallings,* 140 N. C., 524; *Harris v. Smith,* 144 N. C., 439, and cass cited; *Thornton v. McNeely, ibid.,* 622; *Frey v. Lumber Co., ibid.,* 759." *Thompson v. Smith,* 160 N. C., 256. This rule was properly conceded by the defendants' counsel, and the exception to findings of fact were, of course, not urged in this Court.

The assignments of error in the case are nearly all addressed to the findings of fact, and as there is no question of law or legal inference involved in them, there is nothing that we can review or reverse.

The defendants do contend, though, that by seizing the tobacco under the requisition issued in this case, the plaintiffs rescinded the sale of it by Parham to them and, consequently, that they are liable only for the real value of the same, instead of $400, the contract price and the amount charged against them in the account by the referee for the tobacco. But not so, as we view the facts. The sale of the tobacco was a cash transaction, as appears, and defendants had not paid for it nor taken possession of it. The title, therefore, had not vested in (64) them. They had merely a contract of sale. *Millhiser v. Erdman,* 98 N. C., 292 (*S. c.,* 103 N. C., 27); *R. R. v. Barnes,* 104 N. C., 25. Besides, the defendants elected not to treat the plaintiff's action as a rescission of the contract. Plaintiffs instructed the sheriff to deliver the tobacco to defendants, and this was done, and it was received by them without any objection. They did not think at that time to insist on a rescission and to refuse to take the property, but rather elected to

stand by it and avail themselves of it. Having done so, we cannot hear them, when they now take the opposite position, by repudiating what they then chose to do, and rely upon the rescission of the sale.

When a party is given a choice between inconsistent rights, he must make his election once for all. We said of this principle in *Norwood v. Lassiter,* 132 N. C., 52: "When a party has the right to ratify or reject, he is put thereby to his election, and he must decide, once for all, what he will do; and when his election is once made, it immediately becomes irrevocable. This is an elementary principle. *Austin v. Stewart,* 126 N. C., 525. He could not accept the money derived from the sale and at the same time reserve the right to repudiate the sale. *Kerr v. Saunders,* 122 N. C., 635; *Mendenhall v. Mendenhall,* 53 N. C., 287. It is familar learning that when two inconsistent benefits or alternative rights are presented for the choice of a party, the law imposes the duty upon him to decide as between them, which he will take or enjoy, and after he has made the election he must abide by it, especially when the nature of the case requires that he should not enjoy both, or when innocent third parties may suffer if he is permitted afterwards to change his mind and retract." The same is substantially stated in *Austin v. Stewart, supra.* "Where a person has taken possession of or exercised acts of ownership over property under a claim of title or right, he is estopped to set up a claim inconsistent with that under which he has acted." 16 Cyc., 803, citing numerous authorities in note 18 to support this text.

(65) It would prejudice the plaintiff D. H. McCullers if defendant should now be permitted to act in repudiation of his claim of ownership, when he received and appropriated the property as his own, with the consent of the other parties, who ordered it to be delivered to him by the sheriff, conceding his right to it under the contract. He did not have the full title at first, but acquired it by the delivery of the tobacco to him afterwards, and having taken it as owner under the contract, he must pay the stipulated price and not merely its value.

As plaintiffs appear not to have been in the wrong originally, the claim of damages for a wrongful seizure of the tobacco cannot be sustained.

We have so far treated the case as if the bringing of this suit for the tobacco was a repudiation of the contract of sale, as contended by the defendant, but this position may be seriously questioned. It takes two to make a contract, and the consent of both is required to unmake it. The defendants never abandoned their right, but, on the contrary, as appears by their answer, first begged plaintiff for the possession of the tobacco, asserting their title to it, and when this entirely failed, they threatened plaintiffs with a lawsuit if it was not surrendered to them,

and finally received it as their property under the contract, claiming it as their own. Subsequently they sold it in market. Not only is this true, but in their answer, they actually claim damages for the seizure as violative of their rights to its possession. The referee finds that defendants contracted to buy Parham's one-half interest in the tobacco, so that their real right to the tobacco was derived from the contract of sale, and not as landlords. They could not assert any legal claim to it in the latter capacity. Defendants knew of the contract of sale, and must be held to have acted in accordance with their true right under it. They could not claim as landlord, so long as the contract stood, which changed the relation of the parties. If plaintiffs' conduct amounted to a repudiation of the contract of sale, and defendants had acquiesced in it, the result might, perhaps, be different; but they can- (66) not claim under the contract and against it, or occupy two inconsistent positions.

No error.

Cited: Buie v. Kennedy, 164 N. C., 301; *Simmons v. Groom,* 167 N. C., 275; *Spruce Co. v. Hayes,* 169 N. C., 255; *Marler v. Golden,* 172 N. C., 826; *Lewis v. May,* 173 N. C., 105; *McGeorge v. Nicola, ib.,* 709; *Robinson v. Johnson,* 174 N. C., 234.

AREY DISTILLING COMPANY v. MUTUAL AID BANKING COMPANY ET AL.

(Filed 17 September, 1913.)

Intoxicating Liquors—Principal and Agent—Moneys Collected—Action.

Where it appears that the plaintiff, a nonresident, has sold intoxicating liquors in this State, and has sent drafts on the purchaser to the defendant for collection, the latter may not resist recovery of the moneys he has collected for the former upon the ground that the sales were immoral and contrary to our law.

APPEAL by plaintiff from *Long, J.,* at February Term, 1913, of BEAUFORT.

Action tried upon this issue: "What part of the amount collected and received by the defendants to the use of the plaintiff has defendant failed to account for and pay over to the plaintiff. Answer: $108.05."

Upon this trial before the jury, plaintiff offered the witness E. A. Allenach, who testified:

"I was bookkeeper for D. L. Arey Distilling Company, but am not with them now. The total amount of drafts sent by plaintiff to defendant in this case amount to $11,105.50. Of that amount, including

such drafts as defendant returned, the sum of $10,528.45 was remitted or accounted for, the difference between the two items being $577.05. These transactions occurred in 1910. I have been through and over the drafts and bills which were introduced in evidence before the referee, and they show a balance due by defendants to plaintiff of $518.05. This amount does not correspond with the amount
(67) shown in the other statement, for the reason that it did not include the draft on J. W. Stallings and New Bern Pottery Company. The balance due by defendants to plaintiff is $577.05."

Plaintiff also offered in evidence the drafts and statements referred to by the witness. No other evidence was introduced by plaintiff or defendant.

Plaintiff requested the court to charge the jury that if they found the facts to be as testified to, that they should answer the issue $577.05, with interest. The court declined to give this instruction, and the plaintiff excepted and appealed.

Small, MacLean & Bryan for the plaintiff.
No counsel for the defendant.

BROWN, J. The plaintiff, a manufacturer of distilled whiskeys, located in the city of Baltimore, Maryland, shipped whiskey to parties living in the city of New Bern, N. C., and sent drafts with bills of lading attached to the defendant in New Bern for collection.

This suit was brought by plaintiff to recover from the defendants the balance of the money which they had collected but not remitted to plaintiff.

A compulsory reference was ordered at the May Term, 1911, to which plaintiff excepted, and to the report of the referee plaintiff again excepted and demanded a jury trial. The referee reported that defendants had in their hands a balance due plaintiff of $108.55, but that plaintiff could not recover same because the transaction was immoral.

Upon the trial in the Superior Court, plaintiff offered evidence that the total amount of drafts sent by plaintiff to defendants was $11,105.50, of which $10,528.45, including drafts returned, was remitted or accounted for, leaving a balance due of $577.05. This evidence was not controverted or denied in any way.

The testimony of Allenach, the only witness introduced, was not even attempted to be impeached by cross-examination.

His Honor erred in refusing the prayer.

(68) It is immaterial that the drafts collected by defendant bank for plaintiff as its agent were drawn on persons to whom plaintiff had shipped liquor.

The defendant was not so highly moral that it refused to collect and receive such money. Having collected it, the law will not allow the defendant to appropriate it to its own use. *S. v. Fisher,* 162 N. C., 550; *Jewelry Co. v. Joyner,* 159 N. C., 644. This subject is fully discussed in this last case, and the leading authorities are collected and cited, universally holding, in the language of *Justice Buller* in *Farmer v. Russell,* 1. Bos. & P., 296: "When it appeared that the agent had received money to the plaintiff's use, it is immaterial whether the money was paid on a legal or illegal contract."

New trial.

H. T. WARWICK v. MOLLIE L. TAYLOR, ADMINISTRATRIX OF L. L. TAYLOR.

(Filed 17 September, 1913.)

1. Timber Deeds—Period of Cutting—Reversion.

When the grantee in a deed conveying standing timber on lands, with an optional extension period for cutting, desires the further time allowed, he must comply with the conditions imposed in the conveyance, or the timber uncut after the original time allowed will revert to the grantor or his assigns.

2. Trials—Timber Deeds—Conveyance in Affirmance—Timber Reserved—Damages—Evidence.

The defendant in a timber deed conveyed the timber described in his deed, and his grantee failed to finish cutting it in the time allowed. The plaintiff, to whom the original owner conveyed the land, executed a conveyance of the timber to the defendant's grantee, confirming his original deed and extending the time for cutting and removing the timber, which was accordingly done in the stated period: *Held,* the grantee of the defendant acquired his right to cut the timber under the plaintiff's deed, and the defendant cannot be held liable for damages caused by his cutting timber on the land which had been reserved.

3. New Trials — Motions — Newly Discovered Evidence — Supreme Court — Character of Evidence.

A motion for a new trial upon the grounds of newly discovered evidence will only be granted when it is made to appear that it is very probable that substantial injustice has been done by reason of unavoidable failure of the moving party to produce the evidence at the trial, which would have resulted in a different determination of the action in the interest of right and justice; and evidence which is merely cumulative is not ordinarily held sufficient. Hence such motions when made in the Supreme Court for the first time will not be granted where there is no assignment of error appearing of record as to anything that occurred at the trial.

(69) APPEAL by plaintiff from *Cooke, J.*, at the March Term, 1913, of NORTHAMPTON.

From a judgment of nonsuit, upon the first cause of action stated in complaint, plaintiff appeals.

Plaintiff also moves in the Supreme Court for a new trial upon the second cause of action, upon the ground of newly discovered evidence.

The facts are stated in the opinion of the court.

W. H. S. Burgwyn, Mason, Worrell & Long for plaintiff.
Peebles & Peebles, Gay & Midgette for defendant.

BROWN, J. The facts pertinent to the first cause of action are these: Plaintiff conveyed to L. L. Taylor, the intestate, by deed dated 20 June, 1899, all the pine and oak timber of certain dimensions on a tract of land, to be cut and removed within seven years. The deed was duly recorded 22 July, 1899. The said Taylor then gave to the plaintiff the following paper:

I, L. L. Taylor, do hereby give H. T. Warwick permission to cut the scattering pine timber on the hill on 2½ acres of his land lying on the southeast corner of his house where he has been cutting cordwood, near a pond or drain in said woods.

L. L. TAYLOR.

Witness: J. L. HARRIS.

This was recorded 4 April, 1913.

On 7 November, 1901, L. L. Taylor conveyed all said standing (70) timber to the Camp Manufacturing Company by deed recorded 7 January, 1902.

Under the deed from plaintiff to Taylor, the time within which the timber must be cut and removed expired 20 June, 1906, but on 9 July, 1902, the plaintiff executed a deed to the Camp Manufacturing Company, confirming the original conveyance, and conferring upon said company the right to cut and remove all the timber until 20 June, 1908. This deed was recorded 19 July, 1902.

During the extended period of two years, between 20 June, 1906, and 20 June, 1908, the Camp Company cut and removed all the said timber, including "the scattering pine timber on the hill on 2½ acres" described in the paper-writing given by Taylor to Warwick, *supra*, numbering some nineteen sticks.

Upon these facts, the motion to nonsuit was properly sustained.

The evidence shows that all the timber was cut and removed by the Camp Manufacturing Company after the time limit in the deed from plaintiff to Taylor and Taylor to Camp had expired. None of it was cut by the defendant's intestate, Taylor.

The authority of Camp to cut the timber was plaintiff's deed to Camp, dated 9 July, 1902, extending the time authorizing the cutting for two years. Had plaintiff not executed this instrument, all the timber, including the "scattering pine timber on the hill," would have reverted to him.

It is difficult to conceive upon this state of facts why plaintiff should recover against Taylor.

There is no assignment of error by plaintiff as to anything that occurred at the trial of his second cause of action, and he relies solely upon his motion for a new trial for alleged newly discovered testimony as to said second cause of action, which said motion is made for the first time in this Court.

Motions for new trial founded upon alleged newly discovered evidence are carefully scrutinized, and we are not disposed to grant them except for substantial cause in cases that come strictly within the established rules of law applicable to them. *Simmons v. Mann,* 92 N. C., 16.

This Court will not grant a new trial for newly discovered evidence for light causes and considerations. It will do so only (71) in cases where it is very probable that *substantial injustice* has been done by reason of the *unavoidable failure* to produce the evidence on the trial, and when also it is probable that upon a new trial a different result will be reached and the right will prevail. Evidence merely cumulative is generally considered as insufficient. *Simmons v. Mann, supra.*

We have examined carefully the affidavits in support of the motion, and the same is denied. The judgment of the Superior Court is

Affirmed.

Cited: Steeley v. Lumber Co., 165 N. C., 35.

DOCK LAMM ET AL. v. FLORENCE LAMM AND H. R. HINTON ET AL.

(Filed 17 September, 1913.)

1. Trials—Deeds and Conveyances—Fraud and Undue Influence—Quantum of Proof.

Where the validity of a deed to lands is attacked on the ground of fraud and undue influence in its procurement, the plaintiff is only required to prove his allegation thereof by the greater weight of the evidence.

2. Lis Pendens—Purchaser—Notice.

Where in an action to set aside a deed to lands on the grounds of fraud and undue influence, the complaint has been filed containing the necessary allegations and a sufficiently definite description of the lands, a subsequent purchaser takes with notice of the plaintiff's rights, the action being *lis pendens*, and acquires the lands subject to their determination.

3. Same—Trials—Fraud and Undue Influence—Judgments—Trusts and Trustees—Quantum of Proof.

Where judgment has been obtained in plaintiff's favor in his action to set aside a deed to lands for fraud and undue influence, and a purchaser, taking subject to the plaintiff's rights, claims the title under his deed, it is proper for the judgment to declare him the holder of the legal title, in trust for the plaintiff, and direct him to convey accordingly; and as such purchaser claims under the deed sought to be set aside for fraud and undue influence, the rule as to the evidence required is not affected.

4. Trials—Deeds and Conveyances—Fraud and Undue Influence—Evidence—Res Gestæ.

The evidence in this case to set aside a deed for fraud and undue influence, relating chiefly to facts and circumstances in the association between the grantor and grantee, tending to show the extent of the undue influence exerted and the objectionable means by which it was acquired, is held relevant, and competent as a part of the *res gestæ*.

(72) APPEAL by defendant Hinton from *Lyon, J.*, at June Term, 1913, of EDGECOMBE.

This action was instituted by plaintiffs, the heirs at law and children by a former wife of Matthew T. Lamm; that their mother having died, the father intermarried with defendant Florence Lamm, and, on 21 December, 1908, said Matthew Lamm, having sold a piece of land in Wilson County, purchased the land in controversy lying in Edgecombe County, from W. J. Taylor and wife, and the deed therefor was made from said Taylor to Florence Lamm, the second wife, and that said deed was so made by reason of the fraud and undue influence exercised by said Florence. The allegations were denied by defendant. After action commenced and complaint and answer filed, fully describing the land, defendant Florence sold and conveyed the land to George T. Dawes, to wit, in January, 1912, and thereafter and pending the controversy said Dawes sold and conveyed it to H. R. Hinton, who was made party and filed his answer, asserting ownership of the property in December, 1912.

The jury rendered the following verdict:

"Did Florence Lamm, by undue influence and fraud, induce her husband, Matthew T. Lamm, to have deed from W. J. Taylor and wife made to her? Answer: Yes."

Judgment on the verdict for plaintiffs, and defendant Hinton excepted and appealed.

Finch & Connor and Gilliam & Gilliam for plaintiff.
E. B. Grantham, M. V. Barnhill, and T. T. Thorne for defendant.

HOKE, J., after stating the case: In *Harding v. Long,* 103 (73) N. C., 11, *Associate Justice Avery* delivering the opinion, classifies cases of this kind in reference to the degree of proof required to establish the determinative issues as follows:

"The rule governing the quantum and quality of proof required to sustain allegations of fraud, undue influence, and mistake in the execution of written intruments, and to establish resulting trusts, is as follows:

"(1) In cases in which relief is sought on the ground of mutual mistake, mistake of one party and fraud on the part of the other, or that a deed was drawn by mistake as an absolute deed, when it was intended as a mortgage or deed of trust, or it is sought to establish a resulting trust, based on a verbal agreement to buy for another, or to set up a lost deed; in all these cases such allegations, of the party seeking relief, as are necessary to show his right to it, must be established by clear and convincing proof; and evidence *dehors* the deed and inconsistent with it must be shown.

"(2) But where it is sought to have a deed declared void because its execution was obtained by false and fraudulent representations or undue influence, or because it was executed with intent to hinder, delay, or defeat creditors, the allegations material to establish the fraud must be proven so as to produce belief of their truth in the minds of the jury, or so as to satisfy the jury of their truth, or to the satisfaction of the jury."

The case before us comes within the second of these classifications, and the court committed no error in holding that plaintiffs were only required to establish the issue submitted by the greater weight of the evidence.

It is true that the judgment declares Hinton the holder of the legal title, in trust for the claimants, and directs him to convey; but this was not to correct the deed as made by Taylor nor to establish any claim as against him, but the rights of these parties accrued by reason of the fraud and undue influence on the part of the defendant Florence. That was the determinative question involved in the issue, and the judgment was the correct method of establishing the right of plaintiffs as against said Florence, the beneficiary of the fraudulent deed; and this, as we have seen, may be properly shown by the greater (74) weight of the evidence.

The objections to the rulings of the court as to the admission of testimony are without merit. They were chiefly facts and circum-

stances in the association between Matthew Lamm and the defendant Florence, his wife, and tending as they did to show the extent of her influence over him and the objectionable means by which they were acquired, were all part of the *res gestæ* or relevant facts in the *res gestæ*, and were very properly admitted. *Fraly v. Fraly*, 150 N. C., 501.

Defendant Hinton and his immediate grantor, Dawes, having bought and received their title pending the controversy and after complaint filed fully describing the property situate in the same county, hold the same subject to the results of the suit. *Lee v. Giles*, 161 N. C., 548; *Arrington v. Arrington*, 114 N. C., 151.

There is no error in the record, and the judgment entered is affirmed. No error.

Cited: Hodges v. Wilson, 165 N. C., 328; *Glenn v. Glenn*, 169 N. C., 731; *Johnson v. Johnson*, 172 N. C., 531.

SURRY PARKER ET ALS. v. C. R. JOHNSON ET ALS.

(Filed 24 September, 1913.)

Drainage Districts—Procedure.

In this proceeding to form a drainage district under the Laws of 1909, ch. 442, no error is found on appeal, the case being controlled by *Shelton v. White, post*, 90.

APPEAL by plaintiff from *Lane, J.*, at October Term, 1912, of WASHINGTON.

Van B. Martin, Bickett & Calvert for plaintiffs.
A. O. Gaylord, A. D. MacLean, and H. S. Ward for defendants.

CLARK, C. J. This is a proceeding under the general drainage law, 1909, ch. 442, to establish the "Conaby Drainage District" in
(75) Washington County. Substantially the same points are presented that have been decided at this term in *Shelton v. White, post*, 90, and that case is decisive of this.

The record sent up is confusing and the proceedings do not appear in regular order. The defendants were brought in by notice as required by section 2 of said act, and filed answers denying that they would be "benefited by the improvement, and asking that their lands be not included" in the proposed district. This defense was overruled by the clerk, and the defendants excepted.

On the coming in of the final report the defendants again excepted under section 16, because "the cost of construction, together with the amount of damages assessed, would be greater than the resulting benefit that would accrue to their lands." The clerk overruled these objections. Upon appeal to the Superior Court at term-time upon the issues of fact and law involved, as provided by Laws 1911, ch. 67, sec. 3, the jury found the above issue with the defendants, and the court thereupon rendered judgment that they should be "excluded and eliminated" from said district, and enjoined the Conaby Creek Drainage District from issuing bonds for the construction of the canal chargeable upon the lands of the defendants.

The plaintiffs except on the ground that the judge should have passed upon the ruling of the clerk, and should not have submitted issues to the jury. In this, as we have already held in *Shelton v. White, post,* 90, his Honor committed no error. Notwithstanding the finding of the jury, the judge might have affirmed the ruling of the clerk if the formation of the district required such action, the objectors recovering damages. But his Honor adjudged otherwise and directed the exclusion of the objectors.

No error.

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(76)

C. C. HARRINGTON v. ALSTON GRIMES.

(Filed 17 September, 1913.)

Estates—Deeds and Conveyances—"Bodily Heirs"—Interpretation of Statutes.

An estate to B. "and his bodily heirs," under the old law would have conferred a fee tail, which under our statute, where a contrary intent may not be gathered from the instrument construed as a whole, is converted into a fee simple. Revisal, sec. 1578. Cases in which the words "bodily heirs" used in a conveyance are held to be *descriptio personarum*, conveying to them an estate in remainder and as purchasers from the grantor, cited and distinguished.

APPEAL from CHATHAM by defendants, from *Bragaw, J.*

On the hearing it appeared that plaintiff, having contracted to sell defendant a certain tract of land for the sum of $2,500, said defendant declined to carry out the agreement, alleging that the title offered was defective. The plaintiff held the land by deed from T. T. Buckner and wife, N. J. Buckner, and N. J. Buckner had acquired the same under a deed from Willis Byrd and wife to said N. J. Buckner; this deed being in terms as follows:

"This deed, made this the 22d day of June, 1904, by Willis Byrd and wife, Lucy Byrd, of Chatham County and State of North Carolina, of the first part, to N. J. Buckner and her bodily heirs, of Chatham County and State of North Carolina, of the second part:

"Witnesseth, That said Willis Byrd, and wife, Lucy Byrd, in consideration of $100 to them paid by N. J. Buckner, the receipt of which is hereby acknowledged, have bargained and sold and by these presents do hereby bargain, sell, and convey to said N. J. Buckner and her bodily (heirs) a certain tract or parcel of land in Chatham County, State of North Carolina, adjoining the lands of R. J. Yates, T. L. Lasater heirs, and others, bounded as follows: Beginning at the fork of the Pittsboro and Mill Road, running with said Mill Road west 24 chains and 50 links to a stake and pointers, Lasater and Yates corner; thence with Yates line north 2 east 28 chains to the county gate
(77) on the Pittsboro Road, thence down the said road 39 chains to the beginning, containing (40) acres, more or less:

"To have and to hold the aforesaid tract or parcel of land and all privileges and appurtenances thereto belonging to the said N. J. Buckner and her bodily heirs and assigns, to their only use and behoof forever.

"And the said Willis Byrd and wife, Lucy Byrd, covenant with the said N. J. Buckner and her bodily heirs and assigns that they are seized of said premises in fee, and have right to convey the same in fee simple; that the same are free and clear from any and all encumbrances, and that they will warrant and defend the said title to the same against the claims of all persons whomsoever," etc.

The defendant, insisting that the deed in question only conveyed to N. J. Buckner a life estate in the property, declined to accept the title offered or to pay for same.

The court below, being of opinion that the deed conveyed to plaintiff a fee simple, judgment was entered for plaintiff, and defendant excepted and appealed.

Hayes & Bynum for plaintiff.
Ward & Grimes for defendant.

HOKE, J., after stating the case: Under the old law, the deed in question would have conveyed to N. J. Buckner an estate in fee tail, converted by our statute into a fee simple (Revisal, sec. 1578), and his Honor correctly ruled that plaintiff could make a good title. Decisions in support of this construction of the deed will be found in *Perrett v. Bird,* 152 N. C., 220; *Sessoms v. Sessoms,* 144 N. C., 121; *Jones v. Ragsdale,* 141 N. C., 200; *Whitfield v. Garris,* 134 N. C., 24, and many

others could be cited. The well considered cases of *Ackner v. Pridgen,* 158 N. C., 337, and *Puckett v. Morgan,* 158 N. C., 344, cited and relied upon by defendant, in no way militate against this position.

In those cases it was held that, on a perusal of the entire instrument and by reason of the language in which the same was expressed, a deed in the one case and a will in the other, it plainly appeared to be the intent of the grantor to convey only a life estate to the (78) first taker, and that the words "bodily heirs" and "heirs of the body" did not refer to these persons as inheritors of such taker, but were used only as a *descriptio personarum,* carrying to them an estate in remainder and as purchasers from the grantor. But no such intent can be gathered from this instrument, nor does it contain any words or expressions to qualify or affect the ordinary meaning of the words *"bodily heirs"* in connection with the estate limited to N. J. Buckner, and the deed, as stated, has been properly held to convey to such grantee an estate in fee simple.

Affirmed.

Cited: Blake v. Shields, 172 N. C., 629.

C. P. WESTON AND RICHMOND CEDAR WORKS v. JOHN L. ROPER LUMBER COMPANY.

(Filed 24 September, 1913.)

1. Deeds and Conveyances—Boundaries—Trials—Conflicting Evidence.

Where the question of the location of lands in dispute is determined by the location of a certain point named in the description of a deed, and the evidence is conflicting, the verdict of the jury thereon is controlling.

2. Deeds and Conveyances—Title—Lords Proprietors—Bill of Rights—Halifax Constitution—Lands Confiscated—State's Lands.

Section 25 of the Bill of Rights, prefatory to the Halifax Constitution of 1776, vested the property of the soil within the limits of the State, as there laid down, in the "collective body of the people," excepting only "the titles or possessions of individuals holding or claiming under the laws heretofore in force or grants heretofore made by George III. or his predecessors, or the late Lords Proprietors or any of them." Hence, whatever titles George III, or any of the Lords Proprietors retained in themselves, ungranted at that date, passed to the sovereign people of this State, and by chapter 1, Laws 1777 (24 St. Records, 43), became the subject of entry and grant. Therefore, those who establish their title by mesne conveyances under a grant from the State under the act of 1777 of lands of Earl Granville ungranted by him at the time of the adoption of the Constitution of 1776, hold under a valid grant.

(79) APPEAL by defendant from *Long, J.*, at January Term, 1913, of PASQUOTANK.

Winston & Biggs, Ward & Thompson, Meekins & Tillett, and Charles Whedbee for plaintiffs.

W. B. Rodman, A. D. McLean, W. M. Bond, and J. K. Wilson for defendant.

CLARK, C. J. This case was here 160 N. C., 263. The plaintiffs seek to recover a tract of 1,000 acres swamp land, under mesne conveyances from a grant to John Cowper in 1788, and damages for trespass thereon. The question of title by adverse possession does not arise. The defendant admits that it has cut timber on the land in controversy as alleged in the complaint, but denies that such cutting was wrongful or unlawful.

The defendant asked the court to submit an issue as to the true location. This contention hinges upon these words, "then running up the river *to the head thereof.*" The plaintiffs contend that the "head of the river" is at a certain point, and that if their contention is correct the tract will contain 1,026 acres, and the outline of its boundaries will coincide almost precisely with the plat and description in the survey of the Cowper patent 125 years ago, in 1788. But that if the "head of the river" is where the defendant contends, the survey shows that there would be only 740 acres in the original grant, and that the outlines of the boundary will not correspond with said grant to Cowper. There was much evidence on this point, and the jury found in accordance with the contention of the plaintiffs. We find no merit in the exceptions on this point, and we do not think it is necessary to consider in detail the other exceptions, most of which are in fact determined by the decision of this case, 160 N. C., 263.

The real controversy now before us turns upon this point, "Were the lands of John, Lord Carteret, Earl of Granville, subject to entry and grant in July, 1788? The plaintiffs claim under such grant and a complete chain of mesne conveyances to themselves. The (80) defendant claims under a conveyance from the State Board of Education, 24 October, 1904, to George W. Roper, for 38,000 acres, including the *locus in quo*, in consideration of $700. The plaintiffs contend that this is less than 2 cents per acre, and that the conveyance is therefore void, because Revisal, 4009, provides that the "State Board of Education . . . shall not sell swamp lands at a price less than 12½ cents per acre," and contend that at most this could be nothing more than a quitclaim or release of any interest the State board might have in said tract. We need not, however, discuss this point, if the grant to John Cowper in 1788 covered land which was then subject to entry and grant.

The real controversy, therefore, turns upon the proposition whether the lands of Earl Granville were confiscated, which confiscation was rendered invalid by article 6 of the Treaty of Peace with Great Britian in 1783, or became the property of the State as a consequence of Independence.

On 30 June, 1665, Charles II. granted to the eight Lords Proprietors all the lands from the present Virgina State line to the 31 degree north latitude. On September, 1744, George II. set apart to John, Lord Carteret, one degree of latitude southward from the Virginia line, the king having bought out the other seven Lords Proprietors. The southern line of Lord Granville's territory may still be traced in the southern boundary of the counties of Chatham (until the formation of Lee), Randolph, Davidson, Rowan, and Iredell. The Confiscation Act, ch. 17, Laws 1777 (2d Session), 24 State Records, 123, and Laws 1779, ch. 2; 24 State Records, 263, which was passed during the Revolution and which was not enforced, because in violation of the treaty, named the parties whose lands were confiscated, and among these the name of Lord Carteret does not appear. The entry Act, ch. 1, Laws 1777 (2d Session), 24 State Records, 43, expressly withheld those confiscated lands from entry and grant, and the confiscation indeed was never enforced. The act authorized the entry and grant of all lands "which have not been granted by the crown of Great Britain, or the Lords Proprietors of Carolina, or any of them, in fee before the first day of July, 1776, or which have accrued or shall accrue to this (81) State by treaty or conquest."

It is clear from the above language that the lands which were still held by Lord Granville on 1 July, 1776, "had not been granted by him or any of the Lords Proprietors in fee, nor by the crown," and therefore those lands were subject to entry and grant. This was the cotemporaneous construction put by the Legislature on section 25 of the Bill of Rights, prefatory to the Constitution, adopted at Halifax in 1776. That section vested the property of the soil within the limits of the State, as there laid down, in the "collective body of the people," excepting only "The titles or possessions of *individuals* holding or claiming under the laws heretofore in force or grants heretofore made by King George III. or his predecessors, or the late Lords Proprietors or any of them." This is an explicit recognition that whatever titles George III. or any of the Lords Proprietors retained in themselves, ungranted at that date, had passed to the sovereign people of this State and by the subsequent act of 1777, above referred to, all such lands having become the property of the State, became the subject of entry and grant.

The point was directly presented to this Court in *Taylor v. Shuford,* 11 N. C., 116, and the Court held: "The sovereign power cannot be

estopped. Where the king in 1768 granted lands to A. which he had previously granted to Lord Granville, the grant to A. was void; and *as the State succeeded upon the Revolution to Lord Granville's right to the land,* a grant made by the State since shall be preferred to the royal grant to A." It is true that when the seven Lords Proprietors conveyed their interest to the king, Lord Granville, while retaining his one-eight interest in the land, released his right to participate thenceforward in the government. But that did not change the fact that he held the land in the capacity of a *quasi*-sovereign, as Lord Proprietor under the Patent of 1665, and as a coöwner with the king, though partition was made in 1744, and not as an individual. John, Lord Granville, died in 1763, but his heir, Robert, Lord Granville, continued to make grants till February, 1776, when he died, having devised his interest in these lands to the Earl of Coventry.

The contention that the Earl of Granville did not hold the land in this *quasi*-sovereign capacity, but that he was a mere individual grantee, and therefore that his rights were protected from confiscation (82) by the Treaty of Peace of 1783, was presented in an action brought in the United States Court for North Carolina in 1801 by the Earl of Coventry, successor under the devise from Earl Granville, against William R. Davie, Josiah Collins and Nathaniel Allen, grandfather of the late Senator Allen G. Thurman of Ohio, grantees of the State for two small tracts, as test cases. The contention of the heir of the Earl of Granville was not sustained. He was represented by able counsel. Wm. Gaston, later on our Supreme Court, and Edward Harris, afterwards a Superior Court Judge, Judge Duncan Cameron and Blake Baker and M. Woods ably represented the defendants. *Marshall, C. J.,* was criticised for taking no part in the decision which was rendered by District Judge Henry Potter in 1805. An appeal was taken, but was dismissed in the U. S. Supreme Court in 1817 for failure to prosecute. Judge Cameron's argument, which prevailed in Judge Potter's decision, was along the line of the present opinion. The papers are still on file at Raleigh. Though Granville had released to the king his right to share in the government, there was nothing to show that he had changed in any wise the *quasi*-sovereign capacity in which he had held the lands. The title of the king as the grantee of seven Lords Proprietors was on exactly the same footing as the title of the one Lord Proprietor who retained his lands. All lands ungranted by the king or Lords Proprietors to individuals on 1 July, 1776, became the property of the sovereign State of North Carolina, without distinction.

This matter has been so long settled that indeed it now possesses only an antiquarian interest. If it were possible to change it, it would affect

the titles in at least half the counties of the State, except for the protection afforded by the statute of limitations.

We, however, are fully of the opinion that the title of the Earl of Granville passed, like the title of the king, by the right of conquest, and that the new State Government became vested of the ungranted lands of the earl in this part of its territory in exactly the same plight and condition that it became vested with the ungranted lands in the rest of the State *i. e.,* by conquest of the sovereign power.

It is scarcely necessary to discuss more fully this proposition. The other exceptions require no debate. The jury found that the boundaries of the land were as contended for by the plaintiffs, assessed the damages at $637.50 and held that the damages were not barred by the statute of limitations.

No error.

Cited: S. c., 168 N. C., 98.

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(83)

A. G. SPENCER v. GEORGE A. AND MRS. K. E. SPENCER.

(Filed 17 September, 1913.)

1. Wills—Probate—Notice to Executor—Codicil—Interpretation of Statutes.

Before others interested in the probate of a will may apply for its probate, ten days previous notice must be given the executor therein named (Revisal, sec. 3123), and where an executor has probated and qualified under the will, it is equally necessary to give the statutory notice before offering for probate a separate paper-writing as a codicil.

2. Wills—Codicils—Intent—Interpretation of Statutes.

For a paper-writing to be effective as a codicil to a will, it must appear that it was the intention of the testator at the time of making it that it should take effect as a part of his will, and all the formalities and statutory requirements of making and executing a will must have been observed in the codicil. Revisal, sec. 3123.

3. Same—Letters.

A letter which had been written by the testator immediately after making a formal will, and which, without being mentioned in the will, expresses the desire that its addressee should have his interest in certain personalty, does not show the *animus testandi,* so as to make it operate as a codicil. *Alston v. Davis,* 118 N. C., 203, overruled.

4. Wills—Codicils—Insurance—Partnerships—Devises.

Partnership property is possessed *per my et per tout* by the partners, and no one of them may convey his separate interest in any particular part thereof. Hence, as in this case, a partner may not devise any interest

he may have in a policy of life insurance made payable to the copartnership, and certainly not after he has conveyed to the partnership all the interest he had therein.

APPEAL by plaintiff from *Whedbee, J.*, at May Term, 1913, of BEAUFORT.

The action is brought to recover one-sixth of an insurance policy for $5,000, payable to a copartnership known as Spencer Brothers of Washington, North Carolina, composed of George A. and Jones Spencer.

At one time the plaintiff owned a one-sixth interest in said
(84) copartnership. Defendants answered, denying the ownership of plaintiff in said policy, or any part of it.

Plaintiff offered the following evidence:

Copy of the policy of insurance referred to in the pleadings.

Plaintiff offered section 4 of the answer of G. A. Spenceer down to and including the word "time" in the sixth line.

Plaintiff offered a certified copy from the office of the clerk of the Superior Court of Craven County, under his hand and official seal, of the will of the late Jones M. Spencer and the alleged codicil thereto attached, as appears to have been probated.

Upon objection by each of the defendants to the introduction of the copy of the alleged codicil, plaintiff's counsel stated that they had no information that any written notice was ever given to the executor of Jones M. Spencer of the motion to probate the said letter as a codicil to the will of the said Jones M. Spencer, and that plaintiff had no evidence to offer that such notice was given. Defendants severally object and except to the admission of said paper.

Plaintiff introduced bill of sale from the plaintiff to J. M. Spencer and George A. Spencer, Book 156, page 66.

Conveyance from K. Eula Spencer to G. A. Spencer, dated 15 June, 1909.

A. G. Spencer was sworn, and testified: "I am the A. G. Spencer referred to in the paper-writing which we call a codicil, consisting of a letter from Jones M. Spencer. I was the brother of Jones Spencer, and came out of the firm of Spencer Brothers at the time of the execution of the deed or bill of sale which has been read. I have never been paid any part of the proceeds of the policy referred to in this case. George A. Spencer told me the policy had been paid." (Admitted only against G. A. Spencer).

Cross-examination: "I do not recognize the firm ledger; can't see well enough to. The best I can see, I think it is in the hand-writing of George Hepinstall. When I was a member of the firm we carried in

this ledger what we called a stock account. That account repre-
(85) sented the proportionate interest of each member.

"At the time I sold out to J. M. and G. A. I do not exactly remember the relative interests in the firm, but they were about 10 for Jones, 7 for George, and 3 for me. I think Jones died in 1909, some time in March. He returned from his trip to Europe some time in the fall before that, several months, but not as much as six.

"George Spencer told me he had collected the policy. I do not know about the debts the firm owed at the time of the death of my brother. Never heard George Spencer say how much the debts were. He told me there was a very big trade; that they had a big sale and raised about enough to get them out of debt. That was just before Jones died.

"My interest in the partnership would be about one-sixth. I think Jones' was just about as much as George's and mine put together, and George and I were pretty near the same. There was a little difference between George's and my shares up until just a short time before I drew out."

Plaintiff introduced a bill of sale from the plaintiff to J. M. and G. A. Spencer, dated 6 January, 1904, and duly recorded, conveying to the said J. M. and G. A. Spencer, as copartners, all the right, title, interest, and estate of plaintiff, whatever the same may be, in and to all of the partnership assets and all of the partnership property of the said firm of Spencer Brothers, and all accounts and every article of property of whatsoever kind, nature, or description, wherever the same may be situated, which belonged to the firm of Spencer Brothers, or in which they had any interest, including the right to carry on business under the firm name of Spencer Brothers, which bill of sale also conveyed to the said Spencer Brothers all of the interest of the plaintiff, as a member of the said firm, in said insurance policy.

Plaintiff also introduced in evidence a conveyance from K. Eula Spencer, as executrix and devisee of J. M. Spencer, dated 15 June, 1909, and duly recorded, conveying all of the right, title, and interest whereof the said J. M. Spencer died seized and possessed, in and to all of the property and assets of every kind and description belonging to or connected with the business and firm of Spencer Brothers, (86) composed of the said J. M. Spencer and G. A. Spencer, with a provision that the said G. A. Spencer should assume and pay all debts of the said firm.

SECTION OF INSURANCE POLICY.

In the sum of five thousand dollars ($5,000), and promises to pay at its home office, in the city of Philadelphia, unto the firm of Spencer Bros. (comprised of Jones M., Georpe A., and Alexander G. Spencer),

its successors or assigns, the said sum insured, upon receipt of due proof of the death of the insured, during the continuance in force of this policy, upon the following conditions, namely:

WILL OF J. M. SPENCER.

I, J. M. Spencer, being of sound mind and good health, make this my last will and testament. I bequeath to my beloved wife, K. Eula Spencer, my entire estate, real and personal property, and appoint her my executrix.

Witness my hand and seal this 17 September, 1903.

J. M. SPENCER.

Witnesses: CARRIE W. COLE; J. A. JONES.

COPY OF LETTER TO A. G. SPENCER.

NEW YORK, 6/16/08.

BROTHER ALEX:

I am sorry you had to go under. I hope you will save something out of it. If I die I want you to have your part of the five thousand insurance I took out for Spencer Brothers. I have written brother George to see that you get it.

We will sail for southern Italy to-morrow, and will go up through the different countries to London, and then home. Will be gone ten weeks.

Give my love to Mame and Bettie.

Good-bye, Your Brother,

JONES.

(87) This letter was offered for probate, without notice to the executrix, and probated as a codicil to the above will.

Plaintiff rested.

Each defendant severally moved for judgment of nonsuit.

Motion allowed as to each.

The plaintiff duly excepted and appealed.

Ward & Grimes for plaintiff.

A. D. McLean and A. D. Ward for defendants.

BROWN, J. The plaintiff claims title to a portion of the insurance money by virtue of the alleged codicil to the will of Jones Spencer. The record contains no evidence that the letter offered as a codicil was ever duly probated in any court having jurisdiction, and if it was so probated, it is admitted in the record that it was done some time after the probate of the will, and without any notice to the executrix.

Revisal, sec, 3123, provides: "If no executor apply to have the will proved within sixty days after the death of the testator, any devisee or

legatee named in the will, or any other person interested in the estate, may make such application upon ten days notice thereof to the executor."

A codicil is a supplement or an addition to a will made by the testator, and to be taken as a part of the testament, and so intended by him at the time of making it.

The formalities to be observed in the execution of wills and codicils and the methods of probating them are for the most part governed by statutory enactments, but it is generally agreed that a codicil must be executed with the same formalities as a will, and the requirements of the statute must be strictly observed. 6 A. & E., 176.

We think the provisions of section 3123 apply to the production and probate of codicils as much so as to the original will, for to be a codicil it must be testamentary in form and intended by the testator to form a part of his testamentary dispositions.

The wisdom of the statute and the cogent reasons for making it applicable to codicils are illustrated here. In this case the will of J. M. Spencer had been probated, the executrix had qualified and (88) executed the conveyance to her codefendant, G. A. Spencer, more than a year before the alleged codicil purports to have been probated, and she had no notice thereof whatever.

We agree with the learned judge of the Superior Court that the letter in evidence cannot be permitted to operate as a codicil to the will dated 17 September, 1903. The distinguishing feature of all genuine testamentary instruments, whatever their form, is that the paper-writing must appear to be written *animo testandi.*

It is essential that it should appear from the character of the instrument, and the circumstances under which it is made, that the testator intended it should operate as his will, or as a codicil to it.

In the case at bar the testator had made his will in New York City on the eve of his departure for a European trip. This so-called codicil is a letter written to his brother immediately after he had executed his will, and makes no reference to it. It is scarcely probable that the testator regarded or intended such a letter to be in any sense a part of his will. 1 Redfield on Wills, star p. 174 and notes; *St. Johns Lodge v. Callender,* 26 N. C., 335; *Simms v. Simms,* 27 N. C., 684.

Alston v. Davis, 118 N. C., 203, is relied upon by plaintiffs. We admit that it sustains plaintiffs' position, but we are unwilling to follow it as a precedent. It is weakened as such by a brief but expressive and forceful dissent, and by the further fact that another member of the Court took no part in the decision.

If the letter in question was duly probated in Craven, as a codicil to the will, we doubt if it can be attacked in this collateral manner. Possi-

bly the executor should proceed to have the record and judgment of probate set aside in the court where it was made. This point, however, is not made by the learned counsel for plaintiff, and, therefore, we have considered the case, as it was presented, on its merits.

The third and last contention of the defendants appears to us conclusive of this case.

(89) The insurance policy in question was the property of the copartnership, a part of its assets, and was in no sense owned by the individual copartners.

The bill of sale, or assignment, dated 6 January, 1904, executed by plaintiff to J. M. and George A. Spencer, conveyed to them all of plaintiff's interest in the firm's property and assets, including the policy, and it became the property of the firm as a copartnership, and *not the property of Jones Spencer as an individual.*

At the date when the letter was written, the plaintiff owned no part of said policy, as he had conveyed it to his two associates.

J. M. Spencer, in using the words "your part of the $5,000" did not undertake to give his brother his (Jones') part. In fact, Jones Spencer could not convey or bequeath by will his interest in an isolated and distinct item of the partnership property.

It is well settled that a partner cannot transfer his undivided interest in any specific article belonging to the firm (22 A. & E., 104); and this is so because each partner is possessed *per my et per tout;* or, in other words, each has a joint interest in the whole, but not a separate interest in any particular part of the partnership property. 22 A. & E. Enc., page 95; American Digest, Cent. Ed., vol. 33, sec. 143 (c).

It is also held that an action cannot be maintained on an assignment of the interest of one partner in a partnership claim, unsupported by proof of the dissolution of the firm, or that the partner's interest was entire (30 Cyc., 495); and that property payable or transferable to others at the death of the testator may not be disposed of by will. 40 Cyc., 1050.

The judgment of nonsuit is

Affirmed.

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B. F. SHELTON v. J. A. WHITE ET ALS.

(Filed 24 September, 1913.)

1. Drainage Districts—Procedure—Exceptions.

An appeal from the final order of the clerk in establishing a drainage district under the provisions of Laws 1911, ch. 67, sec. 3, is heard only upon the exceptions thereto filed as to issues of law or fact.

2. Drainage Districts—Constitutional Law.

The authority of the Legislature to provide for the creation of levee and drainage districts is based upon the police power, the right of eminent domain, and the taxing power, which is upheld as valid, and the Laws of 1909, ch. 442, and 1911, ch. 67, are constitutional.

3. Drainage Districts—Proceedings to Lay Off—Objections, When Taken—Benefits—Issues.

When the two freeholders and surveyor have acted upon the preliminary order of the clerk of the Superior Court in proceedings to establish a drainage district under the Laws of 1909, ch. 442, and 1911, ch. 67, and the required report is made by them to clerk, as to whether the proposed improvement is practicable and conducive to the general welfare of the district proposed, or whether the lands included will be benefited, etc., and the report filed with map and other things required, it is then the clerk's duty, if the report is favorable, to approve the same and give notice of the date to hear objection, which then may be made by any person whose land has been embraced, that his land be excluded, which may raise an issue of fact as to whether his lands have been benefited or not.

4. Same—Trials—Questions for Jury—Questions for Court.

A petition for the establishment of a drainage district under chapter 67, Laws of 1911, and 1909, ch. 442, of a majority of the resident landowners or of the owners of three-fifths of the land therein, approved by the report of the viewers and surveyor and affirmed by the clerk, permits a minority owner to raise only the issue of fact for the jury to determine as to the benefit to his lands; and should the jury find in favor of the objector, he is not entitled as a matter of right to have his land excluded, but it is for the judge to decide whether this may be done without injury to the district, and if not, he may order that such land be retained, upon payment of the damages to be awarded by the jury, as in condemnation of lands; all other matters embraced in the report are subject to approval by the clerk, and reviewed by the judge without the intervention of a jury, being questions of fact.

5. Drainage Districts—Minority Owner—Objections—Formation of District.

A minority landowner included in a proposed drainage district to be laid out in proceedings under ch. 442, Laws 1909, and ch. 67, Laws of 1911, may not contest the formation of the district, but can raise only the issue as to his benefits therefrom.

6. Drainage District—Original Petitioner—Objections—Procedure.

Upon report of the viewers and surveyor at the final hearing in proceedings to lay off a drainage district, Laws 1909, ch. 442, and 1911, ch. 67, one who signed the original petition may have ascertained from the information contained in the report, contrary to his previous opinion, that the cost of the improvements and damages will amount to more than the benefits to his land, and hence he may then file his objections, and the same procedure is then open to him as if he had not signed the petition.

7. Drainage Districts—Objection by Majority—Findings—Remanding Cause —Dismissal of Proceedings.

In these proceedings to lay off a drainage district it is alleged that upon the coming in of the final report of the viewers and surveyor, a majority of the resident landowners in the proposed district and the owners of three-fifths of the acreage therein objected. This has not been passed upon by the judge of the lower court, and the case is remanded to him for his finding, with direction if the allegation be true, that the proceedings be dismissed.

BROWN, J., did not sit and took no part in the decision of this case.

(91) APPEAL by defendants from *Cline, J.*, at March Term, 1913, of EDGECOMBE.

H. A. Gilliam and W. O. Howard for plaintiffs.
A Paul Kitchin and Manning & Kitchin for defendants.

CLARK, C. J. This is a proceeding under the general drainage law, 1909, ch. 442, as amended by Laws 1911, ch. 67, to establish the "Deep Creek Drainage District" in Edgecombe and Halifax. The original petition asked for the creation of a district 19 miles long and 3 or 4 miles wide, on both sides of Deep Creek. The board of viewers appointed by the preliminary decree recommended a district about
(92) 10 miles long, cutting off both ends of the original proposition. The clerk ordered this modification and the establishment of the district as recommended. All the owners of the land in the district who had not signed the petition were notified as required by the statute, section 2. The clerk directed the engineer and viewers to make their survey and report, with a map, the plans, specifications, classification, and cost.

The board of viewers filed their report in accordance with this decree, the total estimated cost of the improvement being about $40,000 and the acreage 6,135 acres. On 11 May, 1912, when the final report came on for hearing (section 16, ch. 442, Laws 1909), before the clerk, 36 owners of land within the district filed exceptions and asked that the district be not established and that the proceedings be dismissed. Some of the objectors were signers of the original petition, alleging that the report showed that the cost would be practically double the original estimate and would exceed the benefit, and that the district was impracticable. They averred that the objectors owned three-fifths of the land in the proposed district. The clerk overruled all exceptions and confirmed the final report. Exceptions were duly noted and an appeal was taken to the Superior Court in term as provided by the statute.

In the Superior Court, his Honor declined to submit any phase of the controversy to the jury. He heard the evidence and confirmed the judg-

ment of the clerk. It is provided by Laws 1911, ch. 67, sec. 3, amending sec. 17, ch. 442: "Such appeal shall be based and heard only upon the exceptions theretofore filed by the complaining party, either as to issues of law or fact, and no additional exception shall be considered by the court upon the hearing of the appeal."

The authority of the Legislature to provide for the creation of "levee and drainage districts" is based upon the police power, the right of eminent domain, and the taxing power, and has been repeatedly sustained in this Court. The act of 1909 was fully considered and its constitutionality sustained by *Hoke, J.*, in *Sanderlin v. Luken,* 152 N. C., 738, and has been followed in *White v. Lane,* 153 N. C., 14; *Forehand v. Taylor,* 155 N. C., 355; *Mann v. Gibbs,* 156 N. C., 44; (93) *Carter v. Commissioners* (the "Mattamuskeet Lake" case), *ib.,* 183; *Forest v. R. R.,* 159 N. C., 547; *Commissioners v. Webb,* 160 N. C., 595; *Caravan v. Commissioners,* 161 N. C., 100, and *In re Drainage District,* 162 N. C., 127. Similar legislation thereto had been affirmed by this Court on a former statute in many cases, among them, *Norfleet v. Cromwell,* 70 N. C., 639; *Porter v. Armstrong,* 134 N. C., 449; *s. c.,* 139 N. C., 179; *Adams v. Joyner,* 147 N. C., 77; *Staton v. Staton,* 148 N. C., 490. Such legislation has been repeatedly held valid in the United States Supreme Court, as in *Wurtz v. Hoagland,* 114 U. S., 605; *Irrigation District v. Bradley,* 164 U. S., 163, and in many other cases, as well as by numerous decisions in other States, many of which have been collected 10 A. & E. (2 Ed.), 223; 14 Cyc., 1024, 1025.

The procedure in the formation of these districts under Laws 1909, ch. 442, may be thus summarized, leaving out details: A petition must be presented to the clerk, signed by a "majority of the resident landowners of the proposed drainage or levee district, or by the owners of three-fifths of all the land which shall be affected by or assessed for the expense of the proposed improvement." Thereupon notice is issued to all the other landowners in said district, and the clerk appoints a surveyor and two freeholders of the county, who shall make a survey and report whether the proposed improvement is practicable and conducive to the general welfare of the district, whether it will be of benefit to the lands sought to be benefited and whether all the lands benefited are included in the proposed district. They are required to file with this report a map of the proposed district, showing the location of the ditches, canals, or levees proposed, together with any other information bearing on their conclusion.

On the coming in of this report, if it is adverse to the formation of the district, and the clerk shall approve such finding, the petition is dismissed. If, however, they file a favorable report and the clerk shall approve the same, he shall give notice of a further date to hear objec-

(94) tions. If on such hearing he approves the report, he orders the formation of the district. It is then open to any one whose land is included in the district who shall object that he will not be benefited, and who asks that his land shall be excluded, to appeal under section 8 upon the issue of fact whether his lands will be benefited or not. This issue can be tried by jury on appeal. It is not open to him to contest the practicability of the formation of the district which is based upon the petition of the majority of the landowners and approved by the report of the viewers and surveyor and affirmed by the clerk. As a minority landowner, he cannot contest such action. His rights extend no further than to raise the issue of fact whether his own lands will be benefited. If, on appeal, the jury find against the appellant, the judgment of the clerk is of course affirmed. But should the jury find in his favor, he is not entitled as of course to have his land excluded, because in some cases this may destroy the formation of the district which has been ordered on the petition of the majority and sustained by the report of the board of viewers and surveyor and approved by the clerk. The judge, upon the finding of the issue of fact by the jury in favor of the appellant, can either order his land excluded from the proposed district, if that can be done without injuring the district, or he can order that such land be retained within the district for the purpose of giving a right of way for the proposed improvements over his lands, upon the payment of damages awarded by the verdict under the right of eminent domain. Laws 1911, ch. 67, sec. 2.

Upon the preliminary order establishing the district, the court, under section 9 of the act of 1909, refers the report of the surveyor and viewers back to them, "to make a complete survey, plans and specifications, for the drains, levees, or other improvements," and fixes a date for their report. This report shall contain detailed information and be accompanied by a map, profile, and estimate of cost, the assessment of damages and the classification of lands according to benefits. When this final report is filed, notice shall be given by publication of a final hearing, at which date objections may be heard. The clerk may then approve or (95) modify the report, or if the costs of construction and damages prove to be greater than the resulting benefit that will accrue to the lands affected, he may dismiss the proceeding. If the clerk approve the proceeding, any objector who contends that the benefit to him will be less than the cost and damages may appeal under sections 16 and 17 upon that issue and have it passed upon by a jury in the Superior Court. It is not open to him to contest the formation of the district, which is backed by the majority of the landowners. As a minority landowner, he can only raise the issue of fact whether he will be benefited or not. As in case of an appeal from the preliminary order under section 8, if the

jury find against the objector, the judgment is approved; but if the jury find in his favor, then the court will adjudge whether the lands of the objector can be excluded from the district without injury thereto. If this cannot be done, then the objector's lands will be retained in the district for the purpose of a right of way for the proposed improvements, and he will be allowed damages under the right of eminent domain, to be assessed by the jury at the same time that they pass upon the issue of fact.

On the appeal from the preliminary order under section 8 it would not seem that any landowner who has signed the petition should be allowed, contrary to his averments in the petition, to object and appeal. But on the report at the final hearing, it may well be that from the information afforded by such final report any one who signed the petition may find that contrary to his previous opinion the cost of the improvements and damages will amount to more than the benefits accruing, and he should then be entitled to ask that his land be omitted from the district and for an issue of fact as to whether he will be benefited.

If the finding of the jury is that the lands of any objector will not be benefited by the proceeding, they can nevertheless be so included under the right of eminent domain upon an allowance for the damages if the clerk or judge shall so order; or, as provided by Laws 1911, ch. 67, sec. 2, the judge can permit the names of the owners of such lands to be withdrawn from the proceeding; but if such lands are "so situated as necessarily to be located within the outer boundaries of such district, such fact will not prevent the establishment of the dis- (96) trict, and said lands shall not be assessed for any drainage tax; but this shall not prevent the district from acquiring a right of way across such lands for constructing a canal or ditches or for any other necessary purpose authorized by law."

As to all other matters involved in the reports, such as classification of the lands, the assessments, the valuation of the benefit to the respective owners, the location of the ditches and levees, and other incidental matters, these are questions of fact to be determined by the report of the surveyor and board of viewers and later on by the drainage commissioners, when appointed, subject to approval by the clerk, whose action in these respects can be reviewed on exceptions by appeal to the judge. These are questions of fact, and do not require the intervention of a jury. If they did, the delay and expense would render the system impossible.

After the final report and judgment thereon, the work of construction and administration, including the issuance of bonds, is committed to a board of drainage commissioners, who are appointed by the clerk upon

election by the landowners, who in this manner control the execution and maintenance of the work. The drainage commissioners appoint a superintendent of construction.

While the finding of the jury in favor of the objectors as above stated will not entitle them to be excluded from the district unless the judge is of opinion that they are not necessary to the formation of a district, on the other hand, the fact that a majority of the resident landowners or the owners of three-fifths of the land petition for the district is not sufficient to require its formation, unless the viewers shall make the findings required by section 3 and such findings are approved by the clerk, and on appeal by the judge also.

In the present case it is alleged that on the appeal, under sections 16 and 17, from the final order a majority of the resident landowners in the proposed district and the owners of three-fifths of the acreage therein objected. This allegation is not passed on by the judge. The case must therefore be remanded to him. If the fact is as alleged, the pro-
(97) ceeding should be dismissed, notwithstanding that some of the objectors signed the original petition, for upon the coming in of the final report they may ascertain that the facts are different both as to cost and benefit from what was understood when they signed the petition. But if the fact is not so found, then the issue of fact raised by the exceptions of the objectors under section 16 will be submitted to the jury. If that fact is found against the objectors, the judgment should be affirmed. If the fact is found for them, the judge shall then decide nevertheless whether the objectors shall be retained as necessary for the formation of the district, with damages under the right of eminent domain, or shall be excluded.

Upon the facts of this case each party will pay one-half the cost of appeal in this Court.

Remanded.

BROWN, J., did not sit and took no part in the decision of this case.

Cited: Parker v. Johnson, ante, 75; *Griffin v. Comrs.,* 169 N. C., 644; *Banks v. Lane,* 170 N. C., 16; *Drainage District v. Parks, ib.,* 439; *Lumber Co. v. Drainage Comrs.,* 174 N. C., 649.

B. F. SMITH v. COMMISSIONERS OF DARE COUNTY.

(Filed 17 September, 1913.)

Appeal and Error—Division of Opinion—Affirmance of Judgment.

Where one of the five justices of the Supreme Court does not sit or take part in the determination of a case on appeal, and the other members of the Court are equally divided in their opinions, the judgment below stands affirmed.

APPEAL by defendant from *Whedbee, J.*, at March Term, 1913, of PERQUIMANS.

Charles Whedbee, P. W. McMullan, Bond & Bond, and Ward & Thompson for plaintiff.

Ehringhaus & Small, E. F. Aydlett, and J. S. McNider for defendant.

In this case Justice ALLEN did not sit and took no part in the (98) decision of the Court. Justice BROWN and Justice HOKE voted to affirm the judgment; Chief Justice CLARK and Justice WALKER voted for a new trial. The Court being evenly divided, the judgment stands affirmed.

JAMES PENDER, ADMINISTRATOR, v. NORTH STATE LIFE INSURANCE COMPANY.

(Filed 17 September, 1913.)

1. Discretion of Court—Verdict Set Aside—Appeal and Error.

Objection to the verdict of a jury, that it is contrary to the weight of the evidence, must be by motion to set it aside, addressed to the discretion of the trial judge, from which there is no appeal except when this discretion has been grossly abused.

2. Appeal and Error—Weight of Evidence—Matters of Law—Constitutional Law.

The Supreme Court can only review on appeal a "decision of the courts below upon matters of law or legal inference" (Const., Art. IV, sec. 8); and where there is legal evidence submitted to the jury, under correct instructions from the trial judge, no appeal lies from the verdict and judgment to review the findings of fact.

3. Insurance—Evidence—Production of Policy—Trial.

Where the beneficiary of a life insurance policy produces the policy at the trial of an action to recover thereon after its maturity, a *prima facie* case is made for him upon the question of delivery.

4. Insurance—Delivery of Policy—Payments of Premium—Waiver of Rules.

An insurance company may waive a provision requiring that the first premium on a policy of life insurance be made as a prerequisite to its delivery, which may be shown by direct proof that credit therefor had been given to the insured, or inferred from other surrounding circumstances, as, in this case, the production of the policy, at the trial, by the beneficiary, suing for recovery thereon.

5. Same—Principal and Agent—Evidence.

Where resistance is made to a recovery on a life insurance policy in an action brought by the beneficiary after the death of the insured, upon the ground that the insured was the agent of the company at the time it was issued, that the policy was delivered to him as such agent, and thus to be held for delivery until he had paid the first premium, upon which question the evidence is conflicting, an instruction from the court is correct, that if the jury found that the insured received the policy from the company, not as agent or manager, but as an ordinary applicant only, and that he was trusted by the company to pay the first premium, instead of paying it in advance, they should answer the issue for the plaintiff, or "Yes"; but otherwise if the insured was to hold the policy as agent until he, as an ordinary applicant, or individually, should pay the premium.

6. Insurance—Delivery of Policy—Separate Dates—Verdict.

Where in an action by the beneficiary to recover upon a life insurance policy, there is a question as to whether the policy was actually delivered to the insured, it is immaterial as to the exact date of its delivery, should the jury find that it had actually been delivered; and, hence, a finding of the jury that the delivery had been made on two separate dates will not avoid the verdict for inconsistency.

7. Same—Consistent Verdict.

Where in defense to an action upon a life insurance policy it is contended that no delivery of the policy had been made to the insured, and there is evidence that the manual delivery was made on a certain date, and at a later date the insured gave his note for the first premium, which was accepted by the company, findings by the jury to separate issues, that the policy was delivered to the insured and became a consummated contract on both of these dates, are not inconsistent.

8. Insurance—Delivery of Policy—Payment of Premium—Waiver—Knowledge.

The rule of an insurance company that its agent shall not deliver a policy of life insurance more than sixty days after the date of its issue without a new physical examination of the insured, or a new health certificate given by his physician, may be waived by the conduct of the company, and its accepting the note of the insured, contrary to this rule, for the first premium, with knowledge that it had not been observed, and retaining possession thereof without objection, is a waiver of such rule; and knowledge of the facts by the company may be inferred from the facts and circumstances of the case.

APPEAL by defendant from *Cline, J.*, at March Term, 1913, of (100) EDGECOMBE.

This case was before us at Fall Term, 1910, and under the name of *Powell v. Insurance Co.* is reported in 153 N. C., at p. 124 *et seq.* Since that time the former administrator of the beneficiary under the policy has died, and the present plaintiff, as his successor in the administration of the estate of H. D. Teel, has taken his place in the record. The facts of the case are somewhat changed from those we then considered, as will appear by the following verdict of the jury:

1. Did H. D. Teel in his application for the policy, represent that he did not then have, and never had, any habit of taking opium, or any of its preparations, or any narcotics? Answer: Yes.

2. Did H. D. Teel, on the date of said application, have any habit of taking opium, or any of its preparations, or any narcotics? Answer: No.

3. Was said representation a material inducement to the issuing of the policy by the defendant? Answer: Yes.

4. Was said Teel agent and manager of defendant at Tarboro, on 6 December, 1906? Answer: No.

5. Was said policy delivered to said Teel, and did it become a consummated contract between him and defendant on 6 December, 1906? Answer: Yes.

6. Did said Teel, on 10 May, 1907, have the habit of taking opium or any of its preparations, or any narcotics? Answer: No.

7. Was there a material change for the worse in the health of said Teel, prior to 10 May, 1907? Answer: No.

8. Was the said policy delivered to said Teel, and did it become a consummated contract between said Teel and the defendant on 10 May, 1907? Answer: Yes.

The other facts necessary to an understanding of the case are stated in the opinion. The court rendered a judgment upon the verdict for the plaintiff, and the defendant appealed, after duly noting exceptions to the rulings of the court.

F. S. Spruill and W. O. Howard for plaintiff.
Rouse & Land for defendant.

WALKER, J., after stating the case: The answers to the first (101 and third issues were not seriously contested by the plaintiffs, and could not well have been resisted, but they have become immaterial by reason of the answer to the second issue in favor of the plaintiff. Whether the deceased was addicted to the habitual use of opium in any of its forms, or of any other narcotic, was a pure issue of fact to be determined by the jury upon the evidence, which was conflicting. There

was sufficient evidence, in law, to support the finding of the jury, and when this is the case and it is claimed that the jury have given a verdict against the weight of all the evidence, the only remedy is an application to the trial judge to set aside the verdict for that reason. We will not review his ruling upon such a motion, except where it clearly appears that there has been a gross abuse of his discretion, which, of course, will be of exceedingly rare occurrence, and so much so that in our procedure it may be considered as almost a negligible quantity. There was no such abuse in this instance

Under the fourth and fifth issues, the jury, by their answers thereto, have evidently found as facts that H. D. Teel was not agent or manager of the defendant company on 6 December, 1906, when the policy was sent to him from the home office, and that the company did not require payment of the premium in advance, but delivered the policy to H. D. Teel and trusted him for the payment of the premium, the understanding being that the policy should immediately become effective upon its delivery and without prepayment of the premium as a condition upon which it should take effect. We cannot escape this conclusion after a careful perusal of the evidence and the charge of the court, and considering them in connection with the issues four and five, as answered by the jury.

The defendant offered strong evidence to show that H. D. Teel was the defendant's agent and local manager on 6 December, 1906, but there was some evidence on the other side of the question, introduced by the plaintiff, and while it may not be very convincing or even satisfactory, we are not willing to say that it was altogether destitute of probative force, but we do mean to say that it was weak or insufficient to
(102) warrant the finding of the jury. It was some evidence, and was properly submitted to the jury, and the defendant having failed to have the verdict set aside by the judge below, because it was against the weight of the evidence, must abide by the result as final and beyond our control. We can review by appeal "any decision of the courts below upon any matter of law or legal inference," but in jury trials, at least, our jurisdiction ends when that is done. We cannot review findings of fact in such cases. Const., Art. IV, sec. 8. And what we have said applies equally to the sixth and seventh issues. There was conflicting evidence which carried the questions to the jury, and we are concluded by their findings.

Returning to the fifth issue for further consideration, we find that the court instructed the jury, if they found that H. D. Teel received the policy from the insurance company, not as its agent or manager, but as an ordinary applicant for insurance, having no such relation to it, and he was trusted to pay the first premium, instead of paying it in

advance, they should answer the fifth issue "Yes"; but if the insurance company sent the policy to H. D. Teel, he then being its agent or manager, to hold the policy for the company until the premium was paid, and not to deliver it to himself until it was paid, or if H. D. Teel received the policy, not as agent or manager, and laid it aside until he could pay the premiums, and it was not paid by him on 6 December, 1906, they should answer the issue "No." We see no valid objection the defendant can make to this instruction. There was evidence of the facts it embodied sufficient to support either hypothesis stated in it, and the jury manifestly found that H. D. Teel was not agent at the time, and received the policy as an ordinary applicant, having no confidential relation with the company, and that the latter had trusted him to pay the premium. If that be the case, the policy was delivered and in force on 6 December, 1906. If there had been an actual delivery of the policy, nothing else appearing, the production of it at the trial by the plaintiff, who is the beneficiary, makes a *prima facie* case for him. *Perry v. Ins. Co.*, 150 N. C., 143, citing *Kendrick v. Ins. Co.*, 124 N. C., 315; *Grier v. Ins. Co.*, 132 N. C., 542; *Rayburn v. Casualty Co.*, 138 N. C., 379; *Waters v. Annuity Co.*, 144 N. C., 663. That the company (103) may waive the prepayment of the premium and give credit for the same is but to state a self-evident principle, and this waiver may be shown by direct proof that credit was given, or may be inferred from the circumstances as well. *Bodine v. Ins. Co.*, 51 N. Y., 117. No man is bound to insist upon his rights, and an insurance company may disregard the provision requiring prepayment of the premium as a condition of imparting vitality to the policy, and agree, either expressly or impliedly, that it will accept the promise of the applicant to pay on demand or at a future day. The doctrine is thus clearly stated in Vance on Insurance, at p. 178: "Even though the parties may have expressly agreed that the contract shall not be deemed complete until payment of the premium in cash and in full, this stipulation may be waived by the insurer or any of its agents having competent authority. As a general rule, any agent having power to execute and issue contracts on behalf of the insurer has power to waive a condition of prepayment. And an absolute delivery of the policy by such an agent, without payment of the premium, under such circumstances as will justify an inference that credit is to be given, will constitute a waiver of a condition of prepayment. It seems that an intention to give credit may be inferred from the mere fact of unconditional delivery, without requiring present payment. Nor do the courts show great readiness to find that a delivery was made subject to a condition of immediate payment." The cases in this Court, already cited, are substantially to the same effect.

The sixth and seventh issues involved matters of fact alone, there

being, in our opinion, evidence on both sides of the questions submitted to the jury in them. Our remarks as to the second issue are generally applicable to these two issues. We are concluded by the verdict.

In regard to the seventh issue, it was urged before us by the learned counsel for the defendant, that the verdict upon the fifth and seventh issues was inconsistent, as the policy could not have been delivered (104) and become effective on two different dates. But we think the answers to these issues are reconcilable, if it is necessary to bring them into harmony in order to sustain the verdict. It would seem to be immaterial on which of the two dates it took effect. If on either of them, it is valid and enforcible in view of the special facts of this case. But they are consistent, as the jury evidently meant that the policy was delivered on 6 December, 1906, and continued in force until and including 10 May, 1907; but if they were mistaken in law, for any reason, as to its being in force on 6 December, 1906, then upon the facts as they found them to be, it took effect on 10 May, 1907. It is true that there is evidence that H. D. Teel was the agent of defendant on 10 May, 1907, though there is no special finding of the fact. We will assume it to be true. In this connection, there was evidence that H. D. Teel, on 10 May, 1907, gave his note to the agents of the company for $69.35, the amount of premium on this policy, and it was assigned by them to the company and mailed to the company on the same day. It was received by the company without objection, and has been retained ever since, so far as appears.

The defendant contends, though, that there was a rule of the company, in force at the time of these transactions, forbidding an agent to deliver a policy sent to him for delivery, if more than sixty days since it was issued have elapsed, unless the applicant for the policy has furnished the company with a new physical examination or health certificate, given by a physician.

If we concede, for the sake of illustration and argument, that this point is properly raised by the prayer for instruction, the rejection of which is the subject of the twenty-eighth exception, the prayer not being addressed to any particular issue, nor any finding asked in regard to it on the eighth issue, which is sufficient to embrace the question intended to be raised, we do not think it defeats the plaintiff's right of recovery. If there was no such examination, and the rule has been established in such a way as to have bound H. D. Teel to its observance, and the policy, therefore, was issued in violation of the rule, it appears that the company, in February and April, 1907, wrote letters to their agents at Tarboro, N. C., having possession of this and other policies which had been issued for more than sixty days, (105) and called for the payment of the premiums or the return of the

policies, but not insisting upon a new physical examination. These letters were introduced by the defendant at the trial. When we consider these facts and the failure of the defendant to return the premium note and insist upon a compliance with the rule requiring H. D. Teel to furnish to it an examination as to the state of his health, the doctrine of waiver is again applicable. The note of H. D. Teel recited that it was given for the first premium ($69.35) due on the policy of insurance issued to him. The company must have known that there had been no new medical examination, as he was required to furnish it to the company, and failed to do so. Under the circumstances it would not be right for the company to retain the premium note, with knowledge that the alleged rule had not been complied with, and then, after the loss, to insist that the policy was not valid for that reason. And it is this element in the transaction that induces the law to declare a waiver of the condition or to hold the company estopped to set it up in defense of an action upon the policy. It is partly based upon the eminently just maxim that if a party is silent when he should speak, he will not be permitted to speak when justice demands that he should be silent. He will not be allowed to take two chances, when he should be entitled to only one. If we put the case completely, it is this: The law will not allow the company to hold the premium upon the chance that there may be no loss, and, if there is a loss, to deny its liability upon the policy. Acceptance and retention of the premium, with knowledge of the facts, express or to be inferred, shows that it elected to consider the policy in force. *Rayburn v. Casualty Co.*, 138 N. C., 379. Brief reference to the authorities and precedents will be sufficient to show the state of the law upon this question: "The acceptance by an insurance company, with knowledge of facts authorizing a forfeiture or avoidance of the policy, of premiums or assessments which were in no degree earned at the time of such forfeiture or avoidance, constitutes a waiver thereof. This waiver is based on the estoppel of the company to declare void and of no effect insurance for which, with knowledge of the facts, full compensation has been received. This rule (106) is particularly applicable where the company's claim is based on a right of cancellation and return of premiums, rather than on a distinct forfeiture." 3 Cooley Insurance, 2683, 2684, 2686, and the numerous cases cited in the notes. It is said in *Ins. Co. v. Raddin*, 120 U. S., 183: "The only question upon the instructions of the court to the jury which is open to the defendant on this bill of exceptions is whether, if insurers accept payment of a premium after they know that there has been a breach of a condition of the policy, their acceptance of the premium is a waiver of the right to avoid the policy for that breach. Upon principle and authority, there can be no doubt that it is. To hold

otherwise would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract while they decline to bear its burdens. *Ins. Co. v. Wolf*, 95 U. S., 326; *Wing v. Harvey*, 5 D. M. & G., 265; *Frost v. Ins. Co.*, 5 Denio, 154; *Bevin v. Ins. Co.*, 23 Conn., 244; *Ins Co. v. Slockbower*, 26 Pa., 199; *Viele v. Ins. Co.*, 26 Iowa, 9; *Hodson v. Ins. Co.*, 97 Mass., 144."

The other questions raised by the defendant, which are subsidiary to those we have discussed and dependent upon them, require no separate consideration.

This case has been tried three times in the court below, and heard twice in this Court. It has been very ably and learnedly presented to us by counsel, and we have given to it a most patient and thorough examination. After doing so, we have not been able to discover any error in the trial and proceedings below.

No error.

Cited: *Johnson v. R. R., post*, 451; *Murphy v. Ins. Co.*, 167 N. C., 336.

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(107)

LUTHER F. PIERCE ET AL. V. JULIA STALLINGS ET AL.

(Filed 25 September, 1913.)

Deeds and Conveyances—Heirs at Law—Fraud Against Creditors—Actions.

The heirs at law are estopped, under a deed to lands made by their ancestor to another, from claiming any rights that were not available to him. Hence they may not impeach, in their own right, his deed, so made, for fraud against his creditors.

APPEAL by plaintiffs from *Carter, J.*, at May Term, 1913, of JOHNSTON.

Action to set aside a deed, on the ground that same was made with intent to defraud the creditors of the grantor.

There was judgment sustaining demurrer, and plaintiffs excepted and appealed.

Abell & Ward for plaintiffs.
F. H. Brooks for defendants.

HOKE, J. The complaint alleged, in substance, that on 1 June, 1909, D. F. Pierce, owning several tracts of land, conveyed same to his then wife, Julia Pierce, since intermarried with defendant Stallings, and

that said conveyance was made with intent to delay, hinder, and defraud the creditors of the grantor; that said grantor having died, the plaintiffs, his children and heirs at law, instituted the present action to set aside said deed by reason of said fraudulent purpose. There is no allegation nor suggestion in the complaint that the plaintiffs are creditors of the grantor or purchasers for value, etc.; they claim only as heirs at law, and, this being true, plaintiffs are concluded by the deed of their ancestor; as to them, the defendants acquired a good title. *Saunders v. Lee,* 101 N. C., 3; *Ellington v. Currie,* 40 N. C., 21; Waite on Fraudulent Conveyances, sec. 121; *Reynolds v. Faust,* 179 Mo., 21; *Campbell v. Ross,* 187 Ill., 553.

In the citation from Waite, *supra,* the author says: "The heir of a grantor cannot impeach his ancestor's deed on the ground that it was made in fraud of creditors, for he can claim no right which the ancestor was estopped from setting up." And in *Saunders' case,* (108) *supra,* it was held: "A conveyance made with an intent to defraud creditors is nevertheless valid against the maker and all others, except creditors and those who purchase under a sale made for their benefit; and until the title thus conveyed is divested by some proceeding instituted by the creditors, it is sufficient to support an action for the recovery of the land and damages for its detention."

There is no error, and the judgment sustaining the demurrer is Affirmed.

N. H. MONDS, ADMINISTRATOR, v. TOWN OF DUNN.

(Filed 24 September, 1913.)

1. Cities and Towns—Negligence—Defects—Actual Notice.

In an action to recover damages against a town for the negligent killing of plaintiff's intestate by a defective condition of its electric apparatus for lighting the streets, evidence that previous notice had been given to one of its street laborers is incompetent to fix the town with direct knowledge of the defect.

2. Evidence—Witnesses—Opinions—Experience and Observation.

The plaintiff seeks to recover damages for the negligent killing of his intestate by an electric current passing from a wire carrying a heavy voltage of electricity through a transformer to an electric lamp, with a lessened current, claiming that the injury complained of was received through other wires used in manipulating the lamps. Testimony of a nonexpert witness, who had been employed by the defendant for several years was competent, that the voltage on the secondary wire from the transformer to the lamp, from his personal knowledge and experience,

carried a voltage of 110, which was not dangerous; and that several days prior to the occurrence he examined the light and pole, and that the day afterwards, as soon as it could have been done, he examined the transformer, and they were all right.

3. Harmless Error—Evidence.

The exclusion of competent testimony is cured by the subsequent admission of testimony of the same witness upon the same subject.

4. Evidence, Opinion—Relevancy.

Where a witness has not qualified as an expert electrical engineer, his explanation of "the latest improved method of suspending arc lights" is incompetent, especially when such methods are not relevant to the inquiry.

5. Evidence, Expert—Hypothetical Questions.

A hypothetical question asked an expert, not based upon the evidence in the case, is properly excluded.

6. Instructions—Negligence—Contributory Negligence—Proximate Cause.

Semble, in this action to recover of the defendant damages for the death of plaintiff's intestate, alleged negligently to have been caused by certain defects in regard to its wiring and arrangement for manipulating its arc lamp, the evidence was insufficient to carry the case to the jury; but if otherwise, the charge of the court upon the rule of the prudent man, contributory negligence, and proximate cause, is approved.

(109) APPEAL by plaintiff from *Carter, J.*, at May Term, 1913, of HARNETT.

E. F. Young and R. L. Godwin for plaintiff.
Clifford & Townsend for defendant.

CLARK, C. J. The plaintiff's intestate was found dead near a street crossing in the town of Dunn on a rainy night in December, his head and body submerged to the waist in the water in a ditch 4 feet deep, his feet and legs being on the bank. His feet were near an electric light post which was on the edge of the street, across the ditch from the sidewalk. On the pole were the electric light wires of the defendant town, which were owned by the town. An arc light was suspended over the center of the street crossing, about 35 feet from where the body was found. There was a chain connected therewith by means of which the lamp was lowered and raised. This chain was out of the reach of persons passing along the street, and the witness Freeman, who was 6 feet tall, had to reach up to get it.

Late in the afternoon before the body was found the lamp was suspended in its place as usual. At the time the body was found, about 9 o'clock at night, the lamp was lying on the ground in the middle
(110) of the street. One of the secondary wires which it was testified carried a voltage of 110 was found detached therefrom.

This action is brought to recover damages for the alleged negligent killing of the plaintiff's intestate, alleged to have been caused by the defendant's electric wires which were found down on the street as above set forth.

Upon this evidence the court might well have directed a nonsuit. There was slight, if any, evidence, beyond mere conjecture, that the death of the intestate was caused by coming in contact with the wire, 35 feet off, or that there was any negligence of the defendant which caused the contact, if any had been shown. He was not found in contact with the wire, but 35 feet away.

The first exception is to the exclusion of the evidence of the witness, Lynch, who testified that a short time prior to the death of the deceased he told one Freeman that he had received a shock there on the Monday previous. Freeman having later testified that he was hired by the day by the town to trim lamps and do other work by the superintendent employed by the city, the court directed the jury: "You will not consider any evidence to the effect that P. Y. Lynch gave any notice to Mr. Freeman." It cannot be that a remark to a day laborer was notice to the town. Such evidence is only competent as actual notice to the town when it is given to an officer whose duty and interest it is to inform the town authorities, or who has authority himself to act in the matter. A notice to a day laborer on the street of New York or London that there is a defect in the pavement certainly could not be construed as fixing the town with liability by reason of such notice. The same rule of law applies to the town of Dunn. It might be that the town should have taken notice of the defect, if there was one. But certainly it was not competent to show that it had actual notice by reason of a remark made to a day laborer, employed by the town. 28 Cyc., 1397-99.

The witness further testified that on Sunday night before the plaintiff's intestate was killed he crossed at that place, and the lamp was not giving any light. He thought he would shake it, and reached up high to shake it, and when he did, got a considerable shock. He (111) did not tell any of the town commissioners about it, that he remembers. The shock gave him a peculiar feeling. This evidence was stricken out by the judge at the conclusion of the testimony, there being nothing to show that the wire was any lower on Thursday night or connecting the intestate in any way with being struck by reason thereof. According to Lynch's testimony, the wire was out of his way and he received the shock only because he, a very tall man, reached up and grasped the light.

Bizzell, the city superintendent of the defendant's light and water department, testified that the lamp was suspended in the middle of the street by a cable. He said that while the voltage on the primary wire

was 2,300, the voltage on the secondary wire from the transformer to the lamp was 110, and that such voltage was not dangerous and would not give much of a shock; that he had received a shock from a 110-volt current, and it was not much of a shock. The plaintiff excepted because the witness was allowed to testify that 110 volts was not considered a deadly current. But the witness stated that he spoke on his own experience. The plaintiff also excepted because Bizzell testified that the primary wire did not come in contact with the secondary wires, but was above them; that he did not notice the wire on that day, but did so on the next day. This witness further testified that the dead man had not been moved when he got there; that there were no wires about his feet; that he inspected this light and pole two or three days prior to the time; and he also examined the transformer on that pole the next day, which was as soon as it could be done, and found them all right. The plaintiff excepted to this testimony. The witness stated that he had not taken any course in electricity and did not profess to be an expert, and all the experience he had had was being in charge of the electric light business of this town for two or three years past. We do not see any error in admitting the testimony, which was a matter of observation on the part of the witness, who was in charge of the business and had been for two or three years past. There was other evidence that there were no wires found in contact with the body of the deceased, and none to the contrary; that the light in question was hanging (112) in its usual position late in the afternoon before the body of the deceased was found that night. In the reply there was testimony tending to show that the plaintiff's right hand was burned on the inside as if he had taken hold of something, and that there was a blister.

C. W. Thompson, witness for the plaintiff, testified that he was an electrician, but he had not examined the entire line of poles from the crossing where the body was found to the power plant; that he had been over a part of the line. He was asked how much voltage do these wires carry to the arc light as described by Mr. Bizzell in his testimony, and how much voltage would it take to operate an arc light as described by Bizzell and as they are usually suspended. This evidence was excluded, and the plaintiff excepted. But the witness was allowed further to testify that he could form an opinion satisfactory to himself as to how much voltage it would take to operate such an arc light as was described by Mr. Bizzell; that in his opinion it would take 1,100, though it could be operated on 110-volt current if a rheostat was cut in on one side; that he had never known a street arc light operated on 110-volt current; if the primary current is 2,300 volts, it would be an exceptional transformer that would cut it down to 110 at one step, but it could be cut down to 1,100.

If there had been error in excluding the previous questions to Mr. Thompson, it was fully cured by the admission of this testimony by him.

The court excluded a request by the plaintiff to Mr. Thompson to explain to the jury the "latest improved method" of suspending arc lights. In this we do not see any error. *Witsell v. R. R.*, 120 N. C., 557. The witness further stated that he had not taken any course in a technical school nor college, and his experience was mainly acquired by work at the business. It would seem that his qualifications as expert were about the same as those of Mr. Bizzell. This witness was further asked: "If the insulation on the primary wire had been defective and the light had been out of proper care, would it not have caused a larger (113) voltage?" There was no evidence that the insultation on the primary wire was defective, and the hypothetical question was properly excluded.

The court charged the jury that the plaintiff was required to show by the greater weight of evidence that there was a failure to exercise proper care in the performance of legal duties which the defendant owed to the plaintiff, *i. e.*, that degree of care which a reasonably prudent man should use under like circumstances, and that such negligent breach of duty was the proximate cause of the injury (explaining correctly what was "proximate cause"), and that persons in control of electric appliances are charged with a continuous duty of taking reasonable precaution to keep their appliances in proper condition. This is substantially the charge approved in *Ramsbottom v. R. R.*, 138 N. C., 38. If the plaintiff desired more specific instructions, he should have asked for them. *Simmons v. Davenport,* 140 N. C., 407. Besides, the plaintiff could not have been prejudiced, as there was no evidence whatever showing negligence of the defendant which would have brought the wire to the ground, or in reach of the intestate, nor that the wire hung lower than was safe or usual.

The court further charged the jury: "The defendant contends that there is such an extent of mystery introduced in the case by evidence tending to show a burn in both hands and foot, that upon all the evidence they should not be convinced that the death of the plaintiff's intestate was caused from wires being down in the first instance, but rather that the plaintiff's intestate himself brought the wire down." After stating this contention, the court added: "Of course, it is hardly necessary for me to tell you that if the plaintiff's intestate came to his death by meddling with the chain, and then received the shock from the wires which he had himself brought down, he would not be entitled to recover, and upon such finding of fact it would be your duty to answer the first issue 'No.'" The plaintiff excepted to the above instructions, but we find no error.

The whole charge is not sent up, and it does not appear that there were any instructions asked and refused. Upon the whole case, we find no error entitling the plaintiff to a new trial. There was no (114) evidence tending to show that the wires were down by any negligence of the defendant. Indeed, the evidence was scarcely sufficient to justify submitting the case to the jury. They have, however, found the issue in favor of the defendant.

No error.

Cited: S. v. Robertson, 166 N. C., 365; *Webb v. Rosemond,* 172 N. C., 851.

BOARD OF COMMISSIONERS OF VANCE COUNTY v. TOWN OF HENDERSON.

(Filed 24 September, 1913.)

1. Municipal Corporations—Health—Quarantine—Statutes.

The obligation on municipal corporations to quarantine and care for persons afflicted with smallpox is created entirely by statute.

2. Municipal Corporations—Health—Quarantine—Expenses—Statutes.

Where there is a duly appointed and qualified quarantine officer of a county and a superintendent of health in an incorporated town within that county, but who has not been appointed quarantine officer by that town, the town is not liable to the county for the expenses incurred by the county in quarantining and caring for its citizens afflicted with smallpox under the direction and control of its own quarantine officer. Laws 1911, ch. 62, secs. 15 and 21.

3. Same—Action.

Laws 1911, ch. 62, enact a general scheme for the quarantining and caring for smallpox patients by the county and town under certain regulations, and expressly provide (section 21) that "all expenses of quarantine and disinfection shall be borne by the town or county employing a quarantine officer." *Held,* the intent of the Legislature was to require that such expenses shall be paid by the county, when it has a quarantine officer, and may not be recovered in an action brought by the county against a town, within its own borders, for the expense thus incurred in the quarantine and care of its citizens, where the town has not appointed its own quarantine officer, as permitted by the statute.

4. Municipal Corporations—Health—Quarantine—Repealing Statutes.

If there ever was any liability on the part of an incorporated town, having no quarantine officer, for the expenses of the county, wherein it is situated, in quarantining and caring for its citizens afflicted with small-

pox, under the direction of the county smallpox officer, imposed by Revisal 1905, sec. 4508, it was removed by the repealing provision of the Laws 1911, ch. 62.

5. Municipal Corporations—Health—Quarantine—Interpretation of Statutes.

The language of our statutes relative to the quarantining and caring for those within the borders of counties and towns afflicted with smallpox is free from ambiguity, and conveys a definite and sensible meaning, to wit, that an incorporated town, within the borders of a county, having no quarantine officer of its own, is not responsible to the county for the costs incurred in the quarantine and care of its own citizens.

6. Interpretation of Statutes—Words and Phrases—Ambiguity.

Where the language of a statute is free from ambiguity and conveys a definite and sensible meaning, the courts construe it literally, and will not enter into the question of its wisdom or expediency. The rule of construing statutes expressed in ambiguous language discussed by WALKER, J.

7. Municipal Corporations—Health — Quarantine — Separate Government — Taxation—Representation—Constitutional Law.

Where an unincorporated town has not appointed a quarantine officer, it is to be regarded as any unincorporated part of the county as regards its liability for the expenses incurred by the county in the care of its citizens whom the latter, under its health regulations, have quarantined for smallpox; for an incorporated town is taxed, as any other part of the county, to bear this expense, and having no more control over its management than if it were unincorporated, a further tax would be, in effect, like taxation without representation.

8. Municipal Corporations—Interpretation of Statutes—Separate Government —Officious Interference—Expenses—Action.

Revisal, secs. 4508 and 4509, relating to the quarantining for smallpox, should be construed together, and so the city health officer may become its quarantine officer, just as the county health officer is the quarantine officer of the county. Hence, when one officiously interferes with the patients of the other and incurs expenses therefor, no recovery for them can be had.

APPEAL by defendant from *Cline, J.*, at May Term, 1913, of (115) VANCE.

This action was brought to recover certain expenses incurred and paid by the county of Vance in executing the provisions of law in regard to quarantine during an outbreak of smallpox in said county, (116) and in the town of Henderson, which is in the said county, in the years 1911 and 1912. The complaint is lengthy, and necessarily so, but we need not set out even the substance of all the allegations in order to show clearly the matter involved in the appeal. Defendant demurred, and as the complaint is thereby admitted for the purpose of deciding the question of law presented in the case, it may be briefly stated, as ap-

pears therefrom, that the county, between 1 June, 1911, and 1 October, 1912, removed to its pesthouse outside the corporate limits of Henderson, and cared for, a number of smallpox patients from the town, and also had under its care in the town, at the same time, other patients, who were treated at their homes in Henderson under the county quarantine, the total number of patients being sixty-two. The county paid out for the care and cure of these patients the sum of $1,814.12, and made a proper demand for the same, but payment was refused by the defendant. What is actually due would, of course, have to be ascertained by a jury, or otherwise, if the defendant is liable at all. The county had a quarantine officer, but the city of Henderson had none at the time stated. The court overruled the demurrer, and defendant appealed.

A. C. & J. P. Zollicoffer for plaintiff.
Henry T. Powell and T. M. Pittman for defendant.

WALKER, J., after stating the case: Our opinion is that the city of Henderson is not liable for the amount paid by the county of Vance, on account of the maintenance and care of the persons afflicted with smallpox, while they were quarantined, nor for any part of it. The plaintiff's claim is based upon the provisions of Revisal, sec. 4508, and this, with the statute cited by defendant, Laws 1911, ch. 62, sec. 2 (ratified 7 March, 1911), will be discussed presently.

The counties, cities, and towns of the State have only such powers and capacities as have been conferred upon them by law. Dillon on Mun. Corporations (5 Ed.), sec. 59; *Fidelity Co. v. Fleming,* 132 N. C., 337; *S. v. Webber,* 107 N. C., 962; *Harrington v. Greenville,* 159 N. C., (117) 634. "It has been too often decided to be now questioned that the liability of towns to support poor persons is founded upon and limited by statute, and is not to be enlarged or modified by any supposed moral obligation." *Smith v. Coleraine,* 9 Met., 492. In an action to recover the expenses of caring for a smallpox patient, *Justice Hoke,* for this Court, said: "So far as municipal obligation is concerned, it is accepted doctrine that the care and support of the indigent and infirm is a matter of statutory provision." *Copple v. Commissioners,* 138 N. C., 131. But it is unnecessary to pursue this line of thought any further, as the plaintiff bases his right to recover upon the statute.

The Legislature, some years ago, provided an entire scheme for the preservation of the public health in the proper exercise of its police power, and especially for quarantining and caring for persons afflicted with smallpox and other contagious and infectious diseases. This statute will be found in Revisal of 1905, vol. 2, ch. 95. In section 4508 of that chapter it is enacted that "the expense of the quarantine and of the

disinfection shall be borne by the householder in whose family the case occurs, if able; otherwise, by the city, town, or county of which he is a resident."

There was a superintendent of health for Vance County, who was also quarantine officer of the county, duly appointed according to law, and there was a superintendent of health for the town of Henderson, but he had not been appointed quarantine officer.

By Laws 1911, ch. 62, the Legislature adopted a new scheme for the preservation of the public health, and especially for a system of quarantine by which persons are allowed to be isolated and treated, for the purpose of preventing the spread of contagious and other diseases, and it concludes with this section: "All laws and clauses of laws in conflict with this act are hereby repealed." It is provided by section 15 of the act as follows: "The duties of the municipal health officer, within the jurisdiction of the town or city for which he is elected, shall be identical with those of the county superintendent of health for the county, with the exception of the duties of the county superintendent of health pertaining to the jail, convict camp, and county home. The au- (118) thorities of any city or town shall have the power to assign the duties of quarantine officer to the municipal health officer, and in such cases the municipal health officer shall faithfully perform the duties of the quarantine officer as prescribed in sections 20 and 21 of this act." And in section 21 there is this provision: "All expenses of quarantine and disinfection shall be borne by the town or county employing a quarantine officer."

We conclude from a persual of the two statutes, Revisal, ch. 65, sec. 4508, and Laws 1911, ch. 62, sec. 21, that if the former statute ever imposed any liability upon a city without a quarantine officer, the Legislature intended to establish a new rule of liability by the latter section for the expenses of quarantining diseased persons, and to require that they shall be paid by the county which has a quarantine officer, unless the town in that county, where the expenses are incurred, has appointed a quarantine officer and undertaken for itself, by a system of quarantine, to isolate or segregate persons having contagious and other diseases, which are mentioned in the act, within its corporate limits, or, if possible, to take charge and supervision of the patients at their respective homes; but if it should elect, as in this case, not to exercise its power of appointing a quarantine officer for said purpose, it is the duty of the county to perform this service, the expenses thereof to be paid by the county which has a quarantine officer. In other words, the town is entitled, under the provisions of the new act, to the same rights in respect to quarantine, and the prevention of the spread of diseases, as any other part of the county, if it has not assumed to act for itself in the matter

of the appointment of a quarantine officer. This, no doubt, was deemed by the Legislature more just than the former provision, if the true construction of the latter be that it imposed the burden of paying quarantine expenses upon the town, whether it had its own quarantine system or not. It may have occurred to the legislative mind that there was no reason why the town should pay the expense of its own indigent resi-
dents, when it was required by law to contribute its full propor-
(119) tion to the taxes of the county, and should, therefore, be entitled to its proper share in the benefits of the county quarantine without any additional charge.

Where the language of a statute is free from ambiguity and conveys a definite and sensible meaning, the courts should not hesitate to give it a literal interpretation merely because they may question the wisdom or expediency of the enactment. In such a case, these are not pertinent inquires for the judicial tribunal. If there be any unwisdom or injustice in the law, it is for the Legislature to remedy it. For the courts, the only rule is *ita lex scripta est.* If, though, the statute is ambiguous, so as to be fairly susceptible of more than one interpretation, then the courts may rightfully exercise the power of construing its language, so as to give effect to the intention of the Legislature, as the same shall be ascertained and determined from relevant and admissible considerations. But it should be understood that the intention of the lawmaking power is to be ascertained by a reasonable construction of the act, and not one founded on mere arbitrary conjecture. And it is always the actual meaning of the Legislature which must be sought out and followed, and not the judge's own idea as to what the law should be. Finally, although every law must be construed according to the intention of the makers, as evidenced by the language employed to express it, that intention is never resorted to for any other purpose than to ascertain what, in fact, was meant to be done, and not for the purpose of ascertaining what they have done, with the view of determining whether it is politic or expedient, for with that we have nothing to do. We have reached the limit of our jurisdiction when we have certainly found and declared the meaning, as the object is to ascertain what the Legislature intended to enact, and not what is the legal consequence and effect of what they did enact. Black's Interpretation of Laws, pp. 38 and 41.

We think the purpose of this statute is clear and free from uncer-
tainty, but if it is doubtful, the application of the well-settled rule of construction just stated leads us to think that it was not intended
(120) to charge the town with the expenses of the quarantine service, unless it has adopted a system of its own, in which latter case it appears reasonable and just that it should be so charged. We are also of the opinion that the provision in section 21 of Laws 1911, ch. 62,

for paying the expenses of the quarantine is incompatible with the like provision in section 4805 of the Revisal, if the latter imposes a liability for the same upon the town in which there is no quarantine officer, for the act of 1911 explicitly provides that the expenses shall be paid "by the town or county employing a quarantine officer," and the town of Henderson has not employed one, though the county has. Where two statutes are thus in conflict and cannot reasonably be reconciled, the later one repeals the one of earlier date to the extent of the repugnance. *S. v. Perkins,* 141 N. C., 797. We believe that our view of the law in this case accords with the clear intent of the Legislature, and responds also to the dictates of justice and right. There is no good reason why the town or city should be charged with the double burden of paying its full lawful share of the county taxes and also the expenses of quarantine within its limits, from which it receives no more benefit or advantage than other sections of the county. But if it is not satisfied with the county system of quarantine or for any other reason it establishes one of its own, and thus chooses to regulate its own affairs in this respect, it is proper that it should bear the expense, and not the county. It is not just that the county should pay the expenses of the city quarantine when it can have no part in fixing or controlling the amount to be incurred, or in adopting regulations or methods for the economical administration of the law, and the same rule applies with equal force to the city, when entire control is in the hands of the county authorities. Taxation without representation often leads to the exercise of arbitrary and even despotic power, and is not tolerated or permitted in our system of government. He who pays the taxes should have some voice, directly or indirectly, in deciding how they should be laid and how and for what purposes they should be expended. The Legislature evidently did not intend that the county should place this burden upon the city, as a separate corporation, without its consent, or its participation in the exercise of the power by which it was created or imposed. In (121) respect to this matter, the county and the city must be treated, under the statute, as distinct bodies, each exercising its own powers of taxation, within its prescribed sphere, and each liable for its own expenses. When the city does not elect to act for itself by appointing a quarantine officer, it must be regarded as a part of the county, and is entitled to its share of benefits as such in return for its contribution to the county revenue; it is otherwise, though, when it undertakes to exercise sole authority with respect to quarantine within its corporate limits by virtue of the powers given in the act of 1911. These reasons, of course, have influence with us only when there is ambiguity in the statute, but we think it clear that the later provision in the act of 1911 was intended to take the place of the earlier one in the Revisal, and to repeal the latter.

But we are also of the opinion that Revisal, sec. 4508, will not bear the construction upon which the plaintiff relies. It will be seen that by section 4509 the city health officer is also quarantine officer of the city, just as the county health officer is quarantine officer of the county. This throws a flood of light upon the language of section 4508, and clearly reveals its true meaning to be that when the householder is indigent and unable to pay the expenses of patients in his family, they shall be borne by the city, if he resides therein, and if not, by the county; but the city is not liable to the county for the expenses of its patients any more than the county is to the city for the expenses of its patients. Each provides for its own patients and pays their expenses, but not to the other. It could not mean that one of them can officiously pay the expenses of the other and recover them from the latter. Neither one of them is charged with the duty of attending to the affairs of the other in this respect, but each must provide for and pay its own expenses in such cases. But, as we have said, this is all changed by the act of 1911, and the town is not liable if it has not employed a quarantine officer. The general subject is discussed in *McNorton v. Val Verde County,* 25 S. W. (Tex.), 653, which presented somewhat an analogous case, and the Court reached the same conclusion as we do now. If the city of
(122) Henderson was not liable and the county, therefore, paid the expenses officiously, it cannot recover them of the city. This we decided in *Copple v. Commissioners,* 138 N. C., 131.

It seems that section 21, chapter 62, Laws 1911, has been repealed by Laws 1913, ch. 181, sec. 9. This matter was not called to our attention, and we suppose the learned counsel attached no importance to it, as the county paid the expenses for which it now sues in 1911 and 1912, before the passage of the act of 1913, which should be given prospective operation. We merely refer to it to show that we had not overlooked the repealing act.

It follows that, in any view, the court erred in overruling the demurrer. It should have been sustained and the action dismissed. This result makes it unnecessary to consider more particularly the question raised on the argument as to whether the payment by the county of the quarantine expenses incurred in Henderson was officious, nor need we refer to the other matters discussed by counsel.

Reversed.

HENRY HOLMES ET AL. v. W. G. CARR ET ALS.

(Filed 1 October, 1913.)

1. Deeds and Conveyances—Probate Officer—Interest—Relationship.

The mere fact that the probate officer to a deed was the son of the grantor therein does not give him such interest in the lands, as heir at law, as would affect the validity of his act.

2. Deeds and Conveyances—Feeding Estoppel—Married Women.

The widow and daughter of the deceased went into possession of their respective shares of his land under a deed of partition. Thereafter the latter conveyed to another, and it is *Held* that the validity of the partition is immaterial, for the daughter, though a married woman, was estopped by her deed from claiming an interest in her mother's land, which came to her by descent, after her mother's death, and this "fed the estoppel."

APPEAL by plaintiff from *O. H. Allen, J.*, at May Term, 1913, (123) of GREENE.

George M. Lindsay for plaintiffs.
J. Paul Frizzelle for defendants.

CLARK, C. J. The plaintiffs except to the admission of a deed from them to T. W. Carr, the father of defendants, on the ground that the probate was improperly taken by W. G. Carr, the son of the said T. W. Carr, as justice of the peace. Said probate was taken by him in 1894, and at that time he had no interest in the property to which he succeeded, together with the other defendants, as heirs at law of their father, T. W. Carr, who died in 1903.

We have numerous decisions that an acknowledgment of a deed by the husband and wife and privy examination of wife taken before a justice of the peace, commissioner, or a notary is a judicial or at least a *quasi*-judicial act, and that a probate is void if taken before one who has an interest in the conveyance. *White v. Connelly,* 105 N. C., 65; *Long v. Crews,* 113 N. C., 256; *Land Co. v. Jennett,* 128 N. C., 4. But this must be a pecuniary interest in the property conveyed. In *Gregory v. Ellis,* 82 N. C., 227, *Dillard, J.,* says: "No judge, whether probate or other, could take jurisdiction of any cause wherein he was a party or otherwise had a *pecuniary interest.*"

But in this case W. G. Carr, the justice of the peace, though he has since acquired an interest in the property by inheritance, at the time of the conveyance had no interest, either vested or contingent, in the property conveyed. His father might have sold it, or have devised it. The mere fact of his relationship to one of the parties to the conveyance does not affect the validity of the probate of the deed by him. In *McAllister*

v. Purcell, 124 N. C., 262, this question was directly presented, and the Court said: "There is no principle of law, nor precedent, which invalidates the acknowledgment and privy examination taken before an officer who has neither any interest in the instrument, nor is a party thereto, simply because he is related to the parties."

(124) The land belonged to Richard Jones, who died in 1873, leaving Mahala Jones, his widow, and Sarah Holmes, the plaintiff, his daughter, who partitioned the land between them, and they went into possession of their respective shares. In 1894, while Mahala Jones was still living, Sarah Holmes and husband conveyed to T. W. Carr the part of which she was in possession—the land in controversy. Subsequently Mahala Jones died intestate, without having disposed of her land, leaving Sarah Holmes her sole heir. The question whether the partition was valid or not is immaterial. Sarah Holmes had no title to the interest, whether a divided or undivided interest, which Mahala Jones owned in the land at the time of the deed; yet Sarah Holmes, though a married woman, is estopped by her deed, and the subsequent devolution of her mother's title on her by descent "feeds the estoppel." Mordecai's Lectures, 785; *Zimmerman v. Robinson,* 114 N. C., 49.

The other exceptions require no discussion.

No error.

S. S. HOLT v. J. A. WELLONS, RECEIVER.

(Filed 1 October, 1913.)

1. Contracts—Future Delivery—Cotton—Consideration.

A contract to sell a stated number of bales of cotton at a fixed price per pound, on a certain date, is supported by a sufficient consideration, viz., the mutual agreement of the parties, the one to sell and the other to buy the cotton in the quantity and at the price and date determined upon, and it is bilateral and not unilateral.

2. Same—Apparent Validity of Contract.

A definite contract for the sale of cotton at a future date, without indication that it is not what it purports to be, is not void upon its face as a wagering contract.

3. Contracts—Cotton — Future Delivery — Evidence — Prior Transactions — Intent.

Conversations preliminary to the making of a contract and during negotiations leading up to it may be relevant to prove the intent with which it was made, where that intent is in question.

4. Contracts—Indorsements—Evidence.

Evidence of the indorsement on a contract for the sale of cotton made by the buyer to the indorsee, and of the handwriting of the former, is competent in the indorsee's action to recover damages against the seller for the breach of the contract to prove the assignment of it.

5. Contracts, Wagering—Cotton—Future Delivery—Quantum of Evidence—Instructions.

In an action for damages for the breach of a contract when the trial judge has placed the burden of proof under the statute upon the plaintiff to show that actual delivery of the cotton was contemplated, a charge is not erroneous which instructs the jury that the evidence must be believed by them and produce in their minds a conviction that the contract was a *bona fide* one for the actual delivery of the cotton.

6. Contracts, Wagering—Cotton—Future Delivery—Evidence—Good Faith—Actual Delivery—Intent of Parties—Instructions.

Where the defendant in his answer specifically alleges that a contract for the future delivery of cotton was a wagering one, the burden is on the plaintiff to establish that it was not (Revisal, sec. 1691); and in this case where the contract is valid on its face, a charge is held sufficient that if the jury believed the evidence and were convinced thereby that the parties to the contract really and in good faith contemplated an actual delivery of the cotton, and that it was not merely a gambling transaction under the guise of a fair and lawful dealing, they should answer the issue in the negative, that the contract was not a wagering contract which is forbidden by law.

7. Contracts, Valid on Face—Wagering Contracts—Cotton—Future Delivery—Terms of Agreement—Intent.

Where a contract for the future delivery of cotton appears upon its face to be valid, and recovery thereon is resisted on the ground that it is a wagering one, it is the intention of both parties which will control as to whether the contract contemplated the delivery of the cotton, or was couched in the terms of a lawful contract to conceal a gambling agreement in which it was contemplated that one or the other of the parties would win or lose, depending solely upon whether the price should rise or fall, receiving in settlement of the same only the difference in the price, and not the cotton or its value.

8. Instructions—Directing Verdict—Words and Phrases—Appeal and Error—Harmless Error.

A charge of the court directing the answer of the jury to an issue in a certain way, "if they believed the evidence," is undesirable in its form, and is not commended; but reversible error will not be found by reason of the use of this expression where it appears that the appellant was not prejudiced thereby; and where the evidence referred to is not disputed and but one inference can be drawn therefrom, it will not be held as error that the use of this form was a prohibited direction of the verdict by the court.

APPEAL by defendant from *Carter, J.*, at March Term, 1913, (126) of JOHNSTON.

HOLT *v.* WELLONS.

This action was brought to recover damages for the breach of a contract to sell and deliver cotton. The complaint alleges that Keen Company contracted to sell to Austin-Stephenson Company 200 bales of cotton at 10⅛ cents per pound, 100 of the bales deliverable on 20 September, 1907, and the other 100 bales on 20 October, 1907; that the contract was afterwards sold and transferred by Austin-Stephenson Company to the plaintiff, S. S. Holt, and that Keen Company failed to deliver the cotton as they had agreed to do. Plaintiff sues for the difference between the contract price and the market price on the delivery dates, which, as he alleges, is $1,500. Keen Company wrote the following letter to Austin-Stephenson Company on 1 March, 1907:

"GENTLEMEN:—This is to confirm sale to you of 200 bales of good white cotton, f. o. b. Four Oaks, N. C., 100 bales to be delivered 20 September, 1907, and 100 bales to be delivered 20 October, 1907, at 10⅛ cents per pound."

The plaintiff also alleges the breach of another contract, made by Keen Company on 11 March, 1907, to sell and deliver 100 bales of cotton to Austin-Stephenson Company at 10¼ cents per pound and its assignment to him by them, the difference between the market and contract prices being $500. Keen Company wrote the following letter to Austin-Stephenson Company on 11 March, 1907:

"GENTLEMEN:—This is to confirm sale to you of 100 bales of cotton to be delivered f. o. b. Four Oaks, N. C., during the month of November, 1907, at 10¼ cents per pound. This cotton is to be delivered as you buy it, and not to be picked or classified."

(127) Plaintiff alleges a tender of the full price fixed by the contracts of sale and a demand for the cotton, with which defendant refused to comply. They pray judgment for $2,000. Defendant demurred because the contracts, as alleged in the complaint, are unilateral, without consideration, and void. The demurrer was overruled, and defendant excepted. They answered that they were gambling contracts and *ultra vires,* and were not legally sold and transferred to the plaintiff. Upon issues submitted to them, the jury found the contracts were made as alleged; that said contracts were sold and transferred to plaintiff Holt; that they were not gambling contracts; that plaintiff was ready, able, and willing to perform said contracts on his part; that defendant failed and refused to perform the same, and that plaintiff was damaged in the sum of $1,687.50, with interest. Judgment and appeal by defendant.

Winston & Biggs, Abell & Ward, and W. W. Cole for plaintiff.
F. H. Brooks and N. Y. Gulley & Son for defendant.

WALKER, J., after stating the case: We will consider the errors in the order assigned:

1. The demurrer was properly overruled. The contract, as alleged in the complaint, was not unilateral or without consideration or void. It was bilateral and bound both parties, the defendant to deliver the cotton and the plaintiff to pay the price, and for this reason also it was based upon a sufficient consideration, the mutual promises of the parties, being considerations for each other. 9 Cyc., 323. The promise to sell and deliver the cotton was founded upon the reciprocal promise to pay the price as its consideration. The contract is not void, but valid on its face.

It is argued that the plaintiff is bound by the form of the contract as contained in the letters copied into the complaint. If this be so, it does not help the defendant. The contract is still not unilateral, a *nudum pactum,* or otherwise void on its face, but, on the contrary, is apparently valid and binding. The letters merely confirmed the sale, implying that one had already been made, and its validity was then recognized. But in the complaint distinct allegations of a binding contract are made, apart from the letters, so that in any view the (128) demurrer must fail of its purpose. Defendants cited *Rankin v. Mitchem,* 141 N. C., 277, in support of the demurrer, but we do not see how it applies to the question now raised. The promise of the seller in that case to take the cotton back at a given price on a certain date was clearly unilateral, not binding the buyer. That is not the contract here, for this one is mutually binding.

2. The testimony of W. H. Austin, manager of the Austin-Stephenson Company, as to his conversation with Allen K. Smith, president of the Keen Company, objected to by defendant and admitted, was harmless, if incompetent. It tended to prove only a request by Smith of Austin to notify the Keen Company if his Company ever wished to buy any cotton. It was a mere preliminary and only preparatory to negotations. The contract itself was afterwards made by the Austin Company with the Keen Company through J. W. Keen, its secretary, treasurer, and general manager. It also was relevant, as bearing upon the issue of the lawfulness of the contract, which was raised by the defendant. It tended, even if slightly, to show that an actual delivery of the cotton was intended by the parties.

3. The objection that the court admitted the indorsement on the contract to show the transfer, is not meritorious. There was proof of the genuine execution of the same by the Austin-Stephenson Company to plaintiff. The handwriting was properly shown.

4. The charge on the first issue as to the making of the contract by the parties was correct. The court told the jury that the evidence

must be believed by them and produce in their minds a conviction that the contracts were made as alleged by the plaintiff, before they were authorized to answer the issue in favor of the plaintiff, and if it did not produce such a conviction, they should answer the issue "No"; if it did, their answer would be "Yes" This is sufficient, as the judge, later in the charge, distinctly placed the burden of that issue upon the plaintiff.

5. This exception is that the charge on the third issue, as to whether the contracts were founded upon a gaming consideration—a dealing in "futures"—was also sufficiently full and explicit. The burden (129) was put upon the plaintiff to establish that they were not, or the negative of the issue, in accordance with the terms of the statute, Revisal, secs. 1689, 1690, 1691. The charge, in substance and effect, was that, if the jury believed the evidence and were convinced thereby that the parties to the contracts really and in good faith contemplated an actual delivery of the cotton, and that they were not merely gambling transactions under the guise of fair and lawful dealings between them, they should answer "No"; otherwise, their answer should be "Yes, that they were gambling contracts, forbidden by law." This, while briefly expressed, was sufficient, and the jury could not well have failed to understand from it what was the law of the case. We think the instruction stated the general rule correctly. The contract by its terms, not disclosing any gambling element, the matter is to be settled by ascertaining the true underlying purpose of the parties. Was it the intention of both parties that the cotton should not be delivered, and did they conceal in the deceptive terms of a fair and lawful contract, a gambling agreement, by which they contemplated no real transaction as to the article contracted to be delivered? *Edgerton v. Edgerton,* 153 N. C., 167; *Harvey v. Pettaway,* 156 N. C., 375; *Rodgers v. Bell, ibid.,* 378; *Burns v. Tomlinson,* 147 N. C., 645; *Rankin v. Mitchell, supra.* Of course, the law deals only with realities and not appearances—the substance and not the shadow. It will not be misled by a mere pretense, but strips a transaction of its artificial disguise in order to reveal its true character. It goes beneath the false and deceitful presentment to discover what the parties actually intended and agreed, knowing that "the knave counterfeits well—a good knave." It always rejects the ostensible for the real in looking for fraud or a violation of law. The essential inquiry, therefore, in every case is as to the necessary effect of the contract and its true purpose. We said in *Edgerton v. Edgerton, supra*: "The form of the contract is not conclusive in determining its validity, when it is assailed as being founded upon an illegal consideration, and as having been made in contravention of public policy. If under the guise of a contract of sale, the real intent of the parties is merely to speculate in the rise or fall of the price, and the property

is not to be delivered, but only money is to be paid by the party (130) who loses in the venture, it is a gambling contract and void."
The rule is fully stated in 20 Cyc., 930. See, also, *Williams v. Carr,* 80 N. C., 295; *S. v. McGinnis,* 138 N. C., 724; *S. v. Clayton, ibid.,* 732. The principle was strongly and tersely expressed by the Court in *Dillaway v. Alden,* 88 Me., 230: "When, however, there is no real transaction, no real contract for purchase or sale, but only a bet upon the rise or fall of the price of stock, or article of merchandise in the exchange or market, one party agreeing to pay if there is a rise, and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager. No business is done—nothing is bought or sold or contracted for. There is only a bet." Other cases on the subject are cited in *Harvey v. Pettaway, supra.* We think the court stated this rule substantially at least.

6. The defendant objected because the court instructed the jury that "if they believed the evidence" their answer to the seventh issue should be "Yes." That issue related to the corporate power of Keen Company to make contracts. The words, "if you believe the evidence," are specially assigned as error, on the ground of being a direction of the verdict; but we do not think it can be so construed. The evidence was all one way, and, besides, was practically undisputed. There was but one inference to be drawn from it, and while we have often said that another form of expression is more desirable, the resort to such words is not reversible error if it has worked no prejudice. There was no harm done in this case to the defendant by the use of these words, even if we are unable to commend them for general adoption. In *Merrell v. Dudley,* 139 N. C., 58, *Justice Brown* (referring to this subject) said: "The plaintiff also excepts to certain expressions used by the judge below in charging the jury. 'If you believe from the evidence' is an expression urged upon our attention by the plaintiff as erroneous and prejudicial. It is true that the language is inexact, and this form of expression should be eschewed by the judges in charging juries. This Court has heretofore called attention to it in a number of cases.. We do not regard the use of such language as reversible error unless it clearly (131) appears that the appellant was probably prejudiced thereby which does not appear to us in this case. We trust the judges of the Superior Court will in future be advertent to these views as repeatedly expressed by this Court," citing cases. See *S. v. Godwin,* 145 N. C., 461, and cases cited; *S. v. Simmons* 143 N. C., 613; *S. v. R. R.,* 145 N. C., 570, and same case (second appeal), 149 N. C., 508. We have again called attention to the settled view of the court upon this matter, with the hope that it will be followed in charging the juries, even if a

failure to do so will not always be reversible error, and never so unless the objecting party has been prejudiced in some way. It is always safer and better to follow the precedents.

Upon a consideration of the whole case, no fatal error appears.

No error.

Cited: Latham v. Field, post, 361; *Davis v. R. R.,* 170 N. C., 600; *Orvis v. Holt,* 173 N. C., 234, 235.

E. F. WATKINS v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 24 September, 1913.)

Evidence—Witnesses—Opinion Upon the Facts—Experience and Observation.

Where it is alleged that a passing locomotive of the defendant caused damage to plaintiff by setting fire to his land some distance off of the right of way by a spark from the engine, it is competent for a witness, who has had experience running locomotives using the same kind of fuel, to testify whether from his observation the engine, under the conditions, could have thrown a spark the distance stated.

APPEAL by defendant from *Bragaw, J.,* at March Term, 1913, of LEE.

McIver & Williams, A. A. F. Seawell for plaintiff.
W. H. Neal for defendant.

BROWN, J. Plaintiff sues to recover damages for negligently burning his timber by sparks escaping from a passing engine. The fire started off the right of way, and according to defendant's witness, 881 feet (132) from the track. There was much evidence offered on both sides as to whether the fire originated from a spark from an engine.

Defendant offered one Holland, who testified that he reached the fire within five minutes after it started, at a point the above distance from the track; train had passed about an hour previous; that he had operated engines, wood and coal burners, and had much experience in observing how far sparks would fly from them under similar conditions.

The defendant asked the witness this question: "From what you saw, how far would you say sparks would be thrown from one of those locomotives?" The question was excluded. Defendant excepted.

The point is decided in *Caton v. Toler,* 160 N. C., 105, opinion by *Justice Hoke,* wherein the distinction between expert and nonexpert evidence is clearly pointed out, and many authorities cited.

In that case it was held competent for nonexpert witnesses, qualified from observation and experience, to testify, as a statement of fact relative

to the inquiry, that burning lightwood stumps under the conditions indicated were not dangerous, and not likely to throw sparks any distance.

Deppe v. R. R., 154 N. C., 523, relied upon by the plaintiff, is easily distinguishable, for the reason given in the above cited case, viz.: "The answer sought was a deduction of the witness from facts in evidence, and involving clearly an opinion of the witness on the very question the jury were called on to decide."

New trial.

JOHN O. McKEEL, ADMINISTRATOR, v. HENRY HOLLOMAN.

(Filed 1 October, 1913.)

1. Partition—Parties—Interpretation of Statutes.

One who claims an undivided interest in lands in proceedings to sell them and divide the proceeds among tenants in common and to pay debts, etc., may be properly made a party to such proceedings. Revisal, secs. 410, 414, 76.

2. Partition—Tenants in Common—Burden of Proof.

One who has been made a party to proceedings to sell lands for the purpose of dividing the proceeds among tenants in common, and who claims an undivided interest in the lands, which is denied, has the burden of proof upon the issue of his alleged ownership; and may not recover in the absence of any sufficient evidence tending to establish it.

3. Trials—Leading Questions—Courts—Appeal and Error.

Leading questions asked on direct examination may be excluded by the trial judge, in his discretion, from which no appeal ordinarily lies.

4. Tenants in Common—Adverse Possession—Limitation of Actions.

The law raises a legal presumption of title in one who has been in adverse possession of lands, receiving the rents and profits for twenty years or more, which will bar the entry of another claiming an undivided interest therein as tenant in common; for the adverse occupancy of the lands puts the claimant to his action, and if continued for that time without any assertion of his right, it will be lost.

APPEAL by defendants from *O. H. Allen, J.*, at May Term, (133) 1913, of GREENE.

This is a proceeding for the sale of land for partition and to pay the debts of the two original tenants in common out of the proceeds of sale, the balance to be divided among the tenants according to the several and respective interests. All parties have been duly brought into court by the service of process, as the court finds and adjudges in its order, 15 October, 1912. It was ascertained that one Henry Holloman claimed a one-third interest in the land, as heir to Nancy Holloman, daughter of

himself and his wife, Rachel Holloman (formerly Rachel Evans), who was the daughter of John Evans and his wife, Harriet Evans (formerly Harriet McKeel), who was one of the original tenants in common. Henry Holloman's wife predeceased him.

The court, on motion, ordered that Henry Holloman be made a party, to the end that his claim might be determined and the land sold free from any claim upon the title. He was brought in, and pleaded that he was owner of one-third of the land. The court, thereupon, di-
(134) rected the following issue to be submitted to the jury: "Has the defendant Henry Holloman any interest in the land?" Under the instructions of the court, the jury answered this issue in the negative. There was no objection to the issue. Judgment on the verdict, and appeal by Henry Holloman, the intervenor. The other facts are stated in the opinion of the court.

Finch & Connor and L. V. Morrill for plaintiff.
George M. Linsday and L. I. Moore for defendant.

WALKER, J., after stating the case: We find no error in the record. The court properly ordered or permitted Henry Holloman to be made a party. The Code provides that any person may be made a party who has or claims an interest in the controversy adverse to the plaintiff, or whose presence is necessary to a complete determination or settlement of the questions involved therein, and any person claiming title or right of possession to real estate may be made a party, as the case may require, to any such action. Revisal, sec. 410. When a complete determination of the matter cannot be had without the presence of other parties, the court *must* cause them to be brought in. Revisal, sec. 414. The power to make an adverse claimant a party to proceedings for the sale of land for assets, as this is in part, is expressly recognized. Revisal, sec. 76. It would be strange if it were not so under our wise and liberal system of procedure, which seeks to settle all controverted matters in one action and without circumlocution; and further, it is better for all parties concerned that it should be so, in an action of this kind, in order that a good title to the land may be sold, as it will secure a better price. The order being valid, the issue, submitted without objection, both in form and substance necessarily placed the burden of proof upon Henry Holloman, who asserted his title and ownership to a one-third interest in the property, and the judge ruled correctly in this respect. Holloman virtually admitted that plaintiffs had the other two-thirds interest, and the whole, if he is not their cotenant; and the real question was
(135) whether they were entitled to the whole or to only two-thirds. Their proof tended to show, and at least made out a *prima facie* case, that they were entitled to all of it. One test by which to determine

where the burden of proof rests has been said to be, which party would be successful, in law, if no evidence or no more evidence were given. *Amos v. Hughes,* 1 M. & Rob., 464. This Court has once adopted the rule laid down by Taylor, for it says in *Walker v. Carpenter,* 144 N. C., at p. 676, quoting from Bailey's Onus Probandi, p. 2: "In every mode of litigation an assertion of fact avails nothing without proof. Some party to it must commence by producing proof to sustain his allegation. The first rule laid down in the books on evidence is to the effect that the issue must be proved by the party who states an affirmative, not by the party who states a negative. Of course, such affirmative must be one in substance and not merely in form. An eminent writer on the law of evidence says: 'This rule of convenience, which in the Roman law is thus expressed, *Ei incumbit probatio, qui dicit, non qui negat,* has been adopted in practice, not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable, and moreover, it is but reasonable and just that the party who relies upon the existence of a fact should be called upon to prove his own case.'" See, also, *Cox v. Lumber Co.,* 124 N. C., 78. Plaintiffs were owners of the property, according to the proof in the case, by reason of their continuous adverse possession for more than twenty years, unless Holloman was their cotenant. He alleged that he is the owner of one-third, and they denied it. It was, therefore, a claim by him to be let into possession of his one-third, from which they had ousted him, and practically an action of ejectment for that purpose, plaintiffs denying that he ever had any interest in the land. *Whitfield v. Boyd,* 158 N. C., 451; *Daniel v. Dixon, post,* 137. In this case Holloman is substantially an intervenor, asserting his right to one-third of the property, and has the affirmative of the issue as to the title. *Redmond v. Ray,* 123 N. C., 502; *Maynard v. Insurance Co.,* 132 N. C., 711; *Manufacturing Co. v. Tierney,* 133 N. C., 630. He asserts title to one-third as tenant in common, and the other parties deny his right and plead sole seizin (*non tenent* (136) *insimul*), and the case is thus brought within the principle of *Huneycutt v. Brooks,* 116 N. C., 788. The burden, according to the facts and circumstances as they appear and in any view of them, was upon Holloman.

As the burden was upon Holloman, he failed to show any title. He relied on the will of R. D. S. Dixon, but as the evidence by which he offered to show his interest, under the will, was properly excluded, there was nothing left upon which his claim could stand. There was no sufficient identification of the land described in the will. Some of the evidence rejected did not have sufficient probative force to show what land it was. There was no evidence that Dixon owned the land.

The undisputed evidence of plaintiffs shows that they are the owners of the land. If Holloman ever had any interest as tenant in common with them, he lost it by their adverse possession for more than twenty years, he admitting that he did not make any claim to be let into possession of his share, nor any demand for his share of the rents and profits within said time. *Dobbins v. Dobbins,* 141 N. C., 214.

It may be well to say before concluding, that the court had a discretion to exclude leading questions, and we will not review the ruling for that reason.

We may safely place our decision upon the single ground that the answer of Holloman shows that the title of his adversaries is not denied unless he is owner of one-third as tenant in common, and it further appears in the case that they have held possession of the premises adversely, and have been in the pernancy of the rents and profits for more than twenty years, title being out of the State, and he has taken no steps to recover possession of his alleged share, or his share of the rents and profits, within that time, although he had visited them occasionally. If they kept him out of possession of his share of the land and the rents, he was put to his action, and if not prosecuted within the twenty years, the law raised a legal presumption of title in those having the possession and barred his entry. *Dobbins v. Dobbins, supra; Bullin v. Hancock,* 138 N. C., 198; *Whitaker v. Jenkins, ibid.,* 476. "The possession of one tenant in common is, in law, the possession of all the tenants in common. One may, however, disseize or oust the others, and from the time of such ouster the possession of him who keeps out the rest is not their possession, but is adverse to their claims of possession. The sole silent occupation by one of the entire property, without an account to or claim by the others, is not in law an ouster, nor furnishes evidence from which an ouster can be inferred unless it has been continued for that length of time, which furnishes a legal presumption of the facts necessary to uphold an exclusive possession." If there were any technical errors in the rulings upon the evidence, the facts so plainly appear, and the legal inference thereupon is so well settled by the cases, that a reversal, if there was any error in the respects indicated, would be vain and useless. The Court would again reach the same result. We, therefore, sustain the judgment.

(137)

No error.

Cited: Brogden v. Gibson, 165 N. C., 25; *Steeley v. Lumber Co., ib.,* 32; *Holley v. White,* 172 N. C., 78.

SIDNEY DANIEL v. E. S. DIXON ET AL.

(Filed 1 October, 1913.)

1. Tenants in Common—Betterment.

Where one of two tenants in common is entitled against the other to betterments on lands thus held, the betterments increase the value of the lands as a whole, and thus inure one-half of their value to the benefit of the one claiming them. Hence, when the value of such betterments have been adjudged at $700, the claimant is only entitled to recover $350 therefor.

2. Same—Rents and Profits.

The plaintiff in this action was held entitled to undivided half interest in lands, which are still held in common by both parties to the action. It had been also judicially determined that the defendant was entitled to a certain sum paid by him for the cancellation of a mortgage on the lands, and a certain further sum paid by him for betterments; and that he is chargeable with the rents and profits while the lands were in his possession and exclusive enjoyment: *Held*, judgment should be rendered charging the plaintiff a sum equaling one-half of the moneys paid by the defendant in canceling the mortgage and for betterments, and charging the defendant with one-half of the ascertained value of the rents.

3. Ejectment—Undivided Interest—Betterments—Interpretation of Statutes.

An action to recover an undivided interest in lands is in effect a proceeding in ejectment wherein betterments may be assessed. Revisal, sec. 652.

4. Tenants in Common—Betterments.

A tenant in common, irrespective of the statute, Revisal, sec. 652, is entitled to recover against his cotenant for betterments he has placed upon the land.

APPEAL by plaintiff from *O. H. Allen, J.*, at May Term, 1913, (138) of PITT.

Julius Brown and H. S. Ward for plaintiff.
T. J. Jarvis and Harry Skinner for defendants.

CLARK, C. J. This was an action to set aside and annul certain deeds. There was verdict and judgment in favor of the plaintiff, and the judgment was affirmed in this case, 161 N. C., 377. The defendants then filed their petition, under Revisal, 652, for betterments. The jury found that the defendants "had good reason to believe, and did believe, that at the time they were making improvements on the land they had a good title thereto," and that "the premises had been enhanced in value at this time by reason of said improvements $700."

The only point presented is as to the correctness of the judgment. The court signed judgment against the plaintiff for $700 betterments without any deductions for rents and profits adjudged to the plaintiff in a former trial, which the law provides shall be deducted, and without regard to the fact that the plaintiff and the *feme* defendant are still tenants in common, and that the *feme* defendant will get the benefit of the improvements equally with the plaintiff. To charge the plaintiff with the whole of the added value would be contrary to law and natural justice as well.

(139) Where there is a partition of property, the party making betterments is entitled to have the part improved by him allotted in his share, in which case he recovers nothing for the betterments which he has placed upon the property which has thus become his own. *Pope v. Whitehead,* 68 N. C., 191; *Collett v. Henderson* 80 N. C., 337; *Holt v. Couch,* 125 N. C., 456. But in the present case there is no partition, and one-half of the added value of $700 placed upon the whole property by reason of the betterments inures to the benefit of the defendants whose half interest in the property is increased $350, and they are entitled to recover from the plaintiff only the added value of $350 which by reason of the improvements will enhance the plaintiff's interest in the property. In putting $700 in added value on the property, they have spent $350 for their own benefit and $350 for the benefit of the plaintiff.

There was a former judgment in this case at November Term, 1912, which was affirmed, 161 N. C., 377, which adjudged that the plaintiff was entitled to one-half interest in the land described in the pleadings, charged, however, with the payment of one-half of $771.88, which the defendants had disbursed in paying off a mortgage on the property, less one-half the rental value of the property while in the hands of the defendant, the jury having found the average rental value to be $150 per year.

The plaintiff tendered a judgment charging himself with one-half of said $771.88, with interest, and for $350, one-half of said betterments, and charging the defendants with one-half of the rents and profits, with interest. By this calculation the defendants would recover of the plaintiff $184.39. This calculation and adjustment is correct, and the court should have signed the judgment tendered by the plaintiff. The latest case on the subject of betterments is *Whitfield v. Boyd,* 158 N. C., 451, which was, like this, a recovery of an undivided interest in land, and the Court held that it was in effect a proceeding in ejectment, and that betterments could be assessed.

We cannot, however, agree with the contention of the plaintiff, that betterments are only allowed, under the statute, in ejectment. There

is no such restriction therein. Indeed, if no petition for betterments had been filed, it is generally recognized that when tenants in common have partition they are entitled to lands on which they (140) have made improvements assigned to them without credit for the improvements placed thereon. *Pope v. Whitehead,* 68 N. C., 191. This can be done when there is actual partition; but when there is no partition, or there is a sale for partition, the added improvement goes to swell the value of the whole tract, and the defendants here can only recover, as above stated, their one-half of the betterment which was for the benefit of the plaintiff, deducting therefrom the balance due by them to the plaintiff in accordance with the judgment of November Term, 1912.

The amount of rents set off against the claim for betterments does not exceed those accruing within three years before the beginning of this action. The other rents and profits were set off against the lien paid off by the defendants, an adjustment decreed by the judgment of November Term, 1912.

The judgment should be set aside and a new judgment entered in the court below in accordance with this opinion.

Reversed.

Cited: McKeel v. Holloman, ante, 135.

GEORGE F. ANDERSON v. W. H. HARRINGTON ET AL.

(Filed 1 October, 1913.)

1. Trusts and Trustees—Parol Trusts—Partnership.

The plaintiff and defendant agreed, by parol, that they would purchase a tract of land, the latter to advance the purchase price and take the deed to himself and the former to repay it by cutting and selling the timber standing on the land, and that the land was then to be sold and the proceeds divided between them. This action is brought to sell the land and for a division of the proceeds under the terms of the agreement: *Held,* the action was to establish a parol trust in plaintiff's favor, and not for specific performance or to settle a partnership.

2. Trusts and Trustees—Parol Trusts—Statute of Frauds.

The provisions of the statute of frauds, that a sale of lands be in writing and signed by the party charged, etc., does not apply to the declaration of a trust in lands, in the absence of statutory requirement; hence, a parol trust in lands to stand seized to the use of another is enforcible in North Carolina.

(141) APPEAL by defendant from *O. H. Allen, J.*, at May Term, 1913, of CRAVEN.

This issue was submitted to the jury by the court: "Did the plaintiff and defendant contract and agree as alleged in section 1 of the complaint, and was the deed made to Harrington in accordance with said agreement? Answer: Yes."

Section 1 of the complaint is as follows:

That prior to 11 April, 1911, the plaintiff had bargained for the purchase of the tract of land herein referred to, at the price of $450, and applied to the defendant W. H. Harrington for the money, whereupon it was agreed between the plaintiff and W. H. Harrington that plaintiff should buy the property and draw on the defendant W. H. Harrington for the purchase money, and then the plaintiff was to proceed with the cutting of the standing timber on the tract and sell the same and turn over the net proceeds to the defendant W. H. Harrington, until such payments had amounted to the purchase price, and that they would then sell the land and divide the proceeds then between them, share and share alike, or otherwise they would be equal owners in the land after the said W. H. Harrington had been paid the purchase money.

It is admitted in the answer that the deed to the land and timber was executed to defendant by A. J. Waters and wife on 11 April, 1911.

It is further admitted "that plaintiff made a draft on defendant W. H. Harrington for the said $450 with which to pay the grantor in the said deed, which draft was paid and honored by the said W. H. Harrington."

Upon these admissions and the finding of the jury, his Honor adjudged "that W. H. Harrington be first paid the balance of the $450 purchase money, and the balance be equally divided between the plaintiff and defendant; that costs, including this term, be taxed against the defendant W. H. Harrington; that for purpose of division D. L. Ward and

(142) W. D. MvIver be appointed commissioners to make sale of the land and timber according to law."

The defendant excepted and appealed.

W. D. McIver for plaintiff.
D. L. Ward for defendant.

BROWN, J. In the view we take of this case, it is unnecessary to consider each of the numerous assignments of error.

In the briefs the action appears to be treated as one to settle a copartnership, whereas it is in reality an action to set up and establish a parol trust in land.

The defendant requested his Honor to charge the jury:

"There is no evidence in this case to sustain a recovery of an interest in land. In order to recover land, there must be some memorandum in writing signed by the party to be bound thereby."

This is not an action for specific performance of a contract in the sale of land, but one to establish a trust. One of the four methods of creating a trust is by contract, based upon valuable consideration, to stand seized to the use of or in trust for another. *Wood v. Cherry,* 73 N. C., 115.

It is so well settled in this State that the statute of frauds, requiring a memorandum in writing in respect to the sale of land to be signed by the party charged, does not apply to the declaration of trusts, that it is a waste of time to discuss the question at this late day. *Riggs v. Swan,* 59 N. C., 118.

At common law it was not necessary that a trust be declared in any particular mode. In England the statute requires that declarations of trust be evidenced and proved by some writing, but in this State there is no such requirement, and therefore the matter stands as at common law. *Riggs v. Swan,* 59 N. C., 118; *Shelton v. Shelton,* 58 N. C., 292.

In view of this well settled principle, it has been held that where one person buys land under an agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchases the land.

Cobb v. Edwards, 117 N. C., 244; *Holden v. Strickland,* 116 (143) N. C., 185; *Owen v. Williams,* 130 N. C., 165.

The jury have found the facts set out in section 1 of the complaint to be true. Those facts are sufficient to create a trust in the defendant for plaintiff's benefit, and it necessarily follows that the judgment pronounced by his Honor is correct.

The motion to nonsuit was properly denied, as there is abundant evidence introduced by the plaintiff tending to establish the trust alleged in the complaint.

No error.

Cited: Brogden v. Gibson, 165 N. C., 25; *Lynch v. Johnson,* 171 N. C., 629.

R. L. SMITH v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 1 October, 1913.)

1. Carriers of Goods—Bills of Lading—Contract of Carriage—Acceptance of Shipment—Liability.

A common carrier of freight assumes the duty and responsibility of transporting and delivering the freight it accepts for that purpose, and it is not necessary that the contract of carriage should be evidenced by a bill of lading or other writing in order to subject the carrier to the payment of damages of that character in an action brought for that purpose.

2. Carriers of Goods—Live Stock Bills of Lading—Evidence.

It is necessary for a common carrier, relying upon a stipulation in its live-stock bill of lading limiting the value of the stock in event of recovery, to show that the shipment was made under this form of its bills of lading, and the mere fact that such a bill of lading is in the possession of the plaintiff, without its identification as being the one relied on, is insufficient.

3. Same—Interstate Commerce Commission—Classifications.

The classifications of the Interstate Commerce Commission of rates of freight on live stock is irrelevant when the carrier, relying upon a stipulation in its live-stock bill of lading, fails to show that the shipment was made under it.

4. Appeal and Error—Objections—Evidence—Prior Testimony.

Exceptions to the competency of evidence will not be sustained on appeal when the same witness has previously testified, without objection, to the same facts in another part of his examination.

5. Carriers of Goods—Live Stock—Damages—Evidence.

In an action to recover damages from a carrier for the negligent killing of a mule in a carload shipment of live stock, evidence is competent that the mule was found dead at the destination of the shipment with its foot through the slats of the cattle car where a piece of the slat had been, for some time, broken off, which otherwise would not have permitted it; that this was the only place in the car through which a mule could have gotten its foot; that the mule had apparently fallen down in this position and could not again get up.

(144) APPEAL by defendant from *O. H. Allen, J.*, at April Term, 1913, of PITT.

This is an action to recover damages for injury to a horse and a mule, caused by the negligence of the defendant.

The following verdict was returned by the jury:

1. Was the mule mentioned in the complaint injured and killed by the negligence of the defendant: Answer: Yes.

2. If so, in what amount has the plaintiff been damaged thereby? Answer: $200.

3. Was the mare mentioned in the complaint injured by the negligence of the defendant? Answer: Yes.

4. If so, in what amount has the plaintiff been damaged thereby? Answer: $50.

5. Did the plaintiff file claims with the defendant for said injuries, as set out in the complaint? **Answer: Yes.**

Judgment was entered in favor of the plaintiff according to the verdict, and the defendant excepted and appealed.

W. F. Evans for plaintiff.
Harry Skinner for defendant.

ALLEN, J. The plaintiff did not introduce a bill of lading, but he offered evidence tending to prove that on 4 January, 1911, he purchased several horses and mules in Richmond, which were delivered to a connecting line of railway, and were delivered to him at Greenville by the defendant; that he paid the freight to the defendant, and that one mule was dead and a horse injured, when the cars reached Greenville.

The plaintiff further testified that he was present and saw the stock loaded on the cars in Richmond, and that no bill of (145) lading was given to him. All of this evidence was objected to by the defendant, upon the ground that the contract of carriage could not be proven by parol, and at the conclusion of the evidence there was a motion for judgment of nonsuit, the defendant contending that as no bill of lading had been introduced, the plaintiff could not recover.

The position of the defendant cannot be sustained.

In Hutchison on Carriers, sec. 118, the author says: "No receipt, bill of lading, or writing of any kind is required to subject the carrier to the duties and responsibilities of an insurer of the goods. As soon as they are delivered to him for present carriage, and nothing necessary to their being forwarded remains to be done by the owner, the law imposes upon him all the risk of their safe custody as well as the duty to carry as directed. He is regarded as exercising in some sort the functions of a public office, and the law is said to impose upon him his duties and obligations upon this ground as well as upon the ground of the contract, and as soon as the delivery to him and his acceptance are shown, the law imposes the duty and responsibility in virtue of his public employment."

The Supreme Court of the United States also said in *R. R. v. Jurey,* 111 U. S., 591: "No particular form or solemnity of execution is required for a contract of a common carrier to transport goods. It may be by parol, or it may be in writing; in either case it is equally binding." And our own Court declared in *Berry v. R. R.,* 122 N. C., 1003: "Delivery of a bill of lading is not necessary to fix liability upon the defendant. *Wells v. R. R.,* 51 N. C., 47."

No evidence was offered identifying the paper in possession of the plaintiff, or the one held by the defendant, or connecting either with the shipment in controversy, and as no bill of lading containing a valuation clause was in evidence, the classifications of the Interstate Commerce Commission were immaterial and were properly excluded.

The plaintiff testified that no bill of lading was given to him, and he explained the possession of the paper, in form a bill of lading, by showing that after the defendant filed an answer setting out certain stip-
(146) lations, which it alleged were in the bill of lading under which the shipment was made, his counsel wrote to the party from whom the horses and mules were purchased in Richmond, asking for a form of bills for shipments of stock, for the purpose of comparison with the allegations in the answer, and that the paper he had was the one sent him in compliance with his request.

The paper in possession of the defendant's counsel purported to be a copy of a bill of lading, but no evidence was offered showing when it was made, or otherwise explaining it.

The defendant also excepted to the admission of the following question and answer:

The plaintiff was asked, "Would it have been possible, from your observation, for that mule's foot to have gone through the crack unless there had been a piece broken out?" He answered by saying that she could not have done so, in his opinion; that he noticed the car, and that that was the only place that a mule could have gotten its feet through; that the plank at that point had been split off and was an old break.

It is not disputed that the foot of the mule was through the crack, and it was favorable to the defendant to show that there was no other hole in the car.

It follows that the only part of the answer of the witness that was material is the statement, "that the plank at that point had been split off and was an old break." This evidence was, in our opinion, competent, but if not, the defendant could not avail itself of the exception, as the same witness testified to the same facts in another part of his examination, without objection.

He said: "When the shipment reached Greenville there was a mule dead in one car, and one of the horses was severely injured in another. The mule had her feet hanging in a crack of the car about waist high from the floor, and she had apparently fallen down on her back while in that position and could not get up. That the car was slatted with narrow cracks between the slats about 2 inches wide, but at the
(147) point where the mule's feet were hung a piece had been broken out, making the crack at that point much larger. The slats of the car were about 2 inches wide, and at that point about half of the slat

had been broken out, making an opening about 4 inches wide, and large enough for the mule's feet to catch in. That he examined the car thoroughly, and that the break in the slat at the point mentioned had the appearance of having been done for some time, as the broken slat was dirty and colored different from a new break."

The principles announced in *Express Co. v. Croninger,* 227 U. S., and in other cases following it, are not involved in the decision of this case, as no bill of lading containing a valuation clause was in evidence.

The special instructions requested, predicated on the presence of a bill of lading, and the materiality of the classifications of the Interstate Commerce Commission, were properly refused, and as the exceptions to the charge are not considered in the brief, they are deemed to be abandoned. We find

No error.

Cited: *McConnell v. R. R., post,* 508; *McRary v. R. R.,* 174 N. C., 564.

J. R. DAVENPORT ET AL. v. COMMISSIONERS OF PITT COUNTY.

(Filed 1 October, 1913.)

1. Injunction—Findings of Fact—Appeal and Error.

While the findings of fact of the Superior Court judge are not controlling on appeal from an injunction order, they are entitled to consideration in the Supreme Court.

2. County Commissioners — Bridges — Discretionary Powers — Good Faith—Courts—Appeal and Error.

The courts will not review the action of county commissioners in building a bridge wholly situated in the county, to take the place of a public ferry for many years operated across a stream, where there is no evidence of fraud or oppression; such matters being entirely within the discretionary powers conferred by law upon the commissioners, when exercised in good faith.

APPEAL by plaintiff from *O. H. Allen, J.,* at March Term, (148) 1913, of PITT.

Action seeking an injunction. The court found the following facts:

1. That the resolution in controversy was passed by the board of commissionrs on 14 November, 1912, it being an adjourned meeting from the regular meeting which was held on Monday, 4 November, 1912.

2. That on the first Monday in December, 1912, there was a motion by plaintiffs to rescind the action of the commissioners in passing the resolution in controversy, and on said motion being made all action on said resolution was deferred.

3. That said commissioners in passing said resolution on 14 November, acted in good faith and within the discretion vested in them by law.

4. That the defendants, the present board of commissioners of Pitt, have acted in good faith and within the discretion vested in them by law in regard to the resolution in controversy.

5. That Boyd's Ferry is a public ferry and the roads leading up to said ferry on the north and south side of said ferry are public roads.

6. That a bridge at Boyd's Ferry is a public necessity.

It is therefore, on motion of Julius Brown, attorney for the board of commissioners of Pitt County, ordered, adjudged, and decreed that the restraining order heretofore made in the above entitled action be and the same is hereby dissolved and discharged, and that this action be dismissed at the cost of the plaintiffs, to be taxed by the clerk of this court.

O. H. ALLEN,
Judge Presiding.

From an order dissolving the injunction, the plaintiffs appealed.

Albion Dunn, Harry Skinner for plaintiffs.
Julius Brown, F. G. James & Son, Jarvis & Wooten for defendant.

(149) BROWN, J. The object of this action is to enjoin the defendant from constructing a public bridge in lieu of a public ferry which has been operated for many years across Tar River at Boyd's Ferry, wholly within the county of Pitt.

We have examined the affidavits printed in the record, and can find no evidence of fraud or corruption, or of a gross abuse of discretion, and we fully concur in the finding of his Honor that the defendants have acted in good faith and within the discretion vested in them by law in regard to the wisdom and feasibility of erecting the bridge.

While the findings of fact of the judge of the Superior Court are not binding on us in injunction orders, we give them due weight and consideration, and we fully concur in those made in this case.

In adopting the resolution to build the bridge, the defendants acted well within their legal powers. In the absence of fraud, or oppression, it is a matter within their sound discretion, and will not be reviewed by us. *Glenn v. Commissioners,* 139 N. C., 412; *Brodnax v. Groom,* 64 N. C., 244; 7 A. & E., 1009; 16 A. & E., 423.

In discussing the discretion of county commissioners in building bridges, in *Brodnax v. Groom,* 64 N. C., 250, *Judge Pearson* says: "In short, this Court is not capable of controlling the exercise of power on the part of the General Assembly, or of the county authorities, and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly as to the county authorities, and erecting a despotism of five men, which is opposed to the fundamental principles of our government and the usage of all times past."

The principle laid down in this often cited case has been consistently adhered to, and never departed from by this Court where the act is clearly within the power of the county authorities, and no fraud, corruption, or oppression is shown.

Affirmed and action dismissed.

Cited: Supervisors v. Comrs., 169 N. C., 549.

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(150)

BESSIE COOPER ET AL. v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 24 September, 1913.)

1. Trials—Evidence Incompetent—Withdrawing Evidence—Appeal and Error—Harmless Error.

It is not only within the province of the trial judge, but it is his duty, to withdraw from the consideration of the jury evidence which has been erroneously admitted on the trial of an action; and when he has appropriately done so, and it does not appear of record that the appealing party has thereby been injured, it will not constitute reversible error, the error committed having been cured.

2. Expert Evidence—Personal Observation—Corroborative Evidence.

In this action to recover damages of the defendant for negligently inflicting an injury upon the plaintiff, the testimony of a physician as to the plaintiff's physical condition thereafter is held competent as substantive evidence, it being a statement of a fact learned from the personal examination made by the witness, and also as corroborative of other evidence introduced at the trial.

3. Expert Evidence—Physicians—Statements of Party—Biased Testimony—Competency—Evidence Withdrawn—Appeal and Error—Harmless Error.

There is authority that the opinion of a medical expert based upon his examination and statements of an injured person when the examination has been made for the purpose of becoming a witness for such person in an action to recover damages for a personal injury, is incompetent; but however this may be, where testimony of this character of the witness has been withdrawn from the consideration of the jury by the trial judge, any error committed in admitting it is cured.

4. Evidence, Corroborative—Failure to Restrict Evidence—Objections and Exceptions—Appeal and Error.

Where evidence admitted at the trial is competent only in corroboration, it is the duty of the complaining party to request the court to restrict it to the purposes for which it is competent, and failing to do so, he may not successfully assign it for error on appeal.

(151) APPEAL by defendant from *Adams, J.*, at February Term, 1913, of CHATHAM.

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

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

Hayes & Bynum for plaintiff.
Murray Allen for defendant.

ALLEN, J. The principal exception relied on is to the admission of certain evidence of Dr. Farthing, an expert witness, which was important to the plaintiff, and which was withdrawn by the court from the consideration of the jury, the defendant contending that although withdrawn from the jury, its impression upon the minds of the jurors remained and affected their verdict.

The authorities are all to the effect that it was not only within the power, but that it was the duty of the judge to withdraw evidence, which he concluded had been improperly admitted (*Gilbert v. James,* 86 N. C., 248; *Bridges v. Dill,* 97 N. C., 225; *Wilson v. Manufacturing Co.,* 120 N. C., 95), and the rule is fully recognized in *Parrott v. R. R.,* 140 N. C., 547, relied on by the defendant, in which *Justice Brown,* while discussing the withdrawal of evidence, says: "His Honor withdrew the consideration of it from the jury in a very clear and distinct manner. In doing so we do not think his Honor exceeded his authority. When we can see that the appellant has been really injured by such action, we will always order a new trial."

We cannot see from the record that the defendant has been injured, and if we were to base a reversal upon the theory of the defendant, we would be acting upon mere conjecture, unsupported by any fact.

The qualifications of jurors prescribed by the statute are that they shall be men "of good moral character and of sufficient intelligence"—"good and lawful men" of the Constitution, and as the presumption is that the public officers intrusted with the duty to make up the jury lists have performed their duty, we must assume, until the contrary ap-
(152) pears, that there was no man on the jury in this action, who could not understand the direction of the judge not to consider certain evidence, or who would not honestly obey the instruction.

The present *Chief Justice* said in *Wilson v. Manufacturing Co.*, 120 N. C., 95: "If the jury are to be deemed intelligent enough to obey his instructions in the charge, they must also be able to comprehend his instruction that certain evidence had been improperly admitted and is not to be considered by them."

The comments of Mr. Creasy on the jury system, in his work on the English Constitution, may be appropriately applied to our own juries. He says: "Juries are, of course, liable to error; and when they err, their blunders are made in public, and draw at least a full share of notice; but, on the other hand, we should remember the invariable honesty and the almost invariable patience with which juries address themselves to their duty. No spectacle is more markworthy than that which our common-law courts continually offer of the unflagging attention and resolute determination to act fairly and do their best, which is shown by jurors, though wearied by the length of trials, which are frequently rendered more and more wearisome by needless cross-examinations and unduly prolix oratory. . . . Nor are the errors of judgment which juries fall into by any means so numerous as the impungers of the system assert. The jury generally know what they are about much better than their critics do. 'Twelve men conversant with life, and practiced in those feelings which mark the common and necessary intercourse between man and man,' are far more likely to discriminate correctly between lying and truth-telling tongues, between good and bad memories, and to come to a sound common-sense conclusion about disputed facts, than any single intellect is, especially if that single intellect has been 'narrowed, though sharpened,' by the practice of the profession of the law. . . . Each juror knows that it is not by him alone, but by him and his eleven fellow-jurors conjointly, that the verdict is to be given. Each juror, therefore, knows that if any of the eleven differ from him in opinion at the end of the case, they must argue the matter out among them. Each juror, therefore, watches the entire progress of the trial with his reasoning faculties intent on every (153) part of each litigant's case, and thus prepares himself for a full and fair discussion of the whole," and he quotes from the French philosopher De Tocqueville, that "The jury, and especially the civil jury, serves to imbue the minds of the citizens of a country with a part of the qualities and character of a judge; and this is the best mode of preparing them for freedom. It spreads amongst all classes a respect for the decisions of the law; it teaches them the practice of equitable dealings. Each man in judging his neighbor thinks that he may be also judged in his turn. This is in an especial manner true of the civil jury, for though hardly any one fears lest he may become the object of a criminal prosecution, everybody may be engaged in a lawsuit. It teaches

every man not to shrink from the responsibility attaching to his own acts; and this gives a manly character, without which there is no political virtue. It clothes every citizen with a kind of magisterial office; it makes all feel that they have duties to fulfill towards society, and that they take a part in its government; it forces men to occupy themselves with something else than their own affairs, and thus combats that individual selfishness which is, as it were, the rust of the community."

The evidence of Dr. Farthing, which was admitted and not withdrawn, that the muscles in the region of the stomach were rigid, was competent as substantive evidence, and in corroboration of the plaintiff, as the evidence was the result of a physical examination of the plaintiff and was the statement of a fact.

There is authority for the position taken by the defendants, that the opinion of a medical expert, based upon an examination and statements of the party injured, are incompetent, when the examination is made for the purpose of becoming a witness for such party (*R. R. v. Huntley,* 38 Mich., 537; *R. R. v. Wiley,* 134 Ky., 461; but these decisions have no application to the facts presented here, as it appears that all statements made to the doctor by the plaintiff, and his opinion thereon, were withdrawn from the jury.

(154) The defendant admits that the evidence of the father of the plaintiff was competent in corroboration of the plaintiff, but insists that it was not substantive evidence, and complains that his Honor did not restrict the purpose for which it was introduced.

There was no request to restrict the evidence, and the objection is met by Rule 28, 140 N. C., 496: "Nor will it be ground of exception that the evidence competent for some purpose, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted."

Upon the whole record, we find

No error.

Cited: Lucas v. R. R., 165 N. C., 269; *Bagwell v. R. R.,* 167 N. C., 612.

CITY OF RALEIGH v. CARY K. DURFEY.

(Filed 1 October, 1913.)

1. Municipal Corporations — Adverse Possession — Title — Limitation of Actions.

A municipality may acquire title to real property by adverse possession under the statute when held under the same conditions as required of individuals to ripen their title thereby.

2. Municipal Corporations—Sidewalks—Legislative Powers.

A city may sell and convey strips of land owned by it on each side of its market house, in the shape of sidewalks, used for the convenience of hucksters therein and other tenants thereof, when such sale is authorized by statute, and the adjacent owners of property have acquired no rights in these walks incident to the use and enjoyment of their property.

3. Same—Deeds and Conveyances—*Right of Abutting* Owners.

The city of Raleigh, being authorized by the Legislature to sell its market house, including two walkways, one on the north and the other on the south side, each about 6 feet wide, which were used for the convenience of the hucksters and other tenants, with doors opening from each stall, where farm wagons would back up with produce for sale, under the provisions of the statute, contracted to sell the market house, together with these walkways, to the defendant, who refused the deed upon the ground that the plaintiff was without authority to sell the two walkways included in the transaction, as they were a part of the two public streets of the city about 50 feet wide on each side of the market house, and that the owners of the property, having a sufficient sidewalk provided for them, on their side of these streets, had acquired rights therein: *Held*, the walkways for the market house were not a part of the public street, and the owners on the opposite side of the streets could acquire no rights in them.

4. Municipal Corporations—Deeds and Conveyances—Constitutional Law—Sidewalks—Legislative Powers.

There is no constitutional restriction upon the right of the Legislature to authorize a municipality to sell its public sidewalks, under the circumstances of this case, and a sale made in pursuance of the powers conferred is valid.

CONTROVERSY without action, heard by *Cooke, J.*, September (155) Term, 1913, of WAKE, upon the following agreed state of facts:

1. The city of Raleigh is a municipal corporation, chartered under chapter 59, Private Laws of North Carolina, Session 1913, as amended, which charter was adopted on the first Tuesday in April, 1913, by a majority of the then registered and qualified voters of the city of Raleigh, and that James I. Johnson is mayor of the city of Raleigh.

2. That the city has undisputed possession of and claims to own property situate on Fayetteville Street, lying between East Hargett and East

Martin streets, and running back to Wilmington Street, lying between Exchange Place north, or Market Street, and Exchange Place south, and known as the market house, together with the lot upon which the said building is situate, said property measuring 40.2 feet on Fayetteville Street, running back in a rectangular shape 210 feet to Wilmington Street, measuring 40.1 feet on Wilmington Street.

3. That subsection I, section I, article 5 of the said charter, relative to the powers given the board of commissioners of the city of Raleigh, reads as follows: "To open new streets, change, widen, extend, and close any street that is now or may hereafter be opened, and adopt such ordinances for the regulation and use of the streets, squares, and parks and other public property belonging to the city as it may deem (156) best for the public welfare of the citizens of said city."

4. That Exchange Street south, from building line to building line, is 50.4 feet, and Exchange Street north, from building line to building line, is 51.6 feet; that the sidewalks on the north and south sides of the market building measure 6.9 feet from the curb of said sidewalks to the building line of said building, which sidewalks run from Fayetteville Street to Wilmington Street on both sides; that Exchange Street north is 34 feet wide from curb to curb and Exchange Street south is 35 feet wide from curb to curb; that from building line on the south side of south Exchange Street to the building line on the north side of north Exchange Street is a distance of 155.10 feet. Said Exchange streets north and south are only 210 feet long.

5. That Exchange streets north and south are now and have for many years been used in connection with the market, produce wagons backing up to the sidewalks on either side of the market, on Exchange streets north and south; the horses to said wagons facing north and south, as the case may be, and standing at right angles to the north and south sides of the said market; that the length of a horse and wagon is between 16 and 18 feet.

6. The Legislature of North Carolina, Session 1913, authorized the city of Raleigh to sell said property, including the sidewalks on the north and south sides of said building, at a minimum price of $80,000, said act forming chapter 315 of the Private Laws of North Carolina, Session 1913, a copy of which act is hereto attached and marked "Exhibit A."

7. Said property was duly advertised for sale and sealed bids requested, together with a deposit of a certified check for $5,000.

8. On 11 August, 1913, said bids were duly opened by the commissioners of the city of Raleigh, when and where it was found that Cary K. Durfey, as surviving executor and trustee of the estate of Florence P.

Tucker, deceased, was the highest bidder at the price of $90,575, and that his bid was made on condition that the title to said property should be satisfactory, a certified check for $5,000 having accom- (157) panied said bid in accordance with the requirement aforesaid.

9. That the bid of said Durfey as aforesaid was accepted by the said city, and subsequent to said acceptance he assigned his bid, under the same conditions as the bid was made, to Cary K. Durfey, trustee, which assignment was accepted by the said city of Raleigh.

10. That after reasonable time had been given the said Durfey, trustee, to investigate the title to said property, a deed in the usual form and with the usual warranty or warranties, conveying the said building and the said lot, including the sidewalks on the north and south sides, in fee simple, was tendered to said Durfey, trustee, and a demand made for the balance of the purchase price, namely, $85,575, the payment of which was refused by said Durfey for the reason that he stated that the city of Raleigh had no right even under the act aforesaid to sell the sidewalks on the north and south sides of said building, and for the further reason that the city of Raleigh could show no title to part of the property.

11. That the old maps of the city of Raleigh show that in 1834 this was a solid block of property owned by various individuals. On 12 December, 1846, Matthew Shaw gave to the commissioners of the city of Raleigh a deed conveying a tract of land 70 feet by 210 feet, bounded on the west by Fayetteville Street, on the south by the line of the late John Marshall, on the east by Wilmington Street, and on the north by the line of the city market lot.

12. That many years ago the courthouse of Wake County was burned, together with numerous records of conveyances, etc., and that no conveyance of the city market lot referred to in the deed of Matthew Shaw to the commissioners of the city of Raleigh can be found.

13. That there is on record a deed, registered in book 11, at page 190, in the office of the register of deeds for Wake County, from William Hill to Fannie Murden, which states that the lot conveyed by Hill's deed to Murden faces on Martin Street and runs back (158) 68 feet to the line of lot of Matthew Shaw.

14. That it is 70 feet from the northeast corner of the intersection of Fayetteville and Martin streets to the southeast corner of the intersection of Exchange Street south, and Fayetteville Street. That so far as the records of Wake County show, the aforesaid lot conveyed by Matthew Shaw to the city of Raleigh was the only piece of property that he owned in Lot No. 114, which was the south part of the old block as shown by the city maps, bounded by Hargett, Martin, Wilmington, and Fayetteville streets, and measuring about 420 by 210 feet.

15. That there is no record as to whether Exchange Street north was opened by the city out of the property bought by the city for that purpose or by condemnation, but the old maps show that Exchange streets north and south were not streets that were laid off by the State of North Carolina, in the plan of the city of Raleigh.

16. That Exchange Place south covers a part of the property purchased from Matthew Shaw, the balance of said property being occupied by a portion of the market house.

17. That old inhabitants state that the present site, together with the streets thereon, were used for the market house prior to 1860; two wooden structures, namely, the city market and the fire and police house, being situate thereon; that these wooden structures were burned about 1864, and that the present building was built by the city of Raleigh as it now stands about 1867, and has been continuously used as a city market house since that date.

18. That the city of Raleigh has been in undisputed adverse possession under known and visible bounds of the land occupied by the market house for at least sixty years, occupying the same and collecting rents for the same.

19. That subsequent to the opening of Exchange streets north and south, numerous stores have been erected on the north side of Exchange Street north, or Market Street, with entrances facing thereon, and
(159) likewise numerous stores have been erected on the south side of Exchange Street south, with entrances facing on said street, all of which belonged to private parties.

20. That for many years both Exchange Place north and Exchange Place south have been shown on the maps of the city of Raleigh as being of the width above set out.

21. That while the sidewalks on the north and south sides of the market house are paved and curbed, they are used principally by persons trading and trafficking with the produce wagons and for giving access to the side doors of the market, and to a much less extent by persons passing to and from Fayetteville and Wilmington streets.

The questions presented in this controversy without action are as follows:

1. Has the Legislature of North Carolina the authority to authorize the city of Raleigh to include in the sale of the market house the sidewalks on the north and south sides of the market-house building?

2. If the Legislature has no such right, does it make null and void the entire act authorizing the sale of said property?

3. Has the city of Raleigh a good title to the said market property, not including the said sidewalks?

And the parties hereto submit this controversy without action to the court and agree to abide by the decision and the termination of the same.

JOHN W. HINSDALE, JR.,
Attorney for the City of Raleigh.
W. H. PACE,
Attorney for Defendant.

The court rendered judgment for plaintiff. Defendant appealed.

J. W. Hinsdale, Jr., for plaintiff.
W. H. Pace for defendant.

BROWN, J. It is contended by the defendant, as a reason why he should not be required to complete his purchase:

1. That the plaintiff has no valid title to part of the property purchased.

2. That the plaintiff has no right under the act of the Legislature to sell the sidewalks on the north and south sides of the (160) market-house building.

The property purchased by the defendant is the market-house property of plaintiff, situated in the center of Exchange Place. The records of Wake County were partially destroyed by fire some years ago, but it is admitted that the plaintiff has a perfect paper title to all of the property sold except to a portion of it now covered by a part of the market-house building.

It is admitted that the plaintiff has been in undisputed actual adverse possession under known and visible lines and boundaries of the entire land and property for sixty years, occupying the same and collecting the rents.

Upon these facts it would seem to be plain that plaintiff has acquired an absolute title to the property. One of the methods of acquiring title to land is by adverse possession. *Mobley v. Griffin,* 104 N. C., 115. We know of no reason or authority by which a municipality is excluded from that rule and rendered incompetent to acquire title by that method.

The principal controversy seems to be as to whether plaintiff can legally convey the narrow 6-foot strip on north and south sides of the market-house running from Fayetteville to Wilmington streets.

From the facts stated in the case agreed, it is manifest to us that these narrow strips bordering the north and south sides of the market house are not sidewalks, in the ordinary acceptance of that term, or parts of the public streets of the city. They were placed there and evidently elevated a few inches above the street, for the protection of the market house when it was built, and for the convenience of the butchers, hucksters, and other tradesmen who occupy the market-house stalls.

The doors to a dozen of these stalls open on these strips on each side of the market house, and are used by the occupants and their customers. If the market house itself is removed, these strips would be of no use to any one, but would be a dangerous obstruction in the center of Exchange Place.

It is admitted in the case agreed that the public streets on
(161) both north and south sides of this market-house property are known as Exchange Place north, and Exchange Place south, each being about 50 feet in width. It is thus manifest that this was all an open space at one time, and that the market house was built in the center of it.

These narrow strips bordering the market house are not a part of the public street, but are used daily for the numberless carts and wagons to back up against to unload their produce into the stalls opening on the strips. They afford protection as abutments to the market-house building as well as a convenience to its occupants.

It is contended that the abutting property owners on south and north sides of Exchange Place have an interest in the maintenance of these strips as sidewalks which cannot be lawfully taken from them.

It is almost beyond the ken of mortal man to see what benefit these narrow borders to the market house can be to those landowners on the north and south sides of Exchange Place. There is a spacious sidewalk on each side in front of their property leading from Fayetteville to Wilmington streets. Their interest in these narrow strips is more imaginative than real. But as they are not in any sense public streets, they can have no interest in them.

Assuming, for argument's sake, that these strips are public streets, the power of the General Assembly to authorize the sale of this property, including the so-called sidewalks, is undoubted, there being no constitutional restriction. *Moore v. Meroney,* 154 N. C., 158; *Marietta v. Henderson,* 121 Ga., 399; *Williams v. Corey,* 75 Ia., 194.

As the landowners abutting on Exchange Place are not complaining, and can sustain no possible injury, their pecuniary rights need not be considered.

As is said by the Supreme Court of Iowa in a somewhat similar case: "The owners of lots abutting on the west side of the narrowed street could not enjoin the council from carrying their proposed action into effect, on the ground that they would be damaged thereby, inas-
(162) much as the damages relied on by them and shown by their evidence were imaginary rather than actual." *Williams v. Corey, supra.*

In this case the court held that the taking of 12 feet from a street, thereby reducing it to 41 feet, was no injury to property owners on the

other side of the street. No property is taken from these landowners, and they are not directly damaged, and as is said in *Hyde Park v. Dunham,* 85 Ill., 569, "Municipal authorities of cities and villages are vested with complete control over streets, and may contract or widen them when in their opinion the public good so requires them, and damages sustained in consequence of the exercise of such power when property is neither *taken nor directly damaged* thereby are too remote and contingent to be allowed."

Moose v. Carson, 104 N. C., 431, and *Southport v. Stanly,* 125 N. C., 466, cited by defendant, have no application to the facts of this case. The judgment is

Affirmed.

Cited: LeRoy v. Elizabeth City, 166 N. C., 96; *Cross v. R. R.,* 172 N. C., 123.

J. W. BIRD v. THE BELL LUMBER COMPANY ET AL.

(Filed 1 October, 1913.)

1. Master and Servant—Safe Appliances—Negligence.

The master is required to furnish his employees operating a cotton gin with equipment and appliances which are known, approved, and in general use; and he is liable for injuries received by his employees, within the scope of their duties, which are proximately caused by his failure to have done so, or such failure will afford evidence from which his negligence may be inferred.

2. Same—Duty of the Servant to Repair—Contributory Negligence.

Where the foreman or general manager of one of several large farms owned by the master, on which there was a cotton gin, had ample authority and available means for keeping the gin in proper repair, and was charged with the duty of doing so, is injured while attempting to shift the power belt of the gin with a hoe handle, the gin having originally been equipped with levers with which the belt could have been thus shifted without appreciable risk, the damages sustained are attributable to the fault of the servant and as a consequence of his neglect to perform the duty intrusted to him, and he may not recover in his action against the master.

3. Same—Immediate Commands—Evidence—Questions for Jury.

While the immediate command of the master may at times justify conduct of the servant in attempting to work a defective power machine which might otherwise be imputed to his contributory negligence, the question, upon conflicting evidence, as to whether at the time of the injury consequently received, the servant was so acting, is for the jury, under proper instructions from the court.

4. Evidence — Delayed Demands — Recollection of Witnesses — Substantive Evidence.

In an action to recover damages for an injury alleged negligently to have been inflicted, it is competent to show that no claim had been made on the defendant for "nearly a year later" as bearing upon the recollection of the witnesses, and under certain conditions, it is in itself a relevant circumstance affecting the validity of the claim.

5. Instructions—Construed as a Whole—"Contentions"—Application of Evidence.

A charge of the trial judge to the jury should be considered as a whole, and where he has given a general statement of the defendant's contention under one issue, containing some matter applicable only to a different one, it will not be necessarily held for error when it appears that he gave only legal significance to the evidence as it correctly related to each of the several issues.

6. Appeal and Error—Evidence—Verdict—Harmless Error.

Where, in an action involving the issues of negligence and contributory negligence, evidence has been improperly admitted on the second issue, and the answer to the first issue has been in the appellant's favor, the error is rendered harmless by the verdict of the jury.

(163) APPEAL by plaintiff from *Carter, J.*, at the May Term, 1913, of WAYNE.

This action was to recover damages from defendant company for physical injuries caused by reason of the alleged negligence of (164) said defendant in failing to supply safe and suitable equipment for a cotton gin owned by the company and operated for their benefit.

The cause was submitted on the three issues, (1) of negligence, (2) of contributory negligence, (3) damage. The jury answered the first issue in favor of plaintiff.

Judgment on the verdict, and plaintiff excepted and appealed.

W. C. Munroe and G. E. Hood for plaintiff.
Dortch & Barham and Langston & Allen for defendant.

HOKE, J. We find no reversible error on the record, assuredly none which gives plaintiff any just ground of complaint. From the facts in evidence, it appears that on 29 November, 1911, plaintiff received serious physical injuries while engaged in running a cotton gin for defendant company; the said injuries being caused by reason of the endeavor on part of plaintiff to shift the power belt of the gin, using a hoe handle for the purpose. That the gin when in order was equipped with levers for the purpose and by which the belt could be shifted without appreciable risk. We have repeatedly held that in the operation of machinery of this character the employer must supply his employees with

equipment and appliances which are known, approved, and in general use, and that a failure to do so will amount to negligence, or will afford evidence from which such negligence may be inferred. In the present case, however, it was further made to appear that defendant company, owned and controlled by the other defendants, John R. Bell and L. A. Bird, were engaged in an extensive business operating two or three large farms, two cotton gins, and two or three sawmills, etc.; that at the time of the occurrence the plaintiff, who was a brother of one of the defendants, was overseer of one of these farms, having separate control of the same and the gin situate thereon, as foreman and general manager. That plaintiff was fully aware of the dangers incident to the defect, and while the risk was thereby much increased, the device was simple in structure, and plaintiff had the authority and it was part of this duty to have this and other necessary repairs made, and the material, tools, and facilities were at hand for the purpose, or could have (165) been readily procured. There is also evidence on the part of the defendant, unchallenged in the record, that a repair shop was accessible, and from this a machinist or mechanic could have been had to do this work. In this aspect of the testimony it could very properly be maintained that the plaintiff has suffered by reason of his own default, the case coming well within the decision of *Lane v. R. R.*, 154 N. C., as follows: "An employee whose duty it is to make a second inspection of freight cars before they leave the railroad yards in a train, and to see that the car doors are properly fastened, secured, and in condition, assumes the risks of his employment and cannot recover damages caused by a car door swinging loose and down at one end of the rail at the top, along which the door runs upon wheels, when he is furnished with appliances sufficient to repair a defect at the bottom of the door, readily discernible, and when its repairs would have prevented the injury complained of."

It was insisted for plaintiff that this position should not prevail against him by reason of certain testimony tending to show that he acted at the time under the immediate command of the proprietors or one of them, giving him at the same time assurances that the repairs would be made. The principle is sound under certain conditions. We have frequently held that the orders of a superior may at times justify conduct which might otherwise be imputed for contributory negligence (*Allison v. R. R.*, 129 N. C., 336; *Patton v. R. R.*, 96 N. C., 455), but there is doubt if such an interpretation of the evidence is permissible in the present case. Speaking to this matter, the plaintiff, a witness in his own behalf, having stated that he was in charge of the farm and gin and had the repairs made, etc., testified that on one occasion Mr. Bell was down there when one of the levers had broken off, and

he asked witness if this made it very dangerous, and witness replied, "No, not very," and Mr. Bell replied, "If you can do so, keep on and maybe things will slack up and you can fix it." Recalled, the witness in reference to this conversation said: "Mr. Bell asked me if there was any danger about the broken lever," and witness replied, "Not very much," and Mr. Bell replied, "Well, go ahead, and maybe there
(166) will come a rainy day and we could catch up and fix it." Witness further said that on one occasion his brother, Mr. Bird, was down there when both levers had broken, and witness told him about it, and he said, "He didn't have any timber, and would have Mr. Summerlin to fix them next morning, and for witness to go ahead."

It does not distinctly appear at what time this conversation with Bird took place, whether at the time of the occurrence or not. Both of the proprietors deny that they had any such conversation, and testify that being there on different occasions, they noted that the levers were broken and suggested or directed that they be properly repaired. It does not seem that either one of them was intending to take charge of matters or that they were acting in displacement of plaintiff's authority as manager. Certainly, under the circumstances indicated, the only view of the case that would justify imputing responsibility to defendant for the injury would be that plaintiff acted on the requirement of the proprietors or one of them, and this question was referred to the jury under a proper charge on the first issue and they have determined the fact against the plaintiff. They have necessarily said that no such command was given, and this being true, the plaintiff has shown no right to redress. There are objections to the rulings of the court on questions of evidence, but they do not affect the result.

The defendant was allowed to ask the witness Bell when he first received notice that any claim was made against the company, and who made answer, "Nearly a year later." The time elapsed in preferring a claim has direct bearing on the recollection of the witnesses and under certain conditions may in itself be a relevant circumstance affecting the validity of the claim. Wigmore on Evidence, sec. 284.

It was earnestly urged that the court improperly allowed reception of testimony tending to show careless conduct of plaintiff about the machinery on other occasions. This was evidence chiefly bearing on the second issue, that in reference to contributory negligence, and the jury having answered the first issue in favor of the plaintiff, the error
(167) if committed has become harmless. It is true, his Honor referred to this testimony in charging the jury on the first issue, but a perusal of the record will show that his Honor was then giving a general statement of the defendant's contentions, and that he only gave the testimony legal significance in his charge on the second issue. Consid-

ering the charge as a whole, and it is right so to consider it (*Kornegay v. R. R.*, 154 N. C., 390; *S. v. Exum*, 138 N. C., 599), we are of opinion that every position available to plaintiff has been fairly and correctly referred to the jury, and no reason appears for disturbing the results of the trial.

No error.

Cited: S. v. Ray, 166 N. C., 433; *Monk v. Goldstein*, 172 N. C., 519.

SARAH J. BLOUNT v. ROYAL FRATERNAL ASSOCIATION (INC.).

(Filed 17 September, 1913.)

1. Insurance—Policies—Stamped Provisions—Contracts.

Provisions upon which a life insurance policy is issued, stamped upon the face of policy, are a part of the contract entered into, and the validity of these provisions is not affected because they are so stamped.

2. Same—Presumptions.

There is no presumption that changes have been made in a policy of life insurance because upon the face of the policy contract are stamped additional provisions to those therein printed or written.

3. Same—Evidence.

The legal presumption is in favor of the contract as printed or written, which, in cases of life insurance policies, extends to such further provisions as may thereon be stamped upon their face; and this presumption is aided when the plaintiff in his action declares upon the contract and introduces it in evidence in its entirety without allegation or proof to the contrary.

4. Insurance Commissioner—Approval of Policy—Interpretation of Statutes.

Where a policy of life insurance for $500 is sued on, which on its face states that it will be reduced in certain contingencies, which provisions the plaintiff claims to be void because the company has not obtained the approval of the Insurance Commissioner under the requirements of Revisal, sec. 4773a, and therefore he should recover the face value of the policy, the burden of proof is on the plaintiff to show that the approval of the Insurance Commissioner had not been obtained as the statute requires.

5. Same—Contracts—Presumptions.

A policy of life insurance for less than $500 is not invalid when the approval of the Insurance Commissioner has not been obtained for its issuance (Revisal, 4773a), there being no express provision making it so under such circumstances.

APPEAL by plaintiff from *Whedbee, J.*, at April Term, 1913 (168) of WASHINGTON.

This action is to recover the amount of a certificate of insurance for $500, containing the following provision stamped on its face, above the signatures of the officers of the defendant executing the same: "This certificate is issued with the provision that in case of death of the member not more than one-fifth of the amount otherwise due will be payable for each full year of membership," and with the following stipulation indorsed thereon: "The death benefit due on this certificate will be increased 10 per cent per annum of the amount written within for each expired year of membership in force, to continue for a period of ten years, or until the amount written is doubled by such increase." The insured died after one year's full membership, and the only controversy is the amount the plaintiff is entitled to recover. The plaintiff contends that the burden is on the defendant to show that the Insurance Commissioner has approved the issuing of a certificate for less than $500, as provided in Revisal, sec. 4773a, and that having failed to offer any evidence of this fact, the provision stamped on the certificate is void, and she is entitled to recover the face of the certificate, $500, increased by 10 per cent, according to the indorsed stipulation, or a total of $550.

The defendant contends that the certificate is valid as a whole, and that the plaintiff is entitled to recover $110, which is the amount admitted to be due if effect is given to all the terms of the certificate, including the provision stamped thereon.

(169) His Honor rendered judgment in accordance with the contention of the defendant for $110 and costs, and the plaintiff excepted and appealed.

Gaylord & Gaylord and P. H. Bell for plaintiff.
T. T. Thorne for defendant.

ALLEN, J. There is neither allegation nor proof that the certificate of insurance, containing the provision reducing the amount of insurance to less than $500 in certain contingencies, has not been approved by the Insurance Commissioner, and as the validity of the provision is not affected by the fact that it was stamped on the certificate, it is a part of the contract.

In *Waters v. Annuity Co.*, 144 N. C., 671, there was a paster on the policy and entries on the application, and the Court said of them: "It is urged upon our attention that some of the entries, by means of which the application was made to accord with the policy and the paster, were made on the margin of the application and written longitudinally, and that such entries, so made, and even the paster itself, are presumptive evidence of a change in the contract after the application had been first signed. But neither the authorities nor the known usage in the

making of such contracts are in support of the position to the extent contended for. We know that these policies, as well as the applications, are gotten up on printed forms designed to meet the average and general demand in contracts of this nature, and frequently changes are made to meet special circumstances; that these are ordinarily noted on the margin, and a slip is then pasted on the face of the policy to express the contract as affected by these changes. In the absence, therefore, of some special circumstances tending to cast suspicion on such entries, there should be no presumption of any alteration."

The presumption is in favor of the validity of all contracts (*Loyd v. Loyd,* 113 N. C., 189), and this presumption is aided in this case, as the plaintiff declares on the contract, without alleging the fact upon which she now relies to destroy a part of it, and she also introduced the contract in evidence in its entirety.

We are, therefore, of opinion, if the contention of the plain- (170) tiff as to the legal effect of Revisal, sec. 477a, is sound, that, as the presumption is that the contract and every part thereof is valid, nothing to the contrary appearing on the face of it, the burden was on the plaintiff to allege and prove that the Insurance Commissioner did not approve the certificate, and having failed to do so, she cannot recover more than the sum of $110 awarded here.

If, however, the fact appeared affirmatively that the Insurance Commissioner had not approved the certificate, we would not give our assent to the position of the plaintiff that this would avoid the effect of the provision stamped on the certificate, leaving other parts of the certificate in force.

The section of the Revisal relied on reads as follows: "It shall be unlawful for any insurance company, association, or order or society doing business in this State to issue, sell, or dispose of any policy, contract, or certificate for less than $500, or use applications in connection therewith, until the forms of which have been submitted to and approved by the Insurance Commissioner of North Carolina, and copies filed in the Insurance Department."

The statute does not purport to deal with the validity of the contract of insurance, but with the insurance company.

It does not say a policy for less than $500 shall be void unless approved by the Insurance Commissioner, but that it shall be unlawful for the company to issue such policy, and the reason for the language used is obvious. Those who apply for policies of less than $500 usually have little experience in the forms of insurance, or other contracts, and it was thought wise for the Insurance Commissioner to have special supervision over their contracts for their protection, but it was not intended to relieve the company from the contract made.

If the position of the plaintiff should prevail, a policy for $300 would be unlawful unless approved by the Insurance Commissioner, and no recovery could be had on it, except possibly upon the idea that the insured would not be *in pari delicto* with the company.

(171) The case of *Ober v. Katzenstein,* 160 N. C., 440, is in point. There the plaintiff sued upon a contract for the sale of fertilizer, and the defendant contended that the contract was illegal because the plaintiff had failed to comply with the requirements of the statute as to domestication, and was, therefore, doing business in the State unlawfully; but the Court said: "But the statute does not invalidate either the express contract made between the plaintiff and the defendant, nor, indeed, the implied contract raised by the receipt of the goods of the former by the defendant. This point has been recently adjudicated. *Tobacco Co. v. Tobacco Co.,* 144 N. C., 352. If the State, in addition to the penalty, had desired to render invalid the contract and to deny a recovery thereon, it would have so enacted, as it has done in regard to gambling and other illegal contracts."

We are, therefore, of opinion there is no error.

Affirmed.

Cited: Robinson v. Life Ins. Co., post, 420; *Lea v. Ins. Co.,* 168 N. C., 484; *Morgan v. Fraternal Assn.,* 170 N. C., 80.

ANNIE L. HUFFMAN v. SOUTHERN RAILROAD COMPANY.

(Filed 24 September, 1913.)

1. Railroads—Principal and Agent—Conductor—Malicious Abuse of Passenger—Scope of Employment.

The use of abusive and insulting language to a female passenger, by a conductor on a passenger train, because she had not purchased a ticket for a 9-year-old child, traveling with her, is an act done within the scope of his employment, and binding upon the railroad, without its ratification, as an act of its vice-principal.

2. Railroads—Conductor—Malicious Abuse of Passenger—Punitive Damages.

A railroad company is liable in punitive damages for the willful, wanton, and malicious abuse by its conductor of a female passenger traveling on his train, occasioned by her not having purchased a ticket for her 9-year-old child traveling with her.

APPEAL by defendant from *Carter, J.,* at April Term, 1913, of WAYNE.

The facts are sufficiently stated in the opinion of the Court (172) by *Mr. Justice Brown.*

No counsel for the plaintiff.
J. L. Barham for the defendant.

BROWN, J. The jury found that defendant's conductor did maliciously, willfully, wantonly, and rudely mistreat and humiliate plaintiff while a passenger on its train.

The only exception necessary to consider relates to the issue as to damage.

The plaintiff was a passenger on the defendant's train, having her child over 9 years old with her, but no ticket for the child. The conductor rightfully demanded payment of the child's fare. As to what occurred then, there is a marked conflict of evidence. Plaintiff testifies that she reached down in her purse to get the child's fare, when the conductor publicly and without cause wantonly insulted her by telling her that "she was nothing but a cheap, common scalawag of a woman, or otherwise she would have purchased a ticket for the child."

Plaintiff says this "got her dander up," and that she retaliated by calling the conductor a dirt dauber, and saying "she would whip him in twenty minutes but for the disgrace; that the conduct of the conductor and his remarks made her sick; that she had never had her feelings hurt so bad; that she had never been so insulted in her life; that there were a great many ladies and gentlemen on the train, and that they looked at her hard."

The conductor testified that he asked plaintiff for the child's fare, and she emphatically refused to pay it; that he told her he had no right to pass a 9-year-old child free; that plaintiff then said that she would pay it, but she knew why he was so persistent; that he wanted to put it into his pocket and put it to his own use; that he then told her that she was a woman and a cheap-skate, and that he would not say anything more to her about it, and that she abused him all the way, calling him a rascal, scoundrel, and many other epithets.

The contention that the defendant is not liable for the conductor's conduct, whatever at the time it may have been, cannot be maintained. He was in charge of the train, collecting tickets, acting (173) within the scope of his authority, and a vice-principal representing defendant. Under the facts of this case, ratification was not necessary to render defendant responsible for his act. *Stewart v. Lumber Co.,* 146 N. C., 47; *Sawyer v. R. R.,* 142 N. C., 1.

Upon the issue of damages, the judge stated the evidence and contentions of both sides fully and instructed the jury that in order to

warrant the awarding of punitive damages in their sound discretion, they must previously find that the conductor first maliciously, willfully, and wantonly insulted the plaintiff.

His Honor followed the well settled decisions of this Court. *Holmes v. R. R.*, 94 N. C., 321, and cases cited in notes.

No error.

Cited: *Ange v. Woodmen,* 173 N. C., 35.

J. M. GRISWOLD v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 24 September, 1913.)

Telegraphs—Reasonable Office Hours—Service Message—Nondelivery.

Where a telegram is received at its destination by an agent of a telegraph company after reasonable office hours, it is his duty either to deliver it to the addressee or to send back a service message to the sender of the message, notifying him of its nondelivery, and his failure to do so is actionable negligence, for which the company is liable for the damages proximately caused.

APPEAL by defendant from *Daniels, J.,* at the August Term, 1913, of CHATHAM.

Action to recover damages for mental anguish for negligent failure to deliver a telegram reading:

MERRITT GRISWOLD,

Bear Creek, N. C.

Father died at 12 to-day. Burial to-morrow evening, church.

OSCAR GRISWOLD.

(174) The telegram was filed with the Postal Telegraph Company's agent at Wendell, N. C., on Sunday afternoon, 4 February, 1912, at about 4 p. m. It was delivered by Oscar Griswold, nephew of plaintiff, and the agent explained to him that it was doubtful if the message could be gotten through. The agent sent the message off, closed his office, and never went back until Monday morning. The message was received at Bear Creek, N. C., about 6:15 p. m. of the same day by the agent of the defendant, and was not delivered to the plaintiff until the forenoon of Monday. The agent at Bear Creek was in his office when call was made for him, though his Sunday hours were from 8 to 10 in the morning, and 1:30 to 3:30 in the afternoon, and he made no effort to deliver the same or send a service message until the next forenoon. The deceased was brother of the plaintiff and

father of the sender of the message. He died about noon on 4 February, 1912, and was buried at the church about 4 p. m., 5 February, 1912, several miles in the country from Wendell.

There was evidence tending to show that plaintiff could and would have driven to Sanford the night of the 4th, caught a midnight train on the Seaboard for Raleigh, and reached the funeral and burial in time.

The defendant moved for judgment as in case of nonsuit at the close of the plaintiff's evidence, and at the close of the whole evidence renewed the motion. The motion was denied. The defendant also excepted to so much of his Honor's charge as related to the duty of the defendant's agent at Bear Creek to use reasonable effort to deliver the message on Sunday evening after its receipt by him.

The exceptions taken by the defendant bear upon only one point, and that is, what duty the defendant owed to the plaintiff to make any effort to deliver the message to him, after it had received the same at Bear Creek, N. C., several hours after the closing of the defendant's office at that point, in accordance with its office hours for Sunday.

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

H. A. London & Son for plaintiff.
Rose & Rose and Hayes & Bynum for defendant.

ALLEN, J. The appeal presents the single inquiry as to the (175) correctness of the rule that when the telegram is received by the agent of the telegraph company, although outside of reasonable office hours, it is his duty to make reasonable efforts to deliver it, or if he cannot do so, he must endeavor to send a message to the sender, notifying him of nondelivery, and is controlled by *Carter v. Telegraph Co.*, 141 N. C., 374; *Suttle v. Telegraph Co.*, 148 N. C., 480; *Carswell v. Telegraph Co.*, 154 N. C., 112, which have been affirmed at this term in *Ellison v. Telegraph Co., ante*, 5.

No error.

Cited: Miller v. Tel. Co., 167 N. C., 316.

MAMIE W. BARKER v. MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY AND SOUTH ATLANTIC LIFE INSURANCE COMPANY.

(Filed 1 October, 1913.)

1. Insurance—Suicide—Declarations—Res Gestæ—Evidence.

In an action on a life insurance policy, the unfulfilled declarations of the deceased of an intention to get a pistol for lawful purposes, made two weeks and also ten months before his death, are incompetent to rebut suicide, it appearing that the deceased was found early one morning dead from a pistol in his hand; the declaration having been made too remote in point of time to be a part of the *res gestæ*, and also being statements made in his own interest.

2. Same—Appeal and Error.

A new trial will not be granted for erroneous admission of evidence or other errors unless it appears that the appellant has been prejudiced, but in this case it is held that the admission of unfulfilled declarations of the deceased to buy a pistol for lawful purposes, which were erroneously admitted, was reversible error in an action on a life insurance policy which was defended on the ground of suicide.

(176) APPEAL by defendant from *O. H. Allen, J.*, at June Term, 1913, of CARTERET.

A. D. Ward and T. D. Warren for plaintiff.
Guion & Guion for defendants.

CLARK, C. J. This is an action by the widow of Joseph C. Barker on two policies issued by the defendants separately, upon the life of her husband, in which she was named as beneficiary. The actions were brought separately, but by consent they were consolidated and tried as one, the same questions being presented. Indeed, the only matter at issue is the defense that the insured committed suicide.

The plaintiff was allowed to testify that some eight or ten months before her husband's death he stated to her that he needed a pistol as deputy sheriff, and was thinking of getting one, and she also gave a conversation on another occasion, later, between herself and husband, as to the need of a pistol to protect herself in his absence. The object of this testimony was of course to rebut the theory of suicide based upon the purchase of the pistol by him on the evening, or afternoon, of 7 March, 1911, the evidence being uncontradicted that the insured was killed by that pistol, in his own hands, 6:30 the next morning. The controversy is as to whether such killing was intentional or accidental.

The conversations testified to by the wife as having occurred "eight to ten months previously" and at the other time were incompetent as hearsay. They could not possibly be a part of the *res gestæ*. The times

were too remote for that purpose. Such conversations were not merely irrelevant, but were calculated to prejudice the defense. That the assured had, or had not, an intention to buy a pistol for a legitimate purpose eight or ten months previously and on the other occasion referred to, two weeks before the death, could throw no possible light upon the question whether he had an intention to kill himself at the time he bought the pistol. Nor could hearsay evidence of his declarations to his wife in his own favor on those occasions be admissible. Declarations against the party's interests are competent, but not (177) self-serving statements, except in corroboration of competent statements.

Suppose the assured had not succeeded in the act, and had been indicted therefor, could these declarations have been admitted in his favor? On the other hand, suppose he had been indicted for murder committed with that pistol—the killing of some one else than himself—could these declarations made to his wife weeks and months previously of his disposition to buy a pistol for the legitimate purpose, which purpose was not then executed, be admitted to rebut the presumption arising from the killing with a deadly weapon? Suppose, indeed, on such indictment for homicide the same question had arisen as here, whether the shooting was intentional or accidental, would such previous statement by him of an unexecuted intention be competent in his defense? We think not. It follows, therefore, that they were incompetent when the question is whether the killing of himself was accidental or intentional.

We are not disposed to grant a new trial for error in the admission or rejection of testimony unless we can see that it was prejudicial, but we think that the admission of this testimony must have been injurious to the defendants. It was introduced for that purpose. There must be a New trial.

Cited: *S. c.*, 168 N. C., 87.

S. R. RAWLS ET AL. v. JAMES L. MAYO.

(Filed 17 September, 1913.)

1. Judgments—Estoppel—Appeal and Error—Collateral Attack—Procedure—Executors and Administrators.

The deceased had given an option on lands for a certain price to M., subject at the time to an agreement made with S. In an action thereafter brought by M. against the personal representatives, heirs at law and dev-

isees of the deceased, judgment was rendered declaring M. entitled to a deed of conveyance under his option, upon payment of the purchase price. In an action brought by S. under his contract against the same parties concerning the same land, judgment was entered dividing the lands between M. and S. and declaring that the proceeds of the sale of the lands to M. should be treated as real estate assets, from which there was no appeal. The present action is one to compel the administrator of the deceased to collect the purchase price of the lands from M. and apply it to the payment of certain legacies under the will; and it is admitted this cannot be done if the proceeds of the sale are regarded as realty: *Held*, the judgment that the proceeds of sale of the land to M. should be regarded as real estate assets cannot be collaterally attacked, the remedy having been to correct it on appeal for the misapplication of legal principles.

2. Judgment, Voidable—Consent—Infant Parties—Collateral Attack—Procedure.

This is an action against an administrator to compel him to collect certain proceeds of the sale of deceased's land, and apply them to the payment of certain legacies in money left to the plaintiffs under the will of the deceased. In a former action to which the plaintiffs were infant parties it was adjudged that these proceeds be regarded as realty, from which there was no appeal, and it is admitted that if they are so to be regarded the plaintiffs cannot recover. Conceding that the former judgment was entered by consent, it is *Held*, that it would be voidable and not void, and not subject to collateral attack.

(178) APPEAL by plaintiff from *Whedbee, J.*, at May Term, 1913, of BEAUFORT.

On 17 March, 1908, L. R. Mayo and wife gave to James L. Mayo an option to purchase the land he bought of E. Tuthill, at any time on or before 15 July, 1908, for $6,000. At that time Mayo's ownership of said tract was subject to an agreement with Whilden Springer made 7 May, 1904, and duly recorded 21 November, 1907.

On April, 1908, L. R. Mayo died, leaving a last will and testament.

James L. Mayo in apt time brought suit against the personal representative, heirs at law and devisees of L. R. Mayo, to enforce his option. Judgment was rendered at October Court, 1908, declaring him entitled to a deed conveying said land upon the payment of $6,000 to the administrator.

(179) Whilden Springer brought suit against the personal representative, heirs at law and devisees of L. R. Mayo (James L. Mayo was son of L. R. Mayo and a devisee under his will), to enforce his contract made with L. R. Mayo on 7 May, 1904. The cause was heard at December Term, 1910, and judgment entered dividing said lands between James L. Mayo and Whilden Springer.

It seems to have been agreed by the heirs at law (those of them that were over 21 years of age) that as James L. Mayo only got a title

to half interest in the land on account of L. R. Mayo's agreement with Springer, he should pay only one-half, or $3,000.

The plaintiffs were parties to both of said actions, but some of them were infants.

In the second of said actions the following judgment was entered:

"It is now, by consent of the parties and their said attorneys, adjudged and decreed by the court as follows:

(Then follow seven paragraphs which it is not necessary to set out, and then the following:)

"It is further adjudged that the proceeds of sale of said land to James L. Mayo shall be treated as real estate assets, and accounted for by said administrator as such."

The defendants claim that J. L. Mayo has paid the sum of $3,000 due by him to the devisees under the will of L. R. Mayo, but this is not found as a fact.

The will of L. R. Mayo bequeathed to his wife $1,000 in cash, and to his son Samuel $500 in cash, and to his son John B. Mayo $2,000 in cash. These legacies have not been paid, and the administrator has no funds with which to pay them, and refuses to sell real estate to make assets with which to pay them, all the personal estate having been exhausted.

This suit is brought to compel the administrator to collect said money from James L. Mayo and out of same to pay these legacies, and it is admitted that the plaintiffs are not entitled to recover if the purchase money from James L. Mayo is not personal property.

The court was of opinion that the purchase money from the said James L. Mayo, even if it should be paid the administrator, would not be subject to the payment of these legacies, and at (180) close of plaintiff's evidence, on defendant's motion, nonsuited the plaintiffs, and they excepted and appealed.

Ward & Grimes for plaintiffs.

Small, MacLean & Bryan for defendants.

ALLEN, J. It is admitted that the plaintiffs cannot recover if the purchase money in the hands of J. L. Mayo is not personalty, and it appears in the record that a judgment has been rendered in an action, to which the plaintiffs were parties, adjudging it to be real estate, from which there has been no appeal.

If this adjudication was wrong, it is because it was based on the erroneous application of legal principles, and the remedy to correct the error was by appeal. *Stafford v. Gallops,* 123 N. C., 21; *McLeod v. Graham,* 132 N. C., 475.

Nor can the fact that the plaintiffs were infants at the time of the adjudication, and that the judgment was by consent, benefit the plaintiff, if it be conceded that the part adjudging the purchase money to be real estate was by consent, which is not beyond dispute, because if treated as the contract of infants, which is the most favorable view for the plaintiffs, it would be voidable and not void (*Millsaps v. Estes,* 137 N. C., 535), and cannot be attacked collaterally. *Earp v. Minton,* 138 N. C., 204. The plaintiffs have not sought to impeach the judgment by motion or action, but treat it as void, which, as we have seen, is not a correct view to take of it, and we must hold that it precludes a recovery.

Affirmed.

C. B. BELL v. NORFOLK SOUTHERN RAILROAD COMPANY ET AL.

(Filed 24 September, 1913.)

1. Court's Jurisdiction—Federal Courts—Judgments.

The defendant in this case is held liable for the torts committed when the property purchased by it was in the receiver's hands, and the judgment rendered in the Federal court confirming the purchase, etc., did not have the effect of, and was not intended to oust the jurisdiction of the State's courts, under the decision of *Lassiter's case, ante,* 19.

2. Carriers of Goods—Duty to Transport—Common-law Liability—Verbal Demand for Cars—Interpretation of Statutes.

It is the common-law duty of a common carrier to transport freight tendered it within a reasonable time, to which the statute, section 2634a, Revisal, adds the duty that the carrier furnish cars for carload shipments upon request of the shipper in writing, and provides a penalty for its failure to furnish the cars, etc. Hence, where the recovery of the penalty is not sought, but the action is to recover damages for the carrier's failure to receive and ship the goods, a written demand for the cars is not required, and a verbal one is sufficient.

3. Carriers of Goods—Tender for Transportation—Shipment Refused.

The law does not require a vain or foolish thing; and where a railroad company has refused to transport a part of a large shipment, requiring a number of cars, it may not relieve itself from liability on the ground that the whole shipment was not placed on its yards for that purpose, when the part delivered to it occupied all the available space which could have reasonably been used, thus requiring the carrier to transport it before further delivery to it could reasonably have been made.

(181) APPEAL by defendant from *Long, J.,* at Spring Term, 1913, of CURRITUCK.

This action was brought originally against the receivers of the Norfolk Southern Railway, and when the receivership was terminated,

the Norfolk Southern Railroad Company was made a party defendant. The properties of the Norfolk Southern Railway were sold by the receivers, under an order of the Circuit Court of the United States, and the Norfolk Southern Railroad Company became the purchaser.

The decree confirming the sale contains, among others, the following provisions:

"The purchaser or purchasers shall, as a part of the consideration of such sale, and in addition to the purchase price bid, take the property purchased (1) upon the express condition that the purchaser or purchasers, his or their successors or assigns, will pay for and classify all claims and demands heretofore filed, under the order of reference heretofore entered herein on 23 October, 1908, etc.; (2) (182) subject to all pending contracts in respect to the property herein described, lawfully made by the receivers, which said contracts shall be assumed and performed by the purchaser or purchasers, his or their heirs and assigns; (3) and upon the express condition that such purchaser or purchasers, his or their successors and assigns, shall pay, satisfy, and discharge any indebtedness and obligations or liabilities which shall have been contracted or incurred by the receivers in respect thereto before the delivery of possession of the property sold."

"It is further ordered, adjudged, and decreed that this court reserve the exclusive jurisdiction of this cause for the purpose of enforcing and executing the provisions of said decree of foreclosure and sale entered 14 October, 1909, and for the purpose at all times of protecting said grantee, or grantees, their successors or assigns, in the enjoyment of the property, assets, and franchises purchased under the aforesaid decree of foreclosure and sale, and to determine any and all controversies as to the character, extent, and validity of the possession of said grantee, or grantees, their successors or assigns, acquired through the execution of said decree and hereunder; and for the purpose of enforcing all the obligations and liabilities assumed by said grantee, or grantees, their successors or assigns, under and by virtue of the aforesaid decree of foreclosure and sale or any subsequent decree, including this decree."

The evidence on behalf of the plaintiff tends to show that plaintiff was the owner of a lot of piling, and about 1 August, 1909, placed a portion of same upon the right of way of defendant at its regular station, at Shawboro, N. C., and applied to the agent of the defendant company for two cars on which to ship the piling; that the cars were put on the siding the next day, and plaintiff commenced on 5 August to load the cars; that defendant's agent objected to the manner in which plaintiff's servants were loading the cars, and proceeded to instruct them how to load, and that thereafter the plaintiff's servants followed strictly the instructions of the defendant's agent; that the defendant carried the

(183) two flat cars out on the switch, but never moved them from the depot, and refused to issue a bill of lading for the cars; that after this refusal plaintiff verbally applied for cars on which to load other piling which he had placed on the right of way, and on the depot grounds, and in the lane leading to the depot. That some of the piling was not moved out of the woods, some distance away, because plaintiff placed on the station grounds and in the station lane as much of the piling as he could. That plaintiff notified the defendant's agent that he had contracted to deliver all this piling—that on the cars, that on and near the right of way, and that in the woods—to a party in Portsmouth, Va., in ten days, and that plaintiff would lose his sale and suffer great loss if cars were not furnished. That defendant refused to furnish any more cars, and that all the piling was damaged or destroyed, and the plaintiff lost the sale of the same.

That evidence on the part of the defendant tends to show that the cars were loaded by the plaintiff in an improper manner, and could not be moved without great danger to life and property; that plaintiff's attention was called to the fact that the cars were not loaded in the manner required by the rules of the company, and that plaintiff made no demand in writing for cars, but his demands were all verbal.

The plaintiff asked for actual damages, and for penalties to the amount of several hundred dollars for failure to furnish the cars, but the claim for penalties were abandoned by the plaintiff, and only action for damages was tried.

There was a verdict and judgment for plaintiff, and both defendants appealed.

Ward & Grimes and Ernest Sawyer for plaintiff.
W. M. Bond for defendant.

BROWN, J., after stating the case: The defendants assign thirteen errors, but these present only three questions:

1. Is the defendant the Norfolk Southern Railroad Company liable for the tort of the receivers?

2. Was it the duty of the defendants to furnish the cars on a (184) verbal demand?

3. Are the defendants liable for not furnishing cars for the shipment of the piling not actually placed on defendant's right of way?

We are of opinion that each of these questions must be answered in the affirmative.

The first question is disposed of by our decision in *Lassiter v. R. R., ante,* 19. In addition to what is so well said by the *Chief Justice* in *Lassiter's case,* we think a fair interpretation of the decree of the Circuit

Court of the United States is that the court did not intend to in any way interfere with the rights of parties guaranteed to them by the act of Congress.

We deduce from the pleadings, the course of the trial, and the brief of the defendant, that it does not contend that it is not liable if the receivers are liable, but that the said court is without jurisdiction to determine the liability of the receivers. We cannot for a moment assume that the Circuit Court of the United States intended to enter a decree so plainly violative of a Federal statute.

Second: The defendant invoked section 3634a of the Revisal to sustain their contention that plaintiff cannot recover damages for failure to receive and ship the piling, unless there was a written demand for the cars. But this section applies only to actions to recover penalties, and was not intended to in any way relieve the railroad of its common-law duty to transport freight tendered it within a reasonable time.

In speaking to this question in *Meredith v. R. R.,* 137 N. C., 480, *Mr. Justice Connor* says: "It is to be noted that the basis of this action is the alleged breach of the duty imposed by the common law upon carriers to safely carry, and, within a reasonable time, deliver goods tendered them for that purpose. For failure to perform this duty the person injured has a cause of action, in which he may recover such damages as he sustained within the reasonable contemplation of the parties to the contract. To this common-law duty the Legislature added a statutory duty, fixing, for that purpose, a definite time within which such duty should be performed, giving to the person injured an action for a fixed penalty." The act does not supersede or alter the duty of the company at common law. The penalty in the (185) case provided for is superadded. The act merely enforces an admitted duty. *Branch v. R. R.,* 77 N. C., 347.

Third: It is elementary that the law does not require a man to do a vain thing. The plaintiff loaded two cars, which the defendants refused to move. He filled the depot yard and the station lane with piling and demanded cars upon which to load it, and the defendants refused to furnish them. He notified the defendants that he had more piling in the woods near-by ready to place for loading, and the defendants still refused to move that which had been loaded or to furnish cars for that which had been placed. Under these circumstances it would have been the acme of folly for plaintiff to have hauled the other piling and scattered it along the highway.

A case directly in point is *R. R. v. Campbell,* 91 Texas, 552; 43 L. R. A., 225. In that case the Court says: "And it is insisted that the plaintiff did not even have the wood prepared for shipment in this case, and that, therefore, he cannot recover. There was but a small

part of the wood ready for shipment at the time the cars were demanded which the defendant failed to furnish. But was the plaintiff bound to provide the wood with which to fulfill his contract with Kaller, and to offer it at the depot for transportation after the agents of defendant had refused to furnish cars for that purpose? We think not. A similar question arose in the case of *R. R. v. Nicholson,* 61 Texas, 491, and it was there held that a tender of the property was unnecessary where the proposed shipper had been informed in advance that it was not required and could not be accepted. That was a case of a breach of contract to ship at a certain time; but the principle is the same. The rule announced is a general one, and applies to all offers and tenders. When the defendant knew that the transportation would not be furnished, he was not bound, in order to recover for the wrong done him, to prepare and offer the wood. As argued by his counsel, it was his duty to pursue that course best calculated to lessen the damage resulting from the wrong."

In *Waugh v. R. R.,* 131 S. W., 843 (Tex. Civ. App.), the plain-
(186) tiff demanded cars for the shipment of logs. The railroad failed to furnish the cars, and was held liable for special damages incurred by plaintiff in keeping teams ready to haul and load the logs, and also for damages to logs that were worm-eaten. It appears from the facts in the above case that a part of the logs had not been hauled at all, but plaintiff had demanded cars and the company had promised to furnish them.

In *Etheridge v. R. R.,* 136 Ga., 677, 25 Anno. Cases, 138, the Court says: "It was not necessary that the plaintiff should haul and deposit on the right of way the wood he had cut in order for him to have a right of action because of the company's refusal to receive it. The plaintiff alleged that he had hauled and deposited on the right of way of the defendant company a part of the wood he had cut and corded for the purpose of having it shipped by the defendant company. It would have been an useless expense to have deposited the rest of the wood on the right of way if the company would not receive it there."

This case is on all-fours with the facts in the case at bar, and is a convincing authority.

Upon consideration of the whole case, we find

No error.

GENERAL BURNETT v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 24 September, 1913.)

1. Railroads—Relief Department—Benefits—Negligence—Action.

The acceptance by an injured employee of a railroad company of benefits from its relief department does not, under the Federal Employer's Liability Act, and according to the Federal decisions, bar such employee of his right of recovery in his action against the railroad for the damages consequent upon the injury, if negligently inflicted.

2. Railroads—Federal Employer's Liability Act—Limitation of Actions—Pleadings.

The provision of section 6 of the Employer's Liability Act reading, "that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued," is a statute of limitation, and must be specially pleaded both under the general law and Revisal, 360, to become available as a defense.

3. Same—Action—Conditions Annexed—Interpretation of Statutes.

While the Federal Employer's Liability Act divides into several classes the employees of railroads injured by negligence while engaged in interstate commerce, no right of action is given them not found at common law, the only difference being to deprive the carrier of certain defenses it had at common law with respect to contributory negligence, assumption of risk and the negligence of a fellow-servant. Hence, the period of two years prescribed wherein the action must be commenced is not a condition annexed to the right of action, and must be specially pleaded.

4. Same—Intent.

The Federal Employer's Liability Act deprives the employee of the right to bring his action under the State laws, and to this extent deprives him of the common-law right of action, but not of the common-law right to recover in the Federal jurisdiction; and the Federal statute being enacted for the benefit and protection of employees, the requirement that he bring his action within two years, etc., cannot be construed as a condition annexed to his right of recovery, but merely as a statute of limitation, necessary to be pleaded by the employee to become available as a defense.

BROWN, J., was not present and took no part in the decision of this case.

APPEAL by plaintiff from *Cline, J.*, at March Term, 1913, (187) of EDGECOMBE.

This is an action to recover damages for personal injury caused by the negligence of the defendant, and the only defense relied on is that the plaintiff has since his injury accepted benefits from the Relief Department.

No statute of limitations has been pleaded, but it is admitted that this action was commenced more than two years after the injury. It was

further admitted that the complaint alleges a cause of action under the Federal Employer's Liability Act, and that that act is applicable to this case, the point in controversy being whether section 6 of the act
(188) is a condition imposed upon the right of action or a statute of limitation.

The facts are set out in the judgment appealed from, except it is inadvertently stated therein that an issue of negligence was submitted to the jury, when the pleadings show that negligence was not denied, and the only controverted fact was the amount of damages.

The judgment is as follows:

This cause came on originally to be heard before his Honor, George W. Ward, judge, and a jury, at the .....Term, 1911, of Edgecombe. At that time the question of whether or not the plaintiff was injured by the negligence of the defendant, and, if so, the amount of damage sustained by him, was submitted to the jury; and the jury found the issue of negligence in favor of the plaintiff, and fixed his damages at $1,000. No judgment was rendered upon the verdict, but by agreement the matter was left open to be further heard, and judgment signed at some subsequent term of court *nunc pro tunc*. The reason for deferring judgment (as stated to the judge rendering this judgment) was that at said former term one or more cases were pending in the Supreme Court of North Carolina, the decision of which would aid the lower court in a determination of the case at bar.

The plaintiff Burnett insisted that, admitting the facts set out in the defendant's further answer, he was nevertheless entitled to judgment; the defendant insisting that, taking the facts stated herein to be true, it was entitled to judgment that it go hence without day, etc. Thereupon it was agreed that the facts set forth in the further answer by the defendant were true, but the conclusions of law therein were not admitted by the plaintiff. The plaintiff further contended that the contract called the Relief Department was invalid as matter of law; and Judge Ward made an entry on his notes of this admission and contention. It was further understood and agreed between the parties that the expression in paragraph 3 of the further answer, "That the plaintiff did solemnly make and execute his said election, and did receive and
(189) accept under said regulations an aggregate sum of $97," should only be taken as a statement of fact to mean that he did receive checks or drafts aggregating $97 from the relief fund, under the terms of his membership in said Relief Department, and cashed and used them.

The cause was placed upon the motion docket at the March Term, 1913, and came on to be heard before his Honor, E. B. Cline, judge presiding, upon motion of both plaintiff and defendant for judgment in favor of each respectively. It was agreed that if the facts stated in

the further answer in regard to the Relief Department, *and the things done in connection therewith, or not done, by both parties, were not a bar to recovery by plaintiff in this case,* then the court was to render judgment in his favor for $1,000 and costs, but if they constituted a bar to a recovery by him, then the judgment was to be rendered in favor of the defendant.

The court did not understand that the verdict of the jury was to determine the matter other than to find the negligent act and the amount of damages, if any were recoverable. Upon the argument before the undersigned, the plaintiff insisted upon the rendition of a judgment in his favor both under the acts of Congress as well as under the State law. The defendant insisted that the Federal statutes were not applicable, and that it was entitled to judgment under the decision of *King v. R. R.,* 157 N. C., 44, and other decided cases.

Treating the facts set forth in the further answer as true, except as qualified above, and which are made a part of this judgment as fully as though they were set forth herein, the court, upon consideration of Federal statutes, the decision of the Supreme Court of the United States in *R. R. v. Schoubert,* 224 U. S., 603, and other cases, is of the opinion that they cannot aid the plaintiff to a recovery.

As the court understands the application of the decision in *King v. R. R., supra,* to this case, the plaintiff under the facts appearing in the further answer is estopped and precluded from a recovery against the defendant in this action. (190)

It is therefore considered and adjudged that the plaintiff is not entitled to recover, that he take nothing by his writ, and that the defendant go hence without day.

E. B. CLINE,
Judge Presiding.

The plaintiff excepted and appealed.

Fountain & Fountain for plaintiff.
F. S. Spruill for defendant.

ALLEN, J. It is settled beyond controversy by the decisions of the Supreme Court of the United States, that the acceptance of benefits from a relief department does not prevent a recovery of damages for negligence under the Employer's Liability Act of 1908 (*R. R. v. McGuire,* 219 U. S., 549; *R. R. v. Schoubert,* 224 U. S., 603), and as it is admitted that the act is applicable in this case, the only question presented by the appeal is the construction of section 6 thereof, which reads as follows: "That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

If this is a statute of limitation, the defendant cannot avail itself of its protection, because of its failure to plead the statute, which is re-

quired both under our Revisal, sec. 360, and under the general law (Wood on Limitations, vol. 1, sec 7), and, on the other hand, if it is a condition inherent in and annexed to the right of action, the defendant was not required to plead it, and it would operate to defeat the plaintiff's action, which was commenced more than two years after the cause of action accrued.

The last principle is illustrated by the decisions in this State and elsewhere, under Lord Campbell's Act creating a right of action for wrongful death, and is the one invoked by the defendant.

It is true, it has been generally held by the courts that where a statute creates a right not known to the common law, and provides a
(191) remedy for its enforcement, and limits the time within which the remedy must be pursued, the remedy in such cases forms a part of the right, and if not invoked within the time both the remedy and the right are lost (*Bear Lake Co. v. Garland,* 164 U. S., 1; *Negaubauer v. R. R.,* 104 Am. St., 674; *Rodman v. R. R.,* 59 L. R. A., 706); but this view is not universally entertained, as it was held otherwise in *Kaiser v. Kaiser,* 16 Hun., 602, and the rule is at most a rule of construction adopted by the courts to aid in ascertaining the intent of the legislative body.

We must then examine the act of Congress, and after considering its purpose, the subject with which it deals, the language used, and its effect, determine the legal operation of section 6.

Again, we turn to the decisions of the Supreme Court of the United States, and find that one purpose of Congress was to adopt a uniform rule operating alike on all employees of railroad companies engaged in interstate commerce, and that one of the effects of the statute is to supersede the laws of the States in so far as they cover the same field. *Mondou v. R. R.,* 223 U. S., 51 and 53.

The act includes within its terms all employees of railroad companies injured by negligence while employed in interstate commerce, and these may be divided into three or four classes for the purposes of this discussion.

In the first are those employees injured by the negligence of the company, when there is no assumption of risk, no contributory negligence, and no negligence of a fellow-servant; and that there are such employees is exemplified by this record, from which it appears that the only *fact* in issue, or debated in this case, is the amount of damages.

The act of Congress creates no right in this class of employees that did not exist at common law, as they had the right before the act of Congress to maintain an action in the State courts to recover damages for injuries caused by the negligence, and the usual limitation upon the exercise of this right was three years.

In the next class are those employees injured by the negligence (192) of the company, who are guilty of contributory negligence. These are permitted to recover damages, which they could not do at common law, the act introducing the doctrine of comparative negligence, instead of that of contributory negligence.

The change in the law as to contributory negligence confers no right, and is operative only to withdraw from the company a defense theretofore existing, and the same may be said as to changes in the doctrine as the negligence of a fellow-servant, and of assumption of risk.

This seems to be the construction of the act adopted by the Circuit Court of Appeals in *Garrett v. R. R.*, 197 Fed., in which the Court says: "The damages allowed to the injured employee are but declaratory of rights existing at common law," and if correct, it may well be questioned whether the rule of construction relied on by the defendant has any application; but, however this may be, the consideration suggested furnish reasons bearing upon the legal effect of section 6.

The act supersedes the State law and thereby deprives employees of a right of action existing at common law. It is entitled "The Employer's Liability Act," and was enacted for the benefit and protection of employees. It was designed to make it easier for employees to recover damages for injuries caused by negligence, and not to impose conditions destructive, not of the remedy, but of the right.

If so, it seems to us more reasonable to conclude that in an act of this character, having in view the establishment and maintenance of the rights of the employee, under just restrictions, and considering the different classes of employees affected, it was the intent of Congress to limit the time within which an action could be commenced, and not to destroy the right.

The physical separation of the provision as to time from the section defining the right of action is also significant, and when considered in connection with the verbiage of section 6, which is peculiarly adapted to a statute of limitations, becomes without other considerations, almost controlling.

The language of the section is strictly within the definition of a statute of limitation. Mr. Wood says in his work on limitations (vol. 1, sec 1): "Statutes of limitation are such legislative (193) enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced. Statutes which provide that no action shall be brought, or right enforced, unless brought or enforced within a certain time, are statutes of limitations," and in *Upton v. McLaughlin,* 105 U. S., 640, a statute in the following words was held to be a statute of limitations: "No suit, either at law or in equity, shall be maintainable in any court,

between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assigns, unless brought within two years from the time when the cause of action accrued for or against such assignee."

The decisions of our Court upon the provision as to time in the act conferring a right of action for wrongful death (Revisal, sec. 59) in no wise conflicts with the position that section 6 of the Employer's Liability Act is a statute of limitation, because the act first referred to clearly confers a new right of action not existing at common law, the language used is not that ordinarily found in statutes of limitations, and the limitation as to time is a part of the section defining the right of action, and is made a part of it.

The statute reads: "Whenever the death of a person is caused by a wrongful act . . . the person or corporation shall be liable to an action for damage, to be brought within one year after such death."

Dockery v. Hamlet, 162 N. C., 118, is also called to our attention, in which it was held that the limitation of the time within which a claim against a county, city or town could be presented was not a statute of limitation. The decision in that cast was made upon the authority of *Wharton v. Commissioners,* 82 N. C., 14, and the Court was not advertent to the fact that when the *Wharton case* was decided the statute in question was a part of the chapter regulating county revenue, and that since then it has been made a part of the statute of limitations by express legislative act, and is now section 396, subsec. 1, of the Revisal.

King v. R. R., 157 N. C., 44, has no application, because it (194) was decided under the principles of the common law, and this case is governed by the Federal statute.

After full consideration, we are of opinion that the sixth section of the Employer's Liability Act is a statute of limitations, and that there is error.

The plaintiff is entitled to judgment upon the verdict for the amount of damages awarded, less $97 received by him from the Relief Department, which the statute says must be deducted.

Error.

BROWN, J., was not present and took no part in the decision of this case.

Reversed, on writ of error, 239 U. S., 199.

Cited: Nelson v. R. R., 167 N. C., 190; *Herring v. R. R.,* 168 N. C., 556; *Renn v. R. R.,* 170 N. C., 150.

RICHARD BRINKLEY v. ADDIE R. KNIGHT AND RICHMOND CEDAR WORKS.

(Filed 10 September, 1913.)

1. Malicious Prosecution—Criminal Law—Termination of Action.

Before an action for malicious prosecution can be instituted, it is necessary that the proceedings upon which it is based should have been properly terminated.

2. Same—Subsequent Proceedings.

Where the justice of the peace, before whom a criminal action was ordered removed, did not appear to hear and determine it at the time stated, and the constable announced, at the defendant's instance, that the defendant would be released unless some one desired to further prosecute, and then the defendant was accordingly released, it is not such a termination of the criminal action upon which an action for malicious prosecution will lie, it further appearing that thereafter the defendant in that action moved, upon notice, that the prosecutor therein be taxed with costs, and from judgment rendered the prosecutor, the defendant in the present action, appealed to the Superior Court, resulting in the action being remanded to the magistrate's court to be proceeded with, where it subsequently terminated.

APPEAL by defendant from *Long, J.*, at January Special Term, (195) 1913, of GATES.

The action, instituted on 7 February, 1911, against both defendants, was for malicious prosecution, and on averment duly made that Addie R. Knight had wrongfully sued out justice's criminal warrant and caused arrest of plaintiff for entering on the lands of said Addie R. Knight, after being forbidden, and that the other defendant had instigated and abetted said prosecution. Nonsuit having been taken as to defendant Knight, the cause was tried on issues as to liability of the other defendant, and the following verdict rendered:

1. Did the defendant cause the wrongful prosecution of the plaintiff, or assist in same, as alleged? Answer: Yes.

2. If so, was such arrest and prosecution without probable cause? Answer: Yes.

3. Was such arrest and prosecution malicious? Answer: Yes.

4. Was such arrest and prosecution terminated at the time this action was commenced? Answer: Yes.

5. What damage, if any, is plaintiff entitled to recover? Answer: $225.

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

Bond & Bond and Smith & Banks for plaintiff.

Winston & Biggs, Ward & Thompson, Ward & Grimes, and Charles Whedbee, for defendant.

HOKE, J. It is the well established position that, before an action for malicious prosecution can be instituted, it is necessary that the proceedings upon which it is based should have been properly terminated. *Wilkinson v. Wilkinson,* 159 N. C., 266; *Stanford v. Grocery Co.,* 143 N. C., 419; *Welch v. Cheek,* 125 N. C., 353; *Hatch v. Cohen,* 84 N. C., 602; *Rice v. Ponder,* 29 N. C., 390; *Murray v. Lackey,* 6 N. C., 368.

After giving the case most careful consideration, we are of opinion that the facts in evidence as they are now presented do not bring the plaintiff's cause within the principle. From these facts it ap-
(196) pears that, in January, 1911, Mrs. Addie R. Knight, on affidavit, procured from a justice of the peace, G. C. Hobbs, a criminal warrant, charging present plaintiff, Richard Brinkley, with entering on her land after being forbidden, etc.; that said warrant was duly returned the following day before said justice, when, on affidavit of said Brinkley, the cause was removed before another justice, C. M. Manning, to be heard a few days later, at the same place. At said date and place the parties were duly present with their witnesses, and the justice having failed to appear, the constable, at the instance of counsel for Brinkley, made the announcement that, "if any one desired to prosecute Brinkley, they must do so or he would be released," and said constable then and there told Brinkley he was released. The present action was then commenced, as stated, on 7 February, 1911.

"On 11 March, Richard Brinkley moved in said original cause and served a notice upon Addie R. Knight that on 15 March, 1911, he would move the court to tax the cost in that action, and that the defendant be formally discharged. On 15 March, 1911, the justice of the peace, Manning, heard the motion and discharged the said Brinkley and taxed the cost against the defendant Addie R. Knight. Said Addie R. Knight appealed from said judgment, and the same was heard at the Spring Term, 1911, of GATES, which was some time in April. At said term, the cause was remanded to the justice of the peace, with the direction that he forthwith proceed to try the case or otherwise dispose of it. Subsequent to said time the said Manning, J. P., at the request of the said Addie R. Knight, taxed her with the cost of the action."

It is thus shown that the criminal prosecution on which the present action is predicated had not been terminated on 7 February, 1911, the date of commencement of this suit, but was recognized by the parties as existent at least two months after that date, and was so declared by the Superior Court, to which the cause had been carried by appeal of

the prosecutrix on the question of costs. It is that, in several of our decisions, notably in *Rice v. Ponder* and *Murray v. Lackey, supra,* it was held that when a defendant in a criminal prosecution had given bond to appear before the Superior Court and answer the charge (197) and has so appeared and attended throughout the term, no further order or action having been taken in the cause, that such prosecution may be considered as terminated within the meaning of the rule; but they were cases returnable to Superior Court, having stated terms and in which the defendants had met every requirement of their bonds and there was no longer any suit or process against them. But here was an action, as stated, of which the justice's court had final jurisdiction, in which the affidavit and warrant and order of removal before another justice were equivalent to an indictment pending, and, unless ended by order of the justice's court or some unequivocal act of the prosecutor or by lapse of time, it should not be considered as terminated. This was evidently the view taken by plaintiff and his counsel, for, in their notice given in March, 1911, more than a month after action instituted, they notified the prosecutrix that they would move on 15 March, before the justice, to have the costs taxed against her and that the defendant therein be formally discharged; and, after appeal and order of Superior Court, remanding the cause, the present plaintiff was formally discharged from further prosecution of the criminal case. We are of opinion that, on the record, there was error in refusing the defendant's motion to nonsuit, and the same will be allowed.

Error.

Cited: *Carpenter v. Hanes,* 167 N. C., 555; *Hadley v. Tinnin,* 170 N. C., 86.

CHARLES J. O'HAGAN ET AL. v. ADELAIDE JOHNSON ET AL.

(Filed 1 October, 1913.)

Contingent Remainder—Reinvestment—Interpretation of Statutes.

A devise of real and personal property to such of the testator's children as may survive him, to them and their "bodily heirs" forever, and should they die without "heirs of their body" surviving them, to the brothers and sisters of the testator, and should any of these predecease the testator and his children, then the "bodily heirs" of such brother or sister shall take such a part of the estate as their parents would have taken had they been living. This action is brought for the sale of certain of the testator's land by his sole surviving son and his wife, to whom he conveyed his interest therein, the defendants being the testator's brothers and sisters

and the children thereof and all persons who could possibly have an interest in the lands should the plaintiff die without issue, and all being served with process, the infant parties properly represented by guardians *ad litem; Held,* in proceedings for the sale of certain lands of testator and reinvestment of the proceeds under the provisions of the Revisal, sec. 1590, the order was properly made.

(198) APPEAL by defendants from *O. H. Allen, J.,* at May Term, 1913, of PITT.

This is an action, instituted for the purpose of selling certain lands for reinvestment under the provisions of section 1590 of the Revisal.

The land ordered by the court to be sold for reinvestment was devised in item 1 of the last will and testament of Elvira O'Hagan, and said devise is in words as follows: "I give, devise, and bequeath to my children who shall survive me, if any, all my estate, real, personal, or mixed, of every kind and description to have and to hold unto them and the heirs of their bodies forever. And should they die without heirs of their body surviving them, then and in that event, I give, devise, and bequeath the same to all my brothers and sisters equally, share and share alike, and if any of my brothers and sisters shall die before my decease or the decease of my children, if I leave any, then and in that event it is my will and desire that the bodily heirs of such brother or sister shall have such a part of my estate as their parent would have taken, had they been living."

The testatrix left surviving her one child, Charles J. O'Hagan, Sr., one of the parties plaintiff, who is now living, and such estate as he has by reason of said devise in said property he has conveyed to his wife, the other plaintiff herein; and the said plaintiffs commenced this action against the defendants, who are brothers and sisters of the late Elvira O'Hagan, and the children of certain brothers and sisters, as fully set out in the complaint, and summons has been duly served upon all of the defendants as required by the statute, together with all persons

(199) who in any event may become interested in the property sought to be sold upon the happening of any contingency, and these latter persons are duly represented by a guardian *ad litem,* who has filed an answer in the cause.

All parties who would be interested in said land, provided the plaintiff, Charles J. O'Hagan, Sr., should die without sisue, have been made parties defendant, and have been duly served with process; and all parties who might hereafter become interested in said land upon the happening of said contingency have been made parties defendant and are represented herein by a duly appointed guardian *ad litem.*

Upon the filing of the answers, the court rendered a judgment directing the sale of the property, and from which the defendants appealed.

Harry Skinner and Albion Dunn for plaintiffs.
Don Gilliam for defendants.

ALLEN, J. We have examined the record, and see no reason for disturbing the decree entered in the Superior Court.

The proceedings are regular, and have been prepared with great care, indicating patient investigation and a familiarity with the legal principles involved.

The decree is fully sustained by *Springs v. Scott,* 132 N. C., 548; *Hodges v. Lipscomb,* 133 N. C., 199, and *Trust Co. v. Nicholson,* 162 N. C., 257, and upon the authority of these cases the judgment is

Affirmed.

Cited: Smith v. Witter, 174 N. C., 620.

THE THIRD NATIONAL BANK OF ST. LOUIS v. W. P. EXUM ET ALS.

(Filed 8 October, 1913.)

1. Judicial Notice—Courts' Decisions—Numerous Actions—Banks and Banking—Holder in Due Course—Presumptions.

The courts will take notice from the reported cases that suits of this nature brought in behalf of McLaughlin Brothers on notes given for the purchase of "imported French coach horses" have been very numerous, upon the question of whether the plaintiff bank would become a *bona fide* holder in due course of notes of this character, or take them as collateral.

2. Banks and Banking—Bills and Notes—Negotiable Instruments—Irregular Transactions—Presumptive Evidence—Holder in Due Course—Conflicting Evidence—Issues—Trials.

In an action by the bank to recover of a maker of a note given for an "imported French coach horse," as a holder in due course from the original payee, there was evidence of fraud in the procurement of the note. There was also evidence that the bank had taken over from the payee a large number of like notes, aggregating the sum of $50,000, and that it was customary that these notes, when unpaid, were charged to the payee's account by the bank from moneys he kept on deposit there, and that such notes were turned over to the payee's attorneys for collection without expense to the bank. A letter was also in evidence, written by the payee of the note to the plaintiff bank, stating in effect that he would soon see the proper officer of the bank and make an arrangement for starting a special account, or give a demand note to cover such of these notes as were due, and the bank could then collect them for the payee. The cashier of the plaintiff bank testified that the bank had not taken the notes as collateral, but had discounted them in regular course: *Held,* the evidence was conflicting as to whether the bank was the holder in due course of the note sued on, and raised an issue for the determination of the jury on the questions presented, and the refusal of the judge to accept such issues tendered was reversible error.

3. Bills and Notes—Negotiable Instruments—Collaterals—Right of Action—Parties.

One who holds a negotiable note as collateral for the payment of a debt may maintain an action thereon in his own name, but not one who holds "for collection," for the latter is not "the party in interest."

4. Bills and Notes—Negotiable Instruments—Fraud—Pleadings—Holder in Due Course—Burden of Proof—Trials.

Where fraud is alleged in the execution of a negotiable note, one claiming to be a holder thereof in due course has the burden to show that he is a *bona fide* purchaser. Revisal, 2208. *Bank v. Brown*, 160 N. C., 23, cited and distinguished.

(201) APPEAL by defendant from *Justice, J.*, at June Term, 1913, of LENOIR.

Loftin & Dawson and McLean, Varser & McLean for plaintiff.
G. V. Cowper and T. C. Wooten for defendants.

CLARK, C. J. This is another of the numerous actions upon notes executed to McLaughlin Brothers for the purchase of an "imported French coach horse," of which so many have appeared in our reports. At this term, in a case of this kind, *Trust Co. v. Ellen, ante,* 45, we quoted *Winter v. Nobs,* 19, Idaho, at page 28, where that Court took notice from the reported cases that suits of this nature, in behalf of McLaughlin Brothers, were numerous throughout the country.

In this case, the defendant tendered an issue, "Is plaintiff the *bona fide* owner of the note in due course?" The assignment of error on the exception for refusal to submit such issue must be sustained if there was any evidence—and we think there was— to support the issue. Besides the inherent improbability that a bank in St. Louis would buy outright, or take as collateral, the large number of notes of this nature which McLaughlin Brothers were placing with them, signed by distant and unknown parties, as in this State and elsewhere, with the knowledge the bank had of litigation over such notes, there is other evidence for consideration. Among other evidence, there is the letter of 26 September, 1908, from McLaughlin Brothers to the plaintiff bank, in which they say: "The writer will be in St. Louis some time next week, and will make some sort of arrangement and will give you a special account for these due notes, or a demand note, for the amount, and then *you can collect them for us.*" The letter of 24 November, 1908, by the attorneys of McLaughlin Brothers to the plaintiff bank, and the letter of 28 November, in reply show that the litigation in regard to the collection of this note was under the supervision and control of the lawyers for McLaughlin Brothers. There is evidence that a large number of like notes for McLaughlin Brothers were taken

over by the bank, amounting to about $50,000 at one time, and that plaintiff knew nothing of the makers. It was also in evidence that, under instructions from McLaughlin Brothers, when any (202) of these notes were not paid, the plaintiff sent them to the attorneys of McLaughlin Brothers, as in this case. There is no evidence that the bank has ever paid, or been charged with, any expenses on account of the actions on these notes. McLaughlin Brothers deposited funds in bank and the bank charged back the amount of any of these notes which were not paid. They wrote plaintiff 11 August to charge all costs of collateral to them. It would seem that the understanding was that if a note was not paid the bank was to bring suit in its own name under McLaughlin Brothers' instructions and through their attorneys, and the bank was to look finally to McLaughlin Brothers for the payment of any note which was not collected. One of the firm told a witness a number of times that they were to remain liable on the notes whether protested or not, and they had given the bank instructions not to protest the notes and a general waiver of protest, and that they guaranteed the payment of the notes. It was in evidence that the bank had been doing business with McLaughlin Brothers for a number of years, and knew the nature of their business, and was aware of the abundant litigation arising on their contested notes. The cashier of the bank testified that he did not take their notes as collateral. The bank contends that it discounted them in regular course. It may have done so. But there was evidence sufficient to go to the jury on the issue whether or not the bank was the real owner of the note or whether in truth the bank in effect merely held the note for collection and sued in their own name to cut off the defenses which might have been pleaded had McLaughlin Brothers sued in their own names. It was at the request of McLaughlin Brothers that this and other suits upon similar notes were brought in the name of the bank under the general supervision of the attorneys for McLaughlin Brothers, who agreed to pay the expenses of such action. If the bank in truth held the notes for collection, it could not maintain this action. *Abrams v. Cureton,* 74 N. C., 523, and citations in Anno. Ed.

In *Packing Co. v. Davis,* 118 N. C., 548, it was held: "When a bank habitually credited a depositor's account with negotiable instruments indorsed to it by such depositor, giving permission to the (203) depositor to draw against such credits, but charged up to the depositor all such papers as were not paid on presentation, or deducted them from such deposit, such a course of dealing stamps the transaction with reference to the title to instruments so indorsed as being unmistakably a bailment for collection simply, and no greater title is vested

in the bank." To same effect, *Boykin v. Bank,* 118 N. C., 567; *Davis v. Lumber Co.,* 130 N. C., 176; *Cotton Mills v. Weil,* 129 N. C., 552; *Latham v. Spragins,* 162 N. C., 404.

The indorsement of the note was expressly denied, and the court erred in stating to the jury that it was proved, and not denied, that the note went into the hands of the plaintiff before it was due. This point has been recently and fully discussed by *Hoke, J.,* in *Park v. Exum,* 156 N. C., 230, upon facts almost identical with this case.

When there is evidence tending to show fraud in the execution of the note, the burden is thrown upon the plaintiff to show that it was a *bona fide* purchaser, and not upon the defendants to show the negative of that proposition. *Bank v. Fountain,* 148 N. C., 590; *Park v. Exum,* 156 N. C., 231; *Vaughan v. Exum,* 161 N. C., 494; *Bank v. Walser,* 162 N. C., 53; *Trust Co. v. Ellen, ante,* 45.

Revisal, 2208. It is unnecessary to discuss the evidence of fraud in this case as the above errors entitle the defendants to a new trial, and we only refer to the proposition because it is contended by the counsel for the plaintiff that the above rulings had been overturned by the decision in *Bank v. Brown,* 160 N. C., 23. But reference to this last case will show that there was no evidence tending to show fraud, and therefore the burden was not shifted in that case upon the plaintiff to show a purchase before maturity and without notice of the defect. Revisal, 2208.

New trial.

Cited: Trust Co. v. Whitehead, 165 N. C., 75; *Bank v. Branson, ib.,* 349; *Bank v. Drug Co.,* 166 N. C., 100; *Bank v. Roberts,* 168 N. C., 476; *Latham v. Rogers,* 170 N. C., 240; *Worth Co. v. Feed Co.,* 172 N. C., 342.

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NELLIE GERTRUDE CARROLL AND LILLIE CARROLL
v. HENRY SMITH ET AL.

(Filed 8 October, 1913.)

1. Deeds—Delivery—Grantor's Possession—Evidence of Delivery—Transactions with Deceased Persons—Interpretation of Statutes.

Where the title to lands in controversy is made to depend upon the delivery of a deed thereto by H. to A., both of whom are deceased, and there is evidence that the deeds were found after the death of H. among his important papers, testimony of the widow of A. that she saw her husband place the deed in his tin trunk is not evidence of a transaction or communication with the deceased, forbidden by the statute, Revisal, sec. 1631.

2. Evidence—Declarations—Interest of Declarant.

Where title to lands in controversy is made to depend upon the delivery of a deed thereto by H. to A., both of whom are deceased, declarations of H. that he had delivered the deed to A., and made before the defendant had acquird any title, are competent as being against interest and not self-serving declarations.

3. Deeds and Conveyances—Grantor's Possession—Presumptions—Burden of Proof—Trials—Instructions—Appeal and Error.

The presumption that a deed found in the possession of the grantor has not been delivered has no greater effect than to place the burden of proof on him who relies upon its delivery to establish his title to the lands in dispute; hence, when there is competent evidence that the delivery was actually made of the deed to the grantee, it was not error for the court to instruct the jury that its possession by the grantor, if they so found the fact to be, was a circumstance which they could consider, with further correct instructions applicable to the evidence in the case, upon the issue, which will be assumed when the charge is not otherwise excepted to and it is not sent up in the record.

APPEAL by defendants from *Ward, J.*, at May Term, 1912, of SAMPSON.

This is an action to recover a tract of land of 37 acres, which the plaintiffs claim Henry Carroll, from whom the defendants derive their title by devise, conveyed by deed to their ancestor, Albert Carroll, and the only issue in controversy is as to the delivery of the deed.

The deed was probated but not registered, and there was evi- (205) dence that it was delivered to the grantee at the time it was signed and placed by him in his trunk.

After the death of Henry Carroll, the deed was found in his trunk with other papers.

Lillie Carroll, widow of Albert Carroll, testified that she saw Albert Carroll place the deed in his tin trunk, and saw the deed in the trunk, and defendant excepted.

George Melvin, father of Lillie Carroll, testified that he heard Henry Carroll say he had given Albert his deed because he was his dependence, and defendant excepted.

The defendant requested the court to charge the jury, "That the fact of Henry Carroll having the possession of the deed for the 37 acres of land along with his other title papers, if found by the evidence to be the fact, would be presumptive evidence that the deed had not been delivered." The court refused to so charge the jury, and stated that there was no such presumption, but that it was a circumstance only, which the jury might consider. Defendant excepted.

The jury answered the issue in favor of the plaintiffs, and from the judgment rendered, the defendants appealed.

Fowler & Crumpler for plaintiff.
Faison & Wright and G. E. Butler for defendant.

ALLEN, J. The evidence of the widow was objected to under section 1631 of the Revisal, but he did not testify to a communication or transaction with the deceased (*Johnson v. Cameron,* 136 N. C., 243) nor was her evidence against the personal representative of the deceased or against any one claiming under the deceased. *Bunn v. Todd,* 107 N. C., 267. She simply told what she saw, and against one claiming under Henry Carroll and not under Albert Carroll.

We can see no objection to the evidence of George Melvin, and none is shown in the brief. He is not a party to the action, has no pecuniary interest in the result, and was not testifying to a self-serving declaration, but to one made against interest, and before the defendants acquired any title.

(206) There is authority for the position taken by the defendant, that there is a presumption that a deed found in possession of the grantor has not been delivered; but properly understood, this can mean no more than that the burden of proof is on the grantee to prove delivery, and we must assume that his Honor charged correctly as to the burden of proof, as the charge is not sent to this Court, and there is no exception that he did not do so.

Delivery is essential to the validity of a deed, and, in the absence of registration, if the deed is found in possession of the grantor, nothing else appearing, the law says it has not been delivered, and casts the burden of proof on the grantee who alleges a delivery, and it adds no additional force to the charge on the burden of proof to say there is a presumption against delivery.

There is, however, evidence in this case of delivery to the grantee, and it was, therefore, proper for his Honor to charge that possession of the deed by the grantor, if found to exist, was a circumstance which the jury could consider.

In *Tuttle v. Rainey,* 98 N. C., 513, there was a controversy as to the delivery of a deed, and the Court said, while commenting upon an instruction given to the jury: "If it was intended to say that the law presumed a delivery from the possession of the deed, instead of that the law authorizes the jury from the fact to infer a delivery, and, in the absence of rebutting evidence, to act upon it, it would be error."

We are therefore of opinion, on the whole record, there is

No error.

Cited: Hornthal v. R. R., 167 N. C., 629; *Brown v. Adams,* 174 N. C., 496.

J. W. WILLIAMS v. CHARLES F. DUNN & SONS COMPANY.

(Filed 8 October, 1913.)

1. Execution Sale—Motions in the Cause—Title of Cause.

Where a motion is made in the cause to set aside a sheriff's sale under execution issued by one to whom the judgment has been assigned, the title of the cause remains as it was originally, and it should not be entitled in the name of the movant as plaintiff and the name of the purchaser at the sale as defendant.

2. Execution Sales—Advertisement—Declaratory Statutes.

The requirements of Revisal, secs. 641, 642, that a sheriff advertise a sale under execution and serve a copy upon the defendant ten days before the sale, are directory, and when not followed, it will not render the sale void as against a stranger without notice of the irregularity.

3. Execution Sales—Motions to Set Aside—Collateral Attack.

The procedure to set aside a sale of lands under an execution which has not been advertised, and where notice has not been given the defendant, in compliance with Revisal, secs. 641, 642, is, as against a purchaser with notice of the irregularity, by motion in the cause, for the sale cannot be collaterally attacked.

4 Execution Sales—Bidding Repressed—Motions to Set Aside Sale—Fraud—Evidence.

Where the assignee of a judgment causes an execution to issue for a sale of lands, and it appears that the advertisement thereof has not been made as directed by the statute; that there were no opposing bidders present at the sale, and the assignee of the judgment bid it in at a small sum, about one-eighth of its real value—in this case, $800 to $1,000—and the judgment debt was less than $45, the sale will not be permitted to stand unless the strict rights of the purchaser require that it be sustained.

5. Execution Sale—Duty of Sheriff—Sale En Masse—Fraud—Principal and Agent.

The sheriff, as an officer of the court in the sale of lands under an execution issued on a judgment, acts in some respects as the agent both of the judgment debtor and creditor, and should exercise a fair discretion to make the judgment debt and costs, without unnecessary sacrifice of the lands; and while it has not been held with us that the sale of three separate tracts of land as a whole, when one would have been enough to satisfy the execution, is of itself sufficient to invalidate the sale, yet it is so, in direct proceedings, when it further appears that the tracts thus disposed of could have been sold separately without prejudice to the rights of the parties, and there were circumstances of fraud, oppression, or unfairness, to the debtor's disadvantage in the sale.

6. Same—Evidence—Void Sale.

Upon motion made in the cause by a judgment debtor to set aside a sale of his lands made by the sheriff under execution, it appeared that the land brought a grossly inadequate price; that the purchaser, having

superior knowledge of the value of the land, misled the attorney of the judgment debtor, who did not have sufficient time to inform himself in regard thereto; that there was no competition at the sale, by reason of the purchaser's conduct and the failure to properly advertise it; that the debtor had sufficient personal property out of which the execution could have been satisfied; that the purchaser refused at the sale to accept the amount of the judgment and cost, or the price he had bid for the land; that the purchaser was notified of the irregularities of advertisement, etc., at the time of the sale; that the land consisted of three separate tracts, any one of which would have satisfied the judgment and costs, and were sold as a whole: *Held*, the sale thus made *en masse*, with the attendant circumstances of fraud and irregularity, rendered it void as to the judgment debtor.

(208) APPEAL by defendants from *Justice, J.*, at June Term, 1913, of LENOIR.

This was a motion before the clerk, in the case of *Williams v. Williams,* to set aside a sale of land made under an execution. The motion was based upon affidavits filed, and the sale was set aside by him. Plaintiff appealed to the Superior Court, where the action was dismissed, this Court reversing the decision, At the August Term, 1912, of that court, the judgment of the clerk was affirmed, and an order of reference was made for an accounting between the parties. The report of the referee was confirmed at the June Term, 1913, all of which will appear more fully hereafter.

The case was before us at Spring Term, 1912, upon a question of jurisdiction, and is reported in 158 N. C., 399. We then reversed the judgment below dismissing the proceeding, and remanded it for further hearing. Jesse E. Williams filed a lengthy affidavit, upon which he based his motion in the cause to set aside the sale under the execution issued therein. The material allegations of this affidavit, which describes in detail the transaction from its inception to the time of the motion, was denied by the defendant, but *Judge Carter* affirmed the judgment of the clerk of the Superior Court, before whom the motion to set aside the execution was originally made, and in that judg-
(209) ment the clerk finds the facts to be as set forth in the affidavit of the plaintiff, John W. Williams, and those facts are substantially as follows: On 10 February, 1909, Jesse E. Williams, one of the defendants, recovered a judgment against John Williams before a justice of the peace, which was docketed in the Superior Court of Lenoir County. On 21 October, 1910, Jesse E. Williams transferred and asigned this judgment to Charles F. Dunn, cashier of Charles F. Dunn & Son Company. Charles F. Dunn & Son Company is a banking concern and a partnership. On 8 February, 1911, the clerk of the Superior Court issued an execution on the judgment returnable to the March

Term of the Superior Court of Lenoir County, which convened on 13 March, the return day of said execution being less than forty days from the date of its issue. On 14 March the sheriff proceeded to sell the land upon which he had levied, and Charles F. Dunn, representing himself as cashier of Dunn, Son & Company, purchased the property for the sum of $125. The property consisted of three separate lots, each of which, with its improvements, was worth more than $300. The sheriff sold all three of the lots together. Prior to the sale, the plaintiff, through his attorneys, protested against the sale, same being made upon the ground that the execution was irregular, and upon the further ground that the sale thereunder was irregular. The plaintiff at the time had sufficient personal property out of which the execution could have been satisfied. The plaintiff was a resident of Philadelphia and was not present at the sale, and the defendant, taking advantage of his absence, represented to the plaintiff's attorney, who was unfamiliar with the property or its value, and just before the sale, that it was not worth more than $150. Charles F. Dunn, acting for defendants as their duly authorized agent, made his statement to the attorney of plaintiff for the purpose of misleading him and with the intent to prevent fair competition at the sale under the execution, so that the property could be bought by him at an undervalue "or at a figure greatly less than its value," he well knowing that the attorney was acting in ignorance of the real value of the property and had not time for investigation, and this was done with the purpose of defrauding the debtor, by pre- (210) venting a fair sale of the property. The sale of the land was not advertised according to law. Jesse E. Williams and Charles F. Dunn, as assignee of the Williams judgment, had agreed that no execution should issue on the judgment, and this agreement was a part of the consideration for the assignment by Jesse E. Williams to Charles F. Dunn, who was in fact the asignee of the judgment in his individual capacity, and not as cashier of the alleged bank. Charles F. Dunn, who was the only bidder, bought the property for the sum of $125. The purchase price was applied to the Williams judgment (and another judgment against the plaintiff, which had been assigned to Charles F. Dunn) and the cost of the execution sale, and the balance was paid into court. There were no other bidders present at the sale except the defendant Dunn. Execution under which the sheriff attempted to sell was for the sum of $35.12, with interest from 10 February, 1909, and $1.45 cost. The sheriff levied upon and sold all three of the lots at one time, they being worth about $1,000. On 2 September, 1911, the plaintiff, after due notice, moved to set aside the sale upon the grounds set forth in the affidavit filed. Prior to the making of the motion, the plaintiff tendered to the defendant the amount bid at the sale and inter-

est, which was more than sufficient to satisfy the judgment with interest and costs, which had been assigned to the defendant. The clerk found the facts set forth in the affidavit of the plaintiff to be true, and adopted them as his findings, and set aside the execution sale. The judgment of the clerk was affirmed by *Judge Carter* at the August Term, 1912, and a reference ordered to take an account between the parties. The defendant Dunn was in possession of the property from 15 April, 1911, to 1 September, 1912. The rental value of the lots, as alleged by the plaintiff and admitted by the defendant, was $3 per week. The referee, Mr. J. G. Dawson, after allowing the defendant the amount due under the two judgments of Jesse Williams against John W. Williams, and the other judgment against him, which had been assigned to the defendant Dunn, with interest and cost, the balance of the pur-
(211) chase money paid by him and the taxes, found that there was due to plaintiff from the defendant the sum of $121.03, with interest from 21 September, 1912, and that the plaintiff was entitled to have all of said judgments canceled. The findings of the referee, both as to law and facts, were approved by *Judge Justice* at the June Term, 1913, and final judgment entered, from which this appeal was taken by the defendant.

Rouse & Land for plaintiffs.
Charles F. Dunn in propria persona.

WALKER, J. This is a motion to set aside an execution sale, and the title of the original action should have been retained, instead of making the motioner plaintiff and the purchaser at the sale a defendant. It is not a new proceeding, but a motion in the cause, as at first constituted, for the desired relief. The title on the docket here and below should be *Williams v. Williams,* motion by defendant, and not *Williams v. Dunn.* We hope that the clerks and attorneys will hereafter take notice of the procedure in such cases and be governed accordingly, as a compliance with the rule will prevent uncertainty and confusion, which is sure to follow its disregard, and will conduce to order and regularity in judicial proceedings—something much to be desired. The mistake in this case at first produced some little perplexity, which could easily have been avoided by proper attention to orderly arrangement. We believe, though, that we have, at last, succeeded in extracting from the record and stating correctly the relations of the parties and the facts of the case, and have thus removed its seeming complication and difficulty, and simplified the questions involved.

The defendant in the judgment and execution, John W. Williams, alleges that the sale by the sheriff is voidable by him because there was no legal advertisement or notice of the sale; that the execution was

issued within forty days of the court to which it was returnable (Revisal, sec. 624); that the land, consisting of three lots, was sold *en masse* and not in separate parcels, and that Charles F. Dunn, the real plaintiff, as assignee of the original plaintiff, did by fraudulent representations and conduct obtain the land, as purchaser, at an under- (212) value, the price he paid being grossly inadequate.

The law requires a sheriff to advertise a sale under execution and to serve a copy of the advertisement upon the defendant ten days before the sale. Revisal, secs. 641, 642. A failure to comply with this provision of the statute, which is directory, will not render the sale void as against a stranger without notice of the irregularity, nor can it be assailed collaterally, but in such a case the defendant may, on motion, or by direct proceeding, have the sale vacated.

In *Burton v. Spiers,* 92 N. C., 503, *Justice Ashe* said for the Court: "It is well settled as a general rule, that a purchaser at execution sale is not bound to look further than see that he is an officer who sells, and that he is empowered to do so by an execution issued from a court of competent jurisdiction, and he is not affected by any irregularities in the conduct of the sheriff. *Mordecai v. Speight,* 14 N. C., 428; *McEntire v. Durham,* 29 N. C., 151. It follows from this, that a purchaser may get a good title at a sheriff's sale, when there has been no advertisement of the sale; but this is subject to qualifications: As where the purchaser is a stranger, he will get a good title, notwithstanding any irregularities there may have been in the management of the sheriff. *Oxley v. Mizle,* 7 N. C., 250. But when the purchaser is the plaintiff in the execution, or his attorney, or any other person affected with notice of the irregularities, the sale may be set aside at the instance of the defendant in the execution by a direct proceeding. If not so corrected, they cannot be made available by a collateral attack on the purchaser's title. Hence, an execution sale cannot be collaterally avoided because real estate was sold without first levying upon personalty, nor because of irregularities or deficiencies in the advertisements, nor for defects in the levy (Herman on Executions, sec. 39; *Oxley v. Mizle, supra*); and it was held by *Chief Justice Ruffin* in *Harry v. Graham,* 18 N. C., 76, 'that an allegation of fraud against a purchaser at execution sale will not be heard from a stranger to the execution.'" *Dula v. Seagle,* 98 N. C., 458; *Sanders v. Earp,* 118 N. C., 275.

In the *Dula case, Chief Justice Smith* said: "The sheriff acts (213) under the law that prescribes his duties, with a proper responsibility to those affected by what he does. If he sells under execution without advertising, as required by law, and the purchaser has no notice of this dereliction of duty, he acquires title; but it would be other-

wise if the sale was at a time or place not warranted by law, because the purchaser is charged with knowledge of this legal requirement, and does not buy in good faith. *S. v. Rives,* 27 N. C., 297; *Mayers v. Carter,* 87 N. C., 146."

Our case is a good illustration of the justness of the rule. For some reason, and none other than the omission to duly advertise the sale can be fairly assigned, there were no bidders present, and there was, consequently, no competition. In this way the purchaser bid in the land at about one-eighth of its real value, and land worth $800 to $1,000 was sold to pay a debt of less than $45. "This is calculated to cause surprise and to make one exclaim, Why, he got it for nothing! There must have been some fraud or connivance about it." *Worthy v. Caddell,* 76 N. C., 82. Such an apparently unfair sale should not be permitted to stand unless the strict right of the purchaser, under the law, requires us to sustain it, and this we do not think is the case.

Apart from the irregularities in respect to the execution and sale, of which the purchaser, who had by assignment from Jesse E. Williams become the real plaintiff, had notice, it appears by the finding of the clerk that the sheriff sold three distinct lots *en masse,* when if sold separately any one of them would have brought a price far more than sufficient to pay the total of debt, interest and costs, and five times as much as required for that purpose, if the lot thus sold had brought anything like its market value.

The counsel of John W. Williams, the debtor, contends that the fact of selling the three lots as one entire parcel is of itself sufficient to vitiate the sale, and there is strong authority to be found in the decisions of other jurisdictions to sustain this position. Rorer on Judicial Sales, sec. 730, and cases cited; *Tiernan v. Wilson,* 6 Johns. Ch. (N. Y.), 415. But our decisions have not, up to this time, gone quite so far, as we will presently see.

(214) It is generally agreed that it is the duty of the officer to sell in the exercise of a fair discretion, and to the best advantage, so as to make the debt and costs to be levied by the execution without unnecessary sacrifice of the debtor's property. "The proposition is not to be disputed," said *Chancellor Kent* in *Tiernan v. Wilson, supra,* "that a sheriff ought not to sell, at one time, more of the defendant's property than a sound judgment would dictate to be sufficient to satisfy the demand of the writ, provided the part selected can be conveniently and reasonably detached from the residue and sold separately. The justice of this rule is self-evident. As long ago as *Wordye v. Baily* (Noy., 59), *Gawdy, J.,* said, and the rest of the Court agreed with him, that if the sheriff, upon a *fi. fa.* for 40 shillings, takes five oxen, each of the value of 5 pounds, and sells them all, the defendant may have an action of trespass

against him. In addition to what has been repeatedly said in our own courts (8 Johns. 333; 18 Johns. 362; 1 Johns. Ch., 502), I would refer to *Stead v. Course,* (4 Cranch, 403), in which the Supreme Court of the United States held, that if the collector sell a whole tract of land, when a small parcel of it would be sufficient, for taxes, he exceeds his authority, and a plea by the purchaser to a bill to set aside the sale was not to be sustained. It was the case of a sale in Georgia, under a law directing the collector to sell only so much land as was necessary to pay the taxes in arrear. The rule must be the same, without any positive law for the purpose. It rests on principle of obvious policy and universal justice." The learned Chancellor again says: "Any 10 acres taken from any corner of either of these lots would probably have raised the amount of the execution. The very circumstances of advertising and selling the whole supposed interest of the plaintiff, in both lots together, and for so small a demand, was calculated to excite distruct as to the title, and to destroy the value of the sale. It was a perversion of the spirit and policy of the power with which the sheriff was intrusted. It is difficult to define precisely the extent of property that a sheriff may sell together, in mass. There must be a sound discretion exercised by the officer, and each case will furnish a rule applicable to it, under all its circumstances. It is sufficient to say that here is a case in (215) which the abuse of discretion is too flagrant to be endured, and that the law will adjudge such a sale, in such a case, fraudulent. No person can hesitate for a moment to say that the sheriff ought not to have sold more than the interest of the plaintiff in one lot, at one time, and in one parcel; and I believe every one will be ready to conclude that the sale of one lot would have raised the $10 with equal facility as the sale together of both lots. I shall, accordingly, set aside the sale as fraudulent and void in law."

We have referred to this case at some length, as its facts so clearly resemble those to be found in this record, and yet our case more strongly appeals to the conscience of the Court for equitable relief to the debtor, who has so greatly suffered by the manner in which this sale was conducted at the instance of the plaintiff, who was the purchaser. The difference between the cases which makes in favor of this debtor is, that here there were three separate and distinct tracts, each having its own valuable improvements, while on the *Tiernan case* the tract was an entire one, and the Court held that a reasonably sufficient portion should have been cut off and sold, if the land was susceptible of such a division and the whole was not required to satisfy the writ. See, also, *Kinney v. Knaebel,* 51 Ill., 112, 121; *Berry v. Griffith,* 2 H. & G., 337; *Howson v. Deggart,* 8 Johns., 333; *Winters v. Burford,* 6 Cold., 238; *Kiser v. Rid-*

dick, 8 Blackf., 382, 383; *Bank v. Flagg,* 31 Ill., 290; *Phelps v. Cowan,* 25 *ibid.,* 309; Freeman on Executions, (3 Ed.), sec. 295, and especially 296.

Perhaps by no means can we procure a more correct and just view of the duties of the sheriff or other officer in the proceedings which he is authorized to take, after levying upon property for the purpose of producing a satisfaction of the plaintiff's demand, than by conceding that such officer is the agent of both parties, and as such is charged with duties which are not wholly compatible, and which must, nevertheless, be reconciled. It is true that the officer owes to the plaintiff the duty of making the money at or before the return day of the writ, and (216) may be considered as the agent of the plaintiff, charged with the duty of producing a satisfaction of the writ. On the other hand, he is equally the agent of the defendant, charged with the duty of so disposing of his property that the writ against him shall be satisfied with no needless injury or sacrifice. Hence, as the duty of selling the property is modified by the duty of not needlessly sacrificing it, the officer has a discretion with respect to the time and mode of sale. A reasonable discretion, however, is allowed to be exercised in order that the object of the writ may be accomplished, not frustrated, and that the property of the debtor be not causelessly sacrificed. There is no iron rule in regard to this matter, but it may be said that the officer should exercise a sound discretion, honestly and impartially, as between the parties, remembering that he is the sworn minister of the law and not the servant or emissary of either, commissioned to advance, in a covetous manner, the interests of his employer. As is the duty of the just and impartial judge, he should hold the scales evenly balanced.

Judge Freeman, speaking to this very question, said: "Where several distinct parcels of real estate, or several articles of personal property, are to be sold, what is called a 'lumping sale' can rarely be justified. Such a sale when objected to in due time, will not be upheld, unless special circumstances can be shown from which it must be inferred that such sale was either necessary or advantageous. It is sometimes said that such a sale will not be vacated until it is shown to have injured some one. The command of the law that distinct parcels of land shall be offered for sale separately is founded on the assumption that, by so offering them, the best price will probably be secured and the sale not result in the taking from the defendant of any more property than is necessary to satisfy the writ." Freeman on Executions, sec. 296, p. 1703.

Some of the courts have expressed themselves strongly in emphatic condemnation with regard to sales in mass of property divided into separate parts or lots, going to the length of saying that, "Sales in a

lump of real estate held in parcels are not to be countenanced or (217) tolerated." Rorer Jud. Sales (2 Ed.), sec. 730, and the numerous cases in note 6.

But we have not referred to the authorities above for the purpose of approving all that is therein said, as this Court has formulated a rule of its own upon the subject, which we will follow in this case, as it fully sustains the judgment below, and it is not necessary that we should go beyond it, as the facts are now presented to us.

In *Wilson v. Twitty,* 10 N. C., 44, *Judge Hall* opens his opinion by saying: "It is much to be regretted that a more particular rule of conduct has not, by the law, been prescribed to sheriffs in sales of landed property under execution." He then states that while he believes it is not usual to sell separate parcels at once and as a whole, it is not forbidden in express terms, and then adds: "But it is surely the sheriff's duty to sell in the way that will likely be most beneficial for both parties. I mean in the way that will produce the most money." He then strongly intimates that circumstances of fraud or oppression prejudicial to the debtor should avoid the sale, each case to be judged by its own facts. At the same term it was held in *Thompson v. Hodges,* 10 N. C., 52, that "a sale by a sheriff, *en masse,* of tracts of land adjoining each other will be supported." But in both of these cases the jury had found, under the evidence and charge of the court below (*Nash, J.,* presiding in one and *Norwood, J.,* in the other), that there was no element of fraud or oppression. In the *Wilson case, Judge Nash* had charged the jury that the duty of the sheriff was to levy on the entire tract and to sell the parcels separately, but he directed them to find whether the debtor had authorized the sale as made by the officer, and had furnished a description of the land to him. In the *Thompson case, Judge Norwood* charged the jury, "that a sheriff is bound to use such means in the sale of property under execution as any ordinary and prudent man would do in the sale of his own property, in order to make it bring the best possible price." The verdict of the jury was for the lessor of the plaintiff, and the Court discharged the rule for a new trial. Both cases were affirmed in this Court. So the exact duty of the sheriff was not defined by this Court in them, nor consequently was it decided what effect (218) failure to perform it would have upon the validity of the sale.

In *Jones v. Lewis,* 30 N. C., 70, which soon followed the other two cases and cited them, it appeared that executions issued and were, by the sheriff, levied on the undivided interests of John C. and Altas Jones in the premises, which consisted of several tracts. The land was sold by the officer, and at the sale each tract was set up separately, and the interest of the defendant in it sold at one bid. Jesse Person was the purchaser, and to him the sheriff executed the deed. The sale was attacked collat-

erally in an action of ejectment. No fraud or other equitable element was shown, if it could have availed anything in such an action, where there was no direct attack. *Judge Nash* said for the Court: "The second objection is that the interests of John C. and Atlas Jones in the land were sold at one bid, instead of being sold separately. There is no allegation of fraud in the transaction, nor is there any complaint on the part of the owners of the land that their interests have been injured by the mode pursued. We admit that it is unusual, but we do not see that it is therefore contrary to law. The law points out no specific mode in which a sheriff shall *conduct* the sale, but he is bound, by general principles, to sell the property levied on in such way as will probably raise the most money. The office of the sheriff is a highly responsible one, and much discretion must, in many cases, be allowed him. In this case, John C. and Atlas Jones were owners of two undivided fifths of the land sold; it might have been beneficial to them to have their respective interests sold by the same bid; the land thereby might have produced more. But this was a question of fact which, if pertinent to the case, ought to have been submitted to the jury, and we cannot say, as a matter of law, that the sale, for that case, is absolutely void." That case was followed by *Huggins v. Ketchum,* 20 N. C., (Anno. Ed.), 550, in which *Judge Daniel* thus refers to the method of sale by the sheriff: "If the lands embraced in that description comprehended more tracts or parcels of land than one, a sale *en masse* by the sheriff will still be supported, because it is warranted by his execution, and no fraud is shown
(219) either in the sheriff or the purchaser. *Wilson v. Twitty,* 10 N. C., 44; *Thompson v. Hodges, ib.,* 51." And he enlarged upon this view in the subsequent case of *Davis v. Abbott,* 25 N. C., 137, as follows: "Under the execution, issued to satisfy the first judgment mentioned in the case, the sheriff sold *by the acre* as much of the land that had been levied on as made the debt and costs. This mode of sale is not usual, we admit, but we cannot conceive that there is anything illegal in it, and in this case there is no pretense of fraud in the sheriff or loss by the debtor. If chattels are levied on, the sheriff sells the same in parcels, so as to make the debt by as few of them as he can conveniently. If he can save to the defendant a part of his land levied on, and satisfy the execution out of the remainder, the defendant must generally be benefited by it. The sheriff is a high and responsible officer, and a reasonable discretion, exercised by him in making sales, whether by exposing the whole tract or selling by the acre, we think is allowable; both the plaintiff and the defendant may, in many cases, be benefited by it."

The question arose in *McCanless v. Flinchum,* 98 N. C., 358, and *Chief Justice Smith* said: "The defendants say that the sale was made by the sheriff in bulk, and they insist that his deed to the plaintiff was

void for that reason. It is undoubtedly the duty of the sheriff to sell in such way as to realize, so far as he may be able to do so, a fair price for the property sold under execution, and if he fails to do so, the sale is voidable, and, upon objection, may be set aside; but this is a question of fact which ought to be submitted to the jury. *Jones v. Lewis,* 30 N. C., 70."

In *McLeod v. Pearce,* 9 N. C., 110, the Court held that chattels, consisting of various specific articles, taken in execution, cannot be sold *en masse;* the sheriff should conform, as nearly as possible, to such rules as a prudent man would probably observe in selling his own property for the sake of securing a fair price. *Judge Henderson,* in the course of the opinion, said: "The sale is void, on the ground that the *whole* of defendant's interest in the property held by his mother for life was put up by the sheriff and sold at one time, and even without pointing out what the property consisted of; such sale was unfair as tending to lessen the price, to give one bidder, who might have a knowledge of the property, an advantage over the rest, and to encourage speculation. The law which constitutes the sheriff the agent of the parties without their consent will see that he acts fairly; and it is upon this principle that it is necessary for the sheriff to seize the property and have it ready to deliver to the purchaser when from its nature it is capable of seizure. The Court would not be understood to say that where property consisted of a variety of small articles, each article should be sold separately, or he be required to sell separately where it is usual for the owners to sell in the gross; for instance, hogs in parcels, a flock of geese, or sheep, or other things, where it is customary for the owners of them to sell in such manner. Nor would a sale be invalidated where there might be difference of opinion as to the common or proper mode; it must appear *palpably* wrong; no man would adventure here, unless he had a knowledge which it was not to be supposed others possessed, or was a mere speculator." (220)

In *Bevan v. Byrd,* 48 N. C., 397, it appeared that a quantity of unshucked corn belonging to the plaintiff had been levied upon by a constable, who was sued in case for selling *en masse,* and in the absence of the plaintiff, thereby causing the corn to be purchased at an undervalue, to the plaintiff's damage, and this Court held that it was no violation of the officer's duty to divide the corn into small piles and sell it by the pile, *Nash, C. J.,* saying: "When an officer levies an execution upon property, it is his duty so to conduct the sale as will be most beneficial to all parties. The law points out no particular mode in which an officer shall conduct his sales; but he is bound by general principles to sell the property in that way which will probably bring the most money. He is the agent of both parties, appointed by the law to conduct the sale,

and must act in good faith to both, and both are interested that the articles shall bring the greatest amount of money; particularly is it important to the defendant. When various articles are levied (221) upon, they cannot be sold *en masse;* the officers must conform as nearly as possible to such rules as a prudent man would pursue in selling his own property," citing *Jones v. Lewis, supra,* and *McLeod v. Pearce, supra.* It was also held that whether the corn had been properly sold was a question of fact for the jury, to be decided by them under proper instructions from the court as to the law, the judge adding: "The practical eye of the experienced farmer can pretty well inform him of the quantity of corn, both in field and in pile. The purchaser's eye is his chapman."

We have reviewed a few of the cases somewhat at length, on account of the great importance of the question and for the further reason that very little has been said about it by this Court in recent years. It may serve to stimulate officers to a just performance of their important and delicate duty, and to advise them in some manner as to how it should be performed.

One clear result to be deduced from the foregoing authorities is, that if property is sold *en masse,* or in bulk, when it could reasonably be sold in parcels without prejudice to the parties, creditor or debtor, and there is any fraud or oppression, or even unfairness, whereby it is sold at a disadvantage to the debtor, the sale will be voidable by him in a direct proceeding to set it aside.

The facts in this case are so plainly against the fairness of the purchaser's conduct, he being also the plaintiff in the writ, that, as said by *Justice Reade* in a somewhat similar case (*Andrews v. Pritchett,* 72 N. C., 135), it requires no very nice application of them "to stamp this transaction with fraud." Let us assemble a few of the most salient facts:

The land brought a grossly inadequate price, which is a badge of fraud. Charles F. Dunn knew the land, and took advantage of his superior knowledge to deceive and mislead the debtor's attorney as to its real value, and at a time when investigation by the latter could not well be made before the sale. This was fraudulent conduct, as it accomplished its purpose. *Machine Co. v. Bullock,* 161 N. C., 1. There was no competition at the sale, by reason of the purchaser's conduct and the failure to advertise the sale properly, and he, therefore, bought at (222) his own price—$125 for land worth nearly if not quite $1,000; and finally, the land was sold when there was personal property sufficient to pay the amount due and the costs. The debtor, after the sale, tendered to Dunn not only the amount of the debt, interest and costs, which was all the law required him to do, but the full amount bid by

him for the land, and he refused to accept it. The land was sold, notwithstanding Dunn's attention had been called to the irregularities in his execution, the levy and the advertisement. The land, consisting of three separate lots, was sold as a whole, when if any one of the lots had been sold, the proceeds would have been far more than sufficient to pay the debt and costs.

This is not all, but it is surely enough for the purpose of deciding this case. These facts show palpably that the plaintiff in the execution was coveting the land, and not merely seeking, in a fair and legitimate way, the recovery of his debt. The process of the law should not be perverted to such an avaricious and fraudulent object. It will compel the debtor to pay, but will not tolerate unfairness and oppression.

The facts clearly bring this sale within the condemnation of the law, without deciding whether, under our decisions, a much weaker showing would be sufficient to avoid it. The sale *en masse,* with the attendant circumstances of fraud and irregularity, render the sale void as to the debtor. This affirms the judgment.

It is just to the sheriff to say that no wrong can fairly be imputed to him. It was all due to the fault of the purchaser, who, under cover and the supposed protection of the court's process and with special and peculiar knowledge of the facts, sought to use it for the evident purpose of deriving an unfair advantage, and thereby bought the property at a grossly inadequate price to the great sacrifice and damage of his debtor. We have no idea that the sheriff was cognizant of any such inequitable conduct on the part of the purchaser; the debtor makes no charge against him of complicity, and we, therefore, fully acquit him of all blame. The acts of the creditor are alone sufficient to annul the sale.

No error.

(223)

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

(Filed 8 October, 1913.)

1. Husband and Wife—Confidential Communications—"During Marriage"—Evidence.

The confidential communications made between husband and wife which neither will be compelled to disclose, are, by the express language of the statute, those which are communicated "during their marriage," and construing the statute, in connection with the common law, it does not extend to papers about business matters left by the husband in his desk with the apparent intent that they should come into the hands of his wife after his death.

2. Same—Interpretation of Statutes.

The language of our statute in regard to communications between husband and wife is that "no husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage," and the meaning thereof is clearly conveyed by the words employed, free from any ambiguity, that such communications be made, as stated, during the marriage; and hence it may not be extended, by interpretation, so as to include letters or papers, not of a confidential character, written by the husband to the wife, which he intended she should not receive until after his death.

3. Same — Insurance — "Suicide" — Business Communications—Declarations Against Interest—Evidence.

Written communications from the husband to the wife containing directions to her with regard to business transactions are not privileged communications under our statute; and where a husband had written to his wife instructions as to his business affairs, to be followed by her after his death, wherein it evidently appeared he was contemplating suicide, these communications are not privileged in an action upon his life insurance policy, wherein the defense of suicide was interposed, it appearing that he suddenly died shortly after writing the communication to his wife, and that the papers were thereafter found in his desk, evidencing the intent that she should not sooner receive them; and in this case the papers left under such circumstances are held to be competent evidence as declarations against interest.

(224) APPEAL by plaintiff from *O. H. Allen, J.*, at April Term, 1913, of CRAVEN.

This is an action to recover upon a policy of insurance issued by the defendant on 29 December, 1910. The insured died on 13 May, 1911.

The defendant denied liability and set up as a defense that W. B. Burgess, the insured, in violation of the terms of the policy and of the application therefor, committed suicide, and the further defense that the policy was void for the reason that the applicant, W. B. Burgess, had made material false representations in his application for the insurance.

The defendant introduced in evidence on the issue of suicide the following papers:

To My Wife:

Telegraph Joe Latham to come to you at once.

Look out for my Royal Arcanum and Heptasophs.

My Union Central policy is in the hands of the company as collateral for $180; there is $1,000 available on it.

Look into one of the little drawers and you will find a policy in the North State Mutual for $1,500; they hold my note for the premium, but the interest is paid on it up to May 30th; see if you can collect on it.

Tell Joe to write Carey J. Hunter for instruction in regard to the Union Central.

I owe Sam King $20.

I owe Gus Pritchard (colored) $50. Allen Jenkins (colored) $20.

(OVER)

Sell the place for what you can get, pay Mr. Cannaday, and take the rest and do the best you can.

God bless you and the children. Goodbye,

BAT.

Sam can tell you of the other colored people.

This note was in an envelope, and on the back of the envelope (225) the following was written:

"To Mam—Important.

"Mrs. W. B. Burgess.

"See Eugene Wood and get him to bury me and wait until you get insurance."

Plaintiff excepted.

Notice was duly served on the plaintiff to produce said papers on the trial.

The papers were written by the husband, but were not delivered by the insured to his wife, nor did she know of the existence of either until after the death of her husband, when they were brought to her from the private desk of her husband by one of her children. She then gave them to G. A. Whitford before his qualification as administrator, and he retained them until a few days before the trial, and after notice had been served on him, when he returned them to the wife.

The indorsement on the envelope was shown to Eugene Wood, who was undertaker and coroner, and upon request the papers were delivered to the coroner's jury at the inquest, but it does not appear that the paper inclosed in the envelope was read.

The jury returned the following verdict:

1. Did the defendant insure the life of W. B. Burgess in the sum of $1,500, as alleged in the complaint? Answer: Yes.

2. Did the insured, W. B. Burgess, die by his own hand, with intent to commit suicide? Answer: Yes.

3. Did the assured, W. B. Burgess, represent that he had had no serious illness or disease other than that stated in the application? Answer: Yes.

4. Was said representation untrue? Answer: Yes.

5. Was such representation material? Answer: Yes.

6. What sum, if any, is the plaintiff entitled to recover? Answer: .....

Judgment was entered in accordance with the verdict, and the plaintiff excepted and appealed.

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

(226) ALLEN, J. The statute of this State as to communications between husband and wife provides that "No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage," and it is by this statute, construed in connection with the rules of the common law as to what communications are confidential, that the admissibility of the papers introduced in evidence is to be tested. The inquiry naturally resolves itself into two propositions:

1. Are the papers communications from the husband to the wife during marriage?

2. If so, are they confidential?

We will consider the two propositions together. The reasons for the rule preventing the disclosure of confidential communications between husband and wife, as enforced at common law, are well stated by *Taylor, C. J.*, in *Mercer v. State,* 40 Fla., 216: "Society has a deeply rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage; and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status. Therefore the law places the ban of its prohibition upon any breach of the confidence between husband and wife, by declaring all confidential communications between them to be incompetent matter for either of them to expose as witnesses. . . . The reason of the rule for excluding the confidences between husband and wife as incompetent matter to be deposed by either of them, though they may be competent witnesses to testify to other facts, is found to rest in that public policy that seeks to preserve inviolate the peace, good order, and limitless confidence between the heads of the family circle so necessary to every well-ordered civilized society"; and *Judge Daniel* admonishes us in *Hester v. Hester,* 15 N. C., 228, that "the rule should not be extended to the exclusion of truth beyond the limits within which the reason of the law calls for it."

(227) Words in a statute are to be construed as they are ordinarily understood, and where "the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. It is, therefore, only in the construction of statutes whose terms

give rise to some ambiguity, or whose grammatical construction is doubtful, that courts can exercise the power of controlling the language in order to give effect to what they suppose to have been the real intention of the lawmakers. Where the words of a statute are plainly expressive of an intent, not rendered dubious by the context, the interpretation must conform to and carry out that intent. It matters not, in such a case, what the consequences may be. It has, therefore, been distinctly stated, from early times down to the present day, that judges are not to mold the language of the statutes in order to meet an alleged convenience or an alleged equity; are not to be influenced by any notions of hardship, or of what in their view is right and reasonable or is prejudicial to society; are not to alter clear words, though the Legislature may not have contemplated the consequences of using them; are not to tamper with words for the purpose of giving them a construction which is 'supposed to be more consonant with justice' than their ordinary meaning." Endlich Inter. Stat., sec. 4.

"The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the Legislature, to the end that the same may be enforced. This meaning and intention must be sought, first of all, in the language of the statute itself. For it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose and do express that will correctly. If the language of the statute is plain and free from ambiguity and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey." Black on Inter. Statutes, pp. 35 and 36.

The words of the statute under consideration are "communications made by one to the other during marriage."

Communicate, as defined by Webster, is to bestow, to convey, to make known, to recount, to import; as to communicate information to any one, and communication is the act of communicating; and it (228) would seem that a paper, although directed to the wife, of which she had no knowledge and which it was not expected she would see until after the death of the husband, is not a communication during marriage.

The language indicates either that the information should be actually imparted, or, at least, that there should be an expectation of doing so, during marriage.

If, however, the papers introduced in evidence are communications from the husband to the wife, the statute does not render them incompetent unless they are confidential. A perusal of the papers discloses that all the statements made are in regard to business matters; that the directions given could not be performed without disclosing the con-

tents of the papers, and that the husband expected this would be done, and in many respects the papers are testamentary in character.

In 40 Cyc., 2355, the author says: "Communications between husband and wife in respect to purely business matters are not privileged," and the text is supported by the decided cases: *Spitz's Appeal,* 56 Conn., 184; *Parkhurst v. Birdell,* 110 N. Y., 386; *Hanks v. Van Gardner,* 59 Iowa, 181; *Sedgwick v. Turner,* 90 Ind., 281.

We are also not without authority upon the question in our own State. In the *Hester case* before referred to, *Judge Daniel* says: "The rule upon the subject of confidential communications is not denied; the sanctity of such communications will be protected. Persons connected by the marriage tie have, as was said at the bar, the right to think aloud in the presence of each other. But the question remains, What communications are to be deemed confidential? Not those, we think, which are made to the wife, to be by her communicated to others; nor those which the husband makes to the wife as a matter of fact upon which a thing is to operate after his death, when it must be the wish of the husband that the operation should be according to the truth of the fact, as established by his declaration. Suppose a husband were to disclose to his wife that he has given to one of their children a horse, can she not after his death prove that as against the executor? Suppose, also,
that the declaration to which the wife was called had been to her
(229) and another, there is no reason why she, if she will, may not
testify to it, as well as the other. Why? Because it is then apparent that it was not confidential between the husband and wife, in the sense of the rule. The same reason equally applies when, from the subject of the conversation, it is obvious he did not wish it concealed, but, on the contrary, must have desired to make it known, and through her, if he found no other means of doing it."

Note that the learned and accurate judge says, among other things, that the rule does not apply to those communications which "the husband makes to the wife as to a matter of fact upon which a thing is to operate after his death," and it will be seen that it fits each statement in the papers objected to.

This case was approved in *Gaskill v. King,* 34 N. C., 213, in which the widow was permitted to testify that her husband handed the deed in question to her, and told her to take care of it for Anson, and have it proved and recorded for him, whenever she pleased; that she then took it, and put it in her trunk, separate from her husband's papers, and he never saw it afterwards to her knowledge; and that he died in 1836, and shortly afterwards she had the deed proved and registered.

We are, therefore, of opinion, having in view the reason for the rule, the language employed in the statute, the fact that the wife had no knowl-

edge of the papers until after the death of her husband, that it appears from the papers and the attendant circumstances that she was not expected to do so, and the subject-matter of the papers, that they are not confidential communications made by the husband to the wife during marriage, within the meaning of the statute, and were property admitted in evidence, as declarations against interest.

We at first thought *S. v. Wallace,* 162 N. C., 622, was decisive of this in favor of the defendant, but the two cases rest upon different principles, and the distinction between the two is that in the *Wallace case* the letter reached the wife during the life of the husband, and came into the hands of a third person without the connivance or consent of the wife, while in this, the wife knew nothing of the papers until after the death of her husband, and she gave them to another person.

This disposes of the only material exception upon the second (230) issue, and as the finding on that issue precludes a recovery by the plaintiff, it is not necessary to discuss the exceptions arising on the other issues.

No error.

ELIZABETH G. GRIFFIN v. C. E. AND T. A. COMMANDER.

(Filed 8 September, 1913.)

Wills—Devises in Fee—Power of Disposition—Precatory Words.

A devise to G., the widow of the testator, "with power to give and devise" the estate to their children and grandchildren, with the expression, "that they are equally our own and well beloved by each of us, and she has the same right of distribution of our estate as I have, knowing no partiality or discrimination in the same": *Held,* G. took the estate in fee simple, there being no specific language limiting a life estate to her with power of disposition, the words annexed not restricting the estate devised, but being merely an expression of the testator's opinion that his wife had the same right as he of distribution and would impartially make it.

APPEAL by plaintiff from *Bragaw, J.,* at August Term, 1913, of PASQUOTANK.

Ward & Thompson for plaintiff.
J. C. Brooks for defendants.

CLARK, C. J. This is a controversy, submitted without action, to determine whether or not the plaintiff can make a good and valid title to the defendants for certain real estate in Elizabeth City which she has contracted to convey to them.

W. W. Griffin died 1 October, 1897, owning said realty in fee and leaving his widow, who is the plaintiff, two children, N. R. Griffin and Blanche Temple, each of whom had living children, and seven grandchildren, who were the children of his deceased son, William J. Griffin. In March, 1901, said widow and her son, N. R. Griffin, instituted a special proceeding against Blanche Temple and the seven chil-
(231) dren of W. J. Griffin, deceased, for sale of the premises for partition. Such sale was made and confirmed and a deed was made to the plaintiff as purchaser. In that proceeding the children of N. R. Griffin and Blanch Temple were not made parties, and this is now urged as a defect.

The effect of such partition proceedings need not be discussed, for we are of opinion that under the will of W. W. Griffin the plaintiff took a fee simple in the *locus in quo* and has a right to convey a good and indefeasible title to the defendants, to whom she has contracted to sell the same.

W. W. Griffin by his will devised and bequeathed to his widow, the plaintiff, "Elizabeth G. Griffin, all the remainder of my estate, real and personal, with power to give and devise the same after her death, to our beloved children and grandchildren; that inasmuch as they are and should be our lawful heirs and that they are equally our own and well beloved by each of us, as their joint parents, she has the same right of distribution of our estate as I have, knowing no partially nor discrimination in the same."

The rule governing this case is clearly stated in *Borden v. Downey,* 35 N. J. L., 77: "Where an estate for life is expressly given and a power of disposition is annexed to it, in such case the fee does not pass under such devise, but the naked power to dispose of the fee. It is otherwise in case there is a gift generally of the estate, with a power of disposition annexed. *In this latter case the property itself is transferred.*

In the will of W. W. Griffin there is no limitation for life, and the words annexed do not restrict it to a life estate, but are merely an expression of the opinion of the testator that his wife after his death should have complete right of distribution of said estate as fully as he had himself, and would exercise it impartially.

In *McKrow v. Painter,* 89 N. C., 437, the testator gave the property to his wife, "if she remains a widow; and if she marries, she is only to have a child's part . . . and I authorize my wife at her death to divide this property among our children as she sees proper."
(232) The Court held that under the act of 1784, now Revisal, 3138, this language vested the absolute title in the wife of the testator, distinguishing *Alexander v. Cunningham,* 27 N. C., 430.

In *Parks v. Robinson,* 138 N. C., 269, it is held, citing 2 Underhill on Wills, sec. 686, that "A devise to a person for life only, with power of disposition, gives the devisee an estate for life with power to appoint in fee simple."

In *Jackson v. Robins,* 16 Johns. (N. Y.), 588, it is held to be settled law that "Where an estate is given to a person generally, or indefinitely, with power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to the first taker an estate for life only by certain and express words and annexes thereto a power of disposal; in that special and particular case the devisee will not take the estate in fee." This case is cited and approved in *Bass v. Bass,* 78 N. C., 374, where it was held that a devise to the testator's wife of his property, "to be disposed of by will, or in any manner she may deem best," did not impose a limitation upon the gift, and that the words of appointment cannot be held to have such effect; and further, that where an estate is given to a person generally, with the power of disposal, it is in fee unless the testator gives to the first taker an estate for life only and annexes thereto a power to dispose of the reversion, citing 2 Jarman Wills, 171, note 2; Kent. Com., 349; Sugden on Powers, 96.

Jackson v. Robins, supra, is also cited with approval in *Patrick v. Morehead,* 85 N. C., 62, where it is laid down: "It has been settled upon unquestionable authority, that if an estate be given to a person generally, with the power of disposition or appointment, it carries the fee; but if it be given to one for life only, and there is annexed to it such a power, it does not enlarge the estate, but he has only an estate for life." *Bass v. Bass* and *Patrick v. Morehead,* both *supra,* are cited with approval in *Long v. Waldraven,* 113 N. C., 337.

The test in cases of this kind is whether the testator expressly limits the devise of the first taker to a life estate by specific language. No such specific language is used in this case. The plaintiff took a fee simple, absolute, and the phrase, "with the power to devise (233) after her death to our children and grandchildren," does not limit the prior fee-simple estate devised to her. Such words were mere surplusage, because the right to devise is incident to her fee simple. Indeed, the words, "She has the same right of distribution of our savings as I have," intimate a clear intention to devise the fee simple to her. In effect, he said that the property having been acquired by the toil of both of them, he intended that his wife after his death should have the same power of disposing and controlling such property and as fully as he had himself.

The judgment of the court below to the contrary of this opinion is Reversed.

Cited: Fellowes v. Durfey, post, 311; *Satterwaite v. Wilkinson,* 173 N. C., 40; *Darden v. Mathews, ib.,* 188.

PARMELIA EWELL v. M. M. EWELL ET AL.

(Filed 8 October, 1913.)

1. Bastards—Born in Wedlock—Presumptions—Rebuttal Evidence.

The presumption of legitimacy of a child born in wedlock may be rebutted by showing to the satisfaction of the jury, by competent and relevant evidence, that sexual intercourse between the husband and wife did not take place at any time when he, by the laws of nature, could have been the father of the child.

2. Same—Conflicting Evidence—Questions for Jury—Trials—Burden of Proof—Instructions.

In an action for partition of lands, the plaintiff claimed his interest therein as the sole heir at law of C., and that C. and his brother W. were tenants in common of the lands as sole heirs of their father, J. The defendant claimed under W., and contended that though C. was born in wedlock, J. could not have had access to his wife at a time when, under the laws of nature, he could have begotten him. There being conflicting evidence tending to establish the contention of each of the parties upon the issue of the legitimacy of C., it presented a question of fact for the determination of the jury, under instructions from the court that C. having been born in wedlock, there is a presumption of his legitimacy, and the burden was on the defendant to show nonaccess.

3. Evidence—Declarations—Pedigrees—Paternity—Family Bible—Parol Evidence.

Parol evidence of the declarations of a deceased member of a family is not incompetent, because hearsay, as to the pedigree of another member thereof, and such declarations may be written, as entries made in the family bible or other family register or record recognized by the family as such and brought from the proper custody. Hence, the entry of birth and date made in a family bible by a deceased member of the family is competent, as tending to show the date of birth of another member, upon the question of his legitimacy; and it is also competent to show that the deceased, whose paternity is in question, called the child "son," and regarded and treated him as his own child.

4. Same—Copies.

When the original entry in a family bible is competent upon the issue of legitimacy of a member of the family, and when the original has been lost or destroyed, a true copy thereof is admissible as secondary evidence; and while in this case the witness does not testify directly that the copy introduced at the trial is a correct one, the court could infer that fact from the testimony, and properly submitted the paper to the jury, instructing them that they must find that it contained a true copy of the entry before using it as evidence upon the question of ligitimacy.

5. Evidence—Declarations—Paternity—Admissions—Division of Lands by Parol.

The plaintiff claimed an undivided half interest in certain lands as the son and sole surviving heir at law of C., and that the land descended to C.

and his brother W. as heirs at law of their father. The defendant, claiming under W., denied the legitimacy of C. Evidence of a parol partition of the lands between C. and W. is held competent for the purpose of showing that C. had been recognized as the legitimate heir of his father by the defendant, it being conduct from which, in connection with the other facts and circumstances of the case, the jury might infer his legitimacy. Evidence of original entries, inscriptions, etc., to prove pedigree, discussed by WALKER, J.

APPEAL by defendant from *O. H. Allen, J.*, at March Term, (234) 1913, of PITT.

Partition. J. J. Ewell died seized of the tract of land in question, and plaintiff alleges that Charles Ewell and his brother, Walter Ewell, are his sons and consequently were tenants in common of the land as his sole heirs. Defendant denies this allegation, and avers that Charles Ewell was not the legitimate child of J. J. Ewell, although the two, Walter and Charles, were of the same mother, the wife of (235) said Ewell. That J. J. Ewell and his wife had separated before Charles Ewell was begotten, and continued to live apart until his birth, and during the entire period of separation the wife lived in adultery with one Dr. Best, who is the father of Charles Ewell, he having taken the name of his mother. The following is the substance of the testimony:

The defendant's testimony tended to show these facts: J. J. Ewell lived separate and apart from his wife; he spent his time in Martin County; his wife was unfaithful to him; she was intimate with other men, and she had been heard to say that Charles Ewell was not the son of her husband; another man recognized Charles as his son, made presents to him, called him son, and Charles called the other man "daddy."

The plaintiff's testimony tended to show these facts: J. J. Ewell did not live separate and apart from his wife; while it was true he spent much of his time in Martin County, he left his neighborhood in Pitt County because he was charged with committing some criminal offense for which he feared he might be arrested; he had opportunity of access to his wife; he spent some of his time in the neighborhood in which she lived; he had been seen at the house in which she lived about the time that Charles must have been begotten; he made shingles in a swamp within a mile of his wife; he sent to her provisions for her support; he employed a midwife for his wife when Charles was born and paid the fees. The plaintiff also introduced testimony tending to show that Charles was born about the time fixed in the family record, and defendant's testimony tended to show that he was born at a different time.

Upon the issue of paternity it appears therefore that there was conflicting evidence, and it was submitted to the jury to find the fact as to the legitimacy of Charles Ewell, the court instructing the jury that

there is a presumption of legitimacy, Charles having been born during the marriage of the Ewells, and placing the burden upon the defendant to rebut it by showing impotency or nonaccess. The plaintiff Parmelia Ewell is the child of Charles Ewell, who is dead, and claims his interest from him as his heir. The defendant M. M. Ewell claims under
(236) Walter Ewell. The jury returned a verdict in favor of the plaintiff, and defendant M. M. Ewell appealed.

Jarvis & Wooten and F. G. James & Son for plaintiff.
F. C. Harding and Harry Skinner for defendant.

WALKER, J. The case turns upon the legitimacy of Charles Ewell. According to the established rule, when a child is born in wedlock it is presumed in law to be legitimate, and by the ancient common law this presumption could not be rebutted if the husband was capable of procreation and was within the four seas during the period of gestation; but this doctrine was exploded in the case of *Pendrell v. Pendrell,* 2 Str., 925, and gave way to the modern doctrine that the presumption may be rebutted by any competent and relevant evidence tending to satisfy the jury that sexual intercourse did not take place at any time when by the laws of nature the husband could have been the father of the child. *Boykin v. Boykin,* 70 N. C., 262; *S. v. McDowell,* 101 N. C., 734; 2 Greenleaf on Evidence, 130, 131; *S. v. Pettaway* 10 N. C., 623; *Rhyne v. Hoffman,* 59 N. C., 335; *Woodward v. Blue,* 107 N. C., 407; *S. v. Liles,* 134 N. C., 735; *Banbury Peerage Case* (H. of Lords), 1, Simm and Stuart, 153; 5 Cyc., 626.

Our cases have stated the present rule in somewhat different language, but they substantially agree as to its terms and scope, as will be seen from the following extracts:

"When a child is born in wedlock, the law presumes it to be legitimate, and unless born under such circumstances as to show that the husband could not have begotten it, this presumption is conclusive; but the presumption may be rebutted by the facts and circumstances which show that the husband could not have been the father, as he was impotent or could not have had access." *S. v. McDowell, supra* (opinion by *Davis, J.*).

In another case the Court said: "The child was begotten while the parties were man and wife, but was not born until six months after the husband had obtained a divorce *a vinculo matrimonii* on account of adultery. During the time when the child was begotten the hus-
(237) band and wife lived separately, but in the same neighborhood, near enough for the husband to visit her, and it is proved that, occasionally he did go to the house where she was staying. There was, then, an opportunity for sexual intercourse between the parties, and

from that the law presumes that, in fact, there was sexual intercourse between them. This plaintiff must, therefore, be taken to be legitimate, unless it be proven by irresistible evidence that the husband was impotent or did not have any sexual intercourse with his wife; but the former is not pretended, and the latter is a fact which neither the wife nor the declarations of the wife is admissible to prove. *Rex v. Luffe,* 8 East, 193. Here, independent of the declarations of the wife, which must be rejected as incompetent, there is testimony sufficient to rebut the presumption of access. Such being the case, the proof that the plaintiff's mother lived in adultery with a man who testified that he was the father of her children, makes no difference. As was said in the case of *Morris v. Davis,* 14 Eng. C. L., 275, 'It matters not that the general camp, pioneers and all, had tasted her sweet body, because the law fixes the child to be the child of the husband.'" *Rhyne v. Hoffman, supra* (opinion by *Battle, J.*).

More recently this Court said: "Formerly a child born of a married woman was conclusively presumed to be legitimate, but now legitimacy or illegitimacy is an issue of fact resting upon proof of the impotency or nonaccess of the husband. This is true even when the child is begotten as well as born in wedlock. For a stronger reason, this is true when, as in this case, the child was begotten four or five months before the marriage, and the jury believed the evidence that the husband had no intercourse with the prosecutrix prior to the marriage." *S. v. Liles, supra* (opinion by *Clark, C. J.*).

"The question of the legitimacy or illegitimacy of the child of a married woman is one of fact, resting on decided proof as to the nonaccess of the husband, and the facts must generally be left to the jury for determination." 2 Kent Com., 210. See, also, Schouler Dom. Rel., sec. 225; *Hargrave v. Hargrave,* 9 Beavan, 552.

The rule as to the presumption of legitimacy in respect to a (238) child born in lawful wedlock was strongly stated by the Supreme Court of the United States in two of the celebrated *Gaines cases,* in which the question was often considered and discussed. The Court held that access between man and wife is always presumed until otherwise plainly proved, and nothing is allowed to impugn the legitimacy of a child short of proof by facts showing it to be impossible that the husband could have been its father. *Gaines v. Hennon,* 65 U. S., 533; *Patterson v. Gaines,* 47 U. S., 550. Those cases were described by *Mr. Justice Wayne,* in concluding the opinion in the last case of this long protracted litigation, as the most remarkable in the records of the Court. What is therein said, therefore, is entitled to great respect and should have great weight, and it does not materially differ from the rule as formerly settled by this Court.

We conclude that the judge was right in leaving the matter to the jury, as an open question of fact, with a correct instruction as to the presumptions of the law and a proper caution as to how to deal with the evidence.

There are two questions of evidence which require our notice. The plaintiff offered to introduce a copy of the entry in the family bible of the Ewells showing the birth of Charles Ewell and its date. If age, time, and place of birth and death are not in themselves questions of pedigree or genealogy, they may be connected therewith in such way as to render declarations concerning them admissible. They may be material circumstances from which an inference may fairly be drawn as to a person's paternity, as, for example, whether A. is the son of B., and any one of them alone may have this force as proof. McKelvey on Evidence, p. 219. In such case, declarations of deceased members of the family are competent to show the fact in issue. 1 Greenleaf on Evidence (16 Ed.), sec. 114b; McKelvey on Evidenct, *supra.* The declarations may be oral or written, such as entries in the family bible or other family register or record. *Clements v. Hunt,* 46 N. C., 400; 16 Cyc., 1234, and cases in notes 89 and 90; *Lewis v. Marshall,* 5 Peters (U. S.), 470. "The date of a birth and death of an individual,
(239) being matter of pedigree, may be proved by hearsay evidence and general repute in his family, and an entry of a deceased parent, made in a bible, is regarded as a declaration of the parent making the entry, and therefore admissible. 1 Greenleaf on Ev., sec. 104; Phil. Ev. (Cow. & Hill's and Edw. notes), 249-252 and notes." *Greenleaf v. R. R.,* 30 Iowa, 303. But entries in family bibles or other family records are not the only source from which we may legally obtain this kind of proof. Hearsay, or, as it is generally termed, reputation, is admissible in all questions of pedigree. And the phrase "pedigree" embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened. The entry of a deceased parent, or other relative, made in a bible, family missal, or any other book, or document, or paper, stating the fact and date of the birth, marriage, or death, of a child or relative, is regarded as the declaration of such parent or relative in a matter of pedigree. Correspondence of deceased members of the family, recitals in family deeds, descriptions in wills, and other solemn acts are original evidence, where the oral declarations of the parties are admissible. Inscriptions on tombstones and other funeral monuments, engravings on rings, inscriptions on family portraits, charts of pedigree, and the like, are also admissible as original evidence of the same facts. 1 Greenleaf on Evidence (16 Ed.), sec. 114d; *Kelley's Heirs v. Maguire,* 15 Ark., at pages 604 and 605; Jones on Evidence (2 Ed.), sec. 316; *Berkley Peerage case,* 4 Campbell, 401, 418; *Jackson v. Cooley,* 8 Johns., 128, 131.

The following cases sustain and illustrate the rule and the variety of forms which the proof may take: *East v. Martin,* 19 N. H., 152; *Collins v. Grantham,* 12 Ind., 440; *Whitcher v. McLaughlin,* 115 Mass., 167; *North Brookfield v. Warren,* 19 Mass., 171; *Ins. Co. v. Wilkinson,* 53 Ga., 535; *Jones v. Jones,* 45 Md., 144; *Chamberlain v. Chamberlain,* 71 N. Y., 423; *Wren v. Howland,* 75 N. C., 894 (which is like our case in respect to the fact offered to be proven and the mode of proof). The original entry being competent, an authentic copy of it, when the original has been lost or destroyed, must also be. We presume that the judge found as a fact that the original was lost; the copy, (240) therefore, was admissible as secondary evidence, for the general rule applies, 1 Greenleaf Ev., 16 Ed., sec. 563q; *Whitcher v. McLaughlin,* 115 Mass., 167. The entry must have been made by a deceased person or recognized by the family and the record brought from the proper custody. Jones on Ev. (3 Ed.), secs. 312, 315. These requirements seem to have been observed in this case. The testimony of Emily Ewell as to the manner in which Charles Ewell, her husband, made the copy which was offered in evidence, from the family bible, is not very satisfactory. She does not say that the copy is a perfect, or even a true one, but we cannot say there is not sufficient evidence to sustain the finding that the copy is a correct transcript of the original. The court gave the defendant another chance as to this matter by submitting it to the jury and instructing them that they must find that the paper contained a true copy of the entry before using it as evidence upon the question of the legitimacy of Charles Ewell. There can be no doubt of the relevancy of the evidence to prove this fact. The copy, therefore, was properly admissible.

The plaintiff also proposed to prove that there had been a parol partition of the land between the defendants M. M. Ewell and Charles Ewell, for the purpose of showing that Charles Ewell had been recognized as the legitimate heir of J. J. Ewell, and we do not see why it was not competent for this purpose, as an admission or recognition by defendant of this fact, or conduct on his part from which the jury might infer the legitimacy, at least in connection with the other facts and circumstances. Jones on Ev. (3 Ed)., sec. 315, p. 397. The plaintiff did not rely on the partition as valid and proof of her title to one-half of the land, but solely for the purpose first stated. The evidence was properly admitted.

We find no error in the case, after careful examination.

No error.

Cited: West v. Redmond, 171 N. C., 744; *Hall v. Fleming,* 174 N. C., 170.

(241)

R. E. JONES ET AL. v. JARVIS WHICHARD ET AL.

(Filed 8 October, 1913.)

1. Estates—Heirs of the Body—Rule in Shelley's Case—Words and Phrases—Descriptio Personarum.

For the application of the rule in *Shelley's case* to a conveyance to one for life and "the heirs of his body," it must appear that the words "heirs of the body" were used in their technical sense, carrying the estate to such heirs as an entire class to take in succession, with the effect to convey "the same estate to the persons, whether they take by descent or purchase," and when it appears from the perusal of the entire instrument that the words were not intended in their ordinary acceptation as words of inheritance, but simply as *descriptio personarum*, designating certain individuals of the class, or that the estate is thereby conveyed to "any other person in any other manner or quality than the canons of descent provide," the rule does not apply, and the interest of the first taker is an estate for life.

2. Same—Contingent Remainders.

An estate to J. in the conveyance clause of a deed, and in the habendum, to J. and his wife, "during their natural lives, then to their bodily heirs, provided they leave any, and if not, to be equally divided among my nearest of kin, etc.," conveys to J. and his wife a life estate, with remainder over to their children, who take upon the contingency of their surviving their parents, etc. *Springs v. Scott*, 132 N. C., 548, cited and distinguished.

3. Husband and Wife—Contingent Remainders—Seizure of Wife—Curtesy.

Where a contingent remainder in lands is limited to the wife after a life estate to another, and the wife predeceased the life tenant, the husband may not become tenant by the curtesy therein, for she has never been seized of the lands.

4. Deeds and Conveyances—Conflicting Clauses—Construction of Deeds.

Where an estate in fee is granted in the conveyance clause of the deed, and from the habendum and other parts of the deed it appears that the grantor intended to convey an estate for life, with contingent limitations over, the two clauses in the deed will not be regarded as repugnant, but as in explanation of each other, and the intent of the grantor, as gathered from the whole instrument, will prevail.

(242) APPEAL by C. F. Page from *O. H. Allen, J.*, at April Term, 1913, of PITT.

Cause heard on case agreed and after transfer from clerk Superior Court, the question presented being the proper distribution of a fund arising from a sale of land for division.

On the hearing it was made to appear that, in August, 1866, Major Jones made a deed to his son, R. M. Jones, etc., for 40 acres of land, in terms as follows:

"This indenture, made this the 11th day of August, A. D. 1866, between Major Jones of the first part and Robert M. Jones of the second part, both of the county of Pitt and State of North Carolina:

"Witnesseth, That the said Major Jones, for and in consideration of natural love and affection which he has unto the said Robert M. Jones, his son, has given, granted, aliened, released and confirmed, and by these presents do give, grant, alien, release, and confirm unto the said Robert M. Jones, his heirs and assigns, a certain tract of parcel of land situate as follows:

. . . . . .

"To have and to hold the said tract or parcel of land and all the appurtenances thereof to him, the said Robert M. Jones and Martha F. Jones, his wife, during their natural life, and then to their legal bodily heirs, provided they leave any, and if not, to be equally divided among my nearest of kin, etc." That on November 27, 1900, said R. M. Jones made a deed for the land to his wife for life, remainder to seven of his nine children and not including a son, S. L. Jones, or a daughter, Huldah, intermarried with C. F. Page; that Huldah Page had issue born alive, a son, and she and son died before R. M. Jones and wife, and these last having also died, present suit was instituted for sale of land for division.

Plaintiffs are the seven children of R. M. Jones and wife, who were grantees in the deed of R. M. Jones to his wife, etc.

Defendants are S. L. Jones, another son, and C. F. Page, surviving husband of Huldah.

On these facts, it was contended for plaintiffs that, under the rule in *Shelley's case*, the deed from Major Jones conveyed a fee simple, and that when R. M. Jones conveyed the property to his wife for (243) life and remainder to seven of their children, plaintiffs, the deed passed the entire interest, and defendants were thereby excluded.

Defendant S. J. Jones contended that the deed of Major Jones conveyed only a life estate, remainder to his children or issue, in the sense of children or grandchildren, and that he, as one of them, was entitled to a child's interest.

It was insisted for C. F. Page that the deed from Major Jones conveyed a life estate to R. M. Jones and wife, remainder to their issue, in the sense of children and grandchildren, and that this remainder was vested in such children, and that on the death of his wife, Huldah, leaving an infant son, her interest descended to such son, and on his death without issue and without brother or sister, the share passed to C. F. Page, the father, under 6 Canon of Descent, Revisal, ch. 30.

The court below, being of opinion that the deed of Major Jones conveyed a life estate, remainder to the children and grandchildren, con-

tingent on their surviving their parents, entered judgment that defendant S. L. Jones was entitled to a share in the fund, and that C. F. Page was excluded, his son having died before R. M. Jones and wife.

From this judgment said C. F. Page, having duly excepted, appealed.

Harding & Pierce and Ward & Grimes for plaintiff.
Julius Brown for defendant.

HOKE, J., after stating the case: A very full and satisfactory statement of the rule in *Shelley's case* is given in Preston on Estates as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

(244) In approval and illustration of the rule as stated, there are many decisions here and elsewhere to the effect that, in order to its proper application, the word "heirs" or heirs of the body (these last by reason of our statute, Revisal, sec. 1578) must be used in their technical sense, carrying the estate to such heirs as an entire class to take in succession from generation to generation, and they must have the effect to convey "the same estate to the same persons, whether they take by descent or purchase," and, whenever it appears from the context or from a perusal of the entire instrument that the words were not intended in their ordinary acceptation of words of inheritance, but simply as a *descriptio personarum* designating certain individuals of the class, or that the estate is thereby conveyed to "any other person in any other manner or in any other quality than the canons of descent provide," the rule in question does not apply, and interest of the first taker will be, as it is expressly described, an estate for life. *Puckett v. Morgan,* 158 N. C., 344; *Smith v. Proctor,* 139 N. C., 314; *Wool v. Fleetwood,* 136 N. C., 460-470; *May v. Lewis,* 132 N. C., 115; *Whitesides v. Cooper,* 115 N. C., 570; *Mills v. Thorne,* 95 N. C., 362; *Ward v. Jones,* 40 N. C., 404. In the recent and well considered case of *Puckett v. Morgan, supra,* the language of the instrument was, "To M. during her life, then to her bodily heirs, *if any;* but, if she have none, back to her brothers and sisters," well-nigh in the exact terms of the present deed, and it was held that, by reason of the context, the words "bodily heirs" were so qualified as to indicate that they were used merely as a *descriptio personarum* and that M. took only a life estate. The authority is, in our opinion, controlling and fully supports the judgment of his Honor in denying the application of the rule. The cases of *Morrisett v. Stevens,* 136 N. C., 160, and

Whitfield v. Garris, 134 N. C., 24, and others cited by counsel, when properly understood, do not militate against this construction.

In *Whitfield's case* and in *Morrisett's case* the ulterior disposition of the property was not and was not intended as a limitation on the estate conveyed to the first taker, but was a provision whereby one stock of inheritance on certain contingencies was substituted for another, the second to hold as purchasers direct from the grantor or origi- (245) nal owner. *Sessoms v. Sessoms,* 144 N. C., 121. The case of *Puckett v. Morgan* is also authority for the position that this deed of Major Jones conveys an estate for life to R. M. Jones and wife, remainder to their issue in the sense of children and grandchildren. This meaning has not infrequently prevailed when it appeared to be the clear intent of the instrument. *Smith v. Lumber Co.,* 155 N. C., 389-93; *Sain v. Baker,* 128 N. C., 256; *Rollins v. Keel,* 115 N. C., 68, etc. We concur also in the view of his Honor, that this remainder is contingent on these devisees being alive to fill the description at the time of the falling in of the particlar estate. This construction is also sustained by *Puckett v. Morgan,* and the well reasoned case of *Latham v. Lumber Co.,* 139 N. C., 9, and *Bowen v. Hackney,* 136 N. C., 187, are to like effect. It was contended for defendant that this was a vested remainder, relying on certain expressions in *Ex parte Dodd,* 62 N. C., 97, quoted by the Court in *Springs v. Scott,* 132 N. C., 552, but the position is not well taken. In *Springs v. Scott* the Court was dealing with the power to sell contingent remainders, and in using the expression that "such power existed whensoever one was born in whom the estate *can vest,*" the judge delivering the opinion did not intend that the remainder thereby became vested, but the power in question arose whenever one of the class was born in whom the estate would vest on the happening of the contingency. Those cases, in the aspect suggested, have no bearing on the question presented. The remainder in our case was contingent, and, applying the doctrine as above stated, it was properly held that defendant S. L. Jones was entitled to a child's portion of the estate, he being alive to claim it when the life estate terminated, thus filling the description as devisee, and that Huldah L. Page and her son, both having died before the life tenants, did not fill such description and had no interest or estate which the father, C. F. Page, could inherit. The suggestion that C. F. Page could claim as tenant by curtesy is without merit; the existence of the life estate in R. M. Jones and wife would in any case prevent the seizin required for the validity of such a claim. (246) *In re Robert Dixon,* 156 N. C., 26; *Redding v. Voght,* 140 N. C., 562.

We are not inadvertent to the fact that the deed of Major Jones in the premises, if it stood alone, would convey a fee simple, nor to the

legal position that at common law, while it was the usual province of the habendum to define and determine the quantity of the estate or to explain or qualify the premises, it was not allowed to create an estate entirely repugnant to the interest conveyed in the premises, an instance of this appearing in *Haffner v. Irwin,* 20 N. C., 570, where the premises conveyed an estate to A. and his heirs, habendum to B. and his heirs.. Such a position is still recognized here in proper cases, as appears in *Wilkinson v. Norman,* 139 N. C., 41, and other cases of like kind. But in *Triplett v. Williams,* 149 N. C., 394, this Court, in a well sustained opinion by *Associate Justice Brown,* announced the decision that, although a deed in its premises professed to convey an estate to the grantee and his heirs, it would not have the effect to convey a fee simple when it clearly appeared from the habendum or other portions of the instrument that it was the intent to convey only a life estate. That in such case it was not proper to construe the clauses as entirely repugnant, but that the one was in explanation of the other, adopting on that question the rule as given in 1 Devlin on Deeds, sec. 215, as follows: "It may be formulated as a rule, that where it is impossible to determine from the deed and surrounding circumstances that the grantor intended the habendum to control, the granting words will govern; but if it clearly appears that it was the intention of the grantor to enlarge or restrict the granting clause by the habendum, the latter must conrol."

There is no error, and the judgment of the lower court must be Affirmed.

Cited: Brown v. Brown, 168 N. C., 14; *Robeson v. Moore, ib.,* 389; *White v. Goodwin,* 174 N. C., 726.

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IN RE W. W. PIERCE.

(Filed 8 October, 1913.)

1. Witnesses Defaulting—Attorney at Law—Fines—Interpretation of Statutes.

A witness who fails to appear when the case is called in which he has been subpœnaed to testify is not justified in his default because he is a practicing attorney at law and had cases to try in another county at the date upon which the case was called wherein he was a witness, and the party who subpœnaed him can recover the penalty, with the costs of the motions. Revisal, sec. 1643, construed in connection with sec. 1645.

2. Same—Damages.

A witness who has defaulted without justification is liable in damages, besides the penalty, to the party who had him subpœnaed, to the full amount he has sustained "for the want of such witness's testimony." Revisal, sec. 1643.

APPEAL by respondent from *O. H. Allen, J.*, at August Term, 1913, of DUPLIN.

H. L. Stevens for appellant.
No counsel contra.

CLARK, C. J. Judgment *nisi* for $40 having been entered against W. W. Pierce as defaulting witness under Revisal, 1643, on notice to show cause, the judgment was made absolute. The court found the facts: "W. W. Pierce was duly subpœnaed as a witness for the defendant in the case of *I. F. Hill et al. v. W. M. Faison et al.*, to attend the term of the Superior Court of Duplin which began 25 November, 1912. He was notified that he need not attend till Friday, 29 November, on which day he attended. He was a practicing lawyer, and appeared in cases which were ready for trial in Wayne Superior Court, which was then in session, and at his request the judge of that court postponed the trial of his causes till Saturday, 30 November. The case in Duplin Superior Court in which he was subpœnaed as a witness was not reached on Friday, and he applied to the judge of that court for a discharge. His Honor referred him to counsel for the defendant, who declined to excuse him, but paid him his per diem and mileage as required by Revisal, 1298. The witness thereupon, without being excused (248) either by the judge or the counsel for the defendant, returned to Goldsboro, and on the following day, being called as a witness and failing to appear, judgment *nisi* was rendered, and upon this motion the court finding that he did not show sufficient cause or incapacity to attend on said Saturday, 30 November, of Duplin Superior Court, rendered judgment absolute for said penalty, and that Winifred Faison, for whom he had been duly subpœnaed, should recover from the respondent W. W. Pierce the sum of $40, together with the costs of the motion."

This judgment was correct. It is true that the judge also found that the witness believed that he had a right to return to Wayne Superior Court to represent his clients, and therefore that his failure to attend the trial in Duplin Superior Court was not willful. Revisal, 1643, does not require that the failure to attend should be "willful." Besides, if it did, his Honor's finding of law to that effect was incorrect and could not be sustained. Willful means intentionally, and of that there was no question in this case. Willful is used in contradistinction to accidental, or unavoidably (see numerous cases cited 8 Words and Phrases,

7473) Indeed, the only definition given of "wilfully" in Bouvier's Law Dictionary is "intentional." It has some additional meaning in certain circumstances, but not under this statute, which, besides, does not use the word.

The defense that the appellant had a right to look after his practice as a lawyer in preference to obeying the subpœna of the court cannot be sustained. "Ignorance of the law is no excuse." Least of all could it be tolerated in an attorney who has a license which certifies that he is "learned in the law."

"Equality before the law" is a fundamental principle of our system of government. The law is no respecter of persons. While in one sense a lawyer is an officer of the court, that means simply that in the discharge of his duties he is subject to its control and discipline. But this does not excuse him from obedience to legal precepts to which he owes exactly the same respect and obedience as any other citizen. If a lawyer can be excused from obeying a subpœna because he prefers to attend (249) to his business as a lawyer, then a doctor would be equally excused for attending the bedside of his patients, or a locomotive engineer would take his seat in his cab, and a farmer would be equally entitled to pull fodder or pick cotton when those duties are pressing. A banker or a business man might well prefer attending some important meeting which would serve his pecuniary interests to a far greater extent than this witness would have been benefited by being present at the trial of his causes. The public authority has preference over private interest.

When the witness found that he was not discharged on Friday afternoon, and was required to attend as witness again on the next day, he should either have gone to Goldsboro that night to have seen the judge to procure a continuance of his causes, or have procured a brother attorney to represent him, and he could have returned next morning in time for court, or he could have discharged this matter probably equally as well by phone or wire. Certainly, he could not disobey this subpœna from any supposed priority of his personal duty to his client in consideration of a fee received, or expected, to the neglect of his duty to the public. The trial of causes cannot be conducted without the power of the court to compel the attendance of witnesses, for this duty is rarely pleasant or desired by the witnesses themselves, to whom it means also often a pecuniary loss, as well as an inconvenience.

So clear is the requirement that a defaulting witness is not only liable for a fine of $40 on default, but he is "further liable for the full damages which may be sustained for the want of such witness's testimony." Revisal, 1643.

Revisal, 1645, authorizes the reading of a deposition in certain cases, as where the witness is the President of the United States, the Governor of the State, or judge of the court holding a session of his court at the time of the trial, and other officials named in said section whose public duties are deemed as important as their presence at a trial. But the statute does not enumerate lawyers in this category, and it is apprehended that no statute could be passed to give them such exemption without including every other class of the community, to whom their personal interests are as important as the functions of a lawyer, Indeed, the latter can often more readily procure a continu- (250) ance of his cause or the services of a substitute than a doctor, a banker, a merchant, a locomotive engineer, and most other callings and professions. The judgment absolute is

Affirmed.

CABLE PIANO COMPANY v. ARCHIE H. STRICKLAND.

(Filed 8 October, 1913.)

1. Contracts, Written—Varied by Parol—Principal and Agent—Special Agent—Evidence.

One acting as sales agent for a piano company is not a general agent, and his authority to make any change from the written contract, signed by the purchaser, in direct contradiction of the conditions printed thereon in bold-faced type, must be specially shown.

2. Same—Trials—Instructions.

The declarations of an agent for the sale of pianos, that he had special authority to alter by parol the printed form of his sales contract, contrary to its express provision, are incompetent as evidence of his special authority to do so; and where a balance is admitted to be due under the written contract sued on, except for a claim made by the buyer arising from an agreement of this character resting in parol, the jury should be instructed to answer the issue in favor of the plaintiff if they believe the evidence.

APPEAL by plaintiff from *Lyon, J.*, at February Term, 1913, of SAMPSON.

This is an action to recover possession of a piano. Defendant admitted his signature to the contract of sale, which retained title to the piano until the purchase price was paid in full, but aver that plaintiff's selling agent, S. A. Kell, agreed with him at the time of the sale that if the piano came up to Kell's representations, and Strickland gave him a letter of recommendation, that he would credit the note with $50 when

it became due. Defendant paid the balance except $50 due at the time of the payment, and tendered the recommendation. The written
(251) contract contains the following clause in bold type: *"It is expressly agreed that the Cable Piano Company is not to be bound by any provisions other than those printed in the contract, unless the same shall be approved by the Cable Piano Company at————.* This contract subject to the approval of the Cable Piano Company," and the following indorsed thereon:

"NOTICE.—This conditional contract is subject to the approval of the Cable Piano Company at Richmond, Va., and contains all the agreements pertaining thereto. No agent or salesman is authorized to make any alterations herein, to vary in any way the interest clause, nor to give copies thereof not bearing the approval of the Cable Piano Company at Richmond, Va. Factory warranties do not include tuning."

The officers of the plaintiff testified that Kell had no instructions to make any such contract, nor any such authority; that they did not know nor had there been reported to the company any such contract as claimed by the defendant. That the contract approved by the company was the written one, without change.

There was no evidence on the part of the defendant tending to prove authority in Kell to make the agreement alleged by the defendant.

The plaintiff excepted to the introduction of all evidence offered to prove the agreement with Kell. The defendant alleged in his answer, among other things: "That at the end of the period agreed upon, to wit, on 26 September, 1909, the defendant, finding that said piano came up to the recommendations of said Kell, and was in fact a very desirable instrument, came to Clinton, paid to said Kell the sum of $114.80, the same being the balance due on said contract, less the sum of $50, and delivered to said agent a written testimonial in full accordance with the agreement hereinbefore stated, and demanded his contract and receipt in full for said payments. That said Kell accepted said payment and said testimonial, but refused to deliver to the defendant the contract signed by him, claiming that the same was at Richmond, Va., the home office of the plaintiff."

(252) His Honor charged the jury: "If you find from the evidence that at the time of signing the written contract, or before that time, plaintiff's agent, S. A. Kell, acting in the scope of his authority, promised defendant to deduct the sum of $50 from the price of the piano and to credit that sum on the contract, provided that defendant would make the recommendation that the piano bought was a good one and up to the representations, then you will answer the first issue 'No,' the second 'Yes,' issue 1½ 'Yes.'" The plaintiff excepted.

The second issue and the answer thereto were as follows:

"2. Did the plaintiff's agent, S. A. Kell, while acting within the scope of his authority, promise and agree to deduct the sum of $50 from the price of the piano, provided the defendant would make the recommendation referred to in the answer? Answer: Yes."

The plaintiff requested his Honor to instruct the jury, if they believed the evidence, to answer the second issue "No," which was refused, and the plaintiff excepted.

There was a verdict in favor of the defendant, and the plaintiff appealed from the judgment rendered thereon.

Faison & Wright for plaintiff.
H. A. Grady for defendant.

ALLEN, J. The agent from whom the defendant bought the piano was not a general agent of the plaintiff, and the burden was, therefore, on the defendant to prove that he had authority to waive the provisions of the written contract.

It was so held in *Machine Co. v. Hill,* 136 N. C., 128, and in *Medicine Co. v. Mizzell,* 148 N. C., 387.

In the first of these cases the plaintiff was suing upon a contract for the sale of sewing machines, which contained the provision: "It is understood that no claim or any understanding or agreement of any nature whatsoever between this company and its dealers will be recognized, except such as is embraced in written orders or is in writing and accepted by said company at its office," and the defense was that the agent who made the sale made a verbal agreement with them to have the sole agency for sale of the plaintiff's machines in Franklin County, and that they incurred considerable expense, employing an experienced salesman to handle the machines and purchased a horse (253) and wagon for him, but that, in violation of such contract, the plaintiff shipped machines to said county to rivals in business of the defendants, who undersold the defendants, causing them to sell the machines bought of the plaintiff at a loss, besides causing the loss of salary paid their salesman and the cost of equipping themselves for the handling of the machines under their contract for an exclusive agency, and the Court said: "It is true, on one hand, that the plaintiff had the right to restrict the powers of its agents by the notice quoted above, and printed on the orders signed by the defendants, and, on the other, that this restriction could be waived. But the burden to prove that such waiver was within the scope of the agent's authority was upon the defendants. It could not be proved by the agent's own declaration. It must be proved *aliunde* *Taylor v. Hunt,* 118 N. C., 173, and cases there cited; *Summerrow v. Baruch,* 128 N. C., 204."

In the second case the action was brought to recover the price of goods sold and delivered to the defendant under a written contract containing the following stipulation: "This order is not subject to countermand, and we will receive said goods promptly on arrival at the station named above. There is no agreement, verbal or otherwise, affecting the terms of this order, other than is specified herein." The court, over the plaintiff's objection, permitted the defendant to testify that at the time he signed the written contract or order the agent who sold the goods said he would ship them, and the defendant could keep them for ninety days, and if at the expiration of that time they were unsold, he could ship them back to the plaintiff. This Court held the evidence incompetent, and said: "If the agent had the authority to make the oral agreement, the burden was upon the defendant to show it, even if evidence of such agreement was otherwise competent. *Machine Co. v. Hill,* 136 N. C., 128."

The last case of *Medicine Co. v. Mizzell* has been approved in *Woodson v. Beck,* 151 N. C., 146; *Briggs v. Ins. Co.,* 155 N. C., 78; *Bowser v. Tarry,* 156 N. C., 38, and *Simpson v. Green,* 160 N. C., 301.

(254) It follows, therefore, as there was no evidence of authority upon the part of the agent to waive the provisions of the written contract and to make the oral agreement, that his Honor was in error in refusing the instruction prayed for, and in assuming in his charge that there was evidence of authority by the agent.

New trial.

Cited: Bland v. Harvester Co., 169 N. C., 419; *Fairbanks v. Supply Co.,* 170 N. C., 319; *Farquhar Co. v. Hardware Co.,* 174 N. C., 374.

W. J. DOWNING LUMBER COMPANY v. JOHN T. RILEY ET ALS.

(Filed 15 October, 1913.)

Deeds and Conveyances—Timber Deeds—Reservations—Conflicting Rights—Merger.

The owner of lands conveyed the timber thereon to A., under whom defendant claims, down to 12 inches in diameter, and thereafter conveyed the lands to D., who conveyed the timber thereon to the plaintiff down to 10 inches in diameter. Thereafter, with a reservation in his deed of the timber above 10 inches at the base, which he had conveyed to plaintiff, he conveyed the land to C., who conveyed it to the defendants. The defendants' right to cut the timber expired in 1909, and the plaintiff's right to do so in 1913: *Held,* (1) when the defendants acquired the title to the lands, it was subject to plaintiff's unexpired right to cut the timber thereon, subject to the defendants' prior right, which expired in 1909, and, there-

fore, from that time up to 1913 the plaintiff had full right to cut the timber; (2) the merging of the two interests acquired by defendant in the purchase of the lands could not affect the plaintiff's right to cut the timber for the period stated, as he had theretofore acquired it, and it was expressly excepted from defendants' deed to the land.

APPEAL by defendant from *Justice, J.*, heard by consent at chambers, 28 May, 1913, from ONSLOW.

Action to settle title to a lot of timber, heard upon case agreed. From a judgment for the plaintiff, defendant appealed.

J. O. Carr, Frank Thompson for plaintiff.
Duffy & Koonce, Herbert McClammy for defendant.

BROWN, J. The land originally belonged to one G. E. Sim- (255) mons, who sold the timber thereon, down to 12 inches in diameter, to the Angola Lumber Company, by deed dated 23 September, 1899, and gave the company ten years within which to cut it.

This timber was conveyed through mesne conveyances to defendants. The time for cutting it expired 23 September, 1909.

On 11 December, 1899, Simmons conveyed the land upon which the timber grew to E. W. Dixon. On 14 December, 1905, E. W. Dixon and wife conveyed all of the timber, down to 10 inches in diameter, situated upon said land, to the plaintiff, and gave it eight years within which to cut.

On 22 March, 1907, Dixon conveyed said lands upon which the timber was then standing and uncut to Sanders & Costin, who conveyed to defendants on 5 February, 1907.

After describing the two tracts of land conveyed therein, the deed from Dixon to Costin contains this exception: "*Provided,* that the timber on said lands is hereby excepted above 10 inches at the base, also one acre excepted for burial purposes near the Mill Creek Crossing, where the graveyard is. The exemption of the timber mentioned in this deed is only for the time that the timber men hold option for them, to be good to the parties of the second part mentioned in the deed."

It is contended that when the defendant acquired title to the land upon which the Angola timber grew (the time within which it must be cut not having then expired), there was a merger of the two interests. This would be generally true. *Rountree v. Cohn-Bock Co.,* 158 N. C., 153; *Lumber Co. v. Brown,* 160 N. C., 291.

But the deed from Dixon to Sanders & Costin excepted the timber theretofore conveyed from its operation. Consequently there could be no merger, for the ownership of the timber and the land did not unite in one person.

Dixon had thereby conveyed all the timber on same land, down to 10 inches, to plaintiff. This, of course, was subject to the prior right of the Angola deed.

This Angola timber was not cut when the ten years expired, 23 September, 1909. Inasmuch as by reason of the exception in the
(256) Costin deed the defendant acquired no further title or right to the Angola timber than he already possessed when the ten years expired, defendant's right to cut the timber expired with it.

As plaintiff's timber deed from Dixon conveys "all the pine, oak, and poplar timber of and above the size of 10 inches at the base when cut," and as the eight years time limit in that deed did not expire until 14 December, 1913, the plaintiff became the owner of all of such timber growing on the land after 23 September, 1909, and has the right to cut and remove the same up to 14 December, 1913. If the defendants cut and removed any of such timber after 23 September, 1909, they are liable to plaintiff for its value.

Affirmed.

IN RE WILL OF JOHN DUPREE.

(Filed 15 October, 1913.)

1. Wills—Caveat—Unreasonable Delay—Acquiescence—Forfeiture of Right—Presumptions—Limitation of Actions.

While there is no statute of limitation in North Carolina affecting the rights of parties claiming under a will to have it probated, or such statute relative to the caveat prior to 1907 (Revisal, sec. 3135), where a seven-year period was established to enter caveat, upon application for probate made, it has been for a long time recognized here that a right to caveat a will regularly proven in common form may be lost by lapse of time, certainly where the adverse party has, with knowledge, so long acquiesced that it would be unreasonable and unjust for him to question its validity.

2. Wills—Caveat—Unreasonable Delay—Forfeiture of Right—Trials—Questions of Law.

While at common law there was no definiteness or uniformity in the adoption of a period of time wherein the right would be presumed to have been forfeited either by acquiescence or unreasonable delay, the period of twenty years was that more generally prevalent, and though this presumption may be rebutted by proper and sufficient evidence, when the facts are admitted, or had been properly established, it becomes a question for the court to determine whether on such facts the presumption prevails.

3. Same.

The devisee, and those who claim under him, having been in possession of the lands devised for twenty-three years, exercising absolute ownership,

with the knowledge of the adversary party seeking to caveat the will, and who had for that period of time lived only a short distance from the property: it is *Held*, as a matter of law, that the right to caveat the will had, under the circumstances, been forfeited.

4. Same—Attempted Caveats—Bonds—Interpretation of Statutes—Citations.

Where parties seeking to caveat a will have forfeited their right to do so by unreasonable delay and acquiescence, the mere fact that they had applied to the clerk several times when their rights would have been allowed, and the clerk declined and refused to entertain the application because the parties failed to give a proper bond as required, Revisal, sec. 3136, does not affect the result, for no caveat is properly constituted until the statutory requirements are met; and if it had been so constituted the absence of notice issued in reasonable time works a discontinuance.

5. Wills—Caveat—Forfeiture—Presumptions—Limitation of Actions—Infants—Femes Covert—Absence from State.

Where the common-law presumption of forfeiture of the right to caveat a will from unreasonable delay or acquiescence prevails, the matters of infancy, coverture, and absence from the State are not necessarily controlling, but they are considered as relevant facts bearing on the question as to whether the presumption will prevail, and more especially is this true in its application to the absence from the State of a party claiming under the will, when he had first remained in possession of the property for more than a year and the cause is one where jurisdiction could be acquired by publication. *Summerlin v. Cowles*, 101 N. C., 473, cited and distinguished, where the courts of equity adopt ten years as a legal bar in analogy to the statutory period prevailing in an action at common law.

APPEAL by caveators from *O. H. Allen, J.*, at January Term, (257) 1913, of PITT.

Caveat to will. On the trial it was made to appear that John Dupree died in 1887, having made a last will and testament and leaving him surviving two children, Robert Dupree and Olivia, a daughter. (258) That in the will the land and chief part of the personal property was devised and bequeathed to Robert, the son, the daughter receiving a nominal legacy of $5. That in December, 1887, said will, attested by three witnesses, was duly admitted to probate in common form and recorded. That Robert, as owner, went into possession of the land immediately on his father's death, and so remained until 1889 or 1890, when he sold and conveyed the same to Wiley Webb, who then went into possession and remained there until his death in 1908, and since that time his heirs have been in possession of the same. That on 6 March, 1911, caveat to said will was duly entered on behalf of the daughter, Olivia A. Williams, and her husband, J. A. Williams, and bond given, and the heirs at law of Wiley Webb duly cited to appear, etc. That prior to her father's death, the daughter, Olivia, was married to J. W. Williams when she was under age, and she and her husband

have continuously resided in the neighborhood from the time of their marriage to the present, and were duly cognizant of the fact that the will had been admitted to probate and that Robert was in possession, claiming to own same as devisee. That within a year from the father's death, for the daughter and her husband, a written protest to the will or caveat was submitted to the clerk, who declined to entertain the same for lack of a bond, and, later, in 1893, on an insufficient bond being offered, the clerk again declined to receive the paper as a caveat or to docket same, and no citation was ever issued for any of the parties interested, and the paper was kept on the clerk's desk as papers "Not perfected nor ready to go on the docket" until they were destroyed by burning of the courthouse in 1910. There was further evidence that some time after selling the land to Webb the son Robert had gone to Florida and lived there since. There was testimony on the part of the caveators tending to show that J. W. Dupree was not competent to make a will, and for the other parties that he was of sound and disposing mind and memory at the time. At the close of the testimony, his Honor being of opinion that on the evidence and from perusal of the pleadings the right of caveators to proceed in the cause was barred by lapse of time, etc., which
(259) was fully and properly pleaded, entered judgment dismissing the proceedings, and the caveators excepted and appealed.

L. I. Moore and Allsbrook & Phillips for propounders.
Harding & Pierce, Harry Skinner for caveators.

HOKE, J., after stating the case: There is no statute of limitations in this State directly affecting the right of parties claiming under a will to have the same proven, and in so far as it may affect their own interests. *Steadman v. Steadman,* 143 N. C., pp. 346-349. Nor was there any such statute relating to the caveat of a will prior to 1907, when the period of seven years was established from the time of the "application to prove the will and the probate thereof in common form. Revisal, sec. 3135." It has, however, been long recognized here that when a will has been regularly proven in common form, the right to caveat same may be lost by lapse of time, and certainly when after knowledge of such will and its probate the adverse parties have acquiesced for such a length of time as would make it unreasonable and unjust to make further question of its validity. *In re Will Beauchamp,* 146 N. C., 254; *Etheridge v. Corprew,* 48 N. C., 14; *Gray v. Maer,* 20 N. C., 41.

In *Beauchamp's case* it is said: "The right may be forfeited either by acquiescence or unreasonable delay." The time required at common law for the operation of the principle was not established with exact definiteness, nor was it always uniformly applied, but unless shortened by statute, as in Revised Code of 1856, ch. 65, secs. 18 and 19, reducing

the presumptions to ten years in certain instances, the period of twenty years was that more generally prevalent. Undoubtedly this is true as to this jurisdiction (*Worth v. Wrenn,* 144 N. C., 656-660; *Cox v. Brower,* 114 N. C., 422; *Headen v. Womack,* 88 N. C., 468), though a shorter time has been allowed to prevail here, as in *Hamlin v. Mebane,* 54 N. C., 18, where the principle does apply. Unless otherwise expressly regulated, it is independent of the statute of limitations, and while it raises only a presumption in bar of the right claimed, rebuttable by proper and sufficient evidence, when the facts are all admitted, it becomes a question for the court to determine whether on such facts the position shall prevail. *Cox v. Brewer, supra; Headen v. Womack,* (260) *supra; Williams v. Mitchell,* 112 N. C., 293. As said by *Ruffin, J.,* in *Headen's case,* "Like the presumption of payment arising upon a bond under the act of 1826, that of the abandonment of a claim may become, and does become, when the facts of the case are admitted, a conclusion of law from facts to be applied by the court, and not left to the discretion of the jury." This being the correct position, we are of opinion that his Honor clearly made the proper ruling in dismissing the proceedings.

From the facts admitted in the pleadings and evidence, it appears that this will, properly drawn and attested, was duly proven and recorded in Pitt County in 1887, and that the devisee occupied as owner under the will until 1889, or 1890, when he sold to Wiley Webb, and he and his heirs have since been in possession and control of the property as owners, the same being under a deed from the devisee. That during all of this time the caveators, J. W. Williams and wife, have resided within short distance of the property, were fully cognizant of the existence of the will and its terms and of the possession of the property by the purchasers and the nature of their claims, and this delay and long acquiescence has been properly held to bar all right on their part to make further question of the validity of the will.

Our conclusion is not affected by the facts in reference to the attempted caveat in 1887, nor its renewal in 1893. This application was never entertained by the clerk, for lack of a proper bond, which he had the right to require. Revisal, 3136; Code 1883, sec. 2159. The cause was never docketed, nor was any notice or citation even ever issued. No caveat, therefore, has ever been made nor constituted till this of 1911, and if there had been, in the absence of notice issued in reasonable time, it should be held for a discontinuance by analogy to failure to issue an alias summons to term held at stated periods. *Etheridge v. Woodley,* 83 N. C., 12. Nor should the marriage of the daughter under 21 and continuous coverture since be allowed to prevent, in this instance, the effect of the presumption, for when applied in strictness as a common-law

(261) principle, neither the infancy nor marriage of the parties is allowed to interfere as a matter of positive right, but is only a relevant circumstance on the question whether the presumption shall prevail. *Houch v. Adams,* 98 N. C., 519.

True, this position was qualified to some extent in *Summerlin v. Cowles,* 101 N. C., 473; but this qualification only extended to cases where courts of equity adopted ten years as a legal bar, in analogy to the statutory period prevailing in actions at law, and the court held that when so adopted as a statute of limitation the disabilities provided for in the statute should also be recognized. And the same answer may be made to the position that the devisee, Robert Dupree, left the State a year or two after the death of his father, and has since resided in Florida. This absence of a party and the effect claimed for it exists by reason of the statutory provision affecting the statute of limitations proper (Revisal, sec. 366) and is not necessarily controlling as to the common-law presumption. In such case this absence, as in the case of infancy and coverture, is only a relevant fact bearing on the question presented; and more especially is this true, when the party remained in the State and in possession of the property for more than a year and the cause is one where jurisdiction could be acquired by publication.

In the two North Carolina cases of *Gray v. Maer,* 20 N. C., 47, and *Etheridge v. Corprew,* 48 N. C., 14, the application of the principle was denied; but in the first case the time was not over ten years, and it appeared in explanation of the delay that the parties were "numerous and much dispersed and several of them were infants and married women"; and in the second, the time was something over ten years, and it was shown that the petitioners were "numerous and all the time had been under the disabilities of coverture, absence beyond seas, residence in another State, and lunacy"; and, further, "that they had no notice of the death of the testator or of the *will* or its probate." In both of these decisions, however, the principle was recognized as existent here, and neither in any way conflicts with the disposition made of the present case, where, as noted, a will properly witnessed and duly proved and recorded has remained on the record unquestioned for more than (262) twenty-three years, with full rights enjoyed under it by devisee and the person to whom he had conveyed it, and the adverse claimants during all this time have resided in the immediate neighborhood and were fully cognizant of all the facts concerning it.

In *Cox v. Brewer, supra, Burwell, J.,* delivering the opinion, quotes from a Pennsylvania decision as follows: "The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and security of society. No person ought to be permitted to lie by whilst transactions can be fairly

investigated and justly determined until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them. Papers which our predecessors have carefully preserved are often thrown aside or scattered as useless by their successors. It has been truly said that if families were compelled to preserve them they would accumulate to a burdensome extent. Hence statutes of limitations have been enacted in all civilized communities, and in cases not within them prescription or presumption is called in as an indispensable auxiliary to the administration of justice."

After giving the case our full consideration, we hold there was no error in dismissing proceedings, and the judgment of the court below is affirmed.

No error.

Cited: In re Bateman's Will, 168 N. C., 235; *Love v. West,* 169 N. C., 15; *Coxe v. Carson, ib.,* 139.

MICAJAH BARFIELD v. T. R. HILL, MILTON CREECH, AND LENA CREECH.

(Filed 15 October, 1913.)

1. Deeds and Conveyances—Color of Title—Proof—Adverse Possession.

The plaintiff in his action to recover lands must recover upon the strength of his own title; and where he has failed to show title out of the State, he must show such possession under his chain of paper title as color for twenty-one continuous years as will oust the State; and where the evidence is conflicting upon the question of such possession, it is for the jury to determine the issue thus raised.

2. Same—Burden of Proof—Conflicting Evidence—Trials—Instructions.

The trial judge may direct the jury to answer an issue in a certain way, if they believe the evidence to be true, only when this evidence is uncontradicted and one inference alone can be drawn from it; and hence it is error to direct an answer to an issue in plaintiff's favor in an action to recover lands, when the plaintiff relies on adverse possession, under color, in order to oust the State, the burden of proof as to such possession being on the plaintiff.

3. Evidence—Boundaries—Surveys—Recognition of Lines.

Evidence that a certain boundary line in dispute in an action to recover lands had been surveyed by one under whom the plaintiff deraigned his

title, and that those claiming under him had never thereafter claimed beyond this line, is competent evidence in behalf of the defendant, when it tends to establish his claim. *Haddock v. Leary*, 148 N. C., 379, cited and applied.

HOKE and WALKER, JJ., dissenting.

(263) APPEAL by defendants from *Justice, J.*, at June Term, 1913, of LENOIR.

Action to try title to land. This issue was submitted:

Is the plaintiff, Micajah Barfield, the owner of the land described in the complaint? A. Yes, except the land lying west of the line from 7 to H, which would appear to be lands of the defendant Hill, he having been in actual possession under color of title.

The court charged as follows:

"Gentlemen of the jury, is the plaintiff, Micajah Barfield, the owner of the land described in the complaint? The court directs you, gentlemen, if you believe the testimony and find the facts to be as testified to by all the witnesses, you will answer, 'Yes, except that part of the land that lies west of the line indicated on the map running from 7 to H, and as to that he is not the owner.' "

Defendants Creech excepted.

(264) The court rendered judgment in favor of defendant Hill for the tract of land claimed by him, and against defendants Creech for the land claimed by them. They excepted and appealed.

J. P. Frizelle, G. V. Cowper for plaintiff.

Rouse & Land, Loftin & Dawson for defendants.

BROWN, J. It is important to clearly distinguish the contentions made by the defendant Hill, which were sustained and from which there was no appeal, and that made by the defendants Creech, who are appellants in this cause.

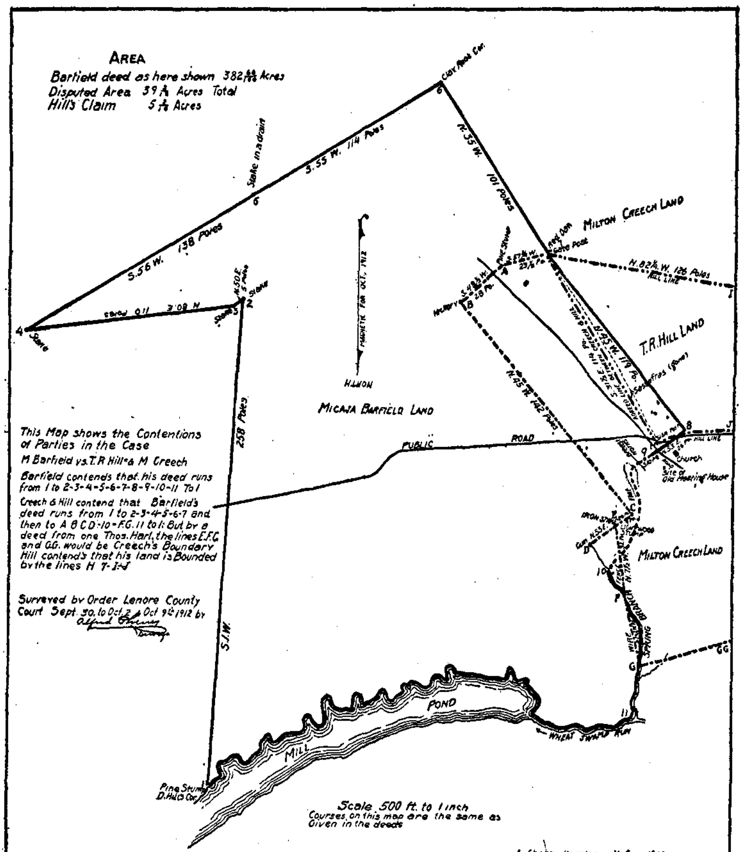
(265) Of the land in dispute, defendant Hill claimed and recovered that portion within the boundaries on the map 7, H, and back to 7. While the defendants Creech, who lost below and appealed, claimed the land in the bounds 7, A, B, C, D, E, 10, 9, H, and back to 7.

The plaintiff introduced a chain of deeds to himself and those under whom he claims, beginning 1 February, 1879, and ending 8 December, 1905, covering the land in dispute.

Plaintiff then introduced evidence tending to prove possession for more than twenty-one years under color, which it is unnecessary to set out. Therefore, the motion to nonsuit was properly denied. While such evidence tends to prove the necessary possession, and is of sufficient

probative force to warrant a jury in finding for the plaintiff, in case they saw fit to do so, we do not think upon the whole evidence the court was justified in *directing* a verdict.

We do not question the right of the judge to do so in certain cases, where the evidence is uncontradicted and believed by the jury to be true



and only one inference can be drawn from it. It is very rare that a verdict can be properly directed where the sole issue is one of possession of land, and much evidence, as in this case, is offered on each side.

The plaintiff must recover upon the strength of his own title, and not rely upon the weakness of his adversary's. Failing to offer a grant from the *State,* the plaintiff relies upon *color* and twenty-one years' possession to show title out of the State.

The burden is, therefore, upon him to prove adverse occupation and claim of ownership of the land in dispute, and covered by his deeds, for twenty-one *continuous* years prior to the alleged trespass, for he must have acquired title at the time of the trespass. *Gordner v. Lumber Co.*, 144 N. C., 110.

Such possession for that period must have been open, notorious, continuous, and unequivocal, and it must have been ascertained and identified under known and visible lines or boundaries. Revisal 1905, sec. 380, subsec. 2; *Mobley v. Griffin*, 104 N. C., 115.

(266) Taking into consideration the evidence offered by the defendant, we do not think the charge of the court can be sustained, for there is contradictory evidence as to whether plaintiff's possession was continuous and unequivocal for the period required.

There is, also, some evidence that plaintiff's possession did not begin twenty-one years before the trespass or the trial. Witness Isler testified: "I remember this land for about twenty-two years. Aldridge was the first I knew on it about twenty-two years ago. Aldridge was on it until Edwards went in." The action was instituted 21 January, 1911, nearly two years and a half before the trial. The witness was speaking, we must infer, as of the date of the trial in the Superior Court.

There is evidence tending to show a marked line between Pate, under whom plaintiff claims, and Creech, and that Miller Creech cut rail timber on the land in dispute near this line, and a witness testified that on one occasion he had heard a conversation between Pate and Miller Creech about some rail timber that Creech had cut near A, and that Creech had cut at that point one tree just over the line.

The testimony of Lovit Hines tends to prove that the Creechs had exercised ownership over this land ever since he could remember, and as far back as 1870.

The plaintiff, himself, testified that Milton Creech had been on the part in dispute for a while after the plaintiff purchased the land from Edwards.

There was also evidence for the defendants that shortly after the war Miller B. Creech chopped and used turpentine trees along the road in the disputed territory, and that these were used for several years; that the house on the disputed territory near A was built in 1870 or 1871, and that there was some cleared land around this house, which had been in possession of the Creechs for a number of years and used by them; that about 1875 Miller B. Creech rented the land in dispute situated in the fork of the road across from the church to one Franklin Dail, who built a gin-house at this point and ran it one season, and then gave it up to Mr. Creech.

There is evidence tending to prove a survey by one Jones in (267) the eighties and that he ran the line as now claimed by defendants, and that Pate and Miller Creech were present and no objection was made by either.

There is evidence of the cutting of timber on the land in dispute by a lumber company by authority of the Creechs, after plaintiff Barfield had purchased from Edwards and lived near-by.

There is other evidence in the record tending to contradict plaintiff's claim of continuous possession, but we deem it unnecessary to go further into it.

The defendants offered to prove that a certain line was surveyed, and that Pate and those from whom plaintiff deraigns his title never claimed beyond it. This evidence was excluded. In this there was error.

In *Haddock v. Leary,* 148 N. C., 379, our learned brother *Justice Allen* charged the jury as follows: "If you find by the greater weight of the evidence that plaintiff and the grantor of defendants ran an equal line on the map from K to H to G to F in 1895, and the plaintiff after that time did not claim beyond this line, you should answer the first issue 'No,' although you should further find that plaintiff's deed covered the land and he was living upon a part of the land embraced in his deed." That charge was sustained. *Kennebec v. Springer,* 4 Mass., 416; Malone Real Prop. Trials, p. 282 and note.

New trial.

HOKE, J., and WALKER, J., dissenting.

W. R. PATE v. CHARLES G. BLADES.

(Filed 15 October, 1913.)

1. Deeds and Conveyances—Fraud—False Representations—Damages.

The old doctrine that an action to recover damages for fraud and deceit would not lie in the case of a sale and purchase of land, in reference to the quantity or correct placing of the property, when the facts were readily ascertainable by survey or otherwise does not now obtain where positive fraud is shown, as where the grantor was unacquainted with the lands conveyed and was deceived and thrown off his guard by false statements designedly made by the grantee at the time, and reasonably relied on by him, and there was nothing to arrest attention or arouse suspicion concerning them.

2. Same—Knowledge—Scienter.

One who induces another to make a deed to lands to him by such false representations as amount to positive fraud, when he did not know

whether the representations made by him were true or false, is as culpable in case the other is reasonably misled or injured by them as if at the time he knew them to be untrue.

3. Deeds and Conveyances—Fraud—False Representations—Trials—Evidence—Nonsuit.

In his action to recover damages for fraud and deceit in the purchase of land, there was evidence for the plaintiff, and *per contra*, tending to show that the plaintiff was, at the time of his executing the deed to the lands to the defendant, under 21 years of age, stationed near Baltimore as an enlisted soldier, awaiting transportation to foreign parts, and unacquainted with the value of the lands conveyed, and under these circumstances the defendant went to see him, assured him he had been over the lands, and that he could rely upon his knowledge of the lands and its value, and so relying upon the defendant's false representations that $1,000 was a fair price for the lands, accepted that sum for it, when, as he ascertained later, just before the commencement of this action, it contained a much greater acreage than he was led to believe, and was worth $10,000 or $11,000: *Held*, viewing the evidence in the light most favorable to the plaintiff, the issue of fraud was for the determination of the jury, and a motion to nonsuit was improperly granted.

4. Deeds and Conveyances—Fraud—False Representations—Quitclaim Deeds—Trials—Evidence.

The plaintiff, while an enlisted man in the army, and awaiting at Baltimore transportation abroad, was induced by the defendant to convey his lands to him for $1,000, when it was reasonably worth $10,000 to $11,000, under such representations as were evidence of positive fraud; there was also evidence that after the plaintiff returned and had opportunity for investigation, but was still without further knowledge of the facts which had been falsely represented, he was induced by the defendant to sign a quitclaim deed for the consideration of $200: *Held*, it is for the jury to determine whether, under all the facts and attendant circumstances, the plaintiff acted as a reasonably prudent man in making the second deed without further investigation, and whether the fraud and deceit existent when the first deed was obtained were effective in procuring the execution of the second deed, and whether the one was the natural effect of the other.

(269) APPEAL by plaintiff from *O. H. Allen, J.*, at the April Term, 1913, of CRAVEN.

Action to recover damages for fraud and deceit in the purchase of land.

There was evidence on part of plaintiff tending to show that, in April, 1899, plaintiff, then under 21, an enlisted soldier in the United States Army, was at Fort McHenry, Baltimore, Md., awaiting transportation to Philippine Islands; that he had been in the army since 1896. While at Fort McHenry, plaintiff received from defendant, by mail from New Bern, N. C., a proposition for an option on a tract of land in Craven County, N. C., abutting on Slocumbs Creek and Neuse River, about 20

miles below New Bern, and which plaintiff supposed to be about 100 acres, some of the land, about 150 acres, having been previously sold; that soon after receipt of option, defendant appeared at Fort McHenry and, after much persuasion, induced plaintiff to sell and convey to him the land in question for the sum of $1,000. The conversation and transaction, by which the trade was brought about, was given at great length in plaintiff's testimony, and containing, among other things, evidence to the effect that defendant estimated the tract at 100 to 150 acres and represented that it was of very little value; that $1,000 was a very favorable price for it, and in this connection, plaintiff further testified as follows: "At the time I sold the land in Baltimore I thought I owned about 100 acres. I did not know the value of the property at the time I executed the deed in Baltimore. I had not seen the land since I was a child. I did not know the extent of the property at the time I executed the quitclaim deed. I was relying upon Mr. Blades absolutely at the time I executed the deed in Baltimore. He said he had been over the land and looked over it and knew it thoroughly, and he would (270) not take advantage of me, for I knew nothing about it, and he was offering me a very good price. I was 21 years old in September after executing the deed in April, 1899."

Plaintiff's evidence further tended to show that, after making this deed, in the line of duty, he went to the Philippine Islands, and, after serving out his time, in January, 1900, he returned to his home in Craven County, about 9 or 10 miles above New Bern, married in 1902, and has since resided in that same neighborhood; that in 1905 plaintiff, who was building a home, was at defendant's lumber plant in New Bern for the purpose of procuring lumber, and, on one occasion, defendant, having ascertained that the plaintiff was under 21 when he executed former deed, broached the subject and offered plaintiff $200 to execute an additional deed for the property, describing same as that piece of land lying on south side of Neuse River, between Slocumb and Hancock creeks, adjoining lands of John Pittman, etc., except the portion formerly sold, containing description further: "It is the purpose and intent of this party of the first part to convey hereby all the lands which he now owns in said county of Craven on the south side of Neuse River between Slocumb and Hancock creeks," etc. Plaintiff testified further, that his mother had died when he was an infant, and his father, having moved to Hancock Creek, died in 1885, when plaintiff was about 7 years of age, when plaintiff went to live with his uncle in the upper part of the county, and had lived there since except when in the army, as stated; that plaintiff was entirely ignorant of the quantity of the land or its value or that the facts were otherwise than as represented by defendant, both when he made the first and second deeds, not having been on or about it since

he was 7 years of age and having no occasion to look into it since; that some time in 1911, being down in that locality on other business, and having attention aroused by some very fine timber land he was passing through, he made inquiry, and ascertained it was a part of the land he had conveyed to defendant. Pursuing such inquiry, he ascertained further that the tract was a very valuable one and contained from
(271) 1,000 to 2,000 acres, and he, therefore, entered present suit. There was further testimony to the effect that this tract conveyed was a good purchase at the price of $10,000, and that the timber on it could have been sold for $11,000 or $12,000 at the time of the first conveyance. There were phases of plaintiff's evidence tending to show that defendant did not have full personal acquaintance with the property, and that no actionable fraud was committed, but, as the cause was nonsuited, the testimony which makes in plaintiff's favor is more particularly referred to, that being the aspect in which the cause must now be considered.

At the close of testimony, on motion, there was an order of nonsuit, and plaintiff, having duly excepted, appealed.

W. D. McIver and R. A. Nunn for plaintiff.
Guion & Guion for defendant.

HOKE, J., after stating the case: It was formerly held, in this State, that an action to recover damages for fraud and deceit would not lie in the case of a sale and purchase of land, in reference to the quantity or correct placing of the property; the position being that the facts were very readily ascertainable, and that the purchaser should have informed himself on these matters by a survey. The principle on which these decisions were made to rest was disapproved in case of positive fraud on the part of the vendor or purchaser, in *Walsh v. Hall,* 66 N. C., 233, and in the subsequent case of *May v. Loomis,* the decisions wherein the former doctrine was upheld, and more directly relevant to the question, *Credle v. Swindell,* 63 N. C., 305, and *Lytle v. Byrd,* 48 N. C., 222, were expressly overruled; this case of *May v. Loomis* being to the effect, among other positions, that the action lies, in proper instances, both in sales of real and personal property. A succinct reference to this change in the attitude of the Court on this subject, and some of the cases by which it was announced, appears in a still later case of *Gray v. Jenkins,* 151 N. C., at page 83, as follows: "Older cases have gone very far in upholding defenses resting upon this general principle, and, as
(272) pointed out in *May v. Loomis,* 140 N. C., 357-358, some of them have been since disapproved and are no longer regarded as authoritative; and the more recent decisions, on the facts presented here, are to the effect that the mere signing or acceptance of a deed by one who can read and write shall not necessarily conclude as to its execu-

tion or its contents, when there is evidence tending to show positive fraud, and that the injured party was deceived and thrown off his guard by false statements designedly made at the time and reasonably relied upon by him. Some of these decisions, here and elsewhere, directly hold that false assurances and statements of the other party may of themselves be sufficient to carry the issue to the jury when there has been nothing to arrest attention or arouse suspicion concerning them. *Walsh v. Hall,* 66 N. C., 233; *Hill v. Brower,* 76 N. C., 124; *May v. Loomis,* 140 N. C., 350; *Griffin v. Lumber Co.,* 140 N. C., 514."

In *Griffin v. Lumber Co.,* 140 N. C., just cited, there is a very full and learned discussion by *Associate Justice Connor* of many of the questions embraced in the present inquiry.

Again, it has been held that while "expressions of commendation or opinion or extravagant statements as to value or prospects or like," not infrequently used by a party in the ordinary effort to puff up the value and quality of his wares in a trade, will not as a rule be considered as fraudulent in law (see the well-considered case of *Cash Register Co. v. Townsend,* 137 N. C., 652), yet, when a party to a bargain makes false assertions as to the value of the property, and the same are knowingly made as an inducement to the trade, and are accepted, reasonably relied upon as such, statements of this kind may constitute an actionable wrong, justifying recovery in case of pecuniary damage. And, in reference to the *scienter,* it has been held that, under some circumstances, "One who intentionally asserts a fact to be true of his own knowledge, when he does not know whether it is true or false, is as culpable in case another is thereby misled or injured as one who makes an assertion which he knows to be untrue." *Modlin v. R. R.,* 145 N. C., 218.

The doctrine sustained in the cases already cited, and refer- (273) ring more particularly to sales of real estate, has been approved and further applied to sales of personal property in several later decisions. *Unitype Co. v. Ashcraft,* 155 N. C., 63, and *Machine Co. v. Bullock,* 161 N. C., 1, and *Machine Co. v. Feezer,* 152 N. C., 516, and a reference to these cases will no doubt be of aid to a proper consideration of the one now presented.

Applying the principles as stated, we are of opinion that, on the facts as they now appear of record, the judgment of nonsuit should be set aside, for, accepting the facts which make for plaintiff's recovery as true and construing them in the light most favorable to him, this being the established rule when a nonsuit has been ordered, it appears in evidence that plaintiff, under 21 years of age, in the city of Baltimore, where he was stationed as an enlisted soldier awaiting transportation to the Philippine Islands, by the false statements and assertions of defendant as to value and quantity, has been induced to convey to the latter, for $1,000,

between 1,000 and 2,000 acres of land, "nearer two than one," situate in the county of Craven, and worth from $11,000 to $12,000, the plaintiff being entirely ignorant of the real facts and relying on the statements of defendant to the effect that the price paid was a just equivalent and "that defendant had been over the land; had looked over it and knew it thoroughly."

It is urged for defendant that, even if this view should prevail as to the first deed, there are no sufficient facts impeaching the second, and nothing occurred at that time to prevent full investigation of the property; but this position may not be allowed as a necessary or legal conclusion from the testimony, for if the plaintiff was induced to make the first deed by fraud and deceit of the defendant, and he then made a second deed, believing and having reason to believe the assurances made in reference to the first, and there was nothing occurring in connection with the execution of the second deed to arouse attention or provoke inquiry into the amount and value of the property, and plaintiff, under all the facts and attendant circumstances, acted as a man of reasonable business prudence in making the second deed without further in-
(274) vestigation, in that event, it may well be determined that the fraud and deceit existent when the first deed was obtained was effective in procuring the execution of the second, and the one was the natural result of the other.

On the evidence, as it now appears, the plaintiff is entitled to have the issues submitted to a jury, and it is so ordered.

Reversed.

A. J. BLAKE v. THOMAS SMITH.

(Filed 15 October, 1913.)

Interpretation of Statutes—Instructions—Appeal and Error.

The trial judge is ordinarily required to charge the jury to the extent of stating in a plain and correct manner the evidence given in the case, and to declare and explain the law arising thereon, except where the facts are few and simple and no principles of law are involved, and he is not requested to charge, Revisal, sec. 535; and in this case it is held for reversible error, there being much conflicting evidence, for the judge to instruct the jury to "take the case and settle it as between man and man," without charging on the different aspects of the case in accordance with the statute.

APPEAL by defendant from *Carter, J.*, at April Term, 1913, of WAKE.

Appeal from justice's court. Verdict and judgment for the plaintiff. The defendant appealed.

No counsel for plaintiff.
B. C. Beckwith for defendant.

BROWN, J. This is a controversy over $14.88, the value of a hog.

The plaintiff and defendant introduced much evidence tending to prove the ownership and value of the hog. Defendant seems to have relied upon an estoppel. The case on appeal states that "His Honor did not charge the jury. He simply said: 'Take the case, gentlemen, and settle it as between man and man.'" This constitutes one of (275) the defendant's assignments of error.

In this State the trial judge is required to charge the jury to the extent of stating in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon (Revisal, sec. 535), except where the facts are few and simple and no principle of law is involved, and he is not requested to charge. *Holly v. Holly,* 94 N. C., 96.

The manner in which the judge is to state the law and evidence for the assistance of the jury must necessarily be left to a great extent to his sound discretion and good sense, but he must charge on the different aspects presented by the evidence, and give the law applicable thereto. *S. v. Rippey,* 104 N. C., 756; *S. v. Matthews,* 78 N. C., 537. For this error there must be a

New trial.

BLACKSTAD MERCANTILE COMPANY v. PARKER AND A. E. GLOVER, PARTNERS.

(Filed 15 October, 1913.)

Contracts, Written—Delivery on Condition—Parol Agreement—Contradiction—Vendor and Vendee.

The rule that a sales agent may not vary a written contract of sale by a parol agreement with the purchaser contrary to the express provision of the writing, has no application when the contract was received by the agent with the verbal understanding that it was not to become effective until further order of the purchaser; and where the agent has sent the contract to his principal in violation of this agreement, and the goods are shipped in consequence, the purchaser is not liable under the written contract, in an action brought thereon for the purchase price.

APPEAL by plaintiff from *Carter, J.,* at the April Term, 1913, of WAKE.

Action tried on appeal from court of justice of the peace, in the Superior Court.

(276) Plaintiff declared on a written contract for purchase of a lot of cheap jewelry, to the amount of $198, the order containing a stipulation as follows:

Date, 14 July, 1911.

BLACKSTAD MERCANTILE COMPANY,
St. Louis, Mo.

GENTLEMEN:—On your approval of the terms and conditions of the above order, please deliver to us, at your earliest convenience, f. o. b. factory or distributing point, the goods above listed on the above terms. We agree that no statement made by ourselves or the salesman will be a part of this agreement, unless written in the original order received and accepted by you.

J. B. LEGTERS,
Salesman.
PARKER & GLOVER,
Customer.

Postoffice, Wendell, N. C.

Defendants denied liability, claiming that they had not made any such contract.

On the issue thus raised, plaintiff presented the written order and proved it had shipped goods to defendants from St. Louis, Mo., 18 July, 1911, as specified in contract, and on arrival at destination at Wendell, N. C., defendants declined to receive same, and had never taken them from express and railroad offices.

The defendant Parker was allowed to testify, over plaintiff's objection, that the transaction had taken place with a salesman of plaintiff, and that, when the order was prepared, he handed it to the salesman with the express understanding and agreement that it was not to be sent in to plaintiff until the defendants gave further order to that effect, and that the salesman, in violation of this understanding, sent the order off immediately; some of the goods coming by freight and some by express. As soon as defendant heard that goods were shipped, he notified plaintiffs that the order had been sent in contrary to the agreement and that the defendants had already written the salesman not to have the
(277) goods shipped, and further saying they were overstocked and could not handle them at that time. This letter was also in evidence.

The court, among other things, charged the jury, in effect, that, in order to constitute a contract, delivery was necessary, and if they found from the evidence that the paper-writing as signed by defendants was left in possession of the salesman, with the understanding that he should hold the same until he heard further from the defendants, and sent it to plaintiffs in violation of such agreement, there would have been no delivery and plaintiff would not be entitled to recover.

2. That a production of the paper in evidence and proof of shipment of goods as therein directed, the burden was then on defendant to negative the fact of delivery, etc.

Verdict for defendants. Judgment, and plaintiff excepted and appealed.

N. Y. Gulley & Son for plaintiff.
Peele & Maynard for defendant.

HOKE, J., after stating the case: The reception of the evidence of the defendant Parker and the charge of the court in reference thereto are in accord with several recent decisions of the Court on the subject. *Garrison v. Machine Co.,* 159 N. C., 285; *Bowser v. Tarry,* 156 N. C., 35; *Pratt v. Chapin,* 136 N. C., 350.

In *Bowser's case, supra,* the Court, after approving the general rule that oral evidence will not be received to contradict or vary a written contract, made statement of the present position as follows: "While this position is unquestioned, it is also fully understood that although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be operative as a contract until the happening of some contingent event, and this on the idea, not that a written contract could be contradicted or varied by parol, but that until the specified event occurred the instrument did not become a binding agreement between the parties. It never in fact became their contract. The principle has been applied with us in several well (278) considered decisions, as in *Pratt v. Chaffin,* 136 N. C., 350; *Kelly v. Oliver,* 113 N. C., 442; *Penniman v. Alexander,* 111 N. C., 427, and is now very generally recognized. *Ware v. Allen,* 128 U. S., 590; *Wilson v. Powers,* 131 Mass., 539; *Rym v. Cambill,* 88 E. C. L., 370; Clark on Contracts, p. 391; Lawson on Contracts (Amer. Ed), p. 318, and, except in deeds conveying real estate, obtains, though the instrument is under seal and delivery has been to the other party. *Blewitt v. Boorum,* 142 N. Y., 357." The cases chiefly relied upon by plaintiff, to wit, *Machaine Co. v. McClamrock,* 152 N. C., 405; *Medicine Co. v. Mizell,* 148 N. C., 385, are not in conflict with this position. Both of these cases proceed upon the theory that there was an existent written contract between the parties, and the question was whether its terms could be contradicted or varied by parol. In the present case, as stated, the question was whether there was or ever had been any written contract between plaintiff and defendants, and the issue having been determined against plaintiff, under a correct charge, the judgment in defendants' favor must be affirmed.

No error.

L. L. DAMERON ET AL. v. ROWLAND LUMBER COMPANY.

(Filed 15 October, 1913.)

1. Deeds and Conveyances—Mutual Mistake—Equity.

A mistake made by the grantor in a deed to standing timber of the number of acres embraced by the description will not alone entitle him to correct the deed, for, in the absence of fraud, the mistake must be mutual.

2. Same—Evidence.

The owner of standing timber conveyed the same to be cut and removed in a stated time, and thereafter executed to the assignee of this right by the grantee in his deed a conveyance, upon consideration, allowing a further time for cutting and removing the timber originally conveyed. In a suit to correct the original deed, brought against the grantee in the second deed, an allegation of fraud was withdrawn and mutual mistake relied on. The evidence tended to show that the mistake alleged was that of the grantor alone; that his own attorney drew the second deed; that the grantor could read and write, and had partially read this deed and delivered it upon receiving the price agreed upon: *Held*, no ground for equitable interference was shown.

(279) APPEAL by plaintiff from *Justice, J.*, at May Term, 1913, of SAMPSON.

This is an action to restrain the cutting of timber and to reform a deed and to recover damages.

On 23 June, 1892, the plaintiffs executed a deed in consideration of $150, to H. L. Pope, trustee, conveying the timber in controversy, with the right to enter and cut and remove the same within fifteen years, and the defendant is the owner by purchase of the property rights and easements in said deed.

On 21 December, 1906, the plaintiffs executed a deed to the defendant, in consideration of $500, extending the time for cutting and removing the timber in the deed to Pope, trustee, three years.

This extension deed was prepared by one of the attorneys for the plaintiffs, and it has the following recital:

"Whereas, we, L. L. Dameron and wife, Sallie Dameron, have heretofore conveyed to Hugh L. Pope, trustee, certain timber trees and privileges on the lands hereinafter described, by deed recorded in Book 80, at page 447, of the register's office of Sampson County, which deed is about to expire, limitation therein named; and whereas said trustee has conveyed said timber and easements to the Rowland Lumber Company, and said company is desirous of securing an extension of time within which to exercise the privileges and rights conveyed in said deed."

The plaintiffs allege in their complaint that the execution of the deed to Pope, trustee, and of the extension deed, was procured by fraud, or

was the result of a mutual mistake, and that both covered more land and timber than was intended to be conveyed; but on the trial they stated in open court that they would go to the jury upon the question of mutual mistake in reference to the drawing of the extension deed referred to in the complaint, and that they would not insist that the defendant had actual notice of any fraud or mistake in connec- (280) tion with the original deed to H. L. Pope, trustee.

The plaintiffs offered evidence tending to prove that the deed to Pope was not drawn according to the contract of sale, and that it included more land and timber than was intended to be conveyed, and one of the plaintiffs testified, among other things, as follows:

"In October, 1906, I signed an option to the defendant for an extension of three years on the Pope deed, and I was paid $1 option money at that time, the agreed price for the extension being $500. This trade was closed by Mr. Turnbull; Joe Faison was out in his buggy. Mr. Turnbull at that time may have had the original deed made to Pope; I don't recollect. He came back on 21 December, 1906, and took up the option and I and my wife executed the extension deed. I think one of my attorneys wrote the extension deed. I reckon I read a little of the extension deed. He may have handed it to me to read. On his paying me the $500 that day, I just simply extended the time for three years on the timber in the original deed. In February, 1909, Joe Faison came and asked me to show him the timber I had sold. I went and showed him, and he blazed a line across my land, cutting off what I claimed to be about 75 acres. There was no chopped or blazed line prior to that time. The timber blazed is shown on the map. Faison blazed according to my directions. This was three years after the execution of the extension deed. Faison never had either the original or extension deed at the time blazes were made under my direction. My wife and I can both read and write. I did not mean to swear in my complaint that at the time of the execution of the extension deed that the boundary of the 75 acres was well defined, and that the trees along said line were blazed. There are about 90 acres of cleared land in my tract."

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

H. A. Grady and Fowler & Crumpler for plaintiff.

A. McL. Graham and George E. Butler for defendant.

ALLEN, J., after stating the case: When this case was here (281) on a former appeal (*Dameron v. Lumber Co.*, 161 N. C., 498) the Court ordered a new trial, and said: "As this case is to be tried again, we will repeat, what has been often decided, that a deed cannot be corrected or reformed because of the mistake of one of the parties to it,

but only when the mistake is mutual, that is, the mistake of both parties, or else upon the mistake of one party brought about by the fraud of the other," and on the new trial the plaintiffs abandoned all allegations of fraud, and relied solely on the allegation of mutual mistake in the execution of the extension deed.

We find no evidence of a mistake on the part of the defendant, and it is doubtful if there is any evidence of mistake on the part of the plaintiffs justifying the intervention of a court of equity, as one of them, and the only one who was a witness, testified that he could read and write; that the deed was prepared by his attorney; that he read a part of it, and that "on his (defendant) paying me the $500 that day, I just simply *extended the time for three years on the timber in the original deed.*"

We are, therefore, of opinion that his Honor properly entered judgment of nonsuit, as there is no evidence of mutual mistake.

Affirmed.

Cited: *Wilson v. Scarboro, post,* 389.

W. F. HUNTER v. SOUTHERN RAILWAY COMPANY AND ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 15 October, 1913.)

1. Appeal and Error—Laches—Excusable Neglect—Meritorious Defense—Recordari—Burden of Proof.

Upon motion in the Superior Court for a *recordari* to a justice's court upon the ground of excusable neglect in perfecting the appeal, the burden of proof is on the movant to show that his neglect was excusable, as well as that he had a meritorious defense.

2. Appeal and Error—Laches—Recordari—Trials—Court's Discretion.

Where the Supreme Court has set aside an order of the Superior Court granting a *recordari* to a justice's court, for that the affidavit and petition did not set out a meritorious defense, it is in the sound discretion of the Superior Court judge to permit the movant to file additional affidavits for the purpose of showing that the defense relied on was meritorious.

3. Appeal and Error—Laches—Partnerships—Knowledge Presumed.

In law each copartner is charged with knowledge of the business of the firm, and excusable neglect in bringing up an appeal from the justice's court to the Superior Court is not shown because of the sickness of the member of a law firm appearing in the case, who usually attended to cases of the character of the one at bar, and the ignorance of the existence of the case by the other.

WALKER, J., concurring in result; ALLEN, J., dissenting.

HUNTER *v.* R. R.

APPEAL by plaintiff from *O. H. Allen, J.,* at August Term, (282) 1913, of LENOIR.

Petition for *recordari.* The judge granted the writ below and ordered the cause to be docketed. Plaintiff excepted and appealed.

T. C. Wooten, Y. T. Ormond for plaintiff.
Rouse & Land for defendants.

BROWN, J. This cause was before us at former term, 161 N. C., 504, and the report of the case is referred to in connection with this opinion.

On that appeal it was deemed unnecessary to pass on the question of excusable neglect, as we held that the affidavit of Rouse and the petition for *recordari* did not set out a meritorious defense to plaintiff's cause of action, and we set aside the order granting the writ.

The burden is on defendants to show excusable neglect as well as a reasonably meritorious defense. The defendants renewed their motion for the writ, and his Honor, *Judge Allen,* permitted them to file the affidavit of Land in addition to the former affidavit of Rouse, for the purpose of showing a meritorious defense. This was excepted to by the plaintiff.

We see no objection to this. It was a matter in the sound discre- (283) tion of the court below. Where a case is not finally disposed of on appeal, amendments are discretionary with the court below, and the court may hear additional facts. *Foy v. Houghton,* 83 N. C., 470; *McMillan v. Baker,* 92 N. C., 110; *Jones v. Swepson,* 94 N. C., 700; *Ashby v. Page,* 108 N. C., 6; *Belville v. Cox,* 109 N. C., 265.

His Honor found the facts set out in the two affidavits to be true, and held that the facts made out a case of excusable neglect as well as a meritorious defense.

All that is before the Court as to the question of excusable neglect is contained in the affidavit of N. J. Rouse, and the excuse therein urged is the sickness of his partner, Land, who, in accordance with the custom and practice in the office of the firm, had charge of this case, and upon him was the duty of its preparation, etc., and who on account of sickness left Kinston without informing his associate of the pendency of the action.

We do not think these facts make out a case of excusable neglect. In actual practice it may be otherwise, but in law each copartner is charged with knowledge of the business of the firm.

When Land left the office of his firm on account of illness, it was his duty to give notice of the pendency of this action in the court of the justice of the peace to his copartner, Rouse.

No facts are given in the affidavits tending to show that he was mentally and physically incapacitated to mention the matter to his copartner. Independent of that, his copartner is charged in law with knowledge of the firm's business.

The same excuse was urged in *White v. Rees,* 150 N. C., 679, and held to be insufficient.

In that case, *Justice Walker* says: "The member of the law firm who had special charge of the case was too sick to attend, but no sufficient excuse is shown for the failure of the other two members of the firm to attend."

The petition for *recordari* is denied.

Reversed.

ALLEN, J., dissents; WALKER, J., concurs in result.

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CHARLES B. WOODLEY v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY.

(Filed 15 October, 1913.)

1. Telephones — Public-service Corporations — Duties Required — Uniform Rules—Discrimination.

A telephone company is a public-service corporation, and as such takes and holds its charter subject to the obligation of rendering its services at uniform and reasonable rates and without discrimination, and of entering into such contracts only as will enable it to perform its chartered duties, whether such contract is evidenced by municipal ordinance or by agreement between the parties.

2. Same—Prepayment for Services.

As a public-service corporation, a telephone company may make such just and needful rules and regulations as required for the proper performance of their statutory duties and in reasonable furtherance of the company's general business; and a rule requiring all of its subscribers, without discrimination, to pay its uniform rates established for its service for a reasonable time in advance, is valid and enforcible, and prepayment for the period of one month is a reasonable requirement.

3. Same—Injunction.

Where a telephone company had required its subscribers to pay for the use of its service at the end of each month, and found by experience that it lost money by the nonpayment by its subscribers for services rendered, and had put in effect a rule requiring prepayment for such services a month in advance, to which all of its subscribers conformed with the exception of the plaintiff, the service for whom had been accordingly

discontinued, an injunction will not be granted, in his action, restraining the company from discontinuing his service, for such would be an unlawful discrimination in his favor against the other users of the telephone service.

4. Telephones—Contracts—Reasonable Regulations—Parol Agreements—Notice—Determinable at Will.

A telephone company had in force a rule requiring its subscribers to pay a month in advance for services to be rendered, and the plaintiff, a subscriber, refused to sign the contract with this provision printed therein, and erased the same therefrom, and at the time signed the contract with the verbal understanding that he would pay at the end of each month: *Held*, (1) the erasure would leave the matter indeterminate, and subject to further regulation by the company; (2) should the oral agreement be held valid, it would ordinarily be determinable at the will of either party, upon reasonable notice.

5. Same—Prepayment for Services.

A written contract with a telephone company made by a subscriber, provided in effect that it should continue for a year, and thereafter for thirty days after written notice given of discontinuance, with the further condition, "that for any reason which appears to the company sufficient, the company may at its option terminate the contract and remove the instrument": *Held*, there was nothing upon the face of the contract to restrain the company from the enforcement of a rule uniformly requiring a prepayment for a month's subscription by the users of the service, certainly after having found the rule necessary from its experience, and giving reasonable notice thereof.

6. Telephones—Municipal Ordinances—Contracts—Security — Regulations—Prepayment for Services.

It is held in this case that a town ordinance providing that a certain telephone company "may require" its subscribers "to keep and pay the rental on such telephones for the period of twelve months," and as a guarantee therefor may require them to give bond as "an assurance of the faithful performance of the terms of the contract," was a protection to the company against the initial expense of installing the telephone at the beginning of the service, and in no wise interfered with the company in its right to make a reasonable rule requiring prepayment a month in advance by its patrons.

7. Telephones—Reasonable Rules—Prepayment for Services.

In order to a valid waiver, there must be an agreement founded on consideration or some element of estoppel. Hence, a telephone company does not waive its right to put into effect and enforce a reasonable rule requiring its patrons to pay in advance for its services rendered by having previously only required them, for a year or more, to pay at the end of each month.

8. Telephones—Statutory Duties—Waiver.

A telephone company, as a public-service corporation, may not waive by its conduct its duty to properly perform its statutory duties or those requiring that it render its service at reasonable rates and without discrimination.

9. Telephones—Reasonable Rules—Prepayment—Tender.

A tender of payment by the subscriber to a telephone company for the continuance of the service for a few days, made after the instrument had been removed for his failure to comply with a reasonable and uniform rule requiring the prepayment for a month, is immaterial in his action seeking an injunction against the discontinuance of the service, upon the ground that the rule was unreasonable.

BROWN, J., did not sit.

(286) APPEAL by defendant from *O. H. Allen, J.*, from LENOIR.

Action, on question of preliminary injunction, heard at chambers in the city of Kinston on 28 July, 1913.

The action was brought to recover damages of defendant for severing plaintiff's telephone connection in the city of Kinston and to compel defendant to restore same. Defendant justified on the ground that plaintiff wrongfully refused to pay the rates monthly in advance, and plaintiff contended that the rates were only due at the end of each month and that defendant had no lawful excuse for its conduct. The court, on the facts as presented, being of opinion with the plaintiff, entered judgment restraining defendant till the hearing and compelling it to restore connection pending the controversy. Defendant having duly excepted, appealed.

G. V. Cowper for plaintiff.

Y. T. Ormond, T. C. Wooten, and G. M. T. Fountain & Son for defendant.

HOKE, J. Our decisions are to the effect that these public-service corporations, including telegraph and telephone companies, take and hold their charters subject to the obligation of rendering services at uniform and reasonable rates and without discrimination, and further, that they have no right to make or continue in the performance of a contract "which renders them unable to perform the duties imposed upon them by their charter," and whether such contract is evidenced by municipal ordinance or by agreement between the parties. *Telegraph Co. v. Telephone Co.*, 159 N. C., 9; *Horner v. Water Co.*, 153 N. C., 535; *Griffin v. Water Co.*, 122 N. C., 206. It is also recognized that

(287) those companies, subject to the provisions of their charter and the general law, may make such just and needful rules and regulations as are required for the proper performance of their statutory duties and in reasonable furtherance of the company's general business; and, in reference to companies of this character, that a rule requiring payment of established rates in advance for a limited period will be considered as

reasonable and valid, and we are of opinion that in case of telephone companies the term of one month comes well within the principle. *Washington v. Tel. Co.*, 59 Wash., 156; 37 Cyc., 1619.

In the present case, on a perusal of the facts in evidence, it appears that defendant company, duly incorporated, desiring to install and operate a new and efficient telephone system for the city of Kinston, was granted the privilege by ordinance of the city and had printed a form of contract for general use requiring payment of monthly rates in advance. That for a year or more after commencing operations the company, desiring to oblige its patrons as far as possible, did not insist on prepayment, collecting very generally at the end of each month; but having ascertained by trial that the loss in collections by this method was so great that the company would not be able to "properly maintain its system and give efficient and satisfactory service to its patrons, it was determined to enforce the feature of the contract requiring payment in advance," and that it was necessary to do this to properly perform its duties. That by the first of January, 1913, a large portion of the subscribers had acquiesced in the requirement, and by May of this year all of the six hundred subscribers had done so but eleven, and since that time all of these eleven except the plaintiff.

In reference to the various notices given plaintiff in this connection, the affidavit of defendant's general manager made averment as follows: "That the said plaintiff was notified in January that unless he complied with this rule of the company his phone would be disconnected. That he was given said notice several times in the month of May, and on the 7th of May he was notified that if he had any special contract that did not require him to pay his rentals in advance, that the company hereby cancels same, and unless he paid his rentals in (288) advance by 15 June, service would be discontinued. That plaintiff was notified in January, 1913, that he must comply with the rules of the company to pay in advance. He stated to affiant that the company had no right to adopt the rule; he did not object to the same, however, but that it was a matter of finance with him, and that he hoped to be able to pay in advance soon. That thereafter every effort was made to induce said plaintiff to comply with said rule and regulation, and upon his persistent failure and refusal to do so, his phone was disconnected and service was discontinued on 16 June, 1913."

We find no substantial denial in the record of the facts relevant to this phase of the inquiry, and it will thus sufficiently appear that for defendant to defer to plaintiff's position in this matter would be an unlawful discrimination in plaintiff's favor on the part of the company and in violation of its statutory duties as a public-service corporation. Applying the legal principles, as heretofore stated, we are of opinion that

on the facts as they now appear of record, the defendant company was well within its rights when it severed plaintiff's connection for nonpayment of monthly dues.

While this disposes of the present appeal, it may be well to refer to some of the positions urged in support of plaintiff's claim. It is contended that he is entitled to present relief by reason of certain averments in his own affidavit to the effect that when the contract of subscription was presented to him for his signature of date 18 October, 1910, stating the rates "at $36 per annum in equal payments of $3 each monthly in advance during the continuation of the contract, etc., plaintiff declined to sign same as written, and did not sign till he had erased the words "monthly in advance," and further, that there was an oral agreement at this time that plaintiff was to pay at the end of each month. So far as the erasure is concerned, this would seem to leave the matter indeterminate and subject to future regulation by the company (*Hermon v. Water Co., supra*), and as to the alleged oral contract, even if the same were made and valid, it being indefinite as to time, would ordinarily be determinable at the will of either party, certainly on (289) giving reasonable notice (*Solomon v. Sewerage Co.*, 142 N. C., 439-445), and if considered a part of the written subscription and controlled by its terms, this contains specific stipulation, "That this contract shall continue for one year from 19 October, 1910, and thereafter until the expiration of thirty days after written notice shall be given by the subscriber of a desire to cancel this agreement, unless the same shall be terminated by the company as specified in the conditions aforesaid"; and one of these conditions is in part as follows: "That for any reason which appears to the company sufficient, the company may at its option terminate the contract and remove the instrument." On the facts, therefore, there is nothing in the contract itself restraining the company from making the change and requiring payment on giving proper notice of the monthly rates in advance.

Again, it is insisted that this collection of rates in advance is prohibited by the municipal ordinance granting defendant the privilege of operating its system in the city of Kinston. Section 13 of the ordinance upon which plaintiff relies, after requiring of defendant service for all citizens of good standing who apply for it, concludes as follows: "That the said Carolina Telephone and Telegraph Company may require such person or persons to keep and pay the rental on such telephones for a period of twelve months, and to guarantee the payment of said rental for said period, the said company having the right to require the said party to give bond in the sum of fifty dollars ($50) as an assurance of the faithful performance of the terms of said contract." This, to our mind, in no way interferes with the right claimed by de-

fendant, but, as its terms clearly import, was only intended as a protection to the company against the initial expense of installing the telephone at the beginning of the service. It is further argued that the company has waived the right in question by not having enforced it for a year or so after making the regulation; but such a position cannot at all be maintained. In order to a valid waiver, there must be an agreement founded on consideration, or there must be some element of estoppel. Neither is present here. It was only a case of temporary acquiescence in a different method on the part of the company, and (290) from a disposition to oblige its patrons, and there was nothing to prevent defendant from enforcing its regulation when it was ascertained by trial that the business could not be satisfactorily conducted in the other way. Apart from this, the doctrine of waiver is subject to the control of public policy, and a public-service corporation no more by waiver than by contract is allowed to put itself in a position which prevents the proper performance of its statutory duties and affording its service at reasonable rates and without discrimination amongst its patrons. 29 A. & E., 1097, 1107.

The suggestion of a tender by plaintiff for a few days service and demand of reinstatement is without merit.

The plaintiff was at the time insisting on his right to pay at the end of each month, and the tender was not in accord with a valid regulation of the company.

We are of opinion that, on the facts as they now appear, the plaintiff has shown no right to a preliminary injunction, and the judgment of the lower court must be

Reversed.

BROWN, J., did not sit.

Cited: Parrott v. R. R., 165 N. C., 310; *Robinson v. Brotherhood*, 170 N. C., 549.

N. G. WILLIAMS, JR. v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 15 October, 1913.)

Railroads—Master and Servant—Duty of Master—Safe Place to Work—Negligence—Evidence—Trials.

There must be a breach of the employer's duty to furnish the employee a safe place to work, for the latter to recover damages for the negligent failure of the former to have done so; and in this case it is held that no such failure is shown, it appearing that the employee, employed as a

section man or assistant section foreman, attempted to go for water, of his own volition and without orders from his superior, down a steep embankment of a railroad fill, across bushes and shrubbery, and was injured by falling upon small pointed snags 6 or 8 inches high, left there from the former clearing of the right of way, as a protection from fires, and which were concealed by the shrubbery and bushes since growing up, and unknown to him at the time, and that he could have safely gone for the water by going to the end of the embankment, a further distance of 75 yards.

(291) APPEAL by plaintiff from *Carter, J.*, at April Term, 1913, of WAKE.

This is an action to recover damages for personal injury, alleged to have been caused by the negligence of the defendant. The complaint alleges that the plaintiff was an employee of the defendant railway company in the capacity of section man or assistant section foreman; that on 11 July, 1911, the section foreman ordered the plaintiff, together with three other employees of the company, to go over the section and tighten bolts; that the section foreman and the portion of the crew with him were engaged in the usual work on the section; that the section foreman advised the plaintiff that the water bucket would be kept with the foreman and his portion of the crew, and instructed the plaintiff and the others with him to get water at the nearest places as they proceeded along the line tightening bolts.

That about 2:30 o'clock in the afternoon they had reached a fill some 12 or 15 feet in height; that prior to this time the company, through its employees, had permitted the sides of the fill to become dangerous by cutting bushes and small trees with a hook, leaving them sharp and pointed, sprouts growing out and weeds growing up on the sides of the fill, concealing the dangerous condition of the right of way; that the plaintiff, not knowing the dangerous condition of the right of way, started down the sides of the fill for water, stumbled on one of these hidden snags or stumps and fell and was injured.

The plaintiff testified as follows: "I am the plaintiff in this action. I live 4 miles west of Cary, N. C. On 11 July, 1911, I was at work on the section for the Seaboard Air Line Railway between Cary and Apex. I went to work for the Seaboard about the 16th or 17th day of June of that year. I was assistant section foreman and my wages
(292) were $1.25 per day. Mr. E. D. Medlin was section foreman. On the morning of 11 July the foreman ordered four of us to go along the section and tighten bolts. The three others and myself were J. A. Marcum, Hinton Hobby, and Charlie Singleton, and the section foreman and the other members of the crew remained behind at work on the right of way. The section foreman told us that he would keep the water bucket with him and those behind, and we should get water at the

nearest places along the line. About 2 o'clock in the afternoon we were tightening bolts on a fill near the 11-mile-post. The fill is 75 or 100 yards long. It was very hot and we were thirsty. Arthur Marcum and I started to a well about 300 yards away, to get water. We were not far from the middle of the fill. We started down the embankment, when my foot struck one of the snags, and in throwing my other foot ahead to try to catch, I fell—rather, sat down—on one of the snags. On the sides of the fill were many snags where the bushes had been cut off with a hook some time before, leaving the snags 8 or 10 inches or 1 foot high. These snags were very sharp. Sprouts had grown out from these stumps or snags, and weeds had grown up about 3 feet high and very thick, hiding the snags. I had never worked on the right of way, and did not know the snags were there. I have worked on the section on the Southern Railroad and have observed other railroads, and never knew one in as bad condition as this with reference to the snags and bushes. I was rendered unconscious, stayed in the Rex Hospital one month. I haven't been able to work regularly since. I am not well now. In April, 1912, I went to work for the Carolina Power and Light Company as conductor. I worked twelve hours a day. When I was working with the section force on the morning of this accident, whenever we felt like it we stopped and got water and came back; that was the order we had. Mr. Medlin wasn't with me at the time of the accident; Mr. Hobby was about two rails behind me; a rail is about 30 feet long; I think he was going after water, too. Mr. Marcum had gone down the fill and was a little ways from me; I think he went under the fence. There was a barb-wire fence at the bottom of the fill. The fill is about 15 feet high and extends something like 40 or 50 feet to- (293) wards Apex; I guess we were nearer the end towards Apex than towards Cary. The accident happened on a bright sunny day about 2 o'clock. I could see the bushes, but couldn't see the ground where I was going. The fill is a gradual slope. The section force are supposed to go over this fill once a year and cut down the bushes for the purpose of keeping them from getting dry and burning property. The rule is that they cut the bushes once a year. I guess they do that so that the engines will not set them on fire. The stick was much larger than a pencil, and 8 inches high. In cutting the bushes they used a blade something like a reap hook. By going to the end of the fill you could get to Mr. Spence's well, where I was going, without having to pass through the bushes. Nobody pointed out the place where I should go. I could start for water from any point."

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

J. C. Little for plaintiff.
Murray Allen for defendant.

ALLEN, J., after stating the case: The rule that the employer must furnish the employee a reasonably safe place to work is fully recognized, and has been applied in numerous decisions of this Court; that it is equally well settled that before one can recover damages for personal injury on account of negligence, he must prove a breach of duty, causing him damage, and we find in the record no evidence of a breach of duty.

The plaintiff was injured several miles from a station, while going down a steep embankment, by falling on a small snag 6 or 8 inches high, which had been left after the defendant cut down the bushes on the right of way, to avoid danger from fire.

We would not hold that leaving an obstruction of this character on an embankment in the country, not usually used by the employees of the defendant or other persons, would be evidence of negligence, and the liability of the defendant would not be increased by the fact that
(294) the snag on which the plaintiff was injured was the result of cutting bushes on the right of way to protect the roadbed and the property of adjoining landowners from fire. The plaintiff was not ordered to go down the embankment, and it appears from his evidence that he not only selected the place for going down, but that he could have avoided the bushes altogether by going to the end of the embankment, a distance of 75 yards.

Affirmed.

DR. SHOOP FAMILY MEDICINE COMPANY v. J. R. DAVENPORT.

(Filed 15 October, 1913.)

1. Contracts, Written—Parol Evidence—Implied Warranty—Principal and Agent.

While a written contract for the sale of goods may not be contradicted by an unauthorized parol agreement made with the sales agent by the purchaser, the law will imply a warranty that the goods are at least merchantable; and where a manufacturer of medicines brings suit upon a contract of this character for the sale of his products, the defense is available to the buyer, upon the implied warranty, that within the knowledge of the seller the medicines were worthless.

2. Contracts—Vendor and Vendee—Goods Returned—Tender—Readiness to Pay—Payment into Court.

The manufacturer and seller of medicines brought suit upon a contract of sale of his products, which was resisted upon the ground that the medi-

cines were worthless. The buyer returned a part of his purchase and sent his check for the balance, which he had sold. The seller returned the check, but not the medicines which had been sent to him. It having been ascertained by the jury that the medicines were worthless, it is *Held*, (1) that the plaintiff could not recover the value of the goods he had kept; (2) that upon the question of interest and costs, the defendant should have shown a continuous readiness to pay, or a payment into court, and merely offering the check on a foreign bank was insufficient.

3. Judgments—Tender—Costs and Interest—Interpretation of Statutes.

A tender of payment under our statute, to stop the costs and the accrual of interest on a judgment subsequently rendered, must be in writing, signed by the party making it, and contain an offer of judgment for the amount tendered. Revisal, sec. 860.

APPEAL by plaintiff from *O. H. Allen, J.*, at March Term, 1913, (295) of PITT.

This is an action to recover the price of certain medicines alleged to have been sold and delivered to the defendant. The indebtedness is denied by him. It appears that plaintiff sold and shipped the goods to defendant, who sold some of them to different customers, amounting to $8.45, and finding that the medicines were worthless, he refunded the money to some of his customers who had bought from him, and returned the rest of the medicines by freight to plaintiff, with a bill of lading for same and a check for the $8.45. Plaintiff returned the check, but kept the goods and the bill of lading. There was evidence that the goods were worthless. Defendant offered to show that the agent, at the time of the sale, agreed that he could return the goods if they were not satisfactory, but this evidence was excluded by the court, as the contract was in writing, and it is stated therein that there is no other agreement, written or oral, than the one stated in the writing. Defendant tendered payment of the $8.45, which was refused, upon the ground that the tender should have been of the whole amount, which is justly due the plaintiff and claimed by him, but he did not allege or show continual readiness to pay, or a payment into court. Judgment for $8.45 and costs in justice's court, where tender was first made and refused, and appeal by defendant.

Albion Dunn for plaintiff.
Harry Skinner and Lewis G. Cooper for defendant.

WALKER, J., after stating the case: The court properly rejected the evidence as to the parol agreement of the plaintiff's agent. The contract could not be contradicted or varied in this way. *Medicine Co. v. Mizell,* 148 N. C., 384, and cases cited. But defendant relies (296) upon the principle that when the plaintiff sold the goods to him, it impliedly represented that they were fit for the use for which they

were intended, or that they were merchantable, and that this representation turned out to be untrue, for they were not only not merchantable, but worthless, to the knowledge of the plaintiff. Mr. Benjamin states the rule on this subject, in substance, to be that in all sales by sample there is an implied warranty that the bulk shall be of equal quality to the sample. Where goods are sold without an opportunity for inspection, there is also an implied warranty that they shall be at least "merchantable"—not that they are of the first quality, or even of the second, but that they are not so inferior as to be unsalable among dealers in the article. This is especially true where, as in this case, the vendor is the manufacturer of the articles sold. Benjamin on Sales, 683, 686, and cases cited in notes. "If a man sell an article, he thereby warrants that it is merchantable; that is, that it is fit for some purpose. If he sells it for a particular purpose, he thereby warrants it to be fit for that purpose." *Jones v. Bright,* 5 Bing., 544. The principle was clearly expressed by *Lord Ellenborough* in *Gardiner v. Gray,* 4 Campbell, 143, where he denied the application of the rule as to sales by sample: "I am of opinion, however, that under such circumstances the purchaser has a right to expect a salable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is, whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market to be sold as *waste silk.* The witnesses describe it as unfit for the purposes of waste silk, and of such a quality that it cannot be sold under that denomination." See, also, *McClung v. Kelley,* 21 Iowa, 508; *Gaylord Mfg. Co. v. Kelly,* 53 (297) N. Y., 518. The principle, as stated, has been recognized and the above authorities approved in *Main v. Field,* 144 N. C., 307. See, also, *Mfg. Co. v. Davis,* 147 N. C., 267; *Rogers v. Niles,* 11 Ohio St., 518; *Fitch v. Archibald,* 29 N. J. L., 160; *Murchie v. Carnell,* 155 Mass., 60; Tiffany on Sales, p. 260. Defendant, therefore, had the right to return the goods if they were unsalable and worthless. But it appears that the plaintiff received and kept that part of the goods reshipped to him by the defendant. There was ample evidence of this fact (35 Cyc., pp. 193 and 321), which the court fairly submitted to the jury, and they have found with the defendant. Surely it is not just that plaintiff should retain the goods and recover their value from the defendant. If he had

refused to receive the goods or had returned them after discovering what they were, a different case might be presented, upon which, though, we express no opinion.

We do not think there was a sufficient tender of the $8.45 to stop interest and costs. To have this effect, the tender must be kept good, by being always ready to pay and by producing the money and paying it into court. *Bilzell v. Haywood,* 96 U. S., 580. In a recent case, *Justice Allen,* referring to this plea of tender and its sufficiency, says: "The plea of tender is defective in that, in addition to alleging that he tendered the amount due, the defendant fails to allege that he has at all times since the tender been ready, able, and willing to pay, and in failing to accompany the plea by payment of the money into court; and the evidence in support of the plea is equally defective." *Lee v. Manley,* 154 N. C., 247. And, again, quoting with approval *Dixon v. Clark,* 57 E. C. L., 376: "The principle of the plea of tender, in our apprehension, is that the defendant has been always ready (*toujours prist*) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money, the plaintiff himself precluding a complete performance by refusing to receive it. And as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in curiam* of the money tendered," cit- (298) ing, also, *Bank v. Davidson,* 70 N. C., 122. In *Soper v. Jones,* 56 Md., 503, it was held that "a plea of tender, not accompanied by *profert in curiam,* is bad." The same was said in *DeBruhl v. Hood,* 156 N. C., 52. This plea of tender applies peculiarly to actions of debt and assumpsit, the present action being assignable to the latter class, if we were proceeding under the former system of pleading. The tender does not pay or satisfy the demand. In this view it may be well to reproduce what this Court said (by *Rodman, J.*) in *Bank v. Davidson,* 70 N. C., 118: "We have recently said in several cases that contracts such as that now before us have been always regarded by the Legislature, and by this Court, as contracts to pay *money,* and not as contracts to deliver specific articles (*Wooten v. Sherrard,* 68 N. C., 334), and that consequently the effect of a tender refused is not to discharge the debt, but merely to stop the interest. That this is the law of contracts to pay money ordinarily is settled. It is so laid down in all the text-books, and must follow from the rule that a plea of tender must aver that the defendant has always been ready and willing to pay, and must be accompanied by a payment of the money into court for the use of the plaintiff. An omission to pay the money into court makes the plea a nullity, and plaintiff may sign judgment. *Bray v. Booth,* 1 Barnes, 131; *Kether v. Shelton,* 1 Stra.,

638." The rule is thus stated in 38 Cyc., 162, 169, 170: "Ordinarily a tender of money does not operate as a satisfaction of the debt, and is no bar to an action thereon; the effect, when the tender is maintained, being to discharge the debtor from a liability for interest subsequent to the tender, or damages that would accrue by reason of nonperformance, and costs afterwards incurred. . . . If the debt or duty is discharged by a tender, or the tender is relied upon as a defense to a foreclosure of a lien or the enforcement of some collateral right, it is sufficient, without more, to plead the tender and refusal, and in pleading a tender of chattels it is not necessary to plead a continuing readiness to pay. But where the debt or duty remains after a tender and refusal, it is not enough for the party who pleads a tender, in an action to recover
(299) the debt, or damages for a failure to perform the duty, to plead the tender and refusal alone, but he must plead that ever since the tender he has at all times been and still is ready to pay the money or perform the duty; and where it is necessary to keep the tender good, the rule in equity in reference to pleading continued readiness to pay is no less strict than at law. Where the debt or duty is not discharged by a tender and refusal, or the tender is made the ground of the cause of action or defense, the tenderer must plead, in addition to a continuing readiness, a *profert in curiam,* that is, that the money has already been brought into court or is now brought into court ready to be paid." In our case it was not averred, nor does it appear, that defendant was ready with the money at the time of the alleged tender, or that he kept himself in readiness to pay, or actually paid it into court. The mere offering of the check was not sufficient, nothing else appearing. *Te Poel v. Shutt,* 57 Neb., 592; *In matter of Collyer,* 124 N. Y. App. Div., 16; *Poague v. Greenlee,* 63 Va., 724; *Larson v. Breene,* 12 Col., 480; 38 Cyc., 146. It was said in *Matter of Collyer, supra:* "His right to money was not affected by the fact that this check was once tendered in open court with a consent to an adjournment until it should be honored, and that he refused it. The check was not legal tender. It was but a direction to a bank to pay the payee; the money represented did not thereby become the property of the payee, nor was it put beyond the control of the maker of the check, nor did the check before presentation work an assignment of the moneys thereby ordered to be paid," citing *O'Connor v. Mechanics Bank,* 124 N. Y., 324. The bank on which the check was drawn was in a different State from that of the creditor's residence.

Smith v. B. & L. Asso., 119 N. C., 257, presents a different question, and is not like this case in its facts. Nor is *Parker v. Beasley,* 116 N. C., 1, in which the question was, whether the lien of a mortgage was released by a tender.

There seems to be a distinction between a tender for a simple, unsecured debt, and one made when the debt is secured by indorsement or a lien, it being declared by some courts, contrary to what (300) was held in *Parker v. Beasley, supra,* that a proper tender discharged the lien. But that question is not now before us. Nor is the principle which is sometimes applied by courts of equity applicable to this case. In *Bateman v. Hopkins,* 157 N. C., 470 (where the facts were peculiar), will be found a discussion of the law in regard to this difference. We there said: In general, the rules of equity concerning the necessity of an actual tender are not so stringent as those which prevail at law, as the decree can be so framed as to protect the parties, and more exact justice can be attained than under the technical rules of the law, which are of greater universality. There may be cases, even at law, or rather governed by strict legal principles, where the tender need not be renewed or kept good, as, for illustration, in *Blalock v. Clark,* 133 N. C., 306 (*S. c.,* 137 N. C., 140); *Hughes v. Knott,* 138 N. C., 105, it being useless to do so; but this rule depends for its application upon the exceptional facts of that class of cases, which may, though, embrace quite a variety of transactions.

Revisal, sec. 860, does not apply, as there was no offer of judgment, which must be in writing and signed by the party making it.

The other exceptions are untenable. The judgment will be modified so as to conform with this opinion in respect to the insufficiency of the tender, and in other respects is affirmed. Costs divided here.

Modified.

Cited: Ashford v. Shrader, 167 N. C., 49; *Grocery Co. v. Vernoy, ib.,* 428; *Jewelry Co. v. Pittman, ib.,* 627; *Furniture Co. v. Mfg. Co.,* 169 N. C., 44; *Saw Co. v. Bryant,* 174 N. C., 356; *Farquhar Co. v. Hardware Co., ib.,* 372; *Register Co. v. Bradshaw, ib.,* 416.

V. B. MOORE v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 15 October, 1913.)

1. Municipal Corporations—Streets and Sidewalks—Raleigh—Title in State—Municipal Control.

While the title to certain streets in the city of Raleigh was reserved by the State of North Carolina, the control of the city over these streets is the same as in any other cities or towns in the State, and it has the same discretionary right to cut down or trim trees bordering the streets for the purpose of government or management, which can only be restrained in cases of willfulness or oppression.

2. Municipal Corporations—Quasi-public Corporations—Charter Powers.

A municipal corporation cannot transfer to a *quasi*-public corporation the rights that it exercises by virtue of its municipal character.

3. Same—Injury to Shade Trees—Damages—Injunction.

Where a *quasi*-public corporation, authorized by its municipal charter to place its poles and string its wires along the streets of a city, threatens the property rights in the shade trees along the sidewalks of adjoining owners, by cutting or trimming the trees, without affording them compensation, an injunction will issue irrespective of whether or not the cutting was about to be done unnecessarily, wantonly, or oppressively.

4. Corporations—Shade Trees—Wanton Injury—Punitive Damages.

Punitive damages may be awarded against a corporation authorized by its charter to place its poles and string its wires along a city street, for wantonness or oppression in cutting shade trees on the sidewalks along its route to the damage of abutting owners.

5. Corporations—Injury to Shade Trees—Measure of Damages—Deterioration of Property.

An abutting owner may recover damages from a *quasi*-public corporation for cutting or trimming shade trees, on the sidewalk in front of his property, done by it for the purpose of stringing its wires, etc., as authorized by its charter, to the extent that his property is thereby depreciated in value.

6. Actions, Form of—Injury to Shade Trees—Condemnation—Measure of Damages.

Forms of action are not now regarded of supreme importance, and the measure of damages for injury to shade trees done by a *quasi*-public corporation in pursuance of its charter powers is the same, whether the action be brought by the person who has a property right in the trees or by the corporation in condemnation proceedings.

(301) APPEAL by plaintiff from *Carter, J.*, at April Term, 1913, of WAKE.

Peele & Maynard for plaintiff.
James H. Pou for defendant.

(302) CLARK, C. J. This is an action to recover damages to the value of plaintiff's lot in Raleigh, by cutting limbs from and disfiguring an ornamental shade tree which stood on the sidewalk in front of the plaintiff's residence. The defendant claimed that it had a right to cut the limbs out of the way of its wires because necessary for its purposes, without incurring any liability to the owner of the property abutting the sidewalk whereon the tree stood, and further, that the fee simple of the streets, including the sidewalks, was in the State of North Carolina, and hence that the plaintiff had no property rights in the tree.

It is historically true that the mile square upon which the city of Raleigh was originally located and within which limits this tree stood was purchased by the State, and the city, so far as it is within those limits, was divided into lots and sold, reserving the title to the streets in the State. But so far as it affects this matter, and all matters, except possibly in exceptional cases, the control of the municipality over its streets is the same in Raleigh as in all the other cities and towns in the State. The city for the purpose of its government and management can, in its discretion, cut down or trim up the trees bordering the streets, and cannot be restrained unless in cases of willfulness or oppression. *Jeffress v. Greenville,* 154 N. C., 499; *Rosenthal v. Goldsboro,* 149 N. C., 128; *Tate v. Greensboro,* 114 N. C., 392. But, subject to such right of the city government, the abutting owner has an easement or property in the shade trees standing along the sidewalk which the law will protect. *Brown v. Electric Co.,* 138 N. C., 345. The city cannot transfer to any individual or to a *quasi*-public corporation for its convenience and profit this superior right, which it can exercise only for the public benefit.

It is also true that the defendant company is empowered by its charter and by the permission of the city to place its poles and wires along the streets for the purpose of carrying the electric light. But it does not follow that therefore it can invade the property rights of the plaintiff in his shade tree without compensation, nor that the plaintiff would not be entitled to an injunction in case the cutting of the tree was about to be done unnecessarily or wantonly or oppressively. The (303) defendant is a public-service corporation, or, as it is usually termed, a *quasi*-public corporation, and can take the property of the plaintiff, but only upon compensation. This is true, even if it had been necessary for the defendant to run its wires through the tree and to cut the limbs, for the defendant cannot invade the property rights of the plaintiff without compensation because convenient or necessary for its benefit to do so.

As a matter of fact, it could not be necessary, because the wires could have been strung above the top of the trees, or could have swerved to either side, or could have been placed underground, as is required in many cities, and even in North Carolina in progressive towns like Charlotte, for instance, on some of its streets. The latter, indeed, must ultimately be required everywhere, for the present system of stringing the wires above ground is unsafe for the public, as we have an instance in *Hayes v. Gas Co.,* 114 N. C., 203, where a broken wire hanging down became charged by contact with a trolley wire, causing the death of a boy passing by. The overhead wires are very unsightly, are troublesome in cases of fires, and are subject to interruption by storms. They are

allowed only as a matter of economy on the part of the light company, and not to entitle them to take the property of others as a matter of right.

The plaintiff is entitled to compensation for the injury done him, and if there was wantonness or oppression, or other bad motive, punitive damages might be added. The subject has been so fully discussed and elucidated in *Brown v. Electric Co.*, 138 N. C., 533, that we need not do more than refer to the reasoning and the conclusion reached in that case.

The plaintiff avers that a great inducement to him in buying the premises was the ornamentation of his ground by this tree and others, and that he spent considerable money in improving and beautifying them. His Honor erred in instructing the jury that the plaintiff was entitled to recover only if the cutting of the limbs had been done in a negligent or unskillful manner. That would add to the amount of the damages which he would be entitled to recover. But it is not the measure of his (304) rights, for he is entitled to compensation for the deterioration, if any, in the value of his property, from the trimming or cutting of the tree, however skillfully done, just as he would have been if the tree had been cut down, however skillfully and carefully and even necessarily the tree had been felled. The plaintiff's property in the tree (subject to the superior right of the city to cut or remove it for public purposes) and his right to enhance the value of his lot by its improvement, on which he had spent care and money, entitle him to compensation for the loss which he may have sustained by the act which the defendant has done for its own convenience and advantage.

It was suggested that the defendant might have obtained the right to trim the tree, or even to cut it down if necessary, under the right of eminent domain, and therefore that the plaintiff could recover damages only in the same method. But forms of action no longer are matters of supreme importance. If the defendant so desires, this may be styled an action to recover damages under the right of eminent domain. The plaintiff's property rights have been invaded by the defendant for its own benefit, and the plaintiff is entitled to recover compensation therefor, and is not restricted to such damages as may have been caused by the unskillfulness or negligence of the defendant.

Error.

BROWN, J., and HOKE, J., dissent.

Cited: *Wood v. Land Co.*, 165 N. C., 371; *Munday v. Newton*, 167 N. C., 657; *Weeks v. Telephone Co.*, 168 N. C., 471; *Wheeler v. Telephone Co.*, 172 N. C., 11.

(305)

E. H. FELLOWES ET ALS. v. C. K. DURFEY ET ALS.

(Filed 22 October, 1913.)

1. Wills—Construction—Intent.

Wills are construed to effectuate the intent of the testator, as gathered from the terms of the will itself.

2. Wills—Devises—Fee Simple—Interpretation of Statutes.

A devise will be construed as in fee, unless the contrary appears from the terms of the will by "clear and express words or it shall be plainly intended." Revisal, sec. 3138.

3. Wills—Interpretation of Statutes—Devises—Limitations—Contingent Remainders.

The only restrictions imposed upon the power of the testator to dispose of his lands as he may please is the limitation as to duration of time, to a life or lives in being and twenty-one years thereafter, and as to certain contingent remainders. Revisal, sec. 1590.

4. Wills—Devises—Construction—Intent—Fee Simple.

A devise and bequest to the testator's wife of all of his estate, real or personal, wherever located or however held, including that held at the time of his death, as absolutely as he held it himself, declaring that she should not be considered as holding it in trust "technically so called, to be enforced by the judgment or decree of any court other than her own conscience, judgment, and affection shall prompt her to so regard it": *Held*, the devise and bequest to the widow, under the clear terms of the will, was in fee absolute.

5. Same—Subsequent Expressions—Life Estates—Power of Disposition—Trusts and Trustees.

Where a testator devises all of his estate to his wife, clearly and unmistakably in fee, a different intent may not be inferred from subsequent expressions used in the will, enjoining her to reserve to herself the homestead and sufficient means of support of herself and family; or setting forth the method of making advancements to their children, which he evidently expected she would make, that the children be charged therewith, except as to their support and education; or stating that his interest in an existing partnership should not be changed unless in her judgment she saw reason to do so; or that she rely on the advice of his brother, who predeceased him, in the management of the property or investment of the funds. Nor can such expressions be construed in this case as limiting the fee previously devised into a life estate to be held in trust with power of disposition.

6. Wills—Devises—Marriage—Defeasible Estates.

A devise to the wife providing that should she marry again the property be divided among her and her children according to the statute of distribution and by the methods he suggested, creates a fee defeasible upon the contingency of her marriage.

(306) APPEAL by defendant from *Carter, J.*, at April Term, 1913, of WAKE.

This is an appeal from a judgment construing the will of Rufus S. Tucker, which is as follows:

RALEIGH, N. C., 6 February, 1880.

I, Rufus S. Tucker, merchant, residing in the city of Raleigh and State of North Carolina, do make and publish this as my last will and testament, at my own home and in my own handwriting.

I give, devise, and bequeath to my dear wife, Florence Perkins Tucker, all my estate, real or personal, wherever located or however held, or all that I may acquire or hold at the time of my death, of whatever nature or description, then belonging to me. I desire that my wife shall take, hold, and own, just as now I hold and own or shall hold and own at the day of my death; I declare her interest in my estate, real and personal, shall be as absolute as my own, and not be considered or taken as a trust, technically so called, to be enforced by the judgment or decree of any court other than her own conscience, judgment, and affection shall prompt her to so regard it. In thus bestowing on my dear wife, Florence, all that I am worth, I wish my children to understand that in so doing I act upon the best convictions of my judgment and from knowledge of their mother's affection, love, and interest in the welfare, comfort, and happiness of each and all of our children, and in the belief that thereby I best protect and control them, and that she will from time to time, as her judgment, sense of justice and duty shall in her own will direct, and as the necessities and wants of our children shall require, make to them such advancements, in cash or property, as she shall think best and proper.

I enjoin it upon her at all times to reserve to herself, as the occupant of the homestead (which is her home) and the proper head of
(307) the family, sufficient means for the proper living of herself and family. That in making advancements to our children she shall charge such child with his or her advancement, if in property, at its market or cash value at the time of the advancement; if any child shall be advanced by me during my life, such child or children shall be charged, of which I will file for my wife's instruction with this will a full statement, and for which such child or children must account in any division that may be made by my wife, or otherwise, of my property. She will understand that the proper nurture and education of her children is not to be regarded as advancements, and have never been so regarded or charged by me.

Should my wife marry again, then it is my will that my wife and children shall select three disinterested friends, my brother William (if living) being one, who shall make an equal and just division of my

property between her and all of our children, or their legal representatives, as if made under the statute of distributions in this State; and in the event of her death as my widow, she may direct by writing the selection of three intelligent and disinterested friends (my brother William being one, if living), who shall make such equal and just division of all my property or estate remaining in her hands, bringing into view and account all previous advancements.

I constitute and appoint my wife, Florence, the executrix of my last will and testament, without security or bond, and desire that so long as she can have the aid and direction of my brother William's advice, that she will be directed by him in the care and management of the property and the investment of any funds not needed or required by her in the proper nurture and maintenance and education of her family. Most of my personal and real estate is now in the name of W. H. & R. S. Tucker, and my desire is that it should remain in the same name or firm, unless there should be found some good reason why it should be changed; in that event, my wife can make the change.

In testimony of all which I have hereunto placed my name and seal.

RUFUS S. TUCKER. [SEAL].

Raleigh, N. C., 6 February, 1880.

Executed before C. McKimmon, W. T. McGee. (308)

NOTE.—Raleigh, N. C., 9 February, 1894. I have decided to keep no record of advances made to my married children, as I have advanced to them as their necessities required. My wife knows about the amounts advanced. RUFUS S. TUCKER.

No advances have been made to my unmarried children.

R. S. T.

Rufus S. Tucker died 4 August, 1894, seized of a large estate, real and personal, and his widow, Florence P. Tucker, who was named therein as devisee and executrix, qualified and entered into possession, claiming the property in fee under said will, She died 11 December, 1909, leaving a will whereby she disposed of the property, which she had taken possession of under the terms of her husband's will under the belief that she possessed the same in fee simple; and at the same time disposed, without distinguishing it, of her property which she had received from other sources.

The court below being of opinion that the property devised to her under the will of her husband was not held by her in fee, but in trust, so adjudged, and the defendants appealed. This action was begun 8 September, 1911. The parties, plaintiffs and defendants, other than

C. K. Durfey, the surviving executor named in the will of Florence P. Tucker, are her five daughters and their living husbands and the children of a deceased son.

Tillett & Guthrie and Winston & Biggs for plaintiffs.
J. H. Pou, S. B. Shepherd, and W. H. Pace for defendants.

CLARK, C. J. The decision of this case affects the present control and custody of a large amount of property, and to a lesser extent its ultimate destination, for the will of Mrs. Tucker substantially divides it equally among her children, and the children of a deceased son, share and share alike, but with the exception of a cash devise to each and some personal property, gives her children the annual interest only, and devises the principal of each share in trust to be divided among the grand-
(309) children at the death of their mothers. The will of Florence P. Tucker is not presented for construction, but the fact that the bulk of the principal of the estate is thus tied up during the lifetime of her children, who are to receive merely the interest, is the ground of the action on the part of the plaintiffs, who contend that the property was not devised to her by her husband in fee, and that the estate should be divided at this time.

The elementary rule for the construction of wills is that every will shall be construed to effectuate the intent of the testator, and that this intention must be gathered from the terms of the will itself. The testator was a man of large estate and of high intelligence, a graduate of the State University, and, as the will itself states, it is written entirely in his own handwriting and is dated fourteen years prior to his death.

The language of the will is explicit, and the testator's intention is very clearly expressed, in these words: "I give, devise, and bequeath to my dear wife, Florence Perkins Tucker, all of my estate, real and personal, wherever located or however held; or all that I may acquire or hold at the time of my death, of whatever nature or description then belonging to me. I desire that my wife shall take, hold, and own, just as I now hold and own, or shall hold and own at the date of my death. I declare her interest in my estate, real and personal, shall be as absolute as my own, and not to be considered or taken as a trust, technically so called, to be enforced by the judgment or decree of any court other than her own conscience, judgment, and affection shall prompt her to so regard it.

These words are so clear and peremptory that we cannot conceive that the testator meant other than to devise his entire property to his wife to "hold and own just as he held and owned, or should hold and own it at the day of his death," and that "her interest in his estate, real and personal, should be as absolute as his own, and not to be considered or

taken as a trust, technically so called, to be enforced by the judgment or decree of any court other than her own conscience, judgment, and affection should prompt her to so regard it."

There is nothing that follows in this will which can shake (310) or throw a doubt upon this so clear expression of the testator's intention, which was declared to be to vest the estate "as absolutely in his wife as the testator held it at his death," and by anticipation forbids any construction of the will which should hold its terms as giving her an interest as trustee and not absolutely.

The next paragraph in the will is an explanation to his children of the reason why he has thus devised the estate absolutely to his wife. He then enjoins upon her to reserve to herself the homestead and sufficient means for the proper support of herself and family. Counsel for the plaintiffs place emphasis upon the word "enjoin." But with the context it is merely the expression of solicitude and a desire that his wife should not out of affection for her children strip herself of a sufficient support and maintenance.

The next paragraph of the will is advice to his wife as to the method of making advancements, which he naturally and evidently expected she would make to the children, and that the children shall be charged for such advancements at the market value at the time, and, further, he expresses the desire that the support and education of the children shall not be regarded as an advancement.

The next paragraph provides that in event his wife should marry (which event did not occur), the property should be divided between her and his children according to the statute of distribution and by the method he suggested. In short, the testator gave his wife a fee in his estate, defeasible on the contingency of her marriage.

The next paragraph of his will appointed his wife sole executrix without security or bond, and expresses a desire that she will avail herself of the advice of his brother, William (who predeceased him), in the management of the property and the investment of surplus funds, adding a desire that his interest in the mercantile firm of which he and his brother were members should remain unchanged unless his wife should find good reason for a change, which was left entirely to her judgment. This is the whole will.

The very able and learned counsel on both sides who argued (311) this cause have cited us to a very large number of cases. But we do not think that they can add to the understanding of this will, which is the clear expression of his intentions as to the disposal of his property, by an educated, intelligent gentleman who knew how to make himself understood in other matters and whose words in this important matter admit of no doubt or ambiguity.

Citations of the decisions of many courts as to other wills, whose language is more or less similar to that here used, cannot aid us, for in few of them, if any, has the intention to confer a fee been contested when so clearly expressed as in this case.

In *Griffin v. Commander, ante,* 230, the devise to the widow was of all the testator's estate, "with power to give and devise the same after her death to our beloved children and grandchildren; that inasmuch as they are and should be our lawful heirs, and that they are equally our own and well beloved by each of us, as their joint parents, she has the same right of distribution of our estate as I have, knowing no partiality or discrimination in the same." We held that the widow held the property in fee, and that the rule applicable was clearly stated in *Borden v. Downey,* 35 N. J. L., 77: "Where an estate for life is expressly given and a power of disposition is annexed to it, in such case the fee does not pass under such devise, but the naked power to dispose of the fee. It is otherwise in case there is a gift generally of the estate, with a power of disposition annexed. In this latter case the property itself is transferred."

In *Jackson v. Robbins,* 16 Johns, (N. Y.), 538, it is held to be settled law that "where an estate is given to a person generally, or indefinitely, with power of disposition, it carries a fee, and the only exception to the rule is where the testator gives to first taker an estate for life only, by certain and express words, and annexes thereto a power of disposal; in that special and particular case the devisees will not take the estate in fee." This case was cited and approved in *Bass v. Bass,* 78 N. C., 374.

(312) To same effect, *Patrick v. Morehead,* 85 N. C., 62; *McKrow v. Painter,* 89 N. C., 437; *Parks v. Robinson,* 138 N. C., 269, and there are other cases in our Court to the same effect.

Counsel for the plaintiffs rely upon two cases in our own courts: *Young v. Young,* 68 N. C., 309, which in no wise resembles this, for there the property was given to the testator's wife "to be managed by her (and that she may be able the better to control and manage our children), to be disposed of by her to them in that manner she may think best for their good and their own happiness." In that case there was simply a trust in the wife and nothing more. The plaintiffs also rely upon *Russ v. Jones,* 72 N. C., 52. In that case the devise was to the wife, who was empowered "to give to my daughter E. all of said property at any time, or from time to time, as said wife may think proper." The Court held that this was a trust, and the wife had only a life estate, quoting as authority the above case of *Young v. Young,* which clearly does not sustain it. The case was evidently not well considered, and no reasoning is given and no authority cited other than *Young v. Young,* which, as we have said, is not in point. It is, however, not necessary to

do more than to point out that the language there construed is no precedent for the construction of the language used in this case.

In *Burns v. Burns,* 70 C. C. A., 370, the Court said: "The tendency of the modern decisions, both in England and in this country, is to restrict the practice which deduces a trust from the expression by a testator of a wish, desire, or recommendation regarding the disposition of property absolutely bequeathed," citing 2 Story Eq. Jur., par. 1069; *Lambe v. Eames,* L. R., 10 Eq. Cas., 267; *In re Hutchinson,* L. R., 8 Ch. Div., 540; Pomeroy Eq. Jur. (2 Ed.), par. 1015; *Foose v. Whitmore,* 82 N. Y., 405, 406; 37 Am. Rep., 572."

In *Holt v. Holt,* 114 N. C., 241, it is said: "In a disposition by will no words are necessary to enlarge an estate devised or bequeathed from one for life into an absolute fee. Indeed, it is generally necessary that restraining expressions should be used to confine the gift to the life of the devisee or legatee." The act of 1794, now Revisal, 3138, requires that a devise shall be held to be in fee unless the contrary appears by "clear and express words, or it shall be plainly in- (313) tended." *Jones v. Richmond,* 161 N. C., 555.

Whatever may be said as to the consistency of testators who confer unrestricted power over property upon their grandchildren or more remote descendants, but who do not see fit to place the same power and confidence in their own children, who are restricted to the receipt of interest merely upon life estates (*Hodges v. Lipscomb,* 128 N. C., 57), testators as yet have such power, for the Statute of Wills which conferred the power to dispose of property by will (*In re Garland Will,* 160 N. C., 555), has not been restricted beyond limiting the power to devise to a life or lives in being and twenty-one years thereafter, and by the recent restriction as to contingent remainders (whether created by will or deed) under Laws 1903, ch. 99, now Revisal, 1590. *Anderson v. Wilkins,* 142 N. C., 159. Besides, the will before us for consideration is not the will of Mrs. Tucker, but that of Rufus S. Tucker, which contains no such limitations.

It would be the merest affectation of learning to quote the almost infinite number of cases in which language differing more or less from that used in this will has been construed by the courts in an effort to arrive at the testator's meaning, and to point out at great length wherein the words in each approximate or differ from the language used in the will before us.

But why darken counsel by multitude of words? The sole duty before us is to declare the meaning of the words of the testator in this case. To our apprehension, the testator gave his entire property as absolutely to his wife as he held it himself, and without annexing any trust; and he said this clearly and intelligibly and without ambiguity.

He made this devise defeasible in the event of his wife's remarriage, an event which did not occur. His will expresses solicitude that his wife should retain sufficient property for her own use, and he evidently expected that she would pass it on to her children. But he did not confer on her any power of appointment, because he had given her the property absolutely, and if he had annexed the power of appointment, after the devise to her generally, in deed explicitly, in fee, it
(314) would not have restricted her interest to a life estate, as the authorities cited from our own Court above amply demonstrate.

The judgment of the court below is

Reversed.

Cited: *Taylor v. Brown,* 165 N. C., 161; *Bullock v. Oil Co., ib.,* 68; *Carter v. Strickland, ib.,* 72; *College v. Riddle, ib.,* 217; *Darden v. Matthews,* 173 N. C., 188; *Hardy v. Hardy,* 174 N. C., 507; *White v. Goodwin, ib.,* 725.

RAEFORD LUMBER COMPANY v. ROCKFISH TRADING COMPANY ET AL.

(Filed 22 October, 1913.)

1. Liens—Material Men—Purchaser Without Notice—Interpretation of Statutes.

The requirement that one furnishing materials for a building must file his lien in six months, applies only as to the rights of a purchaser for value without notice, and where this notice of lien has been filed after the six months period and within twelve months, and the purchaser has acquired the property against which the lien was filed, with actual or constructive notice thereof, he takes subject to the rights of the lienor. Revisal, sec. 2028, amended by chapter 32, Public Laws 1909.

2. Same—Inquiry.

The Legislature being presumed to know and legislate with reference to the existing law, by providing an exception as to the time of filing a lien by the material man, "that as to the rights of a purchaser for value and without notice the notice of lien must be filed within six months," is presumed to have done so with reference to the well established principles as to purchasers, that "where one has notice of an opposing claim, he is put 'upon inquiry' and is presumed to have notice of every fact which a proper inquiry would have enabled him to find out." Revisal, sec. 2028, amended by chapter 32, Public Laws 1909.

3. Liens—Material Men—Purchasers Without Notice—Corporations.

When the officers of a corporation have received verbal notice of a claim of lien of one who had furnished material for a building, before purchasing it for the corporation, and it appears that the notice of lien

had been filed within the twelve months as required by the statute, the corporation acquires subject to the lien; for being purchasers with notice, the statutory exception has no application.

4. Liens—Material Men—Notes—Waiver.

One furnishing material used in the construction of a building does not waive his right of lien by accepting a note for the amount due him therefor, when the note matured before the expiration of the statutory time wherein he is required to file notice of his lien, and he has perfected his right as the statutes require.

5. Liens—Material Men—Purchasers Without Notice—Burden of Proof—Trial—Instructions.

The one who claims he is a purchaser for value without notice of a claim for material furnished on a building, where the notice of lien was not filed within the six months, must bring himself within the proviso, and the burden of proof in this respect is upon him. In this case it is held that the charge as to the burden of proof was immaterial, as there was no real controversy that the purchaser was one without notice.

APPEAL by defendant from *Lyon, J.*, at August Term, 1913, (315) of HOKE.

This is an action to enforce a material lien against real property.

During the spring and summer of 1911, W. N. Campbell bought of the plaintiff material with which to build his house at Rockfish, N. C. The last item of material, as indicated in the notice of lien, was furnished 13 July, 1911. The defendant Campbell gave plaintiff his promissory note for ninety days, which was not paid, and then a renewal note for the same amount for another ninety days, which was not paid, and which was due about the first day of March, 1912.

The notice of lien was duly filed on 13 March, 1912, more than six and less than twelve months after the last of the material was furnished, and after the registration of the deed from W. N. Campbell to the Rockfish Trading Company.

The defendants filed answers denying any liability, and the defendant Rockfish Trading Company further pleaded that it was a purchaser of said property for value and without notice of the alleged claim of plaintiff, and that more than six months had elapsed since plaintiff furnished said material and its notice of lien.

At the trial, A. A. Williford, president of plaintiff corporation, testified that the last of the material was furnished 10 July, 1912, and 19 July thereafter he took defendant's note for said amount (316) and discounted it at the Bank of Raeford. When this note matured it was renewed for another ninety days and again discounted. He further testified that, probably about the first of January, he told J. W.

McLaughlin, an officer of the Rockfish Trading Company, that Campbell had not paid them for the material used for building his house at Rockfish.

J. W. McLaughlin testified in behalf of the Trading Company that it bought the house in which Campbell lived and paid value, and probably more, for it, and that some considerable time before the purchase Williford had said something about plaintiff's claim against Campbell, and that there was no encumbrance on the record against the property.

The deed from Campbell to the Rockfish Trading Company, reciting a consideration of $2,000, was introduced.

There was no dispute as to the amount due the plaintiff.

The jury returned the following verdict:

"1. Is the defendant W. N. Campbell indebted to plaintiff on account for material furnished? If so, in what amount? Answer: Yes; $290, with interest.

"2. Did defendant Rockfish Trading Company purchase the land for value and without notice of lien for material furnished by plaintiff? Answer: No."

There was a motion for judgment of nonsuit by the Trading Company, which was overruled, and it excepted.

His Honor charged the jury that the burden of proof was on the defendant Trading Company on the second issue, and it excepted.

Judgment on the verdict for the plaintiff, and the Trading Company excepted and appealed.

Thomas & Whitley for plaintiff.

J. W. Currie and J. G. McCormack for defendant.

ALLEN, J., after stating the case: The motion to nonsuit rests on two grounds:

1. That it is admitted that the defendant is a purchaser for value, and there is no evidence that it had notice of the lien.

(317) 2. That the acceptance of a note for the amount due for material, and its renewal, is a waiver of the right to a lien.

The correct settlement of these questions requires a consideration of section 2028 of the Revisal, which, as amended by chapter 32, Public Laws 1909, reads as follows: "Notice of lien shall be filed, as hereinbefore provided, at any time within twelve months after the completion of the labor, or the final furnishing the materials, or the gathering of the crops: *Provided,* that as to the rights of a purchaser for value and without notice, the notice of lien must be filed within six months."

The statute evidently means that if the material man wishes to protect himself against a purchaser for value without notice, he must file

his notice of lien within six months, and that as against purchasers for value with notice, he may do so within twelve months.

It also marks the distinction between "notice to the purchaser" and "notice of lien," using the language, "as to the rights of a purchaser for value without notice, the notice of lien must be filed within six months."

"The Legislature is presumed to know the existing law and to legislate with reference to it" (*S. v. R. R.,* 145 N. C., 542), and we must, therefore, assume that at the time of the enactment of the statute it had in mind the particularity required in filing notice of lien, as illustrated in several cases in our reports (*Wray v. Harris,* 77 N. C., 77; *Cook v. Cobb,* 101 N. C., 68; *Jefferson v. Bryant,* 161 N. C., 405), and the principle well established as to purchasers, that "where one has notice of an opposing claim, he is put 'upon inquiry' and is presumed to have notice of every fact which a proper inquiry would have enabled him to find out." *Blackwood v. Jones,* 57 N. C., 57; *Ijames v. Gaither,* 93 N. C., 362; *Whitted v. Fuquay,* 127 N. C., 72.

If this is a correct position, and the term used, "purchaser for value without notice," is construed in accordance with its accepted meaning, there is not only evidence of notice to the defendant, but it is substantially beyond dispute, as one of the officers of the plaintiff testified that he told an officer of the defendant that Campbell had not paid the plaintiff for the material used in building his house at Rockfish, (318) and the officer of the defendant admitted that before the purchase the officer of the plaintiff said something to him about Campbell owing the Raeford Lumber Company for material used in the house.

The second reason assigned by the defendant in support of his motion for judgment of nonsuit—that the acceptance of a note, and its extension, for the amount due for materials, constitute a waiver of the right to a lien—might avail the defendant if it did not appear that the note became due and was unpaid by Campbell before the time for filing the lien expired.

In 27 Cyc., 265, in the article on machanics' liens, the author says: "An extension of the time of payment is not a waiver of the lien, although the lien is lost if the time for payment is extended by agreement beyond the time allowed for enforcing the lien," and the text is sustained by the decided cases. *Montandon v. Deas,* 14 Ala., 33; *Chisholm v. Williams,* 128 Ill., 115; *Woolf v. Shaefer,* 103 N. Y., App. Div., 567; *Hoagland v. Lusk,* 35 Neb., 376; *Cushwa v. Improvement Co.,* 45 W. Va., 490; *Wisconsin Trust Co. v. Robinson,* 68 Fed., 778; *Goble v. Gale,* 41 Am. Dec., 219.

There is a very full note to the last case, in which many authorities are collected to sustain the position that "the acceptance of the debtor's

promissory note is not alone sufficient to effect a waiver of the lien, in the absence of any express agreement that it shall so operate."

We are, therefore, of opinion that there is no error in denying the motion to nonsuit.

The exception to the charge on the burden of proof on the second issue is immaterial, as there is no real controversy as to notice; but if there had been a conflict in the evidence, the burden of the issue is on the defendant.

The defendant does not rely for its protection upon an exception in the enacting clause of the statute, but upon the proviso, which withdraws from its operation, after six months, purchasers for value without notice, and it devolves upon the defendant to bring itself within the proviso.

In Black on Interpretation of Statutes, p. 275, the author (319) says: "Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof."

The question is fully discussed and the authorities collected in *S. v. Goulden,* 134 N. C., 746.

We are therefore, of opinion that there is

No error.

W. H. BREWER v. J. S. WYNNE AND J. P. STELL.

(Filed 15 October, 1913.)

1. Municipal Corporations—Immoral Shows—Police Powers—Arrest.

Under the provisions of Revisal, 3731, and Private Laws 1907, ch. 1, applicable to the city of Raleigh, the chief of police of that city and his lawful officers or subordinates have the right to prevent or suppress an indecent or immoral show, given in any public place or in any place to which the public are invited, and in the proper discharge of these duties they may act immediately whenever such exhibitions are taking place in their presence or are imminent and their interference is required to prevent them; and in such case they may arrest, without warrant, any and all persons who aid or assist in such plays when, under all the facts and circumstances as they reasonably appear to them, such course is necessary for the proper and effective performance of their official duty.

2. Same—Trials—Evidence—Nonsuit.

Upon a nonsuit in an action to recover damages for alleged false arrest and imprisonment, where the defense is interposed that the arrest was made to prevent the production of an immoral show in a place where the public was invited, by the defendants as lawfully authorized officers of a city to do so, and the evidence is conflicting as to whether the show was of the character which was prohibited, the question should be submitted to the jury, under the rule that in such instances the evidence which makes for plaintiff's right to recover must be taken as true and interpreted in the light most favorable to him.

3. Municipal Corporations—Immoral Shows—Police—Powers—Arrest—Reasonable Apprehension.

When it appears in an action for damages for false arrest and imprisonment, defended upon the ground that the arrest was made to prevent the exhibition of a prohibited immoral show, that the plaintiff was arrested and imprisoned by the chief of police, acting without a warrant, under the written instruction of the mayor, the act of imprisonment is one calling for explanation, and would constitute an actionable wrong unless it was sufficiently established that the show in question was indecent or immoral, and that the action of the officer was necessary to prevent or suppress the exhibition under all of the facts as they reasonably appeared to him.

4. Same—Trials—Evidence—Nonsuits.

The defendants in this action arrested and imprisoned the plaintiff, for which he brings his action for damages, and the defense is urged that they made the arrest in the discharge of their duties in preventing the exhibition of an immoral play, as they were authorized to do by the statute. While the evidence was conflicting, that of the plaintiff tended to show that he was under contract to heat the theater, and knew nothing of the character of the show, and was instructed by the manager of the theater to lock the doors and let no one enter, and turning to comply with this request he was arrested and incarcerated by the defendant chief of police, without offering resistance. There was further evidence that the show was not immoral, and that no exhibition thereof would be given without permission of the city authorities: *Held*, a motion to nonsuit was improvidently allowed.

5. Constitutional Law—Judicial Warrants—Municipal Corporations—Ministerial Acts—Orders for Arrest—Immoral Shows.

Judicial warrants, general in terms and unsupported by preliminary oath or sworn evidence and for conduct not committed in the immediate presence of the magistrate, are forbidden by the Federal Constitution, Amendment IV, and by the State Constitution, Art. I, sec. 15; and in this case it is *Held*, that the written order given by the mayor of Raleigh to the chief of police is ministerial in character, and must be so considered in determining whether the mayor authorized the act of arrest by the chief of police, and to what extent he may be held responsible for it.

APPEAL by plaintiff from *Carter, J.*, at April Term, 1913, of (321) WAKE.

Action to recover damages for alleged false arrest and imprisonment.

There was evidence to show that on the night of 16 February, about 7:30 P. M., plaintiff was arrested without warrant in the city of Raleigh by defendant J. P. Stell, chief of police, and confined in the city guardhouse. And it was insisted for plaintiff that the evidence tended to show that the said chief of police was acting at the time under direct instructions of his codefendant, J. S. Wynne, then mayor, and that there was no legal excuse or justification for such arrest, and the same amounted to an actionable wrong.

It was contended for defendants that on the facts in evidence it appeared that plaintiff at the time was engaged in an unlawful act, to wit, the effort to bring on an immoral and indecent show or play at the Academy of Music in the city of Raleigh, and that defendant Stell, being present for the purpose and in the proper performance of official duty, was endeavoring to prevent and suppress the unlawful exhibition, and the arrest of defendant was justifiable and necessary to effect this purpose, and, further, that plaintiff was at the time engaged in resisting efforts of defendant to perform his duty, contrary to the statute.

At the close of plaintiff's testimony and again at the close of the entire evidence, there was motion to nonsuit. The latter motion allowed, and plaintiff excepted and appealed.

Armistead Jones & Son, W. B. Snow, W. H. Lyon, Jr., J. W Bunn, and Douglass & Douglass for plaintiff.

Jones & Bailey and B. M. Gatling for defendant Wynne; Walter L. Watson for defendant Stell.

HOKE, J., after stating the case: Under the general law and the statutes more directly applicable to the city of Raleigh, the chief of police and his officers have the right to prevent or suppress an indecent or immoral show, given in a public place or in any place to which the public are invited. Revisal, sec. 3731; Private Laws 1907, ch. 1. In section 3731 it is made a misdemeanor for "any person . . .
(322) to give or take part in any immoral show, exhibition, or performance where indecent, immoral, or lewd dances or plays are conducted in any booth, tent, room, or other place to which the public is invited, or if any one permit such exhibitions or immoral performances to be conducted in any tent, booth, or other place owned or controlled by him."

By section 28, Private Laws 1907, ch. 1, being the revised charter of the city of Raleigh, the chief of police is given general supervision over "nuisances and the abatement of same," etc. In section 32 he is charged with the duty of preserving the peace and good order of the city, of suppressing disturbances, etc. Section 34 makes provision in

part as follows: "It is hereby made the duty of the police department and officers, at all times of the day or night, and the members of such force are hereby thereunto empowered, to especially preserve the public peace, prevent crime, detect and arrest offenders, suppress riots and unlawful gatherings which obstruct free passage of public streets, sidewalks, parks, and places . . . carefully observe and inspect all places of public amusements, all places of business having a license to carry on any business, and to repress and restrain any unlawful, disorderly conduct, or practice therein."

In the proper discharge of these important duties, the chief of police or his lawful officers and subordinates may act immediately whenever one of these unlawful exhibitions is taking place in their presence or where its performance is imminent and their present interference is required to accomplish the purpose; and in such case they may arrest without warrant any and all persons who aid and assist in such plays and shows whenever, under all facts as they reasonably appear to them, such course is necessary for the proper and effective performance of their official duty. This, we think, presents the correct interpretation of the statutory provisions controlling the matter, and the position is in accord with our cases dealing generally with this subject, as in *Martin v. Houck,* 141 N. C., 317; *Sossaman v. Cruse,* 133 N. C., 470; *S. v. Campbell,* 107 N. C., 948-953; *S. v. Sigman,* 106 N. C., 728; *S. v. McNinch,* 90 N. C., 695; *Neal v. Joyner,* 89 N. C., 287.

While we uphold the right of the police officials to arrest (323) without warrant in proper instances, and do what is reasonably required to prevent or suppress an illegal exhibition, we do not take the view of this case, as it now appears, which seems to have impressed the court below. It is fully understood that when a nonsuit is ordered, the evidence which makes for plaintiff's right to recover must be taken as true and interpreted in the light most favorable to him, and considering the case under that well established rule, we are of opinion that the cause should have been submitted to the jury.

From the facts in evidence it appears that on the night in question the plaintiff was arrested without a warrant and imprisoned for a time in the city guard-house. That this was done by defendant Stell, the chief of police, acting under written instructions from his codefendant, J. S. Wynne, then mayor, to prevent or suppress the exhibition of the play called "The Girl from Rector's." This of itself is an act which calls for explanation, and would constitute an actionable wrong, unless, as heretofore stated, it is sufficiently established that the play in question was indecent or immoral and that the action of the officer was necessary to prevent or suppress the exhibition under all of the facts as they reasonably appeared to him. Speaking more directly to this question,

the plaintiff, a witness in his own behalf, testified: "That he had recovered recently from a long typhoid spell, and not very strong; that he was at the theater on the night in question, being under a contract to supply heat for the building, and while standing near the door he was requested by J. S. Upchurch, the local manager of the theater, to lock the doors and not to let any one in until he said so. That the witness turned to comply with the request. The defendant Stell coming up at the time, seized the witness's hands, took the keys away from him, and said to Mr. Denning, a policeman. 'Arrest this man and lock him up.' That this was done, and the plaintiff, the officer holding him, was taken down the stairway and through a crowd of a thousand people and confined in the city guard-house at or near the market." That witness had not locked the door, but same was still swinging when de-
(324) fendant came up, and that witness didn't strike Mr. Stell or in any way try to resist the arrest; that witness had no personal knowledge of the character of the play, and was there only to heat the building in compliance with his contract to do so whenever a play was put on. That next morning he was taken before the police justice, and they said they had no charge against him, etc.

J. S. Upchurch, a witness for plaintiff, among other things, testified that: "Plaintiff was there under his contract to heat the house; that witness had gone to the mayor that day or the day before and offered to put up bond as to the character of the show, and was told by the mayor that he had made up his mind to stop it, and witness replied 'All right'; and further, on the night in question, it was not the purpose to put on the show that night unless there was an order permitting it from the Superior Court judge, before whom proceedings were pending to test the question. That the doors had not been opened that night and no audience had been admitted, and the witness had directed the doors to be locked with the purpose of keeping every one out until the action of the judge could be ascertained. That plaintiff was just out of bed and very weak that night," etc.

There is much evidence in the record to the effect that "The Girl from Rector's" was an immoral and indecent play; that plaintiff was there to assist in having the same performed, and was engaged at the time in active resistance to the officer, and tending to show, further, that it was necessary to presently arrest the plaintiff in order to prevent the exhibition; but this comes from the testimony of defendants or from the cross-examinations of plaintiff's witnesses, and may not be considered in the case as now presented. Under the principle as heretofore stated, we are allowed to consider only the facts making for plaintiff's right and it does not follow as a legal conclusion from his version of the occurrence that his arrest without warrant was justifiable.

It is urged for defendant that the act complained of was done under written orders of the mayor, and being a judicial act, no responsibility should attach unless he was shown to have acted corruptly or without power in the premises. It may be that under the (325) statutes applicable to the city of Raleigh, some portion of the judicial functions of a justice of the peace are still left with the mayor, but if this be conceded, we do not think the principle relied upon can avail in the present instance. These judicial warrants, general in terms and unsupported by preliminary oath or sworn evidence and for conduct not committed in the immediate presence of the magistrate, are not recognized in the laws of this country. They are forbidden by the constitutions of both State and Nation. North Carolina Constitution, Art. I, sec. 15; Constitution of the United States, Amendment IV. The order in question here, however, is not and does not purport to be a judicial warrant. It is clearly ministerial in character, and must be so considered and dealt with in determining whether the defendant J. S. Wynne authorized the act of the codefendant Stell, and how and to what extent he may be responsible for it.

There is error in the order of nonsuit, and the same must be Reversed.

Cited: Smith v. Agricultural Society, post, 350.

F. P. OUTLAW v. M. E. GRAY.

(Filed 22 October, 1913.)

1. Deeds and Conveyances—Mineral Deposits—Fee Simple.

A conveyance under seal in consideration of a specified sum of money, made to the grantee, "his heirs, executors, administrators, and assigns," of the right of entering in and upon particularly described lands of the grantor, "for the purpose of searching for mineral deposits and fossil substance," and for taking and removing the mineral deposits and fossil substance therefrom, which the grantee "may find imbedded in the earth of the said lands, and for mining and quarrying operations—to any extent he may deem advisable," etc.; and also containing covenants that no other consideration by way of rent is to be paid, and against damage to the lands unnecessary in conducting the operations for mineral, etc.: *Held*, the "mineral deposits and fossil substance" beneath the earth's surface may be conveyed separately from the land, and the deed, in substance and form, being sufficient to convey the fee in land, is also sufficient to convey the mineral and fossil substance therein.

2. Deeds and Conveyances—Incorporeal Hereditaments—Mineral Deposits.

Mineral substances beneath the surface of the earth are regarded as incorporeal hereditaments, and pass by apt words in a deed delivered and registered.

3. Same—Terminable at Will.

Under a conveyance in fee of all the mineral deposits imbedded in lands described, the interest conveyed terminates only when these deposits are removed by the grantee in accordance with the provisions of his deed.

4. Deeds and Conveyances—Mineral Deposits—Construction of Deed.

Where the meaning of a conveyance of mineral deposits on lands is doubtful as to whether it is a license, terminable at the death of the grantor, or in fee, the construction more favorable to the grantee will prevail.

CLARK, C. J., and HOKE, J., dissenting.

(326) APPEAL from *O. H. Allen, J.*, at September Term, 1913, of LENOIR.

Appeal from the clerk, heard by *Allen, J.*, in Lenoir Superior Court, 13 September, 1913. The defendant appealed from the judgment rendered.

Rouse & Land for plaintiff.
Loftin & Dawson, G. V. Cowper for defendant.

BROWN, J. The case turns upon the construction of an indenture from Julia E. Gray to M. E. Gray, the material part of which is as follows:

"That said party of the first part, for and in consideration of the sum of $10 to her in hand paid by the said party of the second part, receipt of which is hereby fully acknowledged, the said party of the first part hath given, granted, bargained, and sold, and by these presents do give, grant, bargain, sell, and convey unto the party of the second part, his heirs, executors, administrators, and assigns, the right of entering in and upon the lands hereinafter described, for the
(327) purpose of searching for all marl deposits and fossil substance, and for taking and removing therefrom said marl and fossil substance which he may find imbedded in the earth of the said lands, and for mining and quarrying operations for that purpose to any extent he may deem advisable, but not to hold possession of any part of the said lands for any other purpose whatsoever."

Here follows a description of the lands and a covenant that no other consideration by way of rent is to be paid for the marl except that recited in the deed, and a clause wherein the grantee covenants that "no

damage shall be done to said lands other than shall be necessary in conducting the operations specified." The instrument is under seal.

The plaintiffs contend that the written instrument is a mere license to quarry for marl and fossil substances in the earth, and that it expired with the death of the grantor. His Honor so held.

The defendant contends it is a deed in fee, and that it conveys in fee simple all "marl deposits and fossil substances" under the surface of the land described in the instrument, under a covenant upon the part of the grantee that no damage shall be done the land other than shall be necessary to remove such deposits.

The character of the instrument and the language employed are both appropriate to the conveyance of a fee-simple estate in "all the marl deposits and fossil substances" imbedded in the earth of the lands described therein, and such is the legal construction we put upon it.

It must be admitted that the deed is sufficient in form to convey a fee in the land itself, had that been the subject of conveyance. That being so, it is sufficient to convey a fee in the mineral deposits described in it.

The grant is made upon a present and stated consideration, and not upon a rent charge or other consideration payable in the future. It is made of "all the marl deposits and fossil substances" imbedded in the land, and not only of such as the grantee may from time to time remove within a given time.

As the grantee is given the right to remove "all the marl de- (328) posits," his interest cannot be terminated until they are removed. Under a revocable license, they could be terminated at any time.

It is made to the grantee and "his heirs, executors, administrators, and assigns," and not to the grantee for years or life. Every clause and recital in the instrument appears to be inconsistent with the idea of a temporary license revocable at the will of the grantor; and is wholly consistent with an intention to convey a fee.

If the meaning is doubtful, we should construe it a fee, that being more favorable to the grantee. Devlin on Deeds, ch. 25.

That mineral substances beneath the surface of the earth may be conveyed by deed distinct from the right to the surface itself is now well settled. The common-law courts of England regarded such rights as incorporeal hereditaments, a right issuing out of a thing corporate, because there could be no livery of seizin.

In this country, where livery of seizin is not essential in the transmission of the title, such rights are regarded as corporeal hereditaments, and pass by apt words in a deed, though not susceptible of livery of seizin, delivery or registration of the deed taking its place. *Hartwell v. Camman,* 64 Am. Dec., 449 (Pa.). The conveyance of such rights in fee is common in Pennsylvania and other mining States.

In that State there are numerous decisions to the effect that a conveyance of the right to take the coal under the grantor's tract of land is a conveyance of the *entire ownership* of the coal in place beneath the land.

Caldwell v. Fulton, 72 Am. Dec., 761, and notes. This case is almost on all-fours with the case at bar.

The words employed in this deed are very comprehensive, and express absolute ownership and complete enjoyment of the interest conveyed.

They are inconsistent with the idea of a temporary and transient use.

Reversed.

CLARK, C. J., and HOKE, J., dissent.

Cited: *Hoilman v. Johnson,* 164 N. C., 269.

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(329)

EUGENE S. KNIGHT v. GERTRUDE S. FOSTER.

(Filed 22 October, 1913.)

1. Landlord and Tenant—Municipal Corporations—Cities and Towns—Sidewalks—Swinging Gates—Negligence of Landlord.

While ordinarily the tenant and not the landlord is liable to third persons for injuries caused to them by the failure to keep the premises in repair, the liability may be extended to the owner, as in this case, for an injury caused to the plaintiff as he was passing, on a dark night, by a gate of the leased premises, which being in disrepair, swung out upon the sidewalk of a public city street, and there imbedded in the ground; this condition having existed at the time the premises were leased, and for months and years, and the owner knew of it and had promised to rectify it, at the solicitation of the tenant.

2. Landlord and Tenant—Municipal Corporations—Ordinances—Streets and Sidewalks — Swinging Gates—Negligence of Owner — Interpretation of Statutes.

A city ordinance making it unlawful for any person to have on his premises a gate that swings out upon a sidewalk of its public streets is valid, and its violation is made a misdemeanor (Revisal, 3702); and, when continuously violated, it may become a nuisance; and the landlord may become liable to third persons injured by reason of his failing to comply with the ordinance, for whether the property is leased before the passage of the ordinance or afterwards, it is his duty, as owner, to comply with its requirements.

WALKER, J., concurs; BROWN, J., concurs in the concurring opinion.

KNIGHT *v.* FOSTER.

APPEAL by plaintiff from *Justice, J.*, at April Term, 1913, of NEW HANOVER.

Ricaud & Jones for plaintiff.
Kellum & Loughlin and John D. Bellamy & Son for defendant.

CLARK, C. J. This is an action for damages sustained by coming in contact with a gate opening upon the sidewalk in front of certain premises in Wilmington owned by the defendant, which gate the plaintiff alleges had been left open and so long neglected, without any fastenings, that it had become permanently fixed in the sand on the sidewalk and settled at the angle at which it stood 29 August, 1911, when the plaintiff, rightfully using said sidewalk, in which the gate had be- (330) come imbedded, and in ignorance of the danger, ran into said gate on a dark and rainy night, there being no light on the street, and sustained the injuries complained of. The defendant demurred to the evidence upon the ground that the tenant and not the owner was liable if any liability existed, and moved for nonsuit. This motion was allowed.

There was evidence that the tenant was a monthly tenant, had rented the premises for seven years, and had repeatedly complained to the owner's agent of the impaired condition of the premises, but that the repairs promised him had not been made.

1 Jaggard Torts, 223, thus sums up the law: "Normally, the occupant and not the owner or landlord is liable to third persons for injuries caused by the failure to keep the premises in repair. The liability may, however, be extended to the landlord or owner—

"(*a*) When he contracts to repair.

"(*b*) Where he knowingly demises the premises in a ruinous condition or in a state of nuisance.

"(*c*) Where he authorizes a wrong."

To same effect, 5 Dillon Mun. Corp. (5 Ed.), 3028 *et seq.* There was evidence from the tenant that the owner in this case contracted to do the repairing, and had promised time and again to repair the gate. There was evidence also that the owner knew of the ruinous condition of the premises, and that the gate had been in this condition for four or five months and one of the witnesses testified that it had been in that condition for three years. We have found no case in which the landlord has been held not liable to a third person for an injury resulting from a street obstruction or a defect known to the landlord to exist at the time of the renting and permitted by him to continue.

It was in evidence that the ordinance of the city, section 40, adopted in 1902, and which is still in force, provides: "It shall be unlawful for any person to have on their premises a gate so constructed as to swing out on the sidewalk of any street or alley of the city of Wilmington,

when open." This gate swung outward, and was in that condition
(331) when the premises were first rented to the present occupant, seven years ago, which was at a date subsequent to the adoption of the ordinance. The liability for any injury resulting therefrom is necessarily upon the owner, under the second subhead above quoted from Jaggard. Even if the ordinance had been passed subsequent to making this lease, this was a change, and not a repair, and hence the duty of making it devolved upon the owner, and not upon the tenant. In 1 Taylor Landlord and Tenant, sec. 175, it is said: "Where injuries result to a third person from the faulty or defective construction of the premises, or from their ruinous condition at the time of the demise, or because they then contain a nuisance, even if this only becomes active by the tenant's ordinary use of the premises, the landlord is still liable, notwithstanding the lease," citing authorities.

Besides, speaking only for myself, in the county of New Hanover the "no-fence" law has been in force for thirteen years, and in the city of Wilmington cattle and stock have been forbidden to run at large for a longer period than that. The retention of a fence and gate was therefore entirely unnecessary as a matter of law, whirh is further demonstrated as a matter of fact also, because this gate had been permanently left open for months and years. If, notwithstanding, the owner wished to keep up an unnecessary fence and gate, the liability for any injury resulting from its negligent condition is upon him, and not upon the tenant, who had no authority to remove them. He says he could have removed the fence and gate, but the owner's agent kept promising to fix them. There is evidence that in that quarter these now useless gates are in ruinous condition, sagging and hanging over the sidewalk. If this action shall call attention to this state of things and secure their removal it may prevent similar injuries and prove a public benefit.

Biggs v. Ferrell, 34 N. C., 1, relied on by defendant, merely holds that the owner of a ferry is not liable for damages caused by the mismanagement of the lessee in operation of the ferry, and is obviously not in point. While the authorities are not entirely in accord, the consensus seems to be that where an obstruction or defect in the abutting
(332) property is created and continued by the tenant, without the knowledge or sanction of the landlord during the term of tenancy, then the liability rests with the tenant; but where dilapidated premises are leased in a ruinous condition, known to the landlord, and such condition causes the use of public highways and thoroughfares in populous cities to become unsafe and insecure, and the landlord knows of the conditions and suffers them to continue, both the landlord and tenant are tort feasors, and may be sued jointly or severally. *Ahern v. Steele,* 115 N. Y., 202, is an instructive case in which the authorities as

to the liability of landlord and tenant to third parties are collected and differentiated. It is there held, citing Wood's Landlord and Tenant, 230, "If a nuisance existed upon the premises at the time of the demise, the landlord as well as the tenant is liable for the damages resulting therefrom." The ordinance prohibiting gates from swinging outward was held reasonable and within the domain of municipal regulations. *Rosedale v. Hanner,* 157 Ind., 390. Under Revisal, 3702, the violation of a city ordinance is a misdemeanor. A continued violation of a valid ordinance is a nuisance.

We need not consider the exceptions to evidence, because they may not arise upon another trial. The judgment of nonsuit is

Reversed.

WALKER, J., concurring: I concur in all that is decided by the opinion of the Court. I do not assent to the proposition that the "no-fence law" has any application to the case. It was intended to fence in cattle, it is true, and not to fence them out, but it still leaves it optional with the owner of land whether he will fence his premises for their protection or other purposes than barring out straying cattle, and does not increase his responsibility for doing so. There are other roving animals than cattle, and he has the right to keep them out and to erect fences for privacy, or for ornamentation, as much so as he may plant trees for that purpose or erect structures for his comfort and convenience.

BROWN, J., concurs in this opinion.

Cited: Rucker v. Willey, 174 N. C., 44.

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(333)

ELGIN CITY BANKING COMPANY v. R. A. MCEACHERN ET AL.

(Filed 22 October, 1913.)

1. Bills and Notes—Indorsement of Payee—Equitable Title—Original Defenses.

Where a note is payable to order and not to bearer, the indorsement of the payee is necessary to transfer the legal title; and where this is not done, a subsequent holder is not one in due course, though the instrument may have been indorsed to him for value by an intermediate holder; and as he is the equitable owner, the instrument is subject to the defenses existing between the original parties.

2. Same—Evidence of Indorsement—Burden of Proof.

Where one claims to be the holder in due course by indorsement of a negotiable note made payable to the order of the payee, and the payee's indorsement is denied, in his action to recover on the note the burden

of proof is on him to prove the indorsement; and where the name of the payee appears thereon as an indorser, and the only evidence of its indorsement by the payee is a promise by him that he would do so, the question of his indorsement is one for the determination of the jury under instructions from the court that the plaintiff must satisfy them thereof by the greater weight of the evidence.

3. Bills and Notes—Indorsement of Payee—Subsequent Indorsee—Equitable Title—Original Defenses.

Where a note payable to order is acquired by the holder from one to whom the note has been delivered, for a valuable consideration by the payee, but without the latter's indorsement, the present holder cannot have acquired a better legal title than his indorsee; and as such indorsee was the owner of the equitable title only, the instrument is still subject to the defenses existing between the original parties.

4. Bills and Notes—Fraud—Equitable Title—Good Faith.

Where fraud in the execution of a negotiable instrument payable to order has been established, the question of good faith in acquiring the instrument does not arise in a suit thereon brought by the owner of the equitable title, who has acquired the instrument without the indorsement of the payee.

APPEAL by plaintiff from *Ferguson, J.*, at April Term, 1913, of ROBESON.

This is an action upon a note executed by the defendant, and payable to the order of Albert O. Tracy, for the purchase price of a horse.

(334) The plaintiff alleged that the note was transferred for value and before it was due, by indorsement to Coleman & Son, and by Coleman & Son to the plaintiff.

The defendant denied the indorsement by Tracy, and alleged that the note was procured by false and fraudulent representations.

Defendants further alleged that the note was not to become effective until and unless it was signed by fourteen solvent persons, the plan of sale being that fourteen men would take shares of $200 each, making up the total purchase price of $2,800, and it was only signed by eleven men, some of whom were not solvent.

The evidence as to the indorsement of the note was as follows:

Charles R. Coleman testified: "I reside at Wayne, Illinois, and am engaged in importing and breeding percheron horses, and farming. I am associated with my sons in business under the firm name of Charles R. Coleman & Sons. On 13 February, 1910, I purchased from Alvin O. Tracy the note of Robert A. McEachern *et al.* (The note was exhibited to him and is the same note sued on in this case.) I accepted this note, the face value thereof with accrued interest thereon, in payment for an imported stallion. Mr. Tracy gave me the bank letter from the Bank of Red Springs at the same time that I bought the note. The

purchase price of the horse I sold Tracy was something like $1,000. I inquired about the note from Tracy, and he satisfied me that the makers were solvent and responsible. I made no inquiry as to what the note was given for. He recommended it so highly that he said he had just as soon put his name across the back of the note. He said he would put his name on the back of the note."

The jury returned the following verdict:

"1. Did the plaintiff become the holder of the note sued on before overdue and without notice that it had previously been dishonored, and did it take it in good faith and for value, without notice of any infirmity or defect in the same? Answer: No.

"2. Is the plaintiff the equitable owner of the note sued on? Answer: Yes.

"3. Did the defendants sign the note sued on with the agree- (335) ment made at the time that the note should be surrendered in the event Tracy or his agent, James, failed to procure the signature of fourteen solvent or responsible parties to said note? Answer: Yes.

"4. Was the execution of the note sued on procured by false and fraudulent representations, as alleged in the answer? Answer: Yes."

The plaintiff requested the following special instructions to be given to the jury by his Honor:

"1. If the jury shall find from the evidence that the note in question was, on 13 February, 1910, sold and delivered, for value, by Alvin O. Tracy to Charles R. Coleman & Sons, and on 10 May, 1910, the same was indorsed, sold, and delivered by said Coleman & Sons to the Elgin City Banking Company, for value, the said plaintiff is presumed to be the holder of said note in due course." His Honor refused to give this instruction, and the plaintiff excepted.

"2. If the jury shall find from the evidence that the Elgin City Banking Company had no knowledge of any fraud or defect in the execution of said note, at the time of the purchase of same from said Coleman & Sons, and that said note was indorsed by said Coleman & Sons and delivered, for value, before maturity, to plaintiff, the said Elgin City Banking Company will be presumed to be the holder of said note in due course." His Honor refused to give this instruction. Plaintiff excepted.

His Honor charged on the first issue: "In order for the plaintiff to be the holder of the note in due course, it is necessary for the plaintiff to show to you from the evidence, and by its greater weight, that it is a purchaser of the note for a valuable consideration, and before it is due; and in order to constitute the plaintiff a holder in due course, it is necessary that it should be indorsed by the payee on the note, and when the indorsement is denied, it devolves upon the plaintiff to prove the indorsement, by the greater weight of the evidence. So that, one of the first

questions for you to inquire into is whether or not the note was indorsed by Tracy to Coleman. The evidence touching the indorsement, (336) and the only testimony in regard to that, is contained in the deposition of Coleman, and it is contained in that portion of the deposition in which the question is asked, 'Was there any contract between you and A. O. Tracy or between the firm of C. R. Coleman & Son and A. O. Tracy, at or prior to the indorsement of this note, that the note should be returned if it is not good, and he recommended it so highly that he had said he had just as soon put his name across the back?' There was nothing said about the indorsement on the note, he said he would put his name on the back of the note; that is all the evidence touching the question of indorsement. It is contended on the part of the defendants that it was only a promise to put it on the back of the note, and there is no evidence that he actually did write his name on the back of the note, but he only agreed to do it, without any proof that he did so. If, upon the evidence, you shall be satisfied by its greater weight that he indorsed the note, then it would be your duty to find that as a fact in consideration of the first issue; but if the proof does not satisfy you by its greater weight, when you come to examine that part of the testimony, and you fail to find that it was indorsed by A. O. Tracy—not that his name was on it, but if he put his name on it himself—then it will become your duty to answer the first issue 'No,' because unless it was indorsed by the payee, A. O. Tracy, the legal title would not pass to Coleman, and could not by Coleman's indorsement pass to the plaintiff. If you should find that the note was indorsed, then it was purchased for a valuable consideration, without notice of its infirmity."

Judgment was entered upon the verdict in favor of the defendants, and the plaintiffs excepted and appealed.

A. P. Spell and R. E. Lee for plaintiff.

McIntyre, Lawrence & Proctor and McLean, Varser & McLean for defendants.

ALLEN, J. As the note sued on is payable to order and not to bearer, the indorsement by Tracy was necessary to pass the title to Coleman & Son, freed of the equities and defenses of the makers against the payee, and without such indorsement the holders of the note were only (337) the equitable owners, and subject to these defenses (Revisal, sec. 2178; *Tyson v. Joyner,* 139 N. C., 72), and the jury, under proper instructions, has found in answer to the first and second issues that the indorsement was not made. Coleman & Son then became the equitable owners of the note under the findings of the jury, subject to the legal

defenses of the defendants against Tracy, and as they could not sell more than they owned, the plaintiff took the note by purchase from Coleman & Son with the same infirmity attached.

It follows, therefore, that the prayers for instruction requested by the plaintiff were properly refused, as they were predicated upon the idea that the plaintiff was a holder in due course and was the owner of the legal and equitable title.

In this view of the case, it is not necessary to consider the first four exceptions to evidence, as they all bear on the question of good faith on the part of the plaintiff, and its notice of fraud, which was immaterial if the plaintiff was only the equitable owner.

It also appears that his Honor charged the jury that the plaintiff had no actual notice of any fraud.

The letter offered in evidence was properly excluded, as the declaration of a stranger and hearsay, but if admitted, it could have had no bearing on the case except to show good faith on the part of Coleman & Son in the purchase of the note, and good faith could have added nothing to their title if there was no indorsement.

There are many other exceptions in the record, most of them being directed to the evidence to prove false and fraudulent representations.

We have examined all of them, and find nothing that will justify a reversal of the judgment.

The evidence of fraud is stronger than in many of the actions on so-called "horse notes" that have been before us.

No error.

(338)

KATIE ANN LOCKLEAR, ADMINISTRATRIX OF JOHN LOCKLEAR,
v. S. A. PAUL ET ALS.

(Filed 22 October, 1913.)

1. Trespass—Title—Adverse Possession—Color—General Reputation—Hearsay Evidence.

The rule that, under certain conditions, parol evidence of general reputation is admissible on the question of boundary, or as to identification of a tract of land or of giving it a general placing when it had been otherwise identified and sufficiently described, does not apply where, in an action of trespass, depending upon an issue as to title to the lands, a party relies on adverse possession under color of title, and seeks to show general reputation of ownership; for evidence of this character does not fall within the exception to the rule that hearsay evidence is inadmissible, and is further objectionable as an expression of an opinion by the witness upon the issue involved and as throwing into the jury box the weight of public opinion.

2. Trespass—Title—Deeds and Conveyances—Trespass by Grantee—Grantor's Liability.

One who attempts to convey standing timber on lands ascertained to belong to another, with the view and purpose of having same manufactured into lumber, in an action involving an issue as to title is responsible in damages, with his grantee, to the owner for damages done by the latter in trespassing upon the lands and cutting the timber under the rights purported to have been conveyed in the deed.

APPEAL by defendant from *Ferguson, J.*, at May Term, 1913, of ROBESON.

This action was to recover damages for the wrongful cutting of timber on the part of defendants and was made dependent, chiefly, on the issue as to title to the land where the cutting occurred.

The cause was before the Court at Spring Term, 1912, on appeal of plaintiffs from a judgment of nonsuit, and will be found reported in 159 N. C., 236. The judgment of nonsuit was reversed for reasons appearing in the opinion by *Associate Justice Walker,* and this opinion having been certified down, the case was tried on the issues of title, trespass on the part of defendants, statute of limitations, and damages.

(339) There was evidence on part of plaintiff tending to show title in John Locklear, plaintiff's intestate, by reason of adverse occupation and assertion of ownership and up to known and visible lines and boundaries covering *locus in quo.* Evidence *contra* on the part of defendants.

Verdict and judgment for plaintiff, and defendants excepted and appealed.

McNeill & McNeill and Britt & Britt for plaintiff.
McLean, Varser & McLean for defendant Paul.
McIntyre, Lawrence & Proctor for Planing Mill, defendant.

HOKE, J., after stating the case: On the trial of the issues the following evidence was admitted, over objection by defendants to both questions and answers, and exceptions duly noted:

"Yes, I know who was reputed to be the owner of the land between these lines I have described.

"Question: Whose was it?

"Answer: The country all around knowed who it was.

"Question: Whose land was it reputed to be?

"Answer: John Locklear's."

It has been held in numerous cases with us that, under certain circumstances, evidence of general reputation is admissible, on questions of private boundary. In one of the later decisions on the subject, *Bland*

v. Beasley, 140 N. C., 630, the Court said: "It is true that evidence of both hearsay and common reputation is received with us in cases of disputed private boundary, but this is an exception to the general rule which requires that the rights of litigants must be determined on sworn testimony. Such testimony, in England, is not admitted in questions of private right, and the principle was only adopted here from necessity, and where, from lapse of time or changing conditions, it has become 'difficult, if not impossible,' that better evidence should be had." And in the same opinion, quoting with approval from some of the former decisions, it was said further: "This reputation, whether by parol or otherwise, should have its origin at a time comparatively remote and always *ante litem motam.* Second, it should attach itself to some monument of boundary or natural object, or be fortified by evidence of occupation and acquiescence tending to give the land some (340) fixed and definite location."

Assuming that the other conditions for the reception of such evidence have been met, it would doubtless be a correct application of the principle, on the question of identifying a tract of land or of giving the same a general placing when it had been otherwise identified and sufficiently described, to hear evidence to the effect that a given tract of land was generally known or reputed to be "the old Locklear tract" or "old Paul homestead" or the like; but the testimony received in this instance was not of that character. There was no question here of identity of tracts or the correct general location of the *locus in quo.* On the evidence, the right of these parties was, in a large measure, made to depend on whether John Locklear had occupied the tract of land claimed by him adversely and under known and visible lines and boundaries for a sufficient length of time to mature his title, and, in our judgment, this evidence, in the form in which it was presented, was not relevant on the question of boundary, but was an opinion on the title, and had the effect of throwing into the jury box the force and effect of public opinion on that issue. Not coming, therefore, under this principle of evidence on boundary which is an exception to the more general rule, it was incompetent as hearsay testimony, and was further objectionable as being an opinion bearing directly on the merits of the controversy as embraced in the entire issue. *Deppe v. R. R.,* 154 N. C., 523; *Smith v. Smith,* 117 N. C., 326; Lawson on Expert Opinion Evidence, p. 557.

We were referred by counsel to *Toole v. Peterson,* 31 N. C., 180, as being an authority against this position, but we do not so understand the decision. In that case, being an action to recover certain lots in the city of Wilmington, a grant to John Watson or Whatson, bearing date in 1735, was located and shown to include the town of Newton, which was the former name of Wilmington. In the course of the trial, it became

desirable to show the identity of the two towns, with the view of proving title to the lots out of the State, and proof was offered and rejected that for sixty or seventy years there was a general reputation that (341) the city of Wilmington was situate within the bounds of the John Watson grant. On appeal, the evidence was held competent and a new trial was granted. Here was a case of disputed identity, and the evidence was clearly relevant on the question of location, and was not, as in our case, an opinion on the title.

The other and numerous questions presented on the appeal are not dealt with, as they are chiefly rulings of the court on questions of evidence, and may not arise on a further hearing of the case. It may be well, however, to refer to an exception that the defendant Sarah A. Paul is not responsible for the trespass complained of, inasmuch as she had made an outright conveyance of the timber to her codefendant, the planing mills, and this company alone had done the cutting. The deed conveyed the timber, with rights of way, etc., required to remove the same. It clearly contemplated and authorized the acts complained of, and, if trespass is established against the company, the grantor in the deed is also responsible. *Dreyer v. Ming,* 23 Mo., 434.

For the error indicated, there must be a

New trial.

Cited: Sullivan v. Blount, 165 N. C., 121; *Owens v. Mfg. Co.,* 168 N. C., 400.

W. A. WITHERS v. THE BOARD OF COMMISSIONERS OF COLUMBUS COUNTY.

(Filed 22 October, 1913.)

1. Municipal Corporations—Counties—Order of Court—Necessary Expenses—Mandamus.

Mandamus against the county commissioners to enforce the payment of a debt for a necessary expense incurred by the county is the proper and only remedy.

2. Municipal Corporations—Homicide—Trials—Necessary Expenses—Chemical Analysis—Costs—Court's Discretion—Counties—Parties—Constitutional Law.

Where a defendant is charged with homicide by means of poison, and the trial judge has ordered a post-mortem examination of the stomach to be made, which was accordingly done, and resulted in the discharge of the defendant, and the taxing of the cost of the analysis against the

county: *Held*, the cost of the analysis was a reasonable county expense, resting within the sound discretion of the court, and binding upon the commissioners.

APPEAL by defendants from *Ferguson, J.*, at the April Term, (342) 1913, of COLUMBUS.

This is a proceeding in mandamus, brought by the plaintiff to compel the defendant to obey an order made at November Term, 1911, of COLUMBUS, directing the payment of $200 to the plaintiff.

The cause was heard at April Term, 1913, of said Court, by *Ferguson, J.*, who adjudged "that the defendants be and are hereby required and commanded to issue warrants for the payment of the order made by his Honor, Frank Carter, in this cause on 2 December, 1912."

The defendant excepted and appealed.

Walter H. Powell for plaintiff.
David J. Lewis, Homer L. Lyon for defendants.

BROWN, J. This proceeding is brought to enforce obedience to an order of Carter, judge, made in a criminal proceeding pending before him. As the facts are fully stated in the order, we set it out in full:

STATE OF NORTH CAROLINA—COLUMBUS COUNTY.

STATE *v.* EDGAR THOMPSON.

This cause coming on for hearing at the November term of the Superior Court of Columbus County, before his Honor, Frank Carter, judge presiding, and it appearing to the court that a bench warrant was issued for the aforesaid Edgar Thompson upon the affidavit of one J. V. Fore, on the charge of murdering Mrs. Edgar Thompson, his wife, by means of poison, and it further appearing to the court that said warrant was duly served on.....day of November, 1911, and that after a hearing before his Honor, Judge Carter, holding the courts of the Seventh Judicial District, the said Edgar Thompson was placed in prison (343) to await the report of the chemist; and the stomach of Mrs. Edgar Thompson, deceased, wife of Edgar Thompson aforesaid, having been duly packed and sealed and forwarded to said chemist for a thorough analysis, the court deeming such analysis proper and necessary in said cause; it also appearing to the court that the sentiment of the good citizens of Columbus County demanded that public justice be quickly and speedily administered in this cause, and it further appearing to the court that after a full and complete analysis of said stomach by the chemist, Prof. W. A. Withers reported to the court that he found no traces of

poisonous substances therein; and it further appearing that these facts were made known to the solicitor, N. A. Sinclair, and that a *nol. pros.* was taken in the above case.

The examination of said stomach of Mrs. Edgar Thompson, deceased, having been ordered by his Honor, Frank Carter, acting upon the advice of the solicitor, N. A. Sinclair, and the above facts set forth: it is now ordered, adjudged, and decreed that the bill of $200 charges of the said Prof. W. A. Withers for making said analysis, together with all other necessary expenses in transporting to Raleigh said stomach and for procuring the evidence of the coroner's inquest and forwarding the same to said chemist, be paid by the county of Columbus, including bill of J. V. Fore, heretofore approved by the solicitor, N. A. Sinclair.

FRANK CARTER,
Judge Presiding.

This 2 December, 1912.

It is contended on behalf of the defendants the board of commissioners:

1. That the proceeding should be dismissed, as no such action can be maintained to enforce the order of Carter, judge.

2. That this not being a necessary expense, his Honor had no legal authority to make said order.

3. That they had no notice of said order, no day in court, and therefore said order was not a legal judgment against the county.

(344) The proceeding by mandamus in this case to compel obedience to the order of Carter, judge, is proper, and the only effective remedy the law gives in case of this character.

That mandamus is the proper remedy against a public officer who refuses to discharge a specific duty required of him by law, has been too often decided to be now open to doubt. *R. R. v. Jenkins,* 68 N. C., 602; *Russell v. Ayer,* 120 N. C., 186; *Bennett v. Commissioners,* 125 N. C., 468.

In their brief the learned counsel for the defendants say: "We take the position that the analysis of the stomach of a person who died under circumstances that might excite suspicion of foul play is not a necessary expense of the county, and the county would therefore be prohibited from contracting a debt for same under Article VII, section 7, of the Constitution of North Carolina.

"If this position is correct, it certainly follows that a Superior Court judge would have no right to make an arbitrary order requiring the county commissioners to do an unlawful or forbidden act, certainly when no notice was served on the commissioners, and they not made parties to the proceeding."

The section of the Constitution relied upon reads as follows:

"No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

In *Bear v. Commissioners,* 124 N. C., 204, construing this section, it is held that to obtain a mandamus to pay a judgment against the county by levying a special tax, the plaintiff must show affirmatively that the consideration for the judgment was for a necessary county expense, or had been sanctioned by a vote of the people.

The section of the Constitution indirectly, but explicitly, permits the exercise by municipal corporations of the power of making provision for necessary expenses free from the restraints in other cases.

What are such necessary expenses has been the subject of many (345) judicial decisions. Applying the principles laid down in all of them, we think his Honor, Judge Carter, had authority to make the order and that it is a necessary expense of the county of Columbus.

There is express legislative authority for the order. Section 3152 of Revisal reads as follows: "In all cases of homicide, any officer prosecuting for the State may, at any time, direct a post-mortem examination of the deceased to be made by one or more physicians to be summoned for the purpose; and the physicians shall be paid a reasonable compensation for such examination, the amount to be determined by the court and taxed in the costs, and if not collected out of the defendant, the same shall be paid by the county."

That the General Assembly, in the exercise of the police power of the State, is authorized to make such an enactment, cannot be doubted.

Counties are but State agencies, and subject to legislative authority, which can direct them to do as a duty all such matters as it can empower them to do.

Under our system of State government, the counties, cities and towns of the State are very important, and essential factors in the administration of the criminal law, and the burden and expense of administering such laws are largely borne by them. In such matters, they are necessarily under legislative control. *Tate v. Commissioners,* 122 N. C., 812; *White v. Commissioners,* 90 N. C., 437; *Jones v. Commissioners,* 137 N. C., 579.

It is further contended that the defendants were not parties to the action in which the order was made, had no day in court, and are consequently not bound by the order.

This position cannot be maintained. The order was made in the administration of the criminal law by the proper officer of the State, and in pursuance of the statute.

The board of commissioners are not parties to such a proceeding, and *ex necessitate rei* cannot be.

Nor are they entitled to any notice before such orders are made. In such cases the matter is left to the sound discretion of the trial judge, and unless such discretion is grossly abused, this Court will not interfere.

The county must rely for the protection of its treasury upon
(346) the sound discretion and sense of duty of the judge of the Superior Court. They should and doubtless do personally examine into such matters with care, and see to it that improper and extravagant allowances are not made.

The order in question was made by Judge Carter in a criminal proceeding and in full accordance with the statute, and must be obeyed.

The order of Ferguson, judge, granting a peremptory mandamus is Affirmed.

J. W. SMITH v. CUMBERLAND COUNTY AGRICULTURAL SOCIETY.

(Filed 22 October, 1913.)

1. Theaters and Shows—Fairs—Danger—Warnings.

It is the duty of the managers of a fair upon whose premises a free balloon ascension is given as an attraction, to see that the premises are reasonably safe for the purpose, and they must use care and diligence to prevent injury, and by policemen or other guards warn the public against dangers that can reasonably be foreseen.

2. Same—"Free Attractions"—Trials—Evidence—Questions for Jury—Nonsuit.

In an action against a fair association to recover damages for mental anguish suffered by one who had paid the admission price, there was evidence tending to show that while the plaintiff was looking at the preparation for a balloon ascension, given as a "free attraction," he was requested by the one in charge to assist in holding the ropes attached to the balloon, and after doing so, and as he was leaving, having gone a few feet, the balloon suddenly ascended, and his foot having caught in a loop of one of the ropes attached, he was carried up with it. The evidence was conflicting as to whether the place was properly guarded or inclosed or as to whether the crowd was warned of the danger in going there. Under the rule applicable as to how the evidence should be considered upon a motion to nonsuit, it is held that such motion was improperly allowed in this case, there being sufficient evidence to take the case to the jury upon the question of defendant's actionable negligence.

8. Trials—Evidence—Nonsuit—Defenses—Independent Contractor—Contributory Negligence.

In an action to recover damages arising from a personal injury alleged to have been negligently inflicted, neither the defense that the act complained of was that of an independent contractor nor evidence of contributory negligence will be considered upon a motion as of nonsuit upon the evidence. *Semble*, from the fact and circumstances of this case, the principal would be responsible, though it were established that the act complained of was that of an independent contractor while giving a balloon ascension as a "free attraction" at a county fair.

APPEAL by plaintiff from *Lyon, J.*, at August Term, 1913, of (347) BLADEN.

R. S. Hall and Shaw & MacLean, McIntyre, Lawrence & Proctor for plaintiff.

Rose & Rose for defendant.

CLARK, C. J. This is an action for injuries sustained by the plaintiff, who was caught by his foot in the trail rope of a balloon which ascended from the fair grounds of defendant at Fayetteville, N. C., and was carried in the air for some distance. The appeal is from a nonsuit, and the testimony of the plaintiff, somewhat condensed, is as follows:

"The plaintiff, who is 53 years old, attended the fair held by the defendant at Fayetteville, and paid his fare for entrance. A balloon "free ascension" had been advertised as one of the attractions for that day, and he went over to the place where they were making arrangements for the balloon to ascend; he walked up to within fifteen or twenty steps of the balloon; there was some difficulty in launching it. It was swaying to and fro, though there was not much breeze. The man in charge, who was unknown to the plaintiff, called for help; he was trying to hold the balloon down until he could get it loaded. He said, "Everybody get a hold." The witness and several others went up and took hold; the witness held on for a few minutes, and then left and walked off eight or ten steps; this man then beckoned him back, and said, "Come back and hold this," and the witness went back and took hold, but only for a minute or two before he turned loose again, because the balloon seemed uncontrollable, and he thought it best to leave. He had gotten only (348) three or four steps, when some ropes caught him around his leg. He threw those ropes off with his hands and just at that time his left foot was caught by a noose in the rope around his instep; he had on a button slipper and the noose caught him around that and jerked his left foot up so quick that his head never struck the ground; the balloon went off like a rifle ball and he went with it. He was a couple of hundred yards in the air before he got righted up; he was hanging by his foot,

head down and he was way up; he could not tell how far; he managed to get up somehow and got hold of the rope and climbed it, and when he got up some distance he managed to get his arm over something and held on with that arm and hand to the rope until the balloon came down. He could not tell how high the balloon went; he was sure a long way from the earth. He said he did not have language to explain his feelings; he said he thought he was gone, and that was the last of him; he imagines he felt like a man on the gallows with the black cap over his face to be hung. He could not say how long that state of feeling continued, but it was a long time; he thinks he was a couple of hundred yards in the air before he managed to raise up somehow and get hold of this rope and climb up it; he does not know how long he was about it; he recollects that he first got hold of his leg and tried to pull up, but his pants slipped and he fell back and his head again swung down; he managed to recover and somehow pulled up his leg, and reached the rope and managed to get his right arm around it and held by that arm, and his left hand to the rope until the balloon came down. When he managed to get his arm over the swing and to hold it there he looked down into space and was 1,500 or 1,600 feet from the ground. He went about 1½ miles, he thinks. When he came down he was still holding by his right arm and his left hand until he struck the ground. He then got the noose off his foot; the balloon rose again and went off, he does not know where, but supposes it must have come down again." The searching party in an antomobile met him coming back bareheaded on a bicycle. The witness then stated at length the impairment of his physical and nervous system and his mental suffering, which of course were serious.

(349) On cross-examination the witness says that "the balloon ascension took place in the race track; is not certain that there was a fence around it, but thinks there was; that he got inside of the race track by going through the gate; did not see any policeman; a crowd of people were going, and he went along with them. He does not recollect seeing any one telling the people to keep off; that he took hold and helped to hold the balloon, because the man in charge called for help, and that he went back the second time because after he started off the man in charge of the balloon said to him, "Come back and help hold this balloon," He says many other men were there helping to hold the balloon down. No one told him not to go into the inclosure and no one warned the crowd to get back from the balloon. If this was done, he did not hear it. He did not hear the man in charge of the exhibition make public outcry that the wind was blowing hard and it was dangerous, and for everybody to keep back; when he went to the race track he was not warned by any policeman or marshal or any one else to keep away after the gate was opened; that if he had not crossed the race track and had not gone near

the balloon, he of course would not have been hurt; he says that a crowd of people were around the balloon within 15 or 20 feet, and he heard no warning given; that he did not know the balloon was going up then or that it was dangerous to be around where the ropes were."

There was evidence on the part of the defendant that the crowd broke down the fence and crowded around the balloon; that there was public warning given that it was dangerous to be there. There was also evidence tending to sustain the defense that the manager of the balloon was an independent contractor. We cannot consider this, as this is an appeal from a nonsuit, and the plaintiff did not offer evidence on this point, which, being an affirmative defense, was a matter for the jury. The defense that the defendant was not liable because it was a public-service company was properly abandoned in this Court. *Hallyburton v. Fair Association,* 119 N. C., 526.

Neither can we consider the evidence tending to show that the plaintiff was guilty of contributory negligence, nor to negative negligence on the part of the defendant. These matters in defense were for the jury to determine, not for the court.

Nothing is better settled than that on a nonsuit the Court will (350) consider only the evidence most favorable to the plaintiff, and in the most favorable aspect to him, since the jury might have taken that view, and the plaintiff cannot be deprived of his right to ask a jury to find that his contention was the true state of the facts. The decisions to this effect are numerous and uniform. *Brewer v. Wynne, ante,* 319.

The rule of liability of fairs, shows, and theaters is summed up, 38 Cyc., 268, with full citation of authorities, as follows:

"The owner of a place of entertainment is charged with an affirmative, positive obligation to know that the premises are safe for the public use, and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance, and he impliedly warrants the premises to be reasonably safe for the purpose for which they are designed." He is not an insurer of the safety of those attending the exhibition, but he must use care and diligence to prevent injury, and by policemen or other guards warn the public against dangers that can reasonably be foreseen. While the defense of "independent contractor" is not before us upon a nonsuit, we may call attention to the fact that the same citation cites *Thompson v. R. R.,* 170 Mass., 577; 64 Am. St., 323; 40 L. R. A., 345, for the proposition that the owner "is not exonerated because the exhibition where the injury was received was provided and conducted by an independent contractor." Nor do we now pass upon the question whether the manager of the balloon was an independent contractor.

Taking the evidence in the aspect most favorable to the plaintiff, and with the inferences which a jury would be authorized to draw therefrom, they would have been justified in finding a verdict in favor of the plaintiff, and that the defendant was guilty of negligence. The matters of defense could not be considered by the judge on a motion for nonsuit.

The nonsuit is

Reversed.

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(351)

WALTER G. FEREBEE v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 29 October, 1913.)

1. Railroads—Broken Car Steps—Master and Servant—Negligence—Contributory Negligence.

In this case there was evidence tending to show that an employee of a railroad company was injured while acting in the course of his employment, at night, by falling from the platform of a car at a station, because of the fact that since the train had left a former station the steps had been broken from the platform; that the only light furnished him was that from a lantern he was carrying; that the steps had been broken from the car by the falling over of large boxes, 4 feet tall and 13 and 18 inches thick, setting on end and unsecured in any way, about 12 to 14 inches from passing cars, left for some weeks on a trestle, and used for the purpose of holding oil cans and other things for the defendant's engineers: *Held*, it was a negligent act of the defendant to leave boxes, as described, so near the main track of its railroad where they were liable, at any time and from ordinary causes, to fall over and collide with the defendant's train, and the jury having by their verdict accepted this version of the occurrence and determined such act was the proximate cause of the plaintiff's injury, without negligence on his part, an actionable wrong has been established; and this position is not affected by the fact that the action was properly brought under the Federal Employers' Liability Act, which provides that contributory negligence shall only be considered in diminution of damages: *Held further*, that there was sufficient evidence to sustain a negative finding of the jury on the issue of contributory negligence.

2. Railroads—Broken Car Steps—Master and Servant—Actus Dei—Concurring Negligence.

Where it has been properly ascertained that the plaintiff, in the course of his employment, was injured by falling from the platform of a car at night, for the reason that the steps of the car had recently been broken off from the platform by the falling over of large boxes negligently left near the track over which the defendant's train had passed, the fact that a heavy windstorm was instrumental in turning these boxes over will not advantage the defense, it being primarily the negligence of the defendant, concurring with an uncontrollable condition, afterwards arising, which proximately caused the injury complained of.

3. Measure of Damages—Mental Anguish—Evidence.

The recovery for mental anguish arising from a personal injury negligently inflicted must be confined to such anxiety which would naturally result from the injury, and the doctrine may not be extended so as to include such as may be caused by its possible or probable effect upon others; and evidence admitted in this case held for reversible error, that the plaintiff was worried or apprehensive because he had a child to educate who had never been to school, and he was rendered incapable of sending him.

APPEAL by defendant from *Carter, J.*, at February Term, 1913, (352) of WAKE.

Action for damages for personal injuries caused by alleged negligence on the part of defendant company.

The action was brought under the Federal Employers' Liability Act, the train on which plaintiff was employed and injured being engaged at the time in interstate commerce, and was submitted and determined on the following issues and verdict:

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

2. What is the whole amount of damages, if any, sustained by the plaintiff? Answer: $15,000.

3. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: No.

4. What amount, if any, shall be deducted from the damages sustained by the plaintiff as the proportion thereof attributable to the plaintiff's own negligence? Answer:.....

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

Ward & Thompson, Douglass & Douglass, W. H. Lyon, Jr., and W. W. Elliott for plaintiff.

R. N. Simms for defendant.

HOKE, J. We find no reversible error affecting the determination of the first and third issues. There was evidence tending to show that, at the time of the occurrence, plaintiff was an employee of defendant company, as baggage master and flagman on a train carrying passengers and freight from Raleigh, N. C., to Norfolk, Va., and that it (353) was a part of plaintiff's duties to go out on the steps of the baggage car as the train moved into a station yard for the purpose of receiving the United States mail and, further, of preventing persons from getting on or off train when it was in motion, and to assist the conductor in seeing that the passengers entered and departed from the train in safety; that on 2 June, 1912, at 9:15 p. m., the train on which plaintiff was so

employed left the station yard in the city of Raleigh on its regular run for Norfolk, and, as it was approaching the station of Wendell, plaintiff, in the line of his duty, went on the platform and started down the steps, and, they having been torn away after the train left Raleigh, he fell through the opening, was dragged some distance by the train, and was fearfully crushed and mutilated and permanently injured; that the night was dark; there was no light on the platform at the time except a little railroad lantern, carried by plaintiff and which threw no light up or down, but just "glared from the sides." It was further proved that for some weeks or longer prior to the occurrence, on the platform or walkway of a trestle, in the Jones Street yard in the city of Raleigh, there had been left a number of boxes to hold oil cans for engineers, and other things; these boxes, 4 feet tall and 13 and 18 inches thick, the same being on the trestle platform, setting up on end and unsecured in any way, and about 4 feet from the rail, leaving them 12 or 14 inches from the car, and the evidence further tended to show that on the night in question one or two of these boxes had toppled over from the jar or other causes and had struck and torn away the steps and thus occasioned the injury complained of. It was a negligent act to leave boxes of that shape and size so near the main track of the railroad where they were liable at any time and from ordinary causes to fall over and collide with defendant's trains, and the jury having accepted this version of the occurrence, and determined, further, that such act was the proximate cause of plaintiff's injuries, an actionable wrong has been established, the statute on which the suit is brought, the Federal Employers' Liability Act, having made provision that contributory negligence, even if it existed,
(354) shall only be considered in diminution of damages.

It was urged for defendant that the evidence tending to show the prevalence of an unusual windstorm on the night in question has not been allowed its proper weight, but, on the facts in evidence, the position cannot avail the defendant. The negligent placing of the boxes having been accepted as the proximate cause of the injury, or one of them, the defendant is not relieved, though an unexpected or unusual storm should have contributed also to the result.

In Shearman and Redfield on the law of negligence, 6th Ed., sec. 16, it is said: "Inevitable accident is a broader term than an act of God. That implies the intervention of some cause not of human origin and not controllable by human power. An accident is inevitable if the person by whom it occurs neither has nor is legally bound to have sufficient power to avoid it or prevent its injuring another. In such a case the essential element of a legal duty is wanting, and it cannot therefore be a case of negligence," etc. Pursuing the same subject in section 16b, the author says, further: "The rule is the same when an act of God or an accident

combines or concurs with the negligence of the defendant to produce the injury, or when any other efficient cause so combines or concurs; the defendant is liable if the injury would not have resulted but for his own negligent act or omission." And, as heretofore stated, no reason is shown why the verdict on the third issue, that as to contributory negligence, should be disturbed; it having been made to appear that plaintiff went out on the platform and started down the steps, in the performance of his duty, and the jury, under a proper charge, having found that he was careful at the time and, under all the circumstances, had no reason to anticipate nor expect that the steps had been torn away.

On perusal of the record, however, we must hold that there was error committed on the trial of the issue as to damages. On that issue the plaintiff, over objection by defendant to both question and to specific portions of the answer, was allowed to testify as follows: "Q. In what respect were you troubled mentally? A. I was troubled about having a wife and child on me, with no prospect and no future. I was worried about having a boy 4 years old. I was worried all the time (355) about no income whatever. I never received a cent for the period of nine months. I had a wife, and a child, who had never been to school a day in his life, to educate." The defendant objects to the last part of the answer.

It is very generally held that mental suffering which would naturally result from physical injury, wrongfully inflicted, is a proper element of the damages which may be awarded, and, in such case, it may be allowed, whether spoken to directly by the witness or not; but the decisions are also to the effect that the damages recoverable from this source must be confined to those which are the natural and proximate result of the injury as it affects the person himself, and that the concern which may be caused by its possible or probable effect upon others may not be considered.

The effort to fix upon proper compensation in injuries of this character is, in many cases, very unsatisfactory, and the testimony received in this instance would introduce such an additional element of uncertainty and of divergence among litigants suffering the same or similar injuries that it has been very generally regarded as too remote. *R. R. v. Claud,* 57 Kansas, 40; *Maynard v. R. R.,* 46 Oregon, 15; *Statler v. Manufacturing Co.,* 195 N. Y., 478; *R. R. v. Story,* 63 Ill. App., 239; *Keyes v. R. R.,* 36 Minn., 290; *Brown v. Sullivan,* 70 Texas, 470; 1 Sedgwick on Damages (9 Ed.), sec. 439.

For the error indicated there must be a new trial on the issue of damages.

Partial new trial.

Cited: *S. c.,* 167 N. C., 293; *Ridge v. R. R., ib.,* 527; *Kistler v. R. R.,* 171 N. C., 579; *Harris v. R. R.,* 173 N. C., 112.

(356)

J. E. LATHAM v. J. E. FIELD ET ALS.

(Filed 5 November, 1913.)

1. Principal and Agent—Cotton Broker—Respondeat Superior.

A sale of cotton made by a broker in his own name, though in fact acting for his principal, will bind the latter, for the acts of the broker therein are imputable to the principal.

2. Same—Scope of Authority—Representations—Conduct—Good Faith.

Where a defendant has represented to the plaintiff that a certain agent or broker was authorized to act for him in the sale of cotton, and, reasonably induced by this representation, and by the acts of the principal and the broker or agent, the plaintiff purchased from the latter cotton of a certain grade, believing, in good faith, that he was dealing with him in his representative capacity only, the defendant would be bound by the transaction, though the broker or agent was acting independently in making the sale.

3. Principal and Agent—Cotton Broker—Scope of Authority—Trials—Evidence—Nonsuit.

When in an action to recover damages for the failure of cotton purchased and delivered to come up to the grade or quality of that purchased, the question has arisen as to whether the purchase was made of the defendant or of his broker or agent, acting independently, there was evidence tending to show, on behalf of the plaintiff, that the defendant solicited his trade for the purchase of cotton, and represented, in the presence of one T., that the latter was his agent in that territory for the sale of cotton, to which T. did not then or thereafter dissent; that subsequent to this statement, thus made by the defendant, the plaintiff bought from T. as agent or broker of the defendant the cotton in question, which defendant shipped to his own order, "Notify T.," indorsing the bill of lading, whereupon T. drew on the plaintiff, bill of lading attached, who paid the draft, and got the cotton several days thereafter, upon its arrival, in accordance with the established custom in such transactions, which provide that the consignee may receive the cotton from the carrier, subject to rejection by him if below the grade contracted for; that the transaction for the purchase of the cotton was confirmed by T., "for the account of Field & Son," the defendants, and that it was only the custom to ascertain the shipper's name in the bill of lading and his indorsement for delivery of the cotton, it being customary for the vendors of cotton to consign it, in this manner, to third persons, in transactions of this character. *Held*, there was evidence sufficient to show that T., acting within the scope of his agency as the defendant's broker, was authorized to bind the defendant as principal to the transaction; and a motion to nonsuit upon the evidence was improperly allowed.

(357) APPEAL by plaintiff from *Peebles, J.*, at April Term, 1913, of GUILFORD.

This case was before us at Fall Term, 1912, and is reported in 160 N. C., 335. The facts, as they now appear, are somewhat different from those there stated. Plaintiff testified that W. H. Field, one of the de-

fendants, called at his place of business in April, 1908, and showed him some samples of cotton, stating that J. D. Turner would thereafter represent his firm in that territory as their broker, and he hoped plaintiff would send them some business through Mr. Turner; that about three weeks after the conversation, plaintiff ordered some cotton from the defendants through Turner, buying 100 bales of strict low middling from defendants through Turner, at 10⅛ cents per pound. Plaintiff paid for the cotton at that price, although it proved to be of a very low and inferior quality, below any known grade and what is called in the trade "junk." The difference in value of the two kinds is 2 cents per pound, and the quantity 46,493 pounds. That he had no further communication with defendants, personally or by letter, after the time of the conversation until the cotton had been shipped and received. He ordered the cotton through Turner, and at first wanted 200 bales, but Turner told him that he could only get 100 bales of the required grade and that he had secured it from defendants. The cotton was shipped to defendants, Greensboro, N. C., "order; notify J. D. Turner," and the bill of lading showed that the cotton was shipped by defendants to their own order, and indorsed by them. J. D. Turner drew the draft for the price, and plaintiff paid it at bank and took up the bill of lading. Draft was signed by Turner and drawn at Greensboro, N. C., and not by Fields & Co. at their home in Cartersville, Ga., as if it had originated there. Cotton is very often shipped through the south to the order of a bank cashier or some clerk in a merchant's office. "As to whose name is on a bill of lading, that is a thing we don't look at. It is who is the shipper of the cotton and whose name is indorsed on the back (358) that makes it negotiable." That he never found out what disposition was made of the proceeds of his payment for the cotton. That he paid the draft, and took the bill of lading to the railway company and got the cotton. He received the following letter confirming the trade:

Our Order No. .....

GREENSBORO, N. C., 5-11-1908.

MESSRS. J. E. LATHAM,
Greensboro, N. C.

DEAR SIRS:—We hereby confirm the following sale made you this day:

100 BALES COTTON.

Grade, strict low middling at 10⅛c. per lb., landed at Group A for shipment prompt. For the account of J. E. Field & Son.

REMARKS: Shipped by J. E. Field & Son, Cartersville, Ga.

Yours truly. JOHN D. TURNER, JR.

N. B.—In any case of reference to this order, please give our order number, subject to Carolina mill rules.

On the cross- and reëxamination, plaintiff testified:

"Mr. Latham, on 19 June, 1908, you addressed a letter to Field & Co., which I have just shown you, and you told them about this offer you had received from the Riverside Cotton Mills of 10 cents? Answer: Yes, sir.

"Plaintiff did not address this communication to the defendants for the purpose of conecting them with the original sale, or for the purpose of getting some reply from defendants in order to connect them with the original sale. Plaintiff's reason for so writing the defendants was that cotton is sold in this territory, including Danville and all the territory around Greensboro, under what is known as the Carolina mill rules. These rules provide that when a shipment of cotton is received, if it is below grade as originally contracted for, it may be rejected by the buyer. Our position on this cotton all the time was that Field & Co., had not performed their contract; that they had shipped something we did not buy, and, so far as we were concerned, we rejected it. (359) We were holding the cotton, waiting for them to replace the contract with the proper grade of cotton which we had bought and which we had paid for. When he paid the draft drawn by Turner, for some $4,600, he knew that the draft had been drawn in Greensboro. He knew that a draft drawn by Field & Co. on him would have originated in Cartersville, Ga. In the former trial he testified that the cotton shipped was very difficult to grade, but in his opinion it would average about strict low middling. Cotton that is full of dust and sand is not merchantable, and for that reason is not gradable cotton. When cotton is bought, it is customary to confirm it. In this instance no confirmation was sent to the defendants, for the reason that plaintiff received a confirmation from J. D. Turner. Plaintiff confirmed the purchase to Turner. It is customary in the cotton trade to confirm either to the vendor or his agent. The sample exhibited to witness is a sample of strict low middling cotton. The sale in controversy was confirmed to plaintiff by J. D. Turner for the account of the defendants. Cotton arrives several days later than drafts, and in this instance the draft was presented and paid by plaintiff probably seven days before the arrival of the cotton. Plaintiff had no opportunity to examine the cotton before he paid the draft. That is the usual custom in the trade. He paid the draft upon the faith of the contract he had with Mr. Turner as broker for J. E. Field & Son, and upon the fact that it was attached to the bill of lading showing J. E. Field & Son, of Cartersville, Ga., were the shippers of the cotton, and that J. E. Field & Son, in order to make the bill of lading negotiable, had indorsed it on the back. He would not have

paid the draft unless the bill of lading had been attached. The paper shown him is the confirmation he received at the time he bought the 100 bales of cotton in controversy."

The bill of lading was introduced. It was of the standard form, issued at Cartersville, Ga., by the railroad company to J. E. Field & Son, and contained the following: "Shippers' order, notify. Consignee, J. D. Turner, Jr.," and was indorsed by J. E. Field & Son and J. D. Turner, Jr. There was more evidence as to the damages, not necessary to be stated. At the close of the plaintiff's testimony, the judge ordered a nonsuit, upon defendant's motion, and plaintiff appealed. (360)

Thomas S. Beall and King & Kimball for plaintiff.
Douglass & Douglass, J. T. Norris, and R. C. Strudwick for defendant.

WALKER, J., after stating the case: The nonsuit requires us to consider the evidence in the most favorable view for the plaintiff. Plaintiff contends that he acted upon the representation of W. H. Field, that J. D. Turner was the broker of defendant, and therefore fully authorized to make contracts for the sale of cotton in their behalf, and that he was dealing with Turner as agent, and not in his individual capacity, and relied upon the statement of W. H. Field that he could so deal in the future.

The rule in regard to agency may be thus stated: A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent, within the scope of his authority he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. *Bank v. Hay,* 143 N. C., 326; *Law v. Stokes,* 3 Vroom (N. J.), 249 Mechem on Agency, sec. 84. "The principal is bound by all the acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions, unknown to the persons dealing with him; and this is founded on the doctrine that where one of two persons must suffer by the act of a third (361) person, he who has held that person out as worthy of trust

and confidence, and as having authority in the matter, shall be bound by it." *Carmichael v. Buck,* 10 Rich. Law, 332 (70 Am. Dec., 226): Story on Agency, sec. 127. "Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact." *Trollinger v. Fleer,* 157 N. C., 81; *Metzger v. Whitehurst,* 147 N. C., 171. These cases fairly illustrate this doctrine and define its limits.

As to the liability of a principal acting through a broker, see 19 Cyc., 292.

The Court, in this case, when fromerly here (160 N. C., 335), stated the duties of a broker and the nature of his agency.

The case may be considered in two aspects:

1. Was Turner, in fact, acting as defendant's broker in the transaction?

2. Did defendants, by W. H. Field, induce the plaintiff to believe that Turner had authority to represent them in selling their cotton, and thereby lead him to make the order for the 100 bales, he believing, and having reason to believe, under the circumstances, that they were selling, not to Turner for himself, but through him to the plaintiff?

If the jury should find that Turner was really acting as agent or broker for the defendants, they would be liable for the damages sustained by the plaintiffs, for the defendants would, in such case, be the principals and the acts of Turner, though in his own name, should be imputable to them as much so as if they had acted for themselves instead of by representation. The form of the transaction is not material. *Holt v. Wellons, ante,* 124.

We think there was evidence to support either of these theories. In the first place, the plaintiff testifies, without qualification, that "he got the cotton from the defendants through Turner,'" and thus he did precisely what W. H. Field told him to do. It also appears that
(362) Turner told the plaintiff that he had succeeded in getting the cotton for them from defendants. In the letter of confirmation it is stated that "the sale was made for the account of J. E. Field & Son," and Turner opens his letter by saying: "We hereby confirm the sale, and request plaintiff, in case of any reference to the order, to give *our* order number." Plaintiff might well argue, and the jury be authorized to find, that Turner, by the use of this language, was not referring merely to himself, but to Field & Son, or to them and himself as their agent. Turner knew of the conversation that W. H. Field had with the plaintiff, for he was present, and it might reasonably be inferred by the jury that as he had not disavowed his agency or notified plaintiff to the contrary, up

to the time of the purchase, he was acting for them in accordance with the understanding at the April meeting. The plaintiff testified that cotton is very often shipped to the order of a bank cashier or some clerk in a merchant's office. The name on the bill of lading is disregarded; they look for the shipper of the cotton and the indorsement on the bill. This was an explanation of the form of the bill of lading, and a reason why the request to notify J. D. Turner of the shipment did not necessarily disprove his agency, or establish the fact that defendants were dealing with him as a principal in the transaction and as a purchaser of the cotton, and its consignee, on his own account. If by the conduct of W. H. Field, or the defendants, the plaintiff was reasonably led to believe that Turner was acting as their broker, and by reason thereof he dealt with him as such, relying upon such conduct and believing in good faith that Turner was acting as broker and not for himself, it would be the same as if he was, in fact, the broker of defendants in selling the cotton.

The jury may consider whether Turner was in fact defendant's broker, and in the bill of lading they requested that he be notified individually of the shipment, merely for their convenience or in accordance with the custom, or whether they, thereby, intended to deal with him individually and not as their broker, or whether they used his name, meaning that he should be their broker, without regard to the fact that he was not addressed as such and knowing that he had been so represented to the plaintiff. These are merely suggestions as to (363) the different views of the evidence, and must not be taken as an intimation upon the weigth or sufficiency of the same to establish either side of the case.

It would serve no practical purpose to further consider the evidence as bearing upon the question of an agency in fact or in law. It is sufficient to say that, as the case is now presented to us, there is evidence fit to be submitted to the jury and to warrant a finding thereon in favor of the plaintiff, under proper instructions from the court as to the law.

There was error in granting the nonsuit. It will be set aside.

Reversed.

Cited: Wynn v. Grant, 166 N. C., 47; *Latham v. Fields, ib.,* 215; *Powell v. Lumber Co.,* 168 N. C., 635; *Furniture Co. v. Russell,* 171 N. C., 485; *Ferguson v. Amusement Co., ib.,* 666; *Realty Co. v. Rumbough,* 172 N. C., 749.

W. N. BARNES v. NORTH CAROLINA PUBLIC-SERVICE CORPORATION.

(Filed 5 November, 1913.)

Street Railways—Operation of Cars—Duty of Traveler—Negligence.

The running of an electric car upon its tracks on a city's street in the usual and customary manner at a moderate speed and without further noise than is necessary is not negligence; and where a traveler in a buggy voluntarily drives in the direction from which it is approaching, is able to safely drive into a side street, and is injured, without coming in contact with the car, because a colt which he was leading, becoming frightened, overturned the buggy, the injury complained of is the result of his own negligence, and he cannot recover damages therefor. The reason that this rule is not applicable to automobiles (ch. 107, Laws 1913), pointed out by CLARK, C. J.

APPEAL by plaintiff from *Shaw, J.*, at August Term, 1913, of GUILFORD.

John A. Barringer for plaintiff.
Taylor & Scales for defendant.

(364) CLARK, C. J. On 31 May, 1912, the plaintiff in a buggy was driving a horse on Church Street in Greensboro. Riding with him was a boy, leading a young unbroken colt in the rear of the buggy by a halter. The street car of the defendant was on its regular run on said street. When the car had reached a point about 75 yards south of the intersection of North Davie Street with said Church Street the motorman on the car and the plaintiff saw each other, they being then about 150 yards apart. The plaintiff drove on, he says, about 75 yards further towards the car, the horse and colt showing signs of fright at the approaching car and becoming more frightened as it drew nearer. The motorman did not stop the car, or slacken speed, and when the car came abreast of the buggy, the colt jumped upon one of the rear wheels of the buggy and upset it, throwing the plaintiff to the ground, whereby he was injured. There was no collision of any kind. There was nothing unusual about the car, which was running at the usual rate of speed and making no noise except that necessarily incident to the operation of street cars.

The plaintiff testified that after the horses became frightened, he continued to drive towards the car, and even started to drive across the track directly in front of it. He further testified that the colt was unbroken and skittish, and that he would have known it would be frightened by the car if he had thought about it; that there were cross streets near where the accident happened which he could have turned

into after his team became frightened, but did not do so because he thought he had as much right on Church Street as defendant's car.

Upon this evidence his Honor properly allowed the motion to nonsuit. It appears from the plaintiff's own evidence that he was not injured by reason of any negligence on the part of the defendant's motorman, but by reason of his horses becoming frightened by a street car operated in the usual method. It is true that he had as much right on the street as the car, but the car had as much right as he did. It was serving the public in the usual and ordinary manner and without any unnecessary noise. The plaintiff should not have driven further in the direction of the car after he saw that his team was frightened, when he could have turned out in the by-street. The injury was caused by his own want of care and not by any want of (365) care on the part of the defendant.

In *Doster v. Street R. R.*, 117 N. C., 661, the Court said: "Where a horse is being driven, or is running uncontrolled, along a highway parallel to a railway of any kind, though it gives unmistakable evidence by its movements that it is alarmed at an approaching train or car, the engineer or motorman in charge is not negligent in failing to diminish the speed in the absence of a collision." The Court further said: "The plaintiff voluntarily exposed himself, his buggy and his mule to the risk of any accident which might be caused by the animal taking fright at the usual noise incident to running a street car by electricity, there being no testimony tending to show that the motorman wantonly or maliciously made unnecessary noises for the purpose of scaring the animal."

There is no suggestion in the complaint, or the testimony, that the motorman in this case wantonly or maliciously ran the car to where the plaintiff was. In the *Doster case* the plaintiff waved the motorman to stop the car, and called to him to do so, and finally got out of his buggy and held the bridle of his horse. In the present case the plaintiff made no motion of any kind nor gave any signal for the car to stop, but drove on towards the car.

The rule laid down in *Doster v. Street R. R., supra,* that a street railway company is not liable for an injury resulting from horses being frightened by the noises or appearance of the car when operated in the usual manner, has been cited and approved. *Everett v. R. R.,* 121 N. C., 520; *Dunn v. R. R.,* 124 N. C., 257; *Moore v. R. R.,* 128 N. C., 458.

"Railroad companies running their trains in a lawful and usual manner are not responsible for damages occurring to travelers along the road in consequence of their team taking fright at the noises ordinarily made by the operation of such trains." 2 Thompson Neg.,

par. 1908; 2 Shearman and Redfield Neg. (6 Ed.), sec. 485; *Morgan v. R. R.*, 98 N. C., 247; 36 Cyc., 1487, 1488, 1490; Clark on Street R. R. (2 Ed.), 114.

The reason of the rule is thus stated in *Doster v. Street R. R.*, 117 N. C., 663: "People who pay their money in the expectation of being carried expeditiously are not to be delayed by every person
(366) who ventures to test the nerve of his horse or mule by driving it along the same street on which a company runs its street cars by electricity. When persons subject themselves to such risk, and no collision with the moving car ensues, the injury caused by the conduct of frightened animals is deemed in law to be due directly to their own want of care."

A condition might occur in which a street car should halt for a moment as if, for instance, if it should suddenly come around a corner, frightening a horse, and the motorman can see that by halting a moment the driver may be given an opportunity to turn around and drive off in safety. In this and other conceivable cases it would be negligent for the motorman not to stop his car a brief period to give the driver of the conveyance an opportunity to save himself. But nothing of this kind occurred in this case.

The plaintiff testified that he was 150 yards from the car when he first saw it, and after seeing it he continued to drive towards it a distance of 75 yards before the accident occurred. Both car and plaintiff were traveling towards the point where North Davie Street crosses Church Street. The plaintiff should not have expected that the car should stop and wait till he might get to Davie Street and turn down it. He should have given way for the car, for he knew that his animals were frightened. He could have turned back or could have turned down a side street. The car could not have done this. Nor, as it was engaged in a service for the public, should the plaintiff have expected that the car should stop when he had ample opportunity to do so himself and avoid the injury. The proximate cause of his injury was his own conduct. *Strickland v. R. R.*, 150 N. C., 4.

We need not consider the evidence as to the nature of the plaintiff's injuries, which were serious. There was certainly *damnum,* but not *injuria.* The plaintiff was not injured by a collision with the defendant's car, but by the colt overturning his buggy and throwing him out. The colt was frightened when the defendant's car was where it had a right to be in the public service, and was being operated in the
(367) usual manner. The colt was frightened because the plaintiff did not choose to turn down one of the by-streets, but drove on probably 75 yards towards the car, which was frightening his team more and more as he approached it. The car was not running unusually

fast. Indeed, it appears that the plaintiff was going at the same speed, as each moved 75 yards after the plaintiff and motorman saw each other.

There is a wide distinction in many respects between a street car and an automobile. The street car is engaged in a public service and running regular schedules, which it owes a duty to the public to observe. It is running on a regular track, and cannot turn out, nor can it stop without losing its schedule. The noises it makes are not so likely to frighten teams as an automobile, and the streets on which the street cars are to be found are well known to drivers, who can avoid them; whereas an automobile may be met with anywhere and unexpectedly. A street car runs slower and makes frequent stops. For these and other reasons the statute has prescribed the speed limit of automobiles and the duties of chauffers on meeting people whose teams are frightened. Chapter 107, Laws 1913.

The judgment of nonsuit is

Affirmed.

Cited: Hanford v. R. R., 167 N. C., 279; *Hall v. Electric Co., ib.*, 285; *Hines v. Casualty Co.*, 172 N. C., 229; *Ins. Co. v. Woolen Mills, ib.*, 539.

EULA B. GARDNER v. NORTH STATE MUTUAL LIFE INSURANCE COMPANY.

(Filed 5 November, 1913.)

1. Insurance, Life—"Binding Slip"—Application—False Representations.

Where an insurance company has given a "binding slip" to an applicant for insurance, it only protects the applicant against the contingency of his sickness intervening its date and the delivery of the policy, if the application for insurance is accepted, and as such slip does not insure of itself, it does not affect the right of the insurer to avail itself of all defenses it may have, under the policy, after its delivery, to avoid payment thereof by reason of material misrepresentations made in the application for it.

2. Same—Written Contracts—Parol Evidence.

After a contract of life insurance has become effective, its terms may not be contradicted so as to affect its continued validity; but it may be shown that the delivery of the policy was made upon false representations in the application therefor, as to the health of the insured and as to his not having been subjected to contagious diseases for a prior period of one year, and the like, for such matters bear upon the question as to whether the policy had ever taken effect as a contract of insurance.

3. Insurance, Life—Principal and Agent—Fraud—Waiver—Knowledge.

Where an insurer has issued a "binding slip" to the insured upon his application for a policy of life insurance, after his examination by its physician, the application providing that the policy should be delivered while the insured was in good health, and it was delivered while he was ill with a fever which resulted in his death, the question of waiver by the company of the benefit of the material false representations made in the application for the policy depends upon the knowledge by the company of the falsity of the representations and the conditions under which it was delivered, or the authority of its agent making the delivery to do so, depending upon his knowledge of the facts and circumstances at the time.

4. Insurance, Life—Application—False Representations—Contagious Diseases—"Binding Slip"—Delivery of Policy.

A representation in an application for life insurance, that the applicant has not been associated with patients having contagious diseases within the year preceding the application, is one which would reasonably influence the insurer in its decision upon the question of taking the risk and issuing the policy, and is regarded as material; and when the representation in this respect is false, a "binding slip" is issued to the insured, and thereafter the policy is delivered without knowledge of the facts and a waiver by the company of its right, the policy may be avoided by it. Revisal, sec. 4808.

5. Same—Typhoid Fever—Evidence.

Where the insured within the year preceding his application for insurance had nursed his wife during a sickness of typhoid fever, and he himself was ill with this fever, from which he afterwards died, when the policy was delivered to him, and there is evidence that a fever of this kind is contagious, and that such conditions would influence the opinion or judgment of the insurer in taking the risk and issuing the policy, it is for the jury to determine, under proper instructions from the court, whether the representation in the application, that the insured had not been associated within the year with one having a contagious disease, was a false and material representation and such as would invalidate the policy.

6. Insurance, Life—Misrepresentations—"Binding Slip"—Delivery of Policy.

Where a "binding slip" is given after the applicant for a life insurance policy has made his written application therefor, which application falsely represents that the applicant has not been associated with a person having a contagious disease within a year, and the policy is delivered to the insured during an illness from one of such diseases, to which he had been exposed, upon the question of a valid delivery of the policy, when the right to rely upon this misrepresentation has not been waived by the insurer, it is competent for the jury to consider whether the agent, not knowing of the misrepresentation in the application, was led to believe that the slip was valid, and that he was accordingly bound to deliver the policy.

7. Insurance, Life — Principal and Agent — Fraud — Collusion — Imputed Knowledge.

An agent of an insurer in delivering a policy of life insurance to the insured, contrary to its terms, and in collusion with him, does not act for the insurer therein, but in fraud of his rights, and no knowledge of the fraudulent conditions existing in the transaction to the knowledge of the agent will be imputed to the principal.

8. Insurance, Life—Issues—"Binding Slip" — Misrepresentations—Verdict Set Aside—Appeal and Error.

In this action to recover upon a policy of life insurance, presenting questions upon the effect of a "binding slip" issued to the insured upon his application for the policy, and defenses upon alleged false representations made in the application, and the validity of a delivery of the policy to the insured during his last illness by the agent of the insurer, etc., it is *Held*, that the issues adopted were insufficient, and as confusion may arise on another trial by retaining any part of the verdict, the entire findings are set aside, and a new trial ordered.

APPEAL by plaintiff from *Cline, J.*, at April Term, 1913, of (369) EDGECOMBE.

This is an action to recover the amount of an insurance policy, alleged to have been issued by the defendant in March, 1912, on the life of John B. Gardner, in favor of the plaintiff, who was his wife. John B. Gardner died in March, 1912, shortly after he made (370) his application for insurance, and the policy was delivered to him by defendant's local agent during his last illness, he being then sick with typhoid fever, which caused his death. The application contained a representation by him that he had not been intimately associated with any one suffering from any transmissible disease within the year before his death. At the time of the application and after the examination of the applicant by a physician, said agent issued what is called in the case a "binding receipt," one of the provisions of which is the following: "In the event this policy shall be approved by the medical director of the company, then the insurance applied for shall be deemed to relate back to and be in force from and after the date of this receipt, but not otherwise." And also the following provision: "That the company shall not incur any liability under this application unless the policy has been issued, delivered, and paid for while I am in good health." The issues and answers thereto by the jury will disclose the nature of the controversy and sufficiently present the question upon which the opinion of the Court rests. They are as follows:

1. Did John B. Gardner represent in his application for insurance that he had not, at the time of his application, been intimately associated with any one suffering from any transmissible disease within the past year? Answer: Yes.

2. Had said Gardner, within the year prior to his application, been intimately associated with any one suffering with any transmissible disease? Answer: Yes..

3. Was said representation material to a contract of insurance between the said Gardner and the defendant? Answer: Yes.

4. Was the said Gardner sick with typhoid fever at the time that the policy in question was left with him by B. H. Howle? Answer: Yes.

5. Did the defendant manager at Rocky Mount (V. T. Lamb) ratify the act of Howle in issuing the "binding receipt" and the delivery of the policy in pursuance thereof? Answer: Yes.

6. Did the policy in question, at the time it was left with said
(371) Gardner by said Howle, become a consummated contract of insurance between the defendant and the insured? Answer: Yes.

7. In what amount, if anything, is the defendant indebted to the plaintiff? Answer: $1,000.

The court set aside the verdict upon the sixth and seventh issues, and having given judgment for the defendant upon those which remained, the plaintiff appealed, reserving her exceptions.

E. B. Grantham and F. S. Spruill for plaintiff.
Rouse & Land for defendant.

WALKER, J. This case has not been tried upon the real and decisive issue raised by the pleadings, but we will consider this question presently and in its order. A careful review of the evidence, the course of the trial, and development of the case, the charge of the court and the issues, leads us to conclude that the jury disobeyed the instructions upon the sixth issue, and it may be clearly inferred that the trial judge set aside the verdict as to the sixth and seventh issues because of this fact. The jury were charged that, if it was found from the evidence the representation in the application mentioned in the first three issues was material, they should answer the sixth issue "No," or if they found that the agent of defendant, V. T. Lamb, did not ratify the "binding receipt" (if it was void), and that John B. Gardner was sick with typhoid fever when he received the policy, they should answer the sixth issue "No," even though they found that the representation was not material. This instruction was not followed by the jury. The false and material representation has something to do with the "binding receipt" and to the extent hereinafter indicated.

The effect of the "binding receipt" was correctly stated by *Judge Cline,* and it is thus defined in Vance on Insurance, p. 160: "The binding slip is merely a written memorandum of the most important terms of a preliminary contract of insurance, intended to give temporary protection pending the investigation of the risk by the insurer, or until

the issue of a formal policy. By intendment, it is subject to all the conditions in the policy to be issued. These informal writings are but incomplete and temporary contracts—memoranda given (372) in aid of parol agreements. Such memoranda usually fix all the essential provisions that are available, but they are not ordinarily intended to include all the terms of the agreement, and always look to the formal policy that is expected subsequently to issue for a complete statement of the contract made. Hence, as heretofore stated, the contract evidenced by the binding slip is subject to all the conditions of the contemplated policy, even though it may never issue, and the same is true of other informal written contracts." *Lipman v. Ins. Co.*, 121 N. Y., 454.

In what has been said or what will hereinafter be said, it must not be understood that we are deciding whether, where a "binding slip" has been delivered to the applicant, the company, in the event of his death or illness occurring subsequently, but before the acceptance of the application, can arbitrarily or even unreasonably reject it or withhold its approval or the approval of the medical director, and thereby avoid its liability, under the clause in the binding slip requiring the approval of the application by the medical director of the company before the issuance shall take effect. This course was taken in *Grier v. Ins. Co.*, 132 N. C., 542, the policies having been delivered in both cases, the only difference in the two being that in *Grier's case* there was no allegation of fraud or a false and material representation, while in this case there is. We are confining ourselves to a consideration of the false representation and its effect upon the later transactions. Nor do we pass upon the question whether the "binding slip" was actually delivered, as the jury have, by clear implication from their answer to the fifth issue, found as a fact that it was, contrary to defendant's contention that it was not delivered. When properly executed, the "binding slip" protects the applicant for insurance against the contingency of sickness intervening its date and the delivery of the policy, if the application for insurance is accepted. If the application is not accepted in the proper exercise of the company's right, and the insurance, therefore, is refused, the "binding slip" ceases *eo instanti* to have any effect. It does not insure of itself, but is merely a provision against any illness supervening it, if there is afterwards an acceptance of the application, upon which it depends for its vitality. This view, which (373) is the prevaling one, if there is anything to the contrary, is clearly stated by the *Chief Justice* in *Grier v. Ins. Co.*, 132 N. C., 542, where it is said that the risk of future illness, that is, after the date of the "binding receipt," is taken by the company, if it afterwards accepts the application or the insurance becomes effective, and the insurance

relates back to the date of the receipt; and further, that the receipt of the premium acknowledged in the policy and the recital of the fact that the policy was delivered while the insured was in good health cannot be contradicted, in the absence of fraud or other sufficient equitable element, as they affect the validity of the contract of insurance, which cannot be impeached in this collateral way. This is sound doctrine, when confined within its proper limits, and not only is it such, but it is also eminently just. The company can show that the manual delivery of the policy was conditional, for this goes to the execution of the contract, or it may prove fraud or other equitable matter in the same way, for the purpose of showing that it never took effect as a contract, as in *Garrison v. Machine Co.*, 159 N. C., 285; *Pratt v. Chaffin*, 136 N. C., 350; *Powell v. Ins. Co.*, 153 N. C., 124; but when the policy is once delivered and becomes effective as a contract, statements therein which, if falsified, will affect its continued validity, cannot be contradicted with a view to avoid the insurance. The entire subject is fully discussed in *Grier's case, supra,* and to some extent in *Kendrick v. Ins. Co.*, 124 N. C., 315, and *Rayburn v. Casualty Co.*, 138 N. C., 379. See, also, Joyce on Insurance, sec. 64.

It became material to inquire whether the company, by its agent with competent authority, had ratified the execution of the binding receipt, as the policy itself was delivered to John B. Gardner, while he was ill with typhoid fever which resulted in his death, the application, which he signed, providing that it should be issued and delivered and the premium paid while he is in good health, in order to be binding upon the company. We will not stop to consider the question whether the evidence was sufficient to warrant the peremptory instruction of the court, that V. T. Lamb had the requisite power to ratify, as the
(374) evidence may be changed at the next trial and present the matter in a different aspect, rendering premature and futile any discussion of it at present; and, besides, this decision may cause it to be considered in a different way. Of course, an agent must have authority in order to bind his principal. This is axiomatic. 1 Joyce on Insurance, sec. 64.

But, as we have intimated, the underlying question in this case, which affects both what is called the "binding slip or receipt" and the validity of the policy, is, whether the company, by itself or its duly authorized agent, has waived the benefit of the false representation made in the application, with full knowledge of the facts. If the representation made in the application was false and material, and the jury so found, and the company was ignorant of its falsity, it vitiates the so-called binding receipt and the policy, unless the company has in some way waived it by its conduct and with full knowledge of the facts. "A false

representation avoids a contract of insurance when material, and wholly without reference to the intent with which it is made, unless it is otherwise provided by statute." Vance on Insurance, p. 269. We need not inquire whether this rule is too broadly stated by Mr. Vance, as it applies, with the meaning intended by him, to the facts of this case, and it has been stated by this Court substantially in the same terms. Every fact which is untruly stated or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium, 16 A. & E. Enc., of law (2 Ed.), 933; Vance on Insurance, 284. This definition was adopted by us in *Fishblate v. Fidelity Co.,* 140 N. C., 589, and has since been approved several times, and is also the definition of other courts. *Bryant v. Ins. Co.,* 147 N. C., 181; *Alexander v. Ins. Co.,* 150 N. C., 536; *Annuity Co. v. Forrest,* 152 N. C., 621; *Ins. Co. v. Conway,* 11 Ga. App., 577; *Maddox v. Ins. Co.,* 6 Ga. App., 681; *Tally v. Ins. Co.,* 111 Va., 778; *Ins. Co. v. Trust Co.,* 38 L. R. A. (N. S.), 33; 3 Cooley Insurance, p. 1953; Vance on Insurance, pp. 267, 269. (375)

It may be stated as a general rule that where, in an application for insurance, a fact is specifically inquired about, or the question is so framed as to call for a true statement of the fact, or to elicit the information desired, reason and justice alike demand that there should be a fair and full disclosure of the fact, or at least a substantial one. 3 Cooley Insurance, p. 2009 (d).

Our case is not essentially different from *Alexander v. Ins. Co., supra,* in which this Court said: "The company was imposed upon (whether fraudulently or not is immaterial) by such representation, and induced to enter into the contract. In such case it has been said by the highest Court that, 'Assuming that both parties acted in good faith, justice would require that the contract be canceled and premiums returned.' *Ins. Co. v. Fletcher,* 117 U. S., 519," citing *Bryant v. Ins. Co., supra,* as decisive of the question. Our statute, Revisal of 1905, sec. 4808, affirms this view, for while it declares that all statements in an application for insurance shall be construed as representations merely, and not as warranties, it further provides that no representation, unless material *or* fraudulent, shall prevent a recovery, the meaning of which plainly is, that a material representation shall avoid the policy if it is also false and calculated to influence the company, if without notice of its falsity, in making the contract at all, or in estimating the degree and character of the risk, or in fixing the premium. *Bryant v. Ins. Co., supra.* Our case is well within this rule.

It is not necessary, as said in *Fishblate's case,* "that the act or conduct of the insured, which was represented by him in the application, should have contributed in some way or degree to the loss or damage, for which the indemnity is claimed." Whether it was material depends upon how, if at all, it would have influenced the company in the respect we have just stated. The determining factor, therefore, in such case is, whether the answer would have influenced the company in deciding for itself, and in its own interest, the important question of accepting (376) the risk, and what rate of premium should be charged. The questions generally are framed with a view to estimating upon the longevity of the applicant, and any answer calculated to mislead the company in regard thereto should be considered as material. There are some contingencies that cannot be provided against, but the company is entitled to have a fair and honest answer to every question, which will enable it to exercise its judgment intelligently and to have the necessary information as a basis upon which to make its calculations, although its best deduction therefrom may only approximate the actual result in the particular case. 3 Cooley Insurance, pp. 1952, 1953; *Ins. Co. v. Conawy,* 11 Ga. App., 557. The applicant is required to act in the utmost faith in giving the information. *Ins. Co. v. Conway, supra.* In life insurance, it is important for the company to know the individual history and characteristics of the applicant, his idiosyncrasies, or the pecularities of his mental and physical constitution or temperament, and his environment at the time of his application. In no other way could the risk or hazard be well determined, or the premium fixed. Is he weak in body or in mind, and if so, to what extent and in what particular way, and what are his inherited traits or the mental and physical characteristics of his progenitors? The inquiry must be not only individual, but ancestral, and the investigation searching as to his past life and future intentions, as experience has shown, in order to make anything like a reliable estimate of the risk to be incurred. And his habits and surroundings are also to be known, considered, and weighed. Has he been exposed to any contagious, infectious, or transmissible disease, is a perfectly legitimate inquiry. Does he propose to change his residence, so that his exposure to climatic of other diseases will be greater and the hazard correspondingly increased? These and many other questions of like kind any prudent man engaged in the business of life insurance would be more than likely to ask, and the answers to them would surely tend to shape the judgment of the underwriter and influence his decision in regard to the risk. Any in- (377) surance company that would issue a policy or contract for insurance upon any other basis and without proper inquiry would be so reckless as to forfeit the confidence of the public.

However it may be generally, in our case it appears that the applicant had been intimately associated with his wife, who was afflicted with typhoid fever, requiring seventeen medical visits for treatment. He nursed his wife and a child in the same house afflicted with the same disease, throughout their illness, and shortly afterwards was himself attacked by it and died. There was ample evidence to show that typhoid fever is transmissible from one person to another in various ways—by flies and other insects, drinking-water, milk and other substances of a like kind, when infected by flies, which carry the fatal germs from the stools or excreta of the typhoid patient. It was testified that when there is typhoid fever in a house or on the premises, it presents a very dangerous situation for those who occupy them or who visit there, as they are thereby brought in close contact with the germ-laden substances and are more exposed to infection. A person physically able to resist or throw off the disease may escape, or he may be so fortunate as not to become the victim of the germ bearers, but he is nevertheless in dangerous surroundings, where the chances of infection are greater than if he were more remote from the premises of the patient. There was also evidence that the application for insurance would have been rejected had the question been correctly answered. John B. Gardner knew, or rather must have known, at the time he answered the question, that he had very recently been intimately associated with his sick wife as her nurse during her severe illness, and the company, if ignorant of the fact, was misled by his answer as to the truth of the matter. Under the charge of the court, which is sustained by our decisions, and was in accordance with the established doctrine, the jury found that the representation was false and was also material, and there was evidence to support the finding. This being so, the question is, Did the defendant, with knowledge of the facts by itself or its agent, waive its right to insist upon this false statement, and, thereby, ratify the "binding slip"? If it did, then the slip being valid, the company took the risk of the illness of the assured occurring subsequent to its date, and the policy was rightfully delivered by defendant's agent to Gardner, (378) although he was sick at he time. *Grier v. Ins. Co., supra.* If it did not thus waive its right, the next question will be, Did the agent deliver the policy, not knowing that the statement in the application was false, and being led thereby to believe that the slip was valid and, of itself, bound him to deliver the policy, and was he influenced by this fact to deliver the policy? This all relates to the valid execution of the policy, and does not contradict or vary its terms.

It will not be denied, we should think, that there can be no legal waiver of a right without a knewledge of the right which is claimed to have been relinquished. The doctrine is well stated in 29 A. & E. Enc. of

Law, at p. 1093: "There can be no waiver, unless the person against whom it is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for their enforcement. No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it." If there was any fraudulent or collusive agreement between the agent and Gardner for the delivery of the policy in disregard of the company's rights, it would avoid the entire transaction and defeat plaintiff's recovery, for fraud vitiates everything. In such case, the agent would be representing himself, and not his principal, and his authority to speak or act for him would cease, as the party claiming the insurance and who assisted in the fraud or was *particeps criminis* cannot take advantage of his own or the agent's wrong. "A contract made by an agent under the influence of bribery (or fraud or collusion) or one made to the knowledge of the other party, in fraud of the principal, is voidable by the latter." Tiffany on Agency, pp. 229-326; *Sprinkle v. Indemnity Co.*, 124 N. C., 405. But the other party (here Gardner) must have had knowledge of the principal's right and that the agent was defrauding his principal, or was disobeying instructions, or acting without the scope of his employment, or he must have colluded with him and thereby obtained something belonging to the principal without being legally entitled thereto. "An agent cannot be allowed to put himself into a position in which his interest and his duty will be in conflict, and if a (379) person who contracts with an agent so deals with him as to give the agent an interest against the principal, the latter, on discovering the fact, may rescind the contract, notwithstanding that it was within the scope of the agent's authority. Thus, a gratuity given, or promise of commission or reward made to an agent for the purpose of influencing the execution of the agency, vitiates a contract subsequently made by him, as being presumptively made under that influence." Tiffany on Agency, p. 229. Under such circumstances of fraud or collusion, notice to the faithless agent of Gardner's illness or any other vital fact would not be imputed to the company, his defrauded principal. Tiffany on Agency, pp. 262-3; *Sprinkle v. Indemnity Co.*, 124 N. C., 405; *Bank v. Burgwyn*, 110 N. C., 267; *Stanford v. Grocery Co.*, 143 N. C., 419. The Sprinkle decision is very much in point, both as to the fraud of the agent and its effect upon the question of notice to the principal of his faithless conduct. The case, in this aspect, may be submitted to the jury, if the defendant so desires and tenders a proper issue for the purpose.

We can now see how important it is to have additional issues or a modification of the present ones, except the first four of them, for in the light of the entire case—pleadings, evidence, charge and verdict—neither

the plaintiff nor the defendant was entitled to a judgment, the verdict having fallen short of presenting all the essential facts, and the Court, therefore, being unable to determine the rights of the parties and pronounce judgment. As some confusion may arise if we retain any part of the verdict, for instance, as to the first four issues, we will set aside the entire finding and let the parties begin anew, which will be in the nature of a repleader, though not technically so, and it is so ordered.

New trial.

Cited: *Daughtridge v. R. R.*, 165 N. C., 193, 195, 198; *Schas v. Ins. Co.*, 166 N. C., 60; *Hardy v. Ins. Co.*, 167 N. C., 23; *Cottingham v. Ins. Co.*, 168 N. C., 265; *Lea v. Ins. Co., ib.*, 483; *Crowell v. Ins. Co.*, 169 N. C., 38.

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W. S. WILSON v. S. H. SCARBORO ET AL.

(Filed 29 October, 1913.)

1. Issues—Deeds and Conveyances—Reformation—Fraud and Mistake.

In an action to reform a deed for fraud or mutual mistake of the parties, there was an affirmative finding upon an issue as to whether there was a parol agreement omitted from the written contract by fraud of the plaintiff or the mutual mistake of the parties. There was no evidence of fraud, and the judge refused the plaintiff's prayer to so instruct the jury: *Held*, the answer to the issue being responsive on the question of fraud as well as mutual mistake, the error permeates the entire case, entitling the plaintiff to a new trial.

2. Contract, Written—Parol Evidence—Contradiction.

Parol evidence is not admissible to contradict, add to, or vary the terms of a written contract; and in an action upon the written instrument it may not be shown that contemporaneously with the writing, the parties had agreed by parol upon other terms and conditions and required their performance by a party, as a part of the consideration upon which the writing had been executed, when the failure to perform the parol stipulation would not only vary the instrument, but invalidate the entire transaction.

3. Deeds and Conveyances—Timber Deeds—Contracts, Executed—Realty—Parol Evidence.

A conveyance of the right to cut and remove timber growing upon lands, within a specified period of time, based upon a valuable consideration, or what is usually known as a deed to standing timber, is an executed contract, operating to convey a defeasible estate therein; and as standing timber is a part of the realty, the contract must be in writing, and may not be contradicted or varied, or proved by parol, but only by

the contract duly executed. Hence, in this case it was inadmissible to prove a contract resting solely in parol, requiring an execution of a note or the giving of other security to one holding a mortgage on the land as a condition upon which the grantee of the timber should exercise his rights under the written contract.

4. Deeds and Conveyances—Timber Deeds—Fraud and Mistake—Instructions.

In an action to reform a timber deed for fraud, or for mutual mistake of the parties, in not incorporating in the writing a parol agreement alleged to have contemporaneously been made, giving the grantee the right to suspend the cutting, etc., if the market price of lumber should decline so as to make is unprofitable, an instruction is erroneous, upon an issue as to whether the plaintiff suspended the cutting and failed to pay for the defendant's timber after he had begun to cut the same, in violation of his agreement, that the issue should be answered affirmatively if the jury found that the parol agreement was omitted from the written contract by plaintiff's fraud, or through mutual mistake, as there were other facts involved in the issue.

5. Contracts, Written—Reformation—Mutual Mistake—Evidence.

To reform a written instrument on the ground of mistake, it must be shown that the mistake was mutual, and not only the mistake of one of the parties to the instrument, who seeks this equitable relief.

(381) APPEAL by plaintiff from *Ferguson, J.*, at October Term, 1912, of WAKE.

This action was brought to recover damages of the defendants for entering upon land and unlawfully taking possession of and detaining certain timber thereon. The defendants "bargained and sold and conveyed" to the plaintiff certain timber described in the contract or conveyance, with the right and privilege to cut and remove the same within five years from 5 April, 1909. While the contract does not so state, the defendants, in their answer, allege that plaintiff was required "to cut the timber continuously after once beginning to cut, until the cutting of the same should be completed, unless while cutting the timber the price of lumber should decline, so that he could not cut the timber at a profit," and that said agreement was omitted from the contract by the mutual mistake of the parties or by the mistake of the defendants and the fraud of the plaintiff, and that plaintiff further promised to put up a guarantee fund of $1,000 or give a note for that amount to one James Moore, who held a mortgage on the land, to insure the full and faithful performance of the contract. This statement of facts, with the issues and answers thereto, will sufficiently explain the matters in controversy.

The following verdict was rendered by the jury:

1. Did the defendants execute a contract with plaintiff to sell him the timber described in the complaint, as alleged therein? Answer: Yes.

2. Was there an agreement between the plaintiff and the de- (382) fendant, before the execution of the written contract, that the plaintiff would cut the timber described in the complaint continuously, after once beginning to cut, until the cutting of the same was completed, unless while cutting the same the price of lumber should decline so that he could not cut the said timber at a profit, as alleged in the amendment to the answer? Answer: Yes.

3. If so, was such agreement to continuously cut such timber omitted from the contract by fraud of the plaintiff, or by the mutual mistake of the plaintiff and the defendants? Answer: Yes.

4. Did plaintiff, at the time of the verbal contract, agree to pay to the defendants the sum of $1,000 as security or guaranty for the proper cutting of the timber described in the complaint, and for the full performance of the contract between the plaintiff and defendants? Answer: Yes.

5. Did plaintiff, at the time of and contemporaneously with the execution of the written contract, agree with defendants that he would give to Mr. James Moore a note for $1,000, which would be as satisfactory to the said Moore as a deposit of $1,000 in money, as a guarantee for the performance of the terms of the contract between plaintiff and defendants, and that failing to give such note to the said Mr. Moore, he would desist from cutting defendants' timber and remove his mills from their lands? Answer: Yes.

6. Did plaintiff give such note to the said James Moore? Answer: No.

7. Did defendants waive the giving of such note? Answer: No.

8. Did plaintiff suspend cutting and paying for defendants' timber after he had begun to cut the same, in violation of his agreement with defendants? Answer: Yes.

9. Did plaintiff remove from defendants' lands timber cut thereon before paying defendants for the same? Answer: No.

10. Did plaintiff cut stumps higher than twenty-four (24) inches; or did he leave logs lying in the woods; or timber in the tops of trees; or leave timber standing scattered over places partly cut (383) over, in violation of the contract with defendants? Answer: Yes.

11. If plaintiff violated the contract in any or all of the respects mentioned in the preceding issue, what amount of damages in money did the defendants sustain thereby? Answer: Six dollars and 75/100 ($6.75).

12. Did plaintiff negligently permit fire to be communicated to defendants' lands and thereby cause damage to defendants' timber, wood, undergrowth, etc.? Answer: No.

13. If your answer to the preceding issue shall be "Yes," what amount of damages did defendants sustain thereby? No answer.

14. Did defendants wrongfully and unlawfully refuse to allow plaintiff to reënter upon their lands and to resume the cutting of their timber under said contract, after he had suspended the cutting of the same? Answer: No.

15. If your answer to the preceding issue shall be "Yes," what damage did plaintiff sustain thereby? No answer.

Judgment on the verdict for the defendants, and plaintiff appealed.

Armistead Jones & Son, Douglass & Douglass, R. N. Simms, and W. H. Lyon for plaintiff.

Jones & Bailey for defendants.

WALKER, J., after stating the case: The defendants allege that there was a stipulation as to the manner of cutting the timber which was omitted from the contract by mutual mistake or by the fraud of the plaintiff inducing a mistake on the part of the defendants. But we do not find in the record any evidence of fraud, and as the jury, in answer to the third issue, have found that there was fraud or mutual mistake, without designating which of the two, we are unable to tell whether their answer was based upon the fraud or the mistake. The court submitted the question of fraud to the jury against an express prayer of the plaintiff that there was no evidence of fraud, and consequently we have an erroneous finding upon the third issue. The jury might have found that there was fraud and no mistake, and yet, misled by the erroneous (384) ruling and instructions of the court, have given the answer, which is fully responsive to the issue. This error so permeates the entire case that it is sufficient of itself to require a new trial. It makes no difference that the alleged agreement was made, unless there was fraud or mutual mistake, for which the contract will be corrected and made to record the truth. There was also error in the rulings upon the fifth issue, as evidence was admitted, over plaintiff's objection, of the agreement as to the deposit of $1,000 or the giving of a note of like amount to James Moore, as a security for the faithful performance of the contract. It evidently tended to vary the contract materially, and even to contradict it.

It was proposed by it to show an oral agreement, not inserted in the contract, which, if broken by the plaintiff, would terminate the timber contract and divest the plaintiff of all rights thereunder. Where the law does not require the contract to be in writing and it was not intended that the written instrument should state the whole of the agreement between the parties thereto, but that a part thereof should rest in parol,

the latter part may be proved, if it does not materially vary or contradict that which has been written, but is consistent therewith. The rule is thus stated in Clark on Contracts (2 Ed.), at p. 85: "Where a contract does not fall within the statute, the parties may, at their option, put their agreement in writing, or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be aided by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing and the whole constitutes one entire contract." Commenting on this passage, in *Evans v. Freeman,* 142 N. C., 61, we said: "In such a case there is no violation of the familiar and elementary rule we have before mentioned (against varying or contradicting a written agreement), because in the sense of that rule the written contract is neither contradicted, added to, nor varied; but leaving it in full force and operation as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing." Numerous cases in this (385) Court sustain this rule. *Cobb v. Clegg,* 137 N. C., 153; *Walker v. Cooper,* 150 N. C., 129; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97; *Evans v. Freeman,* 142 N. C., 61; *Walker v. Venters,* 148 N. C., 388; *Basnight v. Jobbing Co., ibid.,* 350; *Woodson v. Beck,* 151 N. C., 144. But the evidence admitted in our case does not fall within the well-settled rule, as it essentially varies and directly contravenes the written contract, incorporating in it a clause which, in a certain contingency, would nullify or destroy it. This cannot be done. When parties reduce their agreement to writing, parol evidence is not admissible to contradict, add to, or vary it; and this is so, although the particular agreement is not required to be in writing, the reason being that the written memorial is considered to be the best, and therefore is declared to be the only evidence of what the parties have agreed, as they are presumed to have inserted in it all the provisions by which they intended or are willing to be bound. *Evans v. Freeman, supra; Terry v. R. R.,* 91 N. C., 236. In *Evans v. Freeman, supra,* it was further said: "Numerous cases have been decided by this Court in which the application of the same principle has been made to various combinations of facts, all tending, though, to the same general conclusion, that such evidence is competent where it does not conflict with the written part of the agreement and tends to supply its complement or to prove some collateral agreement made at the same time. The other terms of the contract may generally thus be shown where it appears that the writing embraces some, but not all, of the terms. *Twidy v. Saunderson,* 31 N. C., 5; *Manning v. Jones,* 44

N. C., 368; *Daughtry v. Boothe,* 49 N. C., 87; *Perry v. Hill,* 68 N. C., 417; *Willis v. White,* 73 N. C., 484; *Terry v. R. R., supra; Cummings v. Barber,* 99 N. C., 332."

This Court, in *Ray v. Blackwell,* 94 N. C., 10, and *Moffit v. Maness,* 102 N. C., 457, refused to apply the principle allowing the unwritten part of the contract to be shown because the oral evidence tended to contradict or vary the written part of the contract, and not merely to add other consistent terms to it. In *Moffit v. Maness, supra,* we were (386) admonished that the rule against the admissibility of parol testimony to vary the terms of a written instrument has, perhaps, been relaxed too much, and that the farthest limit has been reached in admitting such testimony, beyond which it will not be safe to go. The Court sounds the alarm and warns us against the dangers ahead. It is safer to trust in the writing—the memorial selected by the parties for preserving the integrity of their treaty—than to confide in human memory for the exact reproduction of the facts, for, says *Taylor, J.,* "Time wears away the distinct image and clear impression of the fact, and leaves in the mind uncertain opinions, imperfect notions, and vague surmises." *Smith v. Williams,* 5 N. C., 426. There was no attempt to reform the contract for fraud or mistake in this respect, and the fourth and fifth issues are not so framed.

The instruction upon the eighth issue left out of consideration that, by the terms of the oral agreement, as it is stated by defendant, the plaintiff had the right to suspend the cutting if the market price of lumber had so declined as to make it unprofitable, and the jury were told, instead, that they should answer that issue affirmatively, if they found that there was a stipulation for continuous cutting, and it was omitted from the agreement by fraud of plaintiff or mutual mistake. If it was made and left out of the written agreement by fraud or mistake, the real inquiry then was, whether the plaintiff had violated it by failing to cut continuously when in the then state of the lumber market it was profitable to continue the cutting.

It will be well to notice one position taken by the defendant, which is, that the contract is executory and not an executed contract of sale—a mere agreement to convey the timber, and not a perfected conveyance of it. But we understand that the same rule applies to both executory and executed written contracts, with regard to the competency of parol evidence to vary or contradict them. If the plaintiff has violated the contract as written by the parties, or as it should have been written, if there was fraud or mistake, he may not be able to recover, depending, of course, upon the nature of the breach and the particular terms of the contract. Looking at the verdict and eliminating the first eight (387) issues, as to which there was error, we do not see that the plain-

tiff has committed any breach from which a forfeiture of his contract results. The jury have said that he did not remove any cut timber without paying for it. Apart from this alleged breach, which the jury have negatived, the important and dominating issues in the case are the first eight.

Our opinion, though, is that the contract is an executed one and not merely executory. We have so repeatedly held as to similar contracts in recent years. In *Lumber Co. v. Corey,* 140 N. C., 462, it was said: "This Court has so recently and so fully considered the question as to the true construction of contracts substantially like the one under review (which is substantially like the Wilson-Scarboro deed) that it would seem almost useless for us to add anything to what has already been said. We have decided that such a contract, which could be treated as in effect a conveyance, passes a present estate in the timber, defeasible as to all timber not cut within the limit of time fixed by the parties in their agreement. This is the true construction." And again, in *Hawkins v. Lumber Co.,* 139 N. C., 160: "The true construction of this instrument (a contract for cutting timber within a fixed period) is that the same conveys a present estate of absolute ownership in the timber, defeasible as to all timber not removed within the time required by the terms of the deed; and this statement of the law is approved in *Lumber Co. v. Corey,* 140 N. C., 467." In *Bunch v. Lumber Co.,* 134 N. C., 116, it is said that the form of the instrument counts for little. "It is more a difference in form than in substance. In no event should we give a construction to the instrument which will confer any greater right or estate than is commensurate with the object and purposes of the parties, as expressed in it. The spirit and letter of the contract exclude the idea that when the time fixed by it expired the defendant's assignor was to have any right, interest, or estate in the timber then standing on the land." And approving *Strasson v. Montgomery,* 32 Wis., 52, the principle is thus stated: "The conveyance is of all the trees and timber on the premises, with the proviso that the vendee should take the same off the land within four years. It is well settled, on prin- (388) ciple and by authority, that the legal effect of the instrument is that the vendor thereby conveyed to the vendee all of the trees and timber on the premises which the vendee should remove therefrom within the prescribed time, and that such as remained thereon after that time should belong to the vendor or to his grantee of the premises." See, also, *Hornthal v. Howcutt,* 154 N. C., 230, where the same doctrine was recognized and applied by this Court, speaking by *Justice Allen.* It has also been held that growing trees are a part of the realty, and deeds and contracts concerning them are governed by the law applicable to that species of property. *Drake v. Howell,* 133 N. C., 163; *Hawkins v. Lum-*

ber Co., supra. We see, therefore, that this is an executed contract operating as a conveyance of the timber and a defeasible estate therein, and, of course, is required to be in writing. It cannot be contradicted or varied, nor can it be proved by parol, but only by the writing duly executed.

We should, perhaps, notice another matter. A careful reading of the testimony has not convinced us that there is any evidence of a mutual mistake by the parties in writing their contract. A contract is the agreement of both parties, and not merely the intention of one. Their minds must meet and be in accord upon one and the same thing at the same time. *Rodgers v. Bell,* 156 N. C., 378; *Elks v. Ins. Co.,* 159 N. C., 619. "Even if the defendant had clearly shown that it so understood the agreement, it will not do, as the Court proceeds, not upon the understanding of one of the parties, but upon the agreement of both. No principle is better settled." *Lumber Co. v. Lumber Co.,* 137 N. C., 431, citing *Brunhild v. Freeman,* 77 N. C., 128; *Prince v. McRae,* 84 N. C., 674; *Bailey v. Rutges,* 86 N. C., 520, and other cases.

It follows from this doctrine that no contract can be altered or amended in any substantial respect, except by consent of both parties or by what may be equivalent thereto. If a court finds that there has been a mutual mistake, or its equivalent, viz., that there has been a mistake of one of the parties brought about by the fraud of the other, it will in an otherwise proper case, reform the contract, but not (389) otherwise. The undisclosed intention or understanding of one will not answer the purpose. "The mistake, to be relieved against in equity, must be one that is mutual, material, and not induced by negligence. It must be mutual, if the complainant wishes to have the instrument *reformed,* and not simply set aside, because equity cannot undertake to *reform* on the ground of ignorance or misapprehension of *one* of the parties as to any facts, though it may rescind. It is essential that the mistake, to be relieved against in equity, must be an error on both sides. If, however, such ignorance or misapprehension was induced or fraudulently taken advantage of by the other party, relief will be administered, but obviously on different grounds." Bispham on Equity, sec. 191. "Equity will reform a written contract or other instrument *inter vivos* where, through mutual mistake, or the mistake of one of the parties induced or accompanied by the fraud of the other, it does not, as written, truly express the agreement of the parties." Eaton on Equity, sec. 618; *Warehouse Co. v. Ozment,* 132 N. C., 839; *Pelletier v. Cooperage Co.,* 158 N. C., 403; *Dameron v. Lumber Co.,* 161 N. C., 498, and same case at this term, *ante,* 278.

The defendants' evidence in this case hardly conforms to the standard of proof required for a correction of written instruments. It tends to

show a mistake in his own mind, rather than one common to the parties—his own understanding, rather than the agreement of the parties. It must have been the intention of both to write the contract as he now claims it should be, and to insert in it the clause alleged to have been left out.

The judgment and verdict will be set aside, and a new trial granted.

New trial.

Cited: Archer v. McClure, 166 N. C., 145; *Brown v. Mitchell,* 168 N. C., 313; *Leffal v. Hall, ib.,* 409; *Wilson v. Scarboro,* 169 N. C., 654; *S. c.,* 171 N. C., 607.

(390)

ELIZABETH HOLT ET ALS. v. S. B. ZIGLAR, S. A. ALLEN ET ALS.

(Filed 29 October, 1913.)

1. Wills—Caveat—Judgment Set Aside—Parties.

Where a judgment invalidating a paper-writing purporting to be a will has been set aside, for fraud, it leaves the caveat thereto in full force and effect (Revisal, sec, 3137) until the issue thus raised is tried and a valid judgment has been rendered; and all proper and necessary parties can be made for a final disposition of the proceedings.

2. Wills—Probate—Common Form—Evidence—Interpretation of Statutes.

A will probated in common form before the clerk of the Superior Court is conclusively valid until declared void by a competent tribunal, and may be offered in evidence in proceedings to caveat the will. Revisal, sec. 3128.

APPEAL from *Cook, J.,* at February Term, 1913, of ROCKINGHAM.

PLAINTIFF'S APPEAL.

These are the issues submitted:

1. Was the judgment setting aside the will of Valentine Allen obtained by collusion and fraud, as alleged in the complaint? Answer: Yes.

2. Has more than three years elapsed since the decree of the November Term, 1885, setting aside the will, and institution of this suit? Answer: Yes.

3. Has more than ten years elapsed since the decree of the November Term, 1885, setting aside the will, and institution of the suit? Answer: Yes.

4. Was Elizabeth Holt married after she became 21 years of age? Answer: Yes.

5. Is Elizabeth Holt's right to attack the decree of 1885, for causes set forth in the complaint, barred by the three-year statute of limitations? Answer: No.

6. Was Mary E. Bouldin a *bona fide* purchaser for value and without notice, of the lands described in the deed from S. B. Ziglar and wife, Margaret Ziglar, to Mary E. Bouldin? Answer: No.

(391) 7. Was J. P. Faries a *bona fide* purchaser for value and without notice, of the lands conveyed in the deed from Mary E. Bouldin and husband to J. P. Faries? Answer: No.

8. Was John Henry Carter a *bona fide* purchaser for value and without notice, of the land described in the two deeds from Samuel Allen and wife to John Henry Carter? Answer: Yes.

9. Was John M. Galloway, trustee, a *bona fide* purchaser for value and without notice, of the land described in the deed of trust from J. Ham Cardwell and wife, Ellen Cardwell? Answer: No.

10. Was the 900 acres of land mentioned in Valentine Allen's will divided into three equal shares, and a share each allotted to Samuel A. Allen, Margaret Ziglar and husband, and Ellen Cardwell and husband, and did said parties enter into possession thereof? Answer: Yes.

11. At the time of the death of Valentine Allen, what was the number of living children of Ellen Cardwell? Answer: Seven (7).

12. At the time of the death of Valentine Allen, what was the number of living children of Margaret Ziglar? Answer: Four (4).

Did the children of Margaret Ziglar execute and deliver to Mary E. Bouldin a quitclaim deed for all their right, title, and interest in the real estate of Valentine Allen? Answer: Yes.

Upon the coming in of these issues, his Honor rendered a decree from which plaintiffs appeal.

Watson, Buxton & Watson, C. O. McMichael for plaintiffs.
Humphreys & Sharp, Manly, Hendren & Womble for defendants.

BROWN, J. This case was before us at a former term, 159 N. C., 272, which is referred to for a general statement of the case.

His Honor, *Judge Cooke,* in accordance with that opinion, upon the admitted facts and record evidence in the case, instructed the jury in accordance with our views, and a verdict was rendered accordingly.

The effect of the finding of the jury and the decree of *Judge* (392) *Cooke* upon the first issue is to set aside the judgment of the Superior Court of Rockingham, November Term, 1885, in the case of *Samuel A. Allen v. Margaret Ziglar and others,* invalidating the

will of Valentine Allen, and leaving the caveat to said will in full force and effect (Revisal, sec. 3137) until the issue thus raised is tried and a *bona fide* and valid judgment is rendered.

This we think should end this case, as there is no exception arising under that first issue.

In our former opinion, 159 N. C., 279, we said: "The only issue raised by the pleadings in this case is one of fraud and collusion in respect to the manner in which that will was set at naught."

In our view of the status of this case, it is not proper that we construe this will now.

All of the issues submitted, except the first, are set aside. So much of the judgment of the Superior Court as declares that "the decree entered in the suit of Samuel A. Allen, caveator, against Elizabeth A. Allen and others, disposed of at the November Term, 1885, of the Superior Court of Rockingham County, was obtained and entered through fraud and collusion; that the last will and testament of Valentine Allen was properly proven and probated, according to law, before the clerk of the Superior Court and probate judge of the county of Rockingham on 6 October, 1884, and was and is recorded in Book E of the Record of Wills of said county, at pages 289 *et seq.*, and was offered in evidence in this cause," is affirmed.

This ends this action, but it leaves the caveat proceedings of Samuel Allen of 1885 still pending for trial in the Superior Court of Rockingham County.

The probate of the will before the clerk was in common form, but it is conclusive evidence of the validity of the will until it is vacated or declared void by a competent tribunal, and may be offered in evidence. Revisal, sec. 3128.

As we have held that the judgment entered in the caveat proceedings is fraudulent and void, it necessarily follows that the caveat proceedings have not terminated.

It is still open to Samuel Allen, the caveator, to have the (393) issue thus raised passed on by a jury, and all proper and necessary parties can be brought in in that proceeding. *Holt v. Ziglar,* 159 N. C., 279.

This cause is remanded to the Superior Court of ROCKINGHAM, with instructions to enter a final judgment in accordance with this opinion. The entire cost of the action as well as costs of this appeal will be taxed against the defendants.

The judgment except as hereinbefore stated, is

Reversed.

APPEAL BY DEFENDANT FARIES.

BROWN, J. This is the appeal of the defendant J. P. Faries in the above cause. It is improvidently taken, and must be dismissed.

As an assignee of Samuel Allen, this defendant may be made a party to the caveat proceedings referred to in the other opinion.

Let costs of this appeal be taxed against defendant Faries.

Appeal dismissed.

N. P. POWELL v. A. T. STRICKLAND.

(Filed 5 November, 1913.)

1. Husband and Wife—Witnesses—Criminal Conversation—Adultery—Parties—Interpretation of Statutes.

Our statutes, section 1628 of Revisal, removing the disqualification of a witness to testify by reason of interest or crime, etc.; section 1629, admitting testimony of a witness interested in the event of the action; section 1630, compelling parties or those in whose behalf a suit is brought to give evidence in the proceedings, etc., excepting as to adultery and actions for criminal conversation; section 1631, making testimony of husband and wife competent and compellable, on behalf of any party to the action, excepting, among other things, "evidence for or against each other," in proceedings brought in consequence of adultery and actions or proceedings for or on account of criminal conversation, should be construed together, and thus construed, they do not prohibit the evidence of the husband as to the conduct of his wife, where she is not a party, in his action against another for damages for criminal conversation with his wife and the alienation of her affections.

2. Same—Legal Interest.

Where the husband brings his action against another for criminal conversation with his wife and the alienation of her affections, the testimony of the husband as to the conduct of the wife, where she is not a party, is not testimony against the wife within the meaning of the statute, Revisal, sec. 1636, for she has no legal interest in the event of the case, and will not be bound by this evidence, or the judgment rendered, in any action which may be brought against her involving this same matter, or in which she may have a legal interest.

3. Husband and Wife—Criminal Conversation—Circumstantial Evidence.

In this action brought by the husband to recover damages against another for criminal conversation with his wife and alienation of her affections, it is *Held*, that the husband's evidence as to the conduct of his wife was material, tending, as it did, to forge the first link in the chain of circumstances that he relied on.

4. Same—Adultery.

In an action to recover against another damages for criminal conversation with the wife and the alienation of her affections, it is not necessary for the husband to show the adultery of the wife with the defendant by direct proof, but evidence of the circumstances are sufficient for that purpose if the jury can reasonably infer therefrom the guilt of the parties, and in this case the evidence is held sufficient to take the case to the jury.

5. Husband and Wife—Criminal Conversation—Explanation—Failure of Defendant to Testify.

Where in an action for damages for criminal conversation with the wife and for alienation of her affections, there is evidence sufficient for the consideration of the jury, and requiring explanation by the defendant, his refusal to go upon the stand as a witness in his own behalf and explain it is the subject of fair comment against him to the jury by the plaintiff, subject to the control of the trial judge.

6. Husband—Criminal Conversation—Consent of Wife—Defenses.

The consent of the wife to her own defilement is no defense to an action brought by the husband against another for damages for criminal conversation with her and the alienation of her affections.

7. Husband and Wife—Criminal Conversation—Punitive Damages.

Punitive damages may be awarded, in the discretion of the jury, to the husband in his action for damages brought against another for criminal conversation with her, and alienation of her affections, in view of all the facts and circumstances of the case.

APPEAL by defendant from *Cline, J.*, at April Term, 1913, (395) of FRANKLIN.

This action was brought to recover damages for criminal conversation with plaintiff's wife and the alienation of her affections. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed, after taking and reserving exceptions.

Bickett, White & Malone and W. M. Person for plaintiff.
W. H. Yarborough and Spruill & Holden for defendant.

WALKER, J. This appeal, in one aspect of it, involves the competency of a husband to testify as a witness in his own behalf to the adultery of his wife with the defendant, she, of course, not being a party to the record. It is well known that, at common law, parties to and persons interested in the event of an action were not permitted to testify, nor could the husband or wife testify for or against each other, except in certain cases not necessary to be mentioned. But this has been changed radically by modern legislation, under the wise and skillful leadership of Pitt, Taylor, Lord Denman, and Lord Brougham, the law reformers

of the last century, and the results of their work (14 and 15 Vict., ch. 99; 16 and 17 Vict., ch. 83) have become a part of the statute law of this country in one form or another. It would be vain and unprofitable to attempt any discussion of the authorities in other jurisdictions in regard to the true meaning and extent of this sweeping change in the law of evidence as it existed at the common law, because the statutes are so variant in their terms and phraseology that each must be considered and weighed according to its own peculiar tenor. Close examination of the cases elsewhere has led us, therefore, to conclude that little aid in the construction of our law can be derived from them. We therefore turn to our statutes, and former decisions construing them, for a solution of the question raised by the objection of defendant (396) to the testimony of his adversary.

By Revisal, sec. 1628, "incapacity" or disqualification to testify by reason of interest or crime is removed and every person who is offered as a witness shall be "admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to witnesses to wills." Section 1629 provides that no person shall be excluded as a witness on account of interest in the event of the action. By section 1630 parties themselves, and persons in whose behalf the suit or proceeding is brought or defended, shall be competent and compellable to give evidence, according to the practice of the court, in behalf of either or any of the parties to said suit or proceeding: *Provided,* that the section shall not be considered to apply to any action or other proceeding instituted in consequence of adultery, or to any action for criminal conversation. Section 1636 makes husband and wife of any party to an action or proceeding competent and compellable to testify, on behalf of any party to such action or proceeding, but nothing therein contained shall render husband or wife competent or compellable to give evidence *for or against each other* in any criminal action or proceeding or in an action or proceeding brought in consequence of adultery, or for divorce on account of adultery, nor in any action or proceeding for or on account of criminal conversation. We have omitted so much of the sections as are irrelevant to the case.

It was early held, in *Sumner v. Candler,* 92 N. C., 634 (opinion by *Justice Ashe*), that by section 342 of the Code of Civil Procedure, sec. 589 of The Code (being sections 1628 and 1629 of the Revisal of 1905), that a party to an action has become competent to testify in the courts, because of those sections, the disqualification by reason of interest in the suit or its event having been abolished, and this, too, without any aid from the other two sections, and the question is, whether

by the succeeding sections this capacity to testify has, in any way, been qualified. Section 1630 was intended to provide that parties (397) to actions should be competent to testify "for and against each other," and the proviso was inserted to prevent husband and wife from testifying "for or against each other" in suits to which they are parties and which are based upon charges of adultery, or where the party for or against whom the testimony is given has a legal interest in the cause or its event, as will hereafter appear.

We rest our decision upon the broad and practical view, hitherto taken by this Court with reference to the true meaning of these statutes, so as to execute the manifest intention of the Legislature and open the doors to a certain class of evidence heretofore excluded or barred out, and relax the rigorous rules of the common law, which often worked injustice, if not oppression, by excluding the truth in deference to a mere sentiment. These sections should be construed together, as they relate to the same subject—the competency of witnesses. The trend of our decisions has been to admit the husband and wife as witnesses unless, in a legal sense, they testified "for or against each other" within the meaning of the provisos to the sections, and it has been expressly held that a husband does not testify for or against his wife if she is not a party to the record and has no legal interest in the action or its event, that is, no interest that can, by the rules of law, be affected thereby. A sentimental interest is not sufficient for the exclusion of the testimony of one of the spouses, but it must be a legal interest; and it has been further held that where one is accused of adultery with the wife, who is not a party to the record, the husband is a competent witness to prove the adultery, as neither the evidence nor the judgment can thereafter be used against her. *S. v. Wiseman,* 130 N. C., 726 (opinion by *Clark, J.*); *S. v. Guest,* 100 N. C., 410; *S. v. Parrott,* 79 N. C., 615; *S. v. McDowell,* 101 N. C., 734. It is true that, in those cases, neither the husband nor the wife was a party to the record; but why is it any less against public policy, or any other reason which condemned this kind of evidence at common law, to admit it when the spouses are not parties, than when only one of them is, and the other is not legally affected by the evidence? The one tends just as much to cause dissension and discord between them (398) as the other, and the mere fact that one of them is a party to the record and the other is not, does not lessen the danger of an unhappy breach. If they are not testifying "for or against each other," there is no reason grounded in public policy, as declared now by the statute, why they should not be heard. Suppression of the truth, and exclusion of the light, would be far more impolitic and dangerous to society and the public than the admission of such testimony. The Legislature seems to have thought so, and hence the radical change from the antiquated

rule of the common law. The law was seeking after the truth, and at the same time retaining the real and essential principle of public policy, so far as necessary for the good of society in preserving peace and harmony in the family and the sacred confidences of the marriage state. But it was not deemed wise for the accomplishment of this purpose to exclude either spouse when the other is not a party to the record, and therefore not legally affected by it, or when neither is such a party.

Examining the cases we have cited a little more closely, we find that in *S. v. Wiseman, supra,* the wife and her paramour were indicted for fornication and adultery; a *nol. pros.* was entered as to the wife, and the husband permitted to testify against the remaining defendant; and reference is made to Code, sec. 588 (Revisal, sec. 1636), as qualifying the husband and wife to testify, provided neither is allowed to be a witness "for or against the other" in the cases enumerated in the final clause of that section. In *S. v. Guest, supra,* the wife pleaded guilty and was then permitted to testify against the other defendant as to her adultery with him. In *McDowell's case, supra,* the defendant was charged with bastardy, and the Court held that, while the wife could not prove non-access, or formerly, impotency (*Barringer v. Barringer,* 69 N. C., 179), "she could testify to the criminal intercourse with defendant, of which the child was the offspring; and now (since the enabling statutes), as she is not testifying "for or against" her husband, she is a competent witness under section 588 of Code (Revisal, sec. 1636) to testify in any "suit, action, or proceeding, except as stated in the said action." (399) In *Parrott's case, supra,* two were indicted for an affray, or a mutual assault and battery, in separate bills of indictment, and it was held that the wife of one of them was a competent witness for or against the other on his trial, as "the husband was in no legal sense interested in the result," *Chief Justice Smith,* for the Court, stating that they knew of no rule of law which excluded the husband, the conviction of White not being, in legal effect, the conviction of Parrott; and the same was decided in *S. v. Mooney,* 64 N. C., 54 (opinion by *Justice Settle*), and for the same reason. See, also, *S. v. Phipps,* 76 N. C., 203, cited with approval in *S. v. Guest, supra,* as establishing the same general rule. In the *Phipps case* the Court says: "The policy of the enactment leading to this result is a matter for the (exclusive) consideration of the Legislature. This Court can only declare the law as it finds it." It cannot legislate or make the law. The policy as thus fixed by the only competent body may be very unwise and unsalutary, but our only duty is to submit to it."

We see, then, very clearly what this policy is, viz., to exclude husband and wife when the evidence of either will, in a legal sense, prejudice the other; and that is not the case here. Neither the testimony of plaintiff

nor the judgment in this action can possibly be used against the wife in a prosecution for the adultery. We believe that this single reason for the exclusion of husband and wife, only where the testimony of one will legally affect the other injuriously, permeates the entire body of law on the competency of witnesses, so far as the matrimonial relation is involved. But it has been expressly held in *Barringer v. Barringer,* 69 N. C., 179, that the conclusion is irresistible from the language of the statutes, that husbands and wives are incompetent to give evidence only where they testify "for or against each other" in the class of cases specified in the proviso to Code of Civil Procedure, sec. 341 (Revisal, sec. 1636), and that construing that section so as to give full effect to the enacting clause and the proviso, it applies to suits where they alone are parties, as well as to those where a third party is concerned, as in our case, with the restriction imposed by the proviso. And to the same effect is *Rice v. Keith,* 63 N. C., 319. The wife was excluded there because the case was governed by the law which existed be- (400) fore 1868, the Court saying: "It is proper to call attention to section 341 of the Code of Civil Procedure, which establishes by express enactment the construction which the defendant contends should be placed upon the act of 1866. And from this we deduce an argument in favor of the conclusion at which we have arrived. The Legislature, in the act of 1868, has used language that leaves no room for doubt, and has introduced a new principle into the law of evidence. But under the law as it existed before the passage of this act, the evidence of Mrs. Keith was properly rejected." See *Bradsher v. Brooks,* 71 N. C., 322.

We need not assign reasons for the rule of exclusion at the common law, whether it was upon the ground of interest alone, when the testimony is in favor of the spouse, or marital bias, or public policy when it is against, or whether it was because they were considered as two souls in a single body (*qua sunt duæ animæ in carne una*), as Sir Edward Coke says (Coke on Littleton, 6b), for which he has been accused of striking the first false note; for need we combat the theory that it should be rendered impossible for husband and wife to speculate upon the other's dishonor, relying upon their own testimony to make or support a case? The full, final, and conclusive answer to all of this argument is, *Ita lex scripta est.*

In *Johnson v. Allen,* 100 N. C., 131, evidence of this same character was admitted in a case for criminal conversation, and the Court said "it was competent because it tended to show the relations between the plaintiff's wife and the defendant." The objection to the evidence was a general one, and the Court overruled it, though incidentally remarking that while the question was leading, it was, in this aspect, a matter addressed to the judge's discretion and not reviewable here, as there was no abuse

in its exercise. The Court took it for granted that the evidence was otherwise competent, for there was not even any discussion of the question as to its competency under the statute, which was clearly involved in the case and presented by the objection. If the judges had thought there was any doubt about it, they would not have passed it without some discussion.

(401) But *Broom v. Broom,* 130 N. C., 562, is very much in point, and even goes beyond the necessities of this case. There in a divorce suit the wife was allowed to contradict two witnesses for the plaintiff (her husband), who had testified to her adultery, the Court holding that she was not thereby testifying "for or against her husband." It was also held that the prohibition as to the testimony of husband or wife in such cases is not absolute, but restricted to such testimony of the one which is "for or against the other," and this is said by the court to be a wise provision. We cite that case only to show that the testimony must be "for or against" the other spouse. In *Grant v. Mitchell,* 156 N. C., 15, a criminal conversation case, the wife was excluded because she proposed to testify against her husband, and the Court (opinion by *Justice Allen*) laid stress upon the fact that the test is, whether the testimony of the one spouse would be "for or against" the other, as this is the language of the statute. So it was held in *McCall v. Galloway,* 162 N. C., 353, that the competency of the spouses depended upon whether they were offered to testify "for or against" each other, *Justice Brown* saying: "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.'" It was, therefore, held that declarations of the wife introduced "as against the husband" were incompetent. Her husband was a party, and for that reason her declarations as to his conduct were, in the sense of the statute, incompetent, as he had a *legal* interest in the action and its event. We, therefore, hold that plaintiff's testimony was competent. His counsel contended that it was harmless, but we do not think so, though it is not necessary to decide this question, having ruled with him upon the other view of the matter. It may, however, be said that his testimony was material, as he was forging the first link in the chain of circumstances. *Perkins v. Perkins,* 88 N. C., 41, and especially *S. v. Raby,* 121 N. C., 682.

(402) The defendant contends that there is not sufficient evidence of the alienation of the wife's affections or of the adultery with defendant, but the jury must decide as to its sufficiency to establish the

essential facts. If it is meant that there was no evidence to support the allegations, we think that there was some. It is not necessary to show the adultery by direct proof, but circumstances are sufficient for that purpose, if therefrom the jury can reasonably infer the guilt of the parties. *S. v. Eliason,* 91 N. C., 564; *S. v. Rinehart,* 106 N. C., 790; *S. v. Chancy,* 110 N. C., 507; *S. v. Poteet,* 30 N. C., 23; *S. v. Waller,* 80 N. C., 401; *S. v. Dukes,* 119 N. C., 782; *Burroughs v. Burroughs,* 160 N. C., 515.

In this case it appears, by the evidence, that defendant, a married man with a bad character, had been seen at the home of the woman, in the absence of her husband, with his hand familiarly on her person; that he went there several times, in the absence of her husband, and remained there for some hours during his visits; that the woman had gone to his store, after the hands had quit their work for the day, to see him, and left the store with him, on one occasion going out the back door; that the woman had declared that she no longer loved her husband, abandoned him and her children and refused to live with him, and there were other facts of more or less weight, tending to show their close intimacy and her infatuation. The jury have the right to conclude that the conduct of this married man and this married woman, under the circumstances, was not only very suspicious, but had all the earmarks of a guilty intercourse, when taken with the fact that the defendant refused to go upon the stand in his own behalf and explain them, for there was something requiring explanation. His failure to do so was the subject of fair comment (*Goodman v. Sapp,* 102 N. C., 477), subject to the judge's control, and this fact could be considered just as in any case where there is a failure to produce a witness shown to be cognizant of the facts. The mere failure to testify, standing alone and without reference to the circumstances, counts for nothing against a party, and the jury should presume nothing against him; but when he is called upon to explain, the case is different. *Hudson v. Jordan,* 108 N. C., 10, where the party's failure to testify was regarded as a "pregnant circumstance" against him. (See, also, notes to above (403) cases in the Anno. Edition.)

The consent of the wife to her own defilement is no defense to the action (21 Cyc., 1628; *Yandt v. Hartvunft,* 41 Ill., 9; *Moore v. Hammond,* 119 Ind., 510; *Sieber v. Pettit,* 200 Pa. St., 58), since the wrong relates to the injury which the husband sustains by the dishonor of his marriage bed; the alienation of his wife's affections; the destruction of his domestic comfort; the suspicion cast upon the legitimacy of her offspring; the loss of consortium, or the right to conjugal fellowship of his wife, to her company, coöperation and aid in every conjugal relation; the invasion and deprivation of his exclusive marital rights and privi-

leges; his mental suffering, injured feelings, humiliation, shame and mortification, caused by the loss of her affections and the disgrace which the tortious acts of defendant have brought or heaped upon him, and which are proximately caused by said wrong. Hale on Damages, p. 99 and note; *Johnson v. Allen,* 100 N. C., 31; 21 Cyc., 1628, 1629. And for these results the plaintiff is entitled to recover compensatory damages, as the authorities cited will show. He may also have added by the jury, in their sound discretion, a reasonable sum as punitive, vindictive, or exemplary damages, or smart money, for the willful and wanton conduct of defendant towards him; and these damages, though not susceptible of proof at a money standard, may be fixed by the jury in view of all the facts and circumstances. Authorities *supra,* and *Johnston v. Disbrow,* 47 Mich., 59; *Matheis v. Mazet,* 164 Pa. St., 580; *Cross v. Grant,* 62 N. H., 675. There can scarcely remain a doubt as to the right of the plaintiff to have his compensatory damages or as to the right of the jury, in their discretion, to award punitive damages under the aggravated circumstances disclosed by the evidence in this case.

The rulings and charge of the court were, therefore, correct, and no error in the trial has been discovered by us.

No error.

Cited: Trust Co. v. Bank, 166 N. C., 122; *Bank v. McArthur,* 168 N. C., 54; *S. v. Randall,* 170 N. C., 762.

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(404)

BOARD OF GRADED SCHOOL COMMISSIONERS OF WINSTON v. BOARD OF EDUCATION OF FORSYTH COUNTY.

(Filed 5 November, 1913.)

1. School Districts—Graded Schools—Special Districts—General Taxes—Equitable Division.

Under the construction of Article IX of our Constitution, higher education is to be encouraged as necessary to good government and the happiness of mankind, and there is no constitutional restriction upon a community, which pays a special tax for graded or other schools to establish better school facilities than those imposed generally by statute, from sharing in the equitable division of the general tax levied in the county for schools under the general statute.

2. Same—School Buildings—Interpretation of Statutes.

Where a graded or other special school district has been established in a city or town in a county where the school funds exceed $25,000, it is the duty of the county board of education to include in the distribution

of the fund reserved for building and repairing schoolhouses in the county allowed by the statute, such just and equitable part thereof as is required for such purposes within the graded or special school district established in the city. Revisal, sec. 4116, as amended by chapter 149, Laws 1913.

3. Same—Control of Buildings.

Revisal, sec. 4116, as amended by chapter 149, Laws 1913, requiring, by interpretation, an equitable distribution to graded or special school districts created for a city, of the fund reserved by the county board of education for building and repairing the schoolhouses of the county, the school fund of which exceeds $25,000, is not in conflict with section 4124, for this latter section only makes certain requirement for the building of the schoolhouses, under the control of county board of education, and is silent as to the control of the buildings after they have beeen erected.

APPEAL by defendant from *Cooke, J.*, at May Term, 1913, of FORSYTH.

This is a controversy submitted without action to construe sections 4116 and 4124 of the Revisal of North Carolina.

The plaintiff is a corporate body and has complete control and supervision of the public schools of the city of Winston. The defendant is a corporate body and has control of the public schools of Forsyth County.

Section 4116 of the Revisal, as amended by chapter 149, Public Laws of North Carolina, 1913, provides that the county board of (405) education, after first reserving a fund sufficient to pay the salary of the county superintendent and the expenses of the county board of education, may reserve a fund for building, repairing, and equipping schoolhouses in counties where the school fund exceeds, as it does in Forsyth County, $25,000, a sum not greater than 7¼ per cent of the school fund for said county.

The only question presented is, whether or not the defendant has authority under section 4124 to appropriate money from the building fund to the plaintiff to be used in the erection of a school building in the city of Winston.

It is admitted that the plaintiff has received from the defendant its per capita apportionment as provided in section 4116 for maintaining schools, and that the city of Winston pays more than half the school taxes of Forsyth County levied by the General Assembly.

Judgment for plaintiff, and the defendant appealed.

Manly, Hendren & Womble for plaintiff.
Hastings & Wicker for defendant.

ALLEN, J. The ninth article of the Constitution is devoted to education, and it is declared in the first section of the article that, "Religion,

morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

This language is taken from the Ordinance of Congress of 1787, passed for the government of the Northwest Territory, and was substantially adopted in the Constitution of Ohio, and was considered in *Board of Education v. Minor,* 23 Ohio St., 211 (13 A. R., 233), in which case the Court says: "The three things so declared to be essential to good government are 'religion,' 'morality,' and 'knowledge.' These three words stand in the same category, and in the same relation to the context; and if one of them is used in its generic or unlimited sense, so are all three. That

the word 'knowledge' and the word 'morality' are used in that (406) sense is very plain. The meaning is, that true religion, true morality, and true knowledge shall be promoted by encouraging schools and means of instruction. The last named of these three words 'knowledge,' comprehends in itself all that is comprehended in the other two words, 'religion' and 'morality,' and which can be the subject of human instruction. True religion includes true morality. All that is comprehended in the word 'religion' or in the words 'religion and morality,' and that can be the subject of human instruction, must be included under the general term 'knowledge.' Nothing is enjoined, therefore, but the encouragement of means of instruction in general knowledge—the knowledge of truth. The fair interpretation seems to be, that true 'religion' and 'morality' are aided and promoted by the increase and diffusion of 'knowledge,' on the theory that 'knowledge is the handmaid of virtue' and that all three—religion, morality, and knowledge—are essential to good government."

The ideal citizen, then, under the Constitution, is "the wise man and endued with knowledge," leading to a clean, upright life, and to a just conception of true religion.

One of the means to this end is the establishment of a "general and uniform system of public schools," which is enjoined upon the General Assembly by section 2 of Article IX.

This system as outlined in the Constitution, standing alone, does little more than excite and stimulate the desire for knowledge and is inadequate to enable the citizen to reach the higher heights.

It was to be expected, then, in a government founded upon the will of the people, by men who believed that unlimited knowledge leads to true morality and true religion, and that these are necessary to good government and the happiness of mankind, that some provisions would be made for higher education, as has been done in the sections relating to the University, and that there would be nothing to discourage those living in thickly settled communities, where property valuations are

higher, from incurring obligations, in addition to those imposed by the General Assembly for the system of schools for the entire State, in order that better educational facilities might be furnished to their children, and we therefore find no prohibition in the Constitution (407) preventing a community, which pays a special tax for graded or other schools, from sharing in the equitable division of the tax for schools levied by the State.

It was upon this principle that it was held in *Greensboro v. Hodgin*, 106 N. C., 182, that it was the duty of the county authorities to apportion to a graded school district a part of the school fund levied by the State, but that such district was only entitled to a just and equitable part, and not necessarily to as much as it paid.

The authority to make this apportionment, approved by the Supreme Court, is found in section 4116 of the Revisal, as amended by chapter 149 of the Laws of 1913; and as the same statute enjoins the duty upon the county board of education to reserve a fund for building and repairing schoolhouses in the county, there would seem to be no good reason for permitting graded schools to participate in one part of the fund and excluding them from the other.

The defendant contends, however, that while the board of education is required to reserve a building fund, in section 4116 of the Revisal, that the disposition of the fund is regulated by Revisal, section 4124, in which it is said: "The building of all new schoolhouses shall be under the control and direction of and by contract with the county board of education. All contracts for buildings shall be in writing, and all buildings shall be inspected, received, and approved by the county superintendent of public instruction before full payment is made therefor," and that as the graded school of Winston is under the control of a board of commissioners and not of the board of education, the plaintiff has no right to any part of the fund reserved for buildings.

In other words, the argument of the defendant is that under section 4124 of the Revisal, all school buildings erected from the reserve fund provided for in section 4116 must be under the control of the board of education, and as the graded school buildings of Winston are controlled by a board of commissioners, and not by the board of education, the graded school district is not entitled to share in the building fund.

The two sections are parts of one statute, designed to estab- (408) lish a uniform system of public schools, and the language used should be understood with reference to the context, and in that sense which will make the two harmonious and consistent; and a construction of section 4124 should not be adopted, except from necessity, which would deprive the plaintiff of a benefit conferred by section 4116.

No such necessity exists. Section 4124 does not say that all "new schoolhouses" shall be under the control of the board of education, but that "the building of all new schoolhouses" shall be under its control, and that "all contracts for building" shall be in writing and approved by the county superintendent, thereby conferring authority upon the board of education and the county superintendent to exercise reasonable supervision over the contract for the building, and over its performance, but it is silent as to the control of the building after it has been erected.

We are, therefore, of opinion that there is no conflict between the two sections, and that the plaintiff is entitled to share in the building fund reserved by the defendant, under the conditions prescribed in section 4124, which should be enforced reasonably and not arbitrarily.

This construction accords with the opinion of the State Superintendent of Public Instruction, whose duty it is, by statute, to construe the School Law, and while his construction is not binding on us, it is entitled to high consideration.

In his notes and decisions on the School Law he says: "The city schools are entitled to their equitable part of the building fund. They pay their part of it, and in the apportionment of the building fund, just as in the apportionment of the other part of the school fund, they are entitled to be treated exactly like any other public school district of the county. The fact that these districts are operated under a special charter does not prevent them from being public school districts entitled to all the rights and privileges of other school districts in the distribution of the common public school fund, including the building fund. The fact that they issue bonds and levy taxes for better buildings and equipment ought to entitle them to more consideration instead of less, by the county
(409) board of education, in the distribution of the county building fund, and certainly ought not to cause them to be discriminated against by excluding them from sharing in that fund, which they helped to pay, because they are willing to assume an additional burden of taxation to get better houses and equipment than the county and the regular school district can afford to provide. They should be encouraged rather than discouraged in such commendable efforts."

For the reasons given, the judgment is

Affirmed.

Cited: *Reade v. Durham,* 173 N. C., 682.

SALLIE SIMMONS ET ALS. v. W. R. McCULLIN.

(Filed 22 October, 1913.)

1. Exemptions—Judgments—Consent.

The defendant was convicted of murder of the deceased pending a civil action brought by the widow and administrator, and upon intimation of the judge, but without any evidence of duress, the defendant consented to a judgment in a certain sum in the civil action, payable out of the proceeds of a sale of certain of his real and personal property, which had been attached in the suit brought by the administrator, with the understanding that this should be considered by the judge in passing sentence in the criminal action, which was accordingly done: *Held*, the judgment in the civil action having been rendered by consent, that the property attached should be appropriated to the payment of the amount thereof and cost, without regard to any right of exemption therein, as the defendant could claim no homestead or personal property exemption, to the prejudice of the plaintiffs, for the consent judgment concluded him.

2. Same—Wife's Joinder—Constitutional Law.

A consent judgment entered against a husband, subjecting his lands to the payment of the amount thereof, will pass his homestead interest in the lands thus set apart without the joinder therein of the wife; for the wife's joinder is not required unless there is a judgment docketed and in force, which is a lien upon the land, or unless the homestead has actually been set apart. Const., Art. IV, sec. 8.

3. Exemptions—Judgments—Consent—Estoppel.

A consent judgment has the same force and effect as if it had been entered by the court in regular course, for it becomes a binding judgment when the court sanctions it. Hence, when a consent judgment has been entered for the sale of the property, including defendant's homestead and personal property exemption, it is as complete a bar as if the judgment had been regularly entered in the ordinary course and practice of the court, and it will work an estoppel as effectually as if the action had been tried on its merits.

4. Process—Nonresident—Court's Jurisdiction—Special Appearance—Excusable Neglect—Practice.

Objection to a judgment rendered by default upon the ground that summons therein had been served on the movant, a nonresident, while attending court as a witness in another action, should be made by special appearance, as the motion goes to the jurisdiction of the person and the defective service of process, and not by a motion to set the judgment aside on the ground of excusable neglect, which goes to the merits of the controversy and is equivalent to a general appearance and therefore a waiver of the defect in the service.

APPEAL by plaintiffs from *Lyon, J.*, at February Term, 1913, (410) of SAMPSON.

This is an injunction against a sale of defendant's land. W. R. McCullin and James McCullin were indicted for the murder of Jonah Simmons, and were convicted of murder in the second degree. Plaintiff and the widow brought civil suits to recover damages for the killing. The court, after the verdict was returned in the criminal case, suggested that if a liberal provision was made for the widow, by allowing a judgment in the civil case for $3,000, he would consider it in passing sentence and award the mimimum punishment. The parties all agreed to this and consented that judgment should be entered in favor of the widow for $3,000 and costs. This was accordingly done, and judgment was entered by consent for that sum and costs against W. R. McCullin and for $1 and costs against James McCullin, it being provided therein that "she recover of the defendants the sum of $3,000 and costs of the action, and the sheriff shall satisfy the same out of the property attached by him in the case of Charlie Bradshaw, administrator of Jonah
(411) Simmons, against the said defendants, and that the said Charlie Bradshaw, administrator of Jonah Simmons, recover of defendants the sum of $1 and the costs of action, which the sheriff shall collect out of said property." The property was advertised by the sheriff, in obedience to the judgment of the court, and pending the said advertisement, defendants applied for and obtained an order restraining the sale of the property and an order to show cause why a perpetual injunction should not issue, upon the ground that the sheriff proposed to sell without allotting the homestead. Judge Lyon found as facts, on the hearing of the order to show cause before him, that James McCullin has a wife and child, but owns no real property, and that W. R. McCullin owns real property in Sampson County and has a wife. Upon his findings, the pleadings, and admissions, he adjudged that defendants are not entitled to any exemption in the personal property, and that W. R. McCullin is entitled to a homestead in the land owned by him, which is all he had, and he further adjudged that the sheriff allot and set apart the homestead of W. R. McCullin before proceeding to sell the land, and that he sell only the surplus of the land and what is called the "reversionary interest" and the personal property, and apply the proceeds to the payment of the judgment and costs. Plaintiff appealed.

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

WALKER, J., after stating the case: It is evident that the judgment entered by the consent of the parties was the result of the compromise between them and intended to relieve the two convicted defendants of the heavy pains and penalties of the law which they had violated. In accord-

ance with the agreement, the verdict was changed to one of manslaughter and the lightest sentence imposed, instead of confining the defendants in the penitentiary at hard labor for a long term. No question of duress is raised in the case. It presents the naked question, in the plaintiff's appeal, whether the defendant W. R. McCullin is entitled to a homestead as against this judgment. We observe that the argument of the defendant's counsel is based almost entirely upon the assumption that the judgment was taken *in invitum,* whereas it (412) appears, on its face, to have been entered by consent of the parties. It is not like the judgment of a court ascertaining their rights, with or without a verdict, and decreeing against them of its own will. In such a case, where it is adjudged that money be paid, the sheriff should have the homestead laid off to the defendant before selling the surplus, if any, of the land. The part so allowed and set apart is exempt from sale under the process for the period prescribed by law, and no part of it can be sold under execution until this quality of exemption has ceased to exist. It is not necessary to discuss the right to sell what is called the "reversionary interest," in the view we have taken of the case. Instead of being a judgment *in invitum,* this has all the attributes of a consent judgment, and it expressly provides, as we construe it, that all of the property, real and personal, upon which a former levy, under an attachment, had been made, shall be sold and the proceeds applied to the "satisfaction" of the judgment and costs. This must be the meaning and sense of it, not only in view of the facts and circumstances surrounding the parties at the time it was entered, but by the very terms of the judgment itself. By consent and with the sanction of the court, it is adjudged that the whole of the property be appropriated to the payment of the amount recovered and costs, without regard to any right of exemption.

The only remaining questions are: Was the wife's joinder necessary to thus condemn the property to the satisfaction of the judgment? and, second, Could the husband, in that form, part with his right of exemption? We think that both questions must be answered against the defendant W. R. McCullin. It has been held for a long time and in many cases that the wife's joinder is not required unless there is a judgment docketed and in force, which is a lien upon the land, or unless the homestead has been actually set apart. Const., Art. X, sec. 8; *Mayho v. Cotton,* 69 N. C., 289; *Hughes v. Hodges,* 102 N. C., 249; *Scott v. Lane,* 109 N. C., 155; *Joyner v. Sugg,* 132 N. C., 580; *Rodman v. Robinson,* 134 N. C., 503; *Shackleford v. Morrill,* 142 N. C., 221.

In *Hughes v. Hodges,* the Court (by *Avery, J.*) said: "The (413) defendant conveyed this land by mortgage deed to secure money (loaned to him on the land, as we infer). Until proof to the contrary is offered, the presumption is in favor of this power to convey,

and the defendant offers no evidence of the existence of a judgment against himself. For the purpose of this discussion, there can be no difference between a mortgage and an absolute deed. His first wife, who was then living, did not join, and did not, therefore, convey her right to dower, had she survived her husband. But she died in 1881, and it is not necessary to discuss the rights of defendant's second wife. It is sufficient to say that neither she nor any other person can be allowed a homestead in the land. No homestead having been allotted before the deed was executed in 1876, or since, the deed of the defendant to the plaintiff's testator was valid, and passed the land to the grantee for the purposes mentioned therein, subject only to a contingent right (of dower) no longer hanging over it. We therefore hold that the judge erred in ordering the sale of the reversionary interest, and should have adjudged that the entire interest, instead of the reversionary interest only, be sold, unless the debt should be paid by the time mentioned."

In regard to the second question, we do not see that a judgment is none the less effective as a bar because its merits were determined, in whole or in part, by the agreement of the parties. It seems to us that it is immaterial whether it was obtained by consent or by a decision of the court upon the points in controversy, so far as its conclusiveness and binding force is concerned, which do not depend upon its form or upon the fact that the court investigated or decided the legal principles involved, and there is no substantial reason why it should not be just as effective to finally determine and settle the rights of the parties as if it had been rendered upon demurrer or verdict, nor why it should not be as complete a bar, between the parties to it, as any judgment *in invitum*. It has been conceded by the highest authority to have just that effect, and the courts have held that a judgment entered upon a stipulation of the parties after issue joined has the same binding force and operation as an estoppel as if the action had been tried on the merits and the judgment was a perfect bar. The above principle is
(414) fully stated in the text of 2 Black on Judgments, sec. 705, and well supported by the cases in the notes. "A decree in equity by consent of parties and upon a compromise between them, is a bar to any subsequent suit upon a claim therein set forth as among the matters compromised and settled, although not in fact litigated in the suit in which the decree was rendered." *R. R. v. U. S.*, 113 U. S., 261; *Bugley v. Watson*, 98 Tenn., 357; *Adler v. Van Kirk L. Co.*, 114 Ala., 561. "There can be no doubt that a judgment entered up by the court, upon the agreement of parties, is, to say the least, as conclusive upon them as if judgment were rendered in the ordinary course of proceedings." *Pelton v. Mott*, 11 Vt., 148 (34 Am. Dec. [Extra Anno.] 678). The same

doctrine, we think, has been expressly approved by this Court. In *Stump v. Long,* 84 N. C., 616, it was held that an agreed judgment or order is binding and conclusive and cannot be set aside or modified, without the consent of both parties, except upon the ground of mutual mistake or fraud. See *Edney v. Edney,* 81 N. C., 1; *Kerchner v. McEachern,* 90 N. C., 179, and 93 N. C., 455; *Vaughan v. Gooch,* 92 N. C., 527. It is said in *Kerchner v. McEachern,* 90 N. C., 179, that while the terms are settled by the parties, the judgment has the same force and effect as if it had been entered by the court in regular course, and, in that sense, it becomes the judgment of the court, by virtue of its sanction.

Lamb v. Gatlin, 22 N. C., 37, was decided on specific grounds, and is not like this case, and the same may be said of *Bank v. Commissioners,* 119 N. C., 214. The matters there involved, it was held, were not the subject of agreement, but here the defendant is *sui juris* and can convey, release, or otherwise dispose of his property by deed duly executed, or contract, or judgment regularly entered, and may sometimes even lose his constitutional rights by not asserting them at the proper time and in the proper way. A regular judgment against him, disposing of his homestead, would not be void or even irregular, but at most only erroneous, and to be corrected, if wrong, by appeal. *McLeod v. Graham,* 132 N. C., 473; *Henderson v. Moore,* 125 N. C., 383. *Beavan v. Speed,* 74 N. C., 544, does not apply, as there was no direction to sell the land, but simply a judgment for the amount of the note. As the joinder of the wife is not required, we do not see why the hus- (415) band cannot part with his right of exemption by judgment that the land should be sold to pay the sum recovered as well as he can by mortgage or deed for the same purpose. *Hughes v. Hodges, supra.* Defendant alleges, in his application for the injunction against the sale, that the land is not more than sufficient in value to pay the claim. How, then, can the latter be "satisfied" without selling the land as an entirety, and without regard to the homestead?

In the view we have taken of the case, it is not necessary to discuss the correctness of the decision in *Dellinger v. Tweed,* 66 N. C., 206, which we were asked to reëxamine. The Court's ruling as to the personal property is covered by what we have said in regard to the homestead exemption.

There was error in the judgment, and it will be modified by dissolving the injunction and requiring the land to be sold for the payment of the amount due and costs, without allotting any homestead or personal property exemption. Appellant will recover the costs of this Court.

Error.

DEFENDANT'S APPEAL.

WALKER, J. The decision in the plaintiff's appeal requires us to declare that there was no error in this appeal. There are other reasons that might be assigned for this conclusion, but it is unnecessary to state them.

No error.

Cited: Harrison v. Dill, 169 N. C., 546; *Dalrymple v. Cole,* 170 N. C., 107; *Gardiner v. May,* 172 N. C., 195.

M. E. ROBINSON v. SECURITY LIFE AND ANNUITY COMPANY.

(Filed 29 October, 1913.)

1. Insurance, Life—Discriminating Rates—New Contract—Rights of Insured.

Where one insured has accepted a policy of life insurance upon his own life, stipulating for the annual payment of the premium, which, upon his agreement with the insurer, has been changed to a quarterly payment at the same ratio, and the insurer thereafter has canceled the policy for the refusal of the insured to pay an increase in the quarterly payment plan, which the insurer charges to all of its policyholders alike, the insured, having acted in good faith at the time of making the change to the quarterly payment, has the right to refuse to enter into a new contract at the increased premium, whether the contract he had was legal or illegal.

2. Insurance, Life—Discriminating Rates—Cancellation—Damages—In Pari Delicto—Interpretation of Statutes.

Revisal, sec. 4775, providing, among other things, that no life insurance company may afford any special favor or advantage in premium rates to or discriminate among its policyholders, is a restriction applicable to the company; and where the insured has, in good faith, entered into a policy contract with the company whereby he has secured a policy at a reduced rate of premium, the parties are not *in pari delicto;* and as the statute does not render a contract of this character void, he may recover damages, upon the cancellation by the company of his policy, for its discrimination forbidden by the statute. The question of illegality of a policy of this character discussed by ALLEN, J.

(416) APPEAL by plaintiff from *Carter, J.,* at May Term, 1913, of WAYNE.

Action to recover damages for the wrongful cancellation of a policy of insurance. On 18 January, 1902, the defendant issued to the plaintiff a policy of insurance, in which it was provided that the premium should be $154.11, payable annually, and at the time and since then the insured had the right, under the by-laws of the defendant, upon notice, to change the premium from an annual to a quarterly premium.

Dr. M. E. Robinson, the plaintiff, testified as follows: "Mr. Van Noppen came down here about the time they were organizing this company, in January, 1902, and he said that he wanted to get some prominent men insured in this company so that he could get some insurance, and asked me to give him a few names. I did so, and he came back and said if I would give him some insurance he would give me enough medical examinations of applicants to pay the premium for the first year. He said that I could take out a policy with the premium of $154.11, payable annually in advance, or I could pay a quar- (417) terly premium of $38.53. He made a calculation at the time. I told him that I would take it quarterly, and I have been paying this quarterly premium for ten years, until they merged this company with the Jefferson Standard and others, some time last year. Since then they came around and said they had made a mistake on my premium, which should have been $40.84, and that I would have to pay this amount in the future, or they would cancel the policy. He told me my quarterly premium would be $38.53, and I told him that I would take the quarterly premium, and have been paying it. I do not remember whether the first year's premiums were all paid out of medical service or not. I never did at any time pay $154.11 premiums in advance or any other way, as that receipt states. I wrote to Mr. Grimesly to draw on the Bank of Wayne for payment of the quarterly premiums of $38.53, and the company has drawn drafts for that amount every quarter for over ten years. I paid $38.53 quarterly until April, 1912, when the contention arose. The agent of the company filled out the application for the policy at that time. The agent told me that the premium would be $38.53 quarterly, and the company drew drafts for that amount for about ten years. I supposed that the policy set out our agreement correctly. I never made any complaint about the policy after I got it. There was an inducement offered us. I knew when I took out this policy that I was getting a special and material inducement as to the amount of premiums to be paid. I did not know that it was unlawful to take a policy under such inducements."

G. A. Grimesly testified as follows for defendant: "I was raised in Greene County and am secretary of the Security Life and Annuity Company. I became secretary in the early part of January, 1902. I kept the books of the company. The first annual premium on the policy of Dr. Robinson was paid in advance. The policy is dated 18 January, 1902, the same month I became secretary. It was the duty of the treasurer to call upon policyholders for their premiums after the policies were written and delivered. I called on Dr. Robinson as secretary, about eleven months after the policy was written. Dr. Robinson never made any complaint to the company about the (418)

terms of this policy, nor were there any objections sent or offered to the company on account of the provisions of the policy, that I ever heard of. The first objection I ever heard from Dr. Robinson to the provisions or terms of the policy was when he was given notice of the error in quarterly premium, some ten years after he had received the policy. The error in collecting this premium occurred as follows: We were collecting one-fourth of the regular annual premiums of $154.11, instead of the usual quarterly premium. As soon as we discovered that, we attempted to correct it. The rules and regulations of the company are that the policies were written on an annual basis, that is, we charged an annual premium. The first year the agent was authorized to collect that premium. The annual premium is due in advance. If the policyholders elect to pay the quarterly premium instead of the annual premium, they may do so. The quarterly premium is not one-fourth of the annual premium with any company that I know of. The quarterly premium is made usually with all companies by adding 6 per cent to the annual premium and dividing by four. That is the deferred premium, and the interest is added to cover the cost of collecting. If he desires to pay semiannually, the custom is to add 4 per cent and divide by two. The error in Dr. Robinson's premium was discovered in April or May, 1912. I thereafter demanded of him the same amount that other policyholders for like insurance were paying, and no more. As soon as I notified Dr. Robinson of the mistake, he notified me that there was no mistake and of his agreement with Mr. Van Noppen. He wrote me a number of letters. From the time of the issuing of the policy up until the time of the discovery of the mistake, ten years afterwards, there was no complaint made by Dr. Robinson that I know of. We called on him for the payment of the annual premium, and he said he wanted to pay it quarterly. I do not think we drew drafts. I think Mr. Robinson's statement that he wrote me and requested me to draw on him was correct to the best of my recollection. I think he wrote me that he might be off on business and to draw on the Bank of
(419) Wayne. I failed to draw for the proper amount."

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

Russell M. Robinson and John M. Robinson for plaintiff.
A. L. Brooks for defendant.

ALLEN, J. We will at the outset eliminate from the discussion the evidence as to the agreement with the agent of the defendant, and will assume that this agreement is merged in the written policy, under the authority of *Floars v. Ins. Co.*, 144 N. C., 237.

Conceding this much, and treating everything as true which the evidence reasonably tends to prove, which is the established rule in passing upon judgments of nonsuit, it appears that the defendant issued its policy to the plaintiff in 1902, stating the annual premium to be $154.11; that the by-laws of the defendant gave the plaintiff the right, at his election, to change the premium from an annual to a quarterly premium; that after the policy was issued the defendant drew a draft on the plaintiff for the annual premium, and he said he wished to pay his premiums quarterly; that thereafter the defendant drew on the plaintiff quarterly for ten years for a quarterly premium of $38.53, which the plaintiff paid; that after the expiration of ten years the defendant demanded that the plaintiff pay a quarterly premium of $40.84, which he refused to do; that the policy was thereupon canceled; that the plaintiff knew he was paying a reduced premium, but he did not know that this was illegal, if it was so.

The reasonable inferences from these facts, and inferences which the jury had the right to draw, are that the policy was issued the plaintiff and defendant agreed to change it, acting under the authority of the by-laws of the defendant, and that for ten years the contract of insurance in existence was one to pay a quarterly premium of $38.53, and not an annual premium of $154.11.

If this was the contract, whether legal or illegal, the plaintiff (420) had the right to refuse to enter into a new contract at an increased premium, and no fault can be attributed to him in doing so.

This brings us to the consideration of the two questions chiefly debated in the oral arguments and the printed briefs:

1. Is the contract, which the evidence of the plaintiff tends to establish, legal?

2. If legal, can the plaintiff maintain his action to recover the premiums paid under it, when the defendant, relying upon the plea of illegality, refuses to perform the contract?

The defendant contends that the contract, as interpreted, is an unjust discrimination in favor of the plaintiff, and forbidden by Revisal, sec. 4775, which reads as follows:

"No life insurance company doing business in this State shall make any distinction or discrimination in favor of indivduals, between insurants of the same class and equal expectation of life in the amount of payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the

policy issued thereon; nor shall any such company or agent pay or allow as inducement to insurance any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance."

This section of the Revisal is in all material respects like section 4773a, which was considered at this term in *Blount v. Fraternal Association, ante,* 167, and should receive the same construction.

The statute does not invalidate the contract of insurance or the agreement of the parties, and it purports to operate upon the insurance companies alone.

It says, "No life insurance company shall make any distinction or discrimination," and fails to denounce as illegal a contract of insurance which gives a lower rate to the insured than to others, and it is (421) manifest that at least one of the purposes of the statute was for the benefit of the stronger insurance companies, by declaring that in soliciting insurance all companies should be on an equal footing, and that none should offer inducements below the published rates.

Mr. Vance, in his treatise on insurance, speaking of statutes imposing conditions upon insurance companies to do business, and regulating their contracts, says (pp. 86 and 87): "When, however, the statutes imposing conditions upon doing business by the foreign insurer merely prohibit the making of the contract without compliance with their terms, the question as to the rights of the parties becomes of much greater difficulty. In accordance with the general rule that a contract that is prohibited is illegal, and therefore void, it would follow that neither one of the parties would take any rights under the contract, or could enforce the agreement against the other. Yet to apply this general doctrine to a contract made under such circumstances as usually attend the making of a contract of insurance would work great hardship and be manifestly unjust. The party insured cannot, without great difficulty, discover whether the insurer has complied with all the statutory requirements or not; and while it is true that the statutes imposing these conditions upon the insurer are public acts, and therefore presumed to be known to all, yet it would be unreasonbale to require that every person to whom a corporate insurer offers a contract of insurance should make an exhaustive investigation in order to discover whether his cocontractor has been fully qualified to make the agreement that is proposed, which is a question of fact. It would seem that the insured has a right to presume that the insurer has complied with all the requirements of law. Accordingly, it is held by the great weight of authority that when the insured attempts to enforce such a contract, made in good faith, against the unlicensed insurer, the latter will be estopped to escape liability

under the contract by pleading his own infraction of law. The same principle of estoppel, however, does not apply when the insurer is endeavoring to enforce some right under the contract against the insured. The plaintiff, not having legally qualified himself to make the contract under which he sues, has no standing in law or equity when (422) he attempts to enforce it."

Our case is stronger than the one covered by the quotation, as there is no statute which prohibits the contract made by the plaintiff.

We might, therefore, rest our decision on the legality of the contract, but it is not necessary to do so.

The contract is not immoral, and if illegal, it is so by reason of the provisions of the statute (Revisal, sec. 4775), and the action is not to enforce the contract, but to recover money received by the defendant under it, and after a refusal to perform.

The citation from Vance marks the difference in the relations of the parties to the contract under these circumstances, and demonstrates that they are not in equal fault.

It is there said "that the insured has the right to assume that the insurer has complied with all the requirements of the law," and that "the latter will be estopped to escape liability under the contract by pleading his own infraction of law," and that the insured may maintain an action upon the contract when the insurer cannot.

This principle is clearly recognized in several decisions in our Court, and notably in *Herring v. Lumber Co.*, 159 N. C., 382; which in its essential features is almost identical with the one before us.

In that case the plaintiff and certain other neighboring landowners agreed to sell their timber to the defendant in consideration of the payment of a stipulated sum and the building of a standard-guage railway from Delway to Wallace, and the contract provided for the payment of a penalty upon failure to build the railway. The plaintiff conveyed his timber, and, when the defendant refused to build the railway, sued for the penalty, and one of the defenses set up was that the contract for building the railway was illegal and forbidden by Revisal, sec. 2598.

The Court, in considering the contention of the defendant as to the illegality of the contract, says: "We need not decide whether or not this is a correct position, as we are of the opinion with the plaintiff upon another view of the matter. It appears in the case that the plaintiff and his neighbors, who joined with him in the agreement to sell their timber to the Wallace Manufacturing Company, one of (423) the defendants, were influenced in fixing the price of the same by the stipulation of the said company to construct this road, and that they sold the timber at much less than its reasonable worth because of this agreement, believing that if the road was built and put into opera-

tion, the benefit or advantage they would derive therefrom would compensate them for the loss of the difference between the price charged by them for the timber and the real value thereof. This being so, it would seem to be very unjust and inequitable that the defendants should repudiate their agreement and rely on its invalidity for the purpose of evading the payment of a reasonable price for the timber; in other words, that they should be allowed to keep the amount of the difference between the price paid for the timber and its true value, and, at the same time, refuse to execute their part of the contract to build the road, even upon the ground that it is *malum prohibitum*. If the stipulation to construct the road is invalid, the plaintiff, if *particeps criminis*, is not in *pari delicto*. He can recover the amount of his loss without declaring upon the alleged illegal stipulation, and relief can be given without enforcing this part of the contract. In such a case the action, it may be said, is not based on the agreement alleged to be illegal or invalid, but on the promise created by law to repay money of the plaintiff improperly obtained. 9 Cyc., 547."

Many authorities are cited in support of this position, and among others, *Morville v. Am. Trust Society*, 123 Mass., 129, in which the language used is so apposite to the facts in this record that we reproduce it: "The money of the plaintiff was taken and is still held by the defendant under an agreement which, it is contended, it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. The illegality is not that which arises when the contract is in violation of public policy or of sound morals, and under which the law will give
no aid to either party. The plaintiff himself is chargeable with
(424) no illegal act, and the corporation is the only one at fault in
exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmance of an illegal act."

We are, therefore, of opinion that if the contract is illegal, which is at least doubtful, that the plaintiff, not being *in pari delicto* with the defendant, can maintain his action, and that there was error in granting the motion to nonsuit.

Reversed.

Cited: *Morgan v. Fraternal Assn.*, 170 N. C., 80; *Davis v. R. R.*, 172 N. C., 211.

DELL SCHOOL v. W. W. PEIRCE.

(Filed 22 October, 1913.)

1. Court—Orders—Pleadings—Time Extended—Presumptive Knowledge.

The parties to a civil action are presumed to take notice of a general order made by the court of an extension of time allowed within which to file pleadings beyond that allowed by the statute, and this is especially true when one of the parties represents himself as attorney.

2. Same—Defense Bond—Excusable Neglect.

The defendant in an action for possession of lands must tender his defense bond before he is permitted to answer (Revisal, sec. 453); and when it appears that he has had actual or constructive knowledge of an extension of time to file the complaint, and fails to file his answer within the time allowed, or to obtain an extension of time within which to do so or to file his defense bond, without showing any meritorious reason for his not having done so, his neglect is inexcusable, and a judgment by default entered against him in the cause will not be disturbed on appeal.

3. Excusable Neglect—Judgment—Default—Meritorious Defense.

Upon a motion to set aside a judgment for excusable neglect, the burden of proof is upon the movant to show a meritorious defense as well as that his neglect was excusable; but when he has failed to show the latter, it becomes immaterial as to whether he had a meritorious defense or not.

4. Appeal and Error—Objections—Meritorious Defense—Additional Findings—Practice.

Upon an appeal from the refusal of the judge of the Superior Court to set aside a judgment for excusable neglect, the objection that the judge failed to find additional facts relating to the merits of the defense must be based upon the refusal of a request by the movant that he should do so, in order to be available.

APPEAL by defendant from *O. H. Allen, J.*, at February Term, (425) 1913, of DUPLIN.

This is a motion to set aside a judgment rendered at November Term, 1912. The judge found the following facts:

"Summons was issued 4 July, 1910, and personally served by the deputy sheriff on that date, and returned to the August Term, 1910, of the Superior Court of Duplin County. At the August Term, 1910, an order was duly entered before his Honor, Frank Carter, judge presiding, in open court, making additional parties plaintiffs and allowing the plaintiffs thirty days to file complaint, and no order other than that was made as to pleading, and on 14 September, 1912, the plaintiffs filed a duly verified complaint. The August Term, 1912, of the said court adjourned on 7 September, 1912. The defendant, W. W. Peirce,

is a practicing attorney in the courts of this State. No appearance has even been entered on the docket of this Court, either by the defendant or by an attorney for him. The defendant attended November Term, 1912, of said court, and personally examined the order at the November Term, 1912, and the complaint which was filed by the plaintiff, the same being on file in the clerk's office. No motion was made before the court for time to answer and no time was granted by the court, or by counsel, and there is no rule of the Duplin bar allowing time to answer without application to the court; nor has the defendant ever filed answer in this cause, nor has he given the bond required by the statute or asked to be allowed to do so. The defendant left the court on Friday before final adjournment on Saturday, and on Saturday before the final adjournment the plaintiffs moved the court for judgment for want of an answer. A member of the bar present, not of counsel on either side, suggested that the defendant desired time to answer. The plaintiffs insisted upon their motion, and after hearing the same, his Honor, Carter,
(426) judge, rendered the judgment set out in the record. The judgment at the November Term, 1912, does not appear to have been rendered against the defendant through such mistake, inadvertence, surprise, or excusable neglect as entitles him to relief, and it is so adjudged; nor does he show, in the opinion of the court, a meritorious defense to the action."

The court denied the motion, and defendant appealed.

A. D. Ward and Johnson & Johnson for plaintiff.

W. C. Munroe, W. W. Peirce, and Winston & Biggs for defendant.

WALKER, J. It would be useless to discuss each of the eleven assignments of error, as the material questions are: 1. Was there excusable neglect on the part of the defendant? 2. Did he show a meritorious defense? This is an action to recover the possession of land. Defendant knew that, at August Term, 1912, an order had been made enlarging the time for filing pleadings. The August Term adjourned 7 September, 1912, and the verified complaint was filed 14 September, 1912. Whether the defendant actually knew before the November Term, 1912, that the time for filing pleadings had been extended, the order was made at a regular term, it was his duty to be there and take notice of it, and the law presumes that he had full knowledge of it. *Spencer v. Credle,* 102 N. C., 68; *Zimmerman v. Zimmerman,* 113 N. C., 432; *Hemphill v. Moore,* 104 N. C., 379; Clark's Code (3 Ed.), sec. 595, and the numerous cases in the notes. At any rate, the defendant knew at the November term what had been done, and should then have asked the court for further time to file his answer and defense bond. Instead of doing so, he left the court and took his chances. No reasonable explanation is given

for this apparent neglect of his own interest. Being himself an attorney, he cannot well plead ignorance of the law, and he must, therefore, have known that his time for pleading had expired. To say the least, defendant, in any view of his case, left his affairs in a very precarious state and with a seeming disregard of consequences. He has never yet tendered his defense bond, which must precede his right to answer. It is so distinctly provided by statute. Revisal, sec. 453; *Jones v.* (427) *Best,* 121 N. C., 154. That section requires him to file this bond "before he is permitted to answer, plead, or demur." That was his first duty at November term, as soon as he learned the cause of action, if he intended to defend the action, and this he failed to do. And he took no proper action, in any way, looking to the exercise of his right to defend, or to its revival, as it had then been lost by his delay. We have seen that he had notice of the order at August term, extending the time to plead, and this required him to make reasonable inquiry as to the filing of the complaint and to be on his guard. He had not even entered his appearance on the docket. The law does not allow a party to sleep on his rights. He must keep awake and be alert, exercising the care and watchfulness of an ordinarily prudent man in protecting his rights and saving his interests. We have held that the standard of care by which he must be judged is that which a man ordinarily prudent bestows upon his important business. *Roberts v. Alman,* 106 N. C., 391. We said in the recent case of *McLeod v. Gooch,* 162 N. C., 122, that "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." This applies with peculiar force to the defendant, now applying for relief, as he has assumed the dual position of attorney and client, and must, therefore, give both his personal and professional attention to his business on the docket.

We do not think that, in any view of the facts, the defendant has made out a case of excusable neglect. There was apparent inattention and indifference throughout the progress of the cause, without any adequate explanation. Even if the case was not on the trial or motion docket, defendant should at least have moved for leave to file his answer, and if he had done this, the court, in the exercise of its discretion, may have granted his motion. The fact that this case was not on the trial or motion docket did not prevent the court from giving judgment, though it might have excused defendant's absence if he had been otherwise diligent and active. He took the chance of leaving his case to take care of itself, with no one duly authorized to represent him and look (428) after his interests, and he must abide the result. We cannot take away the advantage his adversary has gained—and legitimately so—by due attention to the case. Vigilance is often a part of the price we must pay for what we get and what we keep after it is acquired. He who neg-

lects his interests is apt to lose them, which is the plight of defendant now. It early grew into one of the cardinal maxims of the law, that it will assist those who are diligent and not those who sleep on their rights, and the law will not take from him who has been thus diligent, what he has secured thereby, and turn it over to him who has lost by his inaction. Broom's Legal Maxims (6 Am. Ed.), star page 857. *Heath, J.*, once remarked that "this is one of the maxims which we learn on our earliest attendance in Westminster Hall." (*Cox v. Morgan,* 2 B. & P., 412), and it is the one underlying the law of limitations or statutes of repose. So much importance does the law attach to diligence in protecting our interests, that it has another maxim equally fundamental and closely related to the one just mentioned: *Qui prior est tempore, potior est jure,* that is, he has the better right who was first in point of time. Broom, 345.

Having reached the conclusion that there is no excusable neglect, it is unnecessary that we should discuss or decide whether defendant has shown a meritorious defense. If he has, as his neglect was inexcusable, the motion should still be denied. He must not only show such a defense, but excusable neglect as well. We have, though, carefully considered the other branch of the case, and are of the opinion that he has shown no legal merits—nothing that would defeat plaintiff's recovery. At least, he has not made it clear to us, and the burden of doing so is upon him.

He complains that the judge should have found additional facts; but there was no request that he should do so, and such a request must appear. *McLeod v. Gooch, supra; Albertson v. Terry,* 108 N. C., 75; *Hardware Co. v. Buhmann,* 159 N. C., 511. This is the well settled practice.

(429) His next position is that he was a nonresident, attending court as a witness, when the summons was served upon him. But this goes to the jurisdiction of the person and the defective service of process. In order to avail himself of it, he should have appeared specially. In a case precisely like this one, the Court held that such a service was not void, but voidable, and advantage, therefore, could be taken of it only by a special appearance. *Cooper v. Wyman,* 122 N. C., 784. The Court there said: "Service in such cases is not void, but voidable; hence, the party, before appearing in the action, should by special appearance move to set aside the return of service (*Thornton v. Machine Co.,* 83 Ga., 288), and if the motion is denied, should request the judge to find the facts and enter them on the record, together with the exception to the ruling, so that it may come up for review on the appeal from final judgment. *Guilford Co. v. Georgia Co.,* 109 N. C., 310." A motion to set aside a judgment upon the ground

of excusable neglect is one addressed to the merits and equivalent to a general appearance, and, therefore, a waiver of any defective service of process. *Scott v. Life Association,* 137 N. C., 515. This case has been frequently approved. Quoting from it in *Woodard v. Milling Co.,* 142 N. C., 102, *Justice Connor* says: "The test for determining the character of the appearance is the relief asked, the law looking to its substance rather than its form." A further reference to *Scott v. Life Association,* and what it decided, may serve to bring this important distinction between a general and special appearance, and the office of each, more clearly before us. We there said: "If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character. 3 Cyc., 502, 503. The question always is, what a party has done, and not what he intended to do. If the relief prayed affects the merits or the motion involves the merits, and a motion to vacate a judgment is such a motion, then the appearance is in law a general one. *Ibid.,* 508, 509. The court will not hear a party upon a special appearance except for the purpose of moving to dismiss an action or to vacate a judgment for want of jurisdiction, and the authorities seem to hold that such a motion cannot be coupled with another based upon grounds which relate to the merits. An appearance for any other purpose than to question the juris- (430) diction of the court is general. 2 Enc. of Pl. and Pr., 632. The effort of the company evidently was to try the matter and obtain a judgment on the merits while standing just outside the threshold of the court. This it could not do. A party cannot be permitted to occupy so ambiguous a position. . . . If a defendant invokes the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general. . . . If he appeals to the merits, no statement that he does not will avail him, and if he makes a defense which can only be sustained by an exercise of jurisdiction, the appearance is general, whether it is in terms limited to a special purpose or not," citing numerous cases. It all comes to this, that he cannot take the inconsistent position of denying the authority of the court to take cognizance of the cause by reason of some defect in the process, and at the same time seek judgment in his favor upon the merits. Affirming this principle as laid down in *Scott v. Life Association* are the following cases: *Allen-Fleming Co. v. R. R.,* 145 N. C., 37; *Warlick v. Reynolds,* 151 N. C., 606; *Grant v. Grant,* 159 N. C., 528. In *Currie v. Mining Co., supra, Justice Allen* concludes the opinion as follows: "The defendants, Allen and Golconda Company, in their application to have the judgment set aside, asked to be allowed to answer, and this is equivalent to a general appearance by both," citing *Scott v. Life Association.* That is our case.

The other exceptions are without any merit. The defendant should first have appeared specially, if he questioned the jurisdiction of the court over him, and if this motion to dismiss was denied, he should have excepted and then proceeded (without appeal) to his motion to set aside the judgment, and appealed from the final order. The procedure is stated in *Cooper v. Wyman, supra.* We find no error in the record.

Affirmed.

Cited: Pierce v. Eller, 167 N. C., 675; *Hyatt v. Clark,* 169 N. C., 179; *Wooten v. Cunningham,* 171 N. C., 126; *Comrs. v. Scales, ib.,* 526; *Lumber Co. v. Cottingham,* 173 N. C., 329.

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CLARENCE JOHNSON, BY HIS NEXT FRIEND, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 22 October, 1913.)

1. Railroads—Public Crossing—Rights of Railroad and Traveler.

Where a railroad track crosses a public highway, though a traveler and the railroad have equal rights to cross, the former must yield the right of way to the latter in the ordinary course of its business.

2. Same—Care Required.

It is the duty of an engineer on a railroad train to give signals and exercise vigilance in approaching the crossing of the railroad and a public highway, and both the employees on the train and the traveler at such places are charged with the mutual duty of keeping a careful outlook for the danger, the degree of care being in proportion to the known danger.

3. Railroads—Public Crossing—Duty of Traveler—"Look and Listen"—Rule of the Prudent Man.

It is incumbent on a traveler at a place where a public highway crosses the railroad track to use his senses of sight and of hearing, before attempting to go upon the track, to the best of his ability, under the existing and surrounding conditions, and to that end he must look and listen in both directions for approaching trains before exposing himself to peril, when opportunity or time is afforded him, this being required by the law under the circumstances.

4. Same—Contributory Negligence—Trials—Questions for Jury.

The rule requiring that a traveler shall look and listen for approaching trains, and take reasonable precautions against exposing himself to peril before going upon a railroad track, where it crosses a public highway, is not always an absolute one, but may be so qualified by attendant circumstances as to require the issue of contributory negligence to be sub-

mitted to the jury; though if he has failed to exercise the care required of him, which is the proximate cause of the injury complained of, it will bar his recovery.

5. Railroads—Signals and Warnings—Duty of Traveler—Negligence—Contributory Negligence—Proximate Cause.

Where a traveler is injured by a train while going upon a railroad track at a public crossing, and his view is obstructed or his hearing an approaching train is prevented, especially if this is done by the fault of the defendant, and the company's servants fail to warn him of the approaching train, and he is induced by this failure of duty to place himself in a position to receive the injury, having used his faculties the best he could under the circumstances to ascertain if there is danger, the failure of the defendant to warn him will be regarded as the proximate cause of the injury, and negligence will be imputed to the company, and not to him.

6. Railroads — Public Crossings — Negligence — Contributory Negligence — Proximate Cause—Last Clear Chance.

If a traveler is injured while upon a railroad track at a public crossing by a train, and is without fault, or if his fault is either excused by some act of the company or is not the proximate cause of the injury, the company having the last clear chance, he may adopt, without the imputation of negligence, such means of extrication, when suddenly confronted by his peril, as are apparently necessary, and the care required of him is that which an ordinarily prudent man would use under the same circumstances.

7. Railroads — Public Crossings — Negligence — Contributory Negligence — Trials—Evidence—Nonsuit.

Where the evidence is conflicting and that of the plaintiff, in his action against a railroad to recover damages for a personal injury alleged to have been negligently inflicted, tends to show that in attempting to cross the defendant's railroad track at a public crossing in a town frequently used, where a freight train had just passed from view, behind a string of cars left on a different track by the defendant; that he had looked and listened before entering upon the track and had reasonably supposed there was no danger from the train; that he was injured while upon the track by some of the cars suddenly coming upon him by reason of the train having made a "flying switch"; that there was no one upon these cars to give warning of their approach, and no timely warning was given, the view of the evidence most favorable to the plaintiff's contention will be taken by the court upon a motion to nonsuit, and it is *Held*, in this case, that such motion was properly disallowed.

8. Railroads—"Flying Switch"—Negligence—Contributory Negligence—Evidence—Trials.

A "flying switch" made by the employees of a railroad where the track is crossed by a public and frequently traveled highway in the populous part of a town, without signals or other warning by persons on the cars or otherwise to notify travelers of the danger, is *per se* gross negligence;

and where one, before crossing the track, has observed the care required of him to look and listen, and has otherwise exercised the caution required of him, and has been injured by reason of a "flying switch" having been made, there is no element of contributory negligence in his action to recover damages for the injury he has sustained.

9. Railroads—Evidence — Negligence — Proof by Comparison — Substantial Identity.

The plaintiff was injured by being run over by defendant's box cars while endeavoring to cross its track at a public crossing, and to rebut the defendant's contention, in his action to recover damages for the injury thus received, he introduced evidence tending to show that he had observed the caution required of him before going on the track, but that his view of the danger was obstructed by box cars left stationary in a certain position on the defendant's track. The defendant, to impeach this evidence of the plaintiff, introduced a witness who offered to testify that he had measured other cars, and from their measurement the plaintiff's statement as to the obstruction could not be true. There was no evidence that the cars left upon the track had been measured, or other evidence as to their size: *Held*, the testimony offered by the defendant was incompetent, there being no evidence of substantial identity of the cars necessary to prove the objective fact.

10. Witness—Railroads—Passes—Evidence—Bias.

It is competent to show on cross-examination that a witness in behalf of a railroad company had attended the trial of an action to recover damages against it, on a pass it had given him, as tending to prove his bias in the defendant's favor.

11. Verdicts—Motion to Set Aside—Court's Discretion—Appeal and Error.

A motion to set aside a verdict as being against the weight of the evidence and for excessive damages is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable on appeal, when he has not abused it. *Pender v. Insurance Co., ante*, 98.

12. Measure of Damages—Negligence—Personal Injury—Decreased Earning Capacity—Present Value.

Where damages are to be awarded for the diminished earning capacity of one who has been injured by the negligence of another, for the period of his remaining life, as ascertained by the jury in accordance with the rules of expectancy, the estimate of the damages recoverable must be based upon the present value of the difference in the plaintiff's earning capacity, caused by the injury, for the period of time ascertained, and not the total difference as it may occur during that period. The rule as before fully stated, *Fry v. R. R.*, 159 N. C., 357, is approved on this point.

13. New Trials—Newly Discovered Evidence—Burden of Proof.

An application to the court for a new trial, upon the ground of newly discovered evidence, should be carefully scrutinized and cautiously examined, with the burden upon the applicant to rebut the presumption that the verdict is correct, and that there has been a lack of due diligence.

14. New Trials—Newly Discovered Evidence—Affidavits—Requisites.

It is required for the granting of a motion for a new trial upon the ground of newly discovered evidence, that it should appear that the desired testimony will be given upon the new trial; that it is probably true, competent, and material; that there has been no laches, but that the movant had used due diligence and means to procure the evidence in due time at the trial; that the evidence is not cumulative and does not tend only to contradict, impeach, or discredit a witness who has testified, and is of such a nature as to show that probably a different result will be reached on another trial, so that right will prevail; and it is held that the facts alleged in the present case are insufficient to bring the application within the rule stated.

APPEAL by defendant from *Daniels, J.*, at July Term, 1913, of (434) LEE.

The plaintiff alleged that on or about 1 September, 1910, he, a boy of about 12 years of age, was attempting to cross the track of the defendant railroad on Elm Street in Maxton, N. C., at a public crossing. That the defendant was engaged in making what is known as a flying switch, and that it negligently ran over the plaintiff as he was crossing the defendant's tracks on said street; that his foot was injured by being run over, and that he was damaged in the sum of $20,000. The specifications of negligence in the complaint are as follows:

1. The train of the defendant was operated in a negligent and careless manner and at an unlawful rate of speed.

2. Defendant had no one on the car, which struck the plaintiff, to control its movements.

3. No lookout was kept on the car.

4. No warning or signal whatsoever was given of its movements or approach, and defendant was making what is known as a flying switch.

5. That the street is constantly used by the public in passing and repassing over the defendant's tracks from one side to the (435) other, and defendant permitted a string of cars to remain standing on one of its tracks, and they so obstructed the view of plaintiff, as he approached the tracks on his bicycle, that he could not see the loose cars, as they moved toward the crossing, after being detached from the train.

The defendant answered, denying all the allegations of negligence, and alleged that plaintiff was guilty of negligence, in that he was coming down Elm Street on a bicycle and crossed defendant's track, after being warned not to do so, and instead of keeping on the street, where there was no danger, he suddenly turned his wheel or bicycle, and running parallel with the said track, he fell under the moving train, and this was the sole cause of his injury.

Much evidence was introduced by the parties to sustain their respective contentions. There was evidence tending to prove the following facts: The Seaboard Air Line Railway at the crossing consists of a main line and a side-track, which side-track branches off west of the crossing and enters, at some distance, the cotton oil mill yard, this part of the track being known as the oil mill siding, and lying on the north side of the main track, next Robert Croom's residence. A "pass track" connects the main line with the side-track, leaving the main line just west of the crossing and merging with the side-track upon and east of the crossing. All the tracks at one point on the crossing are only 19 feet across. Elm Street at this place is a much used thoroughfare, one of the principal residential streets, all three of the principal churches being on it and near this place. It is much used by children going to the graded school, about 200 yards away on this street, cotton oil mill employees, and citizens generally.

The witness for the plaintiff, as well as the plaintiff himself, testified that the view of the pass track mentioned above, and of the main track west of Elm Street, was entirely obscured by a line of standing cars on the oil mill siding, coming almost down to the street. The defendant's witnesses stated that they were making a "running switch," but that the loose car had upon it the conductor and a flagman. The evidence of the plaintiff, and of some of the plaintiff's witnesses, is that there was
(436) no person on the car, and no warning was given of its approach. There is no evidence that any sufficient warning was given at this time. The defendant, however, relied upon a warning, which its evidence tended to show had been given the plaintiff when the train first arrived at Maxton, and was then some 500 or 600 feet west of the crossing, and standing still, to "Stop; we are going to make a switch," after which, so the witness testified, he walked back some 200 feet and turned the train into the switch. Plaintiff testified that the negro was not at the crossing at all.

The witness McNeil, who made the map, testified that he did not know the width of the street; its edge was not well defined; he did not measure the distance between the south edge of the oil mill track and the north edge of the "pass track" on the west side of the street; but he used the map to illustrate his evidence as to measurements he did make. He put some designs on the oil mill track at the direction of young Johnson to represent standing cars, but did not say that the number and the exact position were directed by him.

Plaintiff testified in part as follows: "I started to Strickland's store and went on the left-hand side as you go down street towards Wilmington, Strickland's store being on the opposite side of the railroad; was going after some groceries for my mother; was on a bicycle. I went out

the back yard, down a path to Elm Street, and went then in the usual way, starting to Strickland's store, and when I came to the Seaboard crossing at Elm Street near Mr. Robert Croom's residence, I found a train there, that was shifting and had blocked the crossing. I stopped for it to get out of the way. Stopped somewhere between Mr. Croom's house and the railroad. A colored woman was there, but I did not know her at that time. It was Eliza McIver. She was between me and the Seaboard track, and had a go-cart with a child in it and one by it. At the time I stopped there waiting for that track to clear, I noticed on that oil mill siding some box cars."

Q. How near down to Elm Street did they come? A. They ran near about onto Elm Street, just enough to pass by. They were shifting and the train was running back and forth. I did not attempt (437) to cross the street until the engine cleared and went on towards the depot with some cars attached to it. When it went by, I looked and listened and started across.

Q. What did you look for? A. I looked for another train.

Q. Did you see another? A. No.

Q. What effect, if any, did these cars standing on the oil mill track have on your seeing it? A. It was between me and the loose cars. After the track was clear and the engine had gone down towards Maxton going east, I started across the tracks. Just as I got about across, I heard somebody holler, "Look out!" and I looked around and saw a car and I tried to get between the tracks, and by that time it struck me. I tried to get between the main line and the side-track to clear the cars so I would be safe.

Q. Could you tell which track that loose car was going to take, the main line or the siding? No, sir.

Q. If you had gotten between that main line and the sidetrack, would you have been clear, regardless of what it took? A. Yes; I could have gone down and beaten it to where it was going.

Q. What happened? A. The car struck me about that time and ran over me. I had not gotten quite clear of that side-track that the car came in on. No one was at the crossing except Eliza McIver. I could not see the cars on the main line because of those box cars and the cars that I saw were on the oil mill side-track. They were not blocking the street, but they were near about on the street. I did not see any loose cars on the main line west of Elm Street; I saw one down at the crossing at the oil mill. I saw no cars on the main line except that one down at the crossing. That crossing was about a block west of Elm Street and the other cars I saw were near about to Elm Street on the oil mill side-track. They ran near about up to Elm Street, but I cannot say exactly how close, and those cars stayed on the oil mill track until after

I passed over. When I started down Elm Street this colored woman, who was ahead of me, was about 10 feet from the track, and I was 10 or 15 feet behind her. I was riding a boy's bicycle and I was 12
(438) years old at that time. I remained where I was until I saw the engine go towards the depot. I then immediately got up on my bicycle and rode across, but not until after I looked both ways and listened for another train. I crossed the railroad about the middle of Elm Street and was stricken by the cars.

Q. Was any one on those loose cars? A. No, sir. After the car ran over me, I got up and started home, and I saw a man, who I took to be the flagman, coming towards the switch. When the flagman came, I asked him to carry me home. He did not do anything, but only stood and looked at me. Mrs. Croom came out there and asked him to carry me in her house, if he would not carry me home. He stood and looked at me and did not say anything. About that time Cleo Strickland came along, and I asked him to carry me home. He said, "All right; get up," and I got up in the wagon and he started on across and got to the next crossing. He started the nearest way, got to the nearest crossing, and there was a car on that crossing, and we stopped to let it pass, and the flagman came running down there and said they said carry me to the hospital. I think it was the flagman who said carry me to the hospital. Elm Street is used for all the school children going to school, people going to the Baptist, Methodist, and Presbyterian churches, and people use it to go to the college. It is one of the public thoroughfares of the town. The employees of the oil mill also cross there. They carried me to the hospital, operated on me, and put me to sleep. I had my foot smashed up, a hole cut in the back of my head, and a hole cut in my thigh.

Plaintiff then described his injuries more minutely, as follows: "My foot is perfectly useless, or near about so. I can't use it at all from the heel to the end of the toes. The foot is sensitive and I can't bear any weight on it at all. In walking, I put my weight on my heel. I suffered all the time. Sometimes I got a chance to sleep. This accident happened on Thursday about 10 o'clock and on Saturday following the Thursday, they dressed my foot again and found some gangrene in it. They cut the bone, cut all the flesh off of my foot, and cut two of my toes off. After that, when the doctor dressed it, he kept cutting
(439) off some. He cut off the ball of my foot and scraped the bone. I stayed in the hospital six weeks. I was not under the influence of ether on Saturday when those parts were cut off my foot, and it hurt me so I just had to scream and holler. I could not help it. After I left the hospital I walked on crutches for over a year, and during that time I was not able to put my foot to the ground any. Have not been

able to use the forepart of my foot from the instep out, to amount to anything. Since then it pains me whenever I work any. If I stand up right smart, it hurts me. Can't lift any weight on that foot, and I lost a job because I could not lift and stand on my foot. When the weather changes it feels like neuralgia. The leg of my injured foot is about one-half inch smaller than the other one. Prior to this injury I was carrying water for the oil mill and got 50 cents per day. I can read and write and figure some. I do not use tobacco in any form and do not drink. My health was pretty good prior to this injury."

The defendant offered evidence tending to show that the plaintiff was not injured as he had testified, but fell under the cars and was hurt, as set forth in the answer, and that he was injured by his own carelessness, and not by any negligence of the defendant; that he failed to look and listen when his sight and hearing were unobstructed. The usual four issues were submitted to the jury as to negligence, contributory negligence, the last clear chance, and damages, and the jury answered all of them (except the third, which was not answered) in favor of the plaintiff, assessing his damages at $10,000. The court charged the jury upon the law relating to negligence under the first three issues, and there was no exception thereto. Defendant has reserved these exceptions, which are the ones mentioned and argued in its brief:

1. Refusal of motion to nonsuit or to charge the jury "that, upon all the evidence, the plaintiff, Clarence Johnson, is guilty of contributory negligence."

2. Excluding the evidence of the witness C. C. Hatch, that he had measured other box cars and ascertained their size and dimensions, this with a view of showing by comparison of those cars with those at the crossing in question, upon the assumed similarity of the two, that cars on the main track could not have passed cars standing on the (440) siding in the position described, and as testified by plaintiff.

3. Plaintiff, on cross-examination of defendant's witness, Bonnie Helms, who was employed by it as brakeman, asked him if he came to Maxton on a railroad pass furnished by the defendant. The question and answer were admitted, and defendant excepted.

4. The court charged the jury on the issue of damages as follows, omitting immaterial parts: "Under this issue he is entitled to a reasonable compensation for such injury as you may find to have been negligently inflicted by the defendant which was the direct and necessary consequence of the injury so negligently inflicted; a reasonable compensation for any and all pain which he may have suffered or may hereafter suffer; for all diminution of his power to earn money—his diminished earning capacity, as the books put it. Plaintiff contends that he cannot now perform, and that he will never be able to perform, work that men

usually do in attempting to make a living. He has introduced the mortuary tables that show his expectancy of life is 47 years; and they have made some figures about how much he would earn during that length of time. You are to consider what he was earning when he was hurt, and you may consider the mortuary table about how long he is likely to live; you may consider from what you find from this evidence what his earning capacity will be as he goes on, and then you will satisfy yourselves what would be the amount that he would lose from the earning capacity by reason of this injury to his foot. He is entitled to the difference between what he would make if the injury had not been done and what he would make with it done. You are not bound by the mortuary tables. You are not bound by the figures of the plaintiff or defendant as to any amount which you should give him in consequence of his diminished earning powers. Something was said by the defendant's counsel about $1,000 being a large verdict; but you are not bound by what he claims. You are not bound by what his counsel think he ought to have. You are not bound by what the defendant thinks he ought to have, or his counsel. It is a matter in your sound discretion. (441) You are to exercise your best judgment and your reason upon this evidence. If you reach this issue and say what is the value of his diminished earning capacity, then when you do that, you are to add reasonable compensation for his pain and suffering. In view of all the circumstances, consider this young man's condition in life and his probable future, as far as you can ascertain it, what is a reasonable compensation for the pain and suffering which he has undergone; and when you ascertain that, gentlemen, you add that to such amount as you may have determined to be the amount in which his earning capacity has been diminished by reason of the injury; put both amounts together, and that will be your verdict."

5. That the court refused defendant's motion to set aside the verdict, as being against the weight of the evidence, and the verdict as to damages, because they are excessive.

Judgment upon the verdict, and defendant appealed.

A. A. F. Seawell and Robinson, Caudle & Pruette for plaintiff.
W. H. Neal and K. R. Hoyle for defendant.

WALKER, J., after stating the case: The defendant's motion for a nonsuit upon the evidence, and its request for a peremptory instruction to answer the issues in its favor, were both properly denied. The rule as to the treatment of the evidence upon such a question is not only very familiar, but has been stated in various ways so clearly and with so much repetition as to have become somewhat trite and even hackneyed. We

must again say that we are not at liberty to select those portions of the testimony more favorable to a defendant, in such a case, than the rest and act upon it for his special benefit. Such an imposing array of the evidence in his behalf would be not only one-sided, when we are required to hear both sides equally and fairly, but would manifestly be partial and unjust. The rule is rather the other way. We restated it concretely in the recent case of *Osborne v. R. R.*, 160 N. C., 309, much like ours in its essential facts, though not literally so. Some of the language then used will practically fit almost any case, and is surely applicable to the one at bar. We there said: "Defendant requested the court to (442) enter a judgment of nonsuit upon the evidence, as plaintiff's intestate was guilty of such contributory negligence in driving upon the crossing, without looking or listening, as barred his recovery. The judge could not have done so without deciding an issue of fact, which he is forbidden to do, that being the function of the jury. Pell's Revisal, sec. 535, and cases cited in note. The evidence favorable to defendant's view of the case may be ever so strong and persuasive, but if there is a conflict of testimony, it must be left to the jury, and they must find the facts. This is a case where there was a serious dispute as to the facts, which of course carried the case to the jury. It is our duty, upon a motion for a nonsuit, to consider the evidence in the view most favorable to the plaintiff, for at least one reason, which is, that the jury may adopt his version of the facts as the true one. It would be contrary to all our decisions to discard the proof in his favor and consider only that favorable to the defendant, or to permit the latter to overthrow the former, even if it is more reasonable and convincing. Such a course would contravene the express terms of the statute, and would nullify its plain and explicit injunction, that we, as judges, should confine ourselves to the law of the case and leave the finding of facts to the jury." See *Brittain v. Westall,* 135 N. C., 492; *Deppe v. R. R.,* 152 N. C., 80; *Hamilton v. Lumber Co.,* 156 N. C., 519. We would not hazard much, if anything, by stating broadly that *Osborne's case,* just cited, seems to cover this case as with a blanket, and we may refer to it later in order to show the striking similarity between the two.

As generally pertinent to the case in hand, we may formulate the following rules:

1. Where a railroad track crosses a public highway, both a traveler and the railroad have equal rights to cross; but the traveler must yield the right of way to the railroad company in the ordinary course of the latter's business. *Duffy v. R. R.,* 144 N. C., 26.

2. While a train has the right of way at a crossing, it is the duty of the engineer to give signals and exercise vigilance in approaching such crossings. *Coleman v. R. R.,* 153 N. C., 322. (443)

3. A railroad company and a traveler on a highway crossing are charged with a mutual duty of keeping a careful lookout for danger, and the degree of vigilance is in proportion to the known danger; the greater the danger, the greater the care required of both. *R. R. v. Hansbrough,* 107 Va., 733.

4. On reaching a railroad crossing, and before attempting to go upon the track, a traveler must use his sense of sight and of hearing to the best of his ability under the existing and surrounding circumstances—he must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company, and if he has time to do so; and this should be done before he has taken a position exposing him to peril or has come within the zone of danger, this being required so that his precaution may be effective. *Cooper v. R. R.,* 140 N. C., 209; *Coleman v. R. R.,* 153 N. C., 322; *Wolfe v. R. R.,* 154 N. C., 569, in the last of which cases the rule was applied to an employee charged with the duty of watching a crossing and warning travelers of the approach of trains, and he was required to exercise due care, under the rule of the prudent man, for his own safety by looking and listening for coming trains.

5. The duty of the traveler arising under this rule is not always an absolute one, but may be so qualified by attendant circumstances as to require the issue as to his contributory negligence, by not taking proper measures for his safety, to be submitted to the jury. *Sherrill v. R. R.,* 140 N. C., 255; *Wolfe v. R. R., supra.*

6. If he fails to exercise proper care within the rule stated, it is such negligence as will bar his recovery. *Provided, always,* it is the proximate cause of his injury. *Cooper v. R. R., supra; Strickland v. R. R.,* 150 N. C., 7; *Wolfe v. R. R., supra.*

7. If his view is obstructed or his hearing an approaching train is prevented, and especially if this is done by the fault of the defendant, and the company's servants fail to warn him of its approach, and induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best (444) he could, under the circumstances, to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company, its failure to warn him being regarded as the proximate cause of any injury he received. *Mesic v. R. R.,* 120 N. C., 490; *Osborne v. R. R., supra.*

8. If a traveler is without fault, or if his fault is either excused by some act of the company or is not the proximate cause of his injury, the company having the last clear chance, and if in attempting to cross track on a highway he is suddenly confronted by a peril, he may without the imputation of negligence adopt such means of extrication as are

apparently necessary, and is only held to such measure of care as a man of ordinary prudence would exercise in the same circumstances. *Vallo v. Express Co.*, 14 L. R. A., 745; *Lincoln v. Nichols*, 20 L. R. A., 855; *Crampton v. Ivie Bros.*, 124 N. C., 591, and especially *Douglass v. R. R.*, 82 S. C., 71; 2 Elliott on Railroads (2 Ed.), sec. 1173.

With these general rules to guide us, the solution of the question presented will not be difficult.

This young boy rode up to the crossing on his bicycle and, as he testified, looked and listened for a train. He saw one pass, composed of an engine and box cars, the latter being shifted by the engine. He could not see to the west, because of box cars standing on one of the tracks, which obstructed his view. He did look to the east at the moving train, believing, and having good reason to believe, that it was coming back, and not suspecting that it had detached cars for the purpose of making a "flying switch." He did not and could not hear the noise of the loose cars as they came up to the crossing, for he could not see them through the solid intervening cars, and no warning was given of their approach, the first notice he had of them being the cry of a woman, which he heard at the very time he was stricken by the cars and knocked under them. He, therefore, had no chance to escape. There was no one on the loose cars to give him a signal to leave the track, and the cars on the adjoining track were so near the crossing as to render such a signal ineffective if it had been given. This is his version, and if accepted as true by the jury, it made out a perfect case for him. (445)

Defendant denied it, and alleged that he voluntarily rode between the cars in a negligent manner, not made very clear, and fell from his wheel under the cars and was crushed as he described. They allege that there was a man on the cars to warn those using the crossing, and that a proper and effective signal was given by him and the woman, which was disregarded.

In this conflict of views, the jury were the proper and only arbiters. They found for the plaintiff, and, as we must assume, under proper instructions from the court, as this part of the charge is not in the record, error not being presumed unless alleged and shown. This being so, the facts are as stated by the plaintiff, and he was, therefore, justly and legally entitled to the verdict. If we should nonsuit him or direct a verdict, it would be to reject all of his evidence in favor of that of defendant, which is out of the question. We must adopt his and reject the defendant's, except so far as the latter makes in his favor.

In this view of the facts, what are the legal questions involved and ultimate rights of the parties under them? This Court has recently declared, in *Vaden v. R. R.*, 150 N. C., 700, that, "Making 'flying switches' on the railway tracks and sidings running across and along the streets of

populous towns is *per se* gross negligence, and has been so declared by all courts in this country and by text-writers generally. It is stated in one of the best known text-books that the use of a running switch in a highway in the midst of a populous town or village is, of itself, 'an act of gross and criminal negligence on the part of the company,'" citing Shearman and Redf. Neg. (3 Ed.), sec. 466; *Wilson v. R. R.*, 142 N. C., 333; *Allen v. R. R.*, 145 N. C., 214; *Bradley v. R. R.*, 126 N. C., 742; *Farris v. R. R.*, 151 N. C., 483; *R. R. v. Smith*, 18 L. R. S., 66, to which is appended a most valuable note upon this subject. In this respect, the *Vaden case*, and this one cannot possibly be distinguished.

So we see that defendant was "grossly" in fault at the very inception of this lamentable occurrence. It started wrong in the beginning and continued wrong throughout. It had set a death-trap for the passer-by and the plaintiff unwarily, but without fault, was caught in it, and came very near losing his young life. Will the railroads never stop (446) doing, in this respect, what the courts have so emphatically condemned as contrary to law and humanity? If plaintiff had been killed, upon the facts found by this jury, the person to blame for his death would have been guilty of manslaughter for his palpable negligence with full knowledge of its dangerous tendency. Not only did defendant make the dangerous "flying switch," but by its negligent conduct in concealing the moving of the detached cars, and by failing to give proper signals or warning to travelers using the crossing, it threw the plaintiff off his guard and enticed him into the trap.

The jury having repudiated the defendant's version of the facts and accepted the plaintiff's, there is no room left for the argument that the latter was guilty of contributory negligence, because they have found that he looked and listened and was prevented from any effective use of his faculties or his senses by the wrongful conduct of defendant in moving its cars rapidly without an engine, where they could not be seen, or the noise of their movement heard by plaintiff, and failing to give any warning of their approach. There is no logic that can withstand such an array of facts, and no law which justifies or excuses the defendant's conduct. It is like *Wolfe's case*, in that plaintiff's attention was riveted on the moving train that had just passed with every indication of its immediate return; and the resemblance does not end here, for Wolfe's view to the east was obstructed by cars standing on a side-track, just as plaintiff's view to the east was, in this case, obstructed by cars similarly situated. *Wolfe v. R. R.*, 154 N. C., 569. While a greater degree of vigilance is required of a traveler than of an employee engaged in the performance of other duties for defendant, as in the instance of Wolfe, the principle underlying the two cases is essentially and broadly the same.

Justice Manning said in *Farris v. R. R.*, 151 N. C., 483: "While we are in no wise inclined to relieve the person crossing the tracks of a railroad from the imperative duty of observing the measure of caution so well established for his safety by the well considered decisions of this and other courts, yet it cannot always be said that he is guilty of contributory negligence, as a matter of law, because he did not continue to look and listen at all times continuously for approach- (447) ing trains, where he was misled by the company or his attention was rightfully directed to something else as well."

The crucial facts are that plaintiff did look and listen, and seems to have done the best he could under the circumstances. His suspicion was disarmed by the defendant's fault, and he did not, therefore, anticipate and danger in crossing at the time he did.

All this brings this case under the direct control of *Osborne v. R. R.*, 160 N. C., 309, which is peculiarly analogous to it. We there said: "Applying these principles to the case, it will appear by a bare reading of the evidence that it should not have been withdrawn from the jury by granting a nonsuit. The jury, by their verdict, evidently found that the intestate and J. E. Puckett did look and listen, in the exercise of that degree of care characteristic of the man of ordinary prudence, and, further, that no signal from the approaching train was given. In *Mesic v. R. R.*, 120 N. C., 490, after stating that it is the duty of a traveler on the highway, when he approaches a railroad crossing, to look and listen, even though the railroad may have been negligent, the Court says: 'The rule, however, does not prevail where to look would be useless on account of obstructions, natural in themselves, or such as had been placed by accident or design by the company's employees on their tracks, and when at the same time, the engineer had failed to sound the whistle or ring the bell for the crossing, and in consequence of this failure the plaintiff had been induced to go upon the track and take the risk,'" citing *Hinkle v. R. R.*, 109 N. C., 473; *Alexander v. R. R.*, 112 N. C., 720; *Russell v. R. R.*, 118 N. C., 1098; *Norton v. R. R.*, 122 N. C., 910. See, also, *Inman v. R. R.*, 149 N. C., 126; *Morrow v. R. R.*, 146 N. C., 14; *Norton v. R. R., supra,* and *Farris v. R. R.*, 151 N. C., 483.

Judge Elliott states the rule to be that "where the employees of a railroad company by negligent or wrongful acts mislead a traveler, and put him off his guard, the company may be liable, although the traveler may have done that which, but for the wrongful or negligent acts of the company, must have been considered negligence on his part." He adds that the traveler, though, must continue to exercise ordi- (448) nary care to avoid injury, according to the better reasoned decisions. But this is but another form of stating the general principle, that if the situation and surroundings are suggestive of danger, ordinary

care must be used to avoid it. If the traveler is deceived by appearances produced by the negligent act of the railroad employees, in such way and to the extent that a man of ordinary prudence would not anticipate danger, the company cannot take advantage of its own wrong and impute the blame to him so as to defeat his action.

The railroad company must abandon the device of the flying switch as a means of shifting its cars, which has been strongly condemned by us, as we have seen, or it must take the consequences of its causing injury to persons in the lawful use of its crossings, or at least, it must, by proper signals, whether from the top of the car or on the crossing, and by the exercise of that degree of care which is commensurate with the danger it has produced or enhanced, provide against resulting damage.

Maxton is a populous town, one of our lagest and most prosperous, and this crossing is much used by the public, including school children. Common prudence demands that care, duly proportioned to the great risk they incur when they cross its tracks, should be taken in order that it will not be further increased by the continuance of unnecessary and highly dangerous methods in the operation of trains.

This case illustrates the danger of the "flying switch" and shows how easily it may entrap the unsuspecting traveler:

1. The following car was not coupled to an engine, which by its noise and smoke, its bell or whistle, would attract attention, and being much lighter, it moved almost noiselessly.

2. The engine with its cars had passed, making noise by ringing its bell and otherwise at the other end of the track, and by its movements indicating its return.

3. No one was at the crossing to signal that shifting was in progress.

4. The traveler relies upon the reasonbale supposition that there is no danger ahead, and goes on, not anticipating that defendant, in violation of the law, would make a flying switch, especially under
(449) such circumstances. 2 Thompson on Neg., secs. 1612, 1697 and note.

Add to all this the intervening line of cars which entirely obstruct his view and conceal the impending danger, and the trap is complete.

We do not impute any moral wrong to defendant, as we are dealing only with the legal aspect of the case; but the defendant was negligent to the point of recklessness, even if its acts were thoughtlessly and not intentionally committed.

The second exception is clearly untenable. It was irrelevant to the controversy that the witness C. C. Hatch had measured other box cars, unless it had been shown that the box cars near or at this crossing were of the same dimensions. It is admitted that there is no uniformity in the

width of box cars, and that those on the oil mill siding, which obstructed plaintiff's view, were not measured by the witness or any one else. The rule for estimating or judging one thing by its resemblance to another, therefore, does not apply, as at least substantial identity between them must first be shown before it is admissible to institute the comparision, so that you may reason from one to the other, for the purpose of proving the objective fact. This is so in regard to values, and is equally so as to size, quality, and quantity, or any other characteristic which admits of comparision. If the car at the crossing had been measured, no comparison would have been necessary. It is similitude that opens the door to this kind of evidence and lets it in. We have so held. *Warren v. Mackeley,* 85 N. C., 12; *Chaffin v. Manufacturing Co.,* 135 N. C., 95. Without this element, the evidence, if admitted, would be purely conjectural, and would introduce irrelevant and diverting matters, confusing to the jury and prolonging the trial indefinitely. *Waters v. Roberts,* 89 N. C., 145. We have assumed, for the sake of argument, that the question would otherwise be competent and relevant, which is by no means clear or to be taken as granted, and for that reason have left out of consideration other reasons assigned in support of the court's ruling.

Plaintiff was permitted to show, against defendant's objection, that Bonnie Helms, one of its witnesses and employed as its (450) brakeman, had come to the place of trial on a free pass, given to him by defendant. The purpose was to show his bias. Wigmore says in his work on Evidence (vol. 2, sec. 949): "The range of external circumstances from which probable bias may be inferred is infinite. Too much refinement in analyzing their probable effect is out of place. Accurate, concrete rules are almost impossible to formulate, and, where posible, are usually undesirable. In general, these circumstances should have some clearly apparent force, as tested by experience of human nature, or, as it is usually put, they should not be too remote. The relation of *employment,* present or past, by one of the parties, is usually relevant." But the very point was squarely decided in *R. R. v. Johnston,* 128 Ala., 283, where it is said: "A witness may be questioned on cross-examination about matters which tend to show bias or partiality towards the party by whom he is introduced; and in an action against a railroad company to recover damages it is permissible for the plaintiff, on cross-examination of witnesses introduced by the defendant, to show that they were furnished free transportation for their attendance on the trial, or that they were given the general privilege of riding on the defendant's road; such evidence having a tendency towards establishing a bias on the part of such witnesses." See 1 Greenleaf Ev. (16 Ed.), 450. *Cecil v. Henderson,* 119 N. C., 423, cited by counsel for defendant, is not applicable. The two questions are essentially different.

The defendant moved in the court below set aside the verdict because it is against the weight of the evidence and the damages are grossly excessive, and the motion was pressed in this Court with zeal by counsel; but we must deny it, as we are not authorized to try the facts or to revise the findings of the jury in a case like this; nor do we assent to the claim that the damages are grossly or "shockingly" excessive. We are not, therefore, at liberty to review the ruling against defendant on the motion, but must leave it as we find it, the final appeal in such cases being to the presiding judge, and we may add that there is nothing in the evidence to show that his discretion was not properly exercised; (451) nor are we willing to intimate that we would reverse if we had the power to review. The eminently just judge before whom the case was tried would not have hesitated to set aside the verdict if, upon fair consideration of the proof, it was right to do so. We have just said, at this term, in *Pender v. Insurance Co., ante,* 98: "There was some evidence, which was properly submitted to the jury, and the defendant having failed to have the verdict set aside by the judge below, because it was against the weight of the evidence, must abide by the result as final and beyond our control. We can review by appeal 'any decision of the courts below upon any matter of law or legal inference,' but in jury trials, at least, our jurisdiction ends when that is done. We cannot review findings of fact in such cases. Const., Art. IV, sec. 8." See *Benton v. R. R.,* 122 N. C., 1007, and cases therein cited.

We are of the opinion, though, that there was an error in the charge as to damages. The three clauses in the charge to which exceptions were specially reserved in the assignment of errors are these:

1. "He is entitled to the difference between what he would make if the injury had not been done and what he would make with it done."

2. "If you reach this issue, and say what is the value of his diminished earning capacity, then when you do that, you are to add reasonable compensation for his pain and suffering."

3. "He is entitled to the difference between what he would make if the injury had not been done and what he would make with it done"; and the following: "If you reach this issue, and say what is the value of his diminished earning capacity, then when you do that, you are to add compensation for his pain and suffering"; also the following: "and when you ascertain that, you add that to such amount as you may have determined to be the amount to which his earning capacity has been diminished by the injury." The same instruction was given in *Fry v. R. R.,* 159 N. C., 357, 362. It will be sufficient to sustain this exception that we refer to that case and what we there decided. We there said: "There was error in the following instruction as to damages:

'If you find that he has been permanently injured, and that such (452) injury partially incapacitates him to earn money, then he would be entitled to recover damages for partial incapacity, if you find the injury was caused by the negligence of the defendant. He would be entitled to recover the difference between what he is able to earn at the present time, and in the future, and what he would have been able to earn if the accident had not happened; and passing upon his expectancy, the mortuary table has been read to you, and you will bear that in mind in awarding damages, if you find that the plaintiff is entitled to recover anything.' In an action for injuries by negligence, such as this one, the plaintiff is only entitled to recover the reasonable *present value* of his diminished earning capacity in the future and not the difference between what he would be able to earn in the future but for such injury, and such sum as he would be able to earn in his present condition. *R. R. v. Paschall,* 41 Tex. Civ. App., 357. Where future payments for the loss of earning power are to be anticipated by the jury and capitalized in a verdict, the plaintiff is entitled only to their present worth. *Goodhardt v. R. R.,* 177 Pa. St., 1. The damages to be awarded for a negligent personal injury resulting in a diminution of earning power is a sum equal to the *present worth* of such diminution, and not its aggregate for plaintiff's expectancy of life. *O'Brien v. White,* 105 Me., 308. The rule, as we see, may be stated with varying phraseology, but it all carries the same idea, that the estimate should be based upon the present value of the difference between plaintiff's earning capacity, and not the total difference caused by the injury. The rule is supported by many authorities in this and other jurisdictions. *Pickett v. R. R.,* 117 N. C., 616; *Wilkinson v. Dunbar,* 149 N. C., 20; *Benton v. R. R.,* 122 N. C., 1007; *Watson v. R. R.,* 133 N. C., 188; *R. R. v. Carroll,* 184 Fed. Rep., 772; *Fulsome v. Concord,* 46 Vt., 135; *Kenny v. Folkerts,* 84 Mich., 616." In *Pickett v. R. R.,* 117 N. C., 616, a similar instruction was held (opinion by *Avery, J.*) to be objectionable, because "it left the date which should be the basis of the calculation, to say the least, uncertain, if the language was not susceptible of the contruction that the net income would be estimated as of the period when those dependent on him would have realized the benefit of his labor had he not come to an untimely end." It is there said that the jury (453) should be told that it is the *present value* of the net earnings or income, the rule being stated succinctly and clearly in the seventh headnote of the case. The identical rule is laid down in *Benton v. R. R.,* 122 N. C., 1007 (opinion by *Clark, J.*), citing *Pickett v. R. R., supra; Burton v. R. R.,* 82 N. C., 504; *Kesler v. R. R.,* 66 N. C., 154. This is not merely the just and reasonable rule, where all the damages are to be awarded and paid presently, and not as they accrue in the future,

but it is the only one admissible under the statute, and it is said in *Benton's case* to have been established by the precedents. Any other principle, if adopted, would enable a plaintiff to recover more than could possibly be earned, as no man realizes at once the full earnings or accumulations of a lifetime.

There must be a new trial of the issue as to damages, and it is restricted to that issue, as was done in *Tillett v. R. R.*, 115 N. C., 662; *Pickett v. R. R., supra;* the error relating only to the damages.

New trial.

WALKER, J. Since this case was argued, the defendant has moved for a new trial, upon the ground of newly discovered evidence. Applications of this kind, as we have held, should be carefully scrutinized and cautiously examined, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been a lack of due diligence. 14 A. & E. Enc. Pl. and Pr., 790. We require, as prerequisite to the granting of such motions, that it shall appear by the affidavit: (1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. *Turner v. Davis,* 132 N. C., 187; *S. v. Starnes,* 97 N. C., 423; *Brown v.* (454) *Mitchell,* 102 N. C., 347; *S. v. DeGraff,* 113 N. C., 688; *Schehan v. Malone,* 72 N. C., 59; *Mottu v. Davis,* 153 N. C., 160; *Aden v. Doub, ibid.,* 434. When we examine the affidavit of Hector Austen, and the others, upon which the defendant bases its motion for a new trial, we find that they fall short of complying with the rule we have just stated. In some respects the proposed testimony is merely cumulative, and in others it only tends to contradict or impeach the plaintiff's witnesses at the trial. It is not very definite. The witness does not speak with sufficient positiveness and directness to give us the slightest assurance that there will be a different result if we grant the application. He states that the brake was not applied to the car making the flying switch, which would tend rather to strengthen than to weaken the plaintiff's case. It is not satisfactorily shown that the testimony of the witness, if desired, could not have been secured at the trial by the exercise of proper diligence. We are convinced that the testimony, if it had been introduced before, would not have changed the result. We refer now to the second affidavit of Hector Austen, made in behalf of plaintiff.

Motion denied.

Cited: Talley v. R. R., post, 579; *Wheeler v. Cole,* 164 N. C., 380; *Steeley v. Lumber Co.,* 165 N. C., 35; *Carson v. Ins. Co., ib.,* 126; *Tate v. Mirror Co., ib.,* 281; *Walters v. Lumber Co., ib.,* 392; *Boyd v. Leatherwood, ib.,* 619; *Trust Co. v. Bank,* 166 N. C., 115; *Shepard v. R. R., ib.,* 545; *Embler v. Lumber Co.,* 167 N. C., 464; *Padgett v. McCoy, ib.,* 508; *Horton v. R. R.,* 169 N. C., 116; *Davidson v. R. R.,* 170 N. C., 284; *LeGwin v. R. R., ib.,* 361; *Penninger v. R. R., ib.,* 475; *Brown v. R. R.,* 171 N. C., 269; *Gainey v. Godwin, ib.,* 755; *Lutterloh v. R. R.,* 172 N. C., 118; *Odom v. Lumber Co.,* 173 N. C., 137.

J. T. DOOLEY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 12 November, 1913.)

1. Statutes—Federal Employer's Liability Act—Interpretation.

Where the Federal Employer's Liability Act of 1908, as amended in 1910, in an action brought in the State courts to recover damages for a wrongful death, is set up and relied upon in the State courts, the courts of the State will follow the interpretation put upon it by the Supreme Court of the United States.

2. Same—"Dependency."

The Federal Employer's Liability Act of 1908, as amended in 1910, gives a certain right of recovery to the employee for an injury caused by the carrier's negligence in whole or in part, while the former is engaged in his duties relating to interstate commerce, etc., and "in case of death of such employee, to his or her personal representatives, for the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee," etc. *Held,* it is only necessary to show "dependency" of the beneficiary on the deceased, when his personal representative sues for damages, under the act, in behalf of the remote relatives, termed by the act, "next of kin"; and not when the beneficiary is the parent, or in the same classification, such as the "surviving widow or husband and children of such employee."

3. Same—Measure of Damages—Trials—Evidence.

Where the father of an employee of a common carrier is entitled to recover for the death of the deceased, caused by the carrier's negligence, under the Federal Employer's Liability Act of 1908, it is for a reasonable expectation of pecuniary benefit from the continuance of the life of the son; and evidence to sustain an action for such recovery is held sufficient and within the rule, if it tends to show that the deceased was a young man of good habits and character, in good health, and had helped his father and was disposed to give him his last cent if he needed it; that the father was growing old, and while not actually dependent on the son for support at the time of the latter's death, he could not tell how soon

he might be. And it is further held, that the amendment of 1910 does not affect this construction, for with reference to the original act, so far as it applies to this case, it only declares that the right of action given therein shall survive.

4. Same—Instructions.

Where the father of a deceased employee has been brought within the rule necessary for a recovery, by the personal representative, in an action brought under the provisions of the Federal Employer's Liability Act, it is error for the trial judge to instruct the jury that the measure of his damages is for the loss of life of the intestate estimated at the present value of his net income for the period of expectancy as ascertained by them, after deducting the cost of living, etc., for in such instances a recovery can only be had for a reasonable expectation of pecuniary benefits to the father from the continued life of the son, under the evidence, for that period.

(455) APPEAL by defendant from *Justice, J.*, at March Term, 1913, of NEW HANOVER.

This is an action brought under the Federal Employer's Liability Act of 1908, as amended in 1910, to recover damages for wrongful death.

The first section of the act of 1908 is as follows:

(456) "SEC. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The amendment of 1910 leaves this section as it is in the original act, and adds a new section to the act as follows:

"SEC. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee; but in such case there shall be only one recovery for the same injury."

The plaintiff's intestate was 23 years of age at the time of his death, was unmarried, and left surviving him a father and mother.

The evidence shows that he was a young man of good character and good habits, and that he was strong, healthly, and industrious.

The father testified as follows: "I am foreman for the Tidewater Power Company, track work and trestle work. I think I have been employed there now about 12 years, and am constantly employed. I get fair wages, $100 a month. At present I am not dependent on my son, but I might be in a few years. At present I would be glad to get whatever help I can get. I was not dependent on my son at the time of his death. He never did leave me, but I think he was about 21, (457) as well as I remember, when he began to work for himself. He went to work for the Seaboard at Monroe. His age had nothing to do with his leaving, though. Up to the time he was 21, he gave me money when I needed it. If I happened to be short, he would help me sometimes; if I needed money, he would give it to me—the last cent of it. He could not come home but about every six months; possibly he would come home in a space of about three months; I am not sure about that. He had to come when they let him off."

His Honor charged the jury on the measure of damages that "The measure of damages for loss of plaintiff's intestate is the present value of his net income, and this is to be ascertained by deducting the cost of living and expenditure from his net gross income, and then estimating the present value of the accumulation from such net income, based upon this expectation of life." The defendant excepted.

The defendant moved to nonsuit the plaintiff upon the ground that it was neither alleged nor proven that the father and mother were dependent on the son.

The motion was overruled, and the defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant excepted and appealed.

J. O. Carr for plaintiff.
J. D. Bellamy & Son for defendant.

ALLEN, J., after stating the case: The appeal presents two questions for decision:

1. Can an action be maintained for the benefit of the father under the Federal Employer's Liability Act for the wrongful death of an adult son, without alleging and proving that the father was dependent on the son?

2. If the action can be maintained, did his Honor instruct the jury correctly as to the measure of damages?

Both questions would be answered in the affirmative if we were dealing with an action under the statute of this State, but the action is brought under the Federal statute, and in so far as it has been (458) construed by the Supreme Court of the United States, we are bound by that construction.

We are referred by counsel for the defendant to three recent decisions of that Court, which he insists support his position that dependency must be alleged and proven in all cases: *R. R. v. Vreeland,* 227 U. S., 54; *R. R. v. Didricksen,* 227 U. S., 145; *R. R. v. McGinnis,* 228 U. S., 173.

The question was not raised or decided in either case, that the word "dependent" in the first section of the act of 1908 refers to the beneficiaries named in the statute as well as to the next of kin; and while expressions appear to the effect that it was the purpose of the act to give a right of action to dependent relatives, it is distinctly held that the right of action exists in favor of those named in the statute, other than the next of kin, if there is a reasonable expectation of pecuniary benefit from the continuance of life, although prospective.

In the *Vreeland case,* which was an action for the benefit of the wife on account of the death of her husband, the Court says: "The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. . . . The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, 'according as the action is brought for the benefit of the husband, wife, minor child, or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.' "

In the *Didricksen case:* "The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee," and this language is approved in the *McGinnis case.*

It would seem, then, that the construction placed upon the act by the Supreme Court of the United States is that the action may be maintained in behalf of widow, or husband, or children, or parents, (459) upon proof of a reasonable expectation of pecuniary benefit; and that when it is for the benefit of others as next kin, there must be proof of dependency.

It may be doubted whether the courts should limit and qualify the right of action for the benefit of the widow, etc., when the statute does

not do so, and when the effect is to narrow the scope of the act passed for the protection of employees, so that under this construction in most cases the amount of recovery will be greatly reduced, and in many it will be nominal; but however this may be, the language will not permit the construction that the word "dependent" relates to any of the beneficiaries except the next of kin.

In the first section, after declaring the liability of the employer to the injured employee, it adds: "or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then the next of kin dependent upon such employee, for such injury or death," etc.

The beneficiaries are divided into three classes, and it is only when there is no one belonging to the first and second classes that an action may be maintained in behalf of more remote relatives—next of kin—and they must be dependent.

If, then, the parent may maintain an action for the wrongful death of his son, although not dependent, if he has a reasonable expectation of pecuniary benefit from the continuance of his life, what is the meaning of this phrase, and how may the fact be proven?

We follow the precedent set by *Mr. Justice Lurton,* who said in the *Vreeland case:* "The statute in giving an action for the benefit of certain members of the family of the decedent is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being, that of 9 and 10 Victoria, known as Lord Campbell's Act," and who had recourse to the decision upon the English statute and upon like statutes in different States to ascertain the meaning of the Federal statute.

One of the earliest cases by the English Court is *Franklin v.* (460) *R. R.,* 4 Hurl. & N., 511, in which *Pollock, J.,* says: "It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been forced by the claimants, had the deceased lived, and give damages limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonble expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. Whether the plaintiff had any such reasonable expectation of benefit from the continuance of his son's life, and if so, to what extent, were the questions left in this case to the jury. The proper question then was left, if there was any evidence in support of the affirmative of it. We think there was. The

plaintiff was old and getting infirm; the son was young, earning good wages, apparently well disposed to assist his father, and in fact he had so assisted him to the value of 3s. 6d. a week. We do not say that it was necessary that the actual benefit should have been derived; a reasonable expectation is enough, and such reasonable expectation might well exist, though from the father not being in need, the son had never done anything for him."

This case was approved in *Dalton v. R. R.,* 4 C. B. N. S., 303, and the latter case was cited with approval by *Lord Haldane,* during the present year, in *R. R. v. Jenkins* (1913), A. C., 1, in which he says: "The action is brought under Lord Campbell's Act by the father on behalf of himself and the mother for damages for the loss of the daughter. Now, we have heard a good deal of authority cited as to what the foundation of such an action is, but I do not think there is much difficulty in coming to a conclusion as to the principle which underlies those authorities. The basis is not what has been called *solatium,* that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss. But this loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the propo-
(461) sition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition, either in statute or in any doctrine of law which is applicable; nor do I think it is really established by the authorities, when you examine them. As regards the judgment in the court below, I have already indicated that in my view the real question is that which *Willis, J.,* defines in one of the cases quoted to us, *Dalton v. R. R.* (1): 'Aye or No, was there a reasonable expectation of pecuniary damages?' "

These English cases decide that an action may be maintained for the benefit of the parent for the wrongful death of an adult son, when there is a reasonable expectation of pecuniary benefit from the continuance of the life of the son, and that it is not necessary to prove that the son has contributed to the support of the parent in order to establish such reasonable expectation, and the American authorities support the same position.

In Tiffany on Wrong. Death (2 Ed.), sec. 159, the author says: "The loss which a man suffers by the death of a relative may be the loss of something which he was legally entitled to receive, or may be the loss of something which it was merely reasonably probable he would receive. The first description of loss is principally confined to a husband's loss of his wife's services, a wife's loss of her husband's support and services, a parent's loss of the services of a minor child, and a minor child's loss

of the support of a parent. But the statutes do not confine the benefit of the action to husbands, wives, minor children, and parents of minor children; and hence a person entitled to the benefit of the action may recover damages for the loss of pecuniary benefit to which he was not legally entitled, but which it is reasonably probable he would have received except for the death. The second description of loss includes the loss by the beneficiary of any pecuniary benefit which he might reasonably have expected to receive during the lifetime of the deceased by gift, and also the loss of any accumulations which it is probable that the deceased would have added to his estate had he lived out his natural life, and which the beneficiary would probably have received by inheritance. Thus the second description of loss may be (462) divided into (1) losses of prospective gifts, and (2) losses of prospective inheritance. The loss sustained by a husband, wife, minor child, and parent of a minor child may be both descriptions. The loss sustained by an adult child, parent of an adult child, or collateral relative, can only be of the latter description." The following cases, among others, support the text: *Greenwood v. King*, 82 Neb., 22; *Hillebrand v. Stans. Bis. Co.*, 139 Cal., 236; *Duekman v. R. R.*, 237 Ill., 108; *R. R. v. Kindred*, 57 Tex., 498; *Hopper v. R. R.*, 155 Fed. 277.

In the last case (*Hopper v. R. R.*) the action was brought in Colorado for the benefit of the father for the wrongful death of his daughter, 19 years of age, but an adult under the laws of Colorado, who had never contributed to the support of the father, and *Mr. Justice Van Devanter*, then Circuit judge, said: "Another reason assigned by the Circuit Court for directing a verdict for the defendant was that there was no evidence of any pecuniary injury to the plaintiff from the death of the daughter. In substance, the evidence was as follows: When the deceased was 2 years old, the mother died at the family home in Texas, and shortly thereafter the child was taken by the father to an aunt near Greenfield, Mo., with whom she lived until she was 16. He then sent her to a school at Parkville, Mo., that she might prepare herself for teaching, and he paid the expenses incident thereto. She had been in this school three years and was on a visit to a sister in Colorado when she met her death. She was sympathetic, ambitious, industrious, of good health, fond of her father, and wanted to keep house for him, but had not as yet rendered any service to him or made any contribution to his support. After the mother died, the father continued to reside in Texas, but broke up housekeeping. He was chiefly engaged as a traveling machinist, and sometimes as a farm laborer; his earnings being about $50 per month. He had not married again, and was 60 years old. Considering this evidence in the light of natural influence or prompting of filial ties, we think it would have sustained a finding that there was a reasonable

(463) expectation of substantial, though not large, pecuniary benefit to the father from a continuance of the life of the daughter. *Pierce v. Connors,* 20 Col., 178, 182; 46 Am. St., 279; *Gibson Co. v. Sharp,* 5 Col. App., 321, 327; *Swift v. Johnson,* 71 C. C. A., 619; 138 Fed., 867."

The evidence meets fully this rule of the English and American courts. The deceased was, according to the evidence, strong, healthy, intelligent, and industrious, and he was a young man of good habits and good character.

He had helped the father and was so disposed to him that he would give him his last cent if the father needed it, and the father was growing old, and while not actually dependent on the son for support at the time of death, he did not know how soon he might be.

This furnishes sufficient evidence to sustain a finding that the father had a reasonable expectation of pecuniary benefit from the continuance of the life of the son, and the motion for judgment of nonsuit was, therefore, properly denied.

We do not think the amendment of 1910 affects this action one way or the other, and we forbear discussing it further than to say that it does not purport the deal with any cause of action except there given by section 1, and that it declares that "the right of action given by this act to a person suffering injury shall survive."

The rule for the assessment of damages laid down by his Honor, while following the decision of this Court in the construction of Lord Campbell's Act, is erroneous as applied to the Federal Employer's Liability Act, as construed by the Supreme Court of the United States.

In *R. R. v. Didricksen,* 227 U. S., 145, that Court says: "The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. The damages recoverable are limited to such loss as results to them because they have been deprived of a reasonable (464) expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss thus sustained."

This language was quoted with approval in *R. R., v. McGinnis,* 228 U. S., 175, and the Court adds in the last case: "In a series of cases lately decided by this Court, the act in this aspect has been construed as intended only to compensate the surviving relatives of such a deceased employee for the actual pecuniary loss resulting to the particular person or persons for whose benefit an action is given. The recovery must

therefore be limited to compensating those relatives for whose benefit the administrator sues, as are shown to have sustained some pecuniary loss."

There must, therefore, be a new trial on the issue of damages.

Partial new trial.

Cited: Irvin v. R. R., 164 N. C., 16; *Kenny v. R. R.*, 165 N. C., 103; *Saunders v. R. R.*, 167 N. C., 383; *Raines v. R. R.*, 169 N. C., 193, 194; *In re Stone*, 173 N. C., 210.

IN RE WILL OF W. R. SMITH.

(Filed 12 November, 1913.)

1. Appeal and Error—Evidence—Unanswered Questions—Documentary or Paper Evidence.

When exception is taken to the refusal of the judge to permit a witness to answer a question, it must in some way be made to appear from the form or nature of the question, or by a statement of counsel, what the reply will be, so it may be seen that prejudicial error has been committed, or the exception cannot be considered on appeal; and the same rule applies to the exclusion of record or documentary evidence, the contents of which do not appear.

2. Witnesses—Interest—Bias—Trials—Instructions—Weight of Evidence—Appeal and Error.

Where a witness is interested in the parties to or the result of an action, it is proper for the judge to instruct the jury to consider what bias this interest may have on his testimony, and should they find that his testimony was not thereby biased, to give it such weight as it should otherwise have; and his failure to instruct, further, that the unbiased testimony of the witness was entitled to the same weight as that of any other witness is not error, for the jury may consider that the testimony of other witnesses, from their character, or means of knowledge, or better memory, etc., was more entitled to their credence; and it is further held, if such further instruction were proper, an appeal would only lie from the refusal of a special instruction embodying it.

APPEAL by caveator, W. A. Smith, from *Peebles, J.*, at June (465) Term, 1913, of GUILFORD.

King & Kimball for propounder.

J. A. Barringer for caveator.

WALKER, J. The caveators in this proceeding alleged that the paper-writing, which had been propounded, was not the will of W. R.

Smith, because at the time of its formal execution he did not have sufficient mental capacity to execute such an instrument. There was much evidence taken upon the issue joined between the parties, but it is not necessary to set out even the substance of it, as the exceptions principally relate to its competency.

The caveators asked many questions, to which the propounders objected, and they were excluded, but we cannot sustain the assignment of error in respect to them, as it does not appear what the witnesses would have testified or what was proposed to be proven. Before we can declare that there was an error committed in rejecting evidence, or, if there was error, whether it was prejudicial, we, of course, must know what is the nature of the evidence, in order to ascertain whether it is competent and relevant. Besides, the witness may answer in such a way as to render the error perfectly harmless: for instance, that he has no knowledge of the matter inquired about, or he may give an answer which is entirely unfavorable to the party who asked the question, and perhaps other answers might be given, which would show that the error was not a prejudicial one. Suppose we should order a new trial because the judge excluded the question, "Do you know whether he was suffering with a disease?" and when the question was again put to the witness, he should answer it in the negative, it would at once appear that we had done a vain thing. Counsel should state what they expect to prove by the witness, if the question is objected to, unless the question itself gives sufficient indication of it, and even then there should be some
(466) probability shown that the witness will testify as expected. In *Dickerson v. Dail,* 159 N. C., 541, we said: "There is no statement as to the answer of the witness when the question was admitted, nor as to the evidence sought to be elicited when it was excluded; and as we cannot see that the defendant has been prejudiced, the exceptions cannot be sustained. *S. v. Leak,* 156 N. C., 643." Appellant must show error; we will not presume it, but he must make it appear plainly, as the presumption is against him. *Albertson v. Terry,* 108 N. C., 75; *Lumber Co. v. Buhmann,* 160 N. C., 385. There is another class of objections in this case, where the judge properly excluded the questions, as it appeared that the witnesses did not have the requisite knowledge of the facts to answer them. *Berbarry v. Tombacher,* 162 N. C., 497; *Aman v. Lumber Co.,* 160 N. C., 369. Other questions were ruled out because the were fully covered by previous answers of the witness, which was proper. *Baynes v. Harris,* 160 N. C., 307. There are still others where the time to which they relate is not given, so as to show their pertinency or bearing upon the issue. The Court must be able to see that the proposed evidence is both competent and relevant, and this is required by the rule just stated.

Caveators offered a certain record in a proceeding, said to have involved the sanity of the testator, but the same reason for its exclusion applies as in the case of the objections above noted. We are not informed as to its contents, so that we can see its relevancy and give an intelligent opinion as to the validity of the exception now made to the ruling. We may add these authorities to those already cited upon the general question that the party asking the question, which is excluded, must disclose to the court what he expects to prove by the witness. *Overman v. Coble,* 35 N. C., 1; *S. v. Pierce,* 91 N. C., 606; *Boney v. R. R.,* 155 N. C., 95; *Whitmire v. Heath,* 155 N. C., 304. The same rule prevails in other jurisdictions. *In re Pinney's Will,* 27 Minn., 280. We said in *Whitmire's case:* "A court cannot pass intelligently upon evidence unless it knows what it is, in order that its bearing upon the issue may be determined. The defendant should have stated what he expected to prove, otherwise the question was properly excluded, (467) not because it is incompetent, but because it cannot be seen that it is. The Court must judge of its competency and materiality—not the counsel. This is the well settled practice and the rule of reason." It also applies to papers and records offered in evidence, as will appear by reference to *S. v. Pierce, supra,* and *Fulwood v. Fulwood,* 161 N. C., 601. If the record had any relevancy to the issue, the date to which it related was too remote for any legal bearing upon the case. There must, of course, be some rational connection between the two and some reasonable proximity in point of time, so that the proof that is offered will have at least some tendency to establish the fact embodied in the issue. *Byrd v. Express Co.,* 139 N. C., 273. Such was not the case here. The record was made some time after the date of the will.

The only other assignment of error requiring attention is the one taken to the instruction that, in passing upon the testimony of interested witnesses, the jury may consider any bias they may have by reason of their relation to the parties or the cause, it being insisted that the court should have added, that if the jury found that they were not influenced by their "bias," and that they are credible, "their testimony should have the same credit as that of any other witness," following *S. v. Holloway,* 117 N. C., 732, and this view is earnestly pressed in the brief of counsel. The court was not specially requested to qualify its charge in the respect indicated. But we do not think it should have done so in this case, if the request had been made. If the jury had decided that the witnesses were not biased by their interest or relationship, they should not necessarily have received the credit due to other witnesses, and put upon an equality with them, as the credit to which they were entitled depended, not upon their bias or indifference alone,

but upon other circumstances as well—as for example, their intelligence and their appearance and deportment while on the stand; their character whether good or bad; their means of knowledge; the probability of their story—these and other matters entered into the estimate of the value to be attached to the testimony of the witnesses, and the jury had the right to put them in the scales, in weighing the testimony, for the
(468) purpose of separating the true from the false and finally ascertaining where was the preponderance of the evidence. It may be proper for a judge to tell the jury "that if the witness is not biased by his interest, his testimony should have the same weight as if he was not interested," as said in some of the cases, for this is a truism, and a sensible jury would not overlook it. It is a proposition that proves itself, but it does not mean that the witness shall occupy a position of equality with another who has a better character, more sense and knowledge of the facts, a stronger memory, superior judgment, and whose other qualities and advantages inspire the jury with greater confidence in his credibility. Speaking of the rule of the common law, whereby parties to and persons interested in the event of an action were disqualified, this Court said in *Hill v. Sprinkle,* 76 N. C., 353: "For generations past and up to the last few years, interest in the event of the action, however small, excluded a party altogether as a witness, and that upon the ground, not that he may not 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 in good sense and sound policy. The parties to the action are now conmpetent witnesses, but the reasons which once excluded them still exist, to go only to their credibility." We think that this change in the law of evidence was a wise and salutary one, but it did not abolish the other rules of evidence, and the jury should not be handicapped by an imperative instruction that in the absence of bias of some who are interested, they should give credit to all the witnesses equally, as those who have had no interest may, in other respects and apart from any consideration of bias or impartiality, be more reliable. It is undoubtedly true that interest naturally produces bias, for we have been told that, "If *self* the wavering balance shake, it's rarely right adjusted"; but notwithstanding this tendency of our nature and our frailty, the witness may resist the temptation which thus besets him and prove himself to be worthy of credit. *Smith v. Moore,* 142 N. C., 277. If he is not in fact prejudiced by his relation to the cause or the parties, the jury may then consider
(469) whether there are other circumstances which impair the strength of his testimony, such as want of intelligence, character, knowledge of the facts, and so forth. The subject has so recently under-

gone discussion in this Court that further comment is unnecessary. *Herndon v. R. R.*, 162 N. C., 317. See, also, *S. v. Vann*, 162 N. C., 534

A careful examination of the entire case discloses no reversible error.

No error.

Cited: S. v. Smith, 164 N. C., 479; *S. v. English, ib.*, 509; *Steeley v. Lumber Co.*, 165 N. C., 30; *S. v. Lane*, 166 N. C., 337; *Ferebee v. R. R.*, 167 N. C., 297, 301; *Warren v. Susman*, 168 N. C., 464; *Schas v. Assurance Society*, 170 N. C., 421; *McRary v. R. R.*, 174 N. C., 565.

DE PAUL BREEDEN v. MINNEOLA MANUFACTURING COMPANY.

(Filed 12 November, 1913.)

Master and Servant—Dangerous Machinery—Instructions to Servant—Negligence—Evidence—Duty of Master—Safe Appliances—Contributory Negligence—Trials.

The plaintiff, a 14-year-old boy, was employed to operate a tentering machine in the defendant's cotton factory, and was injured while endeavoring to clean the machine, while in motion, by reason of a rag, given him for the purpose, catching in a part of the machinery and drawing his hand therein. The plaintiff's evidence tended to show that he was unused to the machine and was not instructed in its operation; that theretofore a brush with a handle about 2½ feet long had been given him and the other employees, but had been taken away, under his protest, because its use would probably be injurious to the machine by the wooden handle catching in its cogs, and that with these brushes the machine was cleaned while in operation; that there were times when the machines were not running when they could safely be cleaned with a rag, in the manner described, but that these times were taken up with other duties, and that he was directed by his superior employer to clean the machine with a rag, when in motion: *Held*, defendant's motion as of nonsuit upon the evidence was properly overruled; and it was for the jury to determine as bearing upon the defendant's negligence: (1) whether the plaintiff was directed to clean the machine while in motion; (2) whether the rag was a safe appliance for the purpose; (3) whether the defendant failed to instruct the plaintiff as to the operation of the machine and its dangers, and whether such failure was the proximate cause of the injury. And it is further held, that it is not necessarily inferred from the evidence that the plaintiff was acting at the time in disobedience of orders, from the fact that upon stated occasions the machines were stopped in their operation, when they could safely have been cleaned with a rag.

APPEAL by defendant from *Shaw, J.*, at September Term, (470) 1913, of GUILFORD.

This action was instituted to recover damages because of an injury alleged to have been received while in the employ of the defendant and through its negligence.

In his complaint the plaintiff alleges that he was injured at 2:40 o'clock of the afternoon of Saturday, 2 January, 1909, while cleaning, with a rag in his left hand, a certain part of a tentering machine in the cotton mill of the defendant at Gibsonville while the machine was in motion, and that he was at that time about 14 years of age. The complaint contains four specifications of negligence, to wit:

1. Failure to instruct.

2. That the work assigned to plaintiff "was entirely too heavy."

3. That defendant failed to furnish certain appliances, to wit, brushes, in general and approved use for cleaning machinery; and

4. That the defendant required the plaintiff to clean said tentering machine while running.

The defendant in its answer denied each allegation of negligence and pleaded contributory negligence, assumption of risk, and the three years statute of limitations.

At the close of the plaintiff's testimony the defendant moved that the action be dismissed and for judgment as in the case of nonsuit. This motion was overruled, and defendant excepted.

The defendant offered no testimony, but prayed the court in writing in apt time "to charge the jury to answer the first issue 'No.'" The court refused to charge as requested, and defendant excepted.

(471) The defendant in apt time in writing further prayed the court "to charge the jury, if they answer the first issue 'Yes,' to answer the second issue 'Yes.'" The court refused to charge as requested, and the defendant excepted.

The evidence of the plaintiff tended to prove that at the time of his injury he was 14 years old lacking twenty days; that he had, prior to his injury, worked for four or five years in various cotton mills and had done quite a variety of work, beginning with "picking quills" and ending with the operation of the tentering machine on which he was injured; that he had for several months worked in the room in which the tentering machine was, operating the stitching machine and glossers, and that he was assigned to operate this particular machine "about eight or nine or ten days" before his injury; that prior to two weeks before his injury the defendant company had provided its employees with brushes with which to clean machines, but that at that time these brushes were taken away and they were given rags and waste instead; that when brushes were used for cleaning, his hands would not be nearer then 2 feet to the machine.

The plaintiff testified, among other things, as follows:

"It was my duty to clean the machine everywhere. If I didn't, I had to go back over it. There were no instructions given me at the time I was assigned to work on this machine as to how to clean it and operate it. Up until Saturday before I was hurt on the following Saturday, I had a brush to clean the machine with. It was a brush made out of a picker stick, or anything you could get hold of, so that it was about 2½ or 3 feet long, made out of this warp they make cloth out of. You got the brush and cut notches in the stick and tied this piece of warp on this stick. The handle was from 2½ to 3 feet long. When you were cleaning the machine with a brush it was necessary for you to put your hands about 2 feet from the parts. Mr. Theodore Allred took these brushes and burned them up. When he came around and took the brushes I asked him what I must clean up with, and he says, 'You will have to clean up the best way you can.' I says, 'I am going to swipe me a brush somewhere and use that,' and he says, 'You can't use it if you stay in here; you will have to get out of here if you use a brush. You can clean up with a rag the best you can, or anything that you don't have to stick in there that will break the gears. After they took (472) up the brushes I had nothing except rags to clean up with. Neither Mr. Allred nor any one else warned me as to the danger in cleaning this machine with a rag. I was hurt about two weeks after these brushes had been taken up. I was on my knees wiping this here piece of frame that goes under the frame that holds the other frame to it. The piece that fastens across there. I was wiping this rod with this rag. I don't have a brush so as to stand outside. I had to get on my knees and wipe with that rag. As I went to pull my hand out the wind of this here chain blew the rag and it caught in the sharp-pointed teeth and jerked my hand right under this here wheel. The machine was running. The reason I did not stop the machine to clean it up was simply because they would not let me stop the machine. The reason why I did not stop the machine to clean it up was because, when the cloth would get pushed on me on a Saturday evening, I had to run this machine. They gave us three-quarters of an hour to stop the machine and clean it up, fan off."

Q. Tell who gave you the instructions, who said you had to run it and clean it? A. Both of them gave me instructions, Mr. Charley Stout and Mr. Theodore Allred, both gave me instructions.

Q. State what instructions they gave you. A. Told me I could not stop the machine.

Q. About cleaning up while it was running or not running? A. Yes, sir; could not stop the machine during working hours, and if I wanted to clean it I would have to wait until this three-quarters of an hour came and then clean it, or clean it during spare times when I got a

chance, or stay after working hours and get no pay for it. It would take about one hour and fifteen minutes to clean it like they required. I had to sweep up the floor after I had cleaned up, after Mr. Theodore Allred inspected the machine.

"I said that both Stout and Allred told me not to stop the machine in order to clean it up. I do not know at what hour the machine stopped on Saturday. I know they gave us three-quarters of an hour to stop the machine and sweep up. I do not remember whether it was 5 (473) o'clock or 10 minutes after 6, when the mill closed down on Monday, Tuesday, Wednesday, Thursday, and Friday. I think it was 6 o'clock the year round. On Saturday I think it was 4. I think the machinery shut down in the finishing department on Saturday afternoon about a quarter past 3. It was not a quarter to 3. That is one thing I know. It shut down for us to line the machines up. He started around just as quick as he started to line up the machines; went around and inspected them, and we started to sweep the floor. That time was not given us in which to clean the machines; it was given us in which to line up the machines and sweep up. It was not given us expressly for cleaning the machine. I knew that if I got my hand caught in a moving chain I would get hurt, but you see I was trying to keep out of it. I was trying to prevent an injury to my person. I was doing what they required me to do, cleaning the machine. No instructions were given to me as to cleaning that machine. I knew I had to clean it, and clean it clean. That is all I knew. I knew how to do it with brushes. I didn't know how to do it unless I got down with the rag. I saw the chain there and saw the wheel there, and I knew if my hand was carried by the chain against the wheel that it would hurt me. A lot of the machine was nowhere near the chain and wheel, that is, a lot of the frame. I can't tell how much. I didn't understand the nature and mechanism of the machine before I was assigned to work on it. I knew nothing about it until he told me to run it. I knew how to keep the cloth on the teeth; knew nothing more about it. I knew I was likely to be hurt anywhere in there. I don't know that I knew it was dangerous cleaning that part; no, sir, not in that way. If I had had a brush it would not have been dangerous at all. The way I was cleaning it then I didn't know that I was liable to get hurt right at the present time. If I had, I would not have cleaned it. The chains were where I could see them underneath. I was kneeling down on both knees and the moving wheel and chain were immediately before my eyes. The wind in this chain could have blown the rag and jerked my hand. The rag was tight in my hand, gripped tight. I had it in the palm of my hand. My hand was

caught before I knew it. The chain jerked my hand. I knew if (474) my hand got in there it would get hurt, but I didn't intend for it to get in there."

W. E. Marshall testified for the plaintiff as follows:

"I live at Durham. I lived at Gibsonville in the winter of 1909. I lived there five years and seven months. I was master mechanic of the Minneola Manufacturing Company, the defendant. I was in their employ at the time Paul Breeden got hurt. That machine is something like 30 or 40 feet long, and the machine is to stretch the goods, to weave them all the same number of inches, have all the same length. Sprocket and chain. Chain continuous, one on each side, and as the carriage strikes the chain on each side the chain runs continuous, with a row of pins about like clothes pins or a little larger, something like $\frac{3}{8}$ of an inch long, or half an inch. Space of about $\frac{3}{16}$ of an inch apart, which sets them pretty thick. As these chains revolve they catch the goods here and take it out a certain distance, and the chain widens out. That machine has a frame on each side of it. It is supported by shafts and connections. At the opposite end some rollers which take the goods off and fold it out. Driver on the machine at the opposite corner. Has a loose and tight pulley, and a short shaft drives that pinion into a large gear which drives the machine, operates the whole machine. Up at this end back here where the operator sits the goods is taken off on the table behind, and that goes over a reel, you might call it, and goes down under the platform that he sits on and comes up and enters the chain right here. There it first strikes it. That chain is open, exposed on the machine most of the way around, except a small piece right here (indicating) where the goods come over. The chain is open all the way around. The chain came here and came around the sprocket. The chain was exposed until it strikes that sprocket, which pulls it around. The wheel was more than 3 or 4 inches from the side of the carriage, which reverses backward and forward on the frame of the machine. The wheel reaches to the front of the machine, all except a little shield there to stop the goods, pull the goods off until it strikes the proper place along the chain. In cleaning the machine it is necessary for one to get down under the machine when he is (475) cleaning it with a rag. If one had a brush as was described to clean the machine and those parts about this sprocket wheel, he could do that without getting down under the machine, and could do it without placing his hand in close proximity to the chain and wheels. I worked for this defendant five years and seven months. I had been there something like three years before the injury. I know that this defendant company used brushes to clean their machinery up until about two weeks previous to the time of the injury to Breeden, and I know that

this defendant took the brushes up about two weeks previous to this injury and they burned them up. I worked at the mills at Mayodan in Rockingham County; at Fries, Virginia; at Spray and Gibsonville. The Minneola was the last I worked for. I had worked for the others before. Three of the mills that I had worked for used brushes. One in the spinning-room didn't use long-handled brushes, used short bristle brushes."

The jury returned the following verdict:

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

2. Did the plaintiff by his own negligence contribute to his injury, as alleged in defendant's answer? Answer: No.

3. What damage, if any, is plaintiff entitled to recover? Answer: Seventeen hundred and fifty dollars ($1,750).

Judgment in favor of the plaintiff upon the verdict, and defendant appealed, assigning as error:

1. The refusal of the court to allow its motion that the action be dismissed and for judgment as in the case of nonsuit.

2. The refusal of the court to give defendant's prayer "to charge the jury to answer the first issue 'No.'"

3. The refusal by the court to give defendant's prayer "to charge the jury, if they answer the first issue 'Yes,' to answer the second issue 'Yes.'"

Brooks, Sapp & Hall for plaintiff.
F. P. Hobgood for defendant.

(476) ALLEN, J., after stating the case: There is no controversy as to the law governing this case, the defendant admitting that it was its duty to furnish the plaintiff with suitable and reasonably safe appliances, and to instruct him as to his duties and as to the dangers in operating the machine at which he was working when he was injured.

The contention of the defendant is that, as the plaintiff admits that the mill was stopped on Saturdays for the purpose of cleaning the machines, and that he had other opportunities to do so during the week when the machine was not in motion, the only reasonable deduction from the whole evidence is that the plaintiff was instructed to clean the machine when at rest, and not to do so when in motion, and that if this is true, the rag furnished the plaintiff was a reasonable and safe appliance for cleaning the machine not in motion; that there were no need of instruction, because there was no danger if he performed his duties

as he was told to do, and that the real cause of the injury to the plaintiff was his disobedience of the order not to clean the machine when in motion.

The learned counsel for the defendant urges this contention in a strong, forceful argument, which convinces us that there was good reason for asking the jury to adopt his view; but it does not satisfy us that there was no other reasonable inference to be drawn from the evidence, and if there is evidence of negligence as the cause of the injury, the question is one for the jury, unless the evidence of the plaintiff establishes contributory negligence on his part.

The position of the defendant is predicated upon the allegation that the plaintiff was directed to clean the machine when at rest, and not to do so when in motion.

No witness testified that this instruction or order was given, and the plaintiff testified, "It was my duty to clean the machine everywhere. There were no insructions given me at the time I was assigned to work on the machine as to how to clean it and operate it. No instructions were given to me as to cleaning that machine. Neither Mr. Allred nor any one else instructed me as to the danger in cleaning this machine with a rag." If the jury accepted this evidence, they must have found that the plaintiff was performing his duty when he was injured and that he had not been instructed to stop the machine to clean it.

Again: "I said that both Stout and Allred told me not to (477) stop the machine to clean it up." "The reason I did not stop the machine to clean it up was simply because they would not let me stop the machine."

When the defendant took the brushes from the plaintiff which had been used in cleaning the machine, and in the use of which the hands of the plaintiff would not have been nearer to the machine than 2 feet, the plaintiff said to the foreman: "I am going to swipe me a brush somewhere and use that," and he said: "You can't use it if you stay in here; you will have to get out of here if you use a brush. You can clean up with a rag the best you can, or anything that you don't have to stick in there that will break the gears."

Were not the jury justified in inferring from this evidence that the defendant expected the plaintiff to clean the machine while in motion, as otherwise the use of a brush would not break the gears?

There is also evidence that the brush was taken from the plaintiff on Saturday before he was injured, and that prior to that time the machine was cleaned with the brush while in motion, and as the plaintiff, a boy 14 years of age, had been instructed not to stop the machine, it was not unreasonable for him to conclude that he was to clean the machine in motion, in the absence of specific instructions, which he says were not given him.

The excerpts from the evidence are subject to the criticism that they are taken from different parts of the testimony, and that all associated evidence is not presented, but while this is true, nothing is omitted which is necessarily in conflict with that quoted.

We are, therefore, of opinion that there is evidence that the plaintiff was directed to clean the machine in motion; that the rag given him was not a safe appliance for this purpose; that the defendant failed to instruct the plaintiff as to the operation of the machine and its dangers, and that the failure of duty on the part of the defendant was the cause of the plaintiff's injury; and further, that it is not necessarily
(478) inferred from the evidence of the plaintiff that he was acting in disobedience of orders.

It follows, therefore, that there is no error in overruling the motion for nonsuit or in refusing to give the instructions prayed for.

No error.

Cited: Lynch v. R. R., 164 N. C., 252.

JOHN F. McNAIR AND D. L. GORE v. T. F. BOYD.

(Filed 12 November, 1913.)

1. Deeds and Conveyances—Tax Deeds—Notice—Affidavits—Interpretation of Statutes—Evidence—Registration.

It is necessary to the validity of a tax deed for lands sold for taxes in 1897, and at the present time, that the purchaser at such sale serve notice upon the owner of the land and the parties in possession, and make affidavit that such notice as required by the statute had been fully complied with; and in an action involving title to the lands, that affidavit must have been registered and put in evidence, together with the deed, in order to vest title in the purchaser.

2. Deeds and Conveyances—Tax Deeds—Purchaser—Equity—Foreclosure.

Where lands in 1897 were sold for taxes, and bid in by the county, the county did not become the absolute purchaser, but acquired only the right to foreclose the certificate of purchase or foreclose the deed if such had been made, instead of issuing the certificate, and its assignee could acquire no superior right. Hence, such assignee acquired at most the assignment of an equity under which to institute proceedings for foreclosure. It is otherwise under the provisions of the present law, Revisal, 2905.

3. Deeds and Conveyances—Tax Deeds—Actions—Tender of Taxes—Sheriff's Deed—Execution After Expiration of Term.

In this case to remove a tax deed as a cloud upon the plaintiff's title, the plaintiff properly tendered the amount of taxes due on the lands, and it is held that the sheriff could have executed a valid deed after the expiration of his term of office. Revisal, sec. 950.

4. Deeds and Conveyances — Tax Deeds — Cloud Upon Title — Possession — Limitation of Actions.

Where the plaintiff, in his action to remove a tax deed as a cloud upon his title, is and has been in possession of the lands, the statute of limitations cannot avail as a defense.

5. Trials—Tax Deeds—Verdict, Directing—Presumptions.

Where a tax deed is sought to be set aside for noncompliance with the prerequisites of the statute as to giving notice to the owner and parties in possession before the execution of the sheriff's deed (Revisal, 2884), and it appears from the uncontradicted evidence that the vendee had not thus acquird the right to it, the recitals in the deed are neither conclusive nor presumptive, and it is not error for the judge to instruct the jury to find the issue for the plaintiff, should they find the facts to be as testified.

6. Deeds and Conveyances—Invalid Tax Deeds—Decree.

Where in an action to set aside a tax deed the issue has been found in the plaintiff's favor, a decree of cancellation upon the payment by the plaintiff of the taxes due to the defendant with the statutory interest, should be made.

APPEAL by defendant from *Bragaw, J.*, at April Term, 1913, (479) of RICHMOND.

Russell & Weatherspoon and U. L. Spence for plaintiffs.
John P. Cameron for defendant.

CLARK. C. J. This is an action to remove a cloud from title by canceling and setting aside the deed executed by J. M. Smith, sheriff of Richmond, to W. K. Strickland, 19 January, 1900, in pursuance of a sale of land therein described, for taxes. The lands in controversy were listed for taxation by Peter L. Pate in 1897 and were sold by J. M. Smith, sheriff of Richmond, on 4 July, 1898, to satisfy unpaid taxes thereon; no purchaser bid for the lands, which were thereupon bought in by the county. Thereafter W. K. Strickland purchased the certificate of sale from the county, and the sheriff thereupon executed a deed to him. The plaintiff introduced deeds showing that Peter L. Pate owned the land at the time the lands were listed for 1897, and indeed showing a complete paper title back to a grant from the State, unless the same was divested by the tax deed referred to. It was also in proof that the plaintiff D. L. Gore has since succeeded to the title of Pate.

The statute authorizing the sale of land for taxes for the year (480) 1897 and the execution of a deed therefor required, as now, the purchaser at such sale to serve notices upon the owner of the land and the parties in possession and make affidavit that such notice and acts required by the statute had been complied with before he was

entitled to a deed, and such affidavit must be registered and given in evidence along with the tax deed in order to vest title in such purchaser. No affidavit was made in this case, and the tax deed was therefore invalid. *Mathews v. Fry,* 141 N. C., 582; *King v. Cooper,* 128 N. C., 347.

The statute in force at the time this tax sale was made and the deed executed did not permit a county to become the absolute purchaser of land at a tax sale. But the county could only foreclose the certificate of purchase or foreclose the deed if such deed had been made, instead of issuing a certificate, and the assignee of such county is in no better state than the county. Hence the deed from Smith to Strickland was not a conveyance of the land but at most the assignment of an equity under which to institute proceedings for foreclosure, which was not done. *Wilcox v. Leach,* 123 N. C., 74; *Collins v. Bryan,* 124 N. C., 738; *Whitman v. Dickey, ib.,* 741; *Collins v. Pettitt, ib.,* 726; *Huss v. Craig, ib.,* 743; *Kerner v. Cottage Co.,* 126 N. C., 356; *Smith v. Smith,* 150 N. C., 84.

In *Collins v. Pettitt,* 124 N. C., 727, there was a dissenting opinion on this last point, and the next Legislature amended the statute (Laws 1901, ch. 558, sec. 18) by requiring the sheriff to execute a deed to the county or its assignee, without foreclosure. This section is now Revisal, 2905. But this sale took place under the statute in force prior to that time.

The plaintiffs tendered the amount of taxes due on the lands before suit brought. *Moore v. Byrd,* 118 N. C., 688; *McMillan v. Hogan,* 129 N. C., 314. The deed could, however, be executed by the sheriff after his term expired.

The statute of limitations cannot avail the defendant, since the action is brought to cancel the tax deed in order to remove a cloud from the title of the plaintiffs, who are in possession. *Cauley v. Sutton,* 150 N. C., 330; *Beck v. Merony,* 135 N. C., 532.

There was no evidence contradictory to the facts above re-
(481) cited, and the court therefore properly charged the jury that if they believed the evidence they should answer the issues as set out in the record, which are in favor of the plaintiffs. The recitals in the tax deed are evidence, either conclusive or presumptive, under the terms of the statute. But this does not apply when the tax deed itself is attacked for noncompliance with the prerequisites as to giving notice to the owner and parties in possession before the execution of the deed by the sheriff (Revisal, 2884), and when the evidence is uncontradicted that the lands were bought in by the county and assigned to Strickland, who thereby acquired only an equity to foreclose, but not the right to a deed from the sheriff, under the law then in force.

The decree therefore properly adjudged upon the issues found that the deed from Smith to Strickland should be canceled upon payment by the plaintiff to the defendant of the taxes due on the land on 6 June, 1898, with 20 per cent per annnum interest thereon in accordance with the statute.

No error.

Cited: Lumber Co. v. Pearce, 166 N. C., 592; *Kivett v. Gardner,* 169 N. C., 80; *Jordan v. Simmons, ib.,* 142.

A. R. HERRING v. WALLACE LUMBER COMPANY AND CUMBERLAND LUMBER COMPANY.

(Filed 5 November, 1913.)

1. Deeds and Conveyances—Stipulations—Performance by Grantee.

The grantee in a deed is bound by stipulations or covenants contained in the deed which purport to bind him, though he may not have executed it.

2. Same—Assignee with Knowledge—Timber—Reduced Price—Breach of Contract—Measure of Damages—Railroads.

Where one has taken an assignment of an entire contract, with full knowledge of its terms, and has accepted the benefits thereof, he must also come under the burdens imposed therein upon his assignor, and the legal liabilities incident to them; and it appearing in this case that the plaintiff conveyed timber on his lands to a corporation for a reduced price, under the usual form of deeds of this character, the timber to be removed within a certain period of time, upon consideration that the corporation should build a standard-gauge railroad between certain points and running through the lands conveyed, by which the logs were to have been removed; and it further appearing that the present defendant took an assignment of this deed and the entire contract contained therein, with full knowledge of its terms and the conditions imposed on the grantee named therein; and is in the present ownership and enjoyment of the rights conveyed; and that the railroad agreed upon had not been built, it is *Held,* that the defendant, having elected to repudiate its obligation to construct the railroad, is bound under the general equitable principle of *indebitatus assumpsit,* to make good the loss which the plaintiff has sustained, to be properly admeasured by the difference between the contract price and the actual value of the timber; and further *Held,* that if the defendant or its assignor was not authorized to build a railroad of this character (Revisal, 2698), as it had contracted to do, this defense would not affect the result. *Herring v. R. R.,* 159 N. C., 382.

3. Pleadings—Allegations—Evidence—Prayer for Relief.

Where all the issuable and relevant facts relative to a recovery of damages for the breach of warranty and other stipulations in a conveyance

of standing timber have been pleaded, and appropriate evidence has been introduced, it is immaterial that the prayer for relief in the complaint demands the penalty provided for in the deed, and damages in accordance with the pleadings and evidence may be recovered.

APPEAL by defendant Cumberland Lumber Company from (482) *O. H. Allen, J.*, and a jury at the August Term, 1913, of SAMPSON.

This action was instituted to recover a stipulated penalty for failure to build a standard-guage railroad over lands of plaintiff and others from Wallace, N. C., to Delway, N. C.

On a former trial and again on the present trial there was allegation, with proof, to the effect that on July, 1908, plaintiff and other landowners in his neighborhood had bargained the lumber growing on their land to the defendant, the Wallace Lumber Company, and that the said company, in addition to the specified contract prices, had agreed to build over the lands of the grantors a standard-guage railroad to Delway, N. C., and had stipulated, further, that the road should be completed and ready for transportation by March, 1908; that the timber should be hauled out only on said railroad, and, ond default in building said (483) railroad, the company should forfeit and pay a sum equal to 10 per cent of the value of the timber for the first year and 2½ per cent for the second year, etc.; that subsequently the plaintiffs A. R. Herring and wife executed their formal deed, conveying the timber to the Wallace Company, with privilege of removing the same within ten years, etc., with the right and privilege of ingress and egress, etc., and of constructing all roads and railroads and tramroads, etc., necessary and required for the proper cutting and removal of the timber; and with the further intent to express the agreement between the parties, the deed in question contained the following provision: "That the said party of the second part shall construct and build a standard-guage railroad from Wallace, N. C., or a point thereabout, to Delway, N. C., the same to be completed and ready for use and transportation on or before 15 March, 1908, and that the trees sold in this deed are not to be removed from the land except by said railroad. In case of failure to construct said railroad within the time specified above, then and in that case the said parties of the second part shall forfeit and pay to the said parties of the first part a sum equal to 10 per cent of the purchase price of said trees, and for each year thereafter 2½ per cent additional for five years, or until the ten years expire."

It was further proved that the timber had been sold to the company at a reduced price and below its actual value by reason of this provision as to constructing the railroad, and there was evidence tending to show the difference in amount. It further appeared that, soon after the exe-

cution of this deed, the Wallace Company conveyed and assigned to its codefendant, the Cumberland Lumber Company, the timber in question, together with "all the rights, title, and interest to all the standing timber and timber rights, together with all rights of way owned or controlled by the said party of the first part within the counties of Duplin, Sampson, and Pender, and all other rights, privileges, and easements conveyed and contained in the deeds hereinafter set forth, made and executed to the said party of the first part, and for a full description of said rights, easements, rights of way, timber and timber rights, reference is hereby made to said deeds in the register's offices in the said counties of Sampson, Duplin, and Pender," the deed of plaintiff to the Wallace Company being one of those referred to in the latter instrument. (484)

In their answers, filed separately, both companies deny any and all liability for the stipulated penalty, claiming that the building of a standard-guage railroad is not within the powers conferred by their charters, and also by reason of the inhibitive provisions of secton 2598 of the Revisal.

At a former trial of the cause, the Superior Court judge having intimated an opinion against the right of plaintiff to make recovery, the plaintiff submitted to a nonsuit and appealed. On such appeal, the ruling of the lower court was reversed, and it was held that, although the stipulation as to building a standard-guage railroad might be *ultra vires*—and this the Court did not decide—when it was made to appear that the purchaser had by reason of such stipulation obtained the timber at a reduced price, if he took advantage of such a position and the stipulation was avoided on that account, the vendor should be allowed to recover for the actual value of the timber sold, the proper measure of damages being the difference between the price paid and such actual value.

See opinion of *Associate Justice Walker,* for the Court, 159 N. C., 382, to which reference is also made for a very full and clear statement of the facts relevant to the questions then presented. This opinion having been certified down, and it having been made to appear that the Wallace Company was no longer existent, having been dissolved in accordance with the provisions of law, the questions at issue recurred on the liability of the Cumberland Company, and in addition to the facts admitted of record, issues were submitted and verdict rendered thereon as follows:

1. What, if any, is the difference between the actual value of the timber conveyed by the plaintiff and the price paid as set out in the deed? Answer: $900.

2. Did the Cumberland Lumber Company purchase for the Wallace Manufacturing Company the timber of the plaintiff with notice of the

railroad clause and forfeiture clause set out in the original contract and deed with the Wallace Manufacturing Company? Answer: Yes.

(485) 3. What amount, if any, are the defendants indebted to the plaintiff? Answer: $900, with interest.

4. Is the plaintiff's cause of action set forth in his amended complaint barred by the statute of limitations? Answer: No.

There was judgment on the verdict, and the defendant the Cumberland Lumber Company excepted and appealed, assigning for error, chiefly, that, on the facts in evidence, the said company could not be in any way held for failure to construct the railroad.

George E. Butler and R. L. Herring for plaintiff.
H. L. Stevens for defendant.

HOKE, J., after stating the case: It is very generally held here and elsewhere that the "grantee in a deed poll, containing covenants and stipulations purporting to bind him, becomes bound for their performance, though he does not execute the deed." *Maynard v. Moore,* 76 N. C., 158, approved in *Long v. Swindell,* 77 N. C., 181; *Fort v. Allen,* 110 N. C., 191; *Bank v. Loughran,* 122 N. C., 673; *Burbank v. Pittsburg,* 48 N. H., 475; *Bowen v. Beck,* 94 N. Y., 86; *Easter v. R. R.,* 14 Ohio State, 48; *R. R. v. Reeves,* 64 Ga., 492; Smith Lead. Cases, (9 Am. Ed.), 222-223.

This deed, therefore, from plaintiff and wife to the Wallace Lumber Company, in section VII, contains affirmative stipulation that the grantee "shall construct and build a standard-guage railroad, to be completed, etc.; that the trees sold in this deed are not to be removed from the land except by said railroad, and, in case of failure, a pecuniary penalty of specified amount is collectible by the grantor, the plaintiff; and the defendant, the Cumberland Lumber Company, having taken an assignment of the entire contract, to wit, "all the rights, title, and interest to all the standing timber and timber rights, together with all rights of way, etc., and all other rights, privileges, and easements conveyed and contained in said deed," and being in the present ownership and enjoyment of these rights, etc., must come under the obligations of the covenant and be held responsible for the liabilities legally and necessarily incident to it. In *Norfleet v. Cromwell,* 70 N. C., 634, reported also on a former appeal, 64 N. C., 1, defendant, the

(486) grantee of lands draining into a canal, was sued for his pro rata of necessary repairs thereto on a covenant made by defendant's grantor. After holding defendant liable by reason of the covenant, being one running with the land, the Court, on page 641 of the second appeal, proceeded as follows: "Independently of this, however, there

are two arguments which might be out of place in a mere court of law, but which a court of equity is entitled to notice, that must be considered conclusive of the question:

"1. The consideration for the covenant was the grant of an easement which became appurtenant to the land, and passed with it to the defendant on his purchase. This easement he has accepted and enjoyed, and it is his only title to drain the land into the canal. The principle is generally conceded, and it is certainly equitable, that when the benefit and burden of a contract are inseparably connected, both must go together, and liability to the burden is a necessary incident to the right to the benefit. *Qui sentit commodum sentire debet et onus*; Notes to *Spencer's case,* 1 Smith L. C., 143; *Savage v. Mason,* 3 Cushing, 318; *Coleman v. Coleman,* 7 Harriss, 100." The principle is eminently sound and has been approved with us in different cases and in other courts of recognized authority. *Younce v. Lumber Co.,* 148 N. C., 34; *R. R. v. R. R.,* 147 N. C., 368-385; *R. R. v. Bank,* 42 Neb., 469; *Smith v. Rodgers,* 14 Ind., 224.

The present defendant, then, having taken over the contract with full notice and knowledge of the terms, and being bound by its covenants to build the railroad, as far as this could be effected by agreement between the parties, has elected to repudiate the obligation, and, it having been fully established that this agreement to build the road over the land was allowed substantial effect in reducing the selling price of the timber, under the general equitable principle of *indebitatus assumpsit,* as stated in our former decision, the defendant should make good the loss which the plaintiff has suffered, to be properly admeasured by the difference between the contract price and the actual values. The rights of the parties have been properly adjusted under these principles, and we find no reason for disturbing the results of the trial. It has (487) been repeatedly held in this State that these contracts, conveying standing timber, are contracts concerning realty, and must be so considered and dealt with in determining the rights of the parties, and, this being true, several of the authorities heretofore cited are to the effect that the covenant in question here is one running with the land (*Norfleet v. Cromwell, supra; R. R. v. Reeves, supra; Burbank v. Pittsburg, supra*), and as such binding on the present owner to the extent that the same is lawful, whether with or without notice; see generally on this subject, the well considered case of *Wiggins v. Pender,* 132 N. C., 628; but, it having been clearly established that the Cumberland Company has taken an assignment of the entire contract, with full notice and knowledge of its terms, we rest our decision on the principle that this company, having accepted the benefits of the contract, must also come under its burdens and the legal liabilities incident to them. We

are not unmindful of the fact that the suit was instituted to collect the penalty, and that this is the specific prayer for relief, but all of the issuable and relevant facts having been made to appear both by allegation and proof, the relief may be awarded according to the facts established, and the prayer for relief is not of the substance. There is

No error.

Cited: Henry v. Heggie, post, 527; *Parrott v. R. R.,* 165 N. C., 300; *Guilford v. Porter,* 167 N. C., 369.

T. J. BALLARD v. R. J. LOWRY, SHERIFF, AND S. LOWMAN & CO.

(Filed 12 November, 1913.)

1. Justices' Courts—Judgment Docketed in Superior Court—Service of Process—Execution Recalled—Procedure.

Where a judgment of a justice of the peace has been docketed in the Superior Court and execution issued therefrom, which is sought to be recalled upon the ground that the judgment had been obtained by default and the summons had not been served, though upon its face it so appeared to have been, the remedy is by motion in the justice's court to set aside the judgment there rendered, made upon notice to the plaintiff, his attorney of record, or by publication; and an injunction may not issue in the Superior Court to stay the execution.

2. Same—Findings—Undertakings.

Upon motion duly made before a justice of the peace to set aside his judgment for lack of proper service, which has been docketed in the Superior Court, from whence execution has issued, it is the duty of the justice to find the facts; and when such motion is lodged the defendant may apply to the clerk and have the execution recalled until the motion is finally disposed of, upon giving the required bond.

3. Justices' Courts—Service of Process—Judgment Set Aside—Motion in the Cause—Jurisdiction—Consent of Parties.

Where upon the face of a summons it appears to have been properly served, the service thereof may not be impeached except by motion in the cause to set it aside; and where the summons issued from a justice's court, the Supreme Court will not treat the motion as properly lodged, even by consent of the parties, when it does not so appear to have been done.

(488) APPEAL by plaintiff from order vacating an attachment, from ANSON.

This is an appeal by the plaintiff from an order of *Adams, J.,* dissolving an injunction and dismissing the action.

Lockhart & Dunlap for plaintiff.
Gulledge & Boggan for defendant.

BROWN, J. On 25 February, 1911, at the instance of S. Lowman & Co., J. H. Benton, a justice of the peace for Anson County, issued a summons against T. J. Ballard, returnable 1 March, 1911.

On 27 February, 1911, the said summons was returned to said justice's court with the following indorsement: "Served 27 February, 1911, by reading within summons to T. J. Ballard, defendant. R. J. Lowry, Sheriff; J. T. Short, Deputy Sheriff." On 16 March, 1911, said justice of the peace rendered judgment in favor of S. Lowman & Co. against T. J. Ballard in the sum of $173.75, with interest and costs, and said judgment was docketed in the office of the clerk of the Superior Court of Anson County, and upon which S. Lowman & Co. caused execution to be issued.

Injunction was issued by *Bragaw, J.*, at the instance of T. J. Ballard to prevent the service of said execution, claiming that (489) no summons had ever been served on him in the original case of S. Lowman & Co., against T. J. Ballard before the said J. H. Benton, justice of the peace.

Upon the return day of the restraining order before *Adams, J.*, the latter dissolved the injunction and dismissed the action.

We are of opinion that the proper procedure for the plaintiff to pursue is to move before the justice of the peace to set aside the judgment. It is then the justice's duty to find the facts. Notice of such motion may be given by publication or by service upon the attorney of record.

It appears upon the face of the record that the service of the justice's summons was valid. Therefore, it cannot be impeached except by motion in that cause to set it aside. *McKee v. Angel,* 90 N. C., 62; *Whitehurst v. Trans. Co.,* 109 N. C., 344.

It is said in *Thompson v. Notion Co.,* 160 N. C., 525: "If the judgment is rendered in the absence of the defendant, and the process is defective, or there *is the appearance of service* when in fact none, the defendant may move before the justice to set the judgment aside."

When such motion is lodged, the defendant may apply to the clerk, and, upon giving the required bond, have the execution recalled until the motion is finally disposed of.

We cannot treat this civil action originating in the Superior Court, even by consent, as a motion in the cause in a justice's court.

Affirmed.

Cited: *S. c.,* 168 N. C., 17; *Estes v. Rask,* 170 N. C., 342.

J. H. GOBBLE ET AL. V. CLEVELAND ORRELL ET AL.

(Filed 12 November, 1913.)

1. Divorce—Alimony—Injunction—Receivers.

Pending an action for divorce by the wife, she was allowed a certain amount, to be paid monthly by the husband, and a receiver was appointed to take charge of his personal property to insure the payments, and an order issued restraining the husband from selling his lands. By final decree, the wife obtained an absolute divorce, with adjudication for the payment of alimony, and a receiver was appointed to take charge of the realty and personal property of the husband, and to "pay the alimony out of the rents and profits of the lands, or the proceeds thereof, according to the terms of the decree," etc.: *Held*, the order and decree should be construed together, and as under the decree the receivership was ordered for the land, which was omitted from the prior order, and as the interest of the wife was fully protected by the receivership, the injunction or restraining order ceased to operate. The question as to the effect of a deed, made pending an injunction to sell the lands, discussed by WALKER, J.

2. Receivers—Divorce—Adverse Possession—Possession of Wife.

The possession of lands by a receiver is the possession of the court, and when a receiver has been appointed by the court to hold lands to pay alimony from its rents and profits, decreed to the wife to whom a divorce absolute has been granted, and the receiver has permitted the wife to remain on the land and retain the rents and profits in carrying the order into effect, her possession is not adverse to the husband, or those claiming under him, so as to bar their right to recover it under the statute of limitations.

(490) APPEAL by defendants from *Justice, J.*, at February Term, 1913, of DAVIDSON.

This is an action to recover the possession of land. Hiram Gobble originally owned it, and while he was owner, his then wife, Arena Gobble, obtained an absolute divorce from him at January Term, 1880. In the decree the court adjudged that alimony, in the sum of $400 per annum, be paid by Hiram Gobble to the plaintiff, and appointed a receiver, with directions to "pay out of the rents and profits of said land, or the proceeds thereof, the said alimony, according to the terms of the decree," that is, $400 annually until the death of Hiram Gobble, and $400 annually in four equal quarterly installments thereafter. An order had been previously issued by Judge Graves at Fall Term, 1878, restraining Hiram Gobble from selling or disposing of his real or personal property, and appointing the same person as receiver to take charge of the personal property, but not of the land. The receiver was directed in the preliminary order to sell so much of the personal effects described therein as should be necessary to pay temporary alimony, $10 a
(491) month, then allowed by the court. The final judgment varies,

as will be seen, from the preliminary order, in this respect, that it omits all reference to an injunction against selling the land, and puts the temporary receiver in charge of it, and the personalty, for the purpose of securing the alimony and its regular payment to the wife, who had secured the divorce, with directions hereinbefore stated. Hiram Gobble married a second time, and in 1892 he and his wife conveyed the land by mortgage, with power of sale, to J. M. Lomax, who, upon default in the payment of the debt secured by it, sold the land, under the power, and conveyed it to Robert H. Gobble, the purchaser, who died leaving plaintiffs as his heirs. Hiram Gobble died in 1910, and defendants are his heirs. Arena Gobble died in April, 1911. The receiver, who was a brother of Arena Gobble, collected the rents of the land at first; that is, after the first decree of divorce, his sister remaining on the land, as she had done before. The evidence is not clear as to whether he collected the rents all the time. The jury, under an instruction of the court to answer the issue "Yes," returned the following verdict:

1. Are the plaintiffs the owners and entitled to the possession of the lands decribed in the complaint? Answer: Yes.

2. What damage are plaintiffs entitled to recover of defendants? Answer: $150.

Judgment upon the verdict, and defendant appealed.

E. E. Raper for plaintiff.
Walser & Walser for defendant.

WALKER, J., after stating the case: It is apparent that plaintiffs are the owners of the land, unless the defendants have acquired it by inheritance from their father, who had mortgaged it to J. M. Lomax, it being afterwards sold by him under the mortgage to Robert A. Gobble, father of plaintiffs. Defendants contend that Hiram Gobble sold and conveyed the land in violation of an injunction issued by the court in the divorce suit, and that his deed is therefore invalid; and if this is not so, they claim by the adverse possession of their mother for twenty years of the land after the decree was entered. But in our opinion, neither defense is good or available in law to defeat the (492) plaintiff's recovery. In the first place, it is evident that the court, by omitting all reference to the injunction in the final decree and placing all of the property, both real and personal, in the hands of the receiver, with instructions to collect the rents and profits and pay the alimony, intended to dissolve the prior injunction as being, perhaps, unnecessary and futile, the receiver's possession being quite sufficient to secure the alimony to Mrs. Gobble, which was the object in making the order. The court continued the possession of the receiver as to the personal property and enlarged the former order by giving him possession and control of

the land for the purpose of his resorting to the personal property and the rents and profits of the land to pay the amount of alimony as it matured. The clear inference, and the true construction of the order and decree, which must be taken together, is that the injunction, or restraining order, lapsed or ceased to operate, and the receivership as to all the property was substituted in its place, as being a perfectly adequate and sufficient remedy for the preservation of the wife's rights. The position as to the injunction, therefore, cannot be sustained.

While the point is not presented for decision, a reference to some of the authorities on the question, as to the effect of an injunction upon a deed made in violation of it, may not be out of place, and it will be seen that they are not altogether in perfect accord, some holding that the deed is voidable only to the extent of preventing its interference with the remedy of the party who obtained it, so that it will not be allowed to affect a substantial right of the other party or to deprive him of a substantial interest. If such a right or interest is not impaired, the act done or deed executed in violation of the writ is permitted to stand, or, in other words, it is always subject to the enforcement of the right and the protection of the interest. The other authorities seem to hold the act or deed to be void; but it may be that the apparent conflict can be reconciled, if proper attention is given to the facts of each case decided, and the necessity of protecting the particular right involved, ex-
(493) tending the principle in some cases and relaxing or modifying it in others to suit the facts and exigencies of the particular case. *Butter v. Niles,* 35 Hon. Pr. Rep. (N. Y.), 239, citing *People v. Sturtevant,* 9 N. Y., 263; 2 Spelling on Inj. and Extr. Rem., sec. 1133; *Union Trust Co. v. S. I. N. Y. Nav. and Imp. Co.,* 130 U. S., 565 (32 L. Ed., 1043); 2 High on Inj., sec. 1461; *Morris v. Bradford,* 19 Ga., 527, citing *Roberts v. Jackson,* 1 Wend. (N. Y.), 485; *Farnsworth v. Fowler,* 1 Swan. (31 Tenn.), 1; *Seligson v. Collins,* 64 Texas, 314; *Bissell v. Besson,* 47 N. J. Eq., 580; *Taylor v. Hopkins,* 40 Ill., 442; *Ward v. Billups,* 76 Texas, 466.

The general consensus seems to be that the act in contravention of the writ of injunction is not only punishable as a contempt of the court's authority, but will not be allowed to prejudice the right and remedy of the party in whose interest it issued; but whether, subject to this rule, it will be allowed to stand at all, the authorities are not agreed. We refer to the subject in passing, as the reference may be of some practical avail in the future. It does not affect the merits of this appeal, as we hold that the court did not continue the injunction permanently, conceding its power to do so, its first order being merely equivalent to one enjoining the defendant against selling the land to the hearing, or until the matter was disposed of by a final decree. But

if it had been continued, the plaintiff in that suit, as we will see, was not injuriously affected by its violation, as it was issued to protect and preserve her right to alimony, and this she received in full, and consequently was in no way prejudiced by the mortgage to Lomax and the subsequent conveyance to Robert A. Gobble.

The other position advanced by defendants is equally untenable. They claim that as their mother was in possession for twenty years adversely, she acquired thereby a title to the land; but we cannot admit the premise from which this conclusion is drawn. Her possession was not adverse. The receiver, it appears, collected the rents and profits of the land and paid them to her. The land was in the custody of the law, through him, and the judgment by which he was placed in the possession of it was given at her request. She could not take (494) possession of the land and hold it adversely to the receiver, without being guilty of a contempt of the court by the violation of its order issued at her instance. High on Receivers (3 Ed.), 163. The receiver's possession is that of the court, taken for the purpose of securing the thing in controversy, so that it may be subject to such disposition as it may finally direct. High on Receivers, secs. 134, 135 *et seq.* The defendant in that suit was put out of possession by the judgment, as the receiver was ordered to collect the rents and profits and was entitled to control the possession for that purpose. This being so, the law will not allow the possession by the plaintiff to destroy his title, while he was thus forbidden to enter and assert it. We have an ancient maxim that the act of law shall prejudice no man. Broom's Maxims (6 Ed.), marg. pp. 127, 395. The maxim was applied in *Isler v. Brown,* 66 N. C., 557, and *Howell v. Harrell,* 71 N. C., 161, to prevent the loss of a right by inaction or passiveness caused by its order. It is a just rule, and our moral perceptions of right would be rudely shocked if any other were allowed to prevail and deprive a man of his rights, when by the act of the court or the law he was rendered powerless to protect or preserve them. Besides, there is no evidence here of notorious and adverse possession under a claim of right. The plaintiff in the other case evidently held the possession by consent of the receiver, and her occupation was subordinate to his dominion over the land as an officer of the court. She received the rents and profits in this way, in discharge of her claim for alimony, instead of requiring him to lease the land, collect the rents, and pay them over to her. We will not presume that she intended to do a wrong.

Our conclusion is that the instruction to the jury was correct.

No error.

(495)

J. T. McTEER CLOTHING COMPANY v. W. E. HAY.

(Filed 12 November, 1913.)

1. Judgment—Estoppel—Matters Concluded—Separate Causes.

The principle as to estoppel by judgment of all matters which should have been settled in the action does not extend to the subject of a separate cause of action, between the same parties, not formerly adjudicated, or embraced within the scope of the former inquiry.

2. Same—Trials—Evidence.

Where the debtor has given a note for the amount due his creditor at that time, upon which subsequently a judgment by consent has been rendered, reciting that it was to be for a full settlement of the matters in controversy, it is competent to show in another action between the same parties, wherein the former judgment has been pleaded as an estoppel, that the indebtedness sued on was not due when the note was given, and was not embraced in the former inquiry.

APPEAL by plaintiff from *Peebles, J.*, at May Term, 1913, of ALAMANCE.

This action is to recover two items of an account for goods sold and delivered, the first item being of date 26 March, 1909, for $305, and the second of date 26 March, 1909, for $13.50, both being subject to a credit of $63 for goods returned, leaving a balance due of $255.50.

The defendant denied the indebtedness and pleaded an estoppel by judgment.

The facts appearing of record in regard to the estoppel are as follows:

Prior to the institution of this action, the plaintiff commenced another action against the defendant, in which he alleged that on 14 May, 1909, the defendant was indebted to the plaintiff in the sum of $1,002.28, and that on that day he executed his note therefor, payable in installments; that payments had been made thereon; that default had been made, and that there was a balance due the plaintiff of $452.78.

The defendant answered, admitting the allegations of the complaint, except he alleged that he was entitled to an additional credit of $40.

(496) At January Special Term, 1911, a judgment by consent was rendered in said action, which after reciting that the parties had agreed to a full settlement of all matters in controversy, adjudged that the plaintiff recover $412.78, which was the amount claimed by the plaintiff, less the additional credit of $40 claimed by the defendant. It does not appear of record that the two items embraced in this action were in controversy in the first action, and, on the contrary, the account attached to the complaint in the original action shows those two items were not due when the note was executed, and were not embraced therein.

On the trial of this action, the plaintiff offered a witness who testified: "I live at Knoxville, Tenn. I am treasurer and credit man of the McTeer Clothing Company. I am familiar with the books of that company. I know about the time the note was given for $1,000 as indicated in the record. At that time that was all the indebtedness of W. E. Hay that was due, but not the entire amount he owed. It was never intended that the note should cover anything but the past-due indebtedness at the time the note was given. The items now sued for in this action were not due at the time the note was given. These items were to fall due the October following the execution of the note. The note was in the hands of the collecting department of the Credit Clearing House all the time from the time it was executed until suit was brought on it. It was afterwards forwarded to W. H. Carroll, attorney, here. That note and the suit upon it has been settled. W. E. Hay ordered the goods sued for, by letter." This evidence was withdrawn from the jury, and the plaintiff excepted.

His Honor submitted the following issue to the jury: "1. Were all matters at issue between the plaintiff and defendant settled in the case between the same parties at the January Special Term, 1911?" and instructed the jury if they believed the evidence to answer the issue "Yes," and the plaintiff excepted.

There was a verdict and judgment in favor of the defendant, and the plaintiff excepted and appealed.

W. H. Carroll for plaintiff.
No counsel for defendant.

ALLEN, J., after stating the case: There appears to be some (497) confusion in the authorities as to the matters concluded by judgment, some declaring that it estops only as to the question actually litigated, and others that it not only estops as to those litigated, but also as to all that might have been litigated in the action.

The apparent conflict arises from failure to distinguish between the difference in the causes of action, both rules existing, but being applicable to different facts.

The line is clearly marked in *Cromwell v. County of Sac,* 94 U. S., 351, which has been approved in numerous cases, in which the Court says: "The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action, and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest. 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, although it 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 were 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, (498) so far as future proceedings at law are concerned, as though the defense 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 causes, 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. . . . It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated, therefore, such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause because it might have been determined in the first action."

If the evidence offered by the plaintiff is admissible and true, the former judgment is not, under this rule, an estoppel as to the cause of action alleged, because it was not in issue in the former action and this action is not on the same claim or demand.

We are also of opinion that the evidence offered by the plain- (499) tiff is competent.

The question was decided in *Yates v. Yates,* 81 N. C., 401, which has been approved on this point in *Bryan v. Malloy,* 90 N. C., 513; *Baker v. Garris,* 108 N. C., 227; *Jones v. Beaman,* 117 N. C., 263.

In the *Yates case* the Court says: "A verdict and judgment directly upon the point in issue is, as a plea, a bar, or, as evidence, conclusive upon the same matter directly in question in another suit, not extending to any matter coming collaterally or incidentally in question or inferred by way of argument. *Duchess of Kingston's case,* 2 Smith Leading Cases, 424. This became a rule and is enforced in the courts upon the idea that when a point or question is once litigated and decided by a verdict and judgment, it was justice to the parties and good policy that the same should not again be drawn into contest in a subsequent suit between the same parties. And to give effect and application to the principle, the rules of pleading required it to be availed of by plea of the judgment as a bar, or estoppel, or as evidence on the general issue. And anciently under the system of pleading, conducive to the end of ascertaining and preserving in a permanent form the material issues and the adjudication thereof, it was held that the record should not estop, unless it showed on its face that the very point sought to be kept from a second contest was distinctly presented by an issue and expressly found by a jury. A system of pleading more general and loose having been adopted and allowed at this day, but little of the ancient certainty of allegation and denial is now required; and hence it is difficult, if not impossible, to ascertain the subject-matter of a controversy and the precise points made and decided by a mere inspection of the record as formerly; and therefore it grew to be the rule that it was not necessary that the record should show definitely the precise point or question upon which the right of a plaintiff to recover, or the validity of a defense depended, but only that the same matter might have been litigated and decided, and that intrinsic evidence might be admitted to define what the question was, its materiality, and its decision by the jury. *Young v. Black,* 7 Cranche, 565; *Packet Co. v. Sickles,* 24 How., 333; *Wood v. Jackson,* 8 Wend., 9; *Eastman v.* (500) *Cooper,* 15 Pick., 276; 1 Greenl. Ev., sec. 531. The rule of the admissibility of parol testimony in support of the plea of estoppel to show what was the material point, and its decision in a former action, generally prevails at this day."

We are therefore of opinion there is error, and a new trial is ordered. New trial.

Cited: McMillan v. Teachey, 167 N. C., 91; *Ferebee v. Sawyer, ib.,* 203; *Whitaker v. Garren, ib.,* 662; *Cropsey v. Markham,* 171 N. C., 45.

MAGGIE R. THOMPSON v. CHARLES R. THOMAS.

(Filed 12 November, 1913.)

Deeds and Conveyances—Mental Incapacity—Registration—Heirs at Law.

Where a deed, void for mental incapacity of the grantor to make it, is registered prior to one theretofore made by the same grantor, for a valuable consideration, when he had sufficient mental capacity, the registration under the statute, Revisal, 980, can give no effect to the invalid deed, and the valid deed, though subsequently registered, will be effective; nor can the grantee in the invalid deed claim the land as heir at law of the deceased grantor, for the latter has conveyed his title to another.

APPEAL by defendant from *Long, J.,* at June Term, 1913, of DAVIDSON.

F. C. Robbins, Walser & Walser, and Justice & Broadhurst for plaintiff.

John T. Perkins and Emery E. Raper for defendant.

CLARK, C. J. This is an action to recover two lots in Thomasville, N. C. The plaintiff and defendant are half-brother and sister, and moreover, their mothers were sisters. Both claim title to the property under conveyance from the widow of their father, who was the mother of the defendant. The plaintiff claims under two deeds bearing date 28 January, 1909, each deed reciting a consideration of $1 and both probated 11 April, 1912, after the death of the grantor, and recorded the next day. The defendant claims under a deed from his mother
(501) Sallie L. Thomas, for both lots, dated and registered 14 August, 1909, reciting a consideration of $1 and "other considerations accepted." She died in 1912, leaving her son, the defendant, her sole heir.

The jury upon issues submitted to them found that the deeds to the plaintiff dated 28 January, 1909, were duly executed and for a valuable consideration, and that the plaintiff did not procure their execution by fraud. The jury found that at the time of the execution of the deed of 14 August, 1909, by Sallie L. Thomas to Charles R. Thomas, the defendant, she did not have sufficient mental capacity to execute said deed, and that it was made without valuable consideration.

There was a great mass of evidence on both sides, and numerous exceptions to the admission of evidence and to the charge. None of the exceptions, however, present serious questions of law for the consideration of the Court. The contest was almost entirely one as to the facts, and was settled by the jury upon issues properly submitted.

It can be of no service to discuss well settled propositions of law nor to develop more fully the voluminous evidence upon what must have been a very unpleasant controversy between near relatives.

The deed to the plaintiff executed 28 January, 1909, was not registered until 12 April, 1912, and would not be valid against the junior deed to the defendant executed and registered in August, 1909, if the grantee in the latter deed had been a purchaser for a valuable consideration and the grantor had been competent to execute a deed. But the jury having found that the latter deed was without valuable consideration, the statute would not apply. Revisal, 980. Besides, the jury further found that the grantor at the time of the execution of the deed of 14 August, 1909, did not have "sufficient mental capacity to execute said deed." It was therefore void, and registration could not give it validity. The defendant was sole heir to his mother, but the jury having found that her deed to the plaintiff was executed for a valuable consideration, and that its execution was not procured by fraud, the plaintiff is entitled to recover the premises.

Upon consideration carefully made of all the exceptions and of (502) the entire evidence, we think that the matter has been determined by the jury under the superintendence of the careful and able judge, who committed

No error.

C. SCOTT AND W. C. McLEAN, TRADING AS C. SCOTT & CO., v. L. SCOTT REYNOLDS, ADMINISTRATOR OF L. M. SCOTT.

(Filed 12 November, 1913.)

Trials—Debtor and Creditor—Account—Evidence—Admission of Correctness—Judgment—Interest.

Where there is evidence that the deceased had examined, before his death, the account for which his administrator is sued, and had said it was right, promising to pay it out of certain moneys he was expecting, and that the account sued on was the same as that the deceased had acknowledged, except as to added interest, it is not reversible error for the witness to testify that the account was for groceries, though he testified that he had not personally sold them; and the amount of the debt being established by the verdict of the jury on this evidence, it was proper that the interest thereon be allowed in the judgment.

APPEAL by defendant from *Shaw, J.*, at September Term, 1913, of GUILFORD.

Action tried upon this issue: "Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: $631.63, with legal interest from 30 November, 1910, to present date."

The defendant excepted and appealed.

No counsel for plaintiff.
Adams & MacLean for defendant.

BROWN, J. This action is brought to recover an account for groceries alleged to have been purchased by defendant's intestate from the plaintiffs.

The defendant assigns error because the witness Mann was permitted to testify that the account presented to L. M. Scott, defendant's intestate, was for groceries. The witness Mann testified:

(503) That he works for C. Scott & Co.; clerk in the store; that he knew Levi M. Scott; that he had heard the testimony of Mr. C. Scott; that he presented the account to Mr. Levy Scott; that he took it and looked at it and said: "That is Mr. Clarence Scott, is it?" Witness said, "Yes, sir." He said, "That is all right. I am expecting some dividends from some insurance cases along later in the spring, and I want to settle that up."

This is all that witness said to him about it. That Mr. Scott looked at the account when he said it was all right, and had the account in his hands when he said that; that the amount of the account was $631.63; that the account was the same one presented here; that this is the account he presented, without the interest on it.

Upon cross-examination, the witness testified that it was some time right after the first of the year of 1911 when he presented the account to Mr. Scott; that he presented it to him in his office, right over here near the courthouse. On redirect examination, witness testified that he did not sell any of the goods to Mr. Scott; that Mr. Scott never traded any there after he went to work there for Mr. Scott. Witness was asked this question: "What was the account you presented to him for?" Defendant objected. The court remarked: "I think it is competent." Defendant excepted. Witness answered: "For groceries."

We see no merit in this exception. If the evidence is believed, it proves that the account was duly presented for payment to defendant's intestate and that he recognized and promised to pay it.

It is true the witness did not personally sell the goods, but the fact that they were groceries was doubtless apparent in the account itself.

The remaining assignments of error have as little merit as the above, and need no discussion.

Having proved to the satisfaction of the jury that the account was duly presented and that the defendant's intestate promised to pay it, the plaintiff was clearly entitled to interest.

No error.

(504)

S. P. McCONNELL v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY ET AL.

(Filed 12 November, 1913.)

1. Carriers of Goods—Liability—Insurer.

The liability of a common carrier of goods is that of an insurer, and where there is no valid exemption in the contract of carriage, it extends to every loss or damage, however occasioned, unless by the act of God or the public enemy, or some cause or accident without any fault or negligence on the part of the carrier.

2. Carriers of Goods—Parol Contract.

A parol contract made with the carrier for the transportation of goods is as binding, when established, as a written one.

3. Same—Bills of Lading—Negligence—Restrictive Liability—Waiver.

Where there is evidence tending to show that a common carrier made a parol contract to transport goods for the shipper, without restricting its liability, and thereafter by mistake the shipper signed a bill of lading purporting to restrict the amount of recovery for damages in consideration of the rate made, and the jury have found under correct instructions from the court that the parol agreement had been made, and there was no waiver thereof by the shipper, the carrier's liability for damages to the shipment caused by its negligence is ascertained under the parol contract; and the question as to the validity of stipulations in bills of lading, used in interstate commerce, restricting the recovery of damages to an appraised value at the initial point where the contract was made does not arise.

4. Carriers of Goods—Connecting Lines—Negligence—Interstate Commerce—Contract for Delivery.

Where a carrier has unconditionally contracted to transport and deliver goods beyond its own line to its destination, it is as liable for the damages caused to the shipment by the negligence of its connecting lines as for negligence occurring on its own line of road; and where the shipment is interstate, the Carmack amendment to the Hepburn Act, making the initial line liable for the negligence of its connecting lines and permitting it a recovery against them, need not, therefore, be considered.

APPEAL by defendant from *Adams, J.*, at January Term, 1913, of MOORE.

(505) This action was brought to recover damages for injury to a car-load of household goods, shipped by plaintiff from Oscawana, N. Y., to Carthage, N. C. The goods were shipped under an oral contract for their transportation from the beginning to the end of their journey and their delivery at the terminal point to the consignee. The goods were damaged during the transit, as the jury find, by the negligence of the defendant in transferring them from its car, in which they had been originally and carefully packed, to a car of a connecting line, and also by the careless manner of stowing or arranging them in that car. Defendant alleges that they were shipped under a written contract of carriage, with a specified valuation clause inserted in consideration of a reduced charge or toll for the carriage, it being $10 per 100 pounds, and other stipulations restricting its liability for loss from negligence to its own line or its portion of the through route, and also in other respects; but they need not be dwelt upon, as the decision of the case will turn upon other matters. After the goods had arrived at their destination, plaintiff signed a bill of lading and placed it among the claim papers, as he said, by inadvertence, not meaning thereby to change the contract of shipment, which contained no clause of limitation as to liability or value in case of loss, and that this paper was not signed by him until after the goods arrived in Carthage. That he did not know how this bill got into his files, and he signed it not knowing what it was and by accident or mistake in making up his claim papers.

The following is the verdict of the jury:

1. Did the plaintiff deliver to the defendant for transportation from Oscawana, N. Y., to Carthage, N. C., a car-load of furniture and household goods, as alleged in the complaint? Answer: Yes (by consent).

2. If so, were said furniture and household goods damaged by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

3. Did plaintiff and defendant make a written contract for the transportation of said property, as alleged in the answer? Answer: No.

4. What damage, if any, is the plaintiff entitled to recover? (506) Answer: $2,671, with interest from September, 1911.

Judgment was entered upon the verdict, and defendant appealed.

U. L. Spence for plaintiff.
W. H. Neal for defendant.

WALKER, J., after stating the case: The decision of this appeal turns upon the question as to what was the contract of the parties. If the defendant undertook, for a consideration, to carry the goods from Oscawana, N. Y., to Carthage, N. C., and safely deliver them

there, without restriction and with no release of its common-law liability, the defendant in undoubtedly answerable to the plaintiff for actual damage to the goods. His liability is that of an insurer, with certain well defined exceptions.

Hutchison on Carriers (3 Ed.), sec. 265 (sec. 170a), says: "The liability of the common carrier by law is as has been seen an unusual and extraordinary one, based upon considerations of public policy which have survived the wonderful change in the circumstances under which they were first arose. By that law the common carrier is regarded as a practical insurer of the goods against all losses of whatever kind, with the exception of (1) those arising from what is known as the act of God, and (2) those caused by the public enemy; to which in modern times have been added (3) those arising from the act of the public authority, (4) those arising from the act of the shipper, and (5) those arising from the inherent nature of the goods." *Currie v. R. R.,* 156 N. C., 432.

But there was evidence of negligence on the part of the defendant, which was properly submitted to the jury, and they found that the goods had been damaged by its negligence; so that the question of its common-law liability is not important.

The serious and vital question arose upon the issue as to damages, plaintiff contending for full damages, and the defendant for an assessment according to the terms of the bill of lading. The court instructed the jury to find whether the goods were shipped under the unlimited oral contract or under the contract as evidenced by the bill of lading, and in a charge which was full and explicit upon this point, and exceedingly clear and forceful, and, we may add, very fair to the (507) defendant and as favorable as it was entitled to ask or could expect, the court explained the issue thus squarely made by the parties, and the jury have found that the contract was as stated by the plaintiff, oral and unrestricted, and was not the one contained in the bill of lading.

It was conceded by learned counsel for the defendant (who presented its side of the case with his usual ability and precision, confining himself to the vital issue of the case) that no particular form or solemnity of execution is required for a contract of the carrier to transport goods. It may be by parol, or it may be in writing. *R. R. v. Patrick,* 144 Fed., 632; *R. R. v. Jarey,* 111 U. S., 584; Hutchison on Carriers (3 Ed.), sec. 411 (242); *Berry v. R. R.,* 122 N. C., 1003. In *R. R. v. Patrick, supra,* the Court says: "It (the contract of shipment) may be orally made, and when so made, in the absence of fraud or imposition, it is as obligatory upon both the shipper and carrier as a written one. The difficulty generally arises in establishing its terms by parol, but,

when once established, it determines the rights and obligations of the parties, except as affected by statutory law, as conclusively as if it had been in writing and in the accepted form of a negotiable bill of lading."

As the jury have found that the parties contracted orally, and not according to the usual terms of bills of lading issued by the defendant, which limited its liability and presented a rule for assessing the damages in case of a loss, we are not called upon to comment upon the course of decision in this Court as to the validity of stipulations in bills of lading, used in interstate commerce, restricting the recovery of damages to an appraised value at the initial point where the contract was made, nor need we discuss the effect of recent decisions in the Supreme Court of the United States upon that question (*Adams Express Co. v. Croninger,* 226 U. S., 491) which were mentioned in the charge of the court. We simply determine the rights of the parties according to the oral contract, which the jury have found to be the true one, and not to have been altered in any way or waived by what afterwards transpired. In *Smith* (508) *v. R. R., ante,* 143, we have dealt with the question involved in this case, though not upon the same facts. That case resembled more in its main features *R. R. v. Patrick, supra,* where the Court of Appeals of the Indian Territory (affirmed by the higher court) said: "But the paper issued and denominated a bill of lading in the case at bar was never signed by the carrier, and by reason of that fact it was not a bill of lading, and consequently the pretended limitation of liability stated therein was not binding on the appellee, and none of its provisions was binding on either the carrier or the shipper. Therefore there is no evidence that any verbal or written contract was made between the parties limiting the common-law liability of the carrier." But the principle of the cases is the same.

It having been determined that the goods were shipped under the oral contract to transport and deliver, without any restrictive features, the defendant is liable for the injury to the goods, according to the principles of the common law, as an insurer. *Mitchell v. R. R.,* 124 N. C., 236; *Hingle v. R. R.,* 126 N. C., 932. It was said in *Mitchell's case, supra:* "It is the duty of a common carrier, irrespective of contract, but subject to reasonable regulations, to accept, safely carry, and deliver all goods intrusted to it. If the goods are lost, it must show what became of them, and if they are damaged, it must prove affirmatively that they were damaged in some way that would relieve it from responsibility. The plaintiff has a *prima facie* case when he shows the receipt of the goods by the carrier and their nondelivery or delivery in a damaged condition. Any further defense is in the nature of confession and avoidance. If the defendant pleads exemption by virtue

of a special contract, it must prove the contract and show that the loss or damage comes within some one of the exceptions. It must appear to the court as matter of law that the contract is *reasonable* in all of its essential features, and that the exceptions are not contrary to public policy. All such exceptions, being in derogation of common law, should be strictly construed." *Currie v. R. R.*, 156 N. C., 432.

Without deciding the question, it may well be doubted whether (509) an agreement to waive or discharge the original contract by parol and substitute another for it, which is made after the loss had accrued or after breach, would be binding on the plaintiff, where not founded upon a new consideration. Hutchison on Carriers (3 Ed.), sec. 412 (243); *The Delaware v. Oregon Iron Co.*, 14 Wall. (U. S.), at 603, and cases cited; *Emerson v. Slater*, 22 How., 28, 360.

In the absence of any exemption in the contract from its common-law liability, we must hold that defendant was an insurer, who is liable in all events and for every loss or damage, however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in its contract, whether oral, or written in the form of a bill of lading. *The Delaware v. Oregon Iron Co.*, 14 Wall., at p. 597. This is said by *Justice Clifford*, in that case, to be the best description of a carrier's obligation.

Something was said in the argument as to the Carmack amendment to the Hepburn Act of 1909 (34 Stat. at Large, 584, ch. 3591, U. S. Comp. Stat., Supp. 1909, p. 1149), providing that where goods are received for shipment in interstate commerce the initial carrier shall be liable for damages caused by itself or a connecting carrier, and making void any contract of exemption against such liability, but allowing the initial carrier to recover over against the connecting carrier, on whose line the loss or damage occurred, the amount thereof. We need not decide whether that act is applicable to the facts of this case, as defendant agreed by its oral contract to carry the goods and deliver them at Carthage, choosing its own intermediate agents or connecting lines for the purpose. At common law, carriers are not bound to carry except on their own lines; but they may by special contract subject themselves to liability over the whole course of transit. *R. R. v. Pratt*, 22 Wall., 123; *R. R. v. McCarthy*, 96 U. S., 258; 3 Enc. of U. S. Supreme Ct. Reports, p. 610 and notes. They thus extend their route with the help of others, and their position is the same as to liability for negligence as if the course and means of transportation employed were all their own. *R. R. v. R. R.*, 110 U. S., 667. In this case, (510)

though, the jury have found, when the verdict is interpreted in the light of the pleadings, evidence, and the charge of the court, that defendant's own negligence caused the damage to the goods.

We have discovered no error in the trial or in the record.

No error.

Cited: *Lyon v. R. R.*, 165 N. C., 147.

R. D. GIBSON ET AL. V. BOARD OF COMMISSIONERS OF SCOTLAND COUNTY.

(Filed 12 November, 1913.)

Elections — Registration — Oath of Electors — Duty of Registrar — Right of Electors—Injunction.

It is the duty of the registrar to administer the oath to the electors before registration, but his failure to perform this duty will not deprive the elector of his right to vote; and where an election has been held to determine upon the levy of a tax for a public school district, and the registrar has failed in his duty to administer the oath to all of the electors voting in the district, the election will not be held invalid on that account alone, nor will the levying of the tax be restrained.

APPEAL by plaintiffs from *Webb, J.*, at June Term, 1913, of SCOTLAND.

This is an action in behalf of certain citizens and taxpayers to restrain the levying of a tax for schools in Rockdale Public School District, upon the ground that no legal election authorizing the tax has been held.

The General Assembly, at its session of 1913, passed an act, which was ratified on 6 March, 1913, creating Rockdale Public School District in Scotland County, and directing an election to be held upon the question of levying a tax to support the schools in said district.

The county commissioners of Scotland County, pursuant to the act, ordered the election, and directed that a new registration of voters be had.

(511) The election was held, and a majority voted in favor of the tax, and the vote was properly canvassed and returned, and the result of the election declared.

At the hearing of the motion to continue the temporary restraining order to the hearing, his Honor found the following facts as to the registration of voters, which are not disputed:

"That the registrar did not administer any oath to any one of the 122 voters whose names were entered in said registration book, but he did examine each and every one as to his qualifications to register for said election.

"That no one of the said voters whose names were entered on the registration book offered to be sworn or requested the registrar to administer any oath to him.

"That the registrar would have administered an oath to any or all the applicants for registration had they requested him to do so.

"That no voter within the said school district who had the right to register for said election was denied the right to register and vote in said election.

"That each and every one of the 122 voters whose names were entered in the registration book had the right to qualify and register for said election.

"That the election was held at the time and place designated in the order of the board of county commissioners.

"That the registrar and judges canvassed and judicially determined the results of said election and certified the same to the board of county commissioners at a regular meeting of said board, and the said results were by order of the said board of county commissioners recorded in the office of the register of deeds of Scotland County.

"That the said results as certified and recorded set forth that there were 122 registered electors in said election; that of these 65 cast their ballots in favor of the school and the tax levy, and the remaining 57 were counted in the results of said election against the school and the tax levy, and that a majority of the qualified electors in said election cast their ballots in favor of the school and the tax levy."

The motion of the plaintiffs was denied, the temporary re- (512) straining order dissolved, and the plaintiffs excepted and appealed.

Cox & Dunn for plaintiffs.

E. H. Gibson and Jonathan Peele for defendant.

ALLEN, J. Several irregularities in the registration of voters appear in the record, but counsel for the plaintiffs properly admit that none of them are sufficient to vitiate the election unless the failure to administer an oath to those offering themselves for registration has this effect.

The question is important, presenting as it does, on one hand the possibility of admitting as voters those not legally qualified, if the requirements of the law are not observed, and on the other, making it possible for registrars, by neglect or fraud, to disfranchise an entire electorate.

In this case there is no evidence of any improper motive on the part of the registrar or of any of the officers connected with the election, but the principle declared cannot be confined to this case, and will be authority in many others.

We have given the question careful consideration, and have concluded, in the interest of a free and full expression of the popular will, to abide by the precedent heretofore established in this Court, and to sustain the election.

In *Quinn v. Lattimore,* 120 N. C., 426, it was held that the requirement as to the administration of an oath to the elector before registration was directed to the registrar, and that "Where a registrar of election registers a person entitled, under the Constitution and laws, to vote, but through inadvertence or fraud fails to administer the oath required to be administered, such person shall not be for that reason deprived of his vote."

It is true that in the *Lattimore case* all the names on the registration books were not involved, as in this case; but if the principle is admitted as to one voter, it must logically apply to all.

In 15 Cyc., 307, the author adopts the doctrine of this case, and says:

"Statutes prescribing the mode of proceeding of public officers are (513) regarded as directory unless there is something in the statute which shows a different intent. Hence, as a general rule, a statute prescribing the powers and duties of registration officers should not be so construed as to make the right to vote by registered voters depend upon a strict observance by the registrars of all the minute directions of the statute in preparing the voting list, and thus render the constitutional right of suffrage liable to be defeated, without the fault of the elector, by the fraud, caprice, ignorance, or negligence of the registrars; for if an exact compliance by these officers with all statutory directions should be deemed essential to the right of an elector to vote, elections would often fail, and electors would be deprived without their fault of an opportunity to vote. A constitutional or statutory provision that no one shall be entitled to register without first taking an oath to support the Constitution of the State and that of the United States is directed to the registrars, and to them alone; and if they through inadvertence register a qualified voter, who is entitled to register and vote without administering the prescribed oath to him, he cannot be deprived of his right to vote through this negligence of the officers."

We therefore hold that the election was valid, and that the restraining order ought to have been dissolved.

Affirmed.

ORINOCO SUPPLY COMPANY ET AL. v. MASONIC AND EASTERN STAR HOME ET AL.

(Filed 12 November, 1913.)

1. Liens—Material Men—Filing of Claims—Balance Due Upon Contract—Contract Abandoned—Completion by Owner.

It is necessary, to enforce a lien on a building for materials furnished the contractor, that he file with the owner an itemized statement of the amounts due for materials, or the material man give notice to the owner of the amount due him before the owner settled with the contractor, and then only to the extent of the amount then due; and when this required notice has not been given before the last payment has been made to the contractor, who fails to complete the building, and the owner in completing the building has paid out the balance of the contract price, no lien attaches. Revisal, secs. 2019, 2020, 2021.

2. Interpretation of Statutes—Proviso—Purview.

When a proviso in a statute is directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the Legislature.

3. Interpretation of Statutes—Restrictive Laws—Strict Construction.

Chapter 761, Laws 1911, relative to a lien law applicable to Durham, Rowan, Guilford, and Randolph counties, is local in its nature, and contrary to the general lien laws of the State, and must be strictly construed.

4. Interpretation of Statutes—Liens—Material Men—Proviso—Contradictory Terms.

Chapter 761, Laws 1911, enacting a lien law for materials furnished for a building, etc., applying by section 5 only to Durham, Rowan, Guilford, and Randolph counties, provides that it shall not be enforced in Union or Stanly counties, with a further proviso that where materials are furnished by any person, etc., outside of Union County, "this act shall not apply in the collection of said debt, but the law as it now stands on the statute books shall apply": *Held*, that the act is contradictory, self-destructive, and void.

APPEAL by defendant from *Shaw, J.*, at October Term, 1913, (514) of GUILFORD.

Action heard upon exceptions to report of referee. His Honor overruled all the exceptions of the defendant, confirmed the report of the referee, and rendered judgment against the defendant, the Masonic and Eastern Star Home, incorporated, from which it appealed.

L. M. Swink, Hastings & Whicker, Manly, Hendren & Womble for plaintiff.

Charles A. Hines for the Wharton Builders Supply Company, one of the appellees.

W. F. Harding for defendant.

BROWN, J. This is an action brought by the plaintiffs to subject the property of the defendant to a lien for material furnished to the
(515) Ange Construction Company, a contractor that had undertaken to erect under contract a building upon said defendants' lot in Guilford County.

The contractor failed to complete the building and was adjudicated a bankrupt. The owner completed it and expended more than the contract price, and at the date of the adjudication in bankruptcy, the owner owed the contractor nothing.

None of the creditors, parties in this cause, filed any notice of their claims with the owner prior to the adjudication of the contractor in bankruptcy, except the Orinoco Supply Company, who gave notice of their claim on 16 April, 1912; but this notice was given after the last payment to the contractor by the owner on 8 April, 1912, and at the time the notices were filed nothing was owing to the contractor by the owner.

Under the general lien law of this State, Revisal 1905, secs. 2019, 2020, 2021, material men have no lien for materials furnished the contractor unless the contractor files with the owner an itemized statement of amounts due for material, or the material man gives notice to the owner of the amount due him before the owner makes settlement with the contractor, and then only as to such amount as may be due the contractor from the owner on its contract.

No notice having been given either by the contractor or by the material man before the payments were made by the owner to the contractor, and there being no funds in the hands of the owner due the contractor on his contract at the time notice of claims were given, such claims cannot, under the general statute, be a lien on the property of the owner. 27 Cyc., 102; *Clark v. Edwards,* 119 N. C., 115.

But the plaintiffs contend that the act of 1911, chapter 761, Public-Local Laws, gives them a lien on defendant's property, irrespective of notice to the owner, and without regard to his indebtedness to the contractor.

The special statute provides that the owner shall require the contractor to furnish him, before paying any part of the contract price, an itemized statement duly verified, of the amount owing any person for materials furnished, and that the owner shall pay such amount
(516) shown by the statement to the person furnishing materials. The statute further provides that in the event of failure of the owner to require the itemized statement duly verified, that such failure shall not in any way affect the rights of the laborer or material man to file and enforce his lien.

It is contended by the defendant that such special statute is void for ambiguity as well as in violation of the Federal and State constitutions.

Section 5 of the special statute provides that "This act shall apply only to Durham, Rowan, Guilford, and Randolph counties: *Provided,* this act shall not apply nor shall it be enforced in Union and Stanly counties: *Provided further,* that where material is furnished by any person, firm, or a corporation outside of Union County, the provisions of this act shall not apply in the collection of said debt, but the law as now on the statute-books shall apply."

This special statute, entirely local in its nature, is in abrogation of the general lien law of the State, and undertakes to confer on the furnishers of building material in four counties privileges, legal rights, and advantages not common to the citizens of other counties in the State.

Its constitutionality is doubtful. But we are not called upon to pass upon it, as we think the act is self-destructive and void on its face. Being in abrogation of the general law, it should be strictly construed. 27 Cyc., 20.

It has long been held that if a proviso in a statute be directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the Legislature. 1 Kent Com., 430; Potter's Dwarris, p. 118; Bacon Abr., title "Statute." It was held by all the Barons of the Exchequer in *Attorney-General v. Chelsea Waterworks,* 9 B. & C., 835, that where the proviso of an act of Parliament was directly repugnant to the purview of it, the proviso should stand and be held a repeal of the purview, because, as was said, "it speaks the last intention of the lawgiver." It was compared to a will in which the latter part, if inconsistent with the former, supersedes and revokes it.

Dwarris says, page 118: "It has been remarked upon this case (517) in Fitzgibbon, that a proviso repugnant to the purview renders it equally nugatory and void as a repugnant saving clause; and it is difficult to see why the act should be destroyed by the one and not by the other; or why the proviso and the saving clause, when inconsistent with the body of the act, should be destroyed by the one and not by the other." See, also, *Rex v. Justices of Middlesex,* 2 B. & A., 818; *Townsenl v. Brown,* 24 N. J., 86.

In *Farmers Bank v. Hail,* 59 N. Y., at p. 59, the opinion says: "The saving clause is only an exception of a special thing out of the general things mentioned in the statute, and if repugnant to the purview, is void. The office of the proviso is more extensive; it is used to qualify or restrain the general provisions of an act, or to exclude any possible ground of interpretation, as extending to cases not intended by the Legislature to be brought within its purview, and if repugnant to the

purview, it is not void, but stands as the last expression of the Legislature. As between conflicting provisions of the same statute, the last in order of arrangement will control." See, also, the following pertinent cases: *Hall v. Mining Co.*, Fed. Cases, No. 5931; *Quick v. White Water Township*, 7 Ind., 570; *Rhyne v. State*, 5 Neb., 276; *Ex Parte Hewlet*, 24 Nev., 333; 40 Pac., 96; *Packer v. R. R.*, 19 Pa., 211; *Hightower, Lessee, v. Wells*, 14 Tenn., 249; *Savings Inst. v. Makin*, 23 Me., 360.

The statute under consideration declares on the one hand that it shall apply only to Durham, Guilford, and Randolph counties, and especially that it shall not apply nor be enforced in Union and Stanly counties, and on the other hand it provides where material is furnished by any persons, firm, or corporation outside of Union County the provisions of the act shall not apply in the collection of said debt, but the law now on the statute-books shall apply. So it makes no difference whether in Union or out of Union, the statute is inapplicable to the facts in this case, and admits of no construction which can give any force or effect to it.

(518) We are led to the conclusion that the special statute relied upon by the plaintiffs is contradictory, self-destructive, and void.

Reversed.

WALKER and ALLEN, JJ., concurring in result.

Cited: *Bain v. Lamb*, 167 N. C., 309.

J. R. SHEPHERD, ADMINISTRATOR, v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 12 November, 1913.)

1. Railroads—Headlights—Warnings—Negligence Per Se—Proximate Cause—Trials—Evidence.

The running of a railroad train at night without light, signal, or other warning of its approach, is negligence *per se*, and where a person is injured on a dark night while attempting to cross the track at a place customarily used for crossing, within the limits of a populous town, by a train thus operated, the negligence of the company is continuous and the proximate cause, eliminating the question of contributory negligence, especially as the statute, Laws 1909, ch. 446, requires electric headlights to be used on locomotives.

2. Same—Nonsuit.

In this case there was evidence tending to show that as plaintiff's intestate was on his direct route to his home on a dark night he attempted

to cross defendant's railroad track at a place usually crossed by pedestrians, and while the defendant's freight train was pulling away from the station, in town limits, the intestate was heard to scream and was found in a certain position on the track over which the train had just passed, 75 yards from the station; that the train had no headlight on the locomotive and was not giving signals or warnings as it moved away. The motion to nonsuit should have been denied.

APPEAL by plaintiff from *Peebles, J.*, at May Term, 1913, of ALAMANCE.

W. H. Carroll for plaintiff.
Parker & Parker for defendant.

CLARK, C. J. This is an action for the wrongful death of (519) plaintiff's intestate, Lacy Shepherd. Upon the admissions in the answer and the uncontradicted testimony it appears that Lacy Shepherd died on the morning of 20 February, 1911, from injuries sustained by him the night before on the track of the defendant at Elon College. He lived south of the railroad and about a quarter of a mile west of the station. He was about 14 years of age, a student at Elon College, and was returning home from a Christian Endeavor meeting which had been held in one of the college buildings some 200 yards north of the track. His usual crossing place going to and returning from the college to his home was at Main Street, immediately west of the depot building. On approaching this crossing on that night, he found Main Street blocked by a long freight train, the engine being near the depot building and the rear of the train extending westward. The engine was shifting cars upon the siding by lantern light. The plaintiff's intestate, just before reaching the depot, left his comrades and attempted to cross the railroad track at a point about 75 yards east of the said depot.

There was evidence that he was knocked down and run over by the train which was going east from said station, the engine being without a headlight, and no signal of any kind being given to warn him of its approach. His left leg was cut off entirely. He was a bright young man, having perfect eyesight and hearing and in good health and vigor. The testimony is uncontradicted that it was a dark, windy, cold, rainy night, and that the train was without a headlight or light of any kind showing its approach, and that without any warning or the ringing of a bell or the blowing of a whistle or otherwise, the train moved out from the depot going east, and immediately after it had passed the screams and cries of Lacy Shepherd were heard. Parties went immediately to him and found him lying just north of the railroad track and his foot was lying inside and just south of the north rail of said track. The place where the accident occurred is within the corporate limits of Elon

College and was near two footpaths or crossings used by pedestrians living on south side of the track, going to and from the college buildings, which are on the north side of the railroad.

(520) In *Heavener v. R. R.*, 141 N. C., 245, the Court approved an instruction that if the defendant "was running its train through the corporate limits of the town of Concord, and the track whereon the train was running was much used by the public, both in crossing the track and walking on it, and the jury should further find that on the night alleged it was running its train at a rapid rate without any headlight or other proper signal, and while so running ran over and killed the intestate; and if the jury should further find from the evidence that if there had been a proper light on the engine, or if the bell had been ringing, the intestate would have had notice of the approaching train in time to escape the danger, and that the plaintiff by reason of not having such notice or warning was injured, then such failure to have the headlight or other proper signal was continuing negligence, and would be the proximate cause of the injury."

That case cites *Stanley v. R. R.*, 120 N. C., 514, in which the defendant was held liable where the intestate was walking at night on the railroad track and was killed by being struck by a train which carried no light and gave no signal, and that it was error to instruct the jury that plaintiff could not recover if his intestate could have discovered the train by ordinary watchfulness and precaution, and by using his senses, since the failure of the defendant's train to carry a light was continuing negligence and the proximate cause of the injury." *Stanley v. R. R., supra,* has been cited in many cases; see citations in Anno Edition.

Heavener v. R. R., supra, has been cited with approval in *Morrow v. R. R.*, 147 N. C., 627, which held that it was evidence of negligence on the part of defendant if "the plaintiff when he was injured was where people in the vicinity were accustomed to walk, and under the circumstances he was entitled to notice of the approach of the train, if there was no headlight and it was so dark that he could not see it in time to leave the track," citing *Purnell v. R. R.*, 122 N. C., 832; *Heavener v. R. R.*, 141 N. C., 245. It has also been cited in *Allen v. R. R.*, 149 N. C., 258, and *Hammett v. R. R.*, 157 N. C., 322, which held that the

(521) defendant company was negligent where the intestate was killed by a freight train backing along its tracks "on a dark night, without signals or warnings, and without light on the rear car."

Here the train was going forward, but as there was evidence that there was no light on the engine, and no signal given, the law applicable is the same.

This being a nonsuit, the evidence must be taken in the light most favorable to the plaintiff. *Cotton v. R. R.*, 149 N. C., 229. But, indeed,

there was no conflicting testimony. The evidence was that his way home being blocked by a long freight train, the intestate, a bright and intelligent young man, was struck and fatally injured by the defendant's train about 75 yards east of the depot building, being at the time at or near a well known and much used crossing for pedestrians; that he was evidently on his way home and was going the best and nearest route to get there under the circumstances; that it was a dark, rainy night, and that he was run down and killed by a freight train on which there was no headlight and by which no signal of any kind was given of its approach. Among the numerous cases to sustain the proposition that this was negligence can be cited, in addition to those already quoted, *Holman v. R. R.*, 159 N. C., 44; *Whitesides v. R. R.*, 128 N. C., 229; *Powell v. R. R.*, 125 N. C., 370; *Cox v. R. R.*, 123 N. C., 604; *Fulp v. R. R.*, 120 N. C., 525; *Pickett v. R. R.*, 117 N. C., 637.

In *Snipes v. R. R.*, 152 N. C., 42, the Court says: "It is well established that the employees of a railroad company in operating its trains are required to keep a careful and continuous outlook along the track, and the company is responsible for injuries resulting as the proximate consequence of their negligence in the performance of this duty." How could this duty be performed in the night-time in the absence of a headlight? To the same effect, *Guilford v. R. R.*, 154 N. C., 607; *Edge v. R. R.*, 153 N. C., 214; *Sawyer v. R. R.*, 145 N. C., 29; *Arrowood v. R. R.*, 126 N. C., 629.

"Where the plaintiff's intestate was killed by the engine of the defendant while backing on a dark night over a crossing, without light, signals, or other warning, in a thickly settled community, a (522) clear case of negligence is made out, and without other evidence the question of contributory negligence does not arise." *Gerringer v. R. R.*, 146 N. C., 32 (in which the concurring opinion calls attention to the statute authorizing the abolition of grade crossings and the necessity of doing so); *Purnell v. R. R.*, 122 N. C., 832; *Stanley v. R. R.*, 120 N. C., 514; *Mayes v. R. R.*, 119 N. C., 758; *Lloyd v. R. R.*, 118 N. C., 1010.

It is a reasonable inference upon this evidence that if the train had been supplied with the proper headlight the plaintiff's intestate would most likely have seen its approach in time to have saved himself, or the engineer could have stopped the train in time to have saved his life, especially as the train was just pulling out, and could not have attained a very high rate of speed. If the train could have been stopped in time, it was negligence not to have done so. *Sawyer v. R. R.*, 145 N. C., 24; *Baker v. R. R.*, 144 N. C., 36.

The statute, Laws 1909, ch. 446, now requires every engine of the defendant to carry an electric headlight at night, and failure to do so was

unlawful and *per se* negligence. This of itself entitled the plaintiff to have this case submitted to the jury. Even prior to the statute, failure to carry a headlight was held to be negligence. *Willis v. R. R.*, 122 N. C., 909, and cases there cited, and citations thereto in Anno Ed.

This case differs from *Royster v. R. R.*, 147 N. C., 351, relied on by the defendant, because in that case the plaintiff stepped "in front of a train known to be approaching." It also differs from the other two cases cited by the defendant, *Beach v. R. R.*, 148 N. C., 153, and *Exum v. R. R.*, 154 N. C., 410, in that in those cases the deceased were killed in the daytime while walking on the track, and there was evidence that they did not look and listen for the approaching train.

The judgment of nonsuit must be

Reversed.

Cited: *Hall v. Electric R. R.*, 167 N. C., 285; *McNeill v. R. R., ib.*, 399, 401; *Barnes v. R. R.*, 168 N. C., 514; *Horne v. R. R.*, 170 N. C., 648, 651, 661; *Smith v. Electric R. R.*, 173 N. C., 493.

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(523)

M. HENRY ET AL. v. C. C. HEGGIE.

(Filed 12 November, 1913.)

1. Deeds and Conveyances—Mortgages—Mortgagor's Liability—Contracts.

An accepted offer to buy a certain lot of land, which happens to be subject to mortgage, and without assuming the payment of the mortgage debt, is not an offer to take the land and pay off the encumbrances; and where an agreement of this character has been made, the proposed vendee may refuse to accept a deed tendered him containing a covenant on his part to assume the encumbrances on the property, for the acceptance of such deed would make him incur a personal liability to pay off the mortgage, which he had not agreed to do.

2. Deeds and Conveyances—Delivery—Possession of Grantor—Mortgages—Trials—Verdict, Directing—Questions for Jury.

Where a grantor in a deed produces it on the trial, the production of the deed by him is some evidence that it had not been delivered and accepted; and where there is conflicting evidence as to whether the vendee of lands subject to mortgage had accepted a deed wherein it was covenanted on his part that he would pay off the encumbrance, contrary to his agreement of purchase, it is reversible error for the judge to direct a verdict upon the evidence, if found by the jury to be true, that the deed had been delivered, for the question of delivery is one for the determination of the jury under instructions from the court.

3. Deeds and Conveyances — Mortgages — Mortgagee's Possession—Acceptance—Evidence.

By accepting a deed with covenants to be performed on his part, the grantee binds himself to their performance, whether he signed the deed or not; and where the deed is produced on trial by the grantee upon notice of the grantor or rule of court to do so, it is evidence of his acceptance.

APPEAL by defendant from *Peebles, J.,* at April Term, 1913, of GRANVILLE.

The defendant, desiring to purchase a house and lot from the plaintiff, which were subject to two mortgages, executed by the plaintiff, one in favor of H. M. Gillis for about $900, and the other in favor of W. L. Taylor for about $150, agreed to buy the same for the sum of $25, subject to present encumbrances as stated above. The price asked by the plaintiff was $1,075, and in the letter to him agreeing to (524) buy the property, defendant stated that the payment of the $25 for the property, subject to the mortgages, would equal his price, that is, $1,075. Plaintiff caused a deed for the house and lot to be prepared, executed and acknowledged the same, with joinder and privy examination of his wife, and sent it to the defendant. In the deed there is a covenant on the part of the defendant, as a part of the consideration, to assume all encumbrances on the property, with a special reference to the Gillis and Taylor mortgages, and they are excepted from the warranty. There was evidence that defendant received the deed and accepted the same, giving a check for the $25 to Mr. Lanier, attorney for the plaintiff, who collected the same. Defendant testified that he had not accepted the deed, but delivered it back and had never exercised any control or dominion over the land. The plaintiff paid the Taylor debt, amounting at the time to $165, and brings this action to recover the amount so paid. The property was sold under the Gillis mortgage, and brought not more than enough to pay that debt.

The following issue was submitted to the jury: "Is the defendant indebted to the plaintiff, and if so, in what amount?" and the jury answered it, "Yes; $150, with interest from 12 July, 1910," under an instruction of the court that, if they believed the evidence, they should so answer it. Exception and appeal by the defendant.

T. Lanier and Hicks & Stem for plaintiff.
B. S. Royster for defendant.

WALKER, J., after stating the case: We do not think that the written agreement to buy the lot constituted an assumption of the mortgages, so as to make the defendant liable personally to the plaintiff for the amount he paid to satisfy the Taylor debt. The rule, as settled by the authorities, so far as applicable here, is thus stated in 27 Cyc., at pp. 1342, 1343,

1344: "Where a conveyance of land is made expressly subject to an existing mortgage, the effect, as between the grantor and the grantee, is to charge the encumbrance primarily on the land, so as to pre-
(525) vent the purchaser from claiming reimbursement or satisfaction from his vendor in case he loses the land by foreclosure or is compelled to pay the mortgage to save a foreclosure; in reality, it amounts simply to a conveyance of the equity of redemption. . . . The grantee of mortgaged land does not incur a personal liability for the payment of the mortgage debt, enforcible by the mortgagee, merely because the deed recites that it is made subject to the mortgage; such personal liability is created only by a distinct assumption of the debt or contractual obligation to pay it. Where the land is sold subject to a mortgage, but without an assumption of it by the grantee, the mortgagor remains liable for any deficiency. But still, the contract being one of indemnity and the land being the primary fund for the payment of the mortgage, if the grantor is compelled to pay it, he may require an assignment of the mortgage to himself, or he will be regarded as an equitable assignee so as to be subrogated to the rights of the mortgagee, and so will be enabled to use the mortgage to force reimbursement from his grantee." *Hancock v. Fleming,* 103 Ind., 533; *McNaughton v. Burke,* 63 Neb., 7045; *M. C. & M. Co. v. Hand,* 197 Ill., 288; *Hartley v. Harrison,* 24 N. Y., 170; *Londonslager v. W. H. Land Co.,* 64 N. J. L., 405; *Equitable L. Assn. v. Bostwick,* 100 N. Y., 628. The *McNaughton case* holds that, "One who buys land subject to an encumbrance acquires only an equity of redemption; that is, the interest remaining after the encumbrance has been paid. The understanding between the grantor and grantee is that the former reserves for the benefit of the encumbrancer so much of the estate as may be necessary for the satisfaction of the debt. A conveyance of land subject to a mortgage is neither more nor less than a simple deed of whatever interest or estate the grantor has after the debt is satisfied out of it." *Chief Justice Mitchell,* in *Hancock v. Fleming, supra,* said: " 'The difference between the purchaser assuming the payment of the mortgage and simply buying subject to the mortgage is simply that in the one case he makes himself personally liable for the payment of the debt, and in the other case he does not assume such liability. In both cases he takes the land charged with the
(526) payment of the debt, and is not allowed to set up any defense to its validity.' Jones Mort., sec. 736; *Atherton v. Toney,* 43 Ind., 211; Pomeroy Eq. Jur., sec. 1205. The land, nevertheless, remained the primary fund as between the purchaser and the mortgagee, out of which payment of the debt must be made." It was held in *Londonslager v. W. H. L. Co., supra,* that, "A declaration counting upon an express assumption of a mortgage by the grantee in a deed (the deed being

made part of the declaration) will not be supported by a clause in the deed, 'that the land is conveyed subject to such mortgage,' the words of assumption being absent." The Court ruled in the case of *Eq. L. Assn. Co. v. Bostwick, supra,* that "A personal obligation on the part of a grantee to pay a mortgage upon the premises conveyed may not be implied from a statement in his deed that the conveyance is subject to the mortgage, and that the amount thereof 'forms part of the consideration and is deducted therefrom.'" The language in the last case we have cited is very much like that used in the letter of defendant offering to buy the lot. A valuable authority is *Shepherd v. May,* 115 U. S., 505, where the Court says: "In order to raise such a liability as is contended for by plaintiff in error, there must be words in the deed of conveyance from which, by fair import, an agreement to pay the debt can be inferred. This was expressly held in *Elliott v. Sackett,* 108 U. S., 132, where *Mr. Justice Blatchford,* in delivering the judgment of this Court, said: 'An agreement merely to take land, subject to a specified encumbrance, is not an agreement to assume and pay the encumbrance. The grantee of an equity of redemption, without words in the grant importing in some form that he assumes the payment, does not bind himself personally to pay the debt. There must be words importing that he will pay the debt to make him personally liable.' To the same effect see *Belmont v. Coman,* 22 N. Y., 438; *Fiske v. Tolman,* 124 Mass., 254; *Hoy v. Bramhall,* 4 C. E. Green, 74, 78; *Fowler v. Fay,* 62 Ill., 375. There are no such words in the deed made by the plaintiff in error." These cases also show that the terms of the deed tendered by plaintiff and alleged to have been delivered to and accepted by the defendant are sufficient to constitute an assumption of the mortgage (527) debt and an indemnity against its payment by the plaintiff.

So that it all comes back to the point whether the deed was delivered by the plaintiff and accepted by the defendant so as to bind the latter to a performance of its covenants or stipulations. This is a mixed question of fact and law. The jury must find the facts and the judge declare the law arising thereon. We find, upon examination of the record, as will appear by our statement of the case, that the evidence upon this matter, the acceptance of the deed, was conflicting, and therefore the court could not direct the jury how to find if they believed the evidence. *Rickert v. R. R.,* 123 N. C., 255; *Cox v. R. R., ibid.,* 611; *Bank v. Nimocks,* 124 N. C., 352. The jury cannot well believe *all* of the evidence, if it conflicts. It amounted to an instruction that there is no evidence to prove defendant's contention, when we see that there is. He denies that he accepted the deed, and testifies that he rejected it. Besides, the plaintiff produced the deed at the trial and offered it in evidence. All of this was some evidence. It was stated on the trial as a fact, though it does not

appear in the record, that the deed was produced by the defendant under a notice to him or a rule of the court requiring him to do so. If this appears in the case at the next trial, it may have an important bearing upon the question of delivery and acceptance. If the defendant received and accepted the deed, he is liable upon its covenants, as the acceptance by the grantee of a deed containing a covenant to be performed by him as the consideration of the grant, or a part thereof, is equivalent to an agreement on his part to perform it, without regard to whether he signed it or not. 11 Cyc., 1045; *Maynard v. Moore,* 76 N. C., 158, citing *Staines v. Morris,* 1 Ves. & B., 14; *Finley v. Simpson,* 4 Zabris (N. J.), 311; *Herring v. Lumber Co., ante,* 481.

There was error in the charge, as pointed out, and there must be a New trial.

Cited: Baber v. Hanie, post, 597.

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(528)

H. T. MARTIN v. W. F. CLEGG.

(Filed 19 November, 1913.)

Landlord and Tenant—Ejectment—Reasonable Value—Evidence.

The plaintiff in ejectment is entitled to recover a fair rental value from the defendant holding over after his breach of the contract in failing to pay the stipulated rent, after notice to vacate the premises; and upon the question of this reasonable value it is competent for the defendant to show that a part of the premises had for a long time remained vacant, that it is not readily rented or in much demand.

APPEAL by defendant from *Peebles, J.,* at February Term, 1913, of GUILFORD.

Action tried upon these issues:

1. What sum, if anything, is the plaintiff entitled to recover of the defendant on account of rents as stipulated in the contract? Answer: $2,563.56.

2. Did the defendant commit a breach of his contract by failure to pay rents, as agreed in the contract? Answer: Yes.

3. If so, what sum, if anything, is the plaintiff entitled to recover of the defendant, by way of damages for wrongful detention of the premises in controversy? Answer: Nothing.

4. Did the defendant, by his conduct and delay for six years or thereabout, waive the penalty stipulated in the contract? Answer: Yes.

5. If not, what sum, if anything, is the defendant entitled to recover of the plaintiff, on account of the penalty, $20 per month, stipulated in the contract? Answer: Nothing.

6. Did the defendant, before breach of his contract, install in Martin's building radiation, as alleged? Answer: No.

The defendant accepted and appealed from the judgment rendered.

King & Kimball for plaintiff.
A. L. Brooks for defendant.

BROWN, J. This action is brought to recover the possession of certain property known as Clegg's Hotel in the city of Greensboro.

On 29 October, 1909, defendant was served by the sheriff with (529) a written notice by the plaintiff, to vacate the premises, for neglect, after due notice, to make payments of rent as stipulated. Defendant, in consequence of this notice, refusing to vacate, but continuing in possession, action was instituted in the Superior Court on 28 August, 1911, to eject the defendant and to recover damages for his holding over.

There are twenty-nine assignments of error, but it is necessary to consider only the fifteenth, sixteenth, and seventeenth.

These assignments show error upon the part of the court, because, as stated in the brief of defendant, "after he had opened the door, and permitted plaintiff to show what the reasonable rental of the property was from July, 1909, to 1 January, 1913, declined to permit the defendant to testify with relation to the location of the place, and that it was so situated that you could not always keep it rented, and that there was not always a continuous demand for the stores, and that in fact for about three years of the time one of the stores was not rented."

This extract from the brief is borne out by the record.

Defendant was sworn as a witness in his own behalf, and upon the question as to the actual rental value of the property after October, 1909, his counsel asked him how much the storeroom was vacant, and he answered "Three years." This was excluded.

The witness was then asked:

Q. Is it a place where you can always keep it rented?

Objection by plaintiff. Sustained. Exception by defendant.

And again:

Q. Is there a demand for that store continuously at that rental?

Objection by plaintiff. Objection sustained. Defendant excepts.

The court charged the jury: "If you do not find that he had forfeited his contract, had broken the contract, why then the plaintiff would be entitled to recover simply the stipulated price, $92.51 a month. But if you are satisfied by the greater weight of evidence that the defendant had broken his contract by not paying the rent, then from (530)

that time after he was notified and held over, the plaintiff would be entitled to recover what was a reasonable rental value of the property. To get at that, you will have to take the evidence of the witnesses, together with the stipulated price; that is some evidence of what it was worth; but it is not binding."

Again, at the request of the plaintiff, the court charged: "The court charges you that if you shall find that the defendant committed a breach of his contract, as alleged, then the plaintiff would be entitled to recover from the time of such breach the fair market value of the premises, as you may find the same to be from the evidence, and by its greater weight."

There is no doubt the jury well understood that after October, 1909, when the notice to vacate was served, that, in assessing the rents, they were not to be confined to that stipulated in the contract of lease, but were permitted to consider under the first issue what was the fair rental value of the property.

The rule is recently stated by this Court in *Sloan v. Hart,* 150 N. C., 275, as follows: "By rental value is meant, not the probable profits that might accrue to plaintiffs, but the value as ascertained by proof of what the premises would rent for, or by evidence of other facts from which the fair rental value may be determined."

The testimony rejected, that defendant was unable to find occupants for the storerooms for three years; that the place is one not readily rented and not much in demand, is very pertinent upon the fair rental value of the property.

The plaintiff was permitted to testify: "That the fair rental value of the premises from 1 November, 1909, to 1 January, 1913, over and above the rental stipulated in the lease, is $1,529.64."

Why the defendant should be prohibited from proving that the rental value since 1 November, 1909, is much less than claimed by the plaintiff, we are unable to see.

The court erred in excluding such evidence upon the part of the defendant.

New trial.

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(531)

CRAIG & WILSON v. STEWART & JONES.

(Filed 19 November, 1913.)

1. Contracts—Debtor and Creditor—Order Upon Creditor—Equitable Assignment—Acceptance—Consideration.

An order made by a creditor on his debtor to pay to another whatever amount may be due is, when brought to the notice of the latter, an equita-

ble assignment of the debt; and where the order is written, specifying a sum certain, and is accepted under an agreement that it will be paid to the extent of whatever amount may be due, an action may be maintained by the payee of the order upon its acceptance, not only treated as an equitable assignment, but as an original promise to pay, supported by the consideration of the release of the debtor from his former obligation and also of the amount ascertained to be due; the amount thus recoverable bearing interest from the date of the acceptance, if the money is then in hand. As to whether an unconditional acceptance by the drawee, when he owes nothing to the drawer of the order, falls within the statute of frauds. *Quære.*

2. Contracts—Debtor and Creditor—Acceptance—Trials—Evidence—Instructions—Appeal and Error.

Where the plaintiff sues on the defendant's acceptance of an order made by a third person, and there is evidence only that the acceptance was upon condition that the defendant would pay whatever amount was due by him to the drawer, it is error for the judge to charge the jury upon the law, as if it was an unconditional acceptance (Revisal, sec. 535); and when this and a correct instruction upon the law of a conditional acceptance are so blended and applied to a single issue that the good one is inseparable from the bad, the error is reversible.

3. Trials—Instructions—Issues—Harmless Error.

Instructions to the jury should be addressed to specific issues, but *semble*, where the issues are simple, and, in view of other parts of the charge, they do not appear to have misled the jury, the error in this respect will not be held as reversible.

APPEAL by defendant from *Webb, J.*, at May Term, 1913, of GASTON.

This action was brought to recover an amount of money alleged to be due the plaintiffs on an order given by one N. L. Lancaster to them, and addressed to defendants, who, it is claimed, were indebted to Lancaster for work and labor done. The order is not set out in the (532) record, but we gather from the evidence that it required or requested defendants to pay the amount named in the order to plaintiffs. When the order was presented to defendants, they agreed to pay it "out of anything they owed Lancaster," or "out of what might be due Lancaster by them," and this expression, in substance at least, runs through the whole of the evidence. The jury returned this verdict:

1. Are the defendants indebted to the plaintiffs? Answer: Yes.
2. If so, in what amount? Answer: $62.50.

The judge charged the jury that if the acceptance of the order by the defendants was unconditional, the defendants were bound to pay it, whether they owed Lancaster anything or not, and if they so found, their answer to the first issue should be "Yes," and to the second issue, "$62.50"; or, if they found that it was accepted conditionally, that is, upon condition that defendants would pay it "out of any money that is

due Lancaster by them," and they further find that, at the time they accepted the order, there was money due Lancaster to that amount, or that they owed Lancaster the amount after the day on which the order was presented, they should answer the first issue "Yes" and the second "$62.50"; but if they found that defendants owed him nothing, and the acceptance was conditional, their answer would be "No" to the first issue.

Exceptions were duly taken to these instructions and a motion for a new trial based upon them, and each of them, as erroneous, was overruled. Judgment and appeal by defendants.

Carpenter & Carpenter for plaintiffs.
Mangum & Woltz for defendant.

WALKER, J., after stating the case: There was error in the charge to the jury. After a careful examination of the evidence, we can find none which tends to prove that the acceptance of the order was unconstitutional. The testimony of the witnesses on both sides was to the effect that defendant agreed to pay the order, if they owed Lancaster, or whatever amount they owed him. As there was no evidence to support
(533) the first branch of the instruction, as to the unconditional character of the acceptance, the judge should not have submitted that, as a phase of the case, to the jury. *Worley v. Logging Co.*, 157 N. C., 490. The trial judge should not charge the jury upon an aspect of the case which is not supported by the evidence. *Stewart v. Carpet Co.*, 138 N. C., 60; *Jones v. Ins. Co.*, 153 N. C., 388, and authorities therein cited. He is required "to state in a plain and correct manner the evidence, and declare and explain the law arising thereon." Pell's Revisal, sec. 535 and notes. If defendants accepted the order upon the condition that they would pay it, if they were indebted to Lancaster in that amount, or that they would pay any amount owing to him, and it turned out that they did not owe him, there would, of course, be no liability to plaintiff; but if they did owe him, and the order was presented to them, or they were notified of it, and especially if they promised to pay it out of any money due Lancaster, they would be liable to the extent of the indebtedness, not exceeding, though, the amount of the order and accrued interest. *Brem v. Covington*, 104 N. C., 589. In that case it was held that the order, when duly brought to the notice of the defendant, was in effect an equitable assignment of the amount ordered to be paid, if so much was in the hands of the person upon whom it was drawn.

Plaintiff can recover also upon the acceptance of the order, not treated as an equitable assignment, if the defendant owed Lancaster, as the acceptance would constitute a promise to pay, founded upon a sufficient consideration, viz., the release of Lancaster, and the fact that they owed

him, which would also support the promise to pay the amount thereof to the plaintiffs, instead of to Lancaster. *Brem v. Covington, supra; Mason v. Wilson,* 84 N. C., 51. The last case decides that the statute of frauds has no application where defendants had property of the debtor in their hands with which to pay the debt. If defendants owed Lancaster, plaintiffs will be entitled to recover, in addition to the principal amount, interest from the date on which the order was presented, if the debt to Lancaster was then due. *Brem v. Covington, supra.* The jury were further instructed that if defendants "promised to (534) pay it and accepted it, then they are bound, and the plaintiffs would be entitled to recover." This is erroneous, as there was no evidence to show an absolute promise, but only a conditional one, and besides, it is objectionable in form, as not addressed to any particular issue (*Farrell v. R. R.,* 102 N. C., 390; *Baker v. Brem,* 103 N. C., 72); but in a case like this one, where the issues are so simple, we would not grant a new trial on that account, as, in view of the other parts of the charge, it did not mislead the jury, but sufficiently directed their thoughts to the particular issue, though very general in form. The charge should be so framed as to bear upon the issues, and not confined to the right of either party to recover, as if the case was being tried upon the general issue.

The error first pointed out was of such a nature that it passed into the verdict and vitiated it, as we are unable to say under which instruction the jury answered the issues, and must presume, in such a case, that it was the erroneous one. This is the rule, where two instructions are so blended and applied to a single issue that the good one is inseparable from the bad. *Beam v. Jennings,* 96 N. C., 82; *Holmes v. Godwin,* 71 N. C., 306; *Rowe v. Lumber Co.,* 133 N. C., 433.

There also was evidence in this case that defendants owed Lancaster nothing at the time the order was presented or afterwards. They paid him $250, "in compromise and settlement," to get rid of him and in this way buy their peace, as he had threatened them with a lawsuit.

We need not consider the question whether an unconditional parol acceptance would be binding, as founded upon a sufficient consideration and not affected by the statute of frauds, as there is no evidence now of such a promise.

We have referred to *Mason v. Wilson,* where it is held that, if the drawee has money belonging to the drawer, the latter's promise to pay the debt of the former to a third person, who is his creditor, is an original and independent one, based upon a new consideration and binding upon the promisor, and not being, therefore, within the statute of frauds. *Justice Ashe,* in *Mason v. Wilson,* refers to what is said by *Chancellor Kent* in *Leonard v. Vredenburg,* 8 Johnson (N. Y.), 28, 39, (535)

which is as follows: "There are, then, three distinct classes of cases on this subject, which require to be discriminated: (1) Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. Here, as we have already seen, is not, nor need be, any other consideration than that moving between the creditor and original debtor. (2) Cases in which the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability is the ground of the promise, without any distinct and unconnected inducement. Here must be some further consideration shown, having an immediate respect to such liability, for the consideration for the original debt will not attach to this subsequent promise. The cases of *Fish v. Hutchinson* (2 Wils., 94), of *Charter v. Beckett* (7 Term, 201), and of *Wain v. Warlters,* are samples of this class of cases. (3) A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first classes of cases are within the statute of frauds, but the last is not. 1 Saund., 211, note 2." He then says: "In construing this statute (our act of 1819), it may be laid down as a general rule 'that a promise to answer for the debt, default, or miscarriage of another, for which that other remains liable, must be in writing to satisfy the statute of frauds; *contra,* when the other does not remain liable.' 1 Smith L. C., 371. But there are numerous exceptions to the rule." The learned justice also quotes with approval what is said by *Judge Pearson* in *Stanly v. Hendricks,* 35 N. C., 86: "The principle is this: When in consideration of the promise to pay the debt of another the defendant receives property and realizes the proceeds, the promise is not within the mischief provided against, and the plaintiff may recover on the promise or in an action for money had and received; for, although the promise is in words to pay the debt of another, and the performance of it discharges that debt, still the (536) consideration was not for the benefit or ease of the original debtor, but for a purpose entirely collateral, so as to create an *original* and *distinct* cause of action." The same principle was enforced in *Threadgill v. McLendon,* 76 N. C., 24; *Hicks v. Critcher,* 61 N. C., 353; *Hall v. Robinson,* 30 N. C., 56; *Draughan v. Bunting,* 31 N. C., 10, and more recently in *Voorhees v. Porter,* 134 N. C., 591, where it was held that a creditor may sue directly a party holding a fund which his debtor has dedicated to the payment of his obligation, the transaction not being within the statute of frauds, but the promise of the holder of the fund or property of the debtor being an original one and not merely superadded to that of the debtor, leaving the latter also liable. In the

still more recent case of *Peele v. Powell,* 156 N. C., 553, *Justice Allen* classifies those cases within and those cases without the statute with fine discrimination, and it renders further discussion of the matter superfluous. For the error in the charge, the case must be tried again.

New trial.

Cited: Charlotte v. Alexander, 173 N. C., 518.

S. A. WALTERS v. DURHAM LUMBER COMPANY.

(Filed 19 November, 1913.)

1. Master and Servant—Fellow-servants—Selection of Employees—Negligence.

An employer, except in case of railroads, is not responsible for injuries to an employee attributable solely to the negligence of a fellow-servant, but he is required to exercise reasonable care in selecting employees who are competent and fitted for the work in which they are engaged; and if there is negligence in this respect, and it is shown that such negligence is the proximate cause of the injury to a fellow-servant, he may be held liable.

2. Same—Presumptions—Burden of Proof—Knowledge of Master.

Where damages are sought in an action against the employer for his negligence in selecting an employee, alleged as the proximate cause of a personal injury inflicted on his coemployee, it is the presumption that the employer performed his duty in the selection, and before responsibility can be fixed on him, it must be established by the greater weight of the evidence that the employee has been injured by reason of the carelessness or negligence due to the incompentency of the fellow-servant, who had been employed or retained after knowledge of the fact of incompetency by the employer, either actual or constructive.

3. Master and Servant—Fellow-servants—Duty of Master—Incompetency of Servant—Definition.

The incompetency of an employee which will render the employer responsible in an action for damages for a personal injury negligently inflicted by him on a fellow-servant is not confined to a lack of physical capacity or natural mental gifts, or of technical training when such training is required, but it extends as a general rule to any kind of unfitness which renders the employment or retention of the servant dangerous to his fellow-servant, including habits of carelessness or inattention in a kind of work where such habits or methods are not unlikely to result in injury to the fellow-servant.

4. Master and Servant—Fellow-servant — Negligence — Evidence — Specific Acts—General Character—Knowledge of Master.

Where the master is sued for his negligence in selecting a servant whose negligence is alleged to have proximately caused an injury to a fellow-servant, for which an action for damages has been brought, testimony is

ordinarily competent of the general reputation of the servant for incompetency, for habitual carelessness or inattention on his part to duties which require care and attention, to prevent an injury to a fellow-servant, tending to show his unfitness to perform the services required of him; and in so far as it may tend to establish the character of incompetency of the servant and to fix the master with express or implied knowledge thereof, specific negligent acts of the servant may be shown, though incompetent as tending to show his negligence, which is the subject of the present action.

5. Master and Servant—Fellow-servant—Negligence—Vice Principal—Knowledge—Presumptions.

Where the incompetency of an employee is known to the vice principal of the master, the latter is fixed with knowledge, and is responsible in damages for an injury proximately caused to a fellow-servant by reason of such incompetency; and the fact that the vice principal had subsequently left his employment does not affect the result.

6. Master and Servant—Fellow-servant—Negligence — Incapacity—Trials—Evidence—Nonsuit.

Plaintiff was engaged at the time of his injury at defendant's ripsaw, helping to make pieces for door panels, requiring two persons, "a feeder," who pushes the lumber onto the saw, and a "tailer," who draws the piece away from it, the latter holding the plank down on the saw table in such a manner as to keep it from flying back, impelled by the revolving saw, and injuring the one feeding the machine. While helping to do this work as a feeder, the plaintiff was injured by the piece flying back in the manner described, and in his action for damages introduced evidence tending to show the general reputation of the "tailer," working with him, for inattention and incompetency, and that this was known to the master at the time of his employment, or could have been ascertained by him thereafter had he exercised reasonable care or attention in his capacity of an employer of labor, and that his negligence in this respect was the proximate cause of the injury: *Held*, that a judgment as of nonsuit upon the evidence cannot be sustained.

(538) APPEAL by plaintiff from *Peebles, J.*, at March Term, 1913, of DURHAM.

Action to recover damages for physical injuries caused by the alleged negligence of the defendant company in the selection of a fellow-employee.

There was evidence on the part of plaintiff tending to show that, on 9 November, 1911, the plaintiff, an employee of the defendant company, was engaged in operating a ripsaw, making pieces for door panels; that the work is ordinarily done by two persons, one a feeder, who pushes the lumber or material onto the saw, and the other the "tailer," who draws the piece away from the saw; a witness saying: "The tailer takes hold of it and holds the plank down to the table to keep it from flying up until it gets through the saw. He then lays the plank down"; that

the work requires careful and continuous attention, and if the tailer raises the material before it is severed or before it is clear of the saw, it is not unlikely to be caught and hurled backward, causing injury to the other operator, the feeder; that on the occasion in question the plaintiff's regular assistant, Roberts, having been called away, one Milton Carden, another employee, was sent to do his work; that Carden had not been engaged in this or other work of like kind, and, soon after he commenced, being inattentive and looking away from his work, he raised the piece of material before it was sawed or before it was clear of the saw; that same was caught and thrown against the plaintiff with great force, causing serious and very painful injuries. (539)

In endeavoring to develop his case before the court and jury, plaintiff offered to prove that said Milton Carden had the general reputation of being careless and inattentive and unfitted for work of this kind. The evidence was excluded, and plaintiff excepted.

Again, the plaintiff offered evidence tending to show that said Milton Carden was habitually careless and inattentive to his duties, and had been observantly so during the time he was in the employment of defendant, more than a year. Proof excluded, and plaintiff excepted. In this connection, among others, a witness by the name of W. F. Stanly was asked the following question:

"Q. State whether or not Mr. Carden had the habit of looking away from his work and not giving attention to the work that he was engaged in."

The defendant objected to this question. Counsel for plaintiff explained that the purpose of the question submitted to the witness Stanly was to show that Mr. Carden, an employee of the defendant company, who was working with the plaintiff at the time of the injury, was incompetent and was in the habit of neglecting his work, and that this fact was known to the defendant company. The objection was sustained, and the plaintiff excepted.

This witness was also asked if, in his opinion, Carden was competent for the work he was then engaged in, and question was excluded and plaintiff excepted.

Again, a witness by the name of W. E. Young testified that he was foreman of defendant company for some time prior to 1910, having supervision over Carden and with power to employ and discharge labor, etc., but was not now in the company's employment. This witness was asked the question:

"Q. State whether or not as foreman of the defendant you knew the habits and character of Mr. Carden as a workman at the time you and he worked with the defendant company."

To the foregoing question the defendant objected. The objection was sustained, and plaintiff excepted.

Counsel for plaintiff explained the question was asked for the
(540) purpose of showing that Mr. Carden was incompetent as a workman and that he was inattentive to his work; that he had a habit of looking away from his work and laughing and talking to others, and that this was before the injury, and that these facts were known to this witness, as foreman of the defendant company's mill. He was not foreman at the time the injury occurred, but Mr. Higby was foreman.

Question was excluded, and plaintiff excepted.

This witness was afterwards recalled and stated, without objection: "Had worked for some time, a year or two with Mr. Carden at defendant's plant. He had a way of stopping and speaking to any one, and he would catch hold of them when they would come by, and I had to speak to him about it more than once, occasionally. If any one came by, close by, he would turn around and speak to them over a job whenever he was at work." And again: "What I have noticed and described was just a common habit he had. I know his general reputation in this particular at the mill. I was in a position in the mill invested with power to employ and discharge labor."

Cross-examination: "I left the employ of the defendant company in January, 1910; worked with the defendant, the Durham Lumber Company. Mr. Carden was a grown man. He worked there a long time; don't remember how long. Mr. Carden was a man of sense and intelligence enough to know how to take the boards away from that saw if he paid attention to it."

Several witnesses for defendant testified that Carden had sufficient sense and intelligence to do this work, and it was further disclosed, on cross-examination of some of these witnesses, that while in defendant's employment he was "careless and inattentive and was rough and careless in the way he did his work," etc.

On motion, there was judgment of nonsuit. Plaintiff excepted and appealed.

J. A. Giles and Bryant & Brogden for plaintiff.
W. L. Foushee for defendant.

(541) HOKE, J., after stating the case: It is the very generally accepted principle, unless otherwise provided by statute, as it is in this State in the case of railroads, that an employer of labor is not responsible for injuries to an employee attributable solely to the negligence of a fellow-servant. *Hagins v. R. R.*, 106 N. C., 527. He is held, however, to the exercise of reasonable care in selecting employees who are competent and fitted for the work in which they are

engaged, and, if there has been negligence in this respect, and it is shown that such negligence is the proximate cause of injury to an employee, he may be held liable. Shearman and Redfield on Negligence (6 Ed.), sec. 189; Bailey on Master's Liability, p. 46. The presumption is that the employer has properly performed his duty in the respect suggested, and before responsibility can be fixed on him it must be established by the greater weight of the testimony that the employee has been injured by reason of the carelessness or negligence due to the incompetency of a fellow-servant; that the master has been negligent in employing or retaining an incompetent employee after knowledge of the fact, either actual or constructive. Shearman and Redfield (6 Ed.), sec. 190; Bailey on Master's Liability, pp. 48-55; *Iron Co. v. Ketnon,* 102 Va., 23. In the citation from Shearman and Redfield, the authors say: "The burden of proving negligence in selecting or continuing an unfit servant is upon the plaintiff. He must prove (1) the specific negligent act on which the action is founded, which may, in some cases, but not generally, be such as to prove incompetency, but never can, of itself, prove notice to the master; (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,' or by proving general reputation of the servant for incompetency or negligence; and (4) that the injury complained of resulted from the incompetency proved. For evidence of a defect or bad habit is of no effect if the injury complained of was in no way brought about by that defect or habit. The mere fact of the incompetency of a servant for the work upon which he was employed is not enough to warrant a jury in finding the master guilty of (542) negligence in employing him. But the evidence by which such incompetency is proved may be of such a nature as to raise a fair inference that the master either had notice of the fact or else omitted to make such inquiries as common prudence would have dictated." And, in this connection, it may be well to note that this term, incompetency, is not confined to a lack of physical capacity or natural mental gifts or of technical training when such training is required, but it extends to any kind of unfitness which "renders the employment or retention of the servant dangerous to his fellow-servant," and would include habits of carelessness or inattention in a kind of work where such habits or methods are not unlikely to result in injury. Thompson on Negligence, Vol. IV, sec. 4049.

In making out the proof required to fix the employer with liability on an issue of this character, it is very generally held that testimony

of the general reputation of the fellow-servant for incompetency is admissible, and also of habitual carelessness and inattention on his part tending to show that he was unfitted for the work in which he was engaged; and, by the great weight of authority, it is also held that specific acts of negligence or carelessness and inattention on the part of the offending fellow-servant should be received, not to show that there was negligence in the particular case being investigated, but in so far as they may tend to establish the character of incompetency and that the same was known to the master or should have been in the exercise of the duties incumbent upon him as an employer of labor. *Ally v. Pipe Co.,* 159 N. C., 327-330; *Lamb v. Littman,* 132 N. C., 978; *Baulec v. R. R.,* 59 N. Y., 356; *Stone Co. v. Whalen,* 157 Ill., 472; *Grisbe v. R. R.,* 98 Mo., 330; *Wesley Hilts v. R. R.,* 55 Mich., 437; *R. R. v. Guyton,* 115 Ind., 450; *R. R. v. Camp,* 65 Fed., 962; 1 Wigmore on Evidence, secs. 199-208 and 250; Bailey on Master's Liability, pp. 55, 56, and 57. In the reference to Bailey, *supra,* it is said: "The presumption is that the master has exercised proper care in the
(543) selection of the servant. It is incumbent upon the party charging negligence in this respect to show it by proper evidence. This may be done by showing specific acts of incompetency, and bringing them home to the knowledge of the master or company; or by showing them to be of such nature, character, and frequency that the master, in the exercise of due care, must have had them brought to his notice. But such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of. So it is proper, when repeated acts of incompetency of a certain character are shown on the part of the servant, to leave it to the jury to determine whether they did come to the knowledge of the master, or would have come to his knowledge if he had exercised ordinary care."

The Courts of Pennsylvania and Massachusetts seem to have rejected the evidence of specific acts of negligence for any purpose, on the ground, chiefly, that such evidence tends to unduly multiply the issues; but, as heretofore stated, we think the weight of authority and the better reason sustain the admissibility of the evidence for the purpose and under the circumstances indicated.

Applying these principles, we are of opinion that the evidence offered by plaintiff tending to show the general reputation of Milton Carden, the fellow-servant, should have been received; that the question as propounded to the witness W. E. Young, as to the habits and character of Carden as a workman while under the witness as foreman of defendant's work, was also relevant to the extent that it tended to fix the character of Carden as an incompetent employee and under circumstances from which

knowledge on the part of the master might be reasonably inferred; and if it is established that knowledge of the kind indicated came to this witness in the course and scope of his duties as vice principal of defendant, it would fix the company with notice as a conclusion of law, and the fact that the witness had subsequently left the employment of the company would not affect the result (*Fishblate v. Fidelity Co.*, 140 N. C., 589; *Neal v. Hardware Co.*, 122 N. C., 104; Tiffany on Agency, p. 257; 1 Clark and Skyle on Agency, sec. 474), and, on the evidence admitted, we think the judgment of nonsuit must be set aside. (544)

As the case goes back for a further hearing, we do not consider it desirable to make detailed or specific reference to the inferences permissible on the testimony, but, applying the well established rule that, when there has been a judgment of nonsuit, under the statute the evidence making for validity of plaintiff's claim must be taken as true and interpreted in the light most favorable to him, we are clearly of opinion that the question of defendant's liability should have been referred to the jury on the issues raised by the pleadings and under the principles as heretofore stated.

On the question asked of the witness W. F. Stanly, and excluded, whether, in his opinion, Milton Carden was competent for the work in which he was then engaged, there are decided cases of authority in support of his Honor's ruling. *Troy Fertilizer Co. v. Logan*, 90 Ala., 325; *Moore v. R. R.*, 65 Iowa, 505; Labatt on Master and Servant (2 Ed.), sec. 1597.

We are not prepared to say that the principles sustained by these decisions should apply to all instances nor to any and every class of employees, but, having regard to the character of work and on the facts presented, we hold that the authorities referred to should be allowed as controlling, and that, in the present case, the question was properly excluded.

For the errors indicated, the judgment of nonsuit will be set aside, that the case may be referred to the jury under proper instructions.

Reversed.

Cited: S. c., 165 N. C., 389.

DUNCAN E. McIVER v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 19 November, 1913.)

Ejectment—Justice's Court—Landlord and Tenant—Jurisdiction.

To sustain a summary action of ejectment before a justice of the peace under Revisal, sec. 2001, etc., the relation of landlord and tenant must be shown, and where there is no evidence of this relationship, and title to the realty is the matter involved, the action should be dismissed in the Superior Court for the want of jurisdiction where the action was originally brought.

CLARK, C. J., concurring in part.

(545) APPEAL by plaintiff from *Bragaw, J.*, at March Term, 1913, of LEE.

Summary proceedings in ejectment under the landlord and tenant act, Revisal, sec. 2001, etc.

At the conclusion of the evidence, the court held that the title to land was in controversy, and that the justice of the peace had no jurisdiction under the landlord and tenant act, and dismissed the proceeding. Plaintiff excepted and appealed.

A. A. F. Seawell, C. L. Williams, and L. D. Robinson for plaintiff.
Walter H. Neal for defendant.

BROWN, J. The summary remedy in ejectment provided by the statute for the ousting of tenants who hold over after the expiration of the term is restricted to cases where the relation between the parties is that of landlord and tenant. *Hauser v. Morrison,* 146 N. C., 248; *McCombs v. Wallace,* 66 N. C., 481; *Hughes v. Mason,* 84 N. C., 472.

As said in *McDonald v. Ingram,* 124 N. C., 274: "The only question the court can try under the statute in this proceeding is, Was the defendant the tenant of the plaintiff, and does she hold over after the expiration of the tenancy?"

There is no evidence whatever of a tenancy in this case.

The most that we can make out of the evidence, taking it in its most favorable view for the plaintiff, is that the small piece of land in controversy is covered by a part of the defendant's cotton platform in Sanford; that is was originally constructed by the C. F. and Y. V. Railway Company; that the plaintiff claimed the land, but that it was vacant and unoccupied by any one; that the plaintiff told Fry to go ahead and construct his platform over the property; that it was his property.

There is no evidence that the C. F. and Y. V. Railway Com-
(546) pany or this defendant, or any one duly authorized, ever rented

the property from the plaintiff, or claimed under him. Not even nominal rent has ever been claimed by the plaintiff or paid by the defendant. The plaintiff, being asked when this indefinite and uncertain transaction took place, says: "I have used every effort to definitely state when this transaction took place, but I cannot do that. My best impression is that it was '96, '97, possibly '95. I do not think now it was as late as 1898."

There is evidence that at that time the property was claimed and possessed by the defendant under a deed from John Scott to Raleigh and Augusta Air Line Railroad, dated July, 1876.

The evidence is not sufficient to prove that the defendant company ever held possession of the property as a licensee of the plaintiff, much less as a tenant. There is no evidence that this defendant claims under the C. F. & Y. V. Railway or succeeded it.

We think if the plaintiff claims title, he should pursue his action of ejectment against the defendants in the Superior Court.

Affirmed.

CLARK, C. J., concurs in the opinion of *Mr. Justice Brown,* except in the intimation in the last paragraph that the plaintiff may be put out of court for want of jurisdiction and bring a new action in the Superior Court. It is contrary to the spirit of our present system of procedure when a case has gotten in the Superior Court by appeal, or otherwise, to put the plaintiff out of that court which has full jurisdiction of the cause, because of defect of jurisdiction in the lower court, and tell him to come back into the same court in another method. *Cui bono* shall this be done when he is already in the proper court?

The Superior Court is a court of general jurisdiction. When a case has been tried in a lower court and gets into that court by appeal, the court is seized of full jurisdiction and should proceed to dispose of the cause on the merits. This has been required by statute when the appeal is from the clerk to the Superior Court. The spirit of the Constitution is the same when the appeal is from any other tribunal to the Superior Court. It is true, the practice has been usually otherwise, but not uniformly. *McMillan v. Reeves,* 102 N. C., 559, and other cases cited in *Wilson v. Insurance Co.,* 155 N. C., at page (547) 177. But such practice, it seems to me, should not be followed.

This point has heretofore been discussed in *S. v. McAden,* 162 N. C., at p. 575, citing *Cheese Co. v. Pipkin,* 155 N. C., at p. 401; *Unitype Co. v. Ashcraft, ib.,* at p. 71; *Wilson v. Ins. Co., ib.,* at p. 177. It may be that if the matter is called to the attention of the Legislature appropriate legislation may be had in conformity to the Constitution and the

spirit of our present Procedure, as has been done in regard to appeals from the clerk of the Superior Court. Or the Court some day so hold, for legislation ought not to be necessary under our Constitution.

The present practice in that matter has not been required by any statute or by any provision of the Constitution. It has been merely the following by the courts of the procedure which was very proper under the former system of practice. The Court at any time can refuse to longer follow it, or the Legislature may require that the practice in this respect shall conform to the spirit of our modern procedure.

THE WHITE SEWING MACHINE COMPANY v. I. W. BULLOCK & CO.

(Filed 19 November, 1913.)

Contract—Fraud—Damages—Trials—Evidence.

In this action upon a contract defended upon the ground of fraud, there was evidence of the fraud and resultant damages sufficient to sustain the verdict of the jury, under correct instructions, and no error is found.

APPEAL by plaintiff from *Peebles, J.*, at April Term, 1913, of GRANVILLE.

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

Hicks & Stem and T. H. Hicks for plaintiff.
B. S. Royster for defendant.

HOKE, J. The action was to recover for breach of contract, evi-
(548) denced by written order, for the sale of 150 sewing machines at the price of $26, of date 12 October, 1910.

The defendant admitted the execution of the contract alleged, and offered proof tending to show that the same was procured by the false and fraudulent representations of the plaintiff's agent.

At a former trial of the cause the judge below, being of opinion that there was no evidence tending to support defendant's position, there was recovery by plaintiff.

On appeal, this ruling was reversed, and, in an opinion by *Associate Justice Walker,* containing a full statement of the facts and the principles of law, applicable, it was held that the issue as to fraud must be submitted to the jury. See case reported in 161 N. C., p. 1. This

opinion having been certified down, there was verdict on the issue for defendant, and from judgment on the verdict the present appeal is taken.

The evidence on the part of the defendant tending to establish the alleged fraud is substantially the same as before, except that it now is rather more explicit and direct and there are some additional supporting facts, while there was much testimony in contradiction on the part of the plaintiff, the issue has been fairly submitted to the jury, under the principles laid down as controlling on the former appeal, and we find no reason for disturbing the results of the trial.

It was urged in the argument for plaintiff that the facts in evidence tended clearly to establish that the defendant had decided to break his contract before he was aware of the facts constituting the alleged fraud, and that these facts, therefore, should not be available on the issue; but there was direct evidence on the contrary offered by the defendant, and, in the charge, the disputed fact involved in this position was expressly referred to the jury and it was determined against the plaintiff.

Again it was insisted that it was not shown that defendant was in any way damaged by reason of the alleged fraudulent representations.

Undoubtedly, it is a correct general proposition that fraud without resultant damages does not form the basis for a cause (549) of action; but, if it be conceded that the principle applies here, there was evidence of the defendant tending to show such damage, and the charge of the court was in express recognition of plaintiff's position. On this question, the jury were directed as follows: "Now, upon that issue, the burden is upon the defendant to satisfy you by the greater weight of evidence that they were induced to sign that order by the false and fraudulent representations of Mr. Massey; and that in consequence of those false and fraudulent representations they declined to perform that contract, and that those false and fraudulent representations were calculated to deceive and did deceive and were intended to deceive, and that the defendants lost something thereby."

On careful perusal of the record, we find no reversible error, and the judgment for defendant must be

Affirmed.

Cited: McLaurin v. McIntyre, 167 N. C., 356.

CANNON-TORRENCE COMPANY AND H. A. RHYNE
v. W. H. MARLOTT ET AL.

(Filed 19 November, 1913.)

Principal and Agent—Misappropriation of Funds—Garnishment—Offset.

The plaintiff sued the defendant and garnisheed his former employer for a balance of salary amounting to $55, alleged to be due. The garnishee contended the defendant, while in its employ, had received money upon receipted vouchers for expenses incurred to one W. for team hire, which it afterwards had to settle, and that in this way the defendant had misappropriated $95 belonging to it. The plaintiff contended that W. had authorized the defendant to collect $63.25 of this amount. There was evidence tending to establish both of these contentions. Under the instruction of the court the plaintiff's recovery of the $55 was made to depend upon the authority of the defendant to collect the money as the agent of W., and it was held for reversible error, for that if this agency were established to collect $63.25, and he had wrongfully collected $95, the garnishee would have the right to an offset of $31.75, the difference between the amount authorized and the amount collected.

APPEAL by Southern Power Company, garnishee, from *Webb,* (550) *J.,* at June Term, 1913, of MECKLENBURG.

Two actions were commenced before a justice of the peace against the defendants, one in favor of the Cannon-Torrence Company and the other in favor of H. A. Rhyne, and were tried on appeal in the Superior Court.

When the cases were called, they were, by order of his Honor, consolidated and tried together.

The plaintiffs brought their actions against the defendant W. H. Marlott, and at the same time issued attachments or garnishment against any funds in the hands of the Southern Power Company that might be due Marlott. Marlott had been employed by the Southern Power Company as a patrolman of its power lines at Mount Holly, at a salary of $55 per month. At the time of the commencement of these suits and the issuing of the attachment against the Southern Company, Marlott had just lost or quit his job, and it was the intention of the plaintiffs to attach his salary of $55 for the last month he had worked, to wit, August, 1912. The Southern Power Company filed its return to the notice, denying that it was indebted to Marlott in any sum whatsoever. The Power Company admitted that Marlott had not been paid his salary of $55 for August, 1912, but undertook to show that by means of fraud and false vouchers he had obtained from the Power Company an amount greatly in excess of this $55, and contended that it should be allowed to set these amounts off against its indebtedness to Marlott.

There was evidence tending to prove that, in the course of his employment at Mount Holly, Marlott frequently had occasion to use teams in patrolling the lines of the Power Company. These teams he hired from one Alex West. He was supposed to pay for these teams out of funds in his hands and obtain a receipt or voucher from West for the amount paid. Marlott would present this voucher or receipt of West to the auditor of the Power Company, and the Power Company would then reimburse him the amount shown by the voucher to have been paid West. Until Marlott lost his job, the Southern Power (551) Company was under the belief that Marlott had been paying West cash for the teams he hired, and getting the money back from the Power Company in the manner indicated; but at this time West came over to the Charlotte office of the Power Company and informed its general manager that he had a bill against the Power Company for about $60 for teams furnished Marlott. This was just before Marlott's salary check for the month of August had been paid him. It then developed that instead of paying for the teams as the Power Company had supposed, Marlott had been charging them to the Power Company. The vouchers or receipts which he had been presenting to the Power Company purporting to represent money he had paid out in its behalf to West for these teams, and purporting to be signed by West had not been signed by West at all, but had been forged by Marlott. The amount obtained by Marlott on account of these false vouchers amounted to over $95. When the Power Company discovered that it owed West over $60 on account of teams, which Marlott represented to it that he had paid for, and when it discovered that Marlott had defrauded it of over $95, it refused to pay Marlott his salary of $55 for August, 1912, the salary being less than the amount obtained by Marlott from the Power Company.

The claim of West against the Power Company for hire of teams remaining unpaid amounted to $63.25, which was settled by the payment of $50.

There was evidence on the part of the plaintiffs, which was controverted by the defendant, that Marlott was authorized by West to collect his claim of $63.25.

His Honor charged the jury, among other things, as follows: "So gentlemen, it all turns upon the question of agency. If you find that Marlott was the agent of West, and West authorized him to collect this money in the way and manner it was done, and Marlott went and got the money as agent of West, and West authorized him to do it, and he failed to pay it to West, why, then, the court charges you that the Power Company was no longer indebted to West, and that the $55 belonged to Marlott. But if you find, as I say, that West did not

(552) authorize Marlott to collect this money in the way and manner he did; if you find that he did not authorize Marlott to sign his name to these vouchers; why, then, the court charges you that Marlott would be indebted to the power Company, and the plaintiff could not recover."

The jury returned the following verdict:

1. Was the defendant the Southern Power Company, in the proceedings of attachment and garnishment in this action, indebted to the defendant Marlott in the sum of $55, or any sum? Answer: Yes; $55.

2. Is the defendant the Southern Power Company indebted to plaintiffs? If so, in what amount? Answer: $55.

Judgment was rendered in favor of the plaintiffs, and the Power Company excepted and appealed.

Brevard Nixon and Campbell Fetner for plaintiffs.
Osborne, Cocke & Robinson for defendants.

ALLEN, J. The plaintiffs claim that Marlott, an employee of the defendant Power Company, is indebted to them, and they seek to collect their debt by attaching $55, which they allege the Power Company owes Marlott as salary for the month of August, 1912.

The Power Company denies that it owes Marlott any sum, because it says he wrongfully collected and misappropriated $95 belonging to it, and that this is more than enough to offset the claim for salary.

The plaintiffs reply that the sum of $95 paid to Marlott did not go into his hands as money of the Power Company; that it was paid to him as the agent of West, and was the money of West, and when it was paid to Marlott it settled his claim, because received by his authority.

His Honor submitted these contentions to the jury, but he failed to give any consideration to the evidence of the plaintiffs that the claim which West authorized Marlott to collect amounted to $63.25, and to that of the defendant that he wrongfully collected $95.

(553) If this evidence is true, Marlott collected $63.25 for West, and in addition wrongfully obtained $31.75 of the defendant's money, which could be used as a set-off against the claim for salary.

This view was not presented to the jury; on the contrary, the jury was instructed that if Marlott was the agent of West, "the $55 belonged to Marlott."

In this instruction there is error, because he was only authorized to collect $63.25, and he wrongfully collected $95, the defendant would owe Marlott $55, less the difference between the two amounts.

New trial.

A. T. PENDERGRAST v. DURHAM TRACTION COMPANY.

(Filed 19 November, 1913.)

Street Railways—Personal Injury—Negligence—Accident—Trials—Nonsuit.

In an action against a street car company to recover damages for a personal injury alleged to have been negligently inflicted, there was evidence that while the plaintiff was attempting to alight from a moving car of defendant he caught hold of a grab-handle, used for the purpose, in which a screw on the off side from him, at the bottom of the handle, used for keeping the bar from slipping in the socket, projected about 1-16 of an inch, which caught in a thin finger ring on his hand, as his hand naturally slipped down the bar in alighting, and tore the ring off, to his injury. There was also evidence that the plaintiff had told the conductor to stop for him at this place, and that the motorman, seeing the plaintiff about to alight, told him to wait and he would stop the car: *Held*, the injury was the result of an accident, and not attributable to the defendant's negligence, and a motion as of nonsuit was properly granted.

APPEAL by plaintiff from *Peebles, J.*, at March Term, 1913, of DURHAM.

Action to recover damages for physical injury caused by the alleged negligence on the part of defendant company.

On motion, duly entered, there was judgment of nonsuit, and (554) the plaintiff excepted and appealed.

Bryant & Brogden for plaintiff.
Winston & Biggs and W. L. Foushee for defendant.

HOKE, J. The evidence, among other things, tended to show that on 25 September, 1911, the plaintiff, a passenger on a street car of defendant company, in the endeavor to alight from the car while in motion, had the little finger of his left hand torn off by reason of a thin ring on that finger catching on the head of a screw at the bottom of the grab-handle on the forward part of the car. The plaintiff testified that he had gone out on the platform for the purpose of alighting as the car entered the switch on Chapel Hill Street, when it was moving at the rate of 5 to 6 miles per hour, having asked the conductor to slow up, and, at the time of the occurrence, it was moving at the rate of 3 or 4 miles per hour. That the screw was at the bottom of the grab-handle in the brass knob or socket in which the handle rested, 36 inches from the bottom of the step, and the purpose was to keep the rod from turning in the socket; that it was on the inside of the knob and the head projected about one-sixteenth of an inch from the surface; that plaintiff took hold of the handle on the front of the platform with his right hand and of the handle on the front part of the car with his left hand, and as he attempted to

alight, his left hand glided down the rod and the ring on his little finger caught in the screw-head and was pulled off by the forward movement of the car. The witness testified further that he didn't know whether the conductor heard witness when he asked him to slow down, and that he didn't hear the motorman if he told witness to "Wait and he would stop the car." The motorman testified in this connection that when he saw the plaintiff standing down on the step with his hand on the grab-handle, he said to him, "Mister, if you want to get off, wait a minute, and I will stop the car." On these the controlling facts relevant to the inquiry we are of opinion that the plaintiff was properly nonsuited. Giving due consideration to the circumstance of the obscure placing of the screw and the slight projection on the inside of the lower (555) end of the rod and only 36 inches from the bottom of the step and projecting above the surface only one-sixteenth of an inch, that the plaintiff was caught in a very thin finger ring on his left hand, and that the wrench was given by the forward movement of the car which had never stopped and from which he was in the act of alighting, we are of opinion that the case comes clearly within the category of inevitable accident, and for which the defendant should not be held responsible. Under the combination of circumstances shown forth in the evidence, the negligence of the defendant, if it existed, could in no sense be regarded as the proximate cause of the injury, and the judgment of nonsuit must therefore be

Affirmed.

J. H. TURLINGTON v. A. W. AMAN.

(Filed 19 November, 1913.)

1. Arrest and Bail—Execution Against the Person—Unsatisfied Execution—Motions—Procedure—Statutes.

Where a personal execution against a debtor is allowed by the statute, it must be by motion before the clerk after a return of the execution, against his property, unsatisfied, and from any adverse ruling his decision is subject to review on appeal to the Superior Court (Revisal, sec. 625); and if a judgment in the Superior Court may permit an execution against the person of the debtor, should the execution against this property thereafter be returned unsatisfied, the court is not required to order in the judgment that execution issue against the person of the debtor in anticipation of such a return on the execution.

2. Arrest and Bail—Pleadings—Execution Against the Person—Cause of Arrest—Statutes.

Where the complaint alleges a cause of arrest, whether the same be necessary to the cause of action or not, an execution against the person

of the debtor may issue upon a finding of the cause, under chapter 541, Laws 1891 (now Revisal, sec. 625), after an unsatisfied execution under a judgment against his property has been returned. *Ledford v. Emerson*, 143 N. C., 527, cited and applied.

3. Arrest and Bail—Cause of Arrest—Verdict—Judgment—Statutes.

In order to issue an execution against the person of the defendant in cases where it is permissible, the cause of arrest must be pleaded and proved, the issue affirmatively determined by the jury and judgment rendered. Revisal, sec. 625.

4. Arrest and Bail—Public Officers—Sheriffs—Misappropriation of Funds—Statutes—Sureties—Subrogation—Parties.

A sheriff, who is a public officer, may be held in arrest and bail when he has embezzled or fraudulently misappropriated money or property which, as such officer, he has received, or when he has been guilty of misconduct or neglect in office. Revisal, sec. 727. The right of subrogation of the surety on his bond, under the circumstances of this case, and the question, as to whether the cosureties were necessary parties, discussed by WALKER, J.

APPEAL by plaintiffs from *O. H. Allen, J.*, at August Term, (556) 1913, of SAMPSON.

This is a motion for execution against the person of the defendant, based on the following facts: A. W. Aman was sheriff of Sampson County in 1901, 1903, and 1905, and he was also, by virtue of his office, the treasurer of the county. He gave bond for the performance of his official duties, the collection of State and county taxes among them, with plaintiff and others as his sureties. In January, 1907, having defaulted, he executed a deed of assignment for the benefit of his creditors, and fled from the State. In the assignment he preferred the sureties on his official bond, and then provided for the payment of his general creditors, who, in the month of January, 1907, about five days after the execution and registration of the assignment, filed a petition in the proper United States court to declare him a bankrupt, alleging therein the assignment with its preferences as an act of bankruptcy. The creditors, as a measure of prudence preventing the setting aside of the assignment and saving the property so conveyed for the benefit of themselves and the other creditors, entered into a compromise with the creditors who filed the petition, under the provisions of which the latter were paid off with the proceeds of the property in the hands of the assignee, leaving a balance of $22,000 unpaid, and of this amount plaintiff had to pay $469.22. Plaintiff claims that, as the State and county taxes were paid by the sureties, his share being the (557) amount just stated, he is substituted exactly and fully to the rights and remedies of the creditors and entitled to a personal execution against

defendant, which was one of their remedies, while defendant insists that as the plaintiff and his cosureties gave up their priority under the assignment by the compromise, which was made with their consent, and as they would have been fully indemnified but for such action on their part, they have waived their right to such an execution. Plaintiff replies that if the compromise had not been made, the property would have been sacrificed or they would have been subjected to considerable loss in selling the insolvent estate, and, besides, that the filing of the petition and the adjudication of bankruptcy annulled the assignment, and if not, that it would have been set aside or declared void by the court under the bankruptcy act, the petition having been filed within a few days after the date of the assignment. Defendant admitted the debt.

Issues were submitted to the jury, and answered as follows:

1. Did the defendant, A. W. Aman, as sheriff and tax collector and treasurer *ex officio* of said county of Sampson, make default as such officer, and did he fraudulently convert the public tax money to his own personal account and misapply the same? Answer: Yes.

2. Was the plaintiff a surety on said bond, and what amount was he compelled to pay by reason of the fraudulent conduct of the defendant? Answer: $469.62 and interest from 18 March, 1907.

3. Did the plaintiff and other sureties of A. W. Aman direct F. R. Cooper, asignee of said Aman, to pay off the store creditors of said Aman out of the order of preference named in the deed of assignment? Answer: Yes.

4. What amount of money was paid to said store creditors by said assignee under the direction of the plaintiff and other sureties? Answer: $5,000.

5. Did plaintiff and the other sureties of A. W. Aman direct Cooper, assignee, to pay off the store accounts of A. W. Aman to prevent A. W. Aman from being thrown into bankruptcy and said deed of assignment from being set aside? Answer: Yes.

Plaintiff, in due time, objected to the third and fourth issues,
(558) as irrelevant to the case. The court refused to sign the judgment tendered by the plaintiff, directing that in case the debt could not be levied out of the property, an execution against the person should be issued. Judgment having been entered without this clause, plaintiff excepted and appealed.

Faison & Wright for plaintiff.
No counsel for defendant.

WALKER, J., after stating the case: There are three kinds of executions; one which is issued against the property of the debtor, another

against his person, and still another for the delivery of the possession of real or personal property, or for such delivery with damages, for unlawfully withholding the same. Revisal, sec. 616. An execution against the person of the debtor may be issued, after the return of an execution against his property unsatisfied, if the action be one in which the defendant might have been arrested. Section 625. Turning to the provisions in regard to arrest and bail, we find that a defendant may be arrested and held to bail when as a public officer he has recieved money or property and embezzled or fraudulently misapplied the same, or when he has been guilty of any misconduct or neglect in office. Revisal, sec. 727.

The complaint in this case alleges that defendant embezzled or fraudulently misapplied public funds which had come into his hands as sheriff of the county, which, of course, is also misconduct in office; and the jury, in response to the issues, have found the facts as alleged in the complaint, and the court, in its judgment, refers to these findings and expressly makes them a part thereof, and this is done with sufficient certainty and formality for the issuance of an execution, if the plaintiff otherwise is entitled thereto. But we do not think that, in any view, the request of the plaintiff should have been granted—at least as a matter of right; and this brings us to consider the nature of an execution against the person and when it should issue.

Our statute once provided that where the right to arrest is determined by the nature of the action, or, in other words, where facts stated in the complaint, and necessary to support the cause of action, are such as to authorize an arrest, no order of arrest need be obtained before judgment in order to authorize an execution against (559) the body, and, conversely, no execution against the person can issue upon a judgment where no order of arrest has been previously obtained in the action, unless the facts stated in the complaint necessarily import liability to arrest, and unless the cause of action and the cause of arrest are identical. If the grounds of arrest are extrinsic to the cause of action, and the cause of action is not one which of itself would entitle the plaintiff to a body execution, without a prior order of arrest having been granted, the fact that the complaint contains allegations which would entitle the plaintiff to an order of arrest will not authorize the issuance of such an execution. It is not necesary or proper to set forth such facts in the complaint, because they constitute no part of the cause of action and are not relevant or necessary to be proved. 8 Enc. of Pl. & Pr., 622.

But this has been somewhat changed by the act of 1891, ch. 541, so as to make it sufficient for the issuance of a personal execution that the

complaint alleges a cause of arrest, "whether the same be necessary to the cause of action or not." Pell's Revisal, sec. 625.

The procedure in all such cases has been fully discussed and settled by us in *Ledford v. Emerson,* 143 N. C., 527, and we adhere to what is there said. That case is in perfect accord with *Peebles v. Foote,* 83 N. C., 102; *Huntley v. Hasty,* 132 N. C., 280, and *Kinney v. Laughenour,* 93 N. C., 326, when the facts of the several cases are considered, for they differ materially.

In the *Peebles case* the statement of the cause for the arrest was not an essential allegation of the principal cause of action, and the Court refused the writ because no order of arrest had been previously served, asigning the case to the second class of those in which such an execution can issue, upon the ground that the cause of arrest is collateral and extrinsic to the cause of action.

In the *Kinney case* the cause for arrest and the cause of action were identical (seduction of plaintiff's daughter), which was found by the jury, which finding passed into the judgment and was the basis of it.

The *Huntley case* is in the same category, the two causes be- (560) ing the same, assault and battery. The same may be said of *Carroll v. Montgomery,* 128 N. C., 278.

The question whether it was necessary that there should be an affirmative finding by the jury of the cause for the arrest upon an issue submitted to them was not, therefore, presented in those cases, as in three of them such fact was found, and in the *Peebles case* the Court held that plaintiff was not entitled to the execution, because there was no proper allegation in the complaint and no order of arrest had been served. We are satisfied with the reasons given in *Ledford's case* for requiring a finding by the jury of the cause for the arrest. It is evidently approved in *Stewart v. Bryan,* 121 N. C., 50, in which the Court said: "It will not do to carry the doctrine of *Peebles v. Foote* under section 447 of The Code, as amended by the act of 1891, to the extent contended for in the argument of plaintiff—that, because there is an allegation in the complaint, this fact entitles the plaintiff to an execution against the body of the defendant, whether the plaintiff recovered a judgment against the defendant or not. To sustain this position would be in effect to nullify the Constitution." Of course, the judgment referred to is one based upon such a finding of fact, for no one would ever suppose that a plaintiff would be entitled to any kind of execution if he failed to recover in the action. We have discussed this matter, because it might be inferred (Pell's Revisal, sec. 625 and note) that the *Ledford case* was not altogether in harmony with the other cases, when, as we have seen, there is not the least conflict between them, but the

other cases fully sustain *Ledford v. Emerson.* The following authorities sustain the same view: *Elwood v. Gardner,* 45 N. Y., 354, 355; *Smith v. Knapp,* 30 N. Y., 581. As to the general practice in such cases, 8 Enc. Pl. & Pr., 622 *et seq.* We think that *McAden v. Banister,* 63 N. C., 478, is virtually to the same effect. It was there determined that the right to a body execution depended upon what appeared in the judgment. *Justice Rodman* (who was formerly one of the Code Commissioners) says in that case: "The execution must be based on what appears on his docket, and nothing else. It may be asked, Was a copy of the affidavit and order of arrest a material part of the justice's judgment, and therefore required to be docketed with it? We are (561) of opinion that, for the purpose of enabling him to issue a personal execution, they were; for this purpose they materially qualified the judgment, and gave it an effect it otherwise would not have. For the issuing of an execution against the lands of the defendant they are not material parts of the judgment, as for this purpose they neither added to nor impaired it."

But it is unnecessary to prolong the discussion of this subject. Assuming, for the sake of argument, that plaintiff is entitled to a personal execution, his motion that an order for it be inserted in the judgment was properly denied, as being premature. The statute prescribes that such an execution can be issued only after a return of an execution against the property unsatisfied in whole or in part. Revisal, sec. 625. The court could not anticipate such a juncture.

There is no finding that the defendant is insolvent. But the statute points out the remedy. It is by motion before the clerk, upon return of the unsatisfied execution, for process against the person. If he refuses it, in a proper case, plaintiff may appeal and have his decision reviewed and reversed. Such was the practice adopted and approved in *Kinney v. Laughenour, supra,* and *Huntley v. Hasty, supra.* 8 Enc. Pl. & Pr., 631, 633.

We express no opinion as to plaintiff's right to a personal execution, when properly applied for. He contends that his cause of action is so closely and intimately connected with defendant's wrongful acts, for which he could be arrested, that they form really a part of its "warp and woof," and for that reason he is entitled to the process, citing in support of this view, Brandt on Suretyship and Guaranty, sec. 180, p. 259, and sec. 177. Again, it may be observed that plaintiff is but one of several sureties on the sheriff's bond, and the question is raised whether he can sue alone, and without them as joint plaintiffs, if he relies upon the equitable doctrine of subrogation. See 1 Brandt S. and G. (3 Ed.), sec. 317 and notes, especially note 19 and cases; *Hall v. Meyers,* 90 Ga., 674; Sheldon on Subrogation, sec. 27. Must the entire indebted-

ness be paid and all of the sureties join in one action against the sheriff?

Another question is, whether the doctrine of subrogation applies (562) to such a case at all, so as to invest the paying surety or sureties with all the creditor's rights and remedies, so that they may, as one of the remedies, arrest the defendant. Sheldon on Subrogation, secs. 86, 87 and 136; Brandt S. & G. (3 Ed.), sec. 317 and note, 324 and 328; *King v. Kirby,* 28 Barbour (N. Y.), 49. These and perhaps other questions may arise in the further progress of the case, but we will express no opinion upon them until they are thus reached, and we are required to do so. There was no error in the judgment, nor in the other rulings to which exception was taken.

No error.

Cited: Pickelsimer v. Glazener, 173 N. C., 639.

M. A. TORRENCE ET AL. V. CITY OF CHARLOTTE AND CHARLOTTE PARK AND TREE COMMISSION.

(Filed 19 November, 1913.)

1. Corporations—Condemnation—Fee Simple—Nonuser — Reversion — Interpretation of Statutes.

The Legislature has the power to authorize a waterworks company to acquire a fee in lands, and where the charter of such corporation gives the right to condemn land "to its use in the manner now provided for the condemnation of lands for railroads and other public uses," and was granted when a statute (sec. 20, ch. 62, Battle's Revisal) was in force, providing "the lands assessed and condemned . . . shall be vested in the company in fee simple," the charter will be construed, under the provision of the statute, as giving the right to the company to acquire the land in fee, in condemnation proceedings.

2. Corporations—Waterworks—Condemnation—Fee—Nonuser—Reversion.

Where it appears in a proceeding by a waterworks company to condemn lands, that the price assessed and paid for the lands thereunder was the full value of the fee, which the proceedings purported to transfer, the lands do not revert to the original owner or heirs at law for nonuser of the lands for the purposes for which they were acquired.

3. Same—Statutes—Substitution of Uses—Interpretation of Statutes—Constitutional Law.

A waterworks company having acquired lands under condemnation proceedings, authorized by its charter, and thereunder paid the full value of the fee, thereafter conveyed them to the city for the purpose of a public park, with authority under a legislative enactment for the change in the use of the lands indicated: *Held,* that should the waterworks company not have acquired the fee, the Legislature had the power to authorize

the substitution of the one public use for the other, and the lands did not revert to the original grantor, or his heirs at law, for nonuser of the lands for the original purpose.

APPEAL by plaintiffs from *Webb, J.*, at March Term, 1913, of (563) MECKLENBURG.

F. I. Osborne and Maxwell & Keerans for plaintiffs.

Cansler & Cansler, P. C. Whitlock, and Chase Brenzier for defendants.

CLARK, C. J. The plaintiffs, heirs at law and devisees of the original owners of the lands, brought this action against the city of Charlotte and the Charlotte Park Commission to recover 9 acres of land on which was formerly located the waterworks pumping station and reservoir of the city, upon the ground that the defendants having ceased to use said property for waterworks purposes, the title thereto had reverted to the plaintiff's. The answer denied the plaintiff's right to recover upon the grounds:

1. That by virtue of the condemnation proceedings the Charlotte Waterworks Company, under whom the defendants claim, acquired an *indefeasible fee* in said lands.

2. But even if the grantor of the defendants did not acquire an indefeasible fee in the lands in question, still there was no *reverter* to the plaintiffs, because the defendants were expressly authorized by the General Assembly to *discontinue* the use of said lands for waterworks purposes and to convert them into a public park.

Under chapter 90, Private Laws 1881, the Charlotte Waterworks Company was authorized to purchase or condemn lands for its purpose, and the land was taken under condemnation proceedings. The report, which was confirmed by the court, set forth that $112.50 per (564) acre was the full value thereof, which the parties further agreed was "the *full market value* of said lands."

By virtue of chapter 32, Laws 1905, the defendant Charlotte Park Commission was created and a deed from the Waterworks Company was executed to it, conveying said lands upon condition that they should be perpetually used for a "public park for the white people."

The plaintiffs contend that the waterworks under its charter could acquire only an easement in the lands for waterworks purposes, and that, consequently, on the property ceasing to be used for that purpose it reverted to the plaintiffs. The contention of the defendants is that the Waterworks Company had the power to acquire by condemnation or otherwise, and under the condemnation proceedings they did acquire and paid for an indefeasible fee simple in the said lands; and that if this

was not so, that the Legislature had the right to authorize the use of the lands to be changed from one public purpose (waterworks) to another (public park), which prevented any forfeiture for nonuser or misuser.

The Legislature had the power to authorize the Waterworks Company to acquire an indefeasible fee simple. *R. R. Co. v. Davis,* 19 N. C., 467; 2 Lewis Em. Dom. (3 Ed.), sec. 448; Nichols Em. Dom., sec. 291; *Tellen v. Medford,* (Mass.) 108 Am. St., 459, this last citing Cooley Const. Lim. (7 Ed.), 809 and notes thereto.

The Legislature having provided in the charter of the waterworks Company that it should have the right to condemn land "to its use in the manner now provided by law for the condemnation of lands for railroad or *other public uses,*" this language must be referred back to sec. 20, ch. 62, Battle's Revisal, then in force, which provided "the land assessed and condemned . . . shall be vested in the company in fee simple."

The judgment confirming the report of the commissioners in the condemnation of this land for the waterworks stated that the land had been assessed "the *full value* thereof at the sum of $996.75," being, as
(565) already said, $112.50 per acre. It is well settled that when the city acquired an indefeasible fee in the latter for the waterworks, there could be no forfeiture for nonuser or misuser. 2 Lewis Em. Dom., 1500. In fact, no authority should be necessary for that purpose. To same effect, 3 Dillon Mun. Corp. (5 Ed.), 1620.

There are numerous decisions that when a common carrier acquires a "right of way" by condemnation, it acquires only an "easement" for that purpose. *R. R. v. Sturgeon,* 120 N. C., 225, and citations thereto, in Anno. Ed. When there is a nonuser, the land in such cases does not *revert,* but the easement simply ceases to exist. More than this, the common carrier cannot call for the full width of its right of way, not withstanding its condemnation of, and payment for, the same, until actually needed for its purposes. *R. R. v. Sturgeon, supra.* But this has no application where the condemnation is for a purpose requiring the entire ownership, as for waterworks, and especially when the judgment in such proceedings, and the agreement of the parties show that "full market value" was paid.

But if it were conceded that the Waterworks Company acquired only an easement, it was within the authority of the Legislature to authorize the city to change the public use from waterworks to that of a public park, the latter being not less advantageous or more burdensome to the contiguous landowners. This was fully considered and decided in *Bass v. Navigation Co.,* 111 N. C., 446, in which the Court said (p. 449): "The law applicable in our case is, by its terms, retrospective, and we do not

think that the Legislature transcended the limits of its powers in providing for the substitution of one public agency instead of another (in that case the change in the use of the canal from navigation to manufacturing purposes), and thereby postponing the possibility of the reverter, if it existed at all. That such contingent claim to the reversion is, at best, where admitted to exist, only an expectancy, defeasible at the will of the State, is made more apparent when we recall the admitted principle that it rests with the sovereign to insist upon the forfeiture for failure on the part of the corporation to comply with (566) its charter. And if in our case the State had not moved, and should never move, in the matter, there could be no dissolution."

In *Malone v. Toledo,* 28 Ohio State, 655, the Court held, in an able and exhaustive opinion; "Whatever the estate is, or however denominated, whether fee or easement, as to all property appropriated under the exercise of the law of eminent domain, we think that the real estate so appropriated for one particular public use may by legislative authority be applied to another public use, and this is not necessarily an abandonment, nor is it a forfeiture of the public interest."

In *Strock v. East Orange,* (N. J.) 77 Atlantic, 1051, it is said: "When land has been acquired for a public use, as for a park, by condemnation and payment to the owner of its full value, it seems to be competent to authorize the municipality so acquiring it to use it for other purposes."

Besides the explicit decision in *Bass v. Navigation Co.,* above cited, in a later case, *Wilson v. Leary,* 120 N. C., 90, on the question of a reverter of lands upon the dissolution or extinction of a corporation, it was held, expressly citing and overruling *Fox v. Horah,* 36 N. C., 58, as follows: "Upon the dissolution or extinction of a corporation for any cause, real property conveyed to it in fee does not revert to the original grantors or their heirs; and its personal property does not escheat to the State; and this is so whether or not the corporation was limited by its charter or general statute."

This has been cited and approved in *Broadfoot v. Fayetteville,* 124 N. C., 485, which called attention to the fact that *Fox v. Horah* had been overruled. It had indeed been previously overruled, in effect, in *Von-Glahn v. DeRosset,* 81 N. C., 467. In 2 Kent Commentaries, 307, note, it is said of the doctrine of reverter: "This rule of the common law has in fact become obsolete and odious." In 5 Thompson Corp., sec. 6730, it is said that a reverter applies only to a restricted class of corporations; as, for instance, where a railroad company acquired a right of way as an easement, and on the cessation of such ease- (567) ment the land is relieved of that burden. Land taken for waterworks is for a "public use." That taken for a railroad is taken for a "*quasi*-public use" only.

In Gray on Perpetuities, secs. 44-51, is shown that "My Lord Coke's doctrine of reverter rested on the dictum of a fifteenth century judge (*Mr. Justice Choke* in the *Prior of Spalding's case,* 7 Edward IV., 1467), and is contrary to the only case really decided the point, *Johnson v. Norway,* Winch., 37 (1622), though Coke's statement has often been referred to as law.") The above is quoted from the opinion in *Wilson v. Leary,* 120 N. C., 93, which states that the modern doctrine is that "upon the dissolution of a corporation the title to the real property does not revert to the original grantors nor their heirs," citing 5 Thompson Corp., sec. 6747; *Owen v. Smith,* 31 Barb., 641; *Towar v. Hale,* 46 *ib.,* 361.

Affirmed.

MARTHA TALLEY, ADMINISTRATRIX, v. SOUTHERN RAILWAY COMPANY.

(Filed 19 November, 1913.)

1. Railroads—Pedestrians—Danger—Presumption.

While an engineer on a moving railroad train, who sees a man walking on the track in apparent possession of his strength and faculties, and without information to the contrary, is not required to stop his train or slacken his speed, under the presumption that the pedestrian will leave the track in time to save himself from injury, it is ordinarily where the pedestrian is on the same track on which the train is then running and the circumstances call for alertness or attention on the part of the pedestrian, and does not apply to the peculiar facts of this case.

2. Same—Negligence—Proximate Cause—Sidings—Defective Switch—Stopping Trains—Trials—Evidence—Questions for Jury.

Where a pedestrian on a railroad track is killed on a side-track of a railroad company, leading off from its main line, near a station in a town, and there is evidence tending to show that the train which ran over him, running at a high rate of speed, was a train which for seven years had not taken this siding, and was running near its schedule time, and both the custom and schedule were known to the intestate; that the tracks at this place were customarily used by pedestrians; that upon hearing the warning it gave of its approcah to the station, the pedestrian crossed over to the side-track, where he was killed; that the switch to the side-track showed from its red signal that it had been turned, which could have been seen by the engineer 200 feet ahead and have afforded ample time within which to have stopped the train and avoided the injury: *Held,* the case was one for the determination of the jury on the question whether there had been negligence on the part of the company or its employees in regard to the defective switch or in the failure to get the train sooner under control, and whether such negligence, if established, was the proximate cause of the injury.

3. Same—Contributory Negligence—Nonsuit.

While a pedestrian before going on a railroad track is required to look and listen for approaching trains, and observe a proper degree of care for his safety in doing so, this obligation may be so qualified by facts and attendant circumstances that the question of contributory negligence must be referred to the jury, when he has therein failed; and under the peculiar facts and circumstances of this case it is held that a motion as of nonsuit upon the evidence should not have been granted, there being evidence tending to show that the intestate was killed on a sidetrack by a train, running on schedule time, which had not for seven years taken this siding, by reason of the switch having been unexpectedly turned, and that the deceased had gone from the main track upon the siding, on hearing the approach of the train, and was walking there with his back to it when he was killed, and that it was raining and he was carrying an umbrella, the evidence tending to show that the schedule of this train and the custom not to enter on this side-track were known to the intestate.

WALKER, J., dissenting; BROWN, J., concurring in the dissenting opinion.

APPEAL by plaintiff from *Cooke, J.*, at June Term, 1913, of (568) ROCKINGHAM.

Action to recover damages for alleged negligent killing of plaintiff's intestate. At the close of testimony, on motion, there was judgment of nonsuit. Plaintiff excepted and appealed.

C. O. McMichael and P. W. Glidewell for plaintiff.
Manly, Hendren & Womble for defendant.

HOKE, J. There was evidence on the part of plaintiff tending (569) to show that on 22 April, 1912, the intestate, living about one mile south of Pelham, a station on the Southern Railway, started to that place to mail a letter. That defendant company had two tracks at Pelham running practically north and south, a main track and a siding or pass track, the main track being on the east or right side going north. That there was a walkway along the right of the main track, there being a low fill there, and pedestrains in that vicinity going to Pelham were accustomed to use this walkway and also the main and side tracks, particularly in rainy weather; that it was about the schedule time for the arrival of No 44, a passenger train going north, and the train had given the station signal some distance out when intestate, who had been walking along the path with a raised umbrella over him, it being then raining, was seen to cross the main track and continue his way along the side or pass track, when the train entered on the siding at a speed of from 40 to 50 miles an hour and ran over and killed him.

D. O. Ledbetter, a telegraph operator whose office was in the blockhouse of the company, testified that this train was not "due to go on the side-track" at that place, and had never done so in the six or seven years

that the witness had been employed at that station. It was also admitted on the argument that the intestate was aware of the schedule time of this train and of the custom not to take the siding. There was also evidence tending to show that the switch lock had been tampered with and the switch wrongfully thrown or changed in some way, and that the signal target gave indications of this to the approaching train by showing the red signals, and they could have been seen by the engineer for 300 or 400 feet before reaching the switch, and it was 1,028 feet from the switch to the point on the siding where the intestate was struck and killed. That if the intestate had looked around, he could have seen when the train entered the siding.

(570) There seems to have been no direct evidence on plaintiff's part as to the distance within which this train could have been stopped. A witness for defendant testified that the train was not going over 40 miles an hour, which was about the schedule time for that place, and he did not think it could have been stopped under 1,000 feet. There was evidence on the part of the defendant that the train in question was going 50 to 60 miles an hour, and making up some lost time. That the engineer on seeing the red lights at the switch, which he did some 200 feet back, immediately put on the emergency brakes and did what he could to get the train under control, and that under conditions presented, "a stop in 2,000 feet would have been a good one."

This evidence, however, coming from defendant's witnesses, in so far as it tends to excuse the company, may not be allowed effect in the present appeal, and under the well established rule that only the evidence tending to support the plaintiff's claim may be considered, we are of opinion that the cause should have been submitted to the jury.

True, we have held in many well considered cases that the engineer of a moving train who sees, on the track ahead, a pedestrian who is alive and in the apparent possession of his strength and faculties, the engineer not having information to the contrary, is not required to stop his train or even slacken its speed because of such person's presence on the track. Under the conditions suggested, the engineer may act on the assumption that the pedestrian will use his faculties for his own protection and will leave the track in time to save himself from injury. But this is ordinarily where the person ahead is on the same track and the conditions call for alertness or attention on his part, as in *Exum v. R. R.*, 154 N. C., 408, and in *Beach v. R. R.*, 148 N. C., 153; and neither the decisions in question nor the principle on which they rest necessarily apply when, as in this case, a regular passenger train, scheduled to the contrary and by reason of a defective switch, unexpectedly runs at a high rate of speed onto a siding where people of the vicinity have been accustomed to walk and a collision of some kind is not unlikely to occur.

These conditions, if established, call for a different ruling, and (571) in such case the issue as to the defendant's conduct must be referred to the jury on the question whether there has been negligence on the part of the company or its employees in regard to the defective switch or in the failure to get the train sooner under control, and whether such negligence, if it existed, was the proximate cause of the injury complained of.

And in reference to the conduct of the intestate usually considered and passed upon on the issue as to contributory negligence, while it has been repeatedly held with us that a pedestrian on a railroad track is required to look and listen and be properly attentive to his own safety, and if injured by reason of negligent default in this respect, recovery is barred on account of his own negligent conduct, it is also well recognized that the position does not always nor universally obtain as a conclusion of law, and that the obligation to look and listen, etc., may be so qualified by facts and attendant circumstances that the question of contributory negligence must also be referred to the jury, a principle applied by the Court in *Hammett v. R. R.*, 157 N. C., 322; *Snipes v. Manufacturing Co.*, 152 N. C., 42; *Farris v. R. R.*, 151 N. C., 483; *Hudson v. R. R.*, 142 N. C., 198; *Ray v. R. R.*, 141 N. C., 84; *Sherrill v. R. R.*, 140 N. C., 252; *Lassiter v. R. R.*, 133 N. C., 244; *Purnell v. R. R.*, 122 N. C., 832; *Stanly v. R. R.*, 120 N. C., 514.

In *Ray's case* the plaintiff, who had alighted from a train, was going across the railroad yard towards the depot, walking between the tracks. Seeing another train approaching from an opposite direction, to avoid a collision, he stepped onto a parallel track and was struck by a train negligently backing into the yard, the one on which he had come. Held, a question of contributory negligence for the jury.

In *Sherrill v. R. R., supra,* plaintiff was superintending the construction of a depot where two roads crossed, and was standing on the track of one road overlooking the work. At the time he took this position there was a train of the other road on the crossing some distance away. While plaintiff stood there, the train having passed out, he was run on and injured by a train of this road which had approached without signal or other warning. The court decided that the cause was one for the jury, and in this connection it was held: (572)

"1. One who enters on a public railroad crossing is required to look and listen, and when he fails in this duty and is injured in consequence, the view being unobstructed, under ordinary conditions such person is guilty of contributory negligence."

"2. Negligence having first been established, facts and attendant circumstances may so qualify the obligation to look and listen as to require

the question of contributory negligence to be submitted to the jury, and in some instances the obligation to look and listen may be altogether removed."

In *Lassiter v. R. R.*, a railroad conductor standing on a track engaged in giving instructions as to the movements of his train was run over and killed by another train backing on him without keeping a proper lookout. The cause was held one for the jury.

In *Stanly v. R. R.*, referred to with approval in *Hammett's case, supra*, the Court among other things held as follows: "A person walking on a railroad track is not bound to be on the look out for a danger which he has no reasonable ground to apprehend, and has a right to suppose that the railroad company will take care to provide against injuring pedestrians by the use of proper lights and signals."

In the decisions cited and chiefly relied on by defendant, the Court was of opinion that there was no fact in evidence tending to legally qualify the obligation of the injured party to properly care for his own safety, and recovery was denied on the ground of his own negligence, existent and concurring at the very time of the collision.

Thus in *Exum's* and *Beach's cases* the intestate was killed when they were on the main track of a trunk railroad about the schedule time for a passenger train. The conditions called for alert attention and to the very time of the occurrence, and claimants were held guilty of contributory negligence.

In *High v. R. R.*, 112 N. C., 385, the plaintiff was on a siding when injured, but the freight train was approaching on the main track at a very slow rate of speed, and there was nothing to suggest or indicate to plaintiff that it would not enter on the siding; the evidence, too, (573) seems to establish that there was a passenger train also at the station at this time, making it probable that one or the other would take the siding.

In *Meredith v. R. R.*, also, 108 N. C., 616, the plaintiff was injured on a side-track, but it was by a train moving in the same direction and on same track as plaintiff, and which he had just passed.

In *Tull v. R. R.*, 151 N. C., 545, and *McAdoo v. R. R.*, 105 N. C., 150, and seemingly in *Neal v. R. R.*, 126 N. C., 634, the persons injured or killed were on or near the railroad yards and were run into by switching engines moving back and forth where conditions called for constant attention, and where, as stated, there was nothing to legally qualify the obligation on the claimant to be continuously careful for his own safety.

But none of these cases should be allowed as controlling on the facts presented on this appeal, where the intestate was killed by a regular train whose schedule was fully known, which was not expecting to go on the side-track and had not done so for six or seven years, nor appar-

ently intended to make any stop at the station, and when the intestate on hearing the signal for the station passed over onto this side-track and continued on his way to the station.

On the facts in evidence, we are of opinion that the cause is one coming under the first line of cases to which we have referred, and the issue as to plaintiff's conduct should also be submitted to the jury on the question whether plaintiff was guilty of contributory negligence in failing to observe and note the approach of the train under all the facts and attendant circumstances as they may be shown to have existed at the time.

There was error in the order of nonsuit, and the same will be set aside.

Reversed.

WALKER, J., dissenting: I can see nothing in this record that legally excuses the conduct of the intestate or that takes the case out of the rule, long established by this and many other courts, that one who uses the tracks of a railroad company as a footway, for his own convenience, whether as trespasser or licensee, must look and listen (574) for approaching trains, and the engineer has the right to presume, though he sees him walking along the track, and even to the very last moment when it is too late to save him, that he will step from the track and save himself, provided there is nothing in his appearance indicating a state of helplessness, as, for example, a foot-traveler on a trestle, or in some other position where he cannot safely leave the track, or one apparently deprived of his senses of sight and hearing, or known by the engineer to be deficient in his mental faculties and not then capable of taking care of himself. With these well known exceptions, the rule has been invariable and uniform in all jurisdictions, that a railroad track, wherever and however situated, is a place of danger and affords ample notice to any one who uses it, that he must look both ways and listen for approaching trains, and take care of himself.

The question as to the liability of the defendant has never been determined, with the exceptions already noted, by examining the conduct of the engineer, but solely with reference to that of the person who may be on the track ahead of the train, if apparently in possession of his faculties and senses and able to protect himself from harm.

There is not the slightest question in this case as to the mental condition of the intestate being normal. It is admitted that he was walking on the track and able to leave it at any moment, if he had actually looked and listened and thus had become aware of the approach of the train, and the plaintiff's whole case is bottomed upon the fact that he did not think the side-track, upon which he was injured, would be used by the coming train. All tracks are laid for the use of the railroad company,

and they may go upon them at any time, at their will and pleasure, without previous notice to the public of their intention to do so. Otherwise the running of trains would be regulated by those who use its tracks as trespassers or implied licensees, and not by itself. It would be gross negligence for a company so to conduct its business, and we would not hesitate to so hold, if any injury resulted therefrom. The public
(575) safety requires—yes, demands—that it be allowed perfect freedom in the use of its tracks. Private convenience, in this respect, must yield to the public good, the public convenience, and the public safety. But this Court and many others have held that the fact of his not expecting a train on the siding is no excuse, and does not except his case from the general rule. A court of the highest authority has said: "The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, and that there can be no danger from them." The true principle cannot be stated more clearly or more strongly. But this Court has stated this rule with equal clearness and applied it most rigidly. In *High v. R. R.,* 112 N. C., 385, a leading case on this subject which has been approved over and over again, it appeared that the plaintiff, a woman wearing a long poke-bonnet which totally obstructed her vision, was walking on a side-track, supposing that the approaching train would take the main track, "as they usually did," but it so happened that on the particular occasion it did not, but used the side-track, and it was held to be clear that she could not recover, as she had no right to speculate on the course the engine would take. This is what the Court said with reference to the facts, which are in every essential respect like those we have here: "If the plaintiff had looked and listened for approaching trains, as a person using a track for a footway should in the exercise of ordinary care always do, she would have seen that the train, *contrary to the usual custom,* was moving on the siding. The fact that it was a windy day and that she was wearing a bonnet, or that the train was late, gave her no greater privilege than she would otherwise have enjoyed as licensee; but, on the contrary, should have made her more watchful. There was nothing in the conduct or condition of the plaintiff that imposed upon the engineer, in determining what course he should pursue, the duty of departing from the usual rule that the servant of a company is warranted in expecting licensees or trespassers, apparently sound in mind and body and in possession of their senses, to leave the track till it is too late to prevent a collision," citing *Meredith v.*
(576) *R. R.,* 108 N. C., 616; *Norwood v. R. R.,* 111 N. C., 236. And those cases fully sustain the correctness of the proposition. They both hold that when on the track, the absolute duty of the pedestrian is to look and listen, if he can see and hear, and it is not at all modified by

the fact of its being a side-track instead of the main line. We repeat that the public could not be safely and adequately served upon any other principle. If trains are to be stopped to await the pleasure of foot-passengers in leaving its tracks, when they can step off so easily and avoid injury and not obstruct the passage of trains, the company cannot perform its public duty as a carrier, and the public convenience must give way to private interests, contrary to the maxim of the law.

In *Meredith's case* the party injured was on the side-track and not expecting the train to run on that track, but on another. In this connection let it be said that the same principle applies to trespassers and licensees. It was said in *Meredith's case:* "Actual or implied license from the railroad company to use the track as footway would not relieve him from the consequences of failing to exercise ordinary care. The license to use the track does not carry with it the right to obstruct the road and impede the passage of trains," citing *McAdoo v. R. R.,* 105 N. C., 140. We may also remark that all of those cases hold that the speed of the train can make no difference, because the pedestrian, if he exercises due care, can escape danger as well in the one case as in the other. *High v. R. R.* and *McAdoo v. R. R., supra.* But *Glenn v. R. R.,* 128 N. C., 184, is also decisive of the question. It is another case where the plaintiff stepped from one track to a side-track, thinking that he was safe there, as the train would not run on that track, and therefore he turned his back to the approaching train, which he knew was coming, as he heard its whistle, and did not look or listen. *Held,* that he could not recover. This Court unanimously said: "The railroad track itself was a warning of danger, made imminent by the approaching train. It was then his duty to keep his 'wits' about him and to use them for his own safety. He knew or ought to have known that he was a trespasser, and it was his duty to have gotten out of the way of the train.
The defendant was under no obligation to stop its train at the (577) sight of a man on its track." The Court further said that it was apparent to the engineer that the plaintiff was in full possession of his faculties and could take care of himself, and the engineer had the right to presume that he would leave the track in time to avoid injury. "That he did not do so was his own fault, and he should suffer the consequences of his folly." See, also, *Syme v. R. R.,* 113 N. C., 558. There was a plain duty resting upon the plaintiff's intestate to look and listen and not to take any chances, because he may have supposed that the company would not use one of its tracks. "According to the principle declared in all of the cases, the question of liability is not to be solved by any reference to what the defendant may have done or omitted to do, but by the conduct of the plaintiff, and if the latter would not see when he could see, or would not hear when he could hear, and remained on the track in

reckless disregard of his own safety, the law adjudges any injuries he may have received to be the result of his own carelessness. *Parker v. R. R.*, 86 N. C., 221; *Meredith v. R. R.*, 108 N. C., 616; *Norwood v. R. R.*, 111 N. C., 236; *Syme v. R. R.*, 113 N. C., 565; *Stewart v. R. R.*, 128 N. C., 518; *Wycoff v. R. R.*, 126 N. C., 1152; *Sheldon v. Asheville*, 119 N. C., 606; *Ellerbe v. R. R.*, 118 N. C., 1024; *Lea v. R. R.*, 129 N. C., 459; *Bessent v. R. R.*, 132 N. C., 934.

The decisions in other States are overwhelmingly against the principle that circumstances like those we have here take the case out of the general rule, and it is held that no custom of the railroad company to run its trains according to a certain schedule, or to use one track and not another, or to run its trains at certain times in one direction (east) and at other times in another (west) will excuse one using its tracks from looking and listening, or requires the engineer to presume that he has not done so, but, on the contrary, it is held that he is within the zone of danger however and wherever the track is located. *R. R. v. Hart*, 87 Ill., 529; *Morgan v. R. R.*, 116 C. C. A. (196 Fed., 449); *Kinnare v. R. R.*, 57 Ill., 153; *White v. R. R.*, 73 N. Y., Suppl., 827; *Smith v. R. R.*, 141 Ind., 92; *Boyd v. R. R.*, 50 Wash., 619. Many other cases might (578) be cited, some of them being in defendant's brief.

The Court said in *Morgan v. R. R., supra:* "It is altogether probable that he acted on the daughter's statement that the trains did not come down that track; but he had no right to do so. Which of the tracks would or should be used for its various trains was, of course, a matter for the exclusive determination of the railroad company." It was held in *Rich v. R. R.*, 31 Ind. App., 10, that a traveler using a railroad track has no right to confine his precautions to his knowledge of the schedules and customs of the company, but must take due care against the approach of "extra trains" and even "wild trains," those which are expected as well as those not expected to use the track on which he is walking. And in *White v. R. R., supra,* the Court stated that the accident was due entirely to the plaintiff's want of proper care for his own safety in relying upon his expectation, which was according to the railroad company's usage, "that the train by which he was struck would not come upon the track. He must look out for all trains, and any other rule, it was said, would measure his conduct by the altogether too liberal rule of chances and risks, and would impose upon the railroad company too rigorous and burdensome responsibilities," regardless of the inconvenience to the public arising from operating its trains under any such handicap.

The company owed the intestate no legal duty to keep the switch lock in repair, so that its trains would be held to the main track. It did owe the duty to its passengers to see that its track was in proper condition;

but not to him. Nor was there any duty to notify him when the side-track would be used. His plain duty was to act upon the presumption that it might be used at any time. Besides, the railroad company was not guilty of any negligence with respect to the switch, as it was tampered with by somebody and broken, without any opportunity of the defendant to inspect and repair it. A freight train had just passed by it on the main track, when it was in good order. What is called a side-track in this case is not an unused track, but is really a "pass-track," that is, one by means of which trains running in opposite directions can pass at that point. One is side-tracked and the other passes by on the main line. So that intestate had no right to believe that a train (579) would not pass over the side-track. The question, therefore, is narrowed to this, Which has the superior right to the use of the track, the railroad who owns it and is required to operate its trains for the benefit of the public under certain penalties and liabilities for its neglect, or a trespasser, or even a licensee, who walks on the same for his own convenience, especially when, as in this case, the pedestrian is not bound to use it, but leaves a beaten path on the side of the main track for that purpose, and as matter of choice? This question is not hard to answer, and the preferential right of the railroad company must be admitted.

The Court, in its opinion, concedes the general rule, that a person using a railroad track must "look and listen," but says that the duty may be qualified by the attendant facts and circumstances. There is no such qualification in a case like this one, and the cases cited for this position relate either to crossings, when the view is obstructed or no signals given (*Stanly v. R. R.*); or to some duty owing to a passenger (*Ray v. R. R.*, 141 N. C., 84); or to employees having a right to use the track (*Sherrill v. R. R.*, 140 N. C., 252; *Lassiter v. R. R.*, 133 N. C., 244); or to flying switches or shunting of cars, where a person entitled to use the track is injured thereby (*Farris v. R. R.*, 151 N. C., 483; *Johnson v. R. R., ante*, 431; *Wilson v. R. R.*, 142 N. C., 333; *Hudson v. R. R.*, 142 N. C., 198); or to persons on trestles or helpless on the track (*Snipes v. R. R.*, 152 N. C., 42); or where trains are run without lights or signals in the night-time (*Hammett v. R. R.*, 157 N. C., 322; *Purnell v. R. R.*, 122 N. C., 832). But in all of those cases there was some legal duty owing to the injured party which was neglected. Not a one of them touches the facts of this case, as I think, but all can be referred to a well recognized principle of the law, which does not apply to a trespasser or mere licensee walking along the track, in broad daylight and in full possession of all his faculties, with the power and capacity to look and listen, with an unobstructed view, and, too, with notice by the sound of the whistle, which he heard, that a train was approaching. Besides, there was

(580) nothing here to modify the general rule that a man on the tracks should look and listen, for the company was proceeding rightfully with its train along one of its tracks, without any negligence on its part.

Although the company was not in any legal fault, it is required by this decision to look out for foot-passengers, nevertheless, and to give them timely warning, so that they may leave the track.

Suppose it was doing the unexpected or unusual thing of running on its own side-track. It had the legal right to do it; and in the exercise of a legal right there can be no wrong.

There is nothing in the evidence to prevent the full operation of the ordinary rule requiring track walkers to look out for trains. We have said very recently that even where a traveler on a highway at a crossing has been misled by the negligent act of a railroad company, and is exposed to injury by reason thereof, it does not absolve him of the duty to exercise due care to avoid injury, that is, such care and regard for his own safety as the circumstances and surroundings would naturally and reasonably lead a man of ordinary prudence to use, and if his situation is suggestive of danger, he is required to use such care as is proportioned to the risk or hazard, making allowance, of course, for the conduct of the railroad company or its servants, in so far as it has reasonably affected his own. But at last he must use ordinary care, whatever the situation may be. *Johnson v. R. R., ante,* 431. The only care he could use in this case, or the least he could have exercised, was to look and listen for approaching trains.

Let us suppose that the train had taken the side-track, under an order from the dispatcher and without the knowledge of the intestate, and the switch had been set to the side track, instead of being tampered with, in execution of the order, and plaintiff had been killed, as he would have been, can it be said that he was not required to look and listen, simply because he did not expect the train on the side-track, but presumed that it would stay on the main line? Surely not. He had no greater right or privilege, in his situation, than the ordinary track walker who takes the chances as he did.

(581) My conclusion is that the case falls directly and fully within the principle of *High v. R. R.* and the other cases already cited, and the present decision of the Court, therefore, conflicts with them. I admit that the decision is not in conflict with *Bessent v. R. R.,* 132 N. C., 934; *Morrow v. R. R.,* 147 N. C., 623; *Beach v. R. R.,* 148 N. C., 153, and the many cases in our reports which are like them, and while it recognizes the principles as there stated and applied, and concedes that those cases were properly decided, it fails to extend the same principle, which is thus recognized, to the facts of this case, when it is equally applicable to them.

In *Beach's case* we said: "A railroad track is intended for the running and operation of trains, and not for a walkway; and the company owning the track has the right, unless it has in some way restricted that right, to the full and unimpeded use of it. The public have rights as well as the individual, and usually the former are considered superior to the latter. That private convenience must yield to the public good and public accommodation is an ancient maxim of the law. If we should for a moment listen with favor to the argument and eventually establish the principle that an engineer must stop or even slacken his speed until it may suit the convenience of a trespasser on the track to get off, the operation of railroads would be seriously retarded, if not practically impossible, and the injury to the public might be incalculable. The prior right to the use of the track is in the railway as between it and a trespasser who is apparently in possession of his senses and easily able to step off the track." And in *Morrow's case:* "If he (the pedestrian) actually saw the train or heard it as it approached him, and failed to clear the track, if he had reasonable time to do so (as he had in this case), he was guilty of such negligence as defeats his recovery."

The killing of the intestate was the direct result of his own fault, and there is no culpability on the part of defendant.

BROWN, J., concurs in this opinion.

Cited: Abernathy v. R. R., 164 N. C., 94; *Ward v. R. R.*, 167 N. C., 156; *Treadwell v. R. R.*, 169 N. C., 699; *Hill v. R. R., ib.*, 741; *Davidson v. R. R.*, 170 N. C., 284; *Davis v. R. R., ib.*, 587; *Horne v. R. R., ib.*, 656; *Wyrick v. R. R.*, 172 N. C., 551.

(582)

AMY ALLISON ET ALS. v. W. T. KENION.

(Filed 19 November, 1913.)

Deeds and Conveyances—Marked Corners—Contemporaneous Conveyance—Evidence.

When the parties to a deed contemporaneously agreed as to a controlling corner which they mark at the time, and describe it in the deed as a certain number of feet from a fixed point, evidence is competent, as between the parties, which tends to establish the corner so marked by them; and such location made contemporaneous with the execution of the deed will control course and distance.

ALLISON *v.* KENION.

APPEAL by plaintiffs from *Peebles, J.*, at May Term, 1913 of ORANGE.

Action involving title to land. It was agreed that the judge should find the facts.

From the judgment rendered, the plaintiffs appeal.

Frank Nash for plaintiffs.
John W. Graham for defendant.

BROWN, J. It appears from the record that William Allison acquired title in fee simple to a lot of land in Hillsboro, and on 17 May, 1897, conveyed a part of it to E. L. Coley, who conveyed to Forrest in 1899, who conveyed to defendant in 1905. The only dispute between the plaintiffs and defendant is the location of the dividing line between them, the plaintiffs' southern and the defendant's northern line.

The description contained in each of the deeds is as follows: "Commencing at the northwest granite abutment of Eno Railroad bridge, near the Hillsboro Railroad station, and measuring from point north up Occoneechee Street 654 feet on the east side of said street is the *established* northwest corner of said lot."

The plaintiffs contend that a rock buried one foot in the ground and one foot out of the ground is the true corner, and offered evidence to show that after Cooley had written the deed in William Allison's house, he and Cooley went out, and placed that rock where it is now, (583) and told William Allison that the rock was the end of the 654 feet from abutment of bridge, and was southwest corner of Allison's lot. This evidence in due time was objected to by the defendant, and the judge excluded the same. The plaintiffs excepted.

The evidence excluded is as follows:

Amy Allison, having been duly sworn, testified: "I am the wife of William Allsison, who is now dead, and one of the plaintiffs in this action. Dr. Pride Jones conveyed this land to my husband (the plaintiff had before this introduced the deed of Pride Jones and wife to William Allison, dated September, 1878). We went there to live the November before the deed was made, and we lived there continuously to the death of my husband; and I have lived there continuously since.

"We cultivated the land in controversy as a garden spot, and after my husband's death I cultivated it as such up to April, 1912, when the defendant, Mr. Kenion, took possession of it.

"I know Mr. E. L. Cooley; he is a business man, and not a lawyer, and is living now, but is out of the State. My husband and I executed the deed to him (the deed from William Allison and wife, Amy, to E. L. Cooley, dated 17 May, 1897, and was duly recorded, had been introduced in evidence by the plaintiff).

"He came to our house the day the deed was executed; we lived on Occoneechee Street, and my husband sold him the lot. He stepped the distance from the abutment of the bridge to the point to which we agreed to sell him, and he said it was 654 feet. The ground from the abutment to the point was very rough, cut up with gullies, and full of bushes. Mr. Cooley came in our house, which was near-by, and wrote the deed, and we signed it.

"We then went out to where Mr. Cooley said the measurement stopped, and he put a rock down there, dug a deep hole and put it, the rock, about one foot in the ground and about one foot out. I asked him if that was the line, and he said it was—'everything was right and straight, and you will have no more trouble with it'; that rock is still there.

"Mr. Cooley moved a house out to the lot he bought from us; put up some outbuildings there, and rented it to some mill people, I think. All of the houses were then, and are now south of the line run- (584) ning east from the rock on Occoneechee Street to the river, and we have cultivated up to the rock line until Mr. Kenion interfered in April, 1912.

"Mr. Forrest bought this lot from Mr. Cooley; don't know exactly when Mr. Forrest had a well dug, and told me that if I could furnish some hands, he would have it dug on the line. I furnished a hand and it was dug on the line running east to the river from the rock (the line claimed by plaintiff as the true line).

"Mr. Forrest afterwards sold this lot to the defendant, Mr. Kenion, and he was in possession of it up to the rock line, when, last April, after a measurement by Mr. Webb, the county surveyor, he claimed that the 654 feet ran beyond, north of the rock line, and he took possession of the land in controversy at that time and cultivated it for the year 1912. The annual rental value of this piece of land is $25."

We are of opinion that his Honor erred in excluding this evidence.

It appears upon the face of the deed that the northwest corner, which is the vital point in this controversy, was *established* by the parties to the Cooley deed at the time that deed was executed, and it is permissible to prove by parol evidence at what particular place that northwest corner was *established* by them.

In *Sherrod v. Battle,* 154 N. C., 353, *Mr. Justice Walker* quotes with approval a clear and succinct statement of the law from the New Jersey Court:

"In settling a question of boundary, when there is a latent ambiguity in the description contained in the deed, or a doubt as to the true location of the lines, evidence *aliunde* is admissible to show where the lines are.

"Boundaries may be proved by every kind of evidence admissible to establish any other fact. The question of construction is a question of law to be decided by the court upon the terms of the instrument itself, and when no *latent* ambiguity exists, it must be decided without evidence *aliunde;* but a question of location, or the application of a grant (585) to its proper subject-matter, is a question of fact to be determined by the jury by the aid of intrinsic evidence." *Opdyke v. Stevens,* 28 N. J. Law, 83.

The evidence is admissible upon another ground: It has been held continuously since *Cherry v. Slade,* 7 N. C., 82, that whenever it can be proved that there was a line actually run and marked, and a *corner* made at the time of the execution of the deed, for the purpose of establishing the location of the land, the party claiming under it shall hold accordingly, notwithstanding a mistaken description of the land in the deed.

In commenting upon that rule, *Justice Ashe* says in *Baxter v. Wilson,* 95 N. C., 144: "This construction has been adopted by our Court to carry out the intentions of the parties when it is clearly made to appear; and to effect that object, course or distance will be disregarded, if the means of correcting the mistake be furnished by a more certain description in the same deed, and especially will it be so when *same monument* is erected contemporaneously with the execution of the deed."

The rule is again stated by *Henderson, C. J.,* in *Reed v. Schenck,* 13 N. C., 415, to be: "Parol evidence to control the 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."

In *Shaffer v. Gaynor,* 117 N. C., 16, it is held that, "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."

This rule, whether wisely or not, has been recognized and applied in an unbroken line of cases in this State since 1819. *Deaver v. Jones,* 119 N. C., 598; *Fincannon v. Sudderth,* 144 N. C., 587; *Elliott v. Jefferson,* 133 N. C., 207; *Higdon v. Rice,* 119 N. C., 623.

This question was last discussed by *Justice Hoke* in *Clarke v. Aldridge,* 162 N. C., 327, where it is held that "Where parties, with a (586) view of making a deed, go on 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, such land will pass, at least as between the parties or volunteer claimants, who hold in privity, though a different and erroneous description may appear on the face of the deed."

Whatever may be thought at this day of the wisdom of this rule of evidence, it must be admitted that it is thoroughly engrafted upon the jurisprudence of this State.

In line with our precedents, the Supreme Court of Indiana has held that, in a controversy involving the location of a boundary line, fixed by commissioners of partition, *monuments* fixed at the time, and mentioned in the report, will control distances, and that in such a case parol evidence is admissible to explain an ambiguity arising from "the *omission* to describe the monument at one corner. *Hodge v. Sims,* 29 Ind., 574. This case is cited with approval in *Baxter v. Wilson, supra.*

It is true that an actual survey by a surveyor was not made of the land conveyed by William Allison to Cooley, but what is equally as effective, the two parties themselves went on the land, and Cooley, himself, if the rejected evidence is to be believed, planted the monument at the northwest corner in Allison's presence and with his consent. Cooley, himself, wrote the deed, and this was done contemporaneously with its execution, and the deed so written calls for an established northwest corner.

The plain intention of the parties at the execution of the deed was to convey the land up to that rock which they had planted as a muniment of boundary. This is further manifested by the fact that Allison and the plaintiffs, who are his widow and heirs at law, occupied and cultivated the land up to the rock from the date of the Cooley deed in 1897 to 1912, when this defendant, who had purchased from Forrest in 1905, for the first time claimed the parcel of land in controversy.

There is another principle of law, in the nature of an estoppel, which may be invoked in behalf of the plaintiffs.

Cooley, the grantee in the deed, wrote the deed, measured and (587) located the land, and planted the monument, and, as long as he owned the land, acquiesced in plaintiffs' possession up to it, as did his grantees.

Having himself surveyed the land, so to speak, under designated lines and corners, marked and established by himself, Cooley and those claiming under him are bound by his own admissions and acts, and cannot be permitted to controvert the legal effect of his own conduct to the prejudice of the plaintiffs, especially after long acquiescence. *Barker v. R. R.,* 125 N. C., 599. It is said in that case.

"There is a clear distinction between cases where the parties themselves have definitely located the land, and where it is merely sought to locate it by outside testimony not in the nature of admissions."

We think this distinction is recognized inferentially in *Massey v. Belisle,* 24 N. C., 177, where the Court says on page 177: "The stakes may be real boundaries when so intended by the parties, but it is a settled rule of construction with us that when they are mentioned in a deed simply, or with no other description than that of course and distance, they are intended by the parties, and so understood, to designate imaginary points. If the facts are true, as testified upon the trial, we think the plaintiff is clearly estopped from denying his location of the land, and, therefore, cannot recover."

In his concurring opinion in the same case, *Chief Justice Faircloth,* while differing as to what constitutes color of title, agrees that the plaintiff, having marked the corners at the time, is estopped to contest his own location of the land.

The case we have is much stronger than that, for here the deed itself contains evidence upon its face that a northwest corner was *established* by the parties, and the parol evidence excluded does not contradict or vary the terms of the description, but only tends to locate the spot where that corner was established.

How far this would avail against a *bona fide* purchaser for value without notice, it is needless to discuss, as this defendant does not occupy that position.

(588) The deed itself put him upon notice that there was an established northwest corner, and the evidence, if believed, shows that William Allison and those claiming under him occupied and cultivated the land continuously to the rock up to 1912.

His Honor having erroneously excluded the evidence offered, his findings and judgment are set aside.

New trial.

Cited: S. v. Jenkins, 164 N. C., 529; *Lumber Co. v. Lumber Co.,* 169 N. C., 89; *Nelson v. Lineker,* 172 N. C., 282; *Lee v. Rowe, ib.,* 846.

CHARLES BABER v. S. M. HANIE ET AL.

(Filed 26 November, 1913.)

1. Equity—Subrogation—Mortgages—Deeds and Conveyances—Assumption of Debt.

An assignee of a note secured by a mortgage is entitled to the full benefit of the mortgage; and where the mortgagor has conveyed the mortgaged land, subject to the payment of the mortgage debt, and it has successively been conveyed to several grantees, one to the other, each assuming in his

deed the payment of said debt, a holder for value of the note thus secured, under the equitable doctrine of subrogation, has a right of action, not only against the mortgagor of the lands for whatever balance on the note the foreclosure fails to satisfy, but also against the several grantees of the land, who successively and from each other assumed the indebtedness secured by the mortgage, and evidenced by the note sued on. As to whether the holder of the note may sue the several successive grantees of the land upon their promise to pay the note, as upon contract, *Quœre.*

2. Pleadings—Construction—Prayers for Relief—Subrogation—Contract.

The plaintiff may recover according to the allegation of facts contained in his complaint, and is not restricted by the terms of his prayer for relief; and where he has sufficiently alleged such matters as would, if established, entitle him to recover upon the equitable doctrine of subrogation, he recovers accordingly without any amendment of his prayer for relief, which is based merely upon contract.

APPEAL by plaintiff from *Webb, J.,* at April Term, 1913, of MECKLENBURG.

This is an action to recover money, and is based upon the (589) following facts:

The Forest Hill Realty Company conveyed to S. M. Hanie a lot in the city of Charlotte, and S. M. Hanie gave to Forest Hill Realty Company his notes for the purchase money of said lot and secured the same by deed of trust to James L. DeLaney. The Forest Hill Realty Company assigned said notes to J. J. Harrill, who, in turn, transferred the same to the plaintiff. S. M. Hanie executed a second deed of trust to A. P. Rucker to secure an indebtedness to J. W. Lewis & Co., and the trustee in the first deed of trust and the realty company released to make the second deed of trust a first lien upon the property. Subsequently, Hanie conveyed the property to H. G. Rogers, and in the deed to Rogers from Hanie the following clause was inserted: "Said party of the second part (H. G. Rogers) hereby assumes the payment of two certain deeds of trust, one to J. L. DeLaney and one to A. P. Rucker." H. G. Rogers then conveyed the property to the defendant J. J. Misenheimer, and in the deed from Rogers to Misenheimer there is this clause: "The party of the second part hereby assumes the payment of two certain deeds of trust, one to J. L. DeLaney of $450, and one to A. P. Rucker, trustee, for $1,200. Also one note for $200, payable to Frank A. Rogers, which note the party of the second part hereby assumes as a part of the consideration of this conveyance." The notes secured by the deed of trust to DeLaney are those for the recovery of which this action is brought. J. J. Misenheimer conveyed the property to Miss Brown, in which deed was inserted a clause similar to the one which is in the deed from Rogers to Misenheimer. A. P. Rucker, trustee, foreclosed his deed of trust, and the property brought, at the foreclosure sale, an amount

sufficient only to pay the notes secured by his deed of trust, leaving the notes secured in the deed of trust to J. L. DeLaney unpaid. This action is brought against S. M. Hanie, the maker of the notes, and also against H. G. Rogers and J. J. Misenheimer and Miss Brown, to recover against them personally the amount of the notes. The court held that the action was originally brought upon the theory that the assumption of J. J. Misenheimer and of H. G. Rogers and of Miss Brown (590) established a contractual relation between the plaintiff and the said defendants, so that he had a right to bring an action on the contract directly against them. The defendant J. J. Misenheimer demurred to the complaint, and the demurrer was sustained. The plaintiff then, by order of the court, filed an amended complaint upon the theory that he had an equity to be subrogated to any right S. M. Hanie had as against H. G. Rogers, and upon the further theory that the doctrine of subrogation could be extended from H. G. Rogers to J. J. Misenheimer and from Misenheimer to Miss Brown. Hanie and Rogers are insolvent. The court held that the plaintiff was entitled to recover against Hanie and Rogers, but not against Misenheimer and Brown. Plaintiff excepted and appealed.

L. W. Humphrey and Clarkson & Taliaferro for plaintiff.
J. F. Newill and W. F. Harding for Misenheimer and Brown.

WALKER, J., after stating the case: The court should not have ordered an amendment of the original complaint. It was quite sufficient, in its allegations, to warrant a recovery upon the theory of subrogation or that of contract. The prayer does not narrow the scope of the pleading to its own limits, but a party can recover now according to the facts he states in his pleading, and not necessarily or only according to his prayer. *Voorhees v. Porter,* 134 N. C., 591; *Knight v. Houghtalling,* 85 N. C., 17; *Council v. Bailey,* 154 N. C., 54; *Silk Co. v. Spinning Co., ibid.,* 421, in which cases we said that the special prayer of the plaintiff for other relief does not deprive him of that to which he is entitled upon the allegations of his complaint. The sole point of law involved in this appeal is as to the right of plaintiff (holder of the ten purchase-money notes) to recover of defendant Rogers, Misenheimer, Miss Brown, and Mrs. Purse, *née* Smith, the money secured thereby, all of said defendants having personally assumed the payment of said notes.

In cases of this kind a recovery by the mortgagee from a vendee of the mortgagor of a deficiency in the mortgage debt after fore- (591) closure has been allowed on two grounds. Many of the courts of this country—probably a large majority—allow recovery in such a case upon the broad principle that a third person may maintain an action on a contract made for his benefit. Though the present case seems

to present a good opportunity for the application of that principle, yet from a consideration of the decisions of this Court they appear not to have gone so far.

The other ground upon which a recovery has been allowed against a grantee of the mortgagor is under the doctrine of subrogation, by which, in equity, a creditor may have the benefit of all collateral rights, remedies, and securities for the payment of the debt which a person standing in the relation of a surety for others holds for his indemnity. It has been held that an agreement by the purchaser of an equity of redemption with his vendor that he will assume and pay the mortgage debt will render him personally liable, not only to his grantor, but also directly to the holder of the mortgage. The original doctrine, which is still sometimes advanced, was that this right of the mortgagee to hold the purchaser of the equity of redemption, by reason of the latter's agreement with the mortgagor to assume the payment of the mortgage debt, does not mean that the mortgagee can maintain an action at law upon this agreement between the mortgagor and the purchaser, but rests upon the ground that the contract of the purchaser is a collateral stipulation obtained by the mortgagor, which by equitable subrogation inures to the benefit of the mortgagee. The mortgagee is said to stand on the rights of his debtor, and to be entitled to appropriate for his debt any security held by his debtor for its payment, and his remedy is restricted to the privilege of subrogation to his rights, and will give him no rights against the purchaser which could not, under the contract of purchase, have been claimed by the original debtor. Accordingly the mortgagee has been allowed to enforce the personal liability of such a purchaser only to the extent of the deficiency upon a foreclosure sale of the mortgaged premises, and only if the party to whom the purchaser's agreement was given was himself personally liable for the payment of the mortgage debt. The doctrine of equity is that when the grantee in a deed assumes the payment of the mortgage debt, he is to be regarded as the (592) principal debtor, and the mortgagor occupies the position of a surety, as between themselves, and the mortgagee is permitted to resort to the grantee to recover the deficiency after applying the proceeds of a sale of the mortgaged premises, by the equitable rule that the creditor is entitled to the benefit of all the collateral securities which his debtor has obtained to reinforce the principal obligation, though this right is strictly an equitable one, and its exercise at law has been refused. But the broad doctrine has since been laid down, that one for whose benefit a promise is made to another may maintain an action upon the promise, though he was not a party to the agreement or privy to the consideration thereof; and it was then held in unqualified terms that whoever has for a valuable consideration assumed and agreed to pay another's debt

may be sued directly by the creditor, and that a mortgagee or other encumbrancer may maintain a personal action against a purchaser from the owner of the equity of redemption who has agreed with his grantor to assume and pay off the encumbrance, if the party with whom the agreement was made was himself personally liable upon the mortgage debt, and that the purchaser who has made such an agreement cannot afterwards be released therefrom by his grantor, to whom it was made, without the consent of the creditor, to whose benefit it inures, if the latter has accepted it. The same rule will be applied to the case of any other encumbrance. But the mortgagee can simply hold such a purchaser to the performance of his agreement; he will not be subrogated to any other right against the purchaser. The development of this doctrine is doubtless an outgrowth of the law of substitution. It is sufficient to say that it has also been emphatically denied, and the court which laid down this proposition in its broadest terms (*Lawrence v. Fox,* 20 N. Y., 268) has refused to apply it to other somewhat similar cases, and has said that the rule is one which ought not to be extended.

The above principles are similarly stated by Mr. Sheldon, in his work on Subrogation, but, in the reference to the right of recovery at law on the contract, as having been made for the benefit of the several (593) grantees, he classifies the courts and assigns this one to those of the class which deny the doctrine of a recovery *ex contractu,* but sustain it upon the equitable principle of subrogation, citing in support of the statement *Peacock v. Williams,* 98 N. C., 324, to which may be added *Woodcock v. Bostic,* 118 N. C., 828, and they seem to be aptly cited for that purpose.

We prefer, therefore, in view of the conflict of authority and the previous leaning of this Court towards the equitable right of subrogation, not to put our decision upon the disputed doctrine, but rather to adopt the other reason, which is free from doubt, as its basis. If the question as to the strict contractual rights of the parties should ever arise, we may then, perhaps, consider it in the light of some more recent decisions in this Court. We may well rest our decision upon the case of *Woodcock v. Bostic,* 118 N. C., 828, in which the Court distinctly recognized this principle of equitable subrogation, as between the original vendor and purchaser, when the latter had assumed to pay the encumbrance. The note secured by the mortgage in that case had been transferred to the plaintiff, as was the note in this case, so that the facts of the two cases are precisely the same. The Court, it is true, refused to allow a recovery in that case, because the equitable right was not asked for; but we think, in that respect, it failed to apply the invariable rule under our Code, that relief is granted according to the facts pleaded, and not merely according to the prayer, as the facts stated warranted the grant-

ing of the relief. The case, though, sufficiently settles the other point, but it does not go beyond the first grantee in its scope. It cites *Hayden v. Snow,* 14 Fed., 70; *Keller v. Ashford,* 133 U. S., 610, to which may be added 20 A. & E. Enc. of Law (2 Ed.), 990; *King v. Whittey,* 10 Paige (N. Y.), 467; *Ins. Co. v. Hanford,* 143 U. S., 187; *Henry v. Heggie, ante,* 523, as to the equitable liability of the first grantee. Professor Minor, in his great treatise on Real Property, says: "If the assignee (of the land) does thus assume payment of the mortgage debt, he thereby becomes the principal debtor, and the original mortgagor is only liable subsidiarily as a surety. And while the mortgagee may continue to hold the mortgagor personally liable upon his (594) contract to pay the debt, notwithstanding the assumption of the mortgage by the purchaser of the land, he may also, it seems, hold the purchaser directly responsible, though he is not a party to the agreement between the mortgagor and the purchaser—a right based sometimes upon the principle that one may sue upon a contract to which he is not a party, if it be made for his benefit, and sometimes upon the theory of the subrogation of the mortgagee to the rights of the mortgagor (the surety) against the purchaser (the principal debtor)." 1 Minor on Real Property, sec. 647. See, also, 2 Tiffany on Real Property, sec. 528; 20 A. & E. Enc. (2 Ed.), 992 *et seq.;* 3 Pomeroy Eq. Jur., secs. 1206, 1207.

But the doctrine reaches beyond this and extends to all the subsequent and successive grantees in the chain of assumptions, each forming a link in the chain which binds the last and the intervening purchasers of the equity of redemption, upon their agreements to assume, for the payment of the lien, not only to the first purchaser, but to his vendor and the mortgagee.

In our case, Miss Brown could hold Mrs. Purse (*née* Smith) upon her assumption; and since, as between the immediate parties, Miss Brown was principal and Misenheimer surety, Misenheimer could not only hold Miss Brown on her assumption, but by virtue of the equitable doctrine of subrogation he could also take advantage of Miss Brown's right of recourse to Mrs. Purse (*née* Smith); and since Misenheimer was legally bound to Rogers for the debt, Rogers could enforce all of Misenheimer's rights, including the right to proceed against both Miss Brown and Mrs. Purse (*née* Smith). But Rogers, in his turn, was bound by his obligation to Hanie, so that Hanie could stand in Rogers' shoes and enforce all of his (Rogers') rights, and could, therefore, take advantage of Rogers' right to recover of Misenheimer, and so forth.

Now the plaintiff, as the holder in due course of the notes, can recover of Hanie, the maker of the notes, and can have the advantage of all subsisting obligations in the hands of Hanie securing the payment thereof. So that we reach the inevitable and logical conclusion that by reason of

his equity, as creditor, to be subrogated to all the debtor's rights,
(595) remedies, and securities, plaintiff can recover judgment against each and every one of the defendants. It was argued by counsel for the defendants, as we have stated, that because there was no privity between Hanie and Misenheimer, there could be no recovery against Misenheimer, as there was no right of recourse to Misenheimer in favor of Hanie to which plaintiff could be subrogated. The court below, in sustaining this contention, misconceived the theory and scope of the doctrine of subrogation. If Hanie had, strictly speaking, and primarily, no cause of action against Misenheimer, there was in favor of Hanie the equity to be subrogated to all the rights, remedies, and securities of Rogers, and among them was the right to go against Misenheimer. There is not lacking ample authority for the position here taken. 27 Cyc., 1355, which says: "If mortgaged property passes through the hands of successive grantees, each of whom assumes the mortgage, the personal liability of the last holder inures to the benefit of the mortgagee, and may be enforced by him."

The cases about to be cited all recognize and apply the rule that the mortgagee in such a case, by virtue of the equitable principle of subrogation, can recover of the vendee of the mortgagor, or his successors, who have assumed like obligations to their vendors, an amount sufficient to discharge the encumbrance. *Biddle v. Pugh,* 59 N. J. Eq., 480; *Wager v. Link,* 134 N. Y., 122; *Fisher v. White,* 94 Va., 233; *Hospital of St. Barnabas,* 27 N. J. Eq., 650; *Miller v. Thompson,* 34 Mich., 10; *Osborne v. Cabell,* 77 Va., 462; *Hopkins v. Warner,* 109 Cal., 136; *Crowell v. Currier,* 28 N. J. Eq., 152; *Stover v. Tompkins,* 51 N. W. (Neb.), 1040. This action was not brought by the mortgagee who held the encumbrance on the land, but his assignee of the notes secured thereby. But this should make no difference in the result, as it is familiar doctrine that the assignee of a note secured by a mortgage is entitled to the full benefit of the mortgage. *Jones v. Ashford,* 79 N. C., 172; *Hyman v. Devereux,* 63 N. C., 624. It may not be amiss to add that when the complaint in the case of *Woodcock v. Bostic* was amended in the court below so as to set up the equity of subrogation, and the case, after a trial there, was again brought to this Court, it affirmed a judgment in favor of the plaintiff. The notes secured
(596) by the mortgage were, in that case, as it appears, assigned to the plaintiff. So that the case is a direct decision on the question as to the first grantee, and the doctrine has, by the great weight of authority, as we have seen, been extended to subsequent grantees. We blieve that this decision, apart from the direct authorities sustaining its basic principle, which is greatly favored by the law, is a fair and just interpretation of the meaning and intention of the parties and is the

proper deduction to be made from the form and nature of the several transactions. The equity of subrogation springs naturally out of the two other equities, contribution and exoneration, and is, in fact, one of the means by which those equities are enforced. It is eminently calculated to do exact justice between persons who are bound for the performance of the same duty and obligation, and is one, therefore, which is much encouraged and protected. It was called into existence for the purpose of enabling a party secondarily liable to reap the benefit of any secureties or remedies which the creditor may hold as against the principal debtor, and by the use of which the party paying may thus be made whole. It may be used to enforce the equity of exoneration as against the principal debtor, or of contribution as against others who are in the same rank. Bispham on Equity (6 Ed.), sec. 335. The doctrine is far-reaching and has been so extended that a person standing in the relation of a surety reaps its benefit and is thereby entitled to have all of the principal's means of indemnity, including the privilege of substitution to the principal's or debtor's claim to indemnity or repayment from others, including all remedies and secureties held by him. Sheldon on Subrogation, sec. 100; *Hobson v. Bass,* L. R. 6 Ch., 792; *Rodenbarger v. Bramblett,* 78 Ind., 213. If one surety takes a security from the principal for his own indemnity, it will inure to the benefit of all the sureties by the operation of this rule, because equality is equity. Bispham on Equity (6 Ed.), sec. 337, p. 454. We hold, therefore, that the court has incorrectly applied the law to the facts of this case.

It will not be contended that when the grantees accepted the several deeds they did not each become bound by its covenants, the same as if they had jointly executed them with the grantors, and even though they were deeds poll and not deeds indented. 20 A. & E. Enc. (597) (2 Ed.), 990; *King v. Whitley,* 10 Paige (N. Y.), 467, and *Henry v. Heggie, ante,* 523.

Before closing this opinion, we must acknowledge our indebtedness to Mr. Taliaferro for his learned brief and able argument. His research has greatly enlightened us and facilitated our investigation of the subject.

Error.

Cited: Publishing Co. v. Barber, 165 N. C., 495; *Bryan v. Canady,* 169 N. C., 583; *Warren v. Herrington,* 171 N. C., 167.

ELLA J. MONTGOMERY, ADMINISTRATRIX, v. CAROLINA AND N. W. RAILROAD COMPANY.

(Filed 26 November, 1913.)

Railroads—Safe Appliances — Automatic Couplers — Negligence — Trials— Nonsuit.

It is the duty of a railroad company to equip its cars with automatic couplers and to keep them in proper repair, and in an action to recover for the wrongful death of an employee who was caught between the cars and killed while engaged in coupling the cars, the failure of these couplers to work automatically on that occasion so as to require this act of the intestate, is sufficient evidence of negligence of the defendant to take the case to the jury, and a judgment as of nonsuit should not be granted; and this rule applies to actions brought under our decisions as well as under the Federal statutes known as the Safety Appliance Act.

APPEAL by plaintiff from *Webb, J.*, at August Term, 1913, of CALDWELL.

Mark Squires, J. W. Whisnant, Thomas Newland, M. N. Harshaw, and Murray Allen for plaintiff.

W. C. Newland, J. H. Marion, and O. F. Mason for defendant.

CLARK, C. J. This is an action for wrongful death, caused by the negligence of the defendant. The plaintiff alleges negligence in providing incompetent and untrustworthy coemployees and their failure to operate the train in a proper manner. But the negligence chiefly relied upon is in the failure to provide automatic couplers that were in proper condition, and that those used on the car in question (598) were so defective and out of order that they failed to couple automatically by impact, as required by law, so that it became necessary for plaintiff's intestate to go between the cars for the purpose of adjusting the couplers.

The evidence was that the train had just arrived at the station, the engineer had gone to his dinner, and the fireman who had been left in charge of the engine had formerly been discharged for drunkenness. The cab had been detached from the train and left near the station. The train of cars was then run backwards and forwards, switching. The conductor instructed the employee to couple up to the caboose, and then went back into the office at the station. Upon the first effort to couple up the cab, the coupling failed and the cab was knocked back some distance. The deceased then stepped in to fix the pins, and signed the train back, and on the second impact the cab again failed to make the coupling. The plaintiff's intestate then again stepped in to adjust the coupling, when the cab rolled down upon him while he was endeavor-

ing to adjust the coupling, and crushed him to death. The testimony on these points is uncontradicted. It would be a reasonable inference from the evidence that when the cab rolled down the third time it was in a third attempt to make the coupling. Or it may have been because the cab was itself not under sufficient control by negligence of employees or some defect in roadway.

We have, then, in this case a coupler so defective that it missed making connection twice, and in the third attempt it killed the plaintiff's intestate. This is sufficient evidence to go to the jury that the coupler was defective. The act of Congress requires automatic couplers that are in good condition. To furnish one that was as defective as this is not even a colorable compliance with the law.

Under the Federal statute it is held: "Under the Safety Appliance Act the failure of a coupler to act any time sustains the charge of negligence on the part of the carrier." *R. R. v. Brown,* 229 U. S., 317, citing *R. R. v. U. S.,* 220 U. S., 559.

In *Nichols v. R. R.,* 195 Fed., 517, it is said: "The rule elimi- (599) nating all questions of due care and requiring at all events that the apparatus shall be in working order, repeated and unsuccessful efforts to make the lever operate are some evidence that it was not in the condition required by the statute."

In *Willett v. R. R.,* 122 Minn., 513, the Court said: "This Court has held that the Federal Safety Appliance Act imposes upon railroads engaged in moving interstate traffic the absolute duty to equip their cars with couplers that will, at all times, when operated in an ordinary and reasonable manner, couple upon impact." And it was further said that this duty was not discharged by merely equipping the car with automatic couplers, without using due diligence to keep them in good working order. *Delk v. R. R.,* 220 U. S., 580; *R. R. v. U. S., ib.,* 559.

In *Burho v. R. R.,* 121 Minn., 326, the Court said: "If a coupler fails to work when an honest and reasonable effort was made to operate it, under circumstances and in the manner it is designed to be operated, we conclude that the law is not complied with."

The United States Safety Appliance Act provides that it is unlawful to use "any car in moving interstate commerce not equipped with couplers, coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." This act covers coupling as well as uncoupling. *R. R. v. Voelker,* 129 Fed., 527 (opinion by *Van Devanter, C. J.,* now on U. S. Supreme Court); *Johnson v. R. R.,* 196 U. S., 18, in which *Fuller, C. J.,* states the history of the act and on p. 19 says: "The risk of coupling and

uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically."

In *R. R. v. Brown,* 229 U. S., 321 (decided 10 June, 1913), the Court said it is "settled that the failure of a coupler to work at any time sustains a charge of negligence in this respect, no matter how slight the pull on the coupling lever."

To same effect, Thornton on Safety Appliances, 584 and 588, Note 20, L. R. A. (N. S.), 474, and cases cited. Proof that a coupler will not couple automatically by impact makes out a *prima facie* case suffi-
(600) cient to go to the jury, and if there are extenuating facts they must be shown by the defendant." *R. R. v. Poole,* 175 Ind., 567.

It is unnecessary to consider whether under the facts of this case the action is to be tried under the provisions of the Federal statute, or under the State law. If tried under the Federal Employer's Liability Act, contributory negligence is not a defense, but is to be considered in reduction of damages merely. *Horton v. R. R.,* 157 N. C., 146; *Burho v. R. R.,* 141 N. W., 300; *Johnson v. R. R.,* 178 Fed., 643. Assumption of risk is in express terms abolished by the United States Safety Appliance Act. *Schlemmer v. R. R.,* 220 U. S., 588.

It is alleged in paragraph 3 of complaint that the defendant was engaged as a common carrier in interstate commerce, and this is admitted in paragraph 2 of the answer. If, however, as the defendant contends, this case is to be considered as an injury occurring in intrastate commerce, the law is precisely the same. It was held by this Court, first of all the courts of the Union, in *Greenlee v. R. R.,* 122 N. C., 977; 41 L. R. A., 399; 65 Am. St., 734, and in *Troxler v. R. R.,* 124 N. C., 191; 44 L. R. A., 313; 70 Am. St., 580, and in the many cases affirming the doctrine there laid down, that the failure of a railroad company to have self-coupling devices on its cars is a continuing negligence, and in an action for injury sustained by failure to do so, contributory negligence is no defense. In *Elmore v. R. R.,* 132 N. C., 865, the Court held the failure on the part of a railroad company to keep automatic couplers in good condition and repair is negligence, as much so as if the cars had never been equipped with such couplers. In the opinion in that case, which was the third time it was before this Court, the subject was fully discussed and the conclusion then reached has ever since been adhered to. See citations in the Anno. Ed.

The facts in the *Elmore case* were almost identical with those in the present case.

The judgment of nonsuit must be

Reversed.

PRESENTATION

OF THE

PORTRAIT OF HON. THOMAS C. FULLER

TO THE

SUPREME COURT OF NORTH CAROLINA

BY

COL. CHARLES W. BROADFOOT

Colonel Broadfoot said:

Mr. Chief Justice and Associate Justices: With your consent, we are about to recall to mind a distinguished North Carolinian, the HONORABLE THOMAS C. FULLER, late of this city. He was born in Fayetteville, N. C., on 27 February, 1832, of one of those old families who settled upon Lord Granville's grant, in Colonial days, and have ever stood prominent in our State.

In early life he lost his father. His mother, some years afterwards, married Dr. Simeon Colton, of Fayetteville, a Presbyterian minister, of staunch New England stock, noted for piety, austerity, and learning. Thomas became the protégé of his uncle, Elijah Fuller, Esq., at the time a prominent and well-to-do merchant of that place. The uncle, a man of generous impulses and kindly nature, did his part generously towards the nephew, and gratefully, bounteously, lovingly, was his family afterwards repaid.

Young Fuller received his training at the hands of his stepfather, Dr. Colton, who taught a classical school of high order, and at the law school of Judge Pearson. Upon being licensed, he hung out his shingle at Fayetteville, and from thenceforth to the time of his death was a devoted son of this old town.

The ancients said, it was a hard task to climb Parnassus. *We* know what a rough and tiresome road it is which the young lawyer treads when first he begins to climb. However, Mr. Fuller, with his many friends to cheer him on, aided by strong and influential family connections, climbed rapidly, and we find him with a growing practice, happily married, in 1856, to Caroline Douglas Whitehead, daughter of Williamson Whitehead, Esq., of Fayetteville—the lady of his choice, the woman of his undying love, one gifted in largest measure with all the plain, homespun knowledge, accomplishments, and graces which adorn true womanhood. She was, in deed and in very truth, as soft, gentle, modest, bright, charming, and lovable a woman, with as sweet a smile, as ever plighted her troth. Caddy Whitehead, or Caddy Fuller, was admired by all who met her, and fondly loved by all who knew her. She was the idol of her family and husband. From this marriage were born manly sons and fair daughters, of whom we may not now speak.

This happy couple had scarcely begun housekeeping when the dark shadow of war turned brightness into night. Mr. Fuller was an old-line Whig, and of course an intense Union man, as indeed a large majority of our people were. Lincoln's proclamation for troops, to make war upon the South, was to him the call to arms. He promptly laid aside everything and volunteered as a private in the LaFayette Light Infantry, Joseph B. Starr commanding, soon

to become Co. F, First Regiment, North Carolina Volunteers, which enlisted for the war. So we see that Private Fuller had the honor to be "First at Bethel." He duly blistered his hands shoveling dirt in the trenches at Yorktown, and marched up and down the peninsula, at the command of General Magruder, Colonels Hill and Lee; enjoyed the martial music of Charlie Bank's band, playing its only tune:

"Put him in the ditch,
Put him in the ditch,
For old Magruder,
He says so."

In soberness, Private Fuller did his duty as a soldier. Mr. Chief Justice, we know what that means. He set an example to his comrades and was the life of his company.

When the First Regiment was disbanded November, 1861, it was evident that the war was to last for some time, and Captain Starr and Mr. Fuller set to work at once to raise an artillery company. When it become known that Starr was to be captain and Fuller first lieutenant, old comrades and others volunteered at once, and the company entered into service with full ranks. Lieutenant Fuller had no opportunity to show the stuff that was in him, as the company, for want of guns, was sent to Fort Fisher, and upon being equipped afterwards, served here and there in Eastern North Carolina. While in active service in Starr's Battery, Lieutenant Fuller was elected and took his seat in the last Confederate Congress, receiving an almost unanimous soldier vote, being the youngest member, and by the way, the handsomest, the Adonis of Congress, as he was called. Here, too, no opportunity offered for display of his talents. It was then only a question of how long we could hold out and preserve our honor.

The end came. What an end! Nothing saved us from annihilation but the stout hearts of our men and the sublime virtues of our women. Our soldiers were ragged and soiled, but their souls were intact, undismayed, unconquerable. We say with pride, "First at Bethel, farthest at Gettysburg, last at Appomattox" for them. For our sweethearts, sisters, wives, and mothers, we say, "First at Bethel, farthest at Gettysburg"—foremost in all good works, untiring, self-sacrificing, God-guided women, to them there was no Appomattox; *they* have never surrendered. If pride of ancestry is ever pardonable, our children may well be proud.

Reconstruction is the blackest, most damnable page in the history of our country. Its story has never, and can never be told; far better that it should not be. We must forgive, but we may not forget.

At the first election after the war in 1865, he was elected to Congress from the Cape Fear District, but was not permitted to take his seat, by the rulings of Thad Stevens, *et id omne genus*, which freely translated would read, "and all that lot of fellows of the baser sort." It was during this eventful time that the Hon. Thomas C. Fuller went back to his little office on the banks of Cross Creek, where, lulled by its falling waters, he was soon busily at work. To our thinking, these were the happiest days of his life, riding in from his country home, with carriage full of children, and dinner basket in hand. He had, with all of us, a hard struggle, at first, to keep the wolf from the door. Conditions soon changed. The upheaval caused much litigation, of which he had his full share. Indeed, he stood at the head of the Fayetteville Bar. He first came into State-wide notice by his bold, masterful defense of Tolar and

others before a military commission held at Raleigh. His clients were convicted, of course, and sentenced to death. General Canby commuted to imprisonment for life, and their counsel, by strenuous efforts, after a short time, induced President Johnson to pardon.

Mr. Fuller's reputation rests chiefly on his skill as a criminal lawyer. In this branch of the practice he had no superior in our State, and was called into service in all important cases. Tradition says he saved the life of a prominent and wealthy client, charged with murder, by his skillful conduct of the case. He had an old land surveyor to make a map of the place of the homicide, and by this witness broke down the evidence of the State, made good his plea of self-defense, and set his client free. Now, he had followed this old surveyor in many a land suit in Cumberland by course and distance, and knew exactly how to frame his questions to secure desired answers. His removal to Raleigh followed close upon this verdict.

Of all his criminal cases, he probably took most interest in that of Jacob Manuel, a negro, tried for murder in Cumberland. He honestly, sincerely believed his client innocent, and as usual did his best. It was a case of circumstantial evidence, many facts proven pointing to the accused as the slayer. Mr. Fuller made an attack upon the chief witness for the State, such an attack as only he could make. His speech was a very able one, his whole soul was in it; but he lost. We all know "what fools these jurors be." He succeeded in getting a commutation of sentence from death to life imprisonment, and on a Christmas Eve made an appeal for pardon to Governor Brogden in such earnest manner as would take no refusal, and he made a Christmas present to an old father, who alone had stood faithful, of a pardoned son. This was a charity case, but Judge Fuller's face always lighted up at mention of it.

As a practitioner—the crucial test, after all, of a lawyer—Judge Fuller was fair and straightforward. If he knew any short-cuts, it was to avoid them; he never was known to take advantage of them, and scorned, despised, and denounced them.

In consultation with brethren, he was open, frank, and always pleasant. He never held back a good point, that he might make and take credit for it with judge or jury. It was his client's cause, not his, to be presented in the strongest light, fought to a finish, and won or lost honorably. Hence, he never played for prominence, but cheerfully took any place assigned him by associates. Some of us know, in these latter days, how much these matters count. If an associate made a slip, he was up and ready to repair the loss—never to reproach the unfortunate. With these qualities, it is superfluous to say he was always an agreeable associate, and generally chosen as such by his brethren.

Oh. how kindly, gracious, and tactful the aid he gave to younger members of the bar. To them he was not the big lawyer, who knew it all; but the elder brother, upon whom, somehow, they were at liberty to call. In a rough and tumble fight he had no superior. If, by chance, his well-poised lance was shattered in the onset, he grasped his battle axe; if that failed him, he drew his short sword, and woe betide the adversary who came within its reach. In addressing the Court, his points were clean-cut, clear, and pressed with earnestness; failing to convince, he never wrangled, but bowed with becoming deference.

His reputation as *primus inter pares* rests mainly upon his skill before the jury. Brought up among the Scotch, he had learned to follow Burns' advice, "To keep thro' ev'ry other man, with sharpen'd, sly inspection." In Cumber-

land, where he was raised, if allowed to pick the jury, his cause was almost won before the pleadings were read. He was brimful of what delightful Dick Battle used to call the "*Gaudia certaminis.*" Saturated with his cause his manner before the jury was indescribable. He knew exactly what to say and how to say it. His insight into human nature was so keen that he seemed to read men by some kind of intuition. He never fired over their heads; his shots were around the bull's eye. Beginning with some commonplace remark, he would let fall something to attract their attention; that gained, he would warm up, and if eloquence is vehement simplicity, he was indeed an orator. His language was always plain and homespun, never indulging in fine, prepared speech—and went home. When he began to pull that long moustache, lean frequently over the spittoon, his face to take on a solemn look, his eyes to stare at vacancy, these were weather signs, so to speak, never failing, even in dry weather, to foretell a thunderstorm about to burst to the great discomfiture of the other side. His manner was intensely earnest, impressing the jury with the belief that what he said he believed to be true. There was nothing studied or put on about him. The jury were gently but irresistibly led to think that here was one who was simply aiding them to come to a right verdict, and come they did to a verdict, in Fuller's favor.

One precious, priceless gift he had, now numbered with the liquid fire of the ancients—he knew how to quit!

To our mind, his choicest gift was his skill in the examination of witnesses. He never asked a question without anticipating the answer, and he knew so well how adroitly to frame them that he generally had the wished-for answer. He had in mind exactly what he wanted to prove, and his questions were framed accordingly. If the witnesses were shy or ill at ease, or hostile, a question or two, in words such as he thought would restore their self-possession, placed them at ease, and he had from them the proper answer. He would draw out a witness so smoothly that all that was in him would appear as an open book, colored irresistibly in Fuller's favor. In cross-examination we have seen him cut the ground from under his opponent's feet, and utterly bewilder him, by coaxing an answer out of the main witness which flatly contradicted his evidence in chief, on some important point, or an answer on some new matter that would throw a sidelight, changing entirely the whole aspect of the case; or failing there, some question put to the main witness, with consummate adroitness, would cause him to hesitate, fidget on the stand, lose his temper, perhaps, and break down his whole evidence, and with it the case in hand. If the witness showed his decided leaning against him, and he had no chance to pick something out of him, favorable to his side, his first question would be a declaration of war, and a battle royal would soon follow between witness, who stood upon the defensive, and attorney, who made the attack, the latter choosing his ground, advancing or retiring at pleasure, with the skill which comes of long practice and a thorough knowledge of his art. The issue we may easily guess. And yet he never browbeat a witness, and was too generous to take an unfair advantage of one. We repeat, his skill in handling witnesses was simply marvelous. He wasted no time in idle, foolish questions. If all present-day lawyers were Fullers, sixteen judges could easily do all the work in our Superior Courts, and this bench might, for two days in the week, go to the ball games. But why go on? Suffice it to say, Mr. Fuller was, since the sixties, among the ablest, may we not say, the ablest lawyer in our State. The highest compliment ever paid to him, in our opinion,

was that, Mr. Chief Justice, of your illustrious predecessor, when he said, "Well Tom, I hear that they talk of impeaching me. If they do, I want you for my counsel."

There came to him, as it were, to round out a well-spent life of great activity and usefulness, "to husband out life's taper at the close," the appointment as an "Associate Justice of the United States Court of Private Land Claims" by President Harrison, 10 June, 1891, which he held until his death in this city, 19 October, 1901. The judicial ermine, worn with honor, of course, added nothing to the character, dignity, or consequence of him who wore the Confederate gray jacket in 1861.

We come now to speak of him as a citizen. Here he was at his best. We recall with pleasure his manly figure and handsome face, lighted up with his genial smile. Of fine presence, courtly manners, and pleasing address, he was a marked man in any company. Plain as a pikestaff, easy as an old shoe, he was one that a child would instinctively draw near to. He never unbent—had nothing to unbend—but was always, under all surroundings, the same simple, unpretending man. Broadminded, clear headed, open handed, he lent himself willingly to any project for the upbuilding of his community and was a model citizen.

He had the rare faculty of making friends, whom he fastened, not with hooks of steel, which sometimes snap, but with those tendrils which, growing out of the heart, entwine themselves, we know not how, about objects beloved, which give and stretch upon occasion, but never break.

The poet Pope says: "Whatever is, is right."

Judge Fuller's friends paraphrased thus, "Whatever Fuller does is right." There were no empty seats about his on the hotel piazza where he attended court. He was a fine conversationalist, told a good story, and enjoyed heartily one told by another. He had no private grievance to unload upon his friends—how some folks persecute us in this respect!—but kept his own troubles to himself. Bubbling over with animal spirits, he shed sunshine all about him. We have never known greater devotion shown by mortal man to kith and kin, and they in return almost worshiped him. His washerwoman loved him.

No matter how his mind might be full of weighty matters, he always had time to put in practice the amenities of life—those little things, simple in themselves, which go to make up so much of the enjoyment of those about us, and which so many forget or neglect. A kindly nod for the humble, a pleasant word for the acquaintance, a hearty handshake and cordial greeting for the friend, were to him of course.

After disease had laid a heavy hand upon him, and he knew that the end was nigh, he went home, to Fayetteville. On his way he was asked what he was going for. His reply was, "Just to look at Joe Starr." They are together now.

A very short time before his death, while at table at the Yarborough, an old lawyer friend from home went in to dinner. Judge Fuller recognized him, beckoned to him to come to him, grasped eagerly his hand, while an old-time smile lit up for a moment his wasted face. He said, "George!"—not another word; a tear coursed his cheek. Prompt us, say the words for us, for we cannot. Tom Fuller—we hope we break no canon of decorum when we speak of him, stripped of titles—was a splendid type of the old school Southern gentleman, a species of the genus homo now nearly extinct.

In behalf of those nearest and dearest to him, we present his portrait, and ask you to hang it upon these walls, to keep company with North Carolina's best.

ACCEPTANCE BY CHIEF JUSTICE CLARK

The Court is gratified to receive this portrait of Judge Fuller, which has been so handsomely presented in the speech of Colonel Broadfoot. Judge Fuller was a strong man in every sense of the word; of splendid presence, learned, able and eloquent, he would have taken the first rank at any Bar or in any calling. A gallant soldier, a member of the Confederate Congress, a member-elect to the United States Congress, but wrongfully denied his seat, a magnetic public speaker, a leader in his party and later in life a distinguished member of the Federal Judiciary, he made his strongest impression on the times in which he lived as a "Leader of the Bar."

A strong Bar makes a strong Court. The courts in which Judge Fuller practiced were his debtors for the great aid he rendered in the administration of justice. His views and arguments are imbedded and preserved in many opinions of this Court. Judges necessarily can give but limited time to the consideration of any one cause. But when able and learned counsel have given full consideration to a cause and have thoroughly grasped it and have taken it red-hot to hammer on the anvil of debate, it is a weak court indeed that cannot catch inspiration from the light thus shed. The course of judicial decisions is largely the result of the investigations and reasoning of counsel, who have thus written themselves into judicial opinions. The *Dartmouth College case*, erroneous as many now deem it, and corrected by constitutional amendments in most of the States, was fully as much an incorporation of the views of Daniel Webster as of the great Chief Justice, John Marshall, who wrote it. The same is true of most of the leading decisions of the courts when causes of importance have been debated at the Bar by strong counsel and have become milestones to mark the progress and the development of the law.

It is well to place on these walls the portraits of the judges who have written the decisions of the Court; but it is no less appropriate that we should preserve for the admiration and the emulation of successive generations of lawyers these memorials of those great "Leaders of the Bar" who have shared so largely in forming judicial opinions and in shaping the course and current of the law by the force of their reasoning.

We have already on our walls the portraits of several of the greatest lawyers of this State, and hope to be favored with the portraits of others. But it can well be said that among them there has been none who is more fully entitled to be considered a "Leader of the Bar" than the distinguished subject of the portrait now presented. North Carolina has furnished no abler nor more successful advocate before the jury and the courts than Thomas C. Fuller.

The portrait by Mrs. J. Marshall Williams is a faithful likeness. Its admirable execution is proof conclusive, if proof be needed, that one sex has no monopoly of talent.

The Marshal of the Court will hang this portrait in its appropriate place on the walls of the Library of this Court, and the remarks of the distinguished counsel who has addressed us, so happily, will be printed in the next volume of our Reports.

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APPEAL AND ERROR. See Parties; Trials.

1. *Injunction—Subsequent Motion—Court's Jurisdiction.*—Where in an action by a trustor in a deed of trust given on lands to secure a debt, the court has granted an order restraining the sale of the lands upon condition that the plaintiff pay into court the amount he admits to be due, and he fails to perform the condition imposed and appeals to the Supreme Court, he may not thereafter renew the motion for the order in the Superior Court upon the same state of facts, for the appeal carries with it all questions incident to and necessarily involved in the ruling to the appellate court. *Bonner v. Rodman*, 1.

2. *Trials—Evidence—Instructions—Harmless Error.*—The erroneous admission of evidence on the trial in this case was cured by the charge of the court. *Ellison v. Telegraph Co.*, 6.

3. *Judgment—"Mistake"—Interpretation of Statutes.*—On appeal from an order setting aside a judgment for mistake, etc., under Revisal, 513, the court can review only the question whether the facts found by the lower court constitute such mistake, etc., as would authorize him to set aside the judgment. *Mann v. Hall*, 50.

4. *Same—Verdict.*—Where on appeal from an order setting aside a judgment and verdict for mistake, etc., rendered under provisions of section 513, Revisal, the judge of the lower court has found that by mistake in describing the lands sued for the attorney has demanded judgment in his complaint for a fractional part of the fractional part of lands contended for, and not the whole of such fractional part, mistaking the description of one for that of the other; that during the progress of the trial the testimony of the witnesses reasonably confirmed him in this mistake, and it appears that the judgment entered conformed thereto, it is *Held*, that the order setting aside the judgment and verdict comes within the purview of the statute, and will be sustained, the rights of third persons not having intervened. *Ibid.*

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5. *Reference—Findings of Fact.*—When there is evidence to support the referee's findings of fact, and they are approved by the trial judge, the findings are conclusive on appeal. *McCullers v. Cheatham*, 61.

6. *Division of Opinion—Affirmance of Judgment.*—Where one of the five justices of the Supreme Court does not sit or take part in the determination of a case on appeal, and the other members of the Court are equally divided in their opinions, the judgment below stands affirmed. *Smith v. Commissioners*, 97.

7. *Discretion of Court—Verdict Set Aside.*—Objection to the verdict of a jury, that it is contrary to the weight of the evidence, must be by motion to set it aside, addressed to the discretion of the trial judge, from which there is no appeal except when this discretion has been grossly abused. *Pender v. Insurance Co.*, 98.

8. *Instructions—Directing Verdict—Words and Phrases—Harmless Error.* A charge of the court directing the answer of the jury to an issue in a certain way, "if they believed the evidence," is undesirable in its form, and is not commended; but reversible error will not be found by reason of the use of this expression where it appears that the appellant was not prejudiced thereby; and where the evidence referred to is not disputed and but one inference can be drawn therefrom, it will not be held as error that the use of this form was a prohibited direction of the verdict by the court. *Holt v. Wellons*, 124.

9. *Objections—Evidence—Prior Testimony.*—Exceptions to the competency of evidence will not be sustained on appeal when the same witness has previously testified, without objection, to the same facts in another part of his examination. *Smith v. R. R.*, 143.

10. *Injunction—Findings of Fact.*—While the findings of fact of the Superior Court judge are not controlling on appeal from an injunction order, they are entitled to consideration in the Supreme Court. *Davenport v. Commissioners*, 147.

11. *Trials—Evidence, Incompetent—Withdrawing Evidence—Harmless Error.*—It is not only within the province of the trial judge, but it is his duty, to withdraw from the consideration of the jury evidence which has been erroneously admitted on the trial of an action; and when he has appropriately done so, and it does not appear of record that the appealing party has thereby been injured, it will not constitute reversible error, the error committed having been cured. *Cooper v. R. R.*, 150.

12. *Evidence—Verdict—Harmless Error.*—Where in an action involving the issues of negligence and contributory negligence, evidence has been improperly admitted on the second issue, and the answer to the first issue has been in the appellant's favor, the error is rendered harmless by the verdict of the jury. *Bird v. Lumber Co.*, 162.

13. *Insurance—Declarations.*—A new trial will not be granted for erroneous admission of evidence or other errors unless it appears that the appellant has been prejudiced, but in this case it is held that the admission of unfulfilled declarations of the deceased to buy a pistol

APPEAL AND ERROR—*Continued.*

for lawful purposes, which were erroneously admitted, was reversible error in an action on a life insurance policy which was defended on the ground of suicide. *Barker v. Insurance Co.*, 175.

14. *Interpretation of Statutes—Instructions.*—The trial judge is ordinarily required to charge the jury to the extent of stating in a plain and correct manner the evidence given in the case, and to declare and explain the law arising thereon, except where the facts are few and simple and no principles of law are involved, and he is not requested to charge (Revisal, sec. 535); and in this case it is held for reversible error, there being much conflicting evidence, for the judge to instruct the jury to "take the case and settle it as between man and man," without charging on the different aspects of the case in accordance with the statute. *Blake v. Smith*, 274.

15. *Laches—Excusable Neglect—Meritorious Defense—Recordari—Burden of Proof.*—Upon motion in the Superior Court for a *recordari* to a justice's court upon the ground of excusable neglect in perfecting the appeal, the burden of proof is on the movant to show that his neglect was excusable, as well as that he had a meritorious defense. *Hunter v. R. R.*, 281.

16. *Objections — Meritorious Defense — Additional Findings — Practice.*— Upon an appeal from the refusal of the judge of the Superior Court to set aside a judgment for excusable neglect, the objection that the judge failed to find additional facts relating to the merits of the defense must be based upon the refusal of a request by the movant that he should do so, in order to be available. *School v. Peirce*, 424.

17. *Verdicts—Motion to Set Aside—Court's Discretion.*—A motion to set aside a verdict as being against the weight of the evidence and for excessive damages is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable on appeal, when he has not abused it. *Pender v. Insurance Co., ante*, 98. *Johnson v. R. R.*, 432.

18. *Evidence—Unanswered Questions—Documentary or Paper Evidence.* When exception is taken to the refusal of the judge to permit a witness to answer a question, it must in some way be made to appear from the form or nature of the question, or by a statement of counsel, what the reply will be, so it may be seen that prejudicial error has been committed, or the exception cannot be considered on appeal; and the same rule applies to the exclusion of record or documentary evidence, the contents of which do not appear. *In re Smith's Will*, 464.

19. *Trials—Instructions—Issues—Harmless Error.*—Instructions to the jury should be addressed to specific issues, but *semble*, where the issues are simple, and, in view of other parts of the charge, they do not appear to have misled the jury, the error in this respect will not be held as reversible. *Craig v. Stewart*, 531.

APPEARANCE. See Process.

ARREST AND BAIL.

1. *Execution Against the Person—Unsatisfied Execution—Motions—Procedure—Statutes.*—Where a personal execution against a debtor is allowed by the statute, it must be by motion before the clerk after a return of the execution, against his property, unsatisfied, and from any adverse ruling his decision is subject to review on appeal to the Superior Court (Revisal, sec. 625); and if a judgment in the Superior Court may permit an execution against the person of the debtor, should the execution against his property thereafter be returned unsatisfied, the court is not required to order in the judgment that execution issue against the person of the debtor in anticipation of such a return on the execution. *Turlington v. Aman*, 555.

2. *Pleadings—Execution Against the Person—Cause of Arrest—Statutes.* Where the complaint alleges a cause of arrest, whether the same be necessary to the cause of action or not, an execution against the person of the debtor may issue upon a finding of the cause, under chapter 541, Laws 1891 (now Revisal, sec. 625), after an unsatisfied execution under a judgment against his property has been returned. *Ledford v. Emerson*, 143 N. C., 527, cited and applied. *Ibid.*

3. *Cause of Arrest—Verdict—Judgment—Statutes.*—In order to issue an execution against the person of the defendant in cases where it is permissible, the cause of arrest must be pleaded and proved, the issue affirmatively determined by the jury and judgment rendered. Revisal, sec. 625. *Ibid.*

4. *Public Officers — Sheriffs — Misappropriation of Funds — Statutes — Sureties—Subrogation—Parties.*—A sheriff, who is a public officer, may be held in arrest and bail when he has embezzled or fraudulently misappropriated money or property which, as such officer, he has received, or when he has been guilty of misconduct or neglect in office. Revisal, sec. 727. The right of subrogation of the surety on his bond, under the circumstances of this case, and the question, as to whether the cosureties were necessary parties, discussed by WALKER, J. *Ibid.*

ASSIGNMENT. See Equity.

ATTORNEYS AT LAW. See Partnerships.

BANKS AND BANKING. See Courts.

1. *Notice Not to Pay Check—Parties.*—When sued for the payment of a check drawn on it, upon allegation that the drawer gave previous notice not to do so, a bank defends upon the ground that no such notice was given, the issue raised is only upon the question of notice, and the payee of the check is not a necessary party. *Spruill v. Bank*, 43.

2. *Appeal and Error—Parties—Premature Appeal.*—In this action against a bank for payment of a check after notice from the drawer not to do so, the payee thereof having been made a party defendant, also, an appeal from the judgment of the court dismissing the action as to the payee is premature. *Ibid.*

BASTARDS.

1. *Born in Wedlock—Presumptions—Rebuttal Evidence.*—The presumption of legitimacy of a child born in wedlock may be rebutted by showing to the satisfaction of the jury, by competent and relevant evidence, that sexual intercourse between the husband and the wife did not take place at any time when he, by the laws of nature, could have been the father of the child. *Ewell v. Ewell*, 233.

2. *Same—Conflicting Evidence—Questions for Jury—Trials—Burden of Proof—Instructions.*—In an action for partition of lands, the plaintiff claimed his interest therein as the sole heir at law of C., and that C. and his brother W. were tenants in common of the lands as sole heirs of their father, J. The defendant claimed under W., and contended that though C. was born in wedlock, J. could not have had access to his wife at a time when, under the laws of nature, he could have begotten him. There being conflicting evidence tending to establish the contention of each of the parties upon the issue of the legitimacy of C., it presented a question of fact for the determination of the jury, under instructions from the court that C. having been born in wedlock, there is a presumption of his legitimacy, and the burden was on the defendant to show nonaccess. *Ibid.*

3. *Evidence—Declarations—Pedigree — Paternity — Family Bible — Parol Evidence.*—Parol evidence of the declarations of a deceased member of a family is not incompetent, because hearsay, as to the pedigree of another member thereof, and such declarations may be written, as entries made in the family Bible or other family register or record recognized by the family as such and brought from the proper custody. Hence, the entry of birth and date made in a family Bible by a deceased member of the family is competent, as tending to show the date of birth of another member, upon the question of his legitimacy; and it is also competent to show that the deceased, whose paternity is in question, called the child "son," and regarded and treated him as his own child. *Ibid.*

4. *Same—Copies.*—When the original entry in a family Bible is competent upon the issue of legitimacy of a member of the family, and when the original has been lost or destroyed, a true copy thereof is admissible as secondary evidence; and while in this case the witness does not testify directly that the copy introduced at the trial is a correct one, the court could infer that fact from the testimony, and properly submitted the paper to the jury, instructing them that they must find that it contained a true copy of the entry before using it as evidence upon the question of legitimacy. *Ibid.*

5. *Evidence—Declarations—Paternity—Admissions—Division of Lands by Parol.*—The plaintiff claimed an undivided half interest in certain lands as the son and sole surviving heir at law of C., and that the land descended to C. and his brother W. as heirs at law of their father. The defendant, claiming under W., denied the legitimacy of C. Evidence of a parol partition of the lands between C. and W. is held competent for the purpose of showing that C. had been recognized as the legitimate heir of his father by the defendant, it being conduct from which, in connection with the other facts and

BASTARDS—*Continued.*

circumstances of the case, the jury might infer his legitimacy. Evidence of original entries, inscriptions, etc., to prove pedigree, discussed by WALKER, J. *Ibid.*

BETTERMENTS. See Tenants in Common.

BILLS AND NOTES. See Banks and Banking; Courts.

1. *Fraud—Evidence—Holder in Due Course—Burden of Proof.*—When there is allegation and evidence that a negotiable note sued on was obtained by fraud, it is not error to refuse plaintiff's special request for instruction that he is presumed to be the holder in due course without notice of any equities or defenses existing between the original parties, for the burden of proof is then on him. *Trust Co. v. Ellen*, 45.

2. *Negotiable Instruments — Irregular Transactions — Presumptive Evidence—Holder in Due Course—Conflicting Evidence—Issues—Trials.* In an action by the bank to recover of a maker of a note given for an "imported French coach horse," as a holder in due course from the original payee, there was evidence of fraud in the procurement of the note. There was also evidence that the bank had taken over from the payee a large number of like notes, aggregating the sum of $50,000, and that it was customary that these notes, when unpaid, were charged to the payee's account by the bank from moneys he kept on deposit there, and that such notes were turned over to the payee's attorneys for collection without expense to the bank. A letter was also in evidence written by the payee of the note to the plaintiff bank, stating in effect that he would soon see the proper officer of the bank and make an arrangement for starting a special account, or give a demand note to cover such of these notes as were due, and the bank could then collect them for the payee. The cashier of the plaintiff bank testified that the bank had not taken the notes as collateral, but had discounted them in regular course: *Held*, the evidence was conflicting as to whether the bank was the holder in due course of the note sued on, and raised an issue for the determination of the jury on the questions presented, and the refusal of the judge to accept such issues tendered was reversible error. *Bank v. Exum*, 199.

3. *Negotiable Instruments—Fraud—Pleadings—Holder in Due Course—Burden of Proof—Trials.*—Where fraud is alleged in the execution of a negotiable note, one claiming to be a holder thereof in due course has the burden to show that he is a *bona fide* purchaser. Revisal, 2208. *Bank v. Brown*, 160 N. C., 23, cited and distinguished. *Ibid.*

4. *Indorsement of Payee—Equitable Title—Original Defenses.*—Where a note is payable to order and not to bearer, the indorsement of the payee is necessary to transfer the legal title; and where this is not done, a subsequent holder is not one in due course, though the instrument may have been indorsed to him for value by an intermediate holder; and as he is the equitable owner, the instrument is subject to the defenses existing between the original parties. *Bank v. McEachern*, 333.

BILLS AND NOTES—*Continued.*

5. *Same—Evidence of Indorsement—Burden of Proof.*—Where one claims to be the holder in due course by indorsement of a negotiable note made payable to the order of the payee, and the payee's indorsement is denied, in his action to recover on the note the burden of proof is on him to prove the indorsement; and where the name of the payee appears thereon as an indorser, and the only evidence of its indorsement by the payee is a promise by him that he would do so, the question of his indorsement is one for the determination of the jury under instructions from the court that the plaintiff must satisfy them thereof by the greater weight of the evidence. *Ibid.*

6. *Indorsement of Payee—Subsequent Indorsee—Equitable Title—Original Defenses.*—Where a note payable to order is acquired by the holder from one to whom the note has been delivered, for a valuable consideration by the payee, but without the latter's indorsement, the present holder cannot have acquired a better legal title than his indorsee; and as such indorsee was the owner of the equitable title only, the instrument is still subject to the defenses existing between the original parties. *Ibid.*

7. *Fraud—Equitable Title—Good Faith.*—Where fraud in the execution of a negotiable instrument payable to order has been established, the question of good faith in acquiring the instrument does not arise in a suit thereon brought by the owner of the equitable title, who has acquired the instrument without the indorsement of the payee. *Ibid.*

BILLS OF LADING. See Carriers of Goods.

BROKER. See Principal and Agent.

BURDEN OF PROOF. See New Trials; Bills and Notes; Partition; Trials; Bastards.

CANCELLATION. See Insurance; Deeds and Conveyances.

CARRIERS OF GOODS.

1. *Bills of Lading—Contract of Carriage—Acceptance of Shipment—Liability.*—A common carrier of freight assumes the duty and responsibility of transporting and delivering the freight it accepts for that purpose, and it is not necessary that the contract of carriage should be evidenced by a bill of lading or other writing in order to subject the carrier to the payment of damages of that character in an action brought for that purpose. *Smith v. R. R.*, 143.

2. *Same—Interstate Commerce Commission—Classifications.*—The classifications of the Interstate Commerce Commission of rates of freight on live stock is irrelevant when the carrier, relying upon a stipulation in its live-stock bill of lading, fails to show that the shipment was made under it. *Ibid.*

3. *Live Stock—Damages—Evidence.*—In an action to recover damages from a carrier for the negligent killing of a mule in a car-load shipment of live stock, evidence is competent that the mule was found dead at the destination of the shipment with its foot through the

CARRIERS OF GOODS—*Continued.*

slats of the cattle car where a piece of the slat had been, for some time, broken off, which otherwise would not have permitted it; that this was the only place in the car through which a mule could have gotten its foot; that the mule had apparently fallen down in this position and could not again get up. *Ibid.*

4. *Duty to Transport—Common-law Liability—Verbal Demand for Cars—Interpretation of Statutes.*—It is the common-law duty of a common carrier to transport freight tendered it within a reasonable time, to which the statute, section 2634a, Revisal, adds the duty that the carrier furnish cars for carload shipments upon request of the shipper in writing, and provides a penalty for its failure to furnish the cars, etc. Hence, where the recovery of the penalty is not sought, but the action is to recover damages for the carrier's failure to receive and ship the goods, a written demand for the cars is not required, and a verbal one is sufficient. *Bell v. R. R.*, 180.

5. *Tender for Transportation—Shipment Refused.*—The law does not require a vain or foolish thing; and where a railroad company has refused to transport a part of a large shipment, requiring a number of cars, it may not relieve itself from liability on the ground that the whole shipment was not placed on its yards for that purpose, when the part delivered to it occupied all the available space which could have reasonably been used, thus requiring the carrier to transport it before further delivery to it could reasonably have been made. *Ibid.*

6. *Liability—Insurer.*—The liability of a common carrier of goods is that of an insurer, and where there is no valid exemption in the contract of carriage, it extends to every loss or damage, however occasioned, unless by the act of God or the public enemy, or some cause or accident without any fault or negligence on the part of the carrier. *McConnell v. R. R.*, 504.

7. *Parol Contract.*—A parol contract made with the carrier for the transportation of goods is as binding, when established, as a written one. *Ibid.*

8. *Same — Bills of Lading — Negligence — Restrictive Liability—Waiver.* Where there is evidence tending to show that a common carrier made a parol contract to transport goods for the shipper, without restricting its liability, and thereafter by mistake the shipper signed a bill of lading purporting to restrict the amount of recovery for damages in consideration of the rate made, and the jury have found under correct instructions from the court that the parol agreement had been made, and there was no waiver thereof by the shipper, the carrier's liability for damages to the shipment caused by its negligence is ascertained under the parol contract; and the question as to the validity of stipulations in bills of lading, used in interstate commerce, restricting the recovery of damages to an appraised value at the initial point where the contract was made, does not arise. *Ibid.*

9. *Connecting Lines—Negligence—Interstate Commerce—Contract for Delivery.*—Where a carrier has unconditionally contracted to transport and deliver goods beyond its own line to its destination, it is as

CARRIERS OF GOODS—*Continued.*

liable for the damages caused to the shipment by the negligence of its connecting lines as for negligence occurring on its own line of road; and where the shipment is interstate, the Carmack amendment to the Hepburn Act, making the initial line liable for the negligence of its connecting lines and permitting it a recovery against them, need not, therefore, be considered. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Railroads—Principal and Agent—Conductor—Malicious Abuse of Passenger—Scope of Employment.*—The use of abusive and insulting language to a female passenger, by a conductor on a passenger train, because she had not purchased a ticket for a 9-year-old child, traveling with her, is an act done within the scope of his employment, and binding upon the railroad, without its ratification, as an act of its vice-principal. *Huffman v. R. R.*, 171.

2. *Railroads—Conductor—Malicious Abuse of Passenger—Punitive Damages.*—A railroad company is liable in punitive damage for the willful, wanton, and malicious abuse by its conductor of a female passenger traveling on his train, occasioned by her not having purchased a ticket for her 9-year-old child traveling with her. *Ibid.*

3. *Street Railways — Personal Injury — Negligence — Accident—Trials—Nonsuit.*—In an action against a street car company to recover damages for a personal injury alleged to have been negligently inflicted, there was evidence that while the plaintiff was attempting to alight from a moving car of defendant he caught hold of a grab-handle, used for the purpose, in which a screw on the off side from him, at the bottom of the handle, used for keeping the bar from slipping in the socket, projected about 1-16 of an inch, which caught in a thin finger ring on his hand, as his hand naturally slipped down the bar in alighting, and tore the ring off, to his injury. There was also evidence that the plaintiff had told the conductor to stop for him at this place, and that the motorman, seeing the plaintiff about to alight, told him to wait and he would stop the car: *Held,* the injury was the result of an accident, and not attributable to the defendant's negligence, and a motion as of nonsuit was properly granted. *Pendergrast v. Traction Co.*, 553.

CAVEAT. See Wills.

CITIES AND TOWNS. See Health.

1. *Negligence—Defects—Actual Notice.*—In an action to recover damages against a town for the negligent killing of plaintiff's intestate by a defective condition of its electric apparatus for lighting the streets, evidence that previous notice had been given to one of its street laborers is incompetent to fix the town with direct knowledge of the defect. *Monds v. Dunn*, 108.

2. *Municipal Corporations — Adverse Possession — Title — Limitation of Actions.*—A municipality may acquire title to real property by adverse possession under the statute when held under the same conditions as required of individuals to ripen their title thereby. *Raleigh v. Durfey*, 154.

CITIES AND TOWNS—*Continued.*

3. *Municipal Corporations—Sidewalks—Legislative Powers.*—A city may sell and convey strips of land owned by it on each side of its market house, in the shape of sidewalks, used for the convenience of hucksters therein and other tenants thereof, when such sale is authorized by statute, and the adjacent owners of property have acquired no rights in these walks incident to the use and enjoyment of their property. *Ibid.*

4. *Same—Deeds and Conveyances—Right of Abutting Owners.*—The city of Raleigh, being authorized by the Legislature to sell its market house, including two walkways, one on the north and the other on the south side, each about 6 feet wide, which were used for the convenience of the hucksters and other tenants, with doors opening from each stall, where farm wagons would back up with produce for sale, under the provisions of the statute, contracted to sell the market house, together with these walkways, to the defendant, who refused the deed upon the ground that the plaintiff was without authority to sell the two walkways included in the transaction, as they were a part of the two public streets of the city about 50 feet wide on each side of the market house, and that the owners of the property, having a sufficient sidewalk provided for them, on their side of these streets, had acquired rights therein: *Held*, the walkways for the market house were not a part of the public street, and the owners on the opposite side of the streets could acquire no rights in them. *Ibid.*

5. *Municipal Corporations — Streets and Sidewalks — Raleigh — Title in State—Municipal Control.*—While the title to certain streets in the city of Raleigh was reserved by the State of North Carolina, the control of the city over these streets is the same as in any other cities or towns in the State, and it has the same discretionary right to cut down or trim up trees bordering the streets for the purpose of government or management, which can only be restrained in cases of willfulness or oppression. *Moore v. Power Co.*, 300.

6. *Municipal Corporations—Quasi-public Corporations—Charter Powers.* A municipal corporation cannot transfer to a *quasi*-public corporation the rights that it exercises by virtue of its municipal charter. *Ibid.*

7. *Same—Injury to Shade Trees—Damages—Injunction.*—Where a *quasi*-public corporation, authorized by its municipal charter to place its poles and string its wires along the streets of a city, threatens the property rights in the shade trees along the sidewalks of adjoining owners, by cutting or trimming the trees, without affording them compensation, an injunction will issue irrespective of whether or not the cutting was about to be done unnecessarily, wantonly, or oppressively. *Ibid.*

8. *Corporations — Shade Trees — Wanton Injury — Punitive Damages.* Punitive damages may be awarded against a corporation authorized by its charter to place its poles and string its wires along a city street, for wantonness or oppression in cutting shade trees on the sidewalks along its route to the damage of abutting owners. *Ibid.*

9. *Corporations—Injury to Shade Trees—Measure of Damages—Deterioration of Property.*—An abutting owner may recover damages from a

CITIES AND TOWNS—*Continued.*

quasi-public corporation for cutting or trimming shade trees, on the sidewalk in front of his property, done by it for the purpose of stringing its wires. etc., as authorized by its charter, to the extent that his property is thereby depreciated in value. *Ibid.*

10. *Actions, Form of—Injury to Shade Trees—Condemnation—Measure of Damages.*—Forms of action are not now regarded of supreme importance, and the measure of damages for injury to shade trees done by a *quasi*-public corporation in pursuance of its charter powers is the same, whether the action be brought by the person who has a property right in the trees or by the corporation in condemnation proceedings. *Ibid.*

11. *Municipal Corporations — Immoral Shows — Police Powers — Arrest.* Under the provisions of Revisal, 3731, and Private Laws 1907, ch. 1, applicable to the city of Raleigh, the chief of police of that city and his lawful officers or subordinates have the right to prevent or suppress an indecent or immoral show, given in any public place or in any place to which the public are invited, and in the proper discharge of these duties they may act immediately whenever such exhibitions are taking place in their presence or are imminent and their interference is required to prevent them; and in such case they may arrest, without warrant, any and all persons who aid or assist in such plays when, under all the facts and circumstances as they reasonably appear to them, such course is necessary for the proper and effective performance of their official duty. *Brewer v. Wynne*, 319.

12. *Municipal Corporations — Immoral Shows — Police Powers — Arrest—Reasonable Apprehension.*—When it appears in an action for damages for false arrest and imprisonment, defended upon the ground that the arrest was made to prevent the exhibition of a prohibited immoral show, that the plaintiff was arrested and imprisoned by the chief of police, acting without a warrant, under the written instruction of the mayor, the act of imprisonment is one calling for explanation, and would constitute an actionable wrong unless it was sufficiently established that the show in question was indecent or immoral, and that the action of the officer was necessary to prevent or suppress the exhibition under all of the facts as they reasonably appeared to him. *Ibid.*

13. *Same—Trials—Evidence—Nonsuits.*—The defendants in this action arrested and imprisoned the plaintiff, for which he brings his action for damages, and the defense is urged that they made the arrest in the discharge of their duties in preventing the exhibition of an immoral play, as they were authorized to do by the statute. While the evidence was conflicting, that of the plaintiff tended to show that he was under contract to heat the theater, and knew nothing of the character of the show, and was instructed by the manager of the theater to lock the doors and let no one enter, and turning to comply with this request he was arrested and incarcerated by the defendant chief of police, without offering resistance. There was further evidence that the show was not immoral, and that no exhibition thereof would be given without permission of the city authorities: *Held*, a motion to nonsuit was improvidently allowed. *Ibid.*

CITIES AND TOWNS—*Continued.*

14. *Landlord and Tenant—Municipal Corporations—Ordinances—Streets and Sidewalks—Swinging Gates—Negligence of Owner—Interpretation of Statutes.*—A city ordinance making it unlawful for any person to have on his premises a gate that swings out upon a sidewalk of its public streets is valid, and its violation is made a misdemeanor (Revisal, 3702); and, when continuously violated, it may become a nuisance; and the landlord may become liable to third persons injured by reason of his failing to comply with the ordinance, for whether the property is leased before the passage of the ordinance or afterwards, it is his duty, as owner, to comply with its requirements. *Knight v. Foster*, 329.

CLERKS OF COURT.

Partition—Reversal of Judgment—Fraud—Record—Motion for Judgment —Statutes.—Where it appears of record that the clerk of the Superior Court in proceedings to partition lands had rendered a judgment in plaintiff's favor, and had set it aside on defendant's motion made before him seventeen months thereafter, upon allegation of fraud in its procurement, and likewise that he had fraudulently prevented them from appearing and defending, to which plaintiff did not except, his motion in the Superior Court, in the cause transferred, for judgment in his favor upon the whole record, cannot be allowed; and it is held that the clerk was within the provisions of Revisal, sec. 2494, in setting aside his former order, in plaintiff's favor, on defendant's motion, at the time it was made before him. *Turner v. Davis*, 38.

CLOUD UPON TITLE. See Equity.

COLLATERAL ATTACK. See Judgments.

COLOR OF TITLE. See Deeds and Conveyances; Trespass.

CONDEMNATION. See Eminent Domain.

CONSIDERATION. See Contracts; Deeds and Conveyances.

CONSTITUTION OF NORTH CAROLINA.

ART.

I, sec. 5. Warrants for arrest for offenses not committed in immediate presence of magistrate must be supported by preliminary oath or sworn evidence. *Brewer v. Wynne*, 319.

IV, sec. 8. Only questions of law or legal inference are reviewable in the Supreme Court. *Pender v. Ins. Co.*, 98.

IX. A community which pays a special tax for school facilities is not restricted from sharing in the general tax levied in the county. *Comrs. v. Board of Education*, 404.

X, sec. 8. A consent judgment of the husband may pass the homestead of the wife. *Simmons v. McCullin*, 409.

CONSTITUTIONAL LAW. See Drainage Districts; Deeds and Conveyances.

1. *Appeal and Error—Weight of Evidence—Matters of Law.*—The Supreme Court can only review on appeal a "decision of the courts below upon matters of law or legal inference" (Const., Art. IV, sec.

CONSTITUTIONAL LAW—*Continued.*

8); and where there is legal evidence submitted to the jury, under correct instructions from the trial judge, no appeal lies from the verdict and judgment to review the findings of fact. *Pender v. Ins. Co.*, 98.

2. *Municipal Corporations—Health—Quarantine—Separate Government—Taxation—Representation.*—Where an incorporated town has not appointed a quarantine officer, it is to be regarded as any unincorporated part of the county as regards its liability for the expenses incurred by the county in the care of its citizens whom the latter, under its health regulations, have quarantined for smallpox; for an incorporated town is taxed, as any other part of the county, to bear this expense, and having no more control over its management than if it were unincorporated, a further tax would be, in effect, like taxation without representation. *Commissioners v. Henderson*, 114.

3. *Municipal Corporations—Deeds and Conveyances—Sidewalks—Legislative Powers.*—There is no constitutional restriction upon the right of the Legislature to authorize a municipality to sell its public sidewalks, under the circumstances of this case, and a sale made in pursuance of the powers conferred is valid. *Raleigh v. Durfey*, 154.

4. *Judicial Warrants—Municipal Corporations—Ministerial Acts—Orders for Arrest—Immoral Shows.*—Judicial warrants, general in terms and unsupported by preliminary oath or sworn evidence and for conduct not committed in the immediate presence of the magistrate, are forbidden by the Federal Constitution, Amendment IV, and by the State Constitution, Art. I, sec. 15; and in this it is *Held*, that the written order given by the mayor of Raleigh to the chief of police is ministerial in character, and must be so considered in determining whether the mayor authorized the act of arrest by the chief of police, and to what extent he may be held responsible for it. *Brewer v. Wynne*, 319.

5. *Corporations—Waterworks—Statutes—Substitution of Uses—Interpretation of Statutes.*—A waterworks company having acquired lands under condemnation proceedings, authorized by its charter, and thereunder paid the full value of the fee, thereafter conveyed them to the city for the purpose of a public park, with authority under a legislative enactment for the change in the use of the lands indicated: *Held*, that should the waterworks company not have acquired the fee, the Legislature had the power to authorize the substitution of the one public use for the other, and the lands did not revert to the original grantor, or his heirs at law, for nonuser of the lands for the original purpose. *Torrence v. Charlotte*, 562.

CONTRACTS. See Deeds and Conveyances; Landlord and Tenant; Gaming; Carriers of Goods; Insurance; Telegraphs and Telephones; Equity.

1. *Contracts to Convey—Marriage—Consideration.*—An obligation made to convey lands upon condition that the obligee marry the daughter of the obligor, which he accordingly does, is supported by a valuable consideration, to wit, marriage. *Winslow v. White*, 29.

2. *Same—Statute of Frauds.*—The plaintiff and defendant agreed by parol that if the former married the daughter of the latter, the de-

CONTRACTS—*Continued.*

fendant would pay him a certain sum of money, which was subsequently by mutual agreement changed to a certain strip of the defendant's land. The plaintiff married the defendant's daughter thereafter, and a written agreement, dated as of the date of the marriage, was given by the defendant to the plaintiff, that if the plaintiff "will marry my daughter Lily, I hereby agree to give him all that strip of land," definitely describing it: *Held*, the paper-writing was sufficient under the statute of frauds, and specific performance thereof should be decreed. *Ibid.*

3. *Written—Varied by Parol—Principal and Agent—Special Agent—Evidence.*—One acting as sales agent for a piano company is not a general agent, and his authority to make any change from the written contract, signed by the purchaser, in direct contradiction of the conditions printed thereon in bold-face type, must be specially shown. *Piano Co. v. Strickland*, 250.

4. *Same—Trials—Instructions.*—The declarations of an agent for the sale of pianos, that he had special authority to alter by parol the printed form of his sales contract, contrary to its express provision, are incompetent as evidence of his special authority to do so; and where a balance is admitted to be due under the written contract sued on, except for a claim made by the buyer arising from an agreement of this character resting in parol, the jury should be instructed to answer the issue in favor of the plaintiff if they believe the evidence. *Ibid.*

5. *Written—Delivery on Condition—Parol Agreement—Contradiction—Vendor and Vendee.*—The rule that a sales agent may not vary a written contract of sale by a parol agreement with the purchaser contrary to the express provision of the writing, has no application when the contract was received by the agent with the verbal understanding that it was not to become effective until further order of the purchaser; and where the agent has sent the contract to his principal in violation of this agreement, and the goods are shipped in consequence, the purchaser is not liable under the written contract, in an action brought thereon for the purchase price. *Mercantile Co. v. Parker*, 275.

6. *Written—Parol Evidence—Implied Warranty—Principal and Agent.*—While a written contract for the sale of goods may not be contradicted by an unauthorized parol agreement made with the sales agent by the purchaser, the law will imply a warranty that the goods are at least merchantable; and where a manufacturer of medicines brings suit upon a contract of this character for the sale of his products, the defense is available to the buyer, upon the implied warranty, that within the knowledge of the seller the medicines were worthless. *Medicine Co. v. Davenport*, 294.

7. *Vendor and Vendee—Goods Returned—Tender—Readiness to Pay—Payment into Court.*—The manufacturer and seller of medicines brought suit upon a contract of sale of his products, which was resisted upon the ground that the medicines were worthless. The buyer returned a part of his purchase and sent his check for the

CONTRACTS—*Continued.*

balance, which he had sold. The seller returned the check, but not the medicines which had been sent to him. It having been ascertained by the jury that the medicines were worthless. it is *Held*, (1) that the plaintiff could not recover the value of the goods he had kept; (2) that upon the question of interest and costs, the defendant should have shown a continuous readiness to pay, or a payment into court, and merely offering the check on a foreign bank was insufficient. *Parker v. Beasley*, 116 N. C., 1, and *Bateman v. Hopkins*, 157 N. C., 470, cited and distinguished. *Ibid.*

8. *Trials—Evidence—Nonsuit—Defenses—Independent Contractor — Contributory Negligence.*—In an action to recover damages arising from a personal injury alleged to have been negligently inflicted, neither the defense that the act complained of was that of an independent contractor nor evidence of contributory negligence will be considered upon a motion as of nonsuit upon the evidence. *Semble*, from the facts and circumstances of this case, the principal would be responsible, though it were established that the act complained of was that of an independent contractor while giving a balloon ascension as a "free attraction" at a county fair. *Smith v. Agricultural Society*, 346.

9. *Written—Parol Evidence—Contradiction.*—Parol evidence is not admissible to contradict, add to, or vary the terms of a written contract; and in an action upon the written instrument it may not be shown that contemporaneously with the writing, the parties had agreed by parol upon other terms and conditions and required their performance by a party, as a part of the consideration upon which the writing had been executed, when the failure to perform the parol stipulation would not only vary the instrument, but invalidate the entire transaction. *Wilson v. Scarboro*, 380.

10. *Debtor and Creditor—Order Upon Creditor—Equitable Assignment—Acceptance—Consideration.*—An order made by a creditor on his debtor to pay to another whatever amount may be due, is, when brought to the notice of the latter, an equitable assignment of the debt; and where the order is written, specifying a sum certain, and is accepted under an agreement that it will be paid to the extent of whatever amount may be due, an action may be maintained by the payee of the order upon its acceptance, not only treated as an equitable assignment, but as an original promise to pay, supported by the consideration of the release of the debtor from his former obligation and also of the amount ascertained to be due; the amount thus recoverable bearing interest from the date of the acceptance, if the money is then in hand. As to whether an unconditional acceptance by the drawee, when he owes nothing to the drawer of the order, falls within the statute of frauds, *Quære*. *Craig v. Stewart*, 531.

11. *Fraud—Damages—Trials—Evidence.*—In this action upon a contract defended upon the ground of fraud, there was evidence of the fraud and resultant damages sufficient to sustain the verdict of the jury, under correct instructions, and no error is found. *Sewing Machine Co. v. Bullock*, 547.

CONTRACTS, PAROL. See Carrier of Goods.

CONTRIBUTORY NEGLIGENCE. See Trials; Master and Servant; Negligence.

CORPORATIONS. See Liens; Courts; Cities and Towns.

Waterworks — Condemnation—Fee—Nonuser — Reversion.—Where it appears in a proceeding by a waterworks company to condemn lands, that the price assessed and paid for the lands thereunder was the full value of the fee, which the proceedings purported to transfer, the lands do not revert to the original owner or heirs at law for nonuser of the lands for the purposes for which they were acquired. *Torrence v. Charlotte*, 562.

COSTS. See Judgments.

Municipal Corporations—Homicide—Trials—Necessary Expenses—Chemical Analysis—Court's Discretion—Counties—Parties—Constitutional Law.—Where a defendant is charged with homicide by means of poison, and the trial judge has ordered a post-mortem examination of the stomach to be made, which was accordingly done, and resulted in the discharge of the defendant, and the taxing of the cost of the analysis against the county: *Held*, the cost of the anaylsis was a reasonable county expense, resting within the sound discretion of the court, and binding upon the commissioners. *Withers v. Commissioners*, 341.

COTTON BROKER. See Principal and Agent.

COUNTIES. See Municipal Corporations.

COUNTY COMMISSIONERS.

Bridges—Discretionary Powers—Good Faith—Courts—Appeal and Error. The courts will not review the action of county commissioners in building a bridge wholly situated in the county, to take the place of a public ferry for many years operated across a stream, where there is no evidence of fraud or oppression; such matters being entirely within the discretionary powers conferred by law upon the commissioners, when exercised in good faith. *Davenport v. Commissioners*, 147.

COURTS. See Process; Trials; Clerks of Court; Appeal and Error.

1. *Injunction — Appeal and Error — Subsequent Motion—Jurisdiction.*—Where in an action by a trustor in a deed of trust given on lands to secure a debt, the court has granted an order restraining the sale of the lands upon condition that the plaintiff pay into court the amount he admits to be due, and he fails to perform the condition imposed and appeals to the Supreme Court, he may not thereafter renew the motion for the order in the Superior Court upon the same state of facts, for the appeal carries with it all questions incident to and necessarily involved in the ruling of the appellate court. *Bonner v. Rodman*, 1.

2. *Jurisdiction—Federal Receivers—Permission to Sue—Purchasing Corporation.*—It is unnecessary, under the United States statutes, to get permission from the Federal courts to sue its receivers of an insol-

COURTS—*Continued.*

vent corporation, in the courts of a State, and *a fortiori* such consent is unnecessary to sue in the State court a purchasing railroad corporation under a Federal foreclosure sale, for the wrongful death of an intestate inflicted while the property was being operated by the receivers, after confirmation had been decreed and the purchasing corporation had been put into possession; and it is further held in this case that the decree of the Federal court retaining the cause for the protection of the purchaser and others interested was not intended to have a contrary effect. *Lassiter v. R. R.*, 19.

3. *Railroads — Federal Receivers — Purchasing Corporation—Torts—Liability—State's Courts—Jurisdiction.*—The liability of a purchasing railroad corporation of the property of an insolvent railroad corporation at a foreclosure sale in the Federal court, after confirmation by the court and possession given, for the wrongful death of an intestate, inflicted while the property was being operated by the receivers, is a question of law which may be resolved by the State court in an action there begun; and it is held that such purchasing corporation is liable, for that the earnings of the property in the receiver's hands are first applicable under the law to liabilities of this character, and its application otherwise would be a wrongful diversion which would render the purchasing company equitably liable. *Ibid.*

4. *Judgments—"Mistake," Etc.—Words and Phrases—Interpretation of Statutes.*—Revisal, 513, authorizing the judge to set aside a judgment and verdict or other proceedings within one year after notice, is not restricted to cases of excusable neglect, but embraces also those taken "through his mistake, inadvertence, or surprise," the meaning of each being distinct from the other, and the right applying as to each separate from the other, as, in this case, for "mistake" alone. *Mann v. Hall*, 50.

5. *Judgment, Adverse—"Mistake," Etc.*—Where a successful party litigant has, through his mistake in the description of lands, recovered less than he should be entitled to, he may move the court, under the provisions of Revisal, sec. 513, to set aside the verdict and judgment, the judgment being adversary to him to the extent of the diminution of his recovery through his mistake. *Ibid.*

6. *Appeal and Error—Weight of Evidence—Matters of Law—Constitutional Law.*—The Supreme Court can only review on appeal a "decision of the courts below upon matters of law or legal inference" (Const., Art. IV, sec. 8); and where there is legal evidence submitted to the jury, under correct instructions from the trial judge, no appeal lies from the verdict and judgment, to review the findings of fact. *Pender v. Insurance Co.*, 98.

7. *Jurisdiction—Federal—Judgments.*—The defendant in this case is held liable for the torts committed when the property purchased by it was in the receiver's hands, and the judgment rendered in the Federal court confirming the purchase, etc., did not have the effect of, and was not intended to oust the jurisdiction of the State's courts, under the decision of *Lassiter's case, ante*, 19. *Bell v. R. R.*, 180.

COURTS—*Continued.*

8. *Judicial Notice—Decisions—Numerous Actions—Banks and Banking—Holder in Due Course—Presumptions.*—The courts will take notice from the reported cases that suits of this nature brought in behalf of McLaughlin Brothers on notes given for the purchase of "imported French coach horses" have been very numerous, upon the question of whether the plaintiff bank would become a *bona fide* holder in due course of notes of this character, or take them as collateral. *Bank v. Exum,* 199.

9. *Orders — Pleadings—Time Extended — Presumptive Knowledge.*—The parties to a civil action are presumed to take notice of a general order made by the court of an extension of time allowed within which to file pleadings beyond that allowed by the statute, and this is especially true when one of the parties represents himself as attorney. *School v. Peirce,* 424.

10. *Same—Defense Bond—Excusable Neglect.*—The defendant in an action for possession of lands must tender his defense bond before he is permitted to answer (Revisal, sec. 453); and when it appears that he has had actual or constructive knowledge of an extension of time to file the complaint, and fails to file his answer within the time allowed, or to obtain an extension of time within which to do so or to file his defense bond, without showing any meritorious reason for his not having done so, his neglect is inexcusable, and a judgment by default entered against him in the cause will not be disturbed on appeal. *Ibid.*

11. *Excusable Neglect—Judgment—Default—Meritorious Defense.*—Upon a motion to set aside a judgment for excusable neglect, the burden of proof is upon the movant to show a meritorious defense as well as that his neglect was excusable; but when he has failed to show the latter, it becomes immaterial as to whether he had a meritorious defense or not. *Ibid.*

12. *Justices—Judgment Docketed in Superior Court—Service of Process—Execution Recalled—Procedure.*—Where a judgment of a justice of the peace has been docketed in the Superior Court and execution issued therefrom, which is sought to be recalled upon the ground that the judgment had been obtained by default and the summons had not been served, though upon its face it so appeared to have been, the remedy is by motion in the justice's court to set aside the judgment there rendered, made upon notice to the plaintiff, his attorney of record, or by publication; and an injunction may not issue in the Superior Court to stay the execution. *Ballard v. Lowry,* 487.

13. *Same—Findings—Undertakings.*—Upon motion duly made before a justice of the peace to set aside his judgment for lack of proper service, which has been docketed in the Superior Court, from whence execution has issued, it is the duty of the justice to find the facts; and when such motion is lodged the defendant may apply to the clerk and have the execution recalled until the motion is finally disposed of, upon giving the required bond. *Ibid.*

14. *Justices'—Service of Process—Judgment Set Aside—Motion in the Cause—Jurisdiction—Consent of Parties.*—Where upon the face of a

COURTS—*Continued.*

summons it appears to have been properly served, the service thereof may not be impeached except by motion in the cause to set it aside; and where the summons issued from a justice's court, the Supreme Court will not treat the motion as properly lodged, even by consent of the parties, when it does not so appear to have been done. *Ibid.*

15. *Ejectment—Justices' Courts—Landlord and Tenant—Jurisdiction.*—To sustain a summary action of ejectment before a justice of the peace under Revisal, sec. 2001, etc., the relation of landlord and tenant must be shown, and where there is no evidence of this relationship, and title to the realty is the matter involved, the action should be dismissed in the Superior Court for the want of jurisdiction where the action was originally brought. *McIver v. R. R.*, 544.

COURT'S DISCRETION. See Trials.

CRIMINAL CONVERSATION. See Husband and Wife.

CROSSINGS. See Railroads.

DAMAGES. See Measure of Damages; Husband and Wife; Trespass; Insurance; Trials; Witnesses; Cities and Towns; Eminent Domain.

DANGEROUS MACHINERY. See Master and Servant.

DEBT, ACTION OF.

Trials — Debtor and Creditor — Account — Evidence—Admission of Correctness—Judgment—Interest.—Where there is evidence that the deceased had examined, before his death, the account for which his administrator is sued, and had said it was right, promising to pay it out of certain moneys he was expecting, and that the account sued on was the same as that the deceased had acknowledged, except as to added interest, it is not reversible error for the witness to testify that the account was for groceries, though he testified that he had not personally sold them; and the amount of the debt being established by the verdict of the jury on this evidence, it was proper that the interest thereon be allowed in the judgment. *Scott v. Reynolds*, 502.

DECLARATIONS. See Evidence.

DEEDS AND CONVEYANCES. See Equity; Trials; Mines and Minerals; Equity.

1. *Fixtures — Vendor and Vendee — Reservation of Timber — Expressio Unius, Etc.—Intent.*—A deed to land whereon is laid and affixed an ordinary logging road, which reserves a part of the timber growing on the land, and does not reserve the logging road, passes the title to the latter, under the doctrine of *expressio unius exclusio alterius;* and the contention that the logging road was not intended as a fixture and should not be considered as such, for that it was for the purpose of removing the timber reserved in the deed, cannot be maintained. *S. v. Martin*, 141 N. C., 832, cited and applied. *Basnight v. Small*, 15.

2. *Timber Deeds—Extension Period—Conditions Performed—Grantee of Lands—Notice.*—Where standing timber on land is granted to one

DEEDS AND CONVEYANCES—*Continued.*

and his assigns, to cut within a certain period of time, with a certain extension period to the grantee upon previous notice given and a consideration paid to the grantor, and subsequently the owner conveys the land itself, and in his deed refers to the timber deed, the purchaser of the land takes with notice of the provisions of the timber deed, and the grantee therein and his assigns acquire the right to cut the timber during the extension period upon giving the notice and paying the consideration required to the original owner of the land. *Powell v. Lumber Co.*, 36.

3. *Contracts—Options—Timber Deed—Extension of Time—Conditions—Strict Compliance.*—Where a timber deed provides that, upon payment of a stated consideration and prior notice given, the grantee shall have an extension of time beyond that originally granted in which to cut the timber, the extension clause is merely an option and is strictly construed, requiring an exact compliance with its terms, and in order to be available to the grantee, he must give the notice before the expiration of the original period for cutting and pay or make a proper tender of the consideration named. *Lumber Co. v. Whitley*, 47.

4. *Timber Deeds—Period of Cutting—Reversion.*—When the grantee in a deed conveying standing timber on lands, with an optional extension period for cutting, desires the further time allowed, he must comply with the conditions imposed in the conveyance, or the timber uncut after the original time allowed will revert to the grantor or his assigns. *Warwick v. Taylor*, 68.

5. *Boundaries—Trials—Conflicting Evidence.*—Where the question of the location of lands in dispute is determined by the location of a certain point named in the description of a deed, and the evidence is conflicting, the verdict of the jury thereon is controlling. *Weston v. Lumber Co.*, 78.

6. *Title—Lords Proprietors—Bill of Rights—Halifax Constitution—Lands Confiscated—State's Lands.*—Section 25 of the Bill of Rights, prefatory to the Halifax Constitution of 1776, vested the property of the soil within the limits of the State, as there laid down, in the "collective body of the people," excepting only "the titles or possessions of individuals holding or claiming under the laws heretofore in force or grants heretofore made by George III, or his predecessors, or the late Lords Proprietors or any of them." Hence, whatever titles George III, or any of the Lords Proprietors retained in themselves, ungranted at that date, passed to the sovereign people of this State, and by chapter 1, Laws 1777 (24 St. Records, 43) became the subject of entry and grant. Therefore, those who establish their title by mesne conveyances under a grant from the State under the act of 1777 of lands of Earl Granville ungranted by him at the time of the adoption of the Constitution of 1776, hold under a valid grant. *Ibid.*

7. *Heirs at Law—Fraud Against Creditors—Actions.*—The heirs at law are estopped, under a deed to lands made by their ancestor to another, from claiming any rights that were not available to him. Hence they may not impeach, in their own right, his deed, so made, for fraud against his creditors. *Pierce v. Stallings*, 107.

DEEDS AND CONVEYANCES—*Continued.*

8. *Probate Officer—Interest—Relationship.*—The mere fact that the probate officer to a deed was the son of the grantor therein does not give him such interest in the lands, as heir at law, as would affect the validity of his act. *Holmes v. Carr*, 122.

9. *Feeding Estoppel—Married Women.*—The widow and daughter of the deceased went into possession of their respective shares of his land under a deed of partition. Thereafter the latter conveyed to another, and it is *Held*, that the validity of the partition is immaterial, for the daughter, though a married woman, was estopped by her deed from claiming an interest in her mother's land, which came to her by descent, after her mother's death, and this "fed the estoppel." *Ibid.*

10. *Evidence—Declarations—Interest of Declarant.*—Where title to lands in controversy is made to depend upon the delivery of a deed thereto by H. to A., both of whom are deceased, declarations of H. that he had delivered the deed to A., and made before the defendant had acquired any title, are competent as being against interest and not self-serving declarations. *Carroll v. Smith*, 204.

11. *Conflicting Clauses—Construction of Deeds.*—Where an estate in fee is granted in the conveyance clause of the deed, and from the habendum and other parts of the deed it appears that the grantor intended to convey an estate for life, with contingent limitations over, the two clauses in the deed will not be regarded as repugnant, but as in explanation of each other, and the intent of the grantor, as gathered from the whole instrument, will prevail. *Jones v. Whichard*, 241.

12. *Timber Deeds—Reservations—Conflicting Rights—Merger.*—The owner of lands conveyed the timber thereon to A., under whom defendant claims, down to 12 inches in diameter, and thereafter conveyed the lands to D., who conveyed the timber thereon to the plaintiff down to 10 inches in diameter. Thereafter, with a reservation in his deed of the timber above 10 inches at the base, which he had conveyed to plaintiff, he conveyed the land to C., who conveyed it to the defendants. The defendants' right to cut the timber expired in 1909, and the plaintiff's right to do so in 1913: *Held*, (1) when the defendants acquired the title to the lands, it was subject to plaintiff's unexpired right to cut the timber thereon, subject to the defendants' prior right, which expired in 1909, and, therefore, from that time up to 1913 the plaintiff had full right to cut the timber; (2) the merging of the two interests acquired by defendant in the purchase of the lands could not affect the plaintiff's right to cut the timber for the period stated, as he had theretofore acquired it, and it was expressly excepted from defendants' deed to the land. *Lumber Co. v. Riley*, 254.

13. *Color of Title—Proof—Adverse Possession.*—The plaintiff in his action to recover lands must recover upon the strength of his own title; and where he has failed to show title out of the State, he must show such possession under his chain of paper title as color for twenty-one continuous years as will oust the State; and where the evidence is conflicting upon the question of such possession, it is for the jury to determine the issue thus raised. *Barfield v. Hill*, 262.

14. *Fraud—False Representations—Damages.*—The old doctrine that an action to recover damages for fraud and deceit would not lie in the case of a sale and purchase of land, in reference to the quantity or

DEEDS AND CONVEYANCES—*Continued.*

correct placing of the property, when the facts were readily ascertainable by survey or otherwise, does not now obtain where positive fraud is shown, as where the grantor was unacquainted with the lands conveyed and was deceived and thrown off his guard by false statements designedly made by the grantee at the time, and reasonably relied on by him, and there was nothing to arrest attention or arouse suspicion concerning them. *Gray v. Jenkins*, 151 N. C., 83. *Pate v. Blades*, 267.

15. *Same—Knowledge—Scienter.*—One who induces another to make a deed to lands to him by such false representations as amount to positive fraud, when he did not know whether the representations made by him were true or false, is as culpable in case the other is reasonably misled or injured by them as if at the time he knew them to be untrue. *Ibid.*

16. *Fraud—False Representations—Quitclaim Deeds—Trials—Evidence.*—The plaintiff, while an enlisted man in the army, and awaiting at Baltimore transportation abroad, was induced by the defendant to convey his lands to him for $1,000, when it was reasonably worth $10,000 or $11,000, under such representations as were evidence of positive fraud; there was also evidence that after the plaintiff returned and had opportunity for investigation, but was still without further knowledge of the facts which had been falsely represented, he was induced by the defendant to sign a quitclaim deed for the consideration of $200: *Held*, it is for the jury to determine whether, under all the facts and attendant circumstances, the plaintiff acted as a reasonably prudent man in making the second deed without further investigation, and whether the fraud and deceit existent when the first deed was obtained were effective in procuring the execution of the second deed, and whether the one was the natural effect of the other. *Ibid.*

17. *Trespass—Title—Deeds and Conveyances—Trespass by Grantee—Grantor's Liability.*—One who attempts to convey standing timber on lands ascertained to belong to another, with the view and purpose of having same manufactured into lumber, in an action involving an issue as to title is responsible in damages, with his grantee, to the owner for damages done by the latter in trespassing upon the lands and cutting the timber under the rights purported to have been conveyed in the deed. *Locklear v. Paul*, 338.

18. *Timber Deeds—Contracts, Executed—Realty—Parol Evidence.*—A conveyance of the right to cut and remove timber growing upon lands, within a specified period of time, based upon a valuable consideration, or what is usually known as a deed to standing timber, is an executed contract, operating to convey a defeasible estate therein; and as standing timber is a part of the realty, the contract must be in writing, and may not be contradicted or varied, or proved by parol, but only by the contract duly executed. Hence, in this case it was inadmissible to prove a contract resting solely in parol, requiring an execution of a note or the giving of other security to one holding a mortgage on the land as a condition upon which the grantee of the timber should exercise his rights under the written contract. *Wilson v. Scarboro*, 380.

DEEDS AND CONVEYANCES—*Continued.*

19. *Tax Deeds—Notice—Affidavits—Interpretation of Statutes—Evidence—Registration.*—It is necessary to the validity of a tax deed for lands sold for taxes in 1897, and at the present time, that the purchaser at such sale serve notice upon the owner of the land and the parties in possession, and make affidavit that such notice as required by the statute had been fully complied with; and in an action involving title to the lands, that affidavit must have been registered and put in evidence, together with the deed, in order to vest title in the purchaser. *McNair v. Boyd*, 478.

20. *Tax Deeds—Purchaser—Equity—Foreclosure.*—Where lands in 1897 were sold for taxes, and bid in by the county, the county did not become the absolute purchaser, but acquired only the right to foreclose the certificate of purchase or foreclose the deed if such had been made, instead of issuing the certificate, and its assignee could acquire no superior right. Hence, such assignee acquired at most the assignment of an equity under which to institute proceedings for foreclosure. It is otherwise under the provisions of the present law, Revisal, 2905. *Ibid.*

21. *Tax Deeds—Actions—Tender of Taxes—Sheriff's Deed—Execution After Expiration of Term.*—In this case to remove a tax deed as a cloud upon the plaintiff's title, the plaintiff properly tendered the amount of taxes due on the lands, and it is held that the sheriff could have executed a valid deed after the expiration of his term of office. Revisal, sec. 950. *Ibid.*

22. *Tax Deeds—Cloud Upon Title—Possession—Limitation of Actions.*—Where the plaintiff, in his action to remove a tax deed as a cloud upon his title, is and has been in possession of the lands, the statute of limitations cannot avail as a defense. *Ibid.*

23. *Invalid Tax Deeds—Decree.*—Where in an action to set aside a tax deed the issue has been found in the plaintiff's favor, a decree of cancellation upon the payment by the plaintiff of the taxes due to the defendant with the statutory interest, should be made. *Ibid.*

24. *Stipulations—Performances by Grantee.*—The grantee in a deed is bound by stipulations or covenants contained in the deed which purport to bind him, though he may not have executed it. *Herring v. Lumber Co.*, 481.

25. *Same—Assignee with Knowledge—Timber—Reduced Price—Breach of Contract—Measure of Damages—Railroads.*—Where one has taken an assignment of an entire contract, with full knowledge of its terms, and has accepted the benefits thereof, he must also come under the burdens imposed therein upon his assignor, and the legal liabilities incident to them; and it appearing in this case that the plaintiff conveyed timber on his lands to a corporation for a reduced price, under the usual form of deeds of this character, the timber to be removed within a certain period of time, upon consideration that the corporation should build a standard-gauge railroad between certain points and running through the lands conveyed, by which the logs were to have been removed; and it further appearing that the present defendant took an assignment of this deed and the entire contract contained therein, with full knowledge of its terms and the conditions imposed

DEEDS AND CONVEYANCES—*Continued.*

on the grantee named therein; and is in the present ownership and enjoyment of the rights conveyed; and that the railroad agreed upon had not been built, it is *Held*, that the defendant, having elected to repudiate its obligation to construct the railroad, is bound under the general equitable principle of *indebitatus assumpsit*, to make good the loss which the plaintiff has sustained, to be properly admeasured by the difference between the contract price and the actual value of the timber; and further *Held*, that if the defendant or its assignor was not authorized to build a railroad of this character (Revisal, 2698), as it had contracted to do, this defense would not affect the result. *Herring v. R. R.*, 159 N. C., 382. *Ibid.*

26. *Mental Incapacity—Registration—Heirs at Law.*—Where a deed, void for mental incapacity of the grantor to make it, is registered prior to one theretofore made by the same grantor, for a valuable consideration, when he had sufficient mental capacity, the registration under the statute, Revisal, 980, can give no effect to the invalid deed, and the valid deed, though subsequently registered, will be effective; nor can the grantee in the invalid deed claim the land as heir at law of the deceased grantor, for the latter has conveyed his title to another. *Thompson v. Thomas*, 500.

27. *Delivery—Possession of Grantor—Mortgages—Trials—Verdict, Directing—Questions for Jury.*—Where a grantor in a deed produces it on the trial, the production of the deed by him is some evidence that it had not been delivered and accepted; and where there is conflicting evidence as to whether the vendee of lands subject to mortgage had accepted a deed wherein it was covenanted on his part that he would pay off the encumbrance, contrary to his agreement of purchase, it is reversible error for the judge to direct a verdict upon the evidence, if found by the jury to be true, that the deed had been delivered, for the question of delivery is one for the determination of the jury under instructions from the court. *Henry v. Heggie*, 523.

28. *Mortgages — Mortgagee's Possession — Acceptance—Evidence.*—By accepting a deed with covenants to be performed on his part, the grantee binds himself to their performance, whether he signed the deed or not; and where the deed is produced on trial by the grantee upon notice of the grantor or rule of court to do so, it is evidence of his acceptance. *Ibid.*

29. *Marked Corners—Contemporaneous Conveyance—Evidence.*—When the parties to a deed contemporaneously agree as to a controlling corner, which they mark at the time, and describe it in the deed as a certain number of feet from a fixed point, evidence is competent, as between the parties, which tends to establish the corner so marked by them; and such location made contemporaneous with the execution of the deed will control course and distance. *Allison v. Kenion*, 582.

DEFAULT. See Motions.

DISCRIMINATION. See Telegraphs and Telephones; Insurance.

DIVISION OF OPINION. See Appeal and Error.

DIVORCE.

Alimony—Injunction—Receivers.—Pending an action for divorce by the wife, she was allowed a certain amount, to be paid monthly by the husband, and a receiver was appointed to take charge of his personal property to insure the payments, and an order issued restraining the husband from selling his lands. By final decree, the wife obtained an absolute divorce, with adjudication for the payment of alimony, and a receiver was appointed to take charge of the realty and personal property of the husband, and to "pay the alimony out of the rents and profits of the lands, or the proceeds thereof, according to the terms of the decree," etc.: *Held*, the order and decree should be construed together, and as under the decree the receivership was ordered for the land, which was omitted from the prior order, and as the interest of the wife was fully protected by the receivership, the injunction or restraining order ceased to operate. The questions as to the effect of a deed, made pending an injunction to sell the lands, discussed by WALKER, J. *Gobble v. Orrell*, 489.

DOGS. See Trespass.

DRAINAGE DISTRICTS.

1. *Constitutional Law.*—The Drainage Act of 1909 is constitutional. *Newby v. Drainage District*, 24.

2. *Judgments—Collateral Attack.*—A drainage district laid off under the provisions of the act of 1909 is a *quasi*-municipal corporation, partaking to some extent of the character of a governmental agency, and neither its existence nor the regularity of its proceedings can be collaterally impeached, in an action for trespass for cutting down trees in constructing the drainage canal. *Ibid.*

3. *Damages — Interpretation of Statutes—Proceedings—Judgments—Estoppel.*—The Drainage Act of 1909 affords ample opportunity and machinery for the landowner in a district laid off thereunder to assert his rights, including those of damages to his land, with the right of appeal to the Superior Court; and he is concluded, by the express provision of the statute, by the order of the court confirming the final report of the viewers, unless he has preserved his rights in accordance with the statutory requirements. *Ibid.*

4. *Procedure.*—In this proceeding to form a drainage district under the Laws of 1909, ch. 442, no error is found on appeal, the case being controlled by *Shelton v. White*, *post*, 90. *Parker v. Johnson*, 74.

5. *Procedure—Exceptions.*—An appeal from the final order of the clerk in establishing a drainage district under the provisions of Laws 1911, ch. 67, sec. 3, is heard only upon the exceptions thereto filed as to issues of law or fact. *Shelton v. White*, 90.

6. *Constitutional Law.*—The authority of the Legislature to provide for the creation of levee and drainage districts is based upon the police power, the right of eminent domain, and the taxing power, which is upheld as valid, and the Laws of 1909, ch. 442, and 1911, ch. 67, are constitutional. *Ibid.*

7. *Proceedings to Lay Off—Objections, When Taken—Benefits—Issues.*—When the two freeholders and surveyor have acted upon the preliminary

DRAINAGE DISTRICTS—*Continued.*

nary order of the clerk of the Superior Court in proceedings to establish a drainage district under the Laws of 1909, ch. 442, and 1911, ch. 67, and the required report is made by them to the clerk, as to whether the proposed improvement is practicable and conducive to the general welfare of the district proposed, or whether the lands included will be benefited, etc., and the report filed with map and other things required, it is then the clerk's duty, if the report is favorable, to approve the same and give notice of the date to hear objection, which then may be made by any person whose land has been embraced, that his land be excluded, which may raise an issue of fact as to whether his lands have been benefited or not. *Ibid.*

8. *Minority Owner—Objections—Formation of District.*—A minority landowner included in a proposed drainage district to be laid in proceedings under ch. 442, Laws 1909, and ch. 67, Laws 1911, may not contest the formation of the district, but can raise only the issue as to his benefits therefrom. *Ibid.*

9. *Original Petitioner—Objections—Procedure.*—Upon report of the viewers and surveyor at the final hearing in proceedings to lay off a drainage district, Laws 1909, ch. 442, and 1911, ch. 67, one who signed the original petition may have ascertained from the information contained in the report, contrary to his previous opinion, that the cost of the improvements and damages will amount to more than the benefits to his land, and hence he may then file his objections, and the same procedure is then open to him as if he had not signed the petition. *Ibid.*

10. *Objection by Majority—Findings—Remanding Cause—Dismissal of Proceedings.*—In these proceedings to lay off a drainage district it is alleged that upon the coming in of the final report of the viewers and surveyor, a majority of the resident landowners in the proposed district and the owners of three-fifths of the acreage therein objected. This has not been passed upon by the judge of the lower court, and the case is remanded to him for his finding, with direction, if the allegation be true, that the proceedings be dismissed. *Ibid.*

EASEMENTS. See Eminent Domain.

EJECTMENT. See Tenants in Common.

1. *Landlord and Tenant—Reasonable Value—Evidence.*—The plaintiff in ejectment is entitled to recover a fair rental value from the defendant holding over after his breach of the contract in failing to pay the stipulated rent, after notice to vacate the premises; and upon the question of this reasonable value it is competent for the defendant to show that a part of the premises had for a long time remained vacant, that it is not readily rented or in much demand. *Martin v. Clegg*, 528.

2. *Justice's Court—Landlord and Tenant—Jurisdiction.*—To sustain a summary action of ejectment before a justice of the peace under Revisal, sec. 2001, etc., the relation of landlord and tenant must be shown, and where there is no evidence of this relationship, and title to the realty is the matter involved, the action should be dismissed in the Superior Court for the want of jurisdiction where the action was originally brought. *McIver v. R. R.*, 544.

ELECTION. See Landlord and Tenant.

ELECTIONS.

Elections—Registration—Oath of Electors—Duty of Registrar—Right of Electors—Injunction.—It is the duty of the registrar to administer the oath to the electors before registration, but his failure to perform this duty will not deprive the elector of his right to vote; and where an election has been held to determine upon the levy of a tax for a public school district, and the registrar has failed in his duty to administer the oath to all of the electors voting in the district, the election will not be held invalid on that account alone, nor will the levying of the tax be restrained. *Gibson v. Commissioners*, 510.

ELECTRIC COMPANIES. See Cities and Towns.

EMBEZZLEMENT. See Principal and Agent; Arrest and Bail.

EMINENT DOMAIN.

1. *Municipal Corporations—Streets and Sidewalks—Raleigh—Title in State—Municipal Control.*—While the title to certain streets in the city of Raleigh was reserved by the State of North Carolina, the control of the city over these streets is the same as in any other cities or towns in the State, and it has the same discretionary right to cut down or trim up trees bordering the streets for the purpose of government or management, which can only be restrained in cases of willfulness or oppression. *Moore v. Power Co.*, 300.

2. *Municipal Corporations—Quasi-public Corporation—Charter Powers.*—A municipal corporation cannot transfer to a *quasi*-public corporation the rights that it exercises by virtue of its municipal character. *Ibid.*

3. *Same—Injury to Shade Trees—Damages—Injunction.*—Where a *quasi*-public corporation, authorized by its municipal charter to place its poles and string its wires along the streets of a city, threatens the property rights in the shade trees along the sidewalks of adjoining owners, by cutting or trimming the trees, without affording them compensation, an injunction will issue irrespective of whether or not the cutting was about to be done unnecessarily, wantonly, or oppressively. *Ibid.*

4. *Corporations—Shade Trees — Wanton Injury — Punitive Damages.*—Punitive damages may be awarded against a corporation authorized by its charter to place its poles and string its wires along a city street, for wantonness or oppression in cutting shade trees on the sidewalks along its route to the damage of abutting owners. *Ibid.*

5. *Corporations—Injury to Shade Trees—Measure of Damages—Deterioration of Property.*—An abutting owner may recover damages from a *quasi*-public corporation for cutting or trimming shade trees, on the sidewalk in front of his property, done by it for the purpose of stringing its wires, etc., as authorized by its charter, to the extent that his property is thereby depreciated in value. *Ibid.*

6. *Actions, Form of—Injury to Shade Trees—Condemnation—Measure of Damages.*—Forms of action are not now regarded of supreme importance, and the measure of damages for injury to shade trees done by a *quasi*-public corporation in pursuance of its charter powers is

EMINENT DOMAIN—*Continued.*

the same, whether the action be brought by the person who has a property right in the trees or by the corporation in condemnation proceedings. *Ibid.*

7. *Corporations—Condemnation—Fee Simple—Nonuser—Reversion—Interpretation of Statutes.*—The Legislature has the power to authorize a waterworks company to acquire a fee in lands, and where the charter of such corporation gives the right to condemn land "to its use in the manner now provided for the condemnation of lands for railroads and other public uses," and was granted when a statute (sec. 20, ch. 62, Battle's Revisal) was in force, providing "the lands assessed and condemned . . . shall be vested in the company in fee simple," the charter will be construed, under the provision of the statute, as giving the right to the company to acquire the land in fee, in condemnation proceedings. *Torrence v. Charlotte*, 562.

EMPLOYER AND EMPLOYEE. See Master and Servant.

EQUITABLE TITLE. See Bills and Notes.

EQUITY. See Injunctions.

1. *Contracts—Specific Performance—Conditions Subsequent—Deeds and Conveyances.*—The plaintiff sued for the specific performance of a written contract that if he would marry the defendant's daughter, "and would be good and kind to her," the defendant would give him a certain definitely described tract of land. The plaintiff complied with the conditions imposed, and it is held that so much of them as related to the treatment of the daughter were conditions subsequent and properly decreed to be written into the deed, and were not too indefinite or uncertain to permit the remedy sought. *Winslow v. White*, 29.

2. *Deeds and Conveyances—Mutual Mistake.*—A mistake made by the grantor in a deed to standing timber of the number of acres embraced by the description will not alone entitle him to correct the deed, for, in the absence of fraud, the mistake must be mutual. *Dameron v. Lumber Co.*, 278.

3. *Same—Evidence.*—The owner of standing timber conveyed the same to be cut and removed in a stated time, and thereafter executed to the assignee of this right by the grantee in his deed a conveyance, upon consideration, allowing a further time for cutting and removing the timber originally conveyed. In a suit to correct the original deed, brought against the grantee in the second deed, an allegation of fraud was withdrawn and mutual mistake relied on. The evidence tended to show that the mistake alleged was that of the grantor alone; that his own attorney drew the second deed; that the grantor could read and write, and had partially read this deed and delivered it upon receiving the price agreed upon: *Held*, no ground for equitable interference was shown. *Ibid.*

4. *Deeds and Conveyances—Tax Deeds—Purchaser—Foreclosure.*—Where lands in 1897 were sold for taxes, and bid in by the county, the county did not become the absolute purchaser, but acquired only the right to foreclose the certificate of purchase or foreclosure the deed if such had been made, instead of issuing the certificate, and its assignee

EQUITY—*Continued.*

could acquire no superior right. Hence, such assignee acquired at most the assignment of an equity under which to institute proceedings for foreclosure. It is otherwise under the provisions of the present law, Revisal, 2905. *McNair v. Boyd*, 478.

5. *Deeds and Conveyances—Tax Deeds—Cloud Upon Title—Possession—Limitation of Actions.*—Where the plaintiff, in his action to remove a tax deed as a cloud upon his title, is and has been in possession of the lands, the statute of limitations cannot avail as a defense. *Ibid.*

6. *Subrogation—Mortgages — Deeds and Conveyances — Assumption of Debt.*—An assignee of a note secured by a mortgage is entitled to the full benefit of the mortgage; and where the mortgagor has conveyed the mortgaged land, subject to the payment of the mortgage debt, and it has successively been conveyed to several grantees, one to the other, each assuming in his deed the payment of said debt, a holder for value of the note thus secured, under the equitable doctrine of subrogation, has a right of action, not only against the mortgagor of the lands for whatever balance on the note the foreclosure fails to satisfy, but also against the several grantees of the land, who successively and from each other assumed the indebtedness secured by the mortgage, and evidenced by the note sued on. As to whether the holder of the note may sue the several successive grantees of the land upon their promise to pay the note, as upon contract, *quære*. *Baber v. Hanie*, 588.

7. *Pleadings—Construction—Prayers for Relief—Subrogation—Contract.* The plaintiff may recover according to the allegation of facts contained in his complaint, and is not restricted by the terms of his prayer for relief; and where he has sufficiently alleged such matters as would, if established, entitle him to recover upon the equitable doctrine of subrogation, he recovers accordingly without any amendment of his prayer for relief, which is based merely upon contract. *Ibid.*

ESTATES.

1. *Deeds and Conveyances—"Bodily Heirs"—Interpretation of Statutes.*—An estate to B. "and his bodily heirs," under the old law would have conferred a fee tail, which, under our statute, where a contrary intent may not be gathered from the instrument construed as a whole, is converted into a fee simple. Revisal, sec. 1578. Cases in which the words "bodily heirs" used in a conveyance are held to be *descriptio personarum*, conveying to them an estate in remainder and as purchasers from the grantor, cited and distinguished. *Harrington v. Grimes*, 76.

2. *Contingent Remainder—Reinvestment—Interpretation of Statutes.*—A devise of real and personal property to such of the testator's children as may survive him, to them and their "bodily heirs" forever, and should they die without "heirs of their body" surviving them, to the brothers and sisters of the testator, and should any of these predecease the testator and his children, then the "bodily heirs" of such brother or sister shall take such part of the estate as their parents would have taken had they been living. This action is brought for the sale of certain of the testator's land by his sole surviving son and his

ESTATES—*Continued.*

wife, to whom he conveyed his interest therein, the defendants being the testator's brothers and sisters and the children thereof and all persons who could possibly have an interest in the lands should the plaintiff die without issue, and all being served with process, the infant parties properly represented by guardians *ad litem*: *Held*, in proceedings for the sale of certain lands of testator and reinvestment of the proceeds under the provisions of the Revisal, sec. 1590, the order was properly made under the authority of *Springs v. Scott*, 132 N. C., 542, and that line of decisions. *O'Hagan v. Johnson*, 197.

3. *Heirs of the Body—Rule in Shelley's Case—Words and Phrases—Descriptio Personarum.*—For the application of the rule in *Shelley's case* to a conveyance to one for life and "the heirs of his body," it must appear that the words "heirs of the body" were used in their technical sense, carrying the estate to such heirs as an entire class to take in succession, with the effect to convey "the same estate to the persons, whether they take by descent or purchase," and when it appears from the perusal of the entire instrument that the words were not intended in their ordinary acceptation as words of inheritance, but simply as *descriptio personarum*, designating certain individuals of the class, or that the estate is thereby conveyed to "any other person in any other manner or quality than the canons of descent provide," the rule does not apply, and the interest of the first taker is an estate for life. *Jones v. Whichard*, 241.

4. *Same—Contingent Remainders.*—An estate to J. in the conveyance clause of a deed, and in the habendum, to J. and his wife, "during their natural lives, then to their bodily heirs, provided they leave any, and if not, to be equally divided among my nearest of kin, etc.," conveys to J. and his wife a life estate, with remainder over to their children, who take upon the contingency of their surviving their parents, etc. *Spring v. Scott*, 132 N. C., cited and distinguished. *Ibid.*

5. *Husband and Wife—Contingent Remainders—Seizure of Wife—Curtesy.* Where a contingent remainder in lands is limited to the wife after a life estate to another, and the wife predeceased the life tenant, the husband may not become tenant by the curtesy therein, for she has never been seized of the lands. *Ibid.*

6. *Wills—Subsequent Expressoins—Life—Power of Disposition—Trusts and Trustees.*—Where a testator devises all of his estate to his wife, clearly and unmistakably in fee, a different intent may not be inferred from subsequent expressions used in the will, enjoining her to reserve to herself the homestead and sufficient means of support of herself and family; or setting forth the method of making advancements to their children, which he evidently expected she would make, that the children be charged therewith, except as to their support and education; or stating that his interest in an existing partnership should not be changed unless in her judgment she saw reason to do so; or that she rely on the advice of his brother, who predeceased him, in the management of the property or investment of the funds. Nor can such expressions be construed in this case, as limiting the fee previously devised into a life estate to be held in trust, with power of disposition. *Fellowes v. Durfey*, 305.

ESTATES—*Continued.*

7. *Wills—Devises—Marriage—Defeasible.*—A devise to the wife providing that should she marry again the property be divided among her and her children according to the statute of distribution and by the methods he suggested, creates a fee defeasible upon the contingency of her marriage. *Ibid.*

ESTOPPEL. See Drainage Districts; Exemptions; Deeds and Conveyances; Judgments.

EVIDENCE. See Negligence; Trials; Pleadings; Husband and Wife; Ejectment; Deeds and Conveyances; New Trials; Gambling; Bastards; Master and Servant.

1. *Witnesses—Opinions—Experience and Observation.*—The plaintiff seeks to recover damages for the negligent killing of his intestate by an electric current passing from a wire carrying a heavy voltage of electricity through a transformer to an electric lamp, with a lessened current, claiming that the injury complained of was received through other wires used in manipulating the lamps. Testimony of a non-expert witness, who had been employed by the defendant for several years was competent, that the voltage on the secondary wire from the transformer to the lamp, from his personal knowledge and experience, carried a voltage of 110, which was not dangerous; and that several days prior to the occurrence he examined the light and pole, and that the day afterwards, as soon as it could be done, he examined the transformer, and they were all right. *Monds v. Dunn*, 108.

2. *Opinion—Relevancy.*—Where a witness has not qualified as an expert electrical engineer, his explanation of "the latest improved method of suspending arc lights" is incompetent, especially when such methods are not relevant to the inquiry. *Ibid.*

3. *Witnesses—Opinion Upon the Facts—Experience and Observation.*—Where it is alleged that a passing locomotive of the defendant caused damage to plaintiff by setting fire to his land some distance off of the right of way by a spark from the engine, it is competent for a witness, who has had experience running locomotives using the same kind of fuel, to testify whether from his observation the engine, under the conditions, could have thrown a spark the distance stated. *Watkins v. R. R.*, 131.

4. *Expert—Personal Observation—Corroborative.*—In this action to recover damages of the defendant for negligently inflicting an injury upon the plaintiff, the testimony of a physician as to the plaintiff's physical condition thereafter is held competent as substantive evidence, it being a statement of a fact learned from the personal examination made by the witness, and also as corroborative of other evidence introduced at the trial. *Cooper v. R. R.*, 150.

5. *Expert—Physicians—Statements of Party—Biased Testimony—Competency—Evidence Withdrawn—Appeal and Error—Harmless Error.*—There is authority that the opinion of a medical expert based upon his examination and statements of an injured person when the examination has been made for the purpose of becoming a witness for such person in an action to recover damages for a personal injury, is incompetent; but however this may be, where testimony of the wit-

EVIDENCE—*Continued.*

ness of this character has been withdrawn from the consideration of the jury by the trial judge, any error committed in admitting it is cured. *Ibid.*

6. *Insurance—Policies—Stamped Provisions.*—The legal presumption is in favor of the contract as printed or written, which, in cases of life insurance policies, extends to such further provisions as may thereon be stamped upon their face; and this presumption is aided when the plaintiff in his action declares upon the contract and introduces it in evidence in its entirety without allegation or proof to the contrary. *Blount v. Fraternal Assn.*, 167.

7. *Insurance—Suicide—Declarations—Res Gestæ.*—In an action on a life insurance policy, the unfulfilled declarations of the deceased of an intention to get a pistol for lawful purposes, made two weeks and also ten months before his death, are incompetent to rebut suicide, it appearing that the deceased was found early one morning dead from a pistol in his hand; the declaration being too remote in point of time to be a part of the *res gestæ*, and also being statements made in his own interest. *Barker v. Insurance Co.*, 175.

8. *Deeds—Delivery—Grantor's Possession—Transactions with Deceased Persons—Interpretation of Statutes.*—Where the title to lands in controversy is made to depend upon the delivery of a deed thereto by H. to A., both of whom are deceased, and there is evidence that the deeds were found after the death of H. among his important papers, testimony of the widow of A. that she saw her husband place the deed in his tin trunk is not evidence of a transaction or communication with the deceased, forbidden by the statute, Revisal, sec. 1631. *Carroll v. Smith*, 204.

9. *Boundaries—Surveys—Recognition of Lines.*—Evidence that a certain boundary line in dispute in an action to recover lands had been surveyed by one under whom the plaintiff deraigned his title, and that those claiming under him had never thereafter claimed beyond this line, is competent evidence in behalf of the defendant, when it tends to establish his claim. *Haddock v. Leary*, 148 N. C., 379, cited and applied. *Barfield v. Hill*, 262.

10. *Measure of Damages—Mental Anguish.*—The recovery for mental anguish arising from a personal injury negligently inflicted must be confined to such anxiety which would naturally result from the injury, and the doctrine may not be extended so as to include such as may be caused by its possible or probable effect upon others; and evidence admitted in this case held for reversible error, that the plaintiff was worried or apprehensive because he had a child to educate who had never been to school, and he was rendered incapable of sending him. *Ferebee v. R. R.*, 351.

11. *Contracts, Written—Reformation—Mutual Mistake.*—To reform a written instrument on the ground of mistake, it must be shown that the mistake was mutual, and not only the mistake of one of the parties to the instrument, who seeks this equitable relief. *Wilson v. Scarboro*, 380.

12. *Wills—Probate—Common Form—Interpretation of Statutes.*—A will probated in common form before the clerk of the Superior Court is

EVIDENCE—*Continued.*

conclusively valid until declared void by a competent tribunal, and may be offered in evidence in proceedings to caveat the will. Revisal, sec. 3128. *Holt v. Ziglar*, 390.

EXCUSABLE NEGLECT. See Process; Courts.

EXECUTION. See Arrest and Bail.

1. *Sale—Motions in the Cause—Title of Cause.*—Where a motion is made in the cause to set aside a sheriff's sale under execution issued by one to whom the judgment has been assigned, the title of the cause remains as it was originally, and it should not be entitled in the name of the movant as plaintiff and the name of the purchaser at the sale as defendant. *Williams v. Dunn*, 206.

2. *Sales—Motions to Set Aside—Collateral Attack.*—The procedure to set aside a sale of lands under an execution which has not been advertised, and where notice has not been given the defendant, in compliance with Revisal, secs. 641, 642, is, as against a purchaser with notice of the irregularity, by motion in the cause, for the sale cannot be collaterally attacked. *Ibid.*

3. *Sales—Bidding Repressed—Motions to Set Aside Sale—Fraud—Evidence.*—Where the assignee of a judgment causes an execution to issue for a sale of lands, and it appears that the advertisement thereof has not been made as directed by the statute; that there were no opposing bidders present at the sale, and the assignee of the judgment bid it in at a small sum, about one-eighth of its real value—in this case, $800 to $1,000—and the judgment debt was less than $45, the sale will not be permitted to stand unless the strict rights of the purchaser require that it be sustained. *Ibid.*

4. *Sale—Duty of Sheriff—Sale En Masse—Fraud—Principal and Agent.*—The sheriff, as an officer of the court in the sale of lands under an execution issued on a judgment, acts in some respects as the agent both of the judgment debtor and creditor, and should exercise a fair discretion to make the judgment debt and costs, without unnecessary sacrifice of the lands; and while it has not been held with us that the sale of three separate tracts of land as a whole, when one would have been enough to satisfy the execution, is of itself sufficient to invalidate the sale, yet it is so, in direct proceedings, when it further appears that the tracts thus disposed of could have been sold separately without prejudice to the rights of the parties, and there were circumstances of fraud, oppression, or unfairness, to the debtor's disadvantage in the sale. *Ibid.*

5. *Same—Evidence—Void Sale.*—Upon motion made in the cause by a judgment debtor to set aside a sale of his lands made by the sheriff under execution, it appeared that the land brought a grossly inadequate price; that the purchaser, having superior knowledge of the value of the land, misled the attorney of the judgment debtor, who did not have sufficient time to inform himself in regard thereto; that there was no competition at the sale, by reason of the purchaser's conduct and the failure to properly advertise it; that the debtor had sufficient personal property out of which the execution could have been satisfied; that the purchaser refused at the sale to accept the

EXECUTION—*Continued.*

amount of the judgment and cost, or the price he had bid for the land; that the purchaser was notified of the irregularities of advertisement, etc., at the time of the sale; that the land consisted of three separate tracts, any one of which would have satisfied the judgment and costs, and were sold as a whole: *Held*, the sale thus made *en masse*, with the attendant circumstances of fraud and irregularity, rendered it void as to the judgment debtor. *Ibid.*

EXECUTORS AND ADMINISTRATORS. See Wills; Judgments; Process.

EXEMPTIONS.

1. *Judgments—Consent.*—The defendant was convicted of murder of the deceased pending a civil action brought by the widow and administrator, and upon intimation of the judge, but without any evidence of duress, the defendant consented to a judgment in a certain sum in the civil action, payable out of the proceeds of a sale of certain of his real and personal property, which had been attached in the suit brought by the administrator, with the understanding that this should be considered by the judge in passing sentence in the criminal action, which was accordingly done: *Held*, the judgment in the civil action having been rendered by consent, that the property attached should be appropriated to the payment of the amount thereof and cost, without regard to any right of exemption therein, as the defendant could claim no homestead or personal property exemption, to the prejudice of the plaintiffs, for the consent judgment concluded him. *Simmons v. McCullin*, 409.

2. *Same — Wife's Joinder — Constitutional Law.*—A consent judgment entered against a husband, subjecting his lands to the payment of the amount thereof, will pass his homestead interest in the lands thus set apart without the joinder therein of the wife; for the wife's joinder is not required unless there is a judgment docketed and in force, which is a lien upon the land, or unless the homestead has actually been set apart. Const., Art. IV, sec. 8. *Ibid.*

3. *Judgments—Consent—Estoppel.*—A consent judgment has the same force and effect as if it had been entered by the court in regular course, for it becomes a binding judgment when the court sanctions it. Hence, when a consent judgment has been entered for the sale of the property, including defendant's homestead and personal property exemption, it is as complete a bar as if the judgment had been regularly entered in the ordinary course and practice of the court, and it will work an estoppel as effectually as if the action had been tried on its merits. *Ibid.*

FAIRS. See Theaters and Shows.

FEDERAL COURT. See Courts.

FEDERAL EMPLOYERS' LIABILITY ACT. See Railroads; Statutes.

FELLOW-SERVANT. See Master and Servant.

FIXTURES.

Logging Roads.—An ordinary logging road affixed to the land by the owner of the land is a fixture which goes with the conveyance of the title thereto. *Basnight v. Small*, 15.

"FLYING SWITCH." See Negligence.

FORECLOSURE. See Injunctions; Equity.

FORFEITURE. See Wills.

FRAUD. See Trials; Deeds and Conveyances; Execution Sales; Bills and Notes; Insurance.

FRAUD AND MISTAKE. See Bills and Notes.

1. *Judgment—Questions for Jury—Evidence.*—Evidence is sufficient to sustain a verdict of the jury establishing fraud in the procurement of a deed which tends to show that while the plaintiff was employed by the defendants to obtain for them a deed to the lands, he obtained from them, without consideration, a paper-writing which turned out to be the deed under which he claims, assuring them, at the time, that it was to their interest to sign the paper, and that it was unnecessary for him to comply with their request to read it to them, as he would not wrong them; and that after the deed had been executed to him he claimed no interest in the lands. *Turner v. Davis*, 38.

2. *Issues—Deeds and Conveyances—Reformation.*—In an action to reform a deed for fraud or mutual mistake of the parties, there was an affirmative finding upon an issue as to whether there was a parol agreement omitted from the written contract by fraud of the plaintiff or the mutual mistake of the parties. There was no evidence of fraud, and the judge refused the plaintiff's prayer to so instruct the jury: *Held*, the answer to the issue being responsive on the question of fraud as well as mutual mistake, the error permeates the entire case, entitling the plaintiff to a new trial. *Wilson v. Scarboro*, 380.

3. *Deeds and Conveyances—Timber Deeds—Instructions.*—In an action to reform a timber deed for fraud, or for mutual mistake of the parties, in not incorporating in the writing a parol agreement alleged to have contemporaneously been made, giving the grantee the right to suspend the cutting, etc., if the market price of lumber should decline so as to make it unprofitable, an instruction is erroneous, upon an issue as to whether the plaintiff suspended the cutting and failed to pay for the defendant's timber after he had begun to cut the same, in violation of his agreement, that the issue should be answered affirmatively if the jury found that the parol agreement was omitted from the written contract by plaintiff's fraud, or through mutual mistake, as there were other facts involved in the issue. *Ibid.*

4. *Contracts, Written—Reformation—Mutual Mistake—Evidence.*—To reform a written instrument on the ground of mistake, it must be shown that the mistake was mutual, and not the mistake of only one of the parties to the instrument, who seeks this equitable relief. *Ibid.*

FRAUDS, STATUTE OF. See Statute of Frauds.

FUTURES. See Gaming.

GAMING.

1. *Contracts—Future Delivery—Cotton—Consideration.*—A contract to sell a stated number of bales of cotton at a fixed price per pound, on a certain date, is supported by a sufficient consideration, viz., the

GAMING—*Continued.*

mutual agreement of the parties, the one to sell and the other to buy the cotton in the quantity and at the price and date determined upon, and it is bilateral and not unilateral. *Holt v. Wellons*, 124.

2. *Same—Apparent Validity of Contract.*—A definite contract for the sale of cotton at a future date, without indication that it is not what it purports to be, is not void upon its face as a wagering contract. *Ibid.*

3. *Contracts—Cotton—Future Delivery—Evidence—Prior Transactions—Intent.*—Conversations preliminary to the making of a contract and during negotiations leading up to it may be relevant to prove the intent with which it was made, where that intent is in question. *Ibid.*

4. *Contracts—Indorsements—Evidence.*—Evidence of the indorsement on a contract for the sale of cotton made by the buyer to the indorsee, and of the handwriting of the former, is competent in the indorsee's action to recover damages against the seller for the breach of the contract to prove the assignment of it. *Ibid.*

5. *Contracts, Wagering—Cotton—Future Delivery—Quantum of Evidence—Instructions.*—In an action for damages for the breach of a contract when the trial judge has placed the burden of proof under the statute upon the plaintiff to show that actual delivery of the cotton was contemplated, a charge is not erroneous which instructs the jury that the evidence must be believed by them and produce in their minds a conviction that the contract was a *bona fide* one for the actual delivery of the cotton. *Ibid.*

6. *Contracts, Wagering — Cotton — Future Delivery — Evidence — Good Faith—Actual Delivery—Intent of Parties—Instructions.*—Where the defendant in his answer specifically alleges that a contract for the future delivery of cotton was a wagering one, the burden is on the plaintiff to establish that it was not (Revisal, sec. 1691); and in this case, where the contract is valid on its face, a charge is held sufficient that if the jury believed the evidence and were convinced thereby that the parties to the contract really and in good faith contemplated an actual delivery of the cotton, and that it was not merely a gambling transaction under the guise of a fair and lawful dealing, they should answer the issue in the negative, that the contract was not a wagering contract which is forbidden by law. *Ibid.*

7. *Contracts, Valid on Face—Wagering Contracts—Cotton—Future Delivery—Terms of Agreement—Intent.*—Where a contract for the future delivery of cotton appears upon its face to be valid, and recovery thereon is resisted on the ground that it is a wagering one, it is the intention of both parties which will control as to whether the contract contemplated the delivery of the cotton, or was couched in the terms of a lawful contract to conceal a gambling agreement in which it was contemplated that one or the other of the parties would win or lose, depending solely upon whether the price should rise or fall, receiving in settlement of the same only the difference in the price, and not the cotton or its value. *Ibid.*

GARNISHMENT. See Principal and Agent.

GRADED SCHOOLS. See School Districts.

HARMLESS ERROR. See Appeal and Error; Trials.

HEALTH.

1. *Municipal Corporations — Quarantine — Statutes.*—The obligation on municipal corporations to quarantine and care for persons afflicted with smallpox is created entirely by statute. *Commissioners v. Henderson*, 114.

2. *Municipal Corporations — Quarantine — Expenses — Statutes.*—Where there is a duly appointed and qualified quarantine officer of a county and a superintendent of health in an incorporated town within that county, but who has not been appointed quarantine officer by that town, the town is not liable to the county for the expenses incurred by the county in quarantining and caring for its citizens afflicted with smallpox under the direction and control of its own quarantine officer. Laws 1911, ch. 62, secs. 15 and 21. *Ibid.*

3. *Same—Action.*—Laws 1911, ch. 62, enact a general scheme for the quarantining and caring for smallpox patients by the county and town under certain regulations, and expressly provide (section 21) that "all expenses of quarantine and disinfection shall be borne by the town or county employing a quarantine officer." *Held*, the intent of the Legislature was to require that such expenses shall be paid by the county, when it has a quarantine officer, and may not be recovered in an action brought by the county against a town, within its own borders, for the expense thus incurred in the quarantine and care of its citizens, where the town has not appointed its own quarantine officer, as permitted by the statute. *Ibid.*

4. *Municipal Corporations — Quarantine — Repealing Statutes.*—If there ever was any liability on the part of an incorporated town, having no quarantine officer, for the expenses of the county, wherein it is situated, in quarantining and caring for its citizens afflicted with smallpox, under the direction of the county smallpox officer, imposed by Revisal 1905, sec. 4508, it was removed by the repealing provision of the Laws 1911, ch. 62. *Ibid.*

5. *Municipal Corporations—Quarantine—Interpretation of Statutes.*—The language of our statutes relative to the quarantining and caring for those within the borders of counties and towns afflicted with smallpox is free from ambiguity, and conveys a definite and sensible meaning, to wit, that an incorporated town, within the borders of a county, having no quarantine officer of its own, is not responsible to the county for the costs incurred in the quarantine and care of its own citizens. *Ibid.*

6. *Municipal Corporations—Quarantine—Separate Government—Taxation —Representation—Constitutional Law.*—Where an incorporated town has not appointed a quarantine officer, it is to be regarded as any unincorporated part of the county as regards its liability for the expenses incurred by the county in the care of its citizens whom the latter, under its health regulations, have quarantined for smallpox; for an incorporated town is taxed, as any other part of the county, to bear this expense, and having no more control over its management than if it were unincorporated, a further tax would be, in effect, like taxation without representation. *Ibid.*

HEALTH—*Continued.*

7. *Municipal Corporations—Interpretation of Statutes—Separate Government—Officious Interference—Expenses—Action.*—Revisal, secs. 4508 and 4509, relating to the quarantining for smallpox, should be construed together, and so the city health officer may become its quarantine officer, just as the county health officer is the quarantine officer of the county. Hence, when one officiously interferes with the patients of the other and incurs expenses therefor, no recovery for them can be had. *Ibid.*

HEIRS AT LAW. See Deeds and Conveyances.

HUSBAND AND WIFE. See Estates.

1. *Confidential Communications — "During Marriage" — Evidence.*—The confidential communications made between husband and wife which neither will be compelled to disclose, are, by the express language of the statute, those which are communicated "during their marriage," and construing the statute, in connection with the common law, it does not extend to papers about business matters left by the husband in his desk with the apparent intent that they should come into the hands of his wife after his death. *Whitford v. Insurance Co.*, 223.

2. *Same—Interpretation of Statutes.*—The language of our statute in regard to communications between husband and wife is that "no husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage," and the meaning thereof is clearly conveyed by the words employed, free from any ambiguity, that such communications be made, as stated, during the marriage; and hence it may not be extended, by interpretation, so as to include letters or papers, not of a confidential character, written by the husband to the wife, which he intended she should not receive until after his death. *Ibid.*

3. *Witnesses—Criminal Conversation—Adultery—Parties—Interpretation of Statutes.*—Our statutes, section 1628 of Revisal, removing the disqualification of a witness to testify by reason of interest or crime, etc.; section 1629, admitting testimony of a witness interested in the event of the action; section 1630, compelling parties or those in whose behalf a suit is brought to give evidence in the proceedings, etc., excepting as to adultery and actions for criminal conversation; section 1631, making testimony of husband and wife competent and compellable, on behalf of any party to the action, excepting, among other things, "evidence for or against each other," in proceedings brought in consequence of adultery and actions or proceedings for or on account of criminal conversation, should be construed together, and thus construed, they do not prohibit the evidence of the husband as to the conduct of his wife, where she is not a party, in his action against another for damages for criminal conversation with his wife and the alienation of her affections. *Powell v. Strickland*, 393.

4. *Same—Legal Interest.*—Where the husband brings his action against another for criminal conversation with his wife and the alienation of her affections, the testimony of the husband as to the conduct of the wife, where she is not a party, is not testimony against the wife within the meaning of the statute, Revisal, sec. 1636, for she has no legal interest in the event of the case, and will not be bound by this

HUSBAND AND WIFE—*Continued.*

evidence, or the judgment rendered, in any action which may be brought against her involving this same matter, or in which she may have a legal interest. *Ibid.*

5. *Criminal Conversation — Circumstantial Evidence.* — In this action brought by the husband to recover damages against another for criminal conversation with his wife and alienation of her affections, it is *Held*, that the husband's evidence as to the conduct of his wife was material, tending, as it did, to forge the first link in the chain of circumstances that he relied on. *Ibid.*

6. *Same—Adultery.*—In an action to recover against another damages for criminal conversation with the wife and the alienation of her affections, it is not necessary for the husband to show the adultery of the wife with the defendant by direct proof, but evidence of the circumstances are sufficient for that purpose if the jury can reasonably infer therefrom the guilt of the parties, and in this case the evidence is held sufficient to take the case to the jury. *Ibid.*

7. *Criminal Conversation—Explanation—Failure of Defendant to Testify.* —Where in an action for damages for criminal conversation with the wife and for alienation of her affections, there is evidence sufficient, for the consideration of the jury, and requiring explanation by the defendant, his refusal to go upon the stand as a witness in his own behalf and explain it is the subject of fair comment against him to the jury by the plaintiff, subject to the control of the trial judge. *Ibid.*

8. *Criminal Conversation—Consent of Wife—Defenses.*—The consent of the wife to her own defilement is no defense to an action brought by the husband against another for damages for criminal conversation with her and the alienation of her affections. *Ibid.*

9. *Criminal Conversation—Punitive Damages.*—Punitive damages may be awarded, in the discretion of the jury, to the husband in his action for damages brought against another for criminal conversation with her, and alienation of her affections, in view of all the facts and circumstances of the case. *Ibid.*

HYPOTHETICAL QUESTIONS. See Evidence.

IMMORAL SHOWS. See Cities and Towns.

INCORPOREAL HEREDITAMENTS. See Mines and Minerals.

INDEPENDENT CONTRACTOR. See Contracts.

INFANT PARTIES. See Judgments.

INJUNCTIONS. See Appeal and Error; Telegraphs and Telephones; Cities and Towns.

1. *Foreclosure—Admitted Debt—Equity.*—In an action for an accounting by a trustee in a deed of trust, given on lands to secure a debt, the court may issue an order restraining the trustee from selling the land under the instrument upon condition that he pay into court the amount of money he admits to be due by him, upon the principle that he who asks equity must do equity. *Bonner v. Rodman*, 1.

IN PARI DELICTO. See Insurance.

INSTRUCTIONS. See Trials; Bastards.

INSURANCE. See Wills.

1. *Evidence—Production of Policy—Trial.*—Where the beneficiary of a life insurance policy produces the policy at the trial of an action to recover thereon after its maturity, a *prima facie* case is made for him upon the question of delivery. *Pender v. Insurance Co.*, 98.

2. *Delivery of Policy—Payments of Premium—Waiver of Rules.*—An insurance company may waive a provision requiring that the first premium on a policy of life insurance be made as a prerequisite to its delivery, which may be shown by direct proof that credit therefor had been given to the insured, or inferred from other surrounding circumstances, as, in this case, the production of the policy, at the trial, by the beneficiary, suing for recovery thereon. *Ibid.*

3. *Delivery of Policy—Separate Dates—Verdict.*—Where in an action by the beneficiary to recover upon a life insurance policy there is a question as to whether the policy was actually delivered to the insured, it is immaterial as to the exact date of its delivery, should the jury find that it had actually been delivered; and, hence, a finding of the jury that the delivery had been made on two separate dates will not avoid the verdict for inconsistency. *Ibid.*

4. *Delivery of Policy—Payment of Premium—Waiver—Knowledge.*—The rule of an insurance company that its agent shall not deliver a policy of life insurance more than sixty days after the date of its issue without a new physical examination of the insured, or a new health certificate given by his physician, may be waived by the conduct of the company, and its accepting the note of the insured, contrary to this rule, for the first premium, with knowledge that it had not been observed, and retaining possession thereof without objection, is a waiver of such rule; and knowledge of the facts by the company may be inferred from the facts and circumstances of the case. *Ibid.*

5. *Policies—Stamped Provisions—Contracts.*—Provisions upon which a life insurance policy is issued, stamped upon the face of policy, are a part of the contract entered into, and the validity of these provisions is not affected because they are so stamped. *Blount v. Fraternal Assn.*, 167.

6. *Same—Presumptions.*—There is no presumption that changes have been made in a policy of life insurance because upon the face of the policy contract are stamped additional provisions to those therein printed or written. *Ibid.*

7. *Commissioner — Approval of Policy — Interpretation of Statutes.*—Where a policy of life insurance for $500 is sued on, which on its face states that it will be reduced in certain contingencies, which provisions the plaintiff claims to be void because the company has not obtained the approval of the Insurance Commissioner under the requirements of Revisal, sec. 4773a, and therefore he should recover the face value of the policy, the burden of proof is on the plaintiff to show that the approval of the Insurance Commissioner had not been obtained as the statute requires. *Ibid.*

INSURANCE—*Continued.*

8. *Same—Contracts—Presumptions.*—A policy of life insurance for less than $500 is not invalid when the approval of the Insurance Commissioner has not been obtained for its issuance (Revisal, 4773a), there being no express provision making it so under such circumstances. *Ibid.*

9. *Suicide—Declarations—Res Gestæ—Evidence.*—In an action on a life insurance policy, the unfulfilled declarations of the deceased of an intention to get a pistol for lawful purposes, made two weeks and also ten months before his death, are incompetent to rebut suicide, it appearing that the deceased was found early one morning dead from a pistol in his hand; the declaration being too remote in point of time to be a part of the *res gestæ*, and also being statements made in his own interest. *Barker v. Insurance Co.*, 175.

10. *Husband and Wife—Communications—"Suicide"—Business Communications — Declarations Against Interest — Evidence.*—Written communications from the husband to the wife containing directions to her with regard to business transactions are not privileged communications under our statute; and where a husband had written to his wife instructions as to his business affairs, to be followed by her after his death, wherein it evidently appeared he was contemplating suicide, these communications are not privileged in an action upon his life insurance policy, wherein the defense of suicide was interposed, it appearing that he suddenly died shortly after writing the communication to his wife, and that the papers were thereafter found in his desk, evidencing the intent that she should not sooner receive them; and in this case the papers left under such circumstances are held to be competent evidence as declarations against interest. *Whitford v. Insurance Co.*, 223.

11. *Life—"Binding Slip"—Application—False Representation.*—Where an insurance company has given a "binding slip" to an applicant for insurance, it only protects the applicant against the contingency of his sickness intervening its date and the delivery of the policy, if the application for insurance is accepted, and as such slip does not insure of itself, it does not affect the right of the insurer to avail itself of all defenses it may have, under the policy, after its delivery, to avoid payment thereof by reason of material misrepresentations made in the application for it. *Gardner v. Insurance Co.*, 367.

12. *Same—Written Contracts—Parol Evidence.*—After a contract of life insurance has become effective, its terms may not be contradicted so as to affect its continued validity; but it may be shown that the delivery of the policy was made upon false representations in the application therefor, as to the health of the insured and as to his not having been subjected to contagious diseases for a prior period of one year, and the like, for such matters bear upon the question as to whether the policy had ever taken effect as a contract of insurance. *Ibid.*

13. *Life — Application — False Representations — Contagious Diseases—"Binding Slip"—Delivery of Policy.*—A representation in an application for life insurance, that the applicant has not been associated with patients having contagious diseases within the year preceding

INSURANCE—*Continued.*

the application, is one which would reasonably influence the insurer in its decision upon the question of taking the risk and issuing the policy, and is regarded as material; and when the representation in this respect is false, a "binding slip" is issued to the insured, and thereafter the policy is delivered without knowledge of the facts and a waiver by the company of its right, the policy may be avoided by it. Revisal, sec. 4808. *Ibid.*

14. *Same—Typhoid Fever—Evidence.*—Where the insured within the year preceding his application for insurance had nursed his wife during a sickness of typhoid fever, and he himself was ill with this fever, from which he afterwards died, when the policy was delivered to him, and there is evidence that a fever of this kind is contagious, and that such conditions would influence the opinion or judgment of the insurer in taking the risk and issuing the policy, it is for the jury to determine, under proper instructions from the court, whether the representation in the application, that the insured had not been associated within the year with one having a contagious disease, was a false and material representation and such as would invalidate the policy. *Ibid.*

15. *Life—Misrepresentations—"Binding Slip"—Delivery of Policy.*—Where a "binding slip" is given after the applicant for a life insurance policy has made his written application therefor, which application falsely represents that the applicant has not been associated with a person having a contagious disease within a year, and the policy is delivered to the insured during an illness from one of such diseases, to which he had been exposed, upon the question of a valid delivery of the policy, when the right to rely upon this misrepresentation has not been waived by the insurer, it is competent for the jury to consider whether the agent, not knowing of the misrepresentation in the application, was led to believe that the slip was valid, and that he was accordingly bound to deliver the policy. *Ibid.*

16. *Life—Discriminating Rates—New Contract—Rights of Insured.*—Where one insured has accepted a policy of life insurance upon his own life, stipulating for the annual payment of the premium, which, upon his agreement with the insurer, has been changed to a quarterly payment at the same ratio, and the insurer thereafter has canceled the policy for the refusal of the insured to pay an increase in the quarterly payment plan, which the insurer charges to all of its policyholders alike, the insured, having acted in good faith at the time of making the change to the quarterly payment, has the right to refuse to enter into a new contract at the increased premium, whether the contract he had was legal or illegal. *Robinson v. Life Co.*, 415.

17. *Life—Discriminating Rates—Cancellation—Damages—In Pari Delicto—Interpretation of Statutes.*—Revisal, sec. 4775, providing, among other things, that no life insurance company may afford any special favor or advantage in premium rates to or discriminate among its policyholders, is a restriction applicable to the company; and where the insured has, in good faith, entered into a policy contract with the company whereby he has secured a policy at a reduced rate of premium, the parties are not in *pari delicto;* and as the statute does not render a contract of this character void, he may recover damages,

INSURANCE—*Continued.*

upon the cancellation by the company of his policy, for its discrimination forbidden by the statute. The question of illegality of a policy of this character discussed by ALLEN, J. *Ibid.*

INTEREST. See Debt.

INTERPRETATION OF STATUTES. See Statutes; Deeds and Conveyances.

INTERSTATE COMMERCE. See Commerce; Carriers of Goods.

INTOXICATING LIQUORS.

Principal and Agent—Moneys Collected—Action.—Where it appears that the plaintiff, a nonresident, has sold intoxicating liquors in this State, and has sent drafts on the purchaser to the defendant for collection, the latter may not resist recovery of the moneys he has collected for the former upon the ground that the sales were immoral and contrary to our law. *Distilling Co. v. Bank*, 66.

ISSUES. See Drainage Districts; Fraud or Mistake.

JUDICIAL NOTICE. See Trials.

JUDICIAL WARRANTS. See Cities and Towns.

JUDGMENTS. See Exemptions; Drainage Districts; Clerks of Court; Fraud; Courts; Wills; Motions; Process; Debt; Arrest and Bail.

1. *Trials—Fraud and Undue Influence—Trusts and Trustees—Quantum of Proof.*—Where judgment has been obtained in plaintiff's favor in his action to set aside a deed to lands for fraud and undue influence, and a purchaser, taking subject to the plaintiff's rights, claims the title under his deed it is proper for the judgment to declare him the holder of the legal title, in trust for the plaintiff, and direct him to convey accordingly; and as such purchaser claims under the deed sought to be set aside for fraud and undue influence, the rule as to the evidence required is not affected. *Lamm v. Lamm*, 71.

2. *Estoppel—Appeal and Error—Collateral Attack—Procedure—Executors and Administrators.*—The deceased had given an option on lands for a certain price to M., subject at the time to an agreement made with S. In an action thereafter brought by M. against the personal representatives, heirs at law and devisees of the deceased, judgment was rendered declaring M. entitled to a deed of conveyance under his option, upon payment of the purchase price. In an action brought by S. under his contract against the same parties concerning the same land, judgment was entered dividing the lands between M. and S. and declaring that the proceeds of the sale of the lands to M. should be treated as real estate assets, from which there was no appeal. The present action is one to compel the administrator of the deceased to collect the purchase price of the lands from M. and apply it to the payment of certain legacies under the will; and it is admitted this cannot be done if the proceeds of the sale are regarded as realty: *Held*, the judgment that the proceeds of sale of the land to M. should be regarded as real estate assets cannot be collaterally attacked, the remedy having been to correct it on appeal for the misapplication of legal principles. *Rawls v. Mayo*, 177.

JUDGMENTS—*Continued.*

3. *Voidable—Consent—Infant Parties—Collateral Attack—Procedure.*—This is an action against an administrator to compel him to collect certain proceeds of the sale of deceased's land, and apply them to the payment of certain legacies in money left to the plaintiffs under the will of the deceased. In a former action to which the plaintiffs were infant parties, it was adjudged that these proceeds be regarded as realty, from which there was no appeal, and it is admitted that if they are so to be regarded the plaintiffs cannot recover. Conceding that the former judgment was entered by consent, it is *Held*, that it would be voidable and not void, and not subject to collateral attack. *Ibid.*

4. *Tender—Costs and Interest—Interpretation of Statutes.*—A tender of payment under our statute, to stop the costs and the accrual of interest on a judgment subsequently rendered, must be in writing, signed by the party making it, and contain an offer of judgment for the amount tendered. Revisal, sec. 860. *Medicine Co. v. Davenport*, 294.

5. *Estoppel—Matters Concluded—Separate Causes.*—The principle as to estoppel by judgment of all matters which should have been settled in the action does not extend to the subject of a separate cause of action, between the same parties, not formerly adjudicated, or embraced within the scope of the former inquiry. *Clothing Co. v. Hay*, 495.

JURISDICTION. See Courts; Removal of Causes; Process.

JUSTICES OF THE PEACE. See Courts.

LACHES. See Appeal and Error.

LANDLORD AND TENANT. See Ejectment.

1. *Liens—Release — Trover and Conversion.* — The plaintiff made advancements to the tenant, and the latter, in order to purchase a horse on credit from the defendant, obtained from his landlord a release on one of a number of bales of cotton raised on the land. The plaintiff, who held a mortgage on the crop subject to the landlord's lien, brings this action to recover the value of the bale, alleging unlawful conversion by the defendant, who had received it: *Held*, the transaction between the tenant and the landlord, resulting in the latter's releasing his prior lien on the one bale of cotton, gave the plaintiff, who had held the second lien, a first lien on the bale of cotton delivered to the defendant, and this action will lie. *Powell v. Perry*, 127 N. C., 22, cited and distinguished. *White v. Winslow*, 40.

2. *Liens—Release—Assignment—Vendor and Vendee.*—Where a landlord merely releases a part of the crop raised on his land in favor of a vendor of his tenant, without transferring the debt or any part thereof, the vendor does not acquire in his transaction with the tenant any lien upon the crop released which is superior to that of the one furnishing supplies for the making of the crop, for which he takes a mortgage, the lien being so far an incident to the debt which it secures that it cannot be assigned without at the same time transferring the debt, or at least some part thereof. The Court does not consider the question whether the landlord may by agreement defer his prior lien to those which may be subsequent. *Ibid.*

LANDLORD AND TENANT—*Continued.*

3. *Cropper's Liens—Contracts—Election—Seizure of Crop — Damages—Repudiation of Contract—Consent of Parties.*—The plaintiff made advances to a cropper on defendant's land, and took a mortgage to secure him therein, and thereafter the cropper's interest was assigned to him. The defendant bought, at an agreed price with the cropper ($400), one-half of the crop so raised on the land, which was seized by the plaintiff under process while in the possession of the cropper, but afterwards turned over by the plaintiff to the defendant at his request and solicitation: *Held*, (1) the title to the tenant's share of the crop did not vest in the defendant, under his contract of purchase, as he had neither paid nor taken possession of the crop until given him by the plaintiff, it being a cash transaction; (2) when he received the crop he exercised his right of election to take under the contract at the price therein named, and he could not thereafter disaffirm, or claim as landlord; (3) the tenant having paid his rent, the seizure of the crop by the plaintiff was not, under the circumstances, unlawful, and hence could not subject him to damages therefor; (4) the plaintiff's action to recover the crop could not work a repudiation of the defendant's contract of purchase, it requiring the consent of all parties to unmake it, which defendant refused to give. *McCullers v. Cheatham*, 61.

4. *Municipal Corporations — Cities and Towns — Sidewalks — Swinging Gates—Negligence of Landlord.*—While ordinarily the tenant and not the landlord is liable to third persons for injuries caused to them by the failure to keep the premises in repair, the liability may be extended to the owner, as in this case, for an injury caused to the plaintiff as he was passing, on a dark night, by a gate of the leased premises, which being in disrepair, swung out upon the sidewalk of a public city street, and there imbedded in the ground; this condition having existed at the time the premises were leased, and for months and years, and the owner knew of it and had promised to rectify it, at the solicitation of the tenant. *Knight v. Foster*, 329.

LAST CLEAR CHANCE. See Negligence.

LEGISLATIVE POWERS. See Cities and Towns.

LIENS. See Landlord and Tenant.

1. *Material Men—Purchaser Without Notice—Interpretation of Statutes.* The requirement that one furnishing materials for a building must file his lien in six months, applies only as to the rights of a purchaser for value without notice, and where this notice of lien has been filed after the six months period and within twelve months, and the purchaser has acquired the property against which the lien was filed, with actual or constructive notice thereof, he takes subject to the rights of the lienor. Revisal, sec. 2028, amended by chapter 32, Laws 1909. *Lumber Co. v. Trading Co.*, 314.

2. *Material Men—Purchasers Without Notice—Corporations.*—When the officers of a corporation have received verbal notice of a claim of lien of one who had furnished material for a building, before purchasing it for the corporation, and it appears that the notice of lien had been filed within the twelve months as required by the statute, the corporation acquires subject to the lien; for being purchasers with notice, the statutory exception has no application. *Ibid.*

LIENS—*Continued.*

3. *Material Men—Notes—Waiver.*—One furnishing material used in the construction of a building does not waive his right of lien by accepting a note for the amount due him therefor, when the note matured before the expiration of the statutory time wherein he is required to file notice of his lien, and he has perfected his right as the statutes require. *Ibid.*

4. *Material Men—Purchaser Without Notice—Burden of Proof—Trial—Instructions.*—The one who claims he is a purchaser for value without notice of a claim for material furnished on a building, where the notice of lien was not filed within the six months, must bring himself within the proviso, and the burden of proof in this respect is upon him. In this case it is held that the charge as to the burden of proof was immaterial, as there was no real controversy that the purchaser was one without notice. *Ibid.*

5. *Material Men—Filing of Claims—Balance Due Upon Contract—Contract Abandoned—Completion by Owner.*—It is necessary, to enforce a lien on a building for materials furnished the contractor, that he file with the owner an itemized statement of the amounts due for materials, or the material man give notice to the owner of the amount due him before the owner settled with the contractor, and then only to the extent of the amount then due; and when this required notice has not been given before the last payment has been made to the contractor, who fails to complete the building, and the owner in completing the building has paid out the balance of the contract price, no lien attaches. Revisal, secs. 2019, 2020, 2021. *Supply Co. v. Eastern Star Home*, 513.

6. *Interpretation of Statutes—Proviso—Purview.*—When a proviso in a statute is directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the Legislature. *Ibid.*

LIMITATION OF ACTIONS. See Cities and Towns; Pleadings; Wills; Deeds and Conveyances.

1. *Tenants in Common—Adverse Possession.*—The law raises a legal presumption of title in one who has been in adverse possession of lands, receiving the rents and profits for twenty years or more, which will bar the entry of another claiming an undivided interest therein as tenant in common; for the adverse occupancy of the lands puts the claimant to his action, and if continued for that time without any assertion of his right, it will be lost. *McKeel v. Holloman*, 132.

2. *Receivers—Divorce — Adverse Possession — Possession of Wife.*—The possession of lands by a receiver is the possession of the court, and when a receiver has been appointed by the court to hold lands to pay alimony from its rents and profits, decreed to the wife to whom a divorce absolute has been granted, and the receiver has permitted the wife to remain on the land and retain the rents and profits in carrying the order into effect, her possession is not adverse to the husband, or those claiming under him, so as to bar their right to recover it under the statute of limitations. *Gobble v. Orrell*, 489.

LIS PENDENS.

1. *Drainage Districts—Notice—Subsequent Purchasers.*—The pendency of a proceeding to lay off a drainage district under the provisions of the act of 1909 is notice as to all the lands embraced in the district, and the grantees thereof are bound by the statutory requirements as to the procedure to recover damages to the lands, as were their grantors who were parties to the proceedings and who owned the lands at that time. *Newby v. Drainage District*, 24.

2. *Purchaser—Notice.*—Where in an action to set aside a deed to lands on the grounds of fraud and undue influence, the complaint has been filed containing the necessary allegations and a sufficiently definite description of the lands, a subsequent purchaser takes with notice of the plaintiff's rights, the action being *lis pendens*, and acquires the lands subject to their determination. *Lamm v. Lamm*, 71.

LOGGING ROAD. See Fixtures.

"LOOK AND LISTEN." See Railroads.

LORDS PROPRIETORS. See Deeds and Conveyances.

MALICIOUS PROSECUTION.

1. *Criminal Law—Termination of Action.*—Before an action for malicious prosecution can be instituted, it is necessary that the proceedings upon which it is based should have been properly terminated. *Brinkley v. Knight*, 194.

2. *Same—Subsequent Proceedings.*—Where the justice of the peace, before whom a criminal action was ordered removed, did not appear to hear and determine it at the time stated, and the constable announced, at the defendant's instance, that the defendant would be released unless some one desired to further prosecute, and then the defendant was accordingly released, it is not such a termination of the criminal action upon which an action for malicious prosecution will lie, it further appearing that thereafter the defendant in that action moved, upon notice, that the prosecutor therein be taxed with costs, and from judgment rendered the prosecutor, the defendant in the present action, appealed to the Superior Court, resulting in the action being remanded to the magistrate's court to be proceeded with, where it subsequently terminated. *Ibid.*

MARRIAGE. See Contracts; Wills.

MARRIED WOMEN. See Deeds and Conveyances.

MASTER AND SERVANT.

1. *Safe Appliances—Negligence.*—The master is required to furnish his employees operating a cotton gin with equipment and appliances which are known, approved, and in general use; and he is liable for injuries received by his employees, within the scope of their duties, which are proximately caused by his failure to have done so, or such failure will afford evidence from which his negligence may be inferred. *Bird v. Lumber Co.*, 162.

2. *Same—Duty of the Servant to Repair—Contributory Negligence.*—Where the foreman or general manager of one of several large farms

MASTER AND SERVANT—*Continued.*

owned by the master, on which there was a cotton gin, had ample authority and available means for keeping the gin in proper repair, and was charged with the duty of doing so, is injured while attempting to shift the power belt of the gin with a hoe handle, the gin having originally been equipped with levers with which the belt could have been thus shifted without appreciable risk, the damages sustained are attributable to the fault of the servant and as a consequence of his neglect to perform the duty intrusted to him, and he may not recover in his action against the master. *Ibid.*

3. *Fellow-servants—Selection of Employees—Negligence.*—An employer, except in case of railroads, is not responsible for injuries to an employee attributable solely to the negligence of a fellow-servant, but he is required to exercise reasonable care in selecting employees who are competent and fitted for the work in which they are engaged; and if there is negligence in this respect, and it is shown that such negligence is the proximate cause of the injury to a fellow-servant, he may be held liable. *Walters v. Lumber Co.*, 536.

4. *Same—Presumptions—Burden of Proof—Knowledge of Master.*—Where damages are sought in an action against the employer for his negligence in selecting an employee, alleged as the proximate cause of a personal injury inflicted on his coemployee, it is the presumption that the employer performed his duty in the selection, and before responsibility can be fixed on him, it must be established by the greater weight of the evidence that the employee has been injured by reason of the carelessness or negligence due to the incompetency of the fellow-servant, who had been employed or retained after knowledge of the fact of incompetency by the employer, either actual or constructive. *Ibid.*

5. *Fellow-servants—Duty of Master—Incompetency of Servant—Definition.*—The incompetency of an employee which will render the employer responsible in an action for damages for a personal injury negligently inflicted by him on a fellow-servant is not confined to a lack of physical capacity or natural mental gifts, or of technical training when such training is required, but it extends as a general rule to any kind of unfitness which renders the employment or retention of the servant dangerous to his fellow-servant, including habits of carelessness or inattention in a kind of work where such habits or methods are not unlikely to result in injury to the fellow-servant. *Ibid.*

6. *Fellow-servant—Negligence—Evidence—Specific Acts—General Character—Knowledge of Master.*—Where the master is sued for his negligence in selecting a servant whose negligence is alleged to have proximately caused an injury to a fellow-servant, for which an action for damages has been brought, testimony is ordinarily competent of the general reputation of the servant for incompetency, for habitual carelessness or inattention on his part to duties which require care and attention, to prevent an injury to a fellow-servant, tending to show his unfitness to perform the services required of him; and in so far as it may tend to establish the character of incompetency of the servant and to fix the master with express or implied knowledge

MASTER AND SERVANT—*Continued.*

thereof, specific negligent acts of the servant may be shown, though incompetent as tending to show his negligence, which is the subject of the present action. *Ibid.*

7. *Fellow-servant—Negligence — Vice Principal — Knowledge—Presumptions.*—Where the incompetency of an employee is known to the vice principal of the master, the latter is fixed with knowledge, and is responsible in damages for an injury proximately caused to a fellow-servant by reason of such incompetency; and the fact that the vice principal had subsequently left his employment does not affect the result. *Ibid.*

MATERIAL MEN. See Liens.

MEASURE OF DAMAGES. See Evidence; Telegraphs and Telephones; Eminent Domain.

1. *Negligence—Personal Injury—Decreased Earning Capacity—Present Value.*—Where damages are to be awarded for the diminished earning capacity of one who has been injured by the negligence of another, for the period of his remaining life, as ascertained by the jury in accordance with the rules of expectancy, the estimate of the damages recoverable must be based upon the present value of the difference in the plaintiff's earning capacity, caused by the injury, for the period of time ascertained, and not the total difference as it may occur during that period. The rule as before fully stated, *Fry v. R. R.*, 159 N. C., 357, is approved on this point. *Johnson v. R. R.*, 431.

2. *Federal Employers' Liability Act—Trials—Evidence.*—Where the father of an employee of a common carrier is entitled to recover for the death of the deceased, caused by the carrier's negligence, under the Federal Employers' Liability Act of 1908, it is for a reasonable expectation of pecuniary benefit from the continuance of the life of the son; and evidence to sustain an action for such recovery is held sufficient and within the rule, if it tends to show that the deceased was a young man of good habits and character, in good health, and had helped his father and was disposed to give him his last cent if he needed it; that the father was growing old, and while not actually dependent on the son for support at the time of the latter's death, he could not tell how soon he might be. And it is further held, that the amendment of 1910 does not affect this construction, for with reference to the original act, so far as it applies to this case, it only declares that the right of action given therein shall survive. *Dooley v. R. R.*, 454.

3. *Same—Instructions.*—Where the father of a deceased employee has been brought within the rule necessary for a recovery, by the personal representative, in an action brought under the provisions of the Federal Employers' Liability Act, it is error for the trial judge to instruct the jury that the measure of his damages is for the loss of life of the intestate estimated at the present value of his net income for the period of expectancy as ascertained by them, after deducting the cost of living, etc., for in such instances a recovery can only be had for a reasonable expectation of pecuniary benefits to the father from the continued life of the son, under the evidence, for that period. *Ibid.*

MENTAL ANGUISH. See Telegraphs and Telephones; Evidence.

MENTAL INCAPACITY. See Deeds and Conveyances.

MERGER. See Deeds and Conveyances.

MERITORIOUS DEFENSE. See Appeal and Error; Motions.

MINES AND MINERALS.

1. *Deeds and Conveyances—Mineral Deposits—Fee Simple.*—A conveyance under seal in consideration of a specified sum of money, made to the grantee, "his heirs, executors, administrators, and assigns," of the right of entering in and upon particularly described lands of the grantor, "for the purpose of searching for mineral deposits and fossil substances," and for taking and removing the mineral deposits and fossil substance therefrom, which the grantee "may find imbedded in the earth of the said lands, and for mining and quarrying operations—to any extent he may deem advisable," etc.; and also containing covenants that no other consideration by way of rent is to be paid, and against damage to the lands unnecessary in conducting the operations for mineral, etc.: *Held*, the "mineral deposits and fossil substance" beneath the earth's surface may be conveyed separately from the land, and the deed, in substance and form, being sufficient to convey the fee in land, is also sufficient to convey the material and fossil substance therein. *Outlaw v. Gray*, 325.

2. *Deeds and Conveyances—Incorporeal Hereditaments—Mineral Deposits.* Mineral substances beneath the surface of the earth are regarded as incorporeal hereditaments, and pass by apt words in a deed delivered and registered. *Ibid.*

3. *Same—Terminable at Will.*—Under a conveyance in fee of all the mineral deposits imbedded in lands described, the interest conveyed terminates only when these deposits are removed by the grantee in accordance with the provision of his deed. *Ibid.*

4. *Deeds and Conveyances — Mineral Deposits — Construction of Deed.*—Where the meaning of a conveyance of mineral deposits on lands is doubtful as to whether it is a license, terminable at the death of the grantor, or in fee, the construction more favorable to the grantee will prevail. *Ibid.*

MISTAKE. See Appeal and Error; Courts.

MORTGAGES. See Equity.

1. *Deeds and Conveyances—Mortgagor's Liability—Contracts.*—An accepted offer to buy a certain lot of land, which happens to be subject to mortgage, and without assuming the payment of the mortgage debt, is not an offer to take the land and pay off the encumbrances; and where an agreement of this character has been made, the proposed vendee may refuse to accept a deed tendered him containing a covenant on his part to assume the encumbrances on the property, for the acceptance of such deed would make him incur a personal liability to pay off the mortgage, which he had not agreed to do. *Henry v. Heggie*, 523.

2. *Deeds and Conveyances—Mortgagee's Possession — Acceptance—Evidence.*—By accepting a deed with covenants to be performed on his

MORTGAGES—*Continued.*

part, the grantee binds himself to their performance, whether he signed the deed or not; and where the deed is produced on trial by the grantee upon notice of the grantor or rule of court to do so, it is evidence of his acceptance. *Ibid.*

MOTIONS. See Appeal and Error; Execution.

1. *Excusable Neglect—Judgment—Default—Meritorious Defense.*—Upon a motion to set aside a judgment for excusable neglect, the burden of proof is upon the movant to show a meritorious defense as well as that his neglect was excusable; but when he has failed to show the latter, it becomes immaterial as to whether he had a meritorious defense or not. *School v. Peirce*, 424.

2. *Verdicts—Motion to Set Aside—Court's Discretion—Appeal and Error.* A motion to set aside a verdict as being against the weight of the evidence and for excessive damages is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable on appeal, when he has not abused it. *Pender v. Insurance Co., ante*, 98. *Johnson v. R. R.*, 431.

3. *Justices' Courts—Service of Process—Judgment Set Aside—Motion in the Cause—Jurisdiction—Consent of Parties.*—Where upon the face of a summons it appears to have been properly served, the service thereof may not be impeached except by motion in the cause to set it aside; and where the summons issued from a justice's court, the Supreme Court will not treat the motion as properly lodged, even by consent of the parties, when it does not so appear to have been done. *Ballard v. Lowry*, 487.

MUNICIPAL CORPORATIONS. See Health; Cities and Towns.

1. *Counties—Order of Court—Necessary Expenses—Mandamus.*—Mandamus against the county commissioners to enforce the payment of a debt for a necessary expense incurred by the county is the proper and only remedy. *Withers v. Commissioners*, 341.

2. *Homicide—Trials—Necessary Expenses—Chemical Analysis—Costs—Court's Discretion—Counties—Parties—Constitutional Law.*—Where a defendant is charged with homicide by means of poison, and the trial judge has ordered a post-mortem examination of the stomach to be made, which was accordingly done, and resulted in the discharge of the defendant, and the taxing of the cost of the analysis against the county: *Held*, the cost of the analysis was a reasonable county expense, resting within the sound discretion of the court, and binding upon the commissioners. *Ibid.*

NEGLIGENCE. See Trials; Telegraphs and Telephones; Cities and Towns; Master and Servant; Landlord and Tenant; Railroads.

1. *Instructions—Contributory—Proximate Cause.—Semble*, in this action to recover of the defendant damages for the death of plaintiff's intestate, alleged negligently to have been caused by certain defects in regard to its wiring and arrangement for manipulating its arc lamp, the evidence was insufficient to carry the case to the jury; but if otherwise, the charge of the court upon the rule of the prudent man, contributory negligence, and proximate cause, is approved. *Monds v. Dunn*, 108.

NEGLIGENCE—*Continued.*

2. *Railroads—Broken Car Steps—Master and Servant—Actus Dei—Concurring.*—Where it has been properly ascertained that the plaintiff, in the course of his employment, was injured by falling from the platform of a car at night, for the reason that the steps of the car had recently been broken off from the platform by the falling over of large boxes negligently left near the track over which the defendant's train had passed, the fact that a heavy windstorm was instrumental in turning these boxes over will not advantage the defense, it being primarily the negligence of the defendant, concurring with an uncontrollable condition, afterwards arising, which proximately caused the injury complained of. *Ferrebee v. R. R.*, 351.

3. *Railroads—Public Crossing—Contributory Negligence—Trials—Questions for Jury.*—The rule requiring that a traveler shall look and listen for approaching trains, and take reasonable precautions against exposing himself to peril before going upon a railroad track, where it crosses a public highway, is not laways an absolute one, but may be so qualified by attendant circumstances as to require the issue of contributory negligence to be submitted to the jury; though if he has failed to exercise the care required of him, which is the proximate cause of the injury complained of, it will bar his recovery. *Johnson v. R. R.*, 431.

4. *Railroads — Public Crossings — Contributory Negligence — Proximate Cause—Last Clear Chance.*—If a traveler is injured while upon a railroad track at a public crossing by a train, and is without fault, or if his fault is either excused by some act of the company or is not the proximate cause of the injury, the company having the last clear chance, he may adopt, without the imputation of negligence, such means of extrication, when suddenly confronted by his peril, as are apparently necessary, and the care required of him is that which an ordinarily prudent man would use under the same circumstances. *Ibid.*

5. *Railroads—Public Crossings — Contributory Negligence—Trials—Evidence—Nonsuit.*—Where the evidence is conflicting and that of the plaintiff, in his action against a railroad to recover damages for a personal injury alleged to have been negligently inflicted, tends to show that in attempting to cross the defendant's railroad track at a public crossing in a town frequently used, where a freight train had just passed from view, behind a string of cars left on a different track by the defendant; that he had looked and listened before entering upon the track and had reasonably supposed there was no danger from the train; that he was injured while upon the track by some of the cars suddenly coming upon him by reason of the train having made a "flying switch"; that there was no one upon these cars to give warning of their approach, and no timely warning was given, the view of the evidence most favorable to the plaintiff's contention will be taken by the court upon a motion to nonsuit, and it is *Held*, in this case, that such motion was properly disallowed. *Ibid.*

6. *Railroads—Evidence—Proof by Comparison — Substantial Identity.*—The plaintiff was injured by being run over by defendant's box cars while endeavoring to cross its track at a public crossing, and to rebut the defendant's contention, in his action to recover damages for the

NEGLIGENCE—*Continued.*

injury thus received, he introduced evidence tending to show that he had observed the caution required of him before going on the track, but that his view of the danger was obstructed by box cars left stationary in a certain position on the defendant's track. The defendant, to impeach this evidence of the plaintiff, introduced a witness who offered to testify that he had measured other cars, and from their measurement the plaintiff's statement as to the obstruction could not be true. There was no evidence that the cars left upon the track had been measured, or other evidence as to their size: *Held*, the testimony offered by the defendant was incompetent, there being no evidence of substantial identity of the cars necessary to prove the objective fact. *Ibid.*

7. *Master and Servant—Dangerous Machinery—Instructions to Servant—Evidence — Duty of Master — Safe Appliances—Contributory Negligence—Trials.*—The plaintiff, a 14-year-old boy, was employed to operate a tentering machine in the defendant's cotton factory, and was injured while endeavoring to clean the machine, while in motion, by reason of a rag, given him for the purpose, catching in a part of the machinery and drawing his hand therein. The plaintiff's evidence tended to show that he was unused to the machine and was not instructed in its operation; that theretofore a brush with a handle about 2½ feet long had been given him and the other employees, but had been taken away, under his protest, because its use would probably be injurious to the machine by the wooden handle catching in its cogs, and that with these brushes the machine was cleaned while in operation; that there were times when the machines were not running, when they could safely be cleaned with a rag, in the manner described, but that these times were taken up with other duties, and that he was directed by his superior employer to clean the machine with a rag, when in motion: *Held*, defendant's motion as of nonsuit upon the evidence was properly overruled; and it was for the jury to determine as bearing upon the defendant's negligence: (1) Whether the plaintiff was directed to clean the machine while in motion; (2) Whether the rag was a safe appliance for the purpose; (3) Whether the defendant failed to instruct the plaintiff as to the operation of the machine and its dangers, and whether such failure was the proximate cause of the injury. And it is further held, that it is not necessarily inferred from the evidence that the plaintiff was acting at the time in disobedience of orders, from the fact that upon stated occasions the machines were stopped in their operation, when they could safely have been cleaned with a rag. *Breeden v. Manufacturing Co.*, 469.

8. *Same—Nonsuit.*—In this case there was evidence tending to show that as plaintiff's intestate was on his direct route to his home on a dark night, he attempted to cross defendant's railroad track at a place usually crossed by pedestrians, and while the defendant's freight train was pulling away from the station, in town limits, the intestate was heard to scream and was found in a certain position on the track over which the train had just passed, 75 yards from the station; that the train had no headlight on the locomotive and was not giving signals or warnings as it moved away. The motion to nonsuit should have been denied. *Shepherd v. R. R.*, 518.

NEGLIGENCE—*Continued.*

9. *Railroads—Pedestrians—Danger — Presumption.* — While an engineer on a moving railroad train, who sees a man walking on the track in apparent possession of his strength and faculties, and without information to the contrary, is not required to stop his train or slacken his speed, under the presumption that the pedestrian will leave the track in time to save himself from injury, it is ordinarily where the pedestrian is on the same track on which the train is then running and the circumstances call for alertness or attention on the part of the pedestrian, and does not apply to the peculiar facts of this case. *Talley v. R. R.*, 567.

NEGOTIABLE INSTRUMENTS. See Bills and Notes.

NEWLY DISCOVERED EVIDENCE. See New Trials.

NEW TRIAL.

1. *Motions—Newly Discovered Evidence—Supreme Court—Character of Evidence.*—A motion for a new trial upon the grounds of newly discovered evidence will only be granted when it is made to appear that it is very probable that substantial injustice has been done by reason of unavoidable failure of the moving party to produce the evidence at the trial, which would have resulted in a different determination of the action in the interest of right and justice; and evidence which is merely cumulative is not ordinarily held sufficient. Hence such motions when made in the Supreme Court for the first time will not be granted where there is no assignment of error appearing of record as to anything that occurred at the trial. *Warwick v. Taylor*, 68.

2. *Newly Discovered Evidence—Burden of Proof.*—An application to the court for a new trial, upon the ground of newly discovered evidence, should be carefully scrutinized and cautiously examined, with the burden upon the applicant to rebut the presumption that the verdict is correct, and that there has been a lack of due diligence. *Johnson v. R. R.*, 431.

3. *Newly Discovered Evidence—Affidavits—Requisites.*—It is required for the granting of a motion for a new trial upon the ground of newly discovered evidence, that it should appear that the desired testimony will be given upon the new trial; that it is probably true, competent, and material; that there has been no laches, but that the movant had used due diligence and means to procure the evidence in due time at the trial; that the evidence is not cumulative and does not tend only to contradict, impeach, or discredit a witness who has testified, and is of such a nature as to show that probably a different result will be reached on another trial, so that right will prevail; and it is held that the facts alleged in the present case are insufficient to bring the application within the rule stated. *Ibid.*

NONRESIDENT. See Process.

NONSUIT. See Removal of Causes; Trials.

NOTICE. See Drainage Districts; Lis Pendens; Wills; Cities and Towns.

OFFICE HOURS. See Telegraphs and Telephones.

OPTIONS. See Deeds and Conveyances.

ORDINANCES. See Telegraphs and Telephones.

PAROL TRUSTS. See Trusts.

PARTIES. See Wills; Judgments; Arrest and Bail.

1. *Trials—Proper—Court's Discretion.*—The question as to whether one who is not a necessary party to the action is a proper party is one within the discretion of the trial judge, and from his decision thereof no appeal lies. *Spruill v. Bank*, 43.

2. *Appeal and Error—Premature Appeal.*—In this action against a bank for payment of a check after notice from the drawer not to do so, the payee thereof having been made a party defendant, also, an appeal from the judgment of the court dismissing the action as to the payee is premature. *Ibid.*

3. *Bills and Notes—Negotiable Instruments—Collaterals—Right of Action.* One who holds a negotiable note as collateral for the payment of a debt may maintain an action thereon in his own name, but not one who holds "for collection," for the latter is not "the party in interest." *Bank v. Exum*, 199.

PARTITION. See Clerks of Court.

1. *Parties—Interpretation of Statutes.*—One who claims an undivided interest in lands in proceedings to sell them and divide the proceeds among tenants in common and to pay debts, etc., may be properly made a party to such proceedings. Revisal, secs. 410, 414, 76. *McKeel v. Holloman*, 132.

2. *Tenants in Common—Adverse Possession—Limitation of Actions.*—The law raises a legal presumption of title in one who has been in adverse possession of lands, receiving the rents and profits for twenty years or more, which will bar the entry of another claiming an undivided interest therein as tenant in common; for the adverse occupancy of the lands puts the claimant to his action, and if continued for that time without any assertion of his right, it will be lost. *Ibid.*

PARTNERSHIPS. See Wills; Trusts.

Appeal and Error—Laches—Knowledge Presumed.—In law each copartner is charged with knowledge of the business of the firm, and excusable neglect in bringing up an appeal from the justice's court to the Superior Court is not shown because of the sickness of the member of a law firm appearing in the case, who usually attended to cases of the character of the one at bar, and the ignorance of the existence of the case by the other. *Hunter v. R. R.*, 281.

PAYMENT. See Insurance; Contracts; Judgments.

PLEADINGS. See Courts; Arrest and Bail.

1. *Railroads—Federal Employers' Liability Act—Limitation of Actions.* The provision of section 6 of the Employers' Liability Act reading, "that no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued" is a statute of limitation, and must be specially pleaded both under the general law and Revisal, 360, to become available as a defense. *Burnett v. R. R.*, 186.

PLEADINGS—*Continued.*

2. *Allegations—Evidence—Prayer for Relief.*—Where all the issuable and relevant facts relative to a recovery of damages for the breach of warranty and other stipulations in a conveyance of standing timber have been pleaded, and appropriate evidence has been introduced, it is immaterial that the prayer for relief in the complaint demands the penalty provided for in the deed, and damages in accordance with the pleadings and evidence may be recovered. *Herring v. Lumber Co.*, 481.

3. *Construction—Prayers for Relief—Subrogation—Contract.*—The plaintiff may recover according to the allegation of facts contained in his complaint, and is not restricted by the terms of his prayer for relief; and where he has sufficiently alleged such matters as would, if established, entitle him to recover upon the equitable doctrine of subrogation, he recovers accordingly without any amendment of his prayer for relief, which is based merely upon contract. *Baber v. Hanie*, 588.

POLICE POWERS. See Cities and Towns.

POWERS. See Wills.

PRESUMPTIONS. See Trials; Master and Servant; Insurance; Courts.

PRINCIPAL AND AGENT. See Intoxicating Liquors; Carriers of Passengers; Execution; Contracts.

1. *Cotton Broker—Respondeat Superior.*—A sale of cotton made by a broker in his own name, though in fact acting for his principal, will bind the latter, for the acts of the broker therein are imputable to the principal. *Latham v. Field*, 356.

2. *Same—Scope of Authority—Representations—Conduct—Good Faith.*—Where a defendant has represented to the plaintiff that a certain agent or broker was authorized to act for him in the sale of cotton, and, reasonably induced by this representation, and by the acts of the principal and the broker or agent, the plaintiff purchased from the latter cotton of a certain grade, believing, in good faith, that he was dealing with him in his representative capacity only, the defendant would be bound by the transaction, though the broker or agent was acting independently in making the sale. *Ibid.*

3. *Cotton Broker — Scope of Authority — Trials — Evidence—Nonsuit.*—When in an action to recover damages for the failure of cotton purchased and delivered to come up to the grade or quality of that purchased, the question has arisen as to whether the purchase was made of the defendant or of his broker or agent, acting independently, there was evidence tending to show, on behalf of the plaintiff, that the defendant solicited his trade for the purchase of cotton, and represented, in the presence of one T., that the latter was his agent in that territory for the sale of cotton, to which T. did not then or thereafter dissent; that subsequent to this statement, thus made by the defendant, the plaintiff bought from T. as agent or broker of the defendant the cotton in question, which defendant shipped to his own order, "Notify T.," indorsing the bill of lading, whereupon T. drew on the plaintiff, bill of lading attached, who paid the draft, and got the cotton several days thereafter, upon its arrival, in accordance with the established custom in such transactions, which

PRINCIPAL AND AGENT—*Continued.*

provides that the consignee may receive the cotton from the carrier, subject to rejection by him if below the grade contracted for; that the transaction for the purchase of the cotton was confirmed by T., "for the account of Field & Son," the defendants, and that it was only the custom to ascertain the shipper's name in the bill of lading and his indorsement for delivery of the cotton, it being customary for the vendors of cotton to consign it, in this manner, to third persons, in transactions of this character. *Held*, there was evidence sufficient to show that T., acting within the scope of his agency as the defendant's broker, was authorized to bind the defendant as principal to the transaction; and a motion to nonsuit upon the evidence was improperly allowed. *Ibid.*

4. *Insurance, Life—Fraud—Waiver—Knowledge.*—Where an insurer has issued a "binding slip" to the insured upon his application for a policy of life insurance, after his examination by its physician, the application providing that the policy should be delivered while the insured was in good health, and it was delivered while he was ill with a fever which resulted in his death, the question of waiver by the company of the benefit of the material false representations made in the application for the policy depends upon the knowledge by the company of the falsity of the representations and the conditions under which it was delivered, or the authority of its agent making the delivery to do so, depending upon his knowledge of the facts and circumstances at the time. *Gardner v. Insurance Co.*, 367.

5. *Insurance, Life—Fraud—Collusion—Imputed Knowledge.*—An agent of an insurer in delivering a policy of life insurance to the insured, contrary to its terms, and in collusion with him, does not act for the insurer therein, but in fraud of his rights, and no knowledge of the fraudulent conditions existing in the transaction to the knowledge of the agent will be imputed to the principal. *Ibid.*

6. *Misappropriation of Funds—Garnishment—Offset.*—The plaintiff sued the defendant and garnisheed his former employer for a balance of salary amounting to $55, alleged to be due. The garnishee contended the defendant, while in its employ, had received money upon receipted vouchers for expenses incurred to one W. for team hire, which it afterwards had to settle, and that in this way the defendant had misappropriated $95 belonging to it. The plaintiff contended that W. had authorized the defendant to collect $63.25 of this amount. There was evidence tending to establish both of these contentions. Under the instruction of the court the plaintiff's recovery of the $55 was made to depend upon the authority of the defendant to collect the money as the agent of W., and it was held for reversible error, for that if this agency were established to collect $63.25, and he had wrongfully collected $95, the garnishee would have the right to an offset of $31.75, the difference between the amount authorized and the amount collected. *Cannon v. Marlott*, 549.

PRINCIPAL AND SURETY. See Arrest and Bail.

PROBATE OFFICER. See Deeds and Conveyances.

PROCESS.

1. *Nonresident — Court's Jurisdiction — Special Appearance—Excusable Neglect—Practice.*—Objection to a judgment rendered by default upon

PROCESS—*Continued.*

the ground that summons therein had been served on the movant, a nonresident, while attending court as a witness in another action, should be made by special appearance, as the motion goes to the jurisdiction of the person and the defective service of process, and not by a motion to set the judgment aside on the ground of excusable neglect, which goes to the merits of the controversy and is equivalent to a general appearance, and therefore a waiver of the defect in the service. *Simmons v. McCullin*, 409.

2. *Justices' Courts—Judgment Docketed in Superior Court—Service of Process—Execution Recalled—Procedure.*—Where a judgment of a justice of the peace has been docketed in the Superior Court and execution issued therefrom, which is sought to be recalled upon the ground that the judgment had been obtained by default and the summons had not been served, though upon its face it so appeared to have been, the remedy is by motion in the justice's court to set aside the judgment there rendered, made upon notice to the plaintiff, his attorney of record, or by publication; and an injunction may not issue in the Superior Court to stay the execution. *Ballard v. Lowry*, 487.

3. *Same—Findings—Undertakings.*—Upon motion duly made before a justice of the peace to set aside his judgment for lack of proper service, which has been docketed in the Superior Court, from whence execution has issued, it is the duty of the justice to find the facts; and when such motion is lodged the defendant may apply to the clerk and have the execution recalled until the motion is finally disposed of, upon giving the required bond. *Ibid.*

4. *Justices' Courts—Service of Process—Judgment Set Aside—Motion in the Cause—Jurisdiction—Consent of Parties.*—Where upon the face of a summons it appears to have been properly served, the service thereof may not be impeached except by motion in the cause to set it aside; and where the summons issued from a justice's court, the Supreme Court will not treat the motion as properly lodged, even by consent of the parties, when it does not so appear to have been done. *Ibid.*

PROXIMATE CAUSE. See Negligence.

PUBLIC-SERVICE CORPORATIONS. See Telegraphs and Telephones.

PUNITIVE DAMAGES. See Carriers of Passengers; Cities and Towns; Eminent Domain.

PURCHASER. See Liens.

QUARANTINE. See Health.

QUASI-PUBLIC CORPORATIONS. See Cities and Towns.

QUESTIONS FOR JURY. See Trials.

QUESTIONS OF LAW. See Trials.

RAILROADS. See Deeds and Conveyances.

1. *Signals — Negligence—Natural Characteristics of Animals—Judicial Notice—Proximate Cause—Questions for Jury.*—A flock of turkeys are not as alert to danger as cattle, horses, or other more intelligent creatures, though more quickly alarmed by a sudden sharp sound, as the whistle of an approaching railroad locomotive. Hence, the failure of the engineer to blow the whistle of the locomotive when he sees turkeys feeding on or across the track, or should have seen them by a proper lookout, is actionable negligence. The jury may consider the known characteristic of a turkey to run or fly at a sudden sound, upon the question as to whether the failure to blow the whistle, under these circumstances, was the proximate cause of the damage inflicted by the train running into them. *Lewis v. R. R.*, 33.

2. *Relief Department—Benefits—Negligence—Action.*—The acceptance by an injured employee of a railroad company of benefits from its relief department does not, under the Federal Employers' Liability Act, and according to the Federal decisions, bar such employee of his right of recovery in his action against the railroad for the damages consequent upon the injury, if negligently inflicted. *Burnett v. R. R.*, 186.

3. *Same — Action — Conditions Annexed — Interpretation of Statutes.*— While the Federal Employers' Liability Act divides into several classes the employees of railroads injured by negligence while engaged in interstate commerce, no right of action is given them not found at common law, the only difference being to deprive the carrier of certain defenses it had at common law with respect to contributory negligence, assumption of risk and the negligence of a fellow-servant. Hence, the period of two years prescribed wherein the action must be commenced is not a condition annexed to the right of action, and must be specially pleaded. *Ibid.*

4. *Same—Intent.*—The Federal Employers' Liability Act deprives the employee of the right to bring his action under the State laws, and to this extent deprives him of the common-law right of action, but not of the common-law right to recover in the Federal jurisdiction; and the Federal statute being enacted for the benefit and protection of employees, the requirement that he bring his action within two years, etc., cannot be construed as a condition annexed to his right of recovery, but merely as a statute of limitation, necessary to be pleaded by the employer to become available as a defense. *Ibid.*

5. *Master and Servant—Duty of Master—Safe Place to Work—Negligence —Evidence—Trials.*—There must be a breach of the employer's duty to furnish the employee a safe place to work, for the latter to recover damages for the negligent failure of the former to have done so; and in this case it is held that no such failure is shown, it appearing that the employee, employed as a section man or assistant section foreman, attempted to go for water, of his own volition and without orders from his superior, down a steep embankment of a railroad fill, across bushes and shrubbery, and was injured by falling upon small pointed snags 6 or 8 inches high, left there from the former clearing of the right of way, as a protection from fires, and which were concealed by the shrubbery and bushes since growing up, and unknown

RAILROADS—*Continued.*

to him at the time, and that he could have safely gone for the water by going to the end of the embankment, a further distance of 75 yards. *Williams v. R. R.*, 290.

6. *Broken Car Steps—Master and Servant—Negligence—Contributory Negligence.*—In this case there was evidence tending to show that an employee of a railroad company was injured while acting in the course of his employment, at night, by falling from the platform of a car at a station, because of the fact that since the train had left a former station the steps had been broken from the platform; that the only light furnished him was that from a lantern he was carrying; that the steps had been broken from the car by the falling over of large boxes, 4 feet tall and 13 and 18 inches thick, setting on end and unsecured in any way, about 12 or 14 inches from passing cars, left for some weeks on a trestle, and used for the purpose of holding oil cans and other things for the defendant's engineers: *Held*, it was a negligent act of the defendant to leave boxes, as described, so near the main track of its railroad, where they were liable, at any time and from ordinary causes, to fall over and collide with the defendant's train, and the jury having by their verdict accepted this version of the occurrence and determined such act was the proximate cause of the plaintiff's injury without negligence on his part, an actionable wrong has been established; and this position is not affected by the fact that the action was properly brought under the Federal Employers' Liability Act, which provides that contributory negligence shall only be considered in diminution of damages: *Held further*, that there was sufficient evidence to sustain a negative finding of the jury on the issue of contributory negligence. *Ferrebee v. R. R.*, 351.

7. *Street Railways—Operation of Cars—Duty of Traveler—Negligence.*—The running of an electric car upon its tracks on a city's street in the usual and customary manner at a moderate speed and without further noise than is necessary is not negligence; and where a traveler in a buggy voluntarily drives in the direction from which it is approaching, is able to safely drive into a side street, and is injured, without coming in contact with the car, because a colt which he was leading, becoming frightened, overturned the buggy, the injury complained of is the result of his own negligence, and he cannot recover damages therefor. The reason that this rule is not applicable to automobiles (ch. 107, Laws 1913), pointed out by CLARK, C. J. *Barnes v. Public-Service Corporation*, 363.

8. *Public Crossing—Rights of Railroad and Traveler.*—Where a railroad track crosses a public highway, though a traveler and the railroad have equal rights to cross, the former must yield the right of way to the latter in the ordinary course of its business. *Johnson v. R. R.*, 431.

9. *Same—Care Required.*—It is the duty of an engineer on a railroad train to give signals and exercise vigilance in approaching the crossing of the railroad and a public highway, and both the employees on the train and the traveler at such places are charged with the mutual duty of keeping a careful outlook for the danger, the degree of care being in proportion to the known danger. *Ibid.*

RAILROADS—*Continued.*

10. *Public Crossing—Duty of Traveler—"Look and Listen"—Rule of the Prudent Man.*—It is incumbent on a traveler at a place where a public highway crosses the railroad track to use his senses of sight and of hearing, before attempting to go upon the track, to the best of his ability, under the existing and surrounding conditions, and to that end he must look and listen in both directions for approaching trains before exposing himself to peril, when opportunity or time is afforded him, this being required by the law under the circumstances. *Ibid.*

11. *Same — Contributory Negligence—Trials—Questions for Jury.*—The rule requiring that a traveler shall look and listen for approaching trains, and take reasonable precautions against exposing himself to peril before going upon a railroad track, where it crosses a public highway, is not always an absolute one, but may be so qualified by attendant circumstances as to require the issue of contributory negligence to be submitted to the jury; though if he has failed to exercise the care required of him, which is the proximate cause of the injury complained of, it will bar his recovery. *Ibid.*

12. *Signals and Warnings—Duty of Traveler—Negligence—Contributory Negligence—Proximate Cause.*—Where a traveler is injured by a train while going upon a railroad track at a public crossing, and his view is obstructed or his hearing an approaching train is prevented, especially if this is done by the fault of the defendant, and the company's servants fail to warn him of the approaching train, and he is induced by this failure of duty to place himself in a position to receive the injury, having used his faculties the best he could under the circumstances to ascertain if there is danger, the failure of the defendant to warn him will be regarded as the proximate cause of the injury, and negligence will be imputed to the company, and not to him. *Ibid.*

13. *"Flying Switch" — Negligence — Contributory Negligence—Evidence—Trials.*—A "flying switch" made by the employees of a railroad, where the track is crossed by a public and frequently traveled highway in the populous part of a town, without signals or other warning by persons on the cars or otherwise to notify travelers of the danger, is *per se* gross negligence; and where one, before crossing the track, has observed the care required of him to look and listen, and has otherwise exercised the caution required of him, and has been injured by reason of a "flying switch" having been made, there is no element of contributory negligence in his action to recover damages for the injury he has sustained. *Ibid.*

14. *Headlights—Warnings—Negligence Per Se—Proximate Cause—Trials—Evidence.*—The running of a railroad train at night without light, signal, or other warning of its approach, is negligence *per se*, and where a person is injured on a dark night while attempting to cross the track at a place customarily used for crossing, within the limits of a populous town, by a train thus operated, the negligence of the company is continuous and the proximate cause, eliminating the question of contributory negligence, especially as the statute, Laws 1909, ch. 446, requires electric headlights to be used on locomotives. *Shepherd v. R. R.*, 518.

RAILROADS—*Continued.*

15. *Same — Negligence — Proximate Cause—Sidings—Defective Switch—Stopping Trains—Trials—Evidence—Questions for Jury.*—Where a pedestrian on a railroad track is killed on a side track of a railroad company, leading off from its main line, near a station in a town, and there is evidence tending to show that the train which ran over him, running at a high rate of speed, was a train which for seven years had not taken this siding, and was running near its schedule time, and both the custom and schedule were known to the intestate; that the tracks at this place were customarily used by pedestrians; that upon hearing the warning it gave of its approach to the station, the pedestrian crossed over to the side track, where he was killed; that the switch to the side track showed from its red signal that it had been turned, which could have been seen by the engineer 200 feet ahead and have afforded ample time within which to have stopped the train and avoided the injury: *Held*, the case was one for the determination of the jury on the question whether there had been negligence on the part of the company or its employees in regard to the defective switch or in the failure to get the train sooner under control, and whether such negligence, if established, was the proximate cause of the injury. *Talley v. R. R.*, 567.

16. *Same—Contributory Negligence—Nonsuit.*—While a pedestrian before going on a railroad track is required to look and listen for approaching trains, and observe a proper degree of care for his safety in doing so, this obligation may be so qualified by facts and attendant circumstances that the question of contributory negligence must be referred to the jury, when he has therein failed; and under the peculiar facts and circumstances of this case it is held that a motion as of nonsuit upon the evidence should not have been granted, there being evidence tending to show that the intestate was killed on a side track by a train, running on schedule time, which had not for seven years taken this siding, by reason of the switch having been unexpectedly turned, and that the deceased had gone from the main track upon the siding, on hearing the approach of the train, and was walking there with his back to it when he was killed, and that it was raining and he was carrying an umbrella, the evidence tending to show that the schedule of this train and the custom not to enter on this side track were known to the intestate. *Ibid.*

17. *Safe Appliances—Automatic Couplers—Negligence—Trials—Nonsuit.*—It is the duty of a railroad company to equip its cars with automatic couplers and to keep them in proper repair, and in an action to recover for the wrongful death of an employee who was caught between the cars and killed while engaged in coupling the cars, the failure of these couplers to work automatically on that occasion so as to require this act of the intestate, is sufficient evidence of negligence of the defendant to take the case to the jury, and a judgment as of nonsuit should not be granted; and this rule applies to actions brought under our decisions as well as under the Federal statutes known as the Safety Appliance Act. *Montgomery v. R. R.*, 597.

RECEIVERS. See Divorce.

RECEIVERS, FEDERAL. See Courts.

RECORDARI. See Appeal and Error.

REFERENCE. See Appeal and Error.

REFORMATION. See Fraud and Mistake.

REGISTRAR. See Elections.

REGISTRATION. See Deeds and Conveyances; Elections.

RELEASE. See Landlord and Tenant.

RELIEF DEPARTMENT. See Railroads.

REMAINDER. See Estates; Wills.

REMOVAL OF CAUSES.

Railroads—Nonsuit—Purchasing Corporations—Actions.—Where an action for the negligent killing of intestate was originally brought against the Federal receivers of a railroad company, in the courts of this State, removed by the defendants to the Federal courts, where the plaintiff took a nonsuit, and subsequently the corporate property has been foreclosed and decree confirming the sale has been made, and thereunder the possession of the property has been given to the railroad corporation which purchased at the foreclosure sale, the plaintiff may again bring his action for the same cause, in the State court, against the purchaser, within a year from the time of his taking the nonsuit. *Lassiter v. R. R.*, 19.

REPUTATION. See Evidence.

RES GESTÆ. See Trials; Evidence.

REVERSION. See Deeds and Conveyances; Eminent Domain.

REVISAL. (For greater accuracy, refer to the various subjects in this index.)

SEC.

76. One claiming an interest in lands being partitioned is a proper party. *McKeel v. Holloman*, 132.

410. One claiming an interest in lands being partitioned is a proper party. *McKeel v. Holloman*, 132.

414. One claiming an interest in lands being partitioned is a proper party. *McKeel v. Holloman*, 132.

513. Reviewing an order to set aside a judgment for mistake, etc., the Supreme Court only looks to the facts found by the trial court, and is not restricted to mistake alone. In this case it is held a mistake on the trial in the description in a deed is sufficient. *Mann v. Hall*, 50.

535. The trial judge must charge the jury except where no principles of law are involved and he is not requested to do so. *Blake v. Smith*, 274.

535. Where defendant has accepted an order for payment of money only that may be due the drawer, a charge that the acceptance was unconditional is reversible error. *Craig v. Stewart*, 531.

REVISAL—*Continued.*

SEC.

625. Motion before the clerk for personal execution against debtor, when denied, may be appealed to the Superior Court, and it will not be granted until after an unsatisfied execution against the property. The cause of arrest must be pleaded and proved and affirmatively determined. *Turlington v. Aman*, 555.

641. Sheriff's failure to serve notice of advertisement of sale under execution does not render his deed void as against a stranger without notice. Proceedings to set the deed aside is by motion in the cause. *Williams v. Dunn*, 206.

642. Sheriff's failure to serve notice of advertisement of sale under execution does not necessarily render his deed void as against a stranger without notice. Proceedings to set the deed aside is by motion in the cause. *Williams v. Dunn*, 206.

662. Betterments may be assessed in an action to recover an undivided interest in lands. *Daniel v. Dixon*, 137.

727. An execution may be issued against a sheriff for misappropriation of public funds or for misconduct or neglect in office. *Turlington v. Aman*, 555.

832. A logging road is a fixture. *Basnight v. Small*, 15.

860. A statutory tender must be written, signed, and contain an offer of judgment. *Medicine Co. v. Davenport*, 294.

950. A sheriff may execute a valid deed to lands sold for taxes after the expiration of his term of office. *McNair v. Boyd*, 478.

980. This section can give no validity to a deed void for mental incapacity and prior registered. *Thompson v. Thomas*, 500.

1578. An estate to B. "and his bodily heirs" converted into a fee simple, under the facts in this case. *Harrington v. Grimes*, 76.

1590. The only restrictions imposed upon devises are to a life or lives in being, and as to certain contingent remainders. *Fellowes v. Durfey*, 305.

1590. All parties who could possibly have an interest in the lands in controversy in this case, a sale should be ordered and reinvestment made. *O'Hagan v. Johnson*, 197.

1628. Evidence of wife is competent in an action for criminal conversation wherein she is not a party. *Powell v. Strickland*, 393.

1629. Evidence of wife is competent in an action for criminal conversation wherein she is not a party. *Powell v. Strickland*, 393.

1630. Evidence of wife is competent in an action for criminal conversation wherein she is not a party. *Powell v. Strickland*, 393.

1631. A wife may testify that she saw her husband place deed to lands in controversy in his trunk. *Carroll v. Smith*, 204.

1631. Evidence of wife is competent in an action for criminal conversation wherein she is not a party. *Powell v. Strickland*, 393.

1636. The testimony of husband is not testimony against the wife in an action for criminal conversation wherein she is not a party. *Powell v. Strickland*, 393.

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SEC.

1645. A witness who does not justify in failing to appear and testify is subject to the penalty, and for actual damages. This applies to a lawyer whose excuse is professional business elsewhere at the time. *In re Pierce*, 147.

1691. Where answer alleges that contract sued on is a wagering one, the burden is on the plaintiff to show the contrary. *Holt v. Wellons*, 124.

2001. The relation of landlord and tenant must be shown by the plaintiff in ejectment in justice's court. *McIver v. R. R.*, 544.

2019. Where the owner has paid out the balance of contract price for completing an abandoned contract, without statement of indebtedness by the contractor or notice from material man, the latter may not recover from the owner. *Supply Co. v. Eastern Star Home*, 513.

2020. Where the owner has paid out the balance of contract price for completing an abandoned contract, without statement of indebtedness by the contractor or notice from material man, the latter may not recover from the owner. *Supply Co. v. Eastern Star Home*, 513.

2021. Where the owner has paid out the balance of contract price for completing an abandoned contract, without statement of indebtedness from contractor or notice from material man, the latter may not recover from owner. *Supply Co. v. Eastern Star Home*, 513.

2028. Requirement that lien for material be filed in six months applies to purchasers for value without notice, and one who has notice of opposing claim is put upon inquiry. *Lumber Co. v. Trading Co.*, 314.

2208. One claiming to be a holder of negotiable instrument in due course has the burden of proof when fraud is alleged. *Bank v. Exum*, 199.

2494. In partition proceedings the clerk has authority to set aside his judgment for fraud in its procurement seventeen months thereafter. *Turner v. Davis*, 38.

2634a. A written demand on carrier is only necessary when penalty is claimed. *Bell v. R. R.*, 180.

2698. This section does not affect the rights of owners of lands to recover damages where the corporation, as a part of the consideration, contracts to build a railroad over the lands and fails in the performance. *Herring v. Lumber Co.*, 481.

2884. The recitals in a sheriff's deed to land sold for taxes are not conclusive as to the requisites of notice to owner, etc. *McNair v. Boyd*, 478.

2905. Before the passage of the present law a county did not acquire title to lands sold for taxes and bought in by it. *McNair v. Boyd*, 478.

3123. Notice must be given to executor before others interested may apply; and this section applies to codicil. *Spencer v. Spencer*, 83.

3128. A probate in common form is conclusively valid and evidence in proceedings to caveat the will. *Holt v. Ziglar*, 390.

3135. Before the passage of this act, the right to caveat a will in common form may have been lost by lapse of time. *In re Dupree's Will*, 256.

REVISAL—*Continued.*

SEC.

3137. When a judgment declaring a will invalid has been set aside, the caveat is in full force until a valid judgment has been rendered. *Holt v. Ziglar*, 390.

3138. A devise will be construed in fee unless a contrary intent clearly appears. *Fellowes v. Durfey*, 305.

3305. The killing of a dog, in this case, does not come within the provisions of this section. *Beasley v. Byrum*, 3.

3702. The violation of an ordinance prohibiting gates swinging out over the sidewalk is a misdemeanor. *Knight v. Foster*, 329.

3731. Police officers of towns have authority to suppress indecent shows and make arrests when it reasonably appears to them as necessary. *Brewer v. Wynne*, 319.

4116. Where the receipts are sufficient, a special school district of a city should share in the fund reserved for building and repairing schoolhouses. *Commissioners v. Board of Education*, 404.

4124. This section is not in conflict with section 4116, and special school districts for towns may share in the fund reserved for building and repairing schoolhouses. *Commissioners v. Board of Education*, 404.

4508. There is no liability of an incorporated town, without a quarantine officer, to a county for care of its citizens treated by the latter for smallpox. *Commissioners v. Henderson*, 114.

4509. This section construed with 4508, and no expense is incurred by a city or county having quarantine when the officer of the other interferes. *Commissioners v. Henderson*, 114.

4773a. A policy of life insurance is not invalid when the provisions of this section have not been complied with, and burden of proof is on plaintiff to show the approval of Insurance Commissioner has not been obtained. *Blount v. Fraternal Assn.*, 167.

4775. Where discriminating rates of insurance are charged, the policy is not invalid as to the insured, and he may recover as damages premiums paid, etc. *Robinson v. Life Co.*, 415.

4808. A life insurance policy may be avoided by material misrepresentations in the policy when a "binding slip" has been issued. *Gardner v. Insurance Co.*, 367.

RULE IN SHELLEY'S CASE. See Estates.

RULE OF THE PRUDENT MAN. See Railroads.

RULES AND REGULATIONS. See Telegraphs and Telephones.

SAFE APPLIANCES. See Master and Servant; Railroads.

SALES. See Execution.

SCHOOL DISTRICTS.

1. *Graded Schools—Special Districts—General Taxes—Equitable Division.* —Under the construction of Article IX of our Constitution, higher education is to be encouraged as necessary to good government and the happiness of mankind, and there is no constitutional restriction

SCHOOL DISTRICTS—*Continued.*

upon a community, which pays a special tax for graded or other schools, to establish better school facilities than those imposed generally by statute, from sharing in the equitable division of the general tax levied in the county for schools under the general statute. *Commissioners v. Board of Education*, 404.

2. *Same—School Buildings—Interpretation of Statutes.*—Where a graded or other special school district has been established in a city or town in a county where the school funds exceed $25,000, it is the duty of the county board of education to include in the distribution of the fund reserved for building and repairing schoolhouses in the county, allowed by the statute, such just and equitable part thereof as is required for such purposes within the graded or special school district established in the city. Revisal, sec. 4116, as amended by chapter 149, Laws 1913. *Ibid.*

3. *Same—Control of Buildings.*—Revisal, sec. 4116, as amended by chapter 149, Laws 1913, requiring, by interpretation, an equitable distribution to graded or special school districts created for a city, of the fund reserved by the county board of education for building and repairing the schoolhouses of the county, the school fund of which exceeds $25,000, is not in conflict with section 4124, for this latter section only makes certain requirements for the building of the schoolhouses, under the control of county board of education, and is silent as to the control of the buildings after they have been erected. *Ibid.*

SHADE TREES. See Cities and Towns.

SPECIFIC PERFORMANCE. See Contracts.

STATE'S LAND. See Deeds and Conveyances.

STATUTE OF FRAUDS. See Contracts; Insurance.

Trusts and Trustees—Parol Trusts.—The provisions of the statute of frauds, that a sale of lands be in writing and signed by the party charged, etc., does not apply to the declaration of a trust in lands, in the absence of statutory requirement; hence, a parol trust in lands to stand seized to the use of another is enforcible in North Carolina. *Anderson v. Harrington*, 140.

STATUTES. See Drainage Districts; Clerks of Court; Appeal and Error; Courts; Wills; Health; Insurance.

1. *Forcible Trespass—Killing of Dog—Damages.*—It is forcible trespass for one to enter the premises of another, armed with a shotgun, and unnecessarily shoot and kill the dog of the latter while tied to the piazza of his home, in the presence of his wife and against her protest, and damages may be recovered in the suit by the man and his wife for the injury thereby caused to the wife owing to her age and her affliction with heart disease. In this case there was no evidence to bring it within the purview of Revisal, sec. 3305, relating to the killing of mad dogs. *Beasley v. Byrum*, 3.

2. *Interpretation—Words and Phrases—Ambiguity.*—Where the language of a statute is free from ambiguity and conveys a definite and sensible meaning, the courts construe it literally, and will not enter into

STATUTES—*Continued.*

the question of its wisdom or expediency. The rule of construing statutes expressed in ambiguous language, discussed by WALKER, J. *Commissioners v. Henderson*, 114.

3. *Municipal Corporations — Interpretation—Separate Government—Officious Interference—Expenses—Action.*—Revisal, secs. 4508 and 4509, relating to the quarantining for smallpox, should be construed together, and so the city health officer may become its quarantine officer, just as the county health officer is the quarantine officer of the county. Hence, when one officiously interferes with the patients of the other and incurs expenses therefor, no recovery for them can be had. *Ibid.*

4. *Ejectment—Undivided Interest—Betterments—Interpretation.*—An action to recover an undivided interest in lands is in effect a proceeding in ejectment wherein betterments may be assessed. Revisal, sec. 652. *Daniel v. Dixon*, 137.

5. *Tenants in Common—Betterments.*—A tenant in common, irrespective of the statute, Revisal, sec. 652, is entitled to recover against his cotenant for betterments he has placed upon the land. *Ibid.*

6. *Federal Employers' Liability Act—Action—Conditions Annexed—Interpretation.*—While the Federal Employers' Liability Act divides into several classes the employees of railroads injured by negligence while engaged in interstate commerce, no right of action is given them not found at common law, the only difference being to deprive the carrier of certain defenses it had at common law with respect to contributory negligence, assumption of risk and the negligence of a fellow-servant. Hence, the period of two years prescribed wherein the action must be commenced is not a condition annexed to the right of action, and must be specially pleaded. *Burnett v. R. R.*, 186.

7. *Same—Intent.*—The Federal Employers' Liability Act deprives the employee of the right to bring his action under the State laws, and to this extent deprives him of the common-law right of action, but not of the common-law right to recover in the Federal jurisdiction; and the Federal statute being enacted for the benefit and protection of employees, the requirement that he bring his action within two years, etc., cannot be construed as a condition annexed to his right of recovery, but merely as a statute of limitation, necessary to be pleaded by the employer to become available as a defense. *Ibid.*

8. *Contingent Remainder—Reinvestment—Interpretation.*—A devise of real and personal property to such of the testator's children as may survive him, to them and their "bodily heirs" forever, and should they die without "heirs of their body" surviving them, to the brothers and sisters of the testator, and should any of these predecease the testator and his children, then the "bodily heirs" of such brother or sister shall take such a part of the estate as their parents would have taken had they been living. This action is brought for the sale of certain of the testator's land by his sole surviving son and his wife, to whom he conveyed his interest therein, the defendants being the testator's brothers and sisters and the children thereof and all persons who could possibly have an interest in the lands should the

STATUTES—*Continued.*

plaintiff die without issue, and all being served with process, the infant parties properly represented by guardians *ad litem: Held*, in proceedings for the sale of certain lands of testator and reinvestment of the proceeds under the provisions of the Revisal, sec. 1590, the order was properly made under the authority of *Springs v. Scott*, 132 N. C., 542, and that line of decisions. *O'Hagan v. Johnson*, 198.

9. *Deeds—Delivery—Grantor's Possession—Evidence of Delivery—Transactions with Deceased Persons—Interpretation.*—Where the title to lands in controversy is made to depend upon the delivery of a deed thereto by H. to A., both of whom are deceased, and there is evidence that the deeds were found after the death of H. among his important papers, testimony of the widow of A. that she saw her husband place the deed in his tin trunk is not evidence of a transaction or communication with the deceased, forbidden by the statute, Revisal, sec. 1631. *Carroll v. Smith*, 204.

10. *Execution Sales—Advertisement—Declaratory.*—The requirements of Revisal, secs. 641, 642, that a sheriff advertise a sale under execution and serve a copy upon the defendant ten days before the sale, are directory, and when not followed, it will not render the sale void as against a stranger without notice of the irregularity. *Williams v. Dunn*, 206.

11. *Witnesses Defaulting—Attorney at Law—Fines—Interpretation.*—A witness who fails to appear when the case is called in which he has been subpœnaed to testify is not justified in his default because he is a practicing attorney at law and had cases to try in another county at the date upon which the case was called wherein he was a witness, and the party who subpœaned him can recover the penalty, with the costs of the motions. Revisal, sec. 1643, construed in connection with sec. 1645. *In re Pierce*, 247.

12. *Same—Damages.*—A witness who has defaulted without justification is liable in damages, besides the penalty, to the party who had him subpœnaed, to the full amount he has sustained "for the want of such witness's testimony." Revisal, sec. 1643. *Ibid.*

13. *Wills—Attempted Caveats—Bonds—Interpretation—Citations.*—Where parties seeking to caveat a will have forfeited their right to do so by unreasonable delay and acquiescence, the mere fact that they had applied to the clerk several times when their rights would have been allowed, and the clerk declined and refused to entertain the application because the parties failed to give a proper bond as required, Revisal, sec. 3136, does not affect the result, for no caveat is properly constituted until the statutory requirements are met; and if it had been so constituted, the absence of notice issued in reasonable time works a discontinuance. *In re Dupree's Will*, 256.

14. *Interpretation—Instructions—Appeal and Error.*—The trial judge is ordinarily required to charge the jury to the extent of stating in a plain and correct manner the evidence given in the case, and to declare and explain the law arising thereon, except where the facts are few and simple and no principles of law are involved, and he is

STATUTES—*Continued.*

not requested to charge (Revisal, sec. 535); and in this case it is held for reversible error, there being much conflicting evidence, for the judge to instruct the jury to "take the case and settle it as between man and man," without charging on the different aspects of the case in accordance with the statute. *Blake v. Smith*, 274.

15. *Judgments—Tender—Costs and Interest—Interpretation.*—A tender of payment under our statute, to stop the costs and the accrual of interest on a judgment subsequently rendered, must be in writing, signed by the party making it, and contain an offer of judgment for the amount tendered. Revisal, sec. 860. *Medicine Co. v. Davenport*, 294.

16. *Inquiry.*—The Legislature being presumed to know and legislate with reference to the existing law, by providing an exception as to the time of filing a lien by the material man, "that as to the rights of a purchaser for value and without notice the notice of lien must be filed within six months," is presumed to have done so with reference to the well established principles as to purchasers, that "where one has notice of an opposing claim, he is put 'upon inquiry' and is presumed to have notice of every fact which a proper inquiry would have enabled him to find out." Revisal, sec. 2028, amended by chapter 32, Public Laws 1909. *Lumber Co. v. Trading Co.*, 314.

17. *Statutes—Federal Employers' Liability Act—Interpretation.*—Where the Federal Employers' Liability Act of 1908, as amended in 1910, in an action brought in the State courts to recover damages for a wrongful death, is set up and relied upon in the State courts, the courts of the State will follow the interpretation put upon it by the Supreme Court of the United States. *Dooley v. R. R.*, 454.

18. *Same—"Dependency."*—The Federal Employers' Liability Act of 1908, as amended in 1910, gives a certain right of recovery to the employee for an injury caused by the carrier's negligence in whole or in part, while the former is engaged in his duties relating to interstate commerce, etc., and "in case of death of such employee, to his or her personal representatives, for the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee," etc. *Held*, it is only necessary to show "dependency" of the beneficiary on the deceased, when his personal representative sues for damages, under the act, in behalf of the remote relatives, termed by the act, "next of kin"; and not when the beneficiary is the parent, or in the same classification, such as the "surviving widow or husband and children of such employee." *Ibid.*

19. *Same—Measure of Damages—Trials—Evidence.*—Where the father of an employee of a common carrier is entitled to recover for the death of the deceased, caused by the carrier's negligence, under the Federal Employers' Liability Act of 1908, it is for a reasonable expectation of pecuniary benefit from the continuance of the life of the son; and evidence to sustain an action for such recovery is held sufficient and within the rule, if it tends to show that the deceased was a young man of good habits and character, in good health, and had helped his father and was disposed to give him his last cent if he needed it;

STATUTES—*Continued.*

that the father was growing old, and while not actually dependent on the son for support at the time of the latter's death, he could not tell how soon he might be. And it is further held, that the amendment of 1910 does not affect this construction, for with reference to the original act, so far as it applies to this case, it only declares that the right of action given therein shall survive. *Ibid.*

20. *Same—Instructions.*—Where the father of a deceased employee has been brought within the rule necessary for a recovery, by the personal representative, in an action brought under the provisions of the Federal Employers' Liability Act, it is error for the trial judge to instruct the jury that the measure of his damages is for the loss of life of the intestate estimated at the present value of his net income for the period of expectancy as ascertained by them, after deducting the cost of living, etc., for in such instances a recovery can only be had for a reasonable expectation of pecuniary benefits to the father from the continued life of the son, under the evidence, for that period. *Ibid.*

21. *Interpretation—Proviso—Purview.*—When a proviso in a statute is directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the Legislature. *Supply Co. v. Eastern Star Home*, 514.

22. *Interpretation—Restrictive Laws—Strict Construction.*—Chapter 761, Laws 1911, relative to a lien law applicable to Durham, Rowan, Guilford, and Randolph counties, is local in its nature, and contrary to the general lien laws of the State, and must be strictly construed. *Ibid.*

23. *Interpretation—Liens—Material Men—Proviso—Contradictory Terms.* Chapter 761, Laws 1911, enacting a lien law for materials furnished for a building, etc., applying by section 5 only to Durham, Rowan, Guilford, and Randolph counties, provides that it shall not be enforced in Union or Stanly counties, with a further proviso that where materials are furnished by any person, etc., outside of Union County, "this act shall not apply in the collection of said debt, but the law as it now stands on the statute-books shall apply": *Held*, that the act is contradictory, self-destructive, and void. *Ibid.*

24. *Corporations — Condemnation—Fee Simple—Nonuser—Reversion—Interpretation.*—The Legislature has the power to authorize a waterworks company to acquire a fee in lands, and where the charter of such corporation gives the right to condemn land "to its use in the manner now provided for the condemnation of lands for railroads and other public uses," and was granted when a statute (sec. 20, ch. 62, Battle's Revisal) was in force, providing "the lands assessed and condemned . . . shall be vested in the company in fee simple," the charter will be construed, under the provision of the statute, as giving the right to the company to acquire the land in fee, in condemnation proceedings. *Torrence v. Charlotte*, 562.

25. *Same—Substitution of Uses—Interpretation of Statutes—Constitutional Law.*—A waterworks company having acquired lands under condemnation proceedings, authorized by its charter, and thereunder paid

STATUTES—*Continued.*

the full value of the fee, thereafter conveyed them to the city for the purpose of a public park, with authority under a legislative enactment for the change in the use of the lands indicated: *Held*, that should the waterworks company not have acquired the fee, the Legislature had the power to authorize the substitution of the one public use for the other, and the lands did not revert to the original grantor, or his heirs at law, for nonuser of the lands for the original purpose. *Ibid.*

STREET RAILWAYS. See Railroads; Carriers of Passengers.

SUBROGATION. See Arrest and Bail; Equity.

SUICIDE. See Insurance.

SUITS. See Removal of Causes.

SUPREME COURT. See New Trial.

TAXATION. See Constitutional Law; School Districts.

TAX DEEDS. See Deeds and Conveyances.

TELEGRAPHS AND TELEPHONES.

1. *Delay in Message—Trials—Presumptions.*—Where an unusual delay in the delivery of a telegram by a telegraph company is shown, the burden of proof is on the company to account for the delay; and a presumption of negligence is raised in the absence of sufficient or satisfactory explanation. *Ellison v. Telegraph Co.*, 5.

2. *Office Hours—Trials—Rebuttal Evidence.*—Where in an action to recover damages against a telegraph company for a negligent delay in the delivery of a death message, the defendant seeks to excuse itself for an unusual delay in delivery by showing that it was occasioned by the observance of reasonable office hours, and, to sustain this defense, its agent testifies that he repeatedly called the terminal office and failed to get any response, and there was testimony that both agents were in their respective offices at the time, the testimony of the agent is not conclusive upon the jury, and it is for them to find, upon all the facts and circumstances, whether the agent attempted to transmit the message as testified by him, and the failure of the defendant to introduce the terminal operator in corroboration is a circumstance which the jury may consider upon the question. *Ibid.*

3. *Mental Anguish—Measure of Damages.*—In this action to recover damages of a telegraph company for negligently delaying the transmission and delivery of a death message, it is held that the damages were properly confined by the trial court to the mental anguish consequently suffered by the plaintiff after the time of delivery of the message. *Ibid.*

4. *Death Message—Notice of Importance.*—Where a telegraph company has received a message for transmission and delivery, announcing a death, the character of the message is sufficient to inform the de-

defendant of its great importance, and that mental anguish would probably result from its negligence in failing to transmit it with reasonable promptness. *Ibid.*

5. *Mental Anguish — Relationship—Presumptions — Evidence.*—While no presumption of mental anguish is raised from the negligence of a telegraph company in the transmission or delivery of a message announcing a death to one not related by blood to the deceased, yet such may be shown and damages recovered by the plaintiff, as, in this case, that she had been taken by the deceased into her family at a tender age, and regarded as a daughter by her, and that she actually suffered mental anguish. *Ibid.*

6. *Charges Prepaid—Waiver.*—Where the agent of a telegraph company does not require the prepayment of the charges for the transmission or delivery of a telegram, but accepts it with charges to be collected at destination, it is a waiver by the company of its right to demand its charges in advance, and does not bar a recovery in a suit to recover damages for the negligence of the defendant in the failure to perform its duty respecting it. *Ibid.*

7. *Office Hours—Acceptance of Message—Waiver.*—When the agent of a telegraph company receives a message for transmission and delivery after its office has closed for the day, it is a waiver by the company of its right to the observance of reasonable hours there; and should the company fail to transmit the message to the terminal office for the reason that the office was closed there also, it is his duty to notify the defendant thereof, and his negligent failure to do so is actionable, if the proximate cause of the injury. *Ibid.*

8. *Joint Offices—Sufficient Employees—Negligence.*—It is the duty of a telegraph company to have a sufficient number of employees to discharge properly the duties it contracts to do, and it is no defense to an action to recover damages for its negligent failure to transmit and deliver a message it had accepted for that purpose, that the offices handling the message were joint offices with the railroad company, and its employees there were engaged, at the time, in their duties to the railroad company. *Ibid.*

9. *Trials — Office Hours — Messages—Conditional Acceptance—Questions for Jury.*—It is for the jury to decide, upon conflicting evidence, whether the agent of a telegraph company accepted conditionally, after office hours, a message for transmission, when that defense is relied on in an action to recover damages for the defendant's negligence in its transmission and delivery. *Ibid.*

10. *Death Message—Measure of Damages—Grief—Mental Anguish.*—In this action to recover damages for mental anguish for the alleged negligent delay in the transmission and delivery by the telegraph company of a message announcing a death, the charge of the court that the jury should distinguish between mental anguish and mere grief and regret at the death of the deceased is approved. *Ibid.*

11. *Agreement by Sender and Sendee—Evidence Corroborative.*—Where damages for mental anguish are sought in an action against a tele-

TELEGRAPHS AND TELEPHONES—*Continued.*

graph company for its alleged negligence in the transmission and delivery of a message announcing a death, it is competent, to sustain the plaintiff's evidence that she would have gone on the next train to the place where the body of deceased was then lying, to show a previous arrangement and understanding between the plaintiff and the sender of the message that the latter would notify the former should the condition of the subject of the message become worse. *Ibid.*

12. *Reasonable Office Hours — Service Message — Nondelivery.*—Where a telegram is received at its destination by an agent of a telegraph company after reasonable office hours, it is his duty either to deliver it to the addressee or to send back a service message to the sender of the message, notifying him of its nondelivery, and his failure to do so is actionable negligence, for which the company is liable for the damages proximately caused. *Griswold v. Telegraph Co.*, 173.

13. *Public-service Corporations — Duties Required — Uniform Rules—Discrimination.*—A telephone company is a public-service corporation, and as such takes and holds its charter subject to the obligation of rendering its services at uniform and reasonable rates and without discrimination, and of entering into such contracts only as will enable it to perform its chartered duties, whether such contract is evidenced by municipal ordinance or by agreement between the parties. *Woodley v. Telephone Co.*, 284.

14. *Same—Prepayment for Services.*—As a public-service corporation, a telephone company may make such just and needful rules and regulations as required for the proper performance of their statutory duties and in reasonable furtherance of the company's general business; and a rule requiring all of its subscribers, without discrimination, to pay its uniform rates established for its services for a reasonable time in advance, is valid and enforcible, and prepayment for the period of one month is a reasonable requirement. *Ibid.*

15. *Same—Injunction.*—Where a telephone company had required its subscribers to pay for the use of its service at the end of each month, and found by experience that it lost money by the nonpayment by its subscribers for services rendered, and had put in effect a rule requiring prepayment for such services a month in advance, to which all of its subscribers conformed with the exception of the plaintiff, the service for whom had been accordingly discontinued, an injunction will not be granted, in his action, restraining the company from discontinuing his service, for such would be an unlawful discrimination in his favor against the other users of the telephone service. *Ibid.*

16. *Contracts — Reasonable Regulations—Parol Agreements—Notice—Determinable at Will.*—A telephone company had in force a rule requiring its subscribers to pay a month in advance for services to be rendered, and the plaintiff, a subscriber, refused to sign the contract with this provision printed therein, and erased the same therefrom, and at the time signed the contract with the verbal understanding that he would pay at the end of each month: *Held*, (1) the erasure would leave the matter indeterminable, and subject to further regula-

TELEGRAPHS AND TELEPHONES—*Continued.*

tion by the company; (2) should the oral agreement be held valid, it would ordinarily be determinable at the will of either party, upon reasonable notice. *Ibid.*

17. *Same—Prepayment for Services.*—A written contract with a telephone company made by a subscriber, provided in effect that it should continue for a year, and thereafter for thirty days after written notice given of discontinuance, with the further condition, "that for any reason which appears to the company sufficient, the company may at its option terminate the contract and remove the instrument": *Held*, there was nothing upon the face of the contract to restrain the company from the enforcement of a rule uniformly requiring a prepayment for a month's subscription by the users of the service, certainly after having found the rule necessary from its experience, and giving reasonable notice thereof. *Ibid.*

18. *Municipal Ordinances—Contracts—Security—Regulations—Prepayment for Services.*—It is held in this case that a town ordinance providing that a certain telephone company "may require" its subscribers to keep and pay the rental on such telephones for the period of twelve months, and as a guarantee therefor may require them to give bond as "an assurance of the faithful performance of the terms of the contract," was a protection to the company against the initial expense of installing the telephone at the beginning of the service, and in no wise interfered with the company in its right to make a reasonable rate requiring prepayment a month in advance by its patrons. *Ibid.*

19. *Reasonable Rules—Prepayment for Services.*—In order to a valid waiver, there must be an agreement founded on consideration or some element of estoppel. Hence, a telephone company does not waive its right to put into effect and enforce a reasonable rule requiring its patrons to pay in advance for its services rendered by having previously only required them, for a year or more, to pay at the end of each month. *Ibid.*

20. *Statutory Duties—Waiver.*—A telephone company, as a public-service corporation, may not waive by its conduct its duty to properly perform its statutory duties or those requiring that it render its service at reasonable rates and without discrimination. *Ibid.*

21. *Reasonable Rules—Prepayment—Tender.*—A tender of payment by the subscriber to a telephone company for the continuance of the service for a few days, made after the instrument had been removed for his failure to comply with a reasonable and uniform rule requiring the prepayment for a month, is immaterial in his action seeking an injunction against the discontinuance of the service, upon the ground that the rule was unreasonable. *Ibid.*

TELEPHONES. See Telegraphs and Telephones.

TENANT BY THE CURTESY. See Estates.

TENANTS IN COMMON.

1. *Partition—Burden of Proof.*—One who has been made a party to proceedings to sell lands for the purpose of dividing the proceeds among tenants in common, and who claims an undivided interest in the lands, which is denied, has the burden of proof upon the issue of his alleged ownership; and may not recover in the absence of any sufficient evidence tending to establish it. *McKee v. Holloman*, 132.

2. *Betterments.*—Where one of two tenants in common is entitled against the other to betterments on lands thus held, the betterments increase the value of the lands as a whole and thus inure one-half of their value to the benefit of the one claiming them. Hence, when the value of such betterments have been adjudged at $700, the claimant is only entitled to recover $350 therefor. *Daniel v. Dixon*, 137.

3. *Same—Rents and Profits.*—The plaintiff in this action was held entitled to undivided half interest in lands, which are still held in common by both parties to the action. It had been also judicially determined that the defendant was entitled to a certain sum paid by him for the cancellation of a mortgage on the lands, and a certain further sum paid by him for betterments; and that he is chargeable with the rents and profits while the lands were in his possession and exclusive enjoyment: *Held*, judgment should be rendered charging the plaintiff a sum equaling one-half of the moneys paid by the defendant in canceling the mortgage and for betterments, and charging the defendant with one-half of the ascertained value of the rents. *Ibid.*

4. *Ejectment—Undivided Interest—Betterments—Interpretation of Statutes.*—An action to recover an undivided interest in lands is in effect a proceeding in ejectment wherein betterments may be assessed. Revisal, sec. 652. *Ibid.*

5. *Betterments.*—A tenant in common, irrespective of the statute, Revisal, sec. 652, is entitled to recover against his cotenant for betterments he has placed upon the land. *Ibid.*

TENDER. See Telegraphs and Telephones.

THEATERS AND SHOWS.

1. *Fairs—Danger—Warnings.*—It is the duty of the managers of a fair upon whose premises a free balloon ascension is given as an attraction, to see that the premises are reasonably safe for the purpose, and they must use care and diligence to prevent injury, and by policemen or other guards warn the public against dangers that can reasonably be foreseen. *Smith v. Agricultural Society*, 346.

2. *Same—"Free Attractions"—Trials—Evidence—Questions for Jury—Nonsuit.*—In an action against a fair association to recover damages for mental anguish suffered by one who had paid the admission price, there was evidence tending to show that while the plaintiff was looking at the preparation for a balloon ascension, given as a "free attraction," he was requested by the one in charge to assist in holding the ropes attached to the balloon, and after doing so, and as he was leaving, having gone a few feet, the balloon suddenly ascended,

THEATERS AND SHOWS—*Continued.*

and his foot having caught in a loop of one of the ropes attached, he was carried up with it. The evidence was conflicting as to whether the place was properly guarded or inclosed or as to whether the crowd was warned of the danger in going there. Under the rule applicable as to how the evidence should be considered upon a motion to nonsuit, it is held that such motion was improperly allowed in this case, there being sufficient evidence to take the case to the jury upon the question of defendant's actionable negligence. *Ibid.*

3. *Trials—Evidence—Nonsuit—Defenses — Independent Contractor—Contributory Negligence.*—In an action to recover damages arising from a personal injury alleged to have been negligently inflicted, neither the defense that the act complained of was that of an independent contractor nor evidence of contributory negligence will be considered upon a motion as of nonsuit upon the evidence. *Semble*, from the fact and circumstances of this case the principal would be responsible, though it were established that the act complained of was that of an independent contractor while giving a balloon ascension as a "free attraction" at a county fair. *Ibid.*

TORTS. See Courts.

TRESPASS.

1. *Forcible—Killing of Dog—Damages.*—It is forcible trespass for one to enter the premises of another, armed with a shotgun, and unnecessarily shoot and kill the dog of the latter while it was tied to the piazza of his home, in the presence of his wife and against her protest, and damages may be recovered in the suit by the man and his wife for the injury thereby caused to the wife owing to her age and her affliction with heart disease. In this case there was no evidence to bring it within the purview of Revisal, sec. 3305, relating to the killing of mad dogs. *Beasley v. Byrum*, 3.

2. *Title—Adverse Possession—Color—General Reputation—Hearsay Evidence.*—The rule that, under certain conditions, parol evidence of general reputation is admissible on the question of boundary, or as to identification of a tract of land or of giving it a general placing when it had been otherwise identified and sufficiently described, does not apply where, in an action of trespass, depending upon an issue as to title to the lands, a party relies on adverse possession under color of title, and seeks to show general reputation of ownership; for evidence of this character does not fall within the exception to the rule that hearsay evidence is inadmissible, and is further objectionable as an expression of an opinion by the witness upon the issue involved and as throwing into the jury box the weight of public opinion. *Locklear v. Paul*, 338.

TRIALS. See New Trials; Bastards.

1. *Evidence—Instructions—Harmless Error.*—The erroneous admission of evidence on the trial in this case was cured by the charge of the court. *Ellison v. Tel. Co.*, 5.

TRIALS—*Continued.*

2. *Appeal and Error—Instructions—Harmless Error.*—Where in a plaintiff's appeal it appears that the trial judge erroneously instructed the jury against the rights of the defendant upon the evidence, no error prejudicial to the appellant has been committed, and the jury having accepted the defendant's version, the verdict will stand. *Trust Co. v. Ellen*, 45.

3. *Appeal and Error—Motions—Verdict Set Aside—Court's Discretion.* A motion to set aside a verdict as being against the weight of the evidence is in the discretion of the trial judge, and from his refusal there is no appeal. *Ibid.*

4. *Contracts—Deeds and Conveyances—Options—Timber—Due Diligence—Questions for Jury.*—The plaintiff in this case, having failed to give the prior notice of his intention to avail himself of his option for an extension of the original period of time for cutting the timber upon the lands, or to pay the consideration expressly provided for in his deed to the standing timber, the question of due diligence, and excusable delay, upon the evidence, if admissible, was one to be determined by the jury, under proper instructions, and the fact that the plaintiff gave the cash consideration to the sheriff with direction to deliver it to the defendant does not, in itself, constitute due diligence. *Lumber Co. v. Whitley*, 47.

5. *Judgments—"Mistake," Etc.—Words and Phrases—Interpretation of Statutes.*—Revisal, 513, authorizing the judge to set aside a judgment and verdict or other proceedings within one year after notice, is not restricted to cases of excusable neglect, but embraces also those taken "through his mistake, inadvertence, or surprise," the meaning of each being distinct from the other, and the right applying as to each separate from the other, as, in this case, for "mistake" alone. *Mann v. Hall*, 50.

6. *Judgment, Adverse—"Mistake," Etc.*—Where a successful party litigant has, through his mistake in the description of lands, recovered less than he should be entitled to, he may move the court, under the provisions of Revisal, sec. 513, to set aside the verdict and judgment, the judgment being adversary to him to the extent of the diminution of his recovery through his mistake. *Ibid.*

7. *Timber Deeds — Conveyance in Affirmance — Timber Reserved — Damages—Evidence.*—The defendant in a timber deed conveyed the timber described in his deed, and his grantee failed to finish cutting it in the time allowed. The plaintiff, to whom the original owner conveyed the land, executed a conveyance of the timber to the defendant's grantee, confirming his original deed and extending the time for cutting and removing the timber, which was accordingly done in the stated period: *Held*, the grantee of the defendant acquired his right to cut the timber under the plaintiff's deed, and the defendant cannot be held liable for damages caused by his cutting timber on the land which had been reserved. *Warwick v. Taylor*, 68.

8. *Deeds and Conveyances—Fraud and Undue Influence—Quantum of Proof.*—Where the validity of a deed to lands is attacked on the

TRIALS—*Continued.*

ground of fraud and undue influence in its procurement, the plaintiff is only required to prove his allegation thereof by the greater weight of the evidence. *Lamm v. Lamm*, 71.

9. *Deeds and Conveyances—Fraud and Undue Influence—Evidence—Res Gestæ.*—The evidence in this case to set aside a deed for fraud and undue influence, relating chiefly to facts and circumstances in the association between the grantor and grantee, tending to show the extent of the undue influence exerted and the objectionable means by which it was acquired, is held relevant, and competent as a part of the *res gestae*. *Ibid.*

10. *Appeal and Error—Weight of Evidence—Matters of Law—Constitutional Law.*—The Supreme Court can only review on appeal a "decision of the courts below upon matters of law or legal inference" (Const., Art. IV, sec. 8); and where there is legal evidence submitted to the jury, under correct instructions from the trial judge, no appeal lies from the verdict and judgment to review the findings of fact. *Pender v. Insurance Co.*, 98.

11. *Same—Principal and Agent—Evidence.*—Where resistance is made to a recovery on a life insurance policy in an action brought by the beneficiary after the death of the insured upon the ground that the insured was the agent of the company at the time it was issued; that the policy was delivered to him as such agent, and thus to be held for delivery until he had paid the first premium, upon which question the evidence is conflicting, an instruction from the court is correct, that if the jury found that the insured received the policy from the company, not as agent or manager, but as an ordinary applicant only, and that he was trusted by the company to pay the first premium, instead of paying it in advance, they should answer the issue for the plaintiff, or "Yes"; but otherwise if the insured was to hold the policy as agent until he, as an ordinary applicant, or individually, should pay the premium. *Ibid.*

12. *Same—Consistent Verdict.*—Where in defense to an action upon a life insurance policy it is contended that no delivery of the policy had been made to the insured, and there is evidence that the manual delivery was made on a certain date, and at a later date the insured gave his note for the first premium, which was accepted by the company, findings by the jury to separate issues, that the policy was delivered to the insured and became a consummated contract on both of these dates, are not inconsistent. *Ibid.*

13. *Evidence, Expert—Hypothetical Questions.*—A hypothetical question asked an expert, not based upon the evidence in the case, is properly excluded. *Monds v. Dunn*, 108.

14. *Instructions—Negligence—Contributory Negligence—Proximate Cause. Semble*, in this action to recover of the defendant damages for the death of plaintiff's intestate, alleged negligently to have been caused by certain defects in regard to its wiring and arrangement for manipulating its arc lamp, the evidence was insufficient to carry the case

TRIALS—*Continued.*

to the jury; but if otherwise, the charge of the court upon the rule of the prudent man, contributory negligence, and proximate cause, is approved. *Ibid.*

15. *Leading Questions — Courts — Appeal and Error.*—Leading questions asked on direct examination may be excluded by the trial judge, in his discretion, from which no appeal ordinarily lies. *McKeel v. Holloman*, 132.

16. *Carriers of Goods—Live-stock Bills of Lading—Evidence.*—It is necessary for a common carrier, relying upon a stipulation in its live-stock bill of lading limiting the value of the stock in event of recovery, to show that the shipment was made under this form of its bills of lading, and the mere fact that such a bill of lading is in the possession of the plaintiff, without its identification as being the one relied on, is insufficient. *Smith v. R. R.*, 143.

17. *Evidence, Incompetent—Withdrawing Evidence—Appeal and Error—Harmless Error.*—It is not only within the province of the trial judge, but it is his duty, to withdraw from the consideration of the jury evidence which has been erroneously admitted on the trial of an action; and when he has appropriately done so, and it does not appear of record that the appealing party has thereby been injured, it will not constitute reversible error, the error committed having been cured. *Cooper v. R. R.*, 150.

18. *Evidence, Corroborative—Failure to Restrict Evidence—Objections and Exceptions—Appeal and Error.*—Where evidence admitted at the trial is competent only in corroboration, it is the duty of the complaining party to request the court to restrict it to the purposes for which it is competent, and failing to do so, he may not successfully assign it for error on appeal. *Ibid.*

19. *Master and Servant—Immediate Commands—Evidence—Questions for Jury.*—While the immediate command of the master may at times justify conduct of the servant in attempting to work a defective power machine which might otherwise be imputed to his contributory negligence, the question, upon conflicting evidence, as to whether at the time of the injury consequently received, the servant was so acting, is for the jury, under proper instructions from the court. *Bird v. Lumber Co.*, 162.

20. *Evidence—Delayed Demands—Recollection of Witnesses—Substantive Evidence.*—In an action to recover damages for an injury alleged negligently to have been inflicted, it is competent to show that no claim had been made on the defendant for "nearly a year later" as bearing upon the recollection of the witnesses, and under certain conditions it is in itself a relevant circumstance affecting the validity of the claim. *Ibid.*

21. *Instructions—Construed as a Whole—"Contentions"—Application of Evidence.*—A charge of the trial judge to the jury should be considered as a whole, and where he has given a general statement of the defendant's contention under one issue, containing some matter ap-

TRIALS—*Continued.*

plicable only to a different one, it will not be necessarily held for error when it appears that he gave only legal significance to the evidence as it correctly related to each of the several issues. *Ibid.*

22. *Deeds and Conveyances—Grantor's Possession—Presumptions—Burden of Proof—Instructions—Appeal and Error.*—The presumption that a deed found in the possession of the grantor has not been delivered has no greater effect than to place the burden of proof on him who relies upon its delivery to establish his title to the lands in dispute; hence, when there is competent evidence that the delivery was actually made of the deed to the grantee, it was not error for the court to instruct the jury that its possession by the grantor, if they so found the fact to be, was a circumstance which they could consider, with further correct instructions applicable to the evidence in the case, upon the issue, which will be assumed when the charge is not otherwise excepted to and it is not sent up in the record. *Carroll v. Smith*, 204.

23. *Deeds and Conveyances—Color of Title—Burden of Proof—Conflicting Evidence—Instructions.*—The trial judge may direct the jury to answer an issue in a certain way, if they believe the evidence to be true, only when this evidence is uncontradicted and one inference alone can be drawn from it; and hence it is error to direct an answer to an issue in plaintiff's favor in an action to recover lands, when the plaintiff relies on adverse possession, under color, in order to oust the State, the burden of proof as to such possession being on the plaintiff. *Barfield v. Hill*, 262.

24. *Deeds and Conveyances—Fraud—False Representations—Evidence—Nonsuit.*—In his action to recover damages for fraud and deceit in the purchase of land, there was evidence for the plaintiff, and *per contra*, tending to show that the plaintiff was, at the time of his executing the deed to the lands to the defendant, under 21 years of age, stationed near Baltimore as an enlisted soldier, awaiting transportation to foreign parts, and unacquainted with the value of the lands conveyed, and under these circumstances the defendant went to see him, assured him he had been over the lands, and that he could rely upon his knowledge of the land and its value, and so relying upon the defendant's false representations that $1,000 was a fair price for the land, accepted that sum for it, when, as he ascertained later, just before the commencement of this action, it contained a much greater acreage than he was led to believe, and was worth $10,000 or $11,000; *Held*, viewing the evidence in the light most favorable to the plaintiff, the issue of fraud was for the determination of the jury, and a motion to nonsuit was improperly granted. *Pate v. Blades*, 267.

25. *Deeds and Conveyances — Mutual Mistake — Equity — Evidence.*—The owner of standing timber conveyed the same to be cut and removed in a stated time, and thereafter executed to the assignee of this right by the grantee in his deed a conveyance, upon consideration, allowing a further time for cutting and removing the timber originally conveyed. In a suit to correct the original deed, brought against the

TRIALS—*Continued.*

grantee in the second deed, an allegation of fraud was withdrawn and mutual mistake relied on. The evidence tended to show that the mistake alleged was that of the grantor alone; that his own attorney drew the second deed; that the grantor could read and write, and had partially read this deed and delivered it upon receiving the price agreed upon: *Held*, no ground for equitable interference was shown. *Dameron v. Lumber Co.*, 278.

26. *Appeal and Error—Laches—Recordari—Court's Discretion.*—Where the Supreme Court has set aside an order of the Superior Court granting a *recordari* to a justice's court for that the affidavit and petition did not set out a meritorious defense, it is in the sound discretion of the Superior Court judge to permit the movant to file additional affidavits for the purpose of showing that the defense relied on was meritorious. *Hunter v. R. R.*, 281.

27. *Evidence — Nonsuit—Defenses—Independent Contractor—Contributory Negligence.*—In an action to recover damages arising from a personal injury alleged to have been negligently inflicted, neither the defense that the act complained of was that of an independent contractor nor evidence of contributory negligence will be considered upon a motion as of nonsuit upon the evidence. *Semble*, from the fact and circumstances of this case, the principal would be responsible, though it were established that the act complained of was that of an independent contractor while giving a balloon ascension as a "free attraction" at a county fair. *Smith v. Agricultural Society*, 346.

28. *Insurance—False Representations—Typhoid Fever—Evidence.*—Where the insured within the year preceding his application for insurance had nursed his wife during a sickness of typhoid fever, and he himself was ill with this fever, from which he afterwards died, when the policy was delivered to him, and there is evidence that a fever of this kind is contagious, and that such conditions would influence the opinion or judgment of the insurer in taking the risk and issuing the policy, it is for the jury to determine, under proper instructions from the court, whether the representation in the application, that the insured had not been associated within the year with one having a contagious disease, was a false and material representation and such as would invalidate the policy. *Gardner v. Insurance Co.*, 367.

29. *Deeds and Conveyances—Timber Deeds—Fraud and Mistake—Instructions.*—In an action to reform a timber deed for fraud, or for mutual mistake of the parties, in not incorporating in the writing a parol agreement alleged to have contemporaneously been made, giving the grantee the right to suspend the cutting, etc., if the market price of lumber should decline so as to make it unprofitable, an instruction is erroneous, upon an issue as to whether the plaintiff suspended the cutting and failed to pay for the defendant's timber after he had begun to cut the same, in violation of his agreement, that the issue should be answered affirmatively if the jury found that the parol agreement was omitted from the written contract by plaintiff's fraud, or through mutual mistake, as there were other facts involved in the issue. *Wilson v. Scarboro*, 380.

TRIALS—*Continued.*

30. *Tax Deeds—Verdict, Directing—Presumptions.*—Where a tax deed is sought to be set aside for noncompliance with the prerequisites of the statute as to giving notice to the owner and parties in possession before the execution of the sheriff's deed (Revisal, 2884), and it appears from the uncontradicted evidence that the vendee had not thus acquired the right to it, the recitals in the deed are neither conclusive nor presumptive, and it is not error for the judge to instruct the jury to find the issue for the plaintiff, should they find the facts to be as testified. *McNair v. Boyd*, 478.

31. *Judgments—Estoppel—Evidence.*—Where the debtor has given a note for the amount due his creditor at that time, upon which subsequently a judgment by consent had been rendered, reciting that it was to be for a full settlement of the matters in controversy, it is competent to show in another action between the same parties, wherein the former judgment has been pleaded as an estoppel, that the indebtedness sued on was not due when the note was given, and was not embraced in the former inquiry. *Clothing Co. v.. Hay*, 495.

32. *Contracts—Debtor and Creditor—Acceptance—Evidence—Instructions —Appeal and Error.*—Where the plaintiff sues on the defendant's acceptance of an order made by a third person, and there is evidence only that the acceptance was upon condition that the defendant would pay whatever amount was due by him to the drawer, it is error for the judge to charge the jury upon the law, as if it was an unconditional acceptance (Revisal, sec. 535); and when this and a correct instruction upon the law of a conditional acceptance are so blended and applied to a single issue that the good one is inseparable from the bad, the error is reversible. *Craig v. Stewart*, 531.

33. *Instructions—Issues—Harmless Error.*—Instructions to the jury should be addressed to specific issues, but *semble*, where the issues are simple, and, in view of other parts of the charge, they do not appear to have misled the jury, the error in this respect will not be held as reversible. *Ibid.*

34. *Master and Servant — Fellow-servant — Negligence—Incapacity—Evidence—Nonsuit.*—Plaintiff was engaged at the time of his injury at defendant's ripsaw, helping to make pieces for door panels, requiring two persons, "a feeder," who pushes the lumber onto the saw, and a "tailer," who draws the piece away from it, the latter holding the plank down on the saw table in such a manner as to keep it from flying back, impelled by the revolving saw, and injuring the one feeding the machine. While helping to do this work as a feeder the plaintiff was injured by the piece flying back in the manner described, and in his action for damages introduced evidence tending to show the general reputation of the "tailer," working with him, for inattention and incompetency, and that this was known to the master at the time of his employment, or could have been ascertained by him thereafter had he exercised reasonable care or attention in his capacity of an employer of labor, and that his negligence in this respect was the proximate cause of the injury: *Held*, that a judgment as of nonsuit upon the evidence cannot be sustained. *Walters v. Lumber Co.*, 536.

TRIALS—*Continued.*

35. *Street Railways—Personal Injury—Negligence—Accident—Nonsuit.*—In an action against a street car company to recover damages for a personal injury alleged to have been negligently inflicted, there was evidence that while the plaintiff was attempting to alight from a moving car of defendant he caught hold of a grab-handle, used for the purpose, in which a screw on the off side from him, at the bottom of the handle, used for keeping the bar from slipping in the socket, projected about 1-16 of an inch, which caught in a thin finger ring on his hand, as his hand naturally slipped down the bar in alighting, and tore the ring off, to his injury. There was also evidence that the plaintiff had told the conductor to stop for him at this place, and that the motorman, seeing the plaintiff about to alight, told him to wait and he would stop the car: *Held*, the injury was the result of an accident, and not attributable to the defendant's negligence, and a motion as of nonsuit was properly granted. *Pendergrast v. Traction Co.*, 553.

TROVER. See Landlord and Tenant.

TRUSTS. See Trials; Wills.

1. *Trustees — Parol Trusts — Partnership.*—The plaintiff and defendant agreed, by parol, that they would purchase a tract of land, the latter to advance the purchase price and take the deed to himself and the former to repay it by cutting and selling the timber standing on the land, and that the land was then to be sold and the proceeds divided between them. This action is brought to sell the land and for a division of the proceeds under the terms of the agreement: *Held*, the action was to establish a parol trust in plaintiff's favor, and not for specific performance or to settle a partnership. *Anderson v. Harrington*, 140.

2. *Trustees—Parol Trusts—Statute of Frauds.*—The provisions of the statute of frauds, that a sale of lands be in writing and signed by the party charged, etc., does not apply to the declaration of a trust in lands, in the absence of statutory requirement; hence, a parol trust in lands to stand seized to the use of another is enforcible in North Carolina. *Ibid.*

VENDOR AND VENDEE. See Landlord and Tenant; Contracts.

VERDICT. See Trials; Appeal and Error; Insurance; Motions.

VERDICT SET ASIDE. See Appeal and Error.

WAIVER. See Telegraphs and Telephones; Insurance; Liens.

WARNINGS. See Theaters and Shows.

WATERWORKS. See Eminent Domain.

WILLS.

1. *Probate—Notice to Executor—Codicil—Interpretation of Statutes.*—Before others interested in the probate of a will may apply for its probate, ten days previous notice must be given the executor therein named (Revisal, sec. 3123), and where an executor has probated and

WILLS—*Continued.*

qualified under the will, it is equally necessary to give the statutory notice before offering for probate a separate paper-writing as a codicil. *Spencer v. Spencer*, 83.

2. *Codicils—Intent—Interpretation of Statutes.*—For a paper-writing to be effective as a codicil to a will, it must appear that it was the intention of the testator at the time of making it that it should take effect as a part of his will, and all the formalities and statutory requirements of making and executing a will must have been observed in the codicil. Revisal, sec. 3123. *Ibid.*

3. *Same—Letters.*—A letter which had been written by the testator immediately after making a formal will, and which, without being mentioned in the will, expresses the desire that its addressee should have his interest in certain personalty, does not show the *animus testandi*, so as to make it operate as a codicil. *Alston v. Davis*, 118 N. C., 203, overruled. *Ibid.*

4. *Codicils—Insurance—Partnerships—Devises.*—Partnership property is possessed *per my et per tout* by the partners, and no one of them may convey his separate interest in any particular part thereof. Hence, as in this case, a partner may not devise any interest he may have in a policy of life insurance made payable to the copartnership, and certainly not after he has conveyed to the partnership all the interest he had therein. *Ibid.*

5. *Devises in Fee—Power of Disposition—Precatory Words.*—A devise to G., the widow of the testator, "with power to give and devise" the estate to their children and grandchildren, with the expression "that they are equally our own and well beloved by each of us, and she has the same right of distribution of our estate as I have, knowing no partiality or discrimination in the same": *Held*, G. took the estate in fee simple, there being no specific language limiting a life estate to her with power of disposition, the words annexed not restricting the estate devised, but being merely an expression of the testator's opinion that his wife had the same right as he of distribution and would impartially make it. *Griffin v. Commander*, 230.

6. *Caveat—Unreasonable Delay—Acquiescence—Forfeiture of Right—Presumptions—Limitation of Actions.*—While there is no statute of limitation in North Carolina affecting the rights of parties claiming under a will to have it probated, or such statute relative to the caveat prior to 1907 (Revisal, sec. 3135), where a seven-year period was established to enter caveat, upon application for probate made, it has been for a long time recognized here that a right to caveat a will regularly proven in common form may be lost by lapse of time, certainly where the adverse party has, with knowledge, so long acquiesced that it would be unreasonable and unjust for him to question its validity. *In re Dupree's Will*, 256.

7. *Caveat—Unreasonable Delay—Forfeiture of Right—Trials—Questions of Law.*—While at common law there was no definiteness or uniformity in the adoption of a period of time wherein the right would be presumed to have been forfeited either by acquiescence or unreasonable delay, the period of twenty years was that more generally prevalent, and though this presumption may be rebutted by proper

WILLS—*Continued.*

and sufficient evidence, when the facts are admitted, or had been properly established, it becomes a question for the court to determine whether on such facts the presumption prevails. *Ibid.*

8. *Same.*—The devisee and those who claim under him, having been in possession of the lands devised for twenty-three years, exercising absolute ownership, with the knowledge of the adversary party seeking to caveat the will, and who had for that period of time lived only a short distance from the property: it is *Held,* as a matter of law, that the right to caveat the will had, under the circumstances, been forfeited. *Ibid.*

9. *Caveat—Forfeiture—Presumptions—Limitations of Actions—Infants—Femes Covert—Absence from State.*—Where the common-law presumption of forfeiture of the right to caveat a will from unreasonable delay or acquiescence prevails, the matters of infancy, coverture, and absence from the State are not necessarily controlling, but they are considered as relevant facts bearing on the question as to whether the presumption will prevail, and more especially is this true in its application to the absence from the State of a party claiming under the will, when he had first remained in possession of the property for more than a year and the cause is one where jurisdiction could be acquired by publication. *Summerlin v. Cowles,* 101 N. C., 473, cited and distinguished, where the courts of equity adopt ten years as a legal bar in analogy to the statutory period prevailing in an action at common law. *Ibid.*

10. *Construction—Intent.*—Wills are construed to effectuate the intent of the testator, as gathered from the terms of the will itself. *Fellowes v. Durfey,* 305.

11. *Devises—Fee Simple—Interpretation of Statutes.*—A devise will be construed as in fee, unless the contrary appears from the terms of the will by "clear and express words or it shall be plainly intended." Revisal, sec. 3138. *Ibid.*

12. *Interpretation of Statutes — Devises — Limitations—Contingent Remainders.*—The only restrictions imposed upon the power of the testator to dispose of his lands as he may please is the limitation as to duration of time, to a life or lives in being and twenty-one years thereafter, and as to certain contingent remainders. Revisal, sec. 1590. *Ibid.*

13. *Devises—Construction—Intent—Fee Simple.*—A devise and bequest to the testator's wife of all of his estate, real or personal, wherever located or however held, including that held at the time of his death, as absolutely as he held it himself, declaring that she should not be considered as holding it in trust "technically so called, to be enforced by the judgment or decree of any court other than her own conscience, judgment, and affection shall prompt her to so regard it": *Held,* the devise and bequest to the widow, under the clear terms of the will, was in fee absolute. *Ibid.*

14. *Caveat—Judgment Set Aside—Parties.*—Where a judgment invalidating a paper-writing purporting to be a will has been set aside, for fraud, it leaves the caveat thereto in full force and effect (Revisal,

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sec. 3137) until the issue thus raised is tried and a valid judgment has been rendered; and all proper and necessary parties can be made for a final disposition of the proceedings. *Holt v. Ziglar*, 390.

15. *Probate — Common Form — Evidence—Interpretation of Statutes.*—A will probated in common form before the clerk of the Superior Court is conclusively valid until declared void by a competent tribunal, and may be offered in evidence in proceedings to caveat the will. Revisal, sec. 3128. *Ibid.*

WITNESSES. See Evidence.

1. *Default—Attorney at Law—Fines—Interpretation of Statutes.*—A witness who fails to appear when the case is called in which he has been subpœnaed to testify is not justified in his default because he is a practicing attorney at law and had cases to try in another county at the date upon which the case was called wherein he was a witness, and the party who subpœnaed him can recover the penalty, with the costs of the motion. Revisal, sec. 1643, construed in connection with sec. 645. *In re Pierce*, 247.

2. *Same—Damages.*—A witness who has defaulted without justification is liable in damages, besides the penalty, to the party who had him subpœnaed, to the full amount he has sustained "for the want of such witness's testimony." Revisal, sec. 1643. *Ibid.*

3. *Railroads—Passes—Evidence—Bias.*—It is competent to show on cross-examination that a witness in behalf of a railroad company had attended the trial of an action to recover damages against it, on a pass it had given him, as tending to prove his bias in the defendant's favor. *Johnson v. R. R.*, 432.

4. *Interest—Bias—Trials—Instructions—Weight of Evidence—Appeal and Error.*—Where a witness is interested in the parties to or the result of an action, it is proper for the judge to instruct the jury to consider what bias this interest may have on his testimony, and should they find that his testimony was not thereby biased, to give it such weight as it should otherwise have; and his failure to instruct, further, that the unbiased testimony of the witness was entitled to the same weight as that of any other witness is not error, for the jury may consider that the testimony of other witnesses, from their character, or means of knowledge, or better memory, etc., was more entitled to their credence; and it is further held, if such further instruction were proper, an appeal would only lie from the refusal of a special instruction embodying it. *In re Smith's Will*, 464.