ANNOTATIONS INCLUDE 171 N. C.

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VOL. 164

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1913

(IN PART)

BY

ROBERT C. STRONG,

STATE REPORTER

ANNOTATED BY

WALTER CLARK.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1913

MRS. E. V. HOOPER v. J. O. HOOPER.

(Filed 26 November, 1913.)

1. Husband and Wife—Action for Support—Issues—Divorce—Motions—Judgment.

In an action for support brought by the wife under the provisions of Revisal, sec. 1567, the inquiry is confined to only two material issues, the marriage and the separation. Hence, reasons or excuses of the husband for the separation are irrelevant to the inquiry, as the judgment is not final, and should he establish his right to an absolute divorce in his separate action, he may then move in proceedings of this character to have the judgment therein modified or set aside.

2. Husband and Wife—Action for Support—Pleadings—Admissions—Formal Denials.

In proceedings brought for support by the wife under the provisions of the Revisal, sec. 1567, an admission in the answer of the husband that he had ceased to occupy a room with his wife or be with her at any place in privacy, and that he had notified his landlady that he would not be responsible for her board, is an admission of separation from his wife, though the allegations of separation in the complaint was formally denied in the answer.

APPEAL by defendant from *Lyon, J.*, at chambers, 4 March, 1913; from POLK.

This is a proceeding for support. The defendant asked that issues be submitted to a jury, which were refused, and he excepted.

He also offered affidavits containing charges of infidelity against his wife, which his Honor refused to receive, and he (2) excepted.

After hearing evidence, judgment was rendered in favor of the plaintiff, and the defendant appealed.

Fortune & Roberts for plaintiff.
Smith & Shipman for defendant.

ALLEN, J. This is a special proceeding for alimony, without divorce, brought under section 1567 of the Revisal.

The defendant admits the marriage, and while he denies the allegation of the petition as to separation, he says in his answer that he immediately ceased to occupy a room with his wife or to be with her at any place in privacy, and that in order to protect himself, he informed his landlady of his troubles and that from that time on he would not be responsible for his wife's board, and authorized her to so inform his wife and tell her his reasons, which is equivalent to an admission of a separation.

The statute is one solely for support, and it provides a remedy for the wife, "if any husband shall separate himself from his wife and fail to provide her with necessary substance."

It was, therefore, correctly held in *Skittletharpe v. Skittletharpe,* 130 N. C., 72, that only two material issues of fact can arise in the proceeding: "(1) as to whether the marriage relation existed at the time of the institution of the proceeding, (2) whether the husband separated himself from his wife," and also that the reasons and excuses of the husband for the separation are irrevalent to the inquiry.

If the plaintiff is guilty of the acts charged against her, the defendant may have his remedy in an action for divorce, and as the judgment in this proceeding is not final, he could then move to modify or set it aside.

In the *Skittletharpe case* the Court says: "It is not contemplated by the statute that the judgment should be final and conclusive; for should the husband return to the wife and resume his marriage relations and obligations, the necessity for such a provision would cease; or, should defendant institute a suit for divorce (which is not permitted by the statute to be done until six months after obtaining the informatioin for such cause of action) and obtain an absolute divorce, it is certain
(3) that he ought to be relieved from her further support, which could not be done with a final judgment binding upon the parties."

It follows, as there are no issues of fact raised by the pleadings requiring submission to a jury, and as the charges in the affidavits offered by the defendant are immaterial now, that there is no error in the proceedings in the Superior Court.

Affirmed.

W. M. PRUETT v. SOUTHERN RAILWAY COMPANY.

(Filed 26 November, 1913.)

Carriers of Passengers—Negligence—Accident—Damnum Absque Injuria—Trials—Evidence—Nonsuit.

A railroad company is not responsible for an injury caused to one of its passengers by another which it could not reasonably have anticipated or prevented; and it appearing in this case that the plaintiff was riding with three passengers on seats turned so that they faced each other, and that after drinking whiskey from a bottle, one of the passengers attempted to throw the bottle from the window in a curved tunnel, and the bottle was shattered against the rugged side of the tunnel, causing some of the fragments of glass to fly back and injure the plaintiff's eye, it is *Held*, that the injury thus sustained was accidental, an unusual and unexpected event, from which no damages are recoverable of the railroad.

APPEAL by plaintiff from *Justice, J.*, at Fall Term, 1913, of CLEVELAND.

At the conclusion of the evidence the court sustained motion to nonsuit, and the plaintiff excepted and appealed.

Webb & Mull for plaintiff.
O. F. Mason and O. M. Gardner for defendant.

BROWN, J. The evidence seems to be undisputed, and all of it tends to prove that on 12 August, 1911, the plaintiff was a passenger on the defendant's train and occupied the rear seat in the smoking compartment. (4)

There were two other seats on that side in front of the plaintiff's seat, and these seats were turned so that the four other passengers occupying them sat facing each other; the windows were up, as the weather was hot; one of these four fellow-passengers had a bottle with some whiskey in it; the bottle was passed and the whiskey drunk and the empty bottle was thrown out of the window, and it struck against the bank of a cut through which the train was passing, and broke, and pieces of it came back through the window of the car at which plaintiff was sitting and cut his eye; the banks of this cut were jagged and perpendicular (it being a rock cut), and the roadbed passed through the cut on a curve, and the right side of the track was higher than the left or inside of the curve.

We are of opinion that the injury to the plaintiff resulted from no negligence of the defendant, for there is no evidence that the defendant failed in any duty it owed him.

The misfortune was occasioned by a pure accident, that reasonable care and foresight could not well guard against. It was "an unusual and unexpected event from a known cause, a chance casualty." *Crutchfield v. R. R.*, 76 N. C., 322.

As Webster defines it, "an accident in law is equivalent to *casus*, or such unforeseen, extraordinary extraneous interference as is out of the range of ordinary calculation."

All the courts and text-writers agree that mischief, which could by upon which to predicate a wrong.

The carrier is not required to foresee and guard the passenger against no reasonable possibility have been foreseen, and which no reasonable person would have anticipated, cannot be taken into account as a basis all injuries, but only against such as from the circumstances may reasonably be expected to occur. *Penny v. R. R.*, 153 N. C., 296; *Britton v. R. R.*, 88 N. C., 536.

A common carrier is not a guarantor of the safety of its passengers under all circumstances, but is required only to exercise proper care to guard them against injuries which may reasonably be anticipated.

(5) A carrier of passengers "is not responsible for either violent acts or their consequences, if they could not responsibly have been anticipated as within the range of possibility, nor for such acts as he could not, with due care and diligence, prevent." Shearman and Redfield on Negligence (6 Ed.), sec. 512.

A passenger on a street car who was smoking struck a match and then threw it away while lighted, so that it ignited the frock of a female passenger, which blazed and caused a panic on the car, because of which plaintiff either was thrown, pushed, or jumped from the car and was injured: *Held*, that such facts were insufficient to establish negligence on the part of the railway company. *Fanizzi v. R. R.*, 99 N. Y. S., 281; 113 App. Div., 440; *Sullivan v. R. R.*, 32 L. R. A., 167.

"A carrier is not responsible for injury to a passenger from the acts of another passenger, unless the circumstances are such that by the exercise of ordinary care he could have anticipated the danger and guarded against it." *Adams v. R. R.*, 134 K. Y., 620.

"The rule that it is the duty of a carrier to use the highest degree of care to protect the passenger from wrong or injury by a fellow-passenger applies only when the carrier has knowledge of the existence of the danger, or of the facts and circumstances from which the danger may be responsibly anticipated." *Norris v. R. R.*, 88 S. C., 15; *R. v. Duncan*, 55 Tex. Civ. App., 440.

The judgment of the Superior Court is

Affirmed.

(6)

B. A. IRVIN, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 26 November, 1913.)

1. Railroads — Federal Employer's Liability Act — Transactions With Deceased—Interest—Evidence—Interpretation of Statutes.

In an action brought by the administrator of the deceased, for the benefit of the mother, under the Federal Employer's Liability Act, to recover for the pecuniary loss she has sustained in the negligent killing by the defendant railroad company of her son, it is competent for her to testify as to what pecuniary benefits she had received from her son, such testimony, though she is interested in the event of the action, not being against the representative of a deceased person and prohibited by Revisal, sec. 1631. *Bunn v. Todd*, 107 N. C., 266, cited and applied.

2. Railroads—Federal Employer's Liability Act—Prospective Benefits—Support of Parent—Evidence, Material—Argument to Jury—Instructions—Trials.

An action may be sustained under the Federal Employer's Liability Act brought by the administrator of the deceased employee for the benefit of his parent, for the reasonable expectation of pecuniary benefit from the continuance of the life of the child, although the child has not contributed to the support of the parent, but evidence of contributions when made by the child to the support of the parent is material and important in determining whether such reasonable expectation exists, and also as to the amount of the recovery. Therefore, where the parent has not testified as to the pecuniary benefits he had received during the life of the child, it is competent for the defendant's attorney, in his argument to the jury, to comment on this fact; and while matters of this character are largely left within the discretion of the trial judge, he may not deprive a party litigant of the benefit of his counsel's argument when made within proper bounds and addressed to the material facts of the case; and his doing so, in this case, is held for reversible error, especially as it appears that the error was accentuated by a refusal of a special prayer for instructions tendered by the defendant, that there was no evidence of contribution by the son to the support of the parent, and a charge that the jury may consider what support he had given, when there was no evidence thereof.

3. Railroads—Engineer—Joint Actions—Negligence—Trials—Instructions.

The railroad company and its engineer were jointly sued for the negligent killing of plaintiff's intestate while endeavoring to hold, with another employee, a long pole between the engine and the caboose car, so that the latter could be pushed clear of the track at a crossing it was necessary for the former to pass over. There was evidence tending to show that the engineer was not negligent, which was found to be true by the jury and included in their verdict, but as to the defendant railroad company they found affirmatively upon the issue of negligence upon evidence tending to establish it as to other employees: *Held*, a prayer for special instructions should have been given as requested by the defendant railroad company, that if they found the engineer not negligent, his acts or conduct would not support an affirmative answer to the issue

as to the company's negligence and should not be considered in determining its negligence; and a charge held for reversible error, that the defendant, acting necessarily through its employees, was responsible for any acts of negligence on the part of the train crew which proximately caused the injury complained of.

4. Issues—Assumption of Risks—Trials—Instructions.

In this action to recover damages from a railroad company for the negligent killing of plaintiff's intestate, an additional issue to those of negligence and contributory negligence is suggested as to the assumption of risks, the jury to be instructed in their answer thereto upon their finding as to a certain phase of the controversy with respect to the conduct of the defendant's engineer in signaling the engine forward at the time of the injury. *Horton v. R. R.*, 162 N. C., 424.

CLARK, C. J., concurs in result.

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

This is an action under the Federal Employer's Liability Act, to recover damages for the alleged wrongful death of plaintiff's intestate and son, Leonard C. Ervin, caused by being caught beeween an engine and a freight caboose in the course of a switching movement by using a push pole on the yards at Rural Hall, North Carolina.

The engineer, W. D. Thomas, was made a party defendant, and filed an answer, the jury answering the issue directed at his conduct and the allegations of negligence in respect thereto in his favor.

The deceased was a member of the crew, acting in the capacity of flagman, and was 23 years old when he was killed. The train, which was a freight train, had just come in from Mount Airy. While the conductor was up at the station, getting the bills from the station agent, preparatory to checking the cars that were to be put into his train, the engineer and the fireman, who were on the engine, together with Irvin, O'Neal, and Wall, were endeavoring to get the caboose at a point on the yard where it could be placed at the rear of the train. To do this, it was necessary to get it over and across a switch or "cross-over," where
(8) the Wilkesboro main line and the Mount Airy main line converge.

The first effort made in this direction was to push the caboose on a knoll and release the brakes, expecting gravity (it being down grade) to take it across the switch. This failed, however, the caboose getting only partially across the switch, thus blocking it, and preventing the engine from getting to a necessary portion of the yard. It was necessary to get the caboose out of the way, and from across the switch. It was while endeavoring to do this that Irvin was killed.

The switch on which the caboose stood was a cross-over switch, the caboose having come down from the knoll on one track while the engine

stood on another, these tracks crossing at the switch. The method employed was to get a pole, carried on the side of the tender for that purpose, which was 9 feet 4 inches long and some 6 inches in diameter, weighing about 74 pounds, and put one end against the end sill of the caboose where it was held by Irvin, and let the engine come up and strike the other end, which was held by Wall, thus giving the caboose sufficient momentum to clear the switch by shoving it forward on the track it came in on from the knoll, while the engine (the switch being thrown by O'Neal) would proceed across the switch along the same track it stood on.

The pole, which was called a push pole, would be at a slight angle. At the time the push pole was taken down by Irvin, the conductor was still in the neighborhood of the station, but the evidence of the plaintiff tended to prove that he was present when the intestate was killed and gave the signal to the engineer to move forward. No evidence was introduced that the intestate had ever contributed to the support of his mother.

After setting forth in paragraph 5 that the conductor "was personally present, standing within a few feet of plaintiff's intestate at the time he was injured, and directed plaintiff's intestate in the discharge of his duties at said time, and gave the signal to the engineer to come forward with the engine," the complaint proceeds to charge negligence as follows: That the deceased was negligently ordered to hold the push pole "against the end of the caboose car, which was standing near the intersection of the main track and a side-track, while another employee was holding the other end of the pole, so that the engine" would in moving up come in contact with the pole, thereby giving the (9) caboose car sufficient momentum to get it off the switch; that the deceased was "negligently required to stand at the crossing under the direction of the conductor, and hold his end of the pole against the caboose"; that there was no socket on the caboose to hold the end of the pole up against the caboose; that the engine was an old engine without sufficient brakes, and otherwise defective, and that the pole was old and not strong enough to do the work; that the engineer was not a prudent and careful engineer, and negligently and at an excessive speed brought the engine in contact with the pole, "causing the pole which plaintiff's intestate was holding against the caboose to bend and slip," thereby catching the plaintiff's intestate between the engine and caboose; that the manner in which the work was being done was negligent and irregular.

As a result of failure of proof by the plaintiff, the jury was instructed not to consider the following allegations: (*b*) That intestate was ordered

to use the push pole; (*c*) That the intestate was required by the conductor "to stand at the crossing and hold his end of the pole against the caboose"; (*d*) That the engine was an old engine, without sufficient brakes and otherwise defective; (*e*) That the push pole was old and not strong enough.

The following is the whole of his Honor's charge on the allegations of negligence left to the jury:

"This is an action brought by the administratrix of Leonard C. Irvin to recover damages for the death of her intestate, which she alleges was caused by the negligence of the defendants, and the court charges you it is the duty of a railroad company, or its servants and agents, when engaged in operating a train, to be continuously in the exercise of reasonable care to avoid injury to its servants, as well as its passengers, and if there shall be a failure to perform such duty and in consequence thereof one is killed or injured, that shall be negligence, and if the injury should find by the greater weight of the evidence that such negligence was the proximate cause of the injury, that would be actionable negligence.

"Reasonable care is such degree of care as a prudent man (10) should use under like circumstances and charged with a like duty.

"Proximate cause of an injury is one which produces the result in continuous sequence and without which such injury would not have occurred, and from which any man of ordinary prudence could foresee that such result was probable, under facts as they existed. . . . Now, applying these principles of law to the facts in this case, the court instructs the jury that if they shall find by the greater weight of the evidence that the defendant, the railroad company, through its servants or agents who were operating the train by which the plaintiff's intestate was killed, and W. D. Thomas, the engineer, failed to exercise reasonable care—both of them—for the safety of its crew, and in consequence thereof the plaintiff's intestate was killed; and if the jury shall further find by the greater weight of the evidence that such failure was the proximate cause of the injury, then they shall answer that issue 'Yes' as to both of them. If they should so find as to only one of the defendants, they should answer 'Yes' as to one, and name the one. If they should not so find as to either one of the defendants, they should answer that issue 'No'—'Nothing.'

"If any of that negligence or any negligence which resulted in the death of the intestate was caused by the negligence of any one of the crew who was on that train, and it was the proximate cause—as I have explained proximate cause of an injury—and the negligence was due to a want of exercise of reasonable care, then the railroad company is

responsible, because they have to operate their train by agents, and if the death of the plaintiff was due to a want of exercise of reasonable care on the part of any one who was representing the railroad company there in the operation of its train, it would be imputed to the railroad company.

"So far as Thomas is concerned, the court charges you that notwithstanding Thomas was the engineer, and the conductor was there about the train, or whether he was there or not, or whether he was directed by the conductor to move it or not—doesn't make any difference why he did it—if when he was proceeding with that engine he (11) saw, or by the exercise of reasonable care could have seen, and it was a fact that he could not pass along there and move that car that they wanted to move—that is, the caboose—without imperiling the safety of the men who were holding the end of the pole, and if that was the proximate cause of the injury, that is, his moving down there, whether it was at greater speed or not—if he saw he could not accomplish it without great danger to the plaintiff, and that was the cause of the injury, then it was the proximate cause, and you will say 'Yes' as to him."

The defendant requested his Honor to charge the jury: "If the jury find from the evidence that the defendant W. D. Thomas is not guilty of negligence, then in so far as the plaintiff seeks to charge the railway company by reason of his conduct and acts with respect to the movement and handling of the engine, I charge you that such conduct and acts will not support an answer to the first issue, and you will not consider that phase of the case against the railway company."

This was refused, and the defendant excepted.

During the argument of the counsel for the Southern Railway Company, the last one who addressed the jury in its behalf said to the jury in substance that had Mrs. Irvin gone on the stand she could have testified whether her son, during his life, contributed to her support or not, and how much. Whereupon the court stopped counsel, stating that if Mrs. Irvin had gone on the stand as a witness she could not have testified to such a fact, and directed the jury not to consider such an argument. Whereupon, and at the time, the counsel of the Southern Railway Company objected to the ruling of the court, and upon the objection being overruled, excepted.

The defendant requested his Honor to charge upon the issue of damages: "Upon the question of the pecuniary value of the life of the deceased to his mother, I charge you that there is no evidence that he gave any part of his earnings to his mother." Refused, and defendant excepted.

His Honor charged the jury on the issue of damages as follows: "As this action is brought under the act of Congress known as the
(12) 'Federal Employer's Liability Act,' its provisions govern the rights and liabilities of the plaintiff and the defendant, the Southern Railway Company, and all rules of law must be determined by and in accordance with its provisions, for it is absolutely exclusive as to the subject-matter of its provisions. The State law cannot govern in any aspect of the case.

"By virtue of the provisions of the Federal Employer's Liability Act, the fact that an employee may have been guilty of contributory negligence cannot, as it does under the State law, bar a recovery; but the damages, if the jury find that the plaintiff is entitled to damages, shall be diminished in proportion to the amount of negligence attributable to such employee.

"The measure of damages in this case is not the measure of damages obtaining under the State practice, to wit, the pecuniary value of the life of the intestate during its prospective continuance, but is the measure of damages as fixed by the Federal Employer's Liability Act, and is brought for the benefit of some certain person, to wit, in this case, the mother; so that the measure of damages in this case is the loss in money caused the mother by reason of the death of her son. It is purely and entirely a money or financial loss. How much money has the mother been deprived of by the death of her son, computing the same at its present worth or value? It is not a question of how much the son could have made for his own use had he lived out his allotted time, but the present value of the sum his mother might reasonably have expected to receive from his earnings during her life, for the limit of time within which she could expect to receive financial aid from her son is the time which she could reasonably be expected to live.

"You must not undertake to give the equivalent or the value of human life. You will allow nothing for the suffering or sorrow of either the deceased or his mother. You must not attempt to punish the railway company, but endeavor to give a fair and reasonable pecuniary value for the continuation of the life of the deceased to his mother.

"Therefore, you will consider what sum of money, paid at the present time, in a lump sum, would represent the fair value of what the mother had a reasonable right to expect, under all the circumstances,
(13) to receive from the earnings of her son, had he lived until her death.

"As a basis on which to enable you to make your estimate, it is proper for you to consider the wages the son was receiving, the age and health of the son, the fact that the son might have married and thereby made

it necessary to use all or a part of his earnings in the support of his own family; you will consider the habits, prospect in life, industry and skill of the son, the business in which he was engaged, and its hazards as to life; you will consider how much of his earnings he spent on himself or otherwise, either for necessities or for other purposes, as distinguished from what he spent on or gave to his mother, if you find from the evidence that he contributed anything from his earnings to his mother; because the part of his wages that he spent on himself or for other purposes than that contributed to his mother, or what in the future she might reasonably expect he could contribute, would be entirely eliminated from your calculations.

"There is another limitation upon the amount that you will allow as damages, and that is this: You will allow only the present value of what you may find the mother has lost in money because of the death of her son; for she is getting now in a lump sum that which she would have received from time to time during a future period. By this you are not to understand that you are to ascertain the number of years that the contributions to the mother from her son would probably continue, and then multiply such number of years by the amount of such probable yearly contribution, but you are to give a sum of money that will represent the present value of such contributions.

"The evidence you have heard as to the probable duration of the life of the mother, based upon the mortality tables of the insurance companies, is not conclusive upon the question of the duration of her life. Such tables are submitted to you, not to control you, but merely to guide you. They are based upon averages, and there is no certainty that any person will live the average duration of life.

"Now, if you answer the first issue 'Yes,' to wit, that the Southern Railway is chargeable with negligence, you should first consider the question of damages, without relation to the question of con- (14) tributory negligence. If you find that the plaintiff's intestate was guilty of contributory negligence, it would then be your duty to reduce the amount of damages in proportion thereto, since the act provides that damages shall be diminished in proportion to the amount of negligence attributable to the injured employee.

"I instruct you that this provision means this: If you find that the negligence of the two is equal, that is, that the railway company was guilty of negligence and the plaintiff's intestate was guilty of equal negligence that contributed to the injury, you will reduce the damages one-half. If you find that the plaintiff's intestate was guilty of more negligence than the railroad company, then the damages should be reduced more than one-half. If he was guilty of less negligence than the

railway company, then the damages should not be reduced as much as one half."

The following verdict was returned by the jury:

1. Was the plaintiff's intestate killed by the negligence of the defendant, the Southern Railway Company, and of William D. Thomas, or either of them, and if only one, which one, as alleged in the complaint? Answer: Yes; Southern Railway.

2. Did the plaintiff's intestate, by his own negligence, contribute to his injury, as alleged in the answers of the defendants, the Southern Railway Company and William D. Thomas? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover? Answer: $8,000.

Judgment was entered upon the verdict for $6,000, the plaintiff having consented to the reduction, and the defendant appealed.

Watson, Buxton & Watson and D. L. Ward for plaintiff.
Manly, Hendren & Womble for defendant.

ALLEN, J. We will first consider the exception to the refusal of his Honor to permit counsel for the defendant to argue that the failure of the son to support the mother should be considered by the jury,
(15) and that if he had contributed to her support it would have been proven by the mother.

If the failure of the son to contribute to the support of the mother is a relevant circumstance, and the mother is a competent witness to prove the fact, there is error in the ruling.

1. Is the mother a competent witness to prove the fact of support?

The only objection urged against her competency is under section 1631 of the Revisal.

An accurate and comprehensive analysis of this section will be found in *Bunn v. Todd*, 107 N. C., 266, where the present *Chief Justice* says: "It disqualifies

WHOM—1. Parties to the action.
2. Persons interested in the event of the action.
3. Persons through or under whom the persons in the first two classes derive their title or interest.

A witness, although belonging to one of these classes, is incompetent only in the following cases:

WHEN—To testify in behalf of himself, or the person succeeding to this title or interest against the representative of a deceased person, or committee of a lunatic, or any one deriving his title or interest through them.

And the disqualification of such person, and in even such cases, is restricted to the following—

SUBJECT-MATTER—As to a personal transaction or communication between the witness and the person since deceased or lunatic.

And even to those persons and in those cases there are the following—

EXCEPTIONS—When the representative of, or person claiming through or under, the deceased person or lunatic is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction. *Burnett v. Savage*, 92 N. C., 10; *Sumner v. Candler*, 92 N. C., 634.

Tested by this construction of the statute, the mother is a competent witness, because, while interested in the event of the action, she would not be testifying *against* the representative of a deceased (16) person, etc.

2. Is the failure of the son to contribute to the support of the mother a relevant circumstance?

We held in *Dooley v. R. R.*, 163 N. C., 454, that an action may be maintained under the Federal statute in behalf of a parent when there is a reasonable expectation of pecuniary benefit from the continuance of the life of the child, although the child has not contributed to the support of the parent, and the authorities which support this principle also hold that evidence of contributions by the child to the support of the parent is material and important in determining whether such reasonable expectation exists, and in the assessment of damages which may be recovered, and if such evidence is material and competent for the parent, the defendant may prove the contrary.

The mother is not only a competent witness, but in all probability the only witness, who would know all the facts, and it is held in *Hudson v. Jordan*, 108 N. C., 12, "that the introduction or nonintroduction of a party as a witness in his own behalf is the subject of comment exactly as the introduction or nonintroduction of any other witness would be."

The conduct of counsel in presenting their causes to juries is left largely to the discretion of the trial judge, and that this discretion has been exercised liberally is shown by the following excerpt from 38 Cyc., 1471, where the author says: "Counsel may bring to his use in the discussion of the case well established historical facts, and may allude to such principles of divine law relating to transactions of men as may be appropriate to the case. He may argue matters of which judicial notice is bound to be taken, and state matters which the law presumes, and he may indulge in impassioned bursts of oratory, or what he may consider oratory, so long as he introduces no facts not disclosed by the

evidence. It is not impassioned oratory which the law condemns and discredits in the advocate, but the introduction of facts not disclosed by the evidence. It has been held that he may even shed tears during the argument, the only limitation on this right being that they must
(17) not be indulged in to such excess as to impede or delay the business of the court."

It does not seem that counsel in this case exercised all his privileges; but however this may be, the discretion vested in the judge does not "include the right to deprive a litigant of the benefit of his counsel's argument, when it is confined within proper bounds and is addressed to the material facts of the case." *Puett v. R. R.,* 141 N. C., 335.

We are, therefore, of opinion that the ruling of his Honor was erroneous, and that it constitutes reversible error, because the defendant was not only deprived of the argument of its counsel on a material matter, but the error was accentuated when his Honor refused to charge the jury, at the request of the defendant, that there was no evidence that the son gave any part of his earnings to his mother, and assumed in his charge there was such evidence, when there was none, by saying, "You will consider how much of his earnings he spent on himself or otherwise, either for necessities, or for other purposes, as distinguished from what he spent on or even gave to his mother, if you find from the evidence that he contributed anything from his earnings to his mother."

The defendant was also entitled to have the jury instructed, as requested, that if they found from the evidence that the defendant engineer was not negligent, his acts and conduct would not support an answer to the first issue in favor of the plaintiff, and should not be considered in determining the liability of the railroad company.

We at first thought this might be treated as harmless, in view of the fact that the jury found that the engineer was not negligent and could not, therefore, be presumed to base their findings of negligence against the defendant company upon his acts and conduct; but it not only appears that the prayer was refused, but also that his Honor charged the jury: "If any of that negligence, or any negligence which resulted in the death of the intestate, was caused by the negligence of any one of the crew who was on that train, and it was the proximate cause—as I have explained proximate cause of an injury—and the negligence
(18) was due to a want of exercise of reasonable care, then the railroad company is responsible, because they have to operate their trains by agents, and if the death of the plaintiff was due to a want of exercise of reasonable care on the part of any one who was representing the railroad company there in the operation of its train, it would be imputed to the railroad company."

The charge given is, of course, predicated upon a finding of negligence, but it fails to direct the minds of the jurors to the facts in controversy or to exclude the conduct of the engineer if he was not negligent.

The principal benefit to be derived from a charge to the jury is not the statement of propositions of law, but the elimination of irrelevant matters and causes of action or allegations as to which no evidence has been offered, and thereby let the jury understand and appreciate the precise facts that are material and determinative.

As said by *Merrimon, C. J.,* in *S. v. Wilson,* 104 N. C., 873: "The jury should see the issues, stripped of all redundant and confusing matters, and in as clear a light as practicable."

The prayer for instruction is a correct statement of the law upon an aspect of the case presented by the evidence, and as said by *Justice Walker* in *Baker v. R. R.,* 144 N. C., 42: "We have held repeatedly that if there is a general charge upon the law of the case, it cannot be assigned here as error that the court did not instruct the jury as to some particular phase of the case, unless it was specially requested so to do. *Simmons v. Davenport,* 140 N. C., 407. It would seem to follow from this rule, and to be inconsistent with it if we should not so hold, that if a special instruction is asked as to a particular aspect of the case presented by the evidence, it should be given by the court with substantial conformity to the prayer."

There must, therefore, be a new trial as between the plaintiff and the railroad company.

We have not discussed the refusal to submit an issue as to assumption of risk, because we expressed our views on this question in *Horton v. R. R.,* 162 N. C., 424, and it is not necessary to repeat them; but we would suggest that the issue be submitted at the next (19) trial and that the jury be instructed to answer it "No," if they find by the greater weight of the evidence that the plaintiff was injured by the negligent conduct of the conductor in signaling the engine forward.

We have set out the charge of his Honor on the issue of damages in full, because it involves a new question and is clear, accurate, and comprehensive, as applied to the facts of this case, but would, of course, have to be modified to fit other facts.

New trial.

CLARK, C. J., concurs in result.

Cited: Kenney v. R. R., 165 N. C., 103; *Marcom v. R. R., ib.,* 260; *Saunders v. R. R.,* 167 N. C., 383; *Raines v. R. R.,* 169 N. C., 195.

AMERICAN TRUST COMPANY v. W. S. GOODE ET AL.

(Filed 26 November, 1913.)

Principal and Agent—Realty Broker—Sale by Owner—Commissions—Trials —Evidence—Nonsuit.

While real property remains in the hands of a broker for the purpose of sale, the owner may not consummate the sale with one who had become interested as a proposed purchaser through the efforts of the broker, and escape liability to the latter for the payment of the commissions agreed upon; and where in an action by the broker to recover his commissions, there is conflicting evidence, but the evidence viewed in the light most favorable to the plaintiff's contentions tends to establish a transaction of this character, a judgment as of nonsuit upon the evidence should not be granted.

APPEAL by plaintiff from *Webb, J.*, at January Term, 1913, of MECKLENBURG.

Action by a broker to recover his commissions for the sale of lands.

At the conclusion of the evidence the court rendered a judgment of nonsuit. Plaintiff excepted and appealed.

(20) *J. W. Hutchison, Pharr & Bell for plaintiff.*
Cansler & Cansler for defendants.

BROWN, J. The plaintiff sues to recover commissions upon a sale of real estate alleged to have been made by it on behalf of the defendants. The plaintiff is a corporation doing business in Charlotte, and has a department for the sale and purchase of real estate, of which E. C. Griffith is manager.

The evidence must, in passing upon the motion to nonsuit, be taken in the light most favorable to the plaintiff, and all reasonable inferences must be drawn for the plaintiff's benefit.

The evidence tends to prove that the defendant owned certain property occupied by one Lummus as tenant; that defendant requested Griffith to sell this property to Lummus; that Griffith was trying to sell Lummus the Draper property. When Lummus refused to buy the Draper property, Lummus asked for a price.

Griffith testifies: "I went to Mr. Goode and asked him for the price, and he told me he wanted to submit the property on the basis of $35,000, and not to fail to get a proposition to submit to him. This was the day preceding the consummation of the deal. I then went to see Lummus again, and he was still very much interested in the proposition, and asked me to come back the next afternoon at 5 o'clock.

"Before the appointed hour came, Goode came into the office, and said he was about to close the trade with Lummus for this property, which was located at 203 South Church Street, and wanted me to help him. I had had a number of previous transactions with Goode, having sold him the lot upon which the building was subsequently located.

"In the first conversation, Goode stated that anywhere between $30,000 and $35,000 would be interesting to him, and asked me to submit it at $35,000; said he wanted $35,000 for it; that anywhere between $30,000 and $35,000 would buy the property. I tried to get this offer, and made an appointment with Lummus for 5 o'clock the next afternoon.

"When Goode told me he had closed the deal, he came into the office and said that he had incidentally seen Lummus, they had started talking about the purchase of the property, and that he had (21) gotten down to the point of a bargain—they wanted to trade.

"He said he wanted me to remain in the office until he and Lummus came there; wanted me to draw up the papers. In ten minutes he returned with Lummus; said they had decided to trade, but was depending upon a loan proposition, which I undertook to negotiate, and did."

The plaintiff's evidence tends further to prove that the defendant was thinking of buying the Draper property which the plaintiff had for sale, and that the agreement was that if he did so, he was to pay only a nominal commission for the sale of his own property.

About two weeks after the sale of his property, defendant came to see Griffith and told him he was unable to purchase the Draper property, and asked Griffith what the charges were for selling his property to Lummus.

There is no evidence in the record that defendant, after placing the property in the plaintiff's hands for sale, ever took it out.

On the contrary, the plaintiff's evidence tends to prove that in this case Griffith took up the matter of sale with Lummus at defendant's request, and was the efficient means by which the sale was made, and that he continued in the transaction, managed and conducted it, to a successful conclusion.

It is a fair inference, to be drawn from the defendant's conduct in going to Griffith after he decided not to buy the Draper property and inquiring how much he owed him for his services, that the defendant recognized his liability to pay a reasonable commission.

He had received the full benefit of Griffith's services in selling his property, negotiating the loan, and in preparing and executing the necessary papers. At that time the defendant evidently thought the laborer was worthy of his hire, and, therefore, he inquired the amount of his indebtedness.

It seems to be well settled that if the owner authorizes the broker to effect the sale of his property at a stipulated price, he cannot make a sale direct to a person with whom he knows the broker to be negotiating, or who has been sent to him by the broker, at a less price, (22) and thus defeat the broker's claim for compensation. 9 A. and E. Anno. Cases, page 435, note, and cases cited in notes.

In *Schelgal v. Allerton,* 65 Conn., 260, the owner of real estate, after his efforts to sell to W. had failed and had been abandoned, put it in the hands of a real estate agent to sell at a certain price. He then commenced negotiations with W., and while it still remained in his (agent's) hands, without notice to him the owner sold the property to W. for a less price than that at which the agent had been authorized to sell. The Court held the agent was entitled to his commissions on the amount for which the property sold.

In *Byrd v. Frost,* 29 S. W., 46, the Court held that where an owner of land places it in the hands of a broker to be sold for $4,000, and at the instance of the broker a proposed purchaser looks at the land, and afterwards buys it from the owner for $3,750, the latter is liable for the broker's commissions.

In *Williams v. Bishop,* 11 Colo. App., 378, the Court held that one who sells directly at a reduced price, property listed with a real estate broker to a purchaser the broker had found, and with whom he was negotiating a sale, without having introduced him to his principal, is liable for commissions on the price received.

Hoadley v. Bank, 71 Conn., 599, 44 L. R. A., 321, is a case in point. Here property was placed in the plaintiff's hands for sale, and they told the plaintiff that X. might be a possible purchaser, and asked him to see X. and induce him to buy, stating that X. had some months before offered $38,000 for the property. Plaintiff saw him a number of times, and X. looked over the property. The defendants then sold to X. for $25,000. No agreement for any special rate of commission was made. The court found that plaintiff was the procuring cause of the sale, and entitled to recover. The Court said: "When an owner places land with a real estate broker for sale, he agrees, in the absence of any special contract, to pay the customary commission or brokerage, in case a sale is consummated with a purchaser, (23) who was led to begin the negotiation through the intervention of the broker. It is immaterial that the owner, after the broker has interested the purchaser, secretly pursues the negotiations and himself completes the sale, or that the owner of his own accord effects a sale at a less price than that he gave the broker.

"If any act of the broker in pursuance of his authority to find a

purchaser is the initiatory step that leads to the sale consummated, the owner must pay the commission. The procuring cause of sale is such intervention of the broker for that purpose as constitutes the foundation on which the negotiation is begun.

"The law is clear that a broker does not forfeit his commission because the owner avails himself of the services rendered to sell at a price less than that limited, and the owner's position is not improved if he seeks to fortify his evasion of liability by telling the broker after the rendition of the services he will pay no commission, if he (the owner) sells at such price."

Our own Court has said: "Where a broker authorized to sell at private sale has commenced negotiations, the owner cannot, pending the negotiations, take it into his own hands and complete it, either at or below the price limited, and then refuse to pay the commissions." *Martin v. Holly,* 104 N. C., 36.

In the case at bar, if Griffith's evidence is to be believed, the sale was made within the limits fixed by the defendant when he placed his property in Griffith's hands for sale, that is, between $30,000 and $35,000.

Upon Griffith's version of the facts, the plaintiff is entitled to recover reasonable commissions. The decisions cited by the defendant (*Mallonee v. Young,* 119 N. C., 549; *Abbott v. Hunt,* 129 N. C., 403; *Trust Co. v. Adams,* 145 N. C., 161; *Clark v. Lumber Co.,* 158 N. C., 139), are based upon a different state of facts, and are easily distinguishable from this case as made out upon the plaintiff's evidence.

The judgment of the Superior Court nonsuiting the plaintiff is

Reversed.

Cited: *S. c.,* 167 N. C., 338; *Crowell v. Parker,* 171 N. C., 396.

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(24)

DONALD MACRACKAN v. BANK OF COLUMBUS.

(Filed 26 November, 1913.)

1. Usury—Definition—Interpretation of Statutes—Forfeitures.

Usury is the taking of a greater premium for the use of money loaned than the law allows; and if the lender knowingly takes, receives, reserves, or charges a greater rate than 6 per cent per annum, he forfeits the interest if it has not been paid, and is subject to a penalty of twice this amount if the interest has been paid (Revisal, sec. 1951), and whatever the form of the transaction may be, it is usury if the rate of interest charged or received is unlawful.

2. Usury—Intent Inferred.

Whenever the usurious character of the transaction is revealed on the face of the instrument, the unlawful intent to charge or receive an illegal rate of interest for the money loaned will be inferred from the instrument itself.

3. Usury—Banks and Banking—Loans to Officers—Interpretation of Statutes—In Pari Delicto.

It is the receiving of a usurious rate of interest by the lender of money for which the statute, Revisal, sec. 1951, imposes the penalty, and the question is not affected by the fact that the loan is from a bank and made to a stockholder who is also a director of the bank and a member of its loan or discount committee; nor is the doctrine of *in pari delicto* applicable.

4. Usury — Banks and Banking — Principal and Agent — Cashier — Imputed Knowledge.

Notice to a cashier of a bank of an illegal charge of interest for money loaned by it, contrary to Revisal, sec. 1951, is notice to the bank, and the latter is fixed with notice of a transaction of this character when upon paying the usurious interest the borrower protests to its cashier against the excessive interest he is obliged to pay for the loan.

CLARK, C. J., files concurring opinion; ALLEN and BROWN, JJ., dissenting opinions.

APPEAL by defendant from *Ferguson, J.*, at June Special Term, 1913, of COLUMBUS.

Action to recover the penalty under Revisal, sec. 1951, for knowingly charging and receiving from plaintiff a greater rate of interest than allowed by law, namely, 8 per cent interest on a note for $3,000.

The jury returned the following verdict:

(25) 1. Did the defendant knowingly take and receive from the plaintiff on the $3,000 note a greater rate of interest than 6 per cent per annum from 9 February, 1912? Answer: Yes.

2. If so, what amount of interest was paid on said note from 9 February to 30 May, 1912? Answer: $75.35.

3. What sum, if any, is the plaintiff entitled to recover? Answer: $150.70.

There was evidence that plaintiff was a member of the board of directors, one of the managing and loan committee of defendant bank; but he testified that, as such, he never passed on the loans of the bank, nor did he fix the rate of interest or help to do it. He also testified that he resigned about the time the loan in controversy was made, and that when he paid the unlawful interest he was not a member of the board of directors or the committee.

The following are the two instructions which defendant requested should be given to the jury:

1. "If the jury find from the evidence and by the greater weight thereof that at the time the note sued on in this action, to wit, on 9 November, 1911, and the time same was paid, to wit, on 30 May, 1912, the plaintiff was a stockholder and director in the Bank of Columbus, defendant in this action, and was at said time a member of the loan or finance committee, and as such passed on said note, and was at said time a member of the examining committee, the plaintiff would not be entitled to recover, even though they shall find that the plaintiff was charged and paid a greater rate of interest than 6 per cent."

2. "To entitle the plaintiff to recover in this action, the jury must find by the greater weight of the evidence, not only that the defendant charged and received more than 6 per cent interest from the plaintiff, but at the time same was charged and received the defendant knew it was usury, and there was in the mind of the lender a wrongful intent and purpose to take more than the lawful rate for the use of his money."

The first instruction was refused, and defendant excepted; the second was refused except as given in the charge, and defendant again excepted. Judgment for plaintiff, and defendant appealed.

Jackson & Greer for plaintiff. (26)
Irvin B. Tucker, W. H. Powell, and D. J. Lewis for defendant.

WALKER, J., after stating the case: The defendant loaned to the plaintiff the sum of $3,000, and charged, reserved, and received from him, as interest thereon, a sum in excess of the legal rate. The character of the transaction is not involved in any doubt. Interest is the premium allowed by law for the use of money, while usury is the taking of more for its use than the law allows. It is an illegal profit. 4 Blk. Com., 156; *Yarborough v. Hughes,* 139 N. C., 200. If the lender knowingly takes, receives, reserves, or charges a greater rate than 6 per cent per annum, he forfeits the interest, and if the unlawful interest has been paid to him, he is liable to a penalty of twice the amount of interest so received. Revisal, sec. 1951.

The second prayer for instruction is directed to the intent with which the interest was paid. Where there is negotiation for a loan of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending, and however the transaction may be shaped or disguised, if a profit or return beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, or otherwise, the contract is usurious. The corrupt intent mentioned in the books consists in the charging or receiving the excessive interest with the knowledge that it is prohibited by law, and the purpose to violate it. Our statute makes it usury if the interest is *knowingly*

charged or received at the unlawful rate. When the illegal purpose stands clearly revealed on the face of the instrument, as in this case, no further inquiry into the intent is required. *Miller v. Insurance Co.*, 118 N. C., 612. The contract itself establishes the corrupt intent, as it is susceptible of no other meaning. These principles were settled in the recent case of *Riley v. Sears,* 154 N. C., 509.

This transaction cannot be explained upon any other theory than that the defendant knew the interest it exacted to be unlawful, and this makes it usury. *Doster v. English,* 152 N. C., 339. The court charged the jury that knowledge of the illegal character of the interest
(27) received by the defendant was essential to its liability, when it gave this instruction: "If you find by the greater weight of the evidence that between 9 February, 1912, and 30 May, 1912, the plaintiff paid to the defendant bank a greater rate of interest than 6 per cent, and at the time the bank knowingly charged and received a greater rate than 6 per cent, then it is your duty to answer the first issue 'Yes.' If you do not so find by the greater weight of the evidence, you would answer it 'No.' "

The second question is, Did the fact that plaintiff was a member of the board of directors, and the managing and loan committee, purge the transaction of its usurious taint? The language of our statute (Revisal, sec. 1951) is positive and peremptory, and it was said (by *Justice Hoke*) in *Riley v. Sears, supra,* that the courts have enforced it strictly, and with insistence and alertness. It may be added by us now, that it is the declared policy of the State, which for many years has stood with the approval of the popular will, that usury shall not be exacted of the borrower, and "whenever, directly or indirectly, unlawful interest has been taken or charged, the provisions of the statute must be applied." *Riley v. Sears, supra,* and numerous cases therein cited. The only test is the taking of the excessive interest *knowingly,* and it can make no difference who is the borrower.

There is no exception in the statute of any person or class of persons. A bank is not privileged by the law to exact a larger rate of interest from its stockholders or officers than from those who are not.

This Court has uniformly held that a stockholder who has paid usurious interest to the corporation, of which he is a member, can recover the penalty, "notwithstanding that he is *in pari delicto* in the transaction. The statute (Code, sec. 3836; Revisal, 1951) expressly provides that a party who has so paid usurious interest (and is *in pari delicto*) may recover double the amount he has paid." *Hollowell v. B. and L. Assn.,* 120 N. C., 286. The same was held in *Rowland v. B. and L. Assn.,* 115 N. C., 825, where *Justice Burwell* says: "Thus, it

appears that what it takes from one of its stockholders, under the pretense that it is lending at 6 per cent, it gives to another with a (28) lavish hand. It is both a taker and a giver of usury."

The doctrine is familiar that where each is equally in fault (*in pari delicto*) the law favors him who is defending, or, as otherwise expressed, when the fault is mutual and of equal degree, the law will leave the case as it finds it. But the principle does not apply here. It is not, in law, a case of equal fault. *Lord Ellenborough* once said that where there is oppression on the one side and submission on the other, it never can be predicated as *par delictum,* for one holds the rod and the other bows to it. Broom's Legal Maxims (6 Am. Ed.), 695; *Smith v. Cuff,* 6 M. and S., 160. And in *Atkinson v. Denby,* 7 H. & N. (Exch.), 993, approving *Smith v. Cuff, supra,* and *Smith v. Bromley, infra, Chief Justice Cockburn* said that where one of the parties is in a position to dictate and the other has no other alternative but to submit, it is virtually a state of coercion, and while the parties may be *in delicto,* it is no *par delictum*—they are not equally in fault, one being in a position of dependence on the other and having to submit to his terms or suffer if he does not, and that it would be mischievous if it were held that he could not recover the money paid under such circumstances.

Lord Mansfield, in the Court of King's Bench, while deciding the case of *Lowry v. Bourdieu* (2 Douglas, 469), reported in 99 Eng. Reports (Full Reprint, at pp. 209, 301), said, "he desired it might not be understood that the Court held that, in all cases where money has been paid on an illegal consideration, it cannot be recovered back. That in cases of oppression, when paid, for instance, to a creditor to induce him to sign a bankrupt's certificate, or upon a usurious contract, it may be recovered, for in such cases the parties are not *in pari delicto.*"

The commentator on *Jones v. Barclay, infra* (99 Eng. Reports, Full Reprint, at p. 443, note F. 7), says: "The inference to be drawn from the various decisions that have taken place on this subject, stated her and in the notes to *Lowry v. Bourdieu, supra,* 468, appear to be that, the general principle remaining, that *in pari delicto potior est conditio possidentis,* the two following exceptions to its application (29) are also established: (1) That where the illegality exists in the contract itself, and that contract is not executed, there is a *locus penitentiæ,* the *delictum* is incomplete, and the contract may be rescinded by either party. (2) Where the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where the one party is the principal offender, and the other only criminal from a constrained acquiescence in such illegal conduct, in these cases there is no parity of *delictum* at all between the

parties, and the party so protected by law, or so acting under compulsion, may at any time resort to the law for his remedy, though the illegal transaction be completed."

In another case (*Smith v. Bromley,* reported only in a note to *Jones v. Barclay,* 2 Douglas, 684, but in full from notes of *Justice Buller*), *Lord Mansfield* also said on this subject: "If the act is, in itself, immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis.* But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover (citing cases in note); and it is astonishing that the reports do not distinguish between the violation of the one sort and the other." He then applies this principle, and says that the man who from mere necessity pays more than the other can in justice demand, and who is called in some books the slave of the lender, has the right to recover back what he has thus paid to his creditor, who has no right to retain it in violation of the law, and that the maxim, *Volunti non fit injuria,* does not apply. "It is absurd to say that one willingly transgresses a law made for his own benefit." In order to prevent this oppression and advantage taken of the debtor's necessity, as described by *Lord Mansfield,* our law makes it penal for the lender to take more than it allows. And he concludes thus: "Upon the whole, I am persuaded that it is necessary, for the better support
(30) and maintenance of the law, to allow this action; for no man will venture to *take,* if he knows he is liable to *refund.*"

The law upon which the judges were commenting in the last two cases was not as stringent and inflexible in its terms as our statute (Revisal, sec. 1951). What right have we to restrict the scope of the statute by construction, when its terms are perfectly clear and explicit, being broad and comprehensive enough to embrace every borrower who pays usurious interest and every lender who exacts or receives it? Every man who applies for a loan, in a very genuine sense, counsels that it be made. It would be strange if he should advise anything else. His own interest and present needs would dictate just such a course. Every borrower consents to the loan that is made to him, and often it is urged with extreme importunity. But the greater his necessity and extremity, the less excusable is the act of the lender in exacting usury. If the contention of defendant is upheld, the banks would be practically exempt from the forfeitures and penalties of the law, when they lend upon illegal interest to their officers and agents. Suppose the usurer lends

to his agent, who has charge of his business, at the latter's request, shall he be allowed to keep the usury which he had no right to take? Our law intervenes and declares that not only the excess above the lawful rate may be recovered by the debtor, but "twice the amount paid," and, as we have said, without regard to the class or condition of the borrowers. They are all served alike. The only inquiry is, Was the money obtained extortionately? and if this be so, it has been uniformly decided that an action by the borrower will lie and the money recovered back.

In *Smith v. Cuff,* and other cases cited above, and many other cases that might be added to the list, the debtor had contracted with one of his creditors to give him a secret advantage over his other creditors in a general composition, and having paid the amount bargained for to the preferred creditor, it was held that he could recover it back, although he had made the bargain secretly, covinously, and for the purpose of defrauding the other creditors, who were ignorant of it, and for his own gain and advantage. The debtor recovers the money (31) unlawfully paid, though the creditor, who combined with him to cheat his associates, could not recover on his bargain. *Wittkowsky v. Baruch,* 127 N. C., 313. That case is no stronger than this, for here there is no fraud, and the *statute* gives the action for the usury besides, and it would not only be contrary to the uniform current of decisions noted above, but also against the declared policy of the State, to hold that plaintiff cannot recover.

The defendant loaned this money with its eyes open, so to speak. There is competent evidence that it was its custom to lend it at the higher rate. It cannot shift the blame to the plaintiff because he was its director, when it knew the law, and was fully aware of its violation; nor can its stockholders safely or justly rely on any such excuse. The money, which belongs to the plaintiff, because the law says so, was received by it, placed in its vaults, and is there now, as far as appears. Neither the bank nor its board of directors, nor its body of stockholders, which has supreme control of its affairs, has ever offered to return the excess of interest, though they have all had full notice of its payment by the bringing of this suit, and before it was brought. If they did not authorize the same originally, that is, approve what had been done, they have subsequently ratified it, with knowledge of the facts, by not returning even the excess, but retaining it themselves, and this we know is equivalent to a prior authorization of it.

We doubt if there is any sufficient evidence that plaintiff participated in the meeting in which this loan was made; but that, in our view of the case, is immaterial. There is no place here for recrimination. The law assumes that the debtor is *in delicto,* and protects him against his

own wrong, because of the inequality of the parties. And for this reason it is said that, in equity, "relief is granted against usurious contracts, whether executory or executed, since from considerations of public policy the two parties are not considered as standing on equal terms or *in pari delicto.*" Webb on Usury, sec. 342; 2 Pomeroy Eq. Jur., sec. 937; *Peacock v. Terry,* 9 Ga., 137. His plea, therefore, is
(32) not rejected because of his conduct in "advising" the loan to be made. "A contract by the borrower of money at an usurious rate of interest by which he agrees not to plead usury in defense to it does not estop him from doing so. Such a contract would, if sustained, furnish a ready mode of evading the usury laws." Webb on Usury, sec. 440. Whether this be a sound public policy or not, we are forbidden to inquire. We must abide by the written law. *Ita lex scripta est.*

We have nothing to do with the morality of the transaction nor the abstract merit of plaintiff's claim. We are judges of the law and not censors of his morals; but we say that it comes with poor grace from the defendant, who has openly violated the law, to blame the plaintiff for his part in the transaction. It would be inconsistent for the law to listen to such appeals, and condemn the plaintiff, when it has justified, if not encouraged, what he has done.

In conclusion, let us say that the usury laws are an exception to the rule, *in pari delicto,* and in a case precisely like this one in its essential features, the Court has so held. In *Bank v. Slemmons,* 34 Ohio St., 142 (32 Am. Rep., 364), the Court said: "Recurring in this connection to the defense, it is clear that Thomas, the principal in the notes, was no more estopped from setting up the illegality (usury) by reason of his position as director, than if he had not been officially connected with the bank." Webb on Usury, sec. 518. The Court also held it to be clear, as matter of law, that none of the notes could bear interest, for the reason that their interest-bearing power was destroyed by the illegal agreement, and, therefore, payments made generally could only apply to the principal, and this by the very terms of the statute, the policy of which no court will investigate. "It is the duty of the court to ascertain and declare the law, and not to indulge in speculations as to its policy or propriety, for such questions must be determined by those who make the law. The statutes upon the subject of usury have been long regarded as purely remedial and subject to the modification and control of the legislative department, even as applied to past transactions."
(33) Webb on Usury, sec. 12. And in *Ferguson v. Sulphen,* 8 Ill., 547, it was said of this question: "The law against usury is founded in principles of public policy, principles that have been for ages recognized, and almost universally adopted. Without inquiring

into the policy or justice of the statutes for the prevention of the usury, it is the imperative duty of the judicial tribunals faithfully to execute them. If there is any injustice or impolicy in these enactments, the fault rests with the Legislature and it must provide the proper corrective, and not the courts. Whenever the injured party invokes the aid of the courts, and presents a case clearly within the statute, there should not be the least hesitation in applying the appropriate remedy. The only effective mode of discouraging and preventing the practice of usury is by a rigid enforcement of the provisions of the statute. If a case comes within the mischief of the statute, it should be held to be within the remedy. And this seems to be the principle on which these statutes have everywhere been construed and administered. The real inquiry in every case is, whether there has been a borrowing and lending at a greater rate of interest than the law allows; and this becomes purely a question of fact, to be determined from all the circumstances of the particular case. The defense of usury is entitled to the same respect and consideration as other defenses authorized to be made in the courts, and it is the duty of the court to regard it the same as other defenses."

In defense of the law, if it needs any from us, Chancellor Kent, speaking of Jeremy Bentham's *dictum,* that he should not wish to see the "spirit of project in any degree repressed," and commending the words of Lord Redesdale, that "the statute of usury was founded on great principles of public policy," and further quoting from him, said: "It (the statute) was intended to protect distressed men, by facilitating the means of procuring money on reasonable terms, and by refusing to men who sit idle as high a rate of interest, without hazard, as those can procure who employ money in hazardous undertakings of trade and manufacture. I trust that theoretic reformers have not yet attained, on this subject, any decided victory over public opinion. The statute of usury is constantly interposing its warning voice between the creditor and the debtor, even in their most secret and dangerous (34) negotiations, and teaches a lesson of moderation to the one, and offers its protecting arm to the other. I am not willing to withdraw such a sentinel. I have been called to witness, in the course of my official life, too many victims to the weakness and to the inflamed passions of men," and he expressed the wish that "the first experiments of Bentham's projects may not be made within these walls." *Dunham v. Gould,* 16 Johns. (N. Y.), 367.

The plaintiff, at the time he paid the interest, complained to the cashier that it was excessive, and was told that it was the usual rate. The bank insisted on the usury to the last, and even to this time. If the borrower could not waive his right to take advantage of the usury

by a prior express agreement to do so, which we have seen he cannot do, why should any kind of previous consent affect his right when it was given?

There are four constituent elements in a usurious contract:

1. A loan or forbearance of money, either express or implied.

2. An understanding between the parties that the principal shall be or may be returned.

3. That for such loan or forbearance a greater profit than is authorized by law shall be paid or agreed to be paid.

4. That the contract is entered into with an intention to violate the law.

The fourth element may be implied if all the others are expressed upon the face of the contract, or are established by a sufficiency of evidence. Webb on Usury, sec. 18. All of them have been shown in this case, plainly and clearly, and we conclude that there is no reason why the plaintiff is not entitled to the benefit of the statute, without regard to the moral guilt, or his conduct in asking for it, whether it be good or bad. That the law favors the plea is sufficient; and while it does not become the usurer to question either the wisdom, policy, or justice of the law, it may be said that he is not expected to have a very good opinion of it. It is for this reason that the penalty is given to restrain his cupidity and to punish his defiance of it, and also to deter him from a repetition of the offense. There is no exception in the statute (35) of those who are induced to take usury, even against their will.

It is the bare taking of it that is condemned by the law and penalized. No amount of persuasion, or even importunity, by the borrower, will justify the forbidden act of the usurer. He is subjected to the penalty for what *he* does, and cannot call to his aid the conduct of his debtor for his acquittal. The rule may appear to be harsh in some instances, but it must operate uniformly in order to execute the legislative will, so plainly declared.

Appellant suggests that plaintiff, as one of its officers, was a trustee, and therefore, that advising it to take usury was a breach of trust, for which he is liable in damages to the stockholders. We doubt the correctness of the abstract proposition thus stated, but it does not apply to this case. He denies squarely that he advised it, and the cashier's testimony is not inconsistent with his. The cashier does not say that he advised the taking of 8 per cent in this case, but only that he generally advised it, but they did not always follow his advice. The bank knew that it was charging usury. It was not an incompetent nor an imbecile, and did not have to be told by him what was the legal rate. It will hardly be urged that it did not know the legal rate.

The fiduciary relation, if it existed, counts for nothing, if the *cestui que trust*—the bank and its stockholders—knew of and consented to the loan, as was done in this case. It will not be asserted that the latter could recover any damages under such circumstances. *Townsend v. Williams,* 117 N. C., 336, does not apply. The director here was not dealing with a third party, as in that case, but the bank was dealing with him as its borrower. "Note the diversity." Besides, even if plaintiff has looted the bank, the latter is the beneficiary of the loot, which it now holds and refuses to return. After plaintiff had resigned and he and the bank were at arm's length, so to speak, he having divested himself of all fiduciary relation to it, he complained to the cashier of the excessive interest, when he paid the money, simply as a borrower of the bank, and the bank, by its cashier, even then insisted upon the usury. Notice to the cashier was notice to the bank and its stockholders, for he was vested with plenary authority, and he (36) took the excessive interest for the bank "with his eyes open" and after being warned not to exact it. The bank has since ratified what he did, if ratification was needed to bind it by his act.

Gund v. Ballard, 73 Neb., 547, has no application. It was a suit in equity for a settlement of the affairs of a corporation, and as plaintiff was asking equity, the court merely required him to do equity and take the legal interest, and the whole controversy was about that matter, except so far as it was mixed with the actual fraud of the plaintiff. But that is not this case at all. This is a suit at law, unmixed with any equity, to recover a statutory penalty, and we are compelled to obey the mandate of the statute, regardless of our personal views of its morality. There is no equitable principle involved, and this Court has so ruled in the cases we have cited, which have allowed officers to recover. If, however, the *Gund case* were in point, we should follow our own decisions, which construe our own statutes, especially as they are sustained by decisions in other jurisdictions. If anything is settled by the books, it is that the maxim, *in pari delicto,* does not apply to usury cases. If a borrower's promise to waive usury, which itself induced the loan, is not binding, how can there be any waiver in the case?

The "blood-letting" statute may have been obscure, though we do not think it was, and the Court properly construed it, but it is a "far cry" from this statute to that one, for the Legislature has made its meaning perfectly clear, and there can be no reasonable doubt that the law denounces all loans upon usury indiscriminately and annexes the forfeiture and the penalty. It makes no distinction among borrowers—they are all under its care and protection. The phlebotomy case and this one are, therefore, wide apart in time and tenor, the only similitude being

that the sufferer is bled in both cases, but here the analogy ceases, and the bank cannot assume the role of the good physician, as its own act was not one of benevolence.

There is no danger of breaking a bank by insisting upon obedience to the plain mandate of the statute. Lending to its officers upon usury is no more dangerous to it than lending to other persons. If one
(37) course will deplete its funds and empty its vaults, the other just as surely will do the same thing. No argument, therefore, can be drawn from this classification of borrowers which can militate against the strict execution of the legislative will, as unmistakably written in the statute, Revisal, sec. 1951, and as interpreted by this Court in numerous cases. The stockholders are not parties to this suit, they seek no relief, and the bank has set up no counterclaim, either for itself or in their behalf. If this were a matter of mere sentiment, and not the construction of a positive statute, we might question the propriety of plaintiff's course; but not being so, we must abide by the Legislature's declaration of its policy. The bank, though, is in no position to criticise the plaintiff's conduct, as it has broken the law and still holds his money, received in open violation of it.

In *Thomas v. Fish,* 9 Paige (N. Y.), 478, 482, a case much stronger for the defendant than is this, it was held that the actual fraud of the borrower in palming off a false security upon the lender will not defeat the plea of usury in an action by the latter to recover the debt, as the statute is peremptory in its terms and admits of no such exception. The statute, construed in that case, is like ours. The law encourages the plea to prevent the wrong or its repetition, and to enforce its policy, which is based upon the ancient proverb that "the borrower is servant to the lender," and it seeks, therefore, to protect the latter against injustice and oppression.

The Court in *Miles v. Kelly,* 25 S. W., 724, said that, under the statute, the debtor cannot waive or contract away his right to the defense of usury, nor can he be estopped to insist upon it. To the same effect is *Bank v. Smyth,* 9 Tex. Civ. App., 540, where the debtor attempted to do so by express contract. The Court held that it was directly opposed to the policy of the law to allow it and thereby defeat its beneficent purpose. When rightly considered, the authorities are all one way. At this term we have held, in *Cooke v. Cooke, post,* 272, construing the ten years divorce provision of the statute, that as no exception is made against the right of either party to bring the suit, the Court could
(38) not hold that it can lie only in favor of the party injured. *Justice Hoke* (the *Chief Justice* and *Justice Brown* concurring) says: "There is no such exception, and the courts are not at liberty

to add to the statute what the Legislature has not seen fit to provide." And again: "As no exception is made in favor of the injured party, nor to exclude the time covered by the divorce *a mensa,* we must administer the law as we find it, and if it proves to be unwise in policy or undesirable in results, it must be changed by the legislative department, which has exclusive cognizance of the subject." This is really an apt and close analogy, and, in principle, there is absolutely no difference or distinction between the two cases. The one inevitably rules the other. There was a dissenting opinion in the case, but upon the ground, solely, that the statute had expressly provided that the suit should be brought by the injured party only.

In ascertaining the legislative will, we are warned against what is known as the predestined interpretation of statutes, which takes place when, laboring under a strong bias of mind, induced even by a sense of justice, we unconsciously make the text subservient to our preconceived views or desires, which accord, it is true, with our individual notion of what is abstractly right. This, we are told, is making the law, and not even interpreting or construing it, which itself is not permissible, when it is plainly written and carries but one meaning. There is then no room for reasoning or construction. We merely declare it to be what in reality it is.

After a careful review of the record, we conclude that the ruling of the court was correct.

No error.

CLARK, C. J., *concurring*: I concur fully in all that is said in the admirable opinion by *Mr. Justice Walker* in this case. It leaves nothing to be added. Upon the defendant's own showing, it has been continuously for years an open and defiant violator of the law; yet it is now asking the Court as a special favor to write into the statute an exemption in its favor. The Court has no power to do so, and if it had the discretion, the defendant is not in a position to ask the mercy of the Court. Besides, the plaintiff has his rights, given (39) him by statute.

It is astonishing that those who are indebted for the protection of their property and their business entirely to the respect which the people shall show to the law should thus inculcate by their daily conduct contempt for the law. The law against usury is as much the law of the State, and to be respected as such, as the law against burglary and larceny. Upon what ground can the defendant expect its property to be protected against such offenses when it is setting an example daily to the public of the violation of law for the purpose of taking the

property of others illegally? It can matter little when the property of others is taken contrary to law, whether it is done by the use of a crowbar or by imposing upon the necessities of the needy, in a manner forbidden by statute.

The defendant has had the favor of incorporation, whereby the property of its stockholders and officers is exempt from liability for its debts, except to a limited extent. The bank and its officers have had the protection of the law in safeguarding their property and their persons. Yet, in total disregard of these matters, they have been for years admittedly open and notorious and hardened offenders against the laws of the State.

It is no defense, even if it were shown, that the plaintiff formerly aided the officers of the bank in their illegal conduct. They had no right on that account to victimize him any more than to impose illegally upon any one else. The question presented is not the former conduct of the plaintiff, but their conduct towards him in this transaction. If he had agreed (which he denies) to their exaction of usury in his case, the same is true as to the victim in every case of usury. The law provides that such acquiescence by any borrower shall not only be no estoppel, but that he shall have the right to "recover back twice the amount of interest paid." The plaintiff is entitled to this protection of the law which is given to every other citizen.

There is nothing more dangerous for property holders than to inculcate contempt of law by themselves disregarding it. They awe
(40) the protection of themselves and their property to the respect which is paid by the community to the law and its enforcement.

Townsend v. Williams, 117 N. C., 336, is authority for the proposition that directors must direct, and if loss comes to the company by reason of their misconduct or negligence, they are liable both to stockholders and to creditors. If the directors of this bank, including this plaintiff, by their violation of law subjected the bank to suits for the recovery of double the interest in cases of usury, the stockholders, and if necessary the creditors, are entitled to recover for the losses so inflicted. This is wholesome doctrine, and should be oftener applied. But it has no application in this case, where the plaintiff was the borrower and could not be also acting as a director. In fact, he testifies that he did not assent to the usury charged against him. But if he did, the law forbids it to be held a legal assent. As to this transaction, he stands simply on the same footing as any other borrower. The law gives him the same remedy of recovering double the interest paid that it gives to any other borrower. The stockholders, of course, can recover against the other directors for the loss thus sustained by their conduct.

ALLEN, J., dissenting: The plaintiff ought not to recover upon the facts in this record, unless the law is clear and unmistakable in his favor, and then only in obedience to the mandate of the law, which must be the final arbiter for the judge in his efforts to attain justice.

The plaintiff is an attorney at law, who drew the charter of the defendant bank, and while he denies that he was the general counsel of the bank, he admits that he has now an uncollected claim against it for legal services, which he says were rendered during the time of the transactions complained of. He was at all times a director of the bank, a member of its finance committee, a member of its loan committee, and a member of its examining committee.

He testified, among other things: "I was a stockholder in the bank at the time, and was a director at the time the note was given. I cannot say whether or not I was at the time it was paid. I resigned about that time. I cannot say that I passed on the loans as (41) director. I applied for the loan and obtained it. I was either a member of the loan committee or the finance committee; I cannot say which. They are not the same thing. I did not pass on the loans of the bank or fix the rate of interest or help to do it. I was on the examining committee. I had been director from the time the bank was organized. I was not general attorney for the bank. I have the bank sued for some special services rendered. I drew the charter when the bank was organized. I was director of the bank at the time I borrowed this money and at the time I paid it back, and also a member of the loan and examining and a member of the finance committees."

The cashier of the bank also testified: "Mr. MacRackan advised the board of directors to charge 8 per cent all the time. That was always his advice, but we did not charge 8 per cent all the time."

And upon these admitted facts and upon the evidence, his Honor, in an action by the plaintiff to recover the penalty for charging and receiving usurious interest—double the amount of the interest paid—has excluded from the consideration of the jury everything except the amount of interest paid, and has charged the jury to answer the issue in favor of the plaintiff if the rate of interest was greater than 6 per cent.

He also refused to give the special instruction prayer for by the defendant.

In my opinion, there was error in the charge given and in refusing the one requested.

The plaintiff was a director, and as such, clothed with a trust in behalf of the corporation, stockholders and creditors, and he had no legal or moral right to divest himself of the trust and assume a hostile relation.

The directors elect the officers; their acts are corporate acts; they control and manage the property of the bank, and say to whom money shall be loaned and upon what terms. Invested with these powers, and recognizing that the money of depositors and stockholders cannot be safeguarded unless officers are diligent and honest, the law imposes corresponding duties.

(42) "The high degree of confidence and responsibility resting upon directors of corporations has often led the courts to regard them as trustees, and to declare the relationship existing between them and the stockholders to be that of trustees and *cestuis que rustent,* respectively. If this can be asserted with regard to the generality of corporations, it is peculiarly and exceptionally true with regard to banking corporations, in whose solvency the whole neighboring community must be at least indirectly interested. A bank of issue may properly be regarded as a *quasi*-public corporation. The directors of a bank are not trustees for the stockholders alone, but they owe an even earlier duty to the depositors, and if the bank exercises the privilege of circulation, still a prior duty to the public at large. The law is, as it ought to be, very jealous in exacting the strict and thorough performance of these duties, and it is in the scrutiny of possible breaches of them that the rigid rules which govern trustees have been applied. It is not enough to exculpate a director, that no actual dishonesty can be shown, that he cannot be positively proved to have been influenced by interested motives. Like a trustee, he is absolutely prohibited from the performance of those questionable acts wherein his conduct may be wholly free from blame, but where the bias of self-interest is strong, and may influence him even without his own recognition of the fact. A director, who wishes to keep completely within the protection of the law, must look to something more than the mere integrity of his own intentions." Morse on Banking, sec. 125.

This principle has been declared and enforced in this Court. In *Townsend v. Williams,* 117 N. C., 336, the present *Chief Justice,* quoting from *Shea v. Mabry,* 1 Lea, 319, said: "Directors are not mere figureheads of a corporation. They are trustees for the company, for the stockholders, for the creditors, and for the State. They must not only use good faith, but also care, attention, and circumspection in the affairs of the corporation, and particularly in the safe keeping and disbursement of the funds committed to their custody and control. They must see that these funds are appropriated as intended for the purposes of the trust, and if they misappropriate them or allow others to divert them from those purposes, they must answer for it to their

(43) *cestui que trust.*"

Applying this doctrine to the facts, the plaintiff was a trustee, and the defendant bank, its stockholders, and depositors, were his *cestui que trust.*

The purpose of the trust was to make legal contracts, not illegal ones; and if he allowed the funds of the bank to be diverted from this purpose, he became liable to his *cestui que trust.*

Suppose as director he had approved a loan to a stranger at an illegal rate of interest, and the stranger had paid and then recovered the penalty, can it be doubted that the stockholders and depositors could have compelled him to make good the loss? If so, his position cannot be stronger because the penalty is in his own pocket instead of in the pocket of a stranger; and if he could be made to refund, the law will not permit him to recover.

In *Gund v. Ballard,* 73 Neb., 548, the Court so declared. "The president and director of a bank cannot enter into a contract with the corporation in which he is such an officer to pay an usurious rate of interest on money owing by him to such corporation, and thereby escape the payment of all interest on such indebtedness under the statute denouncing usurious contracts. The law will not permit him, acting in the dual capacity in which he was, and in a sense the agent of his principal, the bank, to enter into a usurious contract with himself and his principal, and thereby escape all liability for the payment of interest on the principal sum of the indebtedness for which he thus became obligated. It must be accepted, we think, as fundamentally correct that he could not be permitted to profit by his own wrongful action, nor by the action of the bank on the one part and himself on the other, to the prejudice of the stockholders, he holding, as he did, the fiduciary relation then existing between him and the corporation and those it represented."

There is another reason for denying a recovery to the plaintiff, if we have regard to the spirit of the statute, "which giveth life," instead of to its letter, "which killeth."

The lender and borrower in a usurious transaction are parties (44) to an illegal contract, and the general rule is that the courts will not aid either party to such a contract. An exception is, however, made in favor of the borrower, but on the distinct ground that as he is under the control of the lender, "in chains," as expressed in the brief of appellee, his payment is not voluntary, and that while *in delicto,* he is not *in pari delicto.*

How is it with the plaintiff? He drew the charter of the bank and aided in its organization. It was the child of his own loins, and as attorney, director, member of the finance committee, member of the loan committee, and member of the examining committee, he had the authority and control of a parent.

Why, then, should we give him relief, unless we return to the days when it was seriously contended that a statute against "letting blood on the streets" embraced a surgeon who bled his patient to save his life?

I not only think the option of the Court wrong, but it appears to me to establish a policy which will weaken confidence in banks, and will furnish opportunity to officers to deplete the funds of the bank, with impunity, at the expense of innocent stockholders and creditors.

If one director can borrow at a usurious rate, and after payment, recover the penalty, so can all. If they can borrow a small amount, they can borrow the capital of the bank, and the larger the rate of interest they charge each other, the greater will be the recovery when they sue for the penalty.

BROWN, J., dissenting: In the language of the *Chief Justice,* "I concur fully in all that is said in the admirable opinion" by *Mr. Justice Allen* "in this case. It leaves nothing to be added."

Upon the plaintiff's own showing he, as a director and one of the controlling officers of the defendant bank, in the language of the *Chief Justice,* "has been continuously for years an open and defiant violator of the law," yet he is now asking the Court to set a premium on his misconduct, to reward him for his misdeeds, and to visit its wrath upon all the other directors except himself.

He admits that he was a director and financial officer of the de-
(45) fendant when he borrowed the money. He participated in the loan to himself, and practically admits that he advised and directed the cashier to charge 8 per cent on all loans.

The first prayer for instruction requested by the defendant and refused by the court, in my opinion, embodies both sound law and good morals. There was abundant evidence to support it.

If the jury should find that the plaintiff was a director in the defendant bank and a member of its finance committee, and passed on and authorized the loan to himself at a usurious rate of interest, he ought not either in law or good morals to be permitted to recover the fruits of his own wrong, and subject the innocent stockholders to loss who had trusted him to conduct their institution honestly and according to the law of the land.

It is said in the concurring opinion in this case that "they (the directors) of this bank have been for years admittedly open, notorious, and hardened offenders against the laws of the State."

One of these "hardened offenders" so severely castigated is the plaintiff, whom the majority of this Court think should be allowed to recover from innocent stockholders the penalties which are intended only for innocent and oppressed debts.

A bank is not a human being, and cannot act for itself. It is a creation of law, an artificial person, and must act through its officers. If they are unfaithful and violate the law, the innocent stockholders suffer.

It is said "that if the directors by violating the usury law subject the bank to suits for the recovery of the penalties imposed by the statute, the stockholders and, if necessary, the creditors are entitled to recover for losses so inflicted," and that "this is a wholesome doctrine and should be oftener applied." I fully concur in that sound and just principle.

That is exactly what the minority of this Court believe should be done in this case. There is no better opportunity to apply this salutary principle than now. By his own conduct, as a director, in voting to loan money to himself at a usurious rate of interest, the plaintiff has subjected the bank and its innocent stockholders to loss.

To hold that the officer and director, who has brought about (46) this loss, can recover the penalties imposed by the statute, as a reward for his own misconduct, and be exonerated also from all future liability for his wrongful act, is in my opinion a legal solecism, and in contravention of a sound public policy.

It is useless to say, as is said in concurring opinion, that the plaintiff denies these charges, although there is strong evidence offered by the defendant to sustain them, for, in refusing the plaintiff's instruction, the court declined to allow the jury to pass upon the matter.

I am of opinion that upon the admitted facts and uncontradicted evidence in this case the plaintiff is entitled to have all excessive interest eliminated from his debt to defendant, but that, inasmuch as a director he consented to the loan to himself at a usurious rate, he is at least *in pari delicto,* and is not entitled to recover penalties which the defendant must suffer because of the plaintiff's own wrongdoing.

It is an almost universal axiom of the law that no man shall enjoy the fruits of his own wrong.

A. A. SHUFORD, JR. v. F. P. COOK.

(Filed 26 November, 1913.)

1. Pleadings—Answer—Admissions—Prior Demand—Waiver—Principal and Surety.

Where the plaintiff brings suit for contribution against a cosurety on a note, alleging his liability as such, and that he had failed or refused reimbursement to the extent of his liability to the plaintiff, who had paid the same, and the defendant answers, denying liability, and there

is no averment that demand had been previously made on the defendant, the right to a demand is waived by the answer, and the statement of the cause of action being only defective, is cured.

2. Principal and Surety—Cosureties—Equity—Contribution—Insolvency of Principal—Actions—Interpretation of Statutes.

Where it appears that the principal on a note has secured his discharge in bankruptcy from his obligations, including a note paid at maturity by one of two sureties thereon, and that a few months thereafter the surety who paid the note brought his action for contribution against his cosurety, who has paid nothing, the right of action given by Revisal, sec. 2844, will not, without more, be denied upon the ground that it requires the insolvency of the principal, in such cases, to be shown at the institution of the action.

3. Principal and Surety—Cosureties—Primary Liability—Trials—Evidence.

Evidence that one signing a note with another did so only as "supplementary surety," with primary liability resting upon his cosurety, is not sufficient which only tends to show that the cosurety represented that the principal was thoroughly solvent, and there was no danger, and thereupon he indorsed the note as surety with the other one.

(47) APPEAL by defendant from *Cline, J.*, at June Term, 1913, of BURKE.

Action to recover the pro rata alleged to be due from defendant as cosurety on a note for $2,400, executed to First National Bank of Hickory, dated 5 June, 1909, payable sixty days after date, by one J. E. Wheeler as principal, and plaintiff and defendant as sureties.

There was evidence on part of plaintiff tending to show the execution of the note; that at maturity of same the bank demanded payment, and plaintiff, having paid the entire amount due, instituted the present action for contribution; that plaintiff has received nothing on said payment from defendant or otherwise. The evidence further tendered to show that, at the time of maturity of the note and the payment of same and at the institution of suit, the said J. E. Wheeler, principal, was resident in Knoxville, Tenn.; that he was insolvent and had been duly adjudged bankrupt by the United States District Court for Northern Division of the Eastern District of Tennessee, and had received his discharge in bankruptcy.

The defendant denied any and all liability on said note, and alleged, further, that no demand had been made upon him for contribution before bringing suit.

The following issues were submitted and responded to by the jury:

1. Was J. E. Wheeler a nonresident of this State at the time plaintiff alleges that he paid off the note of $2,400 to the bank?

(48) Answer: Yes.

2. Was the said J. E. Wheeler insolvent at the time plaintiff alleges he paid the amount of said debt to said bank? Answer: Yes.

3. In what amount, if any, is defendant indebted to the plaintiff? Answer: $1,200, with interest from 8 September, 1909.

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

W. A. Self and Bagby & Blackwelder for plaintiff.
Avery & Ervin for defendant.

HOKE, J. It was chiefly urged for defendant that no demand upon him was alleged in the complaint before bringing suit, and therefore no cause of action was stated. The complaint alleges: "That defendant did not pay and has not paid, directly or indirectly, any part of said obligation, and has failed and refused to reimburse plaintiff in any measure for the sum so paid by plaintiff, and refuses to make contribution as the demands of justice and equity require." And this might well be interpreted as sufficient allegation of demand to permit evidence that same was made before suit brought; but, however that may be, it is uniformly held, in cases of this character, that the right to a demand or notice will be considered as waived when all liability is denied in the answer. It is only a defective statement of a good cause of action, and the defect is cured by such denial. *Woolen Co. v. McKimmon,* 114 N. C., 661; *Buffkins v. Eason,* 112 N. C., 162; *Felton v. Hales,* 67 N. C., 107.

It was further objected that our statute, Revisal, sec. 2844, giving a right of action to surety who has paid the debt against a cosurety when the principal is insolvent or out of the State, by correct interpretation refers to the time when the action is instituted by the surety, and not to the time of payment. This construction has been given the statute in *Leak v. Covington,* 99 N. C., 559; but, in the present case, the note was paid at maturity, 5 August, 1909. The action was instituted on 11 September following. There is no evidence or suggestion that there had been any change, meantime, in the pecuniary condition of the principal; in fact, the discharge in bankruptcy issued to the (49) principal as to any and all debts existent on 7 September, 1909, would seem to be conclusive on this question, and, under the pleadings and all the facts in evidence, we are clearly of opinion that the issues are sufficiently determinative to justify and uphold the judgment.

It was further insisted that there was evidence on part of defendant tending to show that the defendant was not in fact a cosurety with plaintiff, but only a "supplemental surety," and that, as between the two, the plaintiff was under the primary liability. The position and

the testimony tending to support it is sufficiently indicated from this excerpt from the examination of defendant as a witness in the cause:

"I was in Hickory when I indorsed the $2,400 note of Wheeler with Shuford. Mr. Shuford had the note when I first saw it. It had already been indorsed by Mr. Shuford when he handed it to me and asked me to indorse it. . . . He said Mr. Wheeler is all right; and he was not uneasy about him; that as I had indorsed the first note, he wanted me to go on with him. I agreed to indorse it with Mr. Suford, and did."

Q. "What was the inducement for your indorsement of this first note?" (Defendant proposed to show that his inducement to indorse the note was the request of the plaintiff and his assurance that there was no danger in it; that Wheeler was perfectly all right.)

Plaintiff objects. Sustained. Defendant excepts, and this is defendant's sixth exception.

And further: "I will state again that Shuford came to my house and said Wheeler had written to him and asked him to indorse it, and asked me to indorse it with him. I told him I had been on it by myself for a while, and now he could go on by himself. Shuford said there was no danger in it; that Wheeler is perfectly all right; there is no danger. I told him all right, and I indorsed it. That is about all that was said in the conversation between me and Mr. Shuford."

Under authoritative decision, here and elsewhere, there is
(50) nothing in this evidence, either that admitted or proposed, which tends to establish a primary liability on the part of plaintiff nor which makes or tends to make any change in the position of these parties as ordinary cosureties on the note. *Atwater v. Farthing,* 118 N. C., 388; *Daniel v. McRea,* 9 N. C., 590; *Claffel v. John,* 45 Col., 45.

A perusal of the entire evidence bearing on this transaction will disclose that the defendant was the original indorser for Wheeler in this indebtedness, and later the plaintiff came to share it with him, and thereby relieved him of a part at least of his obligation. There is nothing in the record to excuse or which tends to excuse defendant from contributing his just share of the joint liability, and the judgment on the verdict in therefore affirmed.

No error.

H. A. MURRILL v. CHARLES V. PALMER.

(Filed 26 November, 1913.)

1. Landlord and Tenant—Leases—Tenant Holding Over.

When a tenant for a year or longer time holds over and is recognized by the landlord without further agreement or other qualifying facts or circumstances, he becomes tenant from year to year, and is subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existing conditions.

2. Same—Renewal of Lease—Presumptions—Breach by Tenant—Damages.

Where a tenant for a term of years continues to occupy the leased premises after the expiration of the lease, and pays the stipulated monthly rental, which the landlord accepts, and thereafter the landlord asks whether he would desire to renew the lease at an advanced rental, which resulted without further agreement in the continued occupancy by the tenant of the premises, and his continuing to pay the monthly rental in the same amount, the intent of renewing the lease as tenant from year to year is presumed from the circumstances, notwithstanding the tenant declares a different one; and where he leaves the premises before the expiration of the renewed term, he is liable to the landlord for the payment of the rent for the unexpired term, when the latter has used reasonable but unavailing diligence to secure another tenant within that time. Instances in which it is permissible to show a contrary intent to that of a renewal of the lease, where the tenant holds after the expiration of the term, discussed by HOKE, J.

3. Reference—Conclusion of Law—Appeal and Error.

While the finding of a fact in a matter of reference by the court below is conclusive on appeal, the reason does not apply to a conclusion of law upon the facts found: as in this case, a conclusion of law that the tenant had only become a tenant at will.

APPEAL by defendant from *Webb, J.*, at June Term, 1913, of (51) MECKLENBURG.

Action, heard on appeal from a justice's court. The facts formally agreed upon by the parties are stated in the record as follows:

"The above named parties agree that the following statement of facts, together with the exhibits, shall constitute the facts in this action, and agree that his Honor, James L. Webb, judge presiding, shall upon these facts find as a fact the intentions of the parties litigant, and shall give judgment thereon as he shall determine the law to be arising therefrom.

"First. That the plaintiff and defendant entered into a written lease on 27 March, 1909; for a term of two (2) years from 1 April, 1909, for the premises at No. 16 East Morehead Street, in the city of Charlotte, 'upon the following terms and conditions: The yearly rental during said term shall be $500, which the lessee agrees to pay in monthly payments

of $41.67 each, on the first day of each month, in advance.' Agreeable thereto, the defendant occupied said premises and paid rent in advance during the two years, as stipulated under said lease. The lease expired 1 April, 1911. (See Exhibit A.)

"Second. That at the expiration of said lease defendant continued to occupy said premises, and paid as the rent therefor an amount equal to the amount he had formerly paid in advance each month, to wit, $41.67, which sum, however, was paid at the end of each month, and never in advance; that on 30 May, 1911, the plaintiff addressed
(52) a letter to the defendant, stating that the lease had expired, and that he 'would like to renew the lease for the remainder of the twelve (12) months at $45 per month.' (See Exhibit C.) That on 1 June, 1911, the defendant replied to plaintiff, stating, 'Will consider renewal for the next twelve months at the same rental heretofore paid,' and other conditions, such as other improvements, 'check covering rental for the month of May inclosed.' (See Exhibit D.) That nothing came of this correspondence, and the defendant continued in possession of the premises and the plaintiff continued to receive the rent at the end of each month.

"Third. That on 28 September, 1912, the defendant gave the plaintiff written notice that he would vacate said premises on 31st October, following. (See Exhibit E.)

"Fourth. That on 3 October, 1912, the plaintiff replied to the defendant, advising him that 'he was a tenant from year to year, and that he could not vacate the premises until 31 March, 1913; but that if he would secure a satisfactory tenant to take the house on 1st November, the matter would be satisfactory. Any new lease on the property will have to be made at $50 per month until 31 March, 1913." (See Exhibit F.)

"Fifth. That on 16 October, 1912, plaintiff again wrote defendant as shown by Exhibit G.

"Sixth. The defendant immediately replied, stating that he had consulted an attorney, and that he was advised that he had a right to vacate said premises, and would proceed to do so; and further offered to help plaintiff to secure another tenant. (See Exhibit H.)

"Seventh. That on 31 October, 1912, the defendant vacated said premises, and they remained vacated until 1 February, 1913, or for a space of three months, which, as the plaintiff had been receiving $41.67 each month for said premises, entailed a loss of $125.01. (See Exhibit B.)

"Eighth. That immediately upon the premises being vacated by the defendant, plaintiff advertised said property for rent and used due diligence in every way to secure a new tenant immediately, and that he

secured a new tenant within a reasonable time, to wit, about (53) ninety days. That the defendant also endeavored to help plaintiff to secure a new tenant, and that this hiatus in the rental could not have been avoided by any further efforts.

"That this cause of action originated in the magistrate's court, being appealed to the Superior Court by the defendant. That if upon the foregoing exhibits and record, his Honor shall find the plaintiff entitled to recover, he shall give judgment in favor of the plaintiff for $125.01, with interest thereon from 1 February, 1913, until paid. If he shall find the plaintiff is not entitled to recover, he shall give judgment for the defendant."

The court, thereupon, entered judgment as follows: "This cause coming on to be heard on the above agreed statement of facts and the record, and being heard, the court is of the opinion that the defendant was a tenant at will of the plaintiff, and so adjudges. It is therefore ordered by the court that the plaintiff recover nothing of the defendant, and that the cost of this action be taxed against the plaintiff."

From this judgment plaintiff, having duly excepted, appealed to this Court.

T. W. Alexander for plaintiff.

F. I. Osborne, H. C. Miller, W. S. O'B. Robinson, Jr., and N. A. Cocke for defendant.

HOKE, J. It is a principle fully recognized, and not infrequently applied in this State, that when a tenant for a year or a longer time holds over and is recognized as tenant by the landlord, without further agreement or other qualifying facts or circumstances, he becomes tenant from year to year, and subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existent conditions. *Holton v. Andrews,* 151 N. C., 340; *Harty v. Harris,* 120 N. C., 408; *Scheelky v. Koch,* 119 N. C., 80; *Steadman v. McIntosh,* 26 N. C., 291; McAdam Landlord and Tenant (3 Ed.), sec. 32 *et seq.;* Taylor on Landlord and Tenant (9 Ed.), sec. 525.

The position, in the first instance, is at the option of the land- (54) lord. He may treat his tenant, who holds over, as a trespasser, and eject him, or he may recognize him as tenant; but when such recognition has been made, a presumption arises of a tenancy from year to year, and as stated, under the terms and stipulations of the lease as far as the same may apply. This is a rebuttable presumption, which may be overcome by proper and sufficient proof. When there is testimony permitting the inquiry, it is usually a question of intent—an intent, however, which under some circumstances may be inferred from conduct,

and in direct opposition to the express declaration of one or the other of the parties. Thus in McAdam, *supra,* p. 83, it is said: "Notifying the landlord that the tenant does not intend to renew the lease is ineffectual if the tenant wrongfully holds over, for the intent is inferred from the act, and it is this that gives the landlord the right to treat him as a tenant for a renewed term." In further illustration of these general principles, there are decided cases to the effect that the presumption in question shall not prevail where it is made to appear that when the term closed the parties were negotiating for a renewal or change of the lease, and the tenant remained in possession with the acquiescence of the landlord till the matter was determined. *Montgomery v. Willis,* 45 Neb., 434; *Smith v. Aldt,* 7 Daly, 492; *Schilling v. Klein,* 41 Ill. App. Court, 209.

Again it has been properly held that there shall be no wrongful holding over within the meaning of the principle when the tenant has been compelled to continue his occupation of necessity; for instance, when he has remained in possession solely by reason of the sickness of the tenant or some member of his family and of such a character that removal could not be presently made without serious danger to the patient. *Hester v. Mullen,* 159 N. Y., 28.

There is also a decision in the State to effect that the right of the landlord to insist on a tenancy from year to year may be waived, and should be held waived, when after the term had expired the landlord made certain propositions to the tenant for a further renting and agreed to give the tenant time to consider them, and later, having made peremptory demand for a sum certain for a renewal, withdrawing all other
(55) propositions, the tenant thereupon rejected the last proposition and at once vacated the premises. *Drake v. Wilhelm,* 109 N. C., 97. But none of the conditions suggested are presented in this case. On the contrary, a perusal of the facts agreed upon will disclose that defendant rented the dwelling-house of plaintiff for two years from 1 April, 1909, at $500 per annum, the rent payable at $41.67 per month in advance; that at the end of the term the defendant held over without further agreement, and paid the rent for the first month. That on 30 May plaintiff wrote to defendant, "That he would like to renew the lease for the remainder of the twelve months," and demanding a higher rent. Defendant answered, declining to pay more, and offering to take the property for twelve months at same rate, inclosing check at that rate for the month of May, and as the case agreed then states it, "That nothing came of this correspondence." That defendant continued in possession of the premises during that year, 1911, paying the rent at the old rate at the end of each month, and on into the second year, until 28 September, 1912, when he gave plaintiff written notice and vacated the

premises on 30 October, 1912, and plaintiff, using due diligence, was left without a tenant for three months. At the time when the former lease expired there was no treaty pending for renewal. When plaintiff made his demand for a higher rent, the defendant did not accept plaintiff's position in reference to the tenure or vacate the promises. He continued in possession, paying rent at the old rate, and in our opinion there is nothing to prevent the operation of the principle usually obtaining in such cases, and that plaintiff had the right to consider and hold defendant as tenant from year to year.

It was urged for defendant that the question is one of intent, which was left for the judge to find, and that his Honor has found as a fact that the intent was for defendant to occupy the premises as tenant at will; but we do not so interpret the action of his Honor. There is no additional finding of fact by him, but on the facts as presented he adjudges as a conclusion of law that defendant occupied the property as tenant at will. The defendant, after vacting the premises, seems to have acted very well in the matter, and to have done (56) what he could to aid plaintiff in obtaining a new tenant, and he no doubt has acted in good faith; but in our opinion he vacated the premises in breach of his tenure as tenant from year to year, and plaintiff has the right to recover the damages suffered by reason of the premises being without atenant.

On the facts stated, the plaintiff is entitled to judgment for loss of rents, and this will be certified, that such judgment may be entered.

Reversed.

DESTY C. BUCHANAN v. W. C. CLARK ET AL.

(Filed 13 December, 1913.)

1. Trial by Jury—Waiver—Consent—Findings by Judge—Trials—Evidence—Exceptions—Appeal and Error.

The parties to an action may waive their right to a jury by agreeing that the trial judge may find the facts upon the issues involved and declare his conclusions of law arising thereon (Revisal, sec. 540), and where the judge has acted accordingly, the relevant and pertinent facts so found by him are conclusive on appeal when there is any sufficient legal evidence to support them. An exception to a finding of fact, on the ground that there was no evidence thereof, must be made in apt time before the judge.

2. Deeds and Conveyances—Delivery to Another—Acceptance—Trials—Presumptions—Evidence.

Where one purchases land and has the deed made to his illegitimate son, and himself receives and holds the conveyance for the son, it is in

fact a delivery of the deed in such manner as to vest the title of the lands in his son; and where this is done without the knowledge of the son, the presumption is that he will accept the deed made for his benefit, and this presumption will prevail in the absence of evidence to the contrary.

3. Deeds and Conveyances—Test of Delivery—Trials—Evidence.

Where the fact of the delivery of a deed to lands is in question, the test is, whether the grantor in parting with its possession thereby lost control of it, and the power of recalling it.

4. Same—Undisclosed Intent—Reconveyance.

Where a father purchases lands and has a conveyance thereof made to his illegitimate son, saying at the time it was to make provision for him, but without the knowledge of the son, who dies before his majority, a second conveyance from the same grantor obtained afterwards by the father and made to him as grantee cannot divest the title conveyed to the son in the first deed, whatever his undisclosed intent may have been at that time.

5. Deeds and Conveyances—Registration—Purchaser Not for Value—Actual Notice.

The provision of Revisal, sec. 980, was intended to protect a purchaser of land for value from the claim of a grantee under an unrecorded deed, and has no application where a deed has been delivered which conveys the title to a son of the purchaser, and subsequently the purchaser obtains a conveyance thereof to himself from the same grantor without any consideration, for then, the grantor having parted with his title, the second deed is made without value, which is sufficient to avoid it.

CLARK, C. J., dissenting. HOKE, J., did not sit.

(57) APPEAL by defendant Clark from *Lyon, J.*, at October Term, 1912, of AVERY.

Action for the recovery of land, and its decision turns upon the question whether a deed, or instrument in the form of a deed and sufficient to convey presently a fee-simple title in the land, to Raymond Buchanan by C. F. and R. E. Franklin had been delivered. A second deed was executed by the Franklins to the defendant W. C. Clark, at his request, for the same land. Plaintiff, who is the sole heir at law of Raymond Buchanan, he having died some time between the dates of the two deeds, contends that the first paper was duly delivered to defendant W. C. Clark, by the Franklins, the grantors, for Raymond Buchanan, and that Clark agreed to receive and did receive it for that purpose, and that the title, thereby, immediately passed to Buchanan, while Clark denies that there was such a delivery, and avers that he acquired the title. The parties agreed to waive a jury trial, and that the judge should find the facts and state his conclusions of law thereon, and

that judgment should be entered acordingly. The facts were found by the judge, in accordance with the agreement of the parties, and it is sufficient to state that there was ample evidence, without (58) setting it out, to support the said findings, which are as follows:

1. That Raymond Buchanan was an illegitimate son of the plaintiff.

2. That the defendant W. C. Clark was the father of said Raymond Buchanan.

3. That the said Raymond Buchanan died intestate on 15 May, 1911, leaving the plaintiff his sole heir at law.

4. That on 16 March, 1910, the defendants W. C. Clark and C. F. Franklin and R. E. Franklin made an exchange of land, and in consideration of the conveyance of certain land to the defendants C. F. Franklin and R. E. Franklin, they, at the request of the said W. C. Clark, executed a deed in fee simple to said Raymond Buchanan for the lands in controversy, which deed was duly acknowledged by the said defendants Franklin, before T. M. Vance, a justice of the peace, who took the acknowledgement of the said C. F. Franklin and wife, R. E. Franklin, and her privy examination, the said deed being in proper form and signed and sealed by both the Franklins before said acknowledgement.

5. That after the due execution of the deed by the Franklins, and the probate of the same by the justice of the peace, it was delivered to the defendant W. C. Clark, for Raymond Buchanan, who was then in the State of Kentucky.

6. That Raymond Buchanan died before he was 21 years of age.

7. That on 21 November, 1911, after the death of Raymond Buchanan, and after defendants knew of his death, the Franklins, at the request of defendant W. C. Clark, executed a second deed for the property, and delivered the same to the defendant W. C. Clark, and in this second deed W. C. Clark was named as grantee.

8. That during April, 1912, W. C. Clark handed the first deed in which Raymond Buchanan was named as grantee, to defendant C. F. Franklin.

9. That thereafter, upon demand of plaintiff's attorney, the defendant C. F. Franklin delivered said deed to the plaintiff, (59) and the same was registered in Avery County.

10. That at the time of the execution of the second deed above mentioned the defendant W. C. Clark executed and delivered to the defendant C. F. Franklin a paper-writing as follows:

STATE OF NORTH CAROLINA—AVERY COUNTY.

This is to certify that I hereby bind myself, my heirs and executors, to pay to C. F. Franklin and wife and damages that may lawfully be

awarded against them for making second deed for a piece of land, being a tract of land that said W. C. Clark intended to give to Raymond Buchanan.

Witness by hand and seal, this 21 November, 1911.

His
W. C. × CLARK. [SEAL]
Mark.

11. That the defendant Clark caused the said second deed to be registered before the registration of the first deed above mentioned.

12. That there was no consideration for the execution and delivery of the second deed.

13. That at the time of the execution of the first deed the grantors therein and the said W. C. Clark intended that the land in controversy should belong to Raymond Buchanan in fee simple.

14. That the rents and profits derived from the land in controversy since the death of Raymond Buchanan are $25.

15. That the defendant W. C. Clark withholds the land in controversy from the plaintiff, and has been in possession of the same, withholding the same from the plaintiff since the death of Raymond Buchanan on 15 May, 1911.

The court thereupon adjudged, upon the facts so found, that plaintiff is the owner of the land and entitled to the possession thereof; that defendants have no interest therein, and that the second deed of the Franklins to W. C. Clark be delivered up and canceled, and that
(60) the clerk of the court also cancel the same on the registry thereof, and also gave judgment against defendant for the costs. The defendant W. C. Clark excepted and assigned errors as follows:

1. To the failure and omission of the court to find that it was the intention of W. C. Clark to deliver the deed to Raymond at the time of the death of the said Clark.

2. To the failure and omission of the court to find that it was the purpose and intention of W. C. Clark to make some provision for Raymond Buchanan so as to make him equal with his other children, and that this purpose was defeated by the death of the said Buchanan before the time at which the said Clark intended to deliver the deed.

3. To the judgment, upon the ground that, on the facts found, it should have been rendered in favor of the defendant W. C. Clark.

Harrison Baird, L. D. Love, and Edmund Jones for plaintiff.

S. J. Ervin, W. C. Newland, and Lawrence Wakefield for defendant.

WALKER, J., after stating the case: We are of opinion that the defendants in this case are completely foreclosed by the judge's findings

of fact. Parties can have their causes tried by jury, by reference, or by the court. They may waive the right of trial by jury by consenting that the judge may try the case without a jury, in which event he finds the facts and declares the law arising thereon. Revisal, sec. 540. His findings of fact are conclusive, unless proper exception is made in apt time that there is no evidence to support his findings or any one or more of them. The present *Chief Justice,* in *Matthews v. Fry,* 143 N. C., 384, thus states the procedure in such cases: "The parties waived a jury trial and agreed in writing that the judge should find the facts and enter judgment thereon as upon the facts so found he might decide the law to be. The judge found the facts and entered judgment thereon in favor of the defendant. When the certificate of opinion was presented in the court below, the plaintiff moved for judgment in accordance therewith. The defendant resisted this judgment and asked for trial *de novo,* and insisted that some of the findings of fact had been made by the judge without any evidence to support them. The findings (61) of fact by the judge, when authorized by law or by the consent of parties, are as conclusive as when found by a jury, if there is any evidence," citing *Branton v. O'Briant,* 93 N. C., 103; *Roberts v. Insurance Co.,* 118 N. C., 435; *Walnut v. Wade,* 103 U. S., 688. The findings have the force and effect of a verdict. This is also the rule in other jurisdictions. *Griffith v. Manufacturing Co.,* 115 Ga., 592. The point was expressly decided, with reference to the delivery of a deed, in *Avent v. Arrington,* 105 N. C., 377, where it was held that the finding as to delivery, supported by some evidence, was not reviewable here. This question is important, for a bare reference to the judgment will show at once that the judge has found that, in fact, there was a delivery of the deed by the Franklins to W. C. Clark for Raymond Buchanan. The following two findings, aside from others of equal force, may be selected as conclusive upon this question:

"1. That after the due execution of the said deed by the defendants Franklin, and the probate of the same by the said justice of the peace, the said deed was delivered to the said defendant W. C. Clark, for said Raymond Buchanan, who was then in the State of Kentucky.

"2. That at the time of the execution of the first deed, the grantors therein and the said W. C. Clark intended that the land in controversy should belong to Raymond Buchanan in fee simple."

Conceding for the sake of discussion, that the defendant W. C. Clark has distinctly excepted, upon the ground that there is no evidence to sustain this finding, which may be questionable, we yet think that the evidence is sufficient for the purpose. The deed was prepared on 16 March, 1910; actually delivered to defendant W. C. Clark on the same day, for

Raymond Buchanan, his son, after having been duly probated, and was registered 8 May, 1912. C. F. Franklin testified that he delivered the deed to W. C. Clark, who said that he "wanted the land deeded to Raymond." Mrs. Franklin testified that "W. C. Clark had them
(62) to make the deed to Raymond, so his other children could not knock him out of it," and further, that W. C. Clark took the deed, said nothing about delivery, but that he wanted Raymond to have it. The second deed was executed by the Franklins to W. C. Clark after the death of Raymond Buchanan, and on 21 November, 1911, and there was no consideration for it. The Franklins told Clark they did not want to make the second deed, as it was illegal, they having already made one to Raymond Buchanan, and Clark gave them the paper-writing, agreeing thereby to indemnify them against damages for making the second deed. All this, of itself, was evidence sufficient to support the findings, without any reference to other testimony in the case. There could not well be a "second" deed unless there had been a "first" one. The Franklins simply signed the paper, acknowledged it as their act and deed before the justice, and delivered it to W. C. Clark, who accepted it with the distinct understanding between them that he held it for his natural son, Raymond Buchanan. This was all done at the time. He so held it for a year and eight months or more, and then the second deed was made.

After the first deed had vested the fee-simple estate absolutely in Raymond Buchanan, nothing that the parties did afterwards, without his consent, could divest it. It makes no difference what the undisclosed or unexpressed intention of W. C. Clark was; having received the deed for his son, he is bound by his act, and the title then passed from the grantors, the Franklins, to Raymond Buchanan. The deed had passed out of the possession of the Franklins and they had lost control of it and all power of recall, and they so regarded the transactions. This is the supreme test of a delivery. In *Phillips v. Houston,* 50 N. C., 302, *Judge Battle* clearly stated the rule: "The delivery of a deed 'depends upon the fact that a paper, signed and sealed, is put out of the possession of the maker.' That, we think, is the true test, and if it appears that the grantor, or donor has parted with the possession of the instrument to the grantee or donee, or to any other person for him, the delivery is complete, and the title of the property granted or given thereby passes.

But it will be otherwise if the grantor or donor retain any
(63) control over the deed; as if he, when he hands it to a third person, request him to keep it and deliver it to the person for whom it is intended, unless he shall call for it again. These principles will be found to govern all the cases, beginning with *Tate v. Tate,* 21 N. C., 22, running through *Baldwin v. Maultsby,* 27 N. C., 505; *Snider v.*

Lackenour, 37 N. C., 360; *Ellington v. Currie,* 40 N. C., 21; *Roe v. Lovick,* 43 N. C., 88; *Gaskill v. King,* 34 N. C., 211; and *Newlin v. Osborne,* 49 N. C., 157, and down to *Airey v. Holmes, ante,* 142. Tried by the above mentioned test, the delivery of the deed, in the present case, must be declared to be complete. The donor handed the paper, signed and sealed, to a third person, for the use of the donee, without any reservation whatever, and when it was returned to her she immediately handed it to another person, for the donee, without the slightest intimation that she was to have any control over it. The delivery, however, was perfect when the instrument was handed to the first person, and it made no difference whether it was registered before or after the donor's death." This case, at a long interval, but after being thoroughly approved as laying down the correct doctrine, was followed by *Robbins v. Rascoe,* 120 N. C., 79, and *Fortune v. Hunt,* 149 N. C., 358, in which *Justice Brown* reiterated the principle as follows: "When the maker of a deed delivers it to some third party for the grantee, parting with the possession of it, without any condition or any direction as to how he shall hold it for him, and without in some way reserving the right to repossess it, the delivery is complete and the title passes at once, although the grantee may be ignorant of the facts, and no subsequent act of the grantor or any one else can defeat the effect of such delivery," citing *Phillips v. Houston, supra,* and *Robbins v. Rascoe, supra.* See *Tate v. Tate,* 21 N. C., 26; *Hall v. Harris,* 40 N. C., 303. "A deed is good if delivered to a stranger to the use of the grantee, and at the time it was thus delivered." *Threadgill v. Jennings,* 14 N. C., 384. It appeared in *Tate v. Tate,* 21 N. C., 26, that David Tate executed a deed of bargain and sale conveying land to his infant children, and delivered the deed to their uncle, Hugh Tate, in whose possession it remained until his death, when the bargainor went to the widow (64) of Hugh Tate and obtained the deed before it was registered and canceled it by tearing off his signature and that of the witness, and he, David Tate, conveyed the same property to another. The delivery of the deed was upheld, the Court saying: "Where the maker of a deed parts from the possession of it to anybody, there is a presumption that it was delivered as a deed for the benefit of the grantee, and it is for the maker to show that it was on condition, as an escrow. Such a delivery to a third person is good, and the deed presently operates, and infants may assent to such a deed to themselves, and their assent is presumed until the contrary appears," citing several English cases. *Judge Henderson* said in *Kirk v. Turner,* 16 N. C., 14: "A delivery of a deed is in fact its tradition from the maker to the person to whom it is made, or to some person for his use; for his acceptance is presumed

until the contrary is shown. It being for his interest, the presumption is, not that he *will accept,* but that he *does.*" The facts in *Morrow v. Alexander* were that a father, residing in South Carolina, signed and sealed a deed to his daughter, residing in North Carolina, and delivered it in South Carolina to his son, to be given to his daughter; held by this Court that the delivery to his son was complete, and the title passed, citing *Gaskill v. King,* 34 N. C., 211, which cites and sustains *Tate v. Tate, supra. McLean v. Nelson,* 46 N. C., 396, is also in point, and is to this effect: "When one delivers a deed to a third person in the absence of the grantee, the latter is presumed to accept it, so that it forthwith becomes a deed, and the legal effect is to pass the property. This presumption may, of course, be rebutted by proving that the party refused to accept it; but until he refuses, his assent is presumed for the purpose of giving effect to the instrument as a deed. *Ut res magis valeat quam pereat.*" In the last case, *Judge Pearson* rests the presumption of an acceptance by the grantee, not only upon the benefit conferred by the deed and the further presumption that a man will take advantage of that which advances his own interests, but says that the reason lays deeper, and that it also rests upon the maxim *ut res magis valeat* (65) *quam pereat.* The presumption of assent on the part of the grantee remains until there is a dissent by him or his heirs, and is sufficient to vest the title.

The plaintiff, who is his heir, expressly assents to the conveyance, and, therefore, holds an irrevocable title to the land conveyed by the deed. No one, it is true, can be forced to take a title against his will, but the right of dissent prevents this from being done. It is the delivery to the third person for the grantee that passes the title, upon his presumed assent; the deed, though, is put beyond the control of the grantor, and his power of recall is forever gone, because, as to him, it has been delivered. This is the principle established in the earliest period of this Court, and it has been followed ever since. It was illustrated practically in *Phillips v. Houston,* 50 N. C., 302, where it was shown that the donor signed and sealed the deed and delivered it to Holland, the witness, and requested him to take it to the courthouse and have it recorded, which was not done until after the donor's death; it was held that the delivery to the first person (Holland) was perfect, and it made no difference whether it was registered before or after the donor's death, the Court saying: "In *Hall v. Harris,* 40 N. C., 303, it was said by the Court that the delivery of a deed depends upon the fact that a paper signed and sealed is put out of the possession of the maker. That, we think, is the true test, and if it appears that the grantor or donor has parted with the possession of the instrument to the grantee or donee,

or to any other person for him, the delivery is complete, and the title of the property granted or given thereby passes. But it will be otherwise if the grantor or donor retains any control over the deed; as if he, when he hands it to a third person, requests him to keep it and deliver it to the person for whom it is intended, *unless* he shall call for it again. These principles will be found to govern all the cases, beginning with *Tate v. Tate,* 21 N. C., 22, and then a large number of North Carolina cases are cited." To those may be added two of recent date in this Court, *Helms v. Austin,* 116 N. C., 751, and *Frank v. Heiner,* 117 N. C., 79; and also *Adams v. Adams,* 21 Wall. (U. S.), 185; *Hedge v. Drew,* 12 Pick. (Mass.), 141. The Franklins, when they (66) delivered the deed to W. C. Clark, said absolutely nothing indicating that they intended to reserve the least control over the deed. They parted with it unconditionally and the title at once passed to the grantee. Nothing that was done afterwards by them alone would destroy its efficacy as a deed, or even impair it.

It is unquestionable, too, that probate and registration of a deed furnish presumptive proof of its delivery, and were, therefore, additional evidence to sustain the finding of the fact. *Fortune v. Hunt, supra.* They were more than this, being *prima facie* evidence of the delivery, and sufficient in themselves and even as against opposing proof, to support the finding as to the fact of delivery, it being for the judge, acting like a jury would, to weigh the evidence and decide upon its preponderance. If there was any evidence, as we have shown, the finding cannot be disturbed.

The supplemental finding as to the intention of W. C. Clark, that his son should have the land, as his part of the estate, so that he could share with the other children, tends to strengthen the views already stated. The death of his son so soon was an event he may not have contemplated, but it was accidental, and did not alter the fact of the delivery, or tend to disprove it, but rather the contrary.

The act of 1885, ch. 147 (Revisal, sec. 980), has no application, as defendant is admittedly not a purchaser for value, and the judge so finds, and the circumstances of the case would exclude him from its benefits. *Austin v. Staten,* 126 N. C., 783.

Of course, the decision of this case must rest upon a correct understanding and statement of the facts as found by the court. The salient facts are these:

1. That after the due execution of the deed by the Franklins to Raymond Buchanan, and the probate of the same by the justice of the peace, it was delivered unconditionally to the defendant W. C. Clark, for Raymond Buchanan, who was then in the State of Kentucky. This is the judge's sixth finding of fact.

(67) 2. The deed of the Franklins to Raymond Buchanan was executed and delivered by them to W. C. Clark for him 16 March, 1910, and the subsequent deed of the Franklins to W. C. Clark, which they told Clark they did not have the right to make, was executed on 21 November, 1911, or one year and eight months after the delivery of the other deed, and not even anything said between them about it during this long interval of time.

3. W. C. Clark, on that day (21 November, 1911), when he insisted on the execution of the deed to him by the Franklins and gave them the writing admitting the execution of the prior deed, had full actual notice of the latter deed. This is admitted. This, of course, is not notice under the Connor Act, but he was not a purchaser for value, as the judge expressly finds, having paid nothing for the deed. This was also admitted on the argument. To hold that he is protected by that statute would violate its very principle, and would enable him to perpetrate a fraud upon his son, for whom he voluntarily held the other deed.

4. It is perfectly clear that the Franklins parted with the possession of the deed with intent to pass the title to Raymond Buchanan and put the same beyond their control or recall. They so say, and the judge so finds. They could not have recovered the deed or the land by action. The title, therefore, passed out of them, and there is no one in whom it could have vested except Raymond Buchanan, as there was no intention in the minds of the parties to vest it in any one else. W. C. Clark so understood it, as he said: "I gave the deed to my wife to hold; I was acting for this boy, though he did not know it, and I was not his agent." But this is evidence, and we must abide by the facts as found by the judge, which plainly fix him with the intention to accept the deed, not for himself, nor for any one else, but his son alone. No subsequent change of mind can affect the result.

5. The additional finding of the court, under the *certiorari,* goes no further than to show an undisclosed or unexpressed intention of W. C. Clrak to do something which he did not do at the proper time, and is based altogether upon evidence as to what he afterwards, and long afterwards, said about it, and after his son had died. He could not
(68) thus recall a delivery already completely made, and if we should so hold, no man's deed would be safe from attack, and every title in this State would be in constant jeopardy, depending, not upon what a grantor may have done, but upon his uncommunicated intentions or the thoughts hidden in the inner recesses of his mind, even if he had them. It will place every grantee at the mercy of his grantor.

No error is disclosed in the record.

No error.

HOKE, J., not sitting.

CLARK, C. J., dissenting: It is elementary that *delivery* is essential to a deed. In my opinion, there is no evidence whatever of a delivery in this case; on the contrary, the facts show conclusively that there was no attempted delivery, and no present intention shown to deliver. The evidence shows an intention not to deliver till an event which has not yet happened, *i. e.,* Clark's own death.

The facts, briefly stated, are that Clark exchanged lands with the defendant Franklin and his wife. Clark executed his deed to Franklin and in exchange Franklin was to convey another tract to him. But at Clark's request, Franklin inserted in the deed the name of Raymond Buchanan, the illegitimate son of Clark. There was no delivery to Buchanan, no consideration paid by him, and no agreement by Clark to hold for him. Buchanan was a stranger to the transaction, and there was nothing to make Clark a trustee for him. Clark, in effect, remained the true owner of the land, and retained the same control over it and over the deed as he had had over the land which he conveyed to Franklin in exchange. He had an intention, he testifies, to deliver the deed to Buchanan at his own death; but it was an intention founded on no consideration and based upon no agreement with Franklin or Buchanan, and such intention remained unexecuted. Buchanan never saw the deed, so far as the evidence shows; had no agreement about it, and was not even aware of its existence. He was at the time in a distant State, and died before becoming 21 years of age and without (69) having returned to North Carolina.

On Raymond's death, Clark changed his mind, handed the deed back to Franklin and wife, and obtained a new deed for himself. At Franklin's request, he gave him an agreement to pay any damages which might accrue to him by reason of giving Clark a second deed to the land which he had *"intended* to give to Raymond Buchanan." This is so expressed in the contract, and shows that he had not given the land to Raymond. His statement to Franklin when he received the deed, that he intended to have the deed delivered to Buchanan at his own death, shows that he was to retain control over it. The case, therefore, comes squarely under the decision in *Weaver v. Weaver,* 159 N. C., 18.

After Raymond's death, upon the demand of the plaintiff's lawyer, Franklin surrendered the deed, which Clark had returned to him, to the plaintiff, who had it recorded, but subsequent to the registration of the deed to Clark. The deed never having been delivered to Buchanan, this forcible obtaining it after its return to Franklin and its registration thereafter could have no effect. The privy examination of Franklin's wife and acknowledgment of her husband to the first deed could have no validity, in view of the fact that there had been no delivery to Buchanan.

The deed was based upon no consideration moving from Buchanan. It remained in the control and possession of Clark, who did not agree to hold it for Buchanan, but merely expressed an intention to give it to him at his own death. Buchanan could not have maintained an action against Clark to convert him into a trustee nor to compel him to deliver the deed.

Clark retained control over the deed and of the land. He has parted with neither the title nor the possession of the land, and retained the right to cancel the deed at will. He could have maintained, upon tender of the return of the deed to Franklin and wife, an action to compel Franklin and wife to execute their contract and to deliver to him a deed for the land in exchange for the land he had conveyed to them. He could not, "unbeknownst" to both himself and Buchanan, pass
(70) the title to Buchanan and deprive himself of his own property, when he has received no consideration therefor and had not expressed even an intention to do so, except an intention, without any consideration from Buchanan, to deliver the deed to him at his own death. He has done nothing to deprive himself of his own property, merely because he had an unexecuted intention, on a future event which has not occurred, to pass the title to Buchanan, who died before the event occurred.

The whole matter remained *in fieri,* and Clark possessed the right to cancel his intended gift of the property to Buchanan and to take the title to himself, which he has done. Until delivery to Buchanan, the paper-writing, though signed and acknowledged by Franklin and wife, was not a deed, and had no more effect than if it had been a blank piece of paper. It is different when such paper is delivered to the grantee named therein.

In obedience to the writ of *certiorari* from this Court, the judge made the following additional finding of fact: "That the defendant W. C. Clark purchased and paid for the land on his own intitative, without the knowledge of Raymond Buchanan, intending at the time to deliver the deed to the said Raymond Buchanan on his return to the State, so that the said Raymond Buchanan, who was illegitimate, should share with his other children in his estate; and the said Raymond having died before his return to the State, the said W. C. Clark surrendered the deed to the grantors and procured the other deed to himself." It is thus found as a fact by the court, by consent of the parties, that the deed was never delivered to Buchanan; that Clark received it, not as his agent, but as a purchaser for value, and held it subject to his own control of it, and with the intention to deliver it to Buchanan on a contingency which did not happen, and that he was not under any compulsion to have delivered it at all.

Besides, under Revisal, 980, Clark being a purchaser for a valuable consideration, and his deed registered first, the conveyance to Buchanan, even if it had been delivered and even if it had been registered by authority, was not valid against him. It is true, Clark had (71) notice of the prior deed. But it has been held in cases too numerous to be cited that "no notice, however full and formal, can supply notice by registration, and a purchaser for value under a prior registered deed is not affected by notice of an unregistered deed, even if the holders thereunder are in possession of the property." In this case Clark remained in possession, and Buchanan had possession neither of the deed nor of the land. *Tremaine v. Williams,* 144 N. C., 114; *Collins v. Davis,* 132 N. C., 106; *Blalock v. Strain,* 122 N. C., 283; *Patterson v. Mills,* 121 N. C., 267, and cases cited; *Hinton v. Leigh,* 102 N. C., 28; *Blevins v. Barker,* 75 N. C., 436.

Cited: *Lynch v. Johnson,* 171 N. C., 614, 620.

J. W. BETHELL v. J. T. McKINNEY AND A. D. IVIE.

(Filed 3 December, 1913.)

1. Appeal and Error—Pleas in Bar.

Where specific performance of a contract to convey land is resisted upon the ground that the proposed grantor is a married man whose life will not join in the conveyance, an appeal from a decree of performance and the payment into court of the agreed purchase price abated to the extent of the value of the wife's dower, to be subsequently ascertained, is in the nature of an appeal from a plea in bar, and presents an exception to the general rule which requires the entire case to be passed upon before the appeal will be entertained.

2. Deeds and Conveyances—Contracts to Convey—Husband and Wife—Dower Valuation—Abatement—Judgments.

The contingent dower interest of the wife in the lands of her living husband is capable of being valued, and where she refuses to join her husband in a deed to his lands, which he has contracted to convey, and resistance to making the conveyance is based thereon, a decree in an action by the vendee for specific performance, that the vendor convey the land at the agreed price to be reduced by the value of the wife's dower, is a proper one.

3. Deeds and Conveyances—Husband and Wife—Dower—Warranties—Encumbrances.

The inchoate right of dower of the widow in the lands of her living husband, while not an estate in his lands, is such an encumbrance on

the title as is contemplated in the usual covenants and warranties against encumbrances contained in a deed to the fee.

4. Deeds and Conveyances—Definite Tract of Land—Acreage—Purchase Price Abatement.

Where a definite tract of land has been contracted to be sold, in the absence of fraud and false representations, the purchaser is not entitled to an abatement in the price because of a shortage in the acreage as represented, where the quantity of the land has not been guaranteed or warranted.

(72) APPEAL by defendant from *Cooke, J.*, at June Term, 1913, of ROCKINGHAM.

H. R. Scott, King & Kimball for plaintiff.
A. L. Brooks, P. W. Glidewell, and C. O. McMichael for defendants.

CLARK, C. J. On 5 April, 1912, the defendants executed a contract to sell to the plaintiff "the farm known as the J. T. McKinney place, lying on the Reidsville-Lawsonville road, about 2 miles from Reidsville, N. C., at the price of $8,000, including the crop now on said land, said farm containing 375 acres, more or less," and stipulated, "the deed to be executed to said Bethell is to contain the usual covenants of warranty and the property relieved of any and all encumbrances now subsisting. Said land adjoins C. H. Overman, Mrs. John Harrison, W. C. Harris, and others."

This action was brought for specific performance. The defendant J. T. McKinney answered that he had tendered a fee-simple warranty deed for his interest in the said land; that he is a widower, and that there is no lien or mortgage upon his interest in said property, which allegation is admitted in the reply.

The other defendant, Ivie, answered, alleging that he is and has always been willing to execute to the plaintiff a fee-simple warranty deed covering the tract described in the contract, but that the plaintiff refused to accept the same; that his wife is unwilling to join in
(73) said deed, and that the plaintiff knew at the time of the contract of sale that the defendant Ivie was a married man, and that his wife was entitled to a contingent dower in the land, and that the plaintiff knew that the contract did not stipulate for her joinder in the deed; that there is a mortgage upon his interest in the land for the purchase money, but that the plaintiff understands that the amount thereof is to be deducted from the purchase money to be paid by him.

Upon motion by the plaintiff for judgment upon the pleadings, the court decreed:

1. That the defendants should execute "a good and sufficient deed in

fee simple to the lands described in the contract, with the usual covenants, and relieved of all encumbrances thereon, and conveying said land by metes and bounds upon the plaintiff paying into court the contract price of $8,000, with interest from 5 April, 1912, to be abated:

(*a*) By the full net market value of the rents and profits of the 1912 crops grown on said lands, and by the full net market value of the rents and profits of the 1913 crops growing on said lands;

(*b*) By a sum proportionate to the net deficiency in acreage between 375 acres, the amount in acreage contracted to be conveyed, and the amount in acreage which a survey ordered of the lands described in the pleadings shall establish;

(*c*) By the amount, with interest, of any valid subsisting lien or liens of record or otherwise, which in any manner might be asserted against said lands or against the title thereto in priority to the title decreed to be conveyed to the plaintiff and his assigns;

(*d*) By the present value of the inchoate right of dower of the wife of the defendant A. D. Ivie, as damages or equitable compensation for failure of title to that extent, unless defendant Ivie shall in the meantime procure said deed to be executed by his wife with her private examination.

The court further decreed that the defendant A. D. Ivie make reasonable effort to procure his wife to join him in the execution of the deed with her privy examination, and, further, that on her failure to join, there should be submitted for determination by the jury at (74) the next term the following issues:

(1) The value of the rents and profits of the lands for the year 1912 and for the year 1913.

(2) The present value of the inchoate right of dower of the wife of the defendant A. D. Ivie in his interest in the lands.

(3) That there should be a survey to determine the acreage, with a view to the abatement of the price. The defendants excepted to this judgment.

The ascertainment of these issues might have been made before the appeal was taken, so that the whole case should come up from the final judgment. But the defendants do not object on the ground that this is a premature appeal and ask that the points involved shall be decided. In this case the points decided are really in the nature of pleas in bar which may well be passed upon before the matters necessary for an accounting are submitted to ascertainment by a referee or a jury. *Royster v. Wright,* 118 N. C., 152, and cases there cited. Where there is a plea in bar, it presents an exception to the general rule which requires the entire case to be passed upon before the court will consider the appeal.

There is no controversy as to the tract of land that was agreed to be conveyed, nor as to the price. There are but two points of difference. The plaintiff contends that he is entitled to have the wife of the defendant Ivie join in the deed or that he answer in damages by way of abatement for the estimated value of her contingent right of dower, and that he is entitled as against both defendants to an abatement in the price on account of a shortage of 70 acres, because, as he alleges, there are only 305 acres of land, instead of 375.

As to the first matter of difference, it is not denied that at the time of the execution of the contract the plaintiff knew that the defendant Ivie was a married man, and it is admitted that his wife is still living. Under the terms of the contract before us, the plantiff is entitled to an abatement of the purchase price of the land on account of the dower right of the wife of the defendant Ivie. The defendants agreed "to make and deliver a deed to said lands. The deed is to contain
(75) the usual covenants of warranty and the property relieved of any and all encumbrances now subsisting." The language in the contract, "all encumbrances now subsisting," includes an inchoate right of dower, because the defendants contracted to relieve the land of the encumbrances.

It is settled in this State that inchoate dower is an encumbrance. In *Gore v. Townsend,* 105 N. C., 228, the Court says: "Although therefore, an inchoate right of dower cannot be properly denominated an estate in land, nor indeed a vested interest therein, and notwithstanding the difficulty of defining with accuracy the precise legal qualities of the interest, it may, nevertheless, be fairly deduced from the authorities that it is a substantial right, possessing in contemplation of law the attributes of property, and to be estimated and valued as such. It has many of the incidents of property. It has a present value that can be computed. It is a valuable consideration for a conveyance to the wife. The wife may maintain an action for its protection. She may file a bill or bring an action for the redemption of a mortgage covering it. It has been repeatedly declared by the courts 'an encumbrance within the meaning of the usual covenants in a deed.'"

In *Trust Co. v. Benbow,* 135 N. C., 303, at 311: "As dower was a humane provision for the sustenance of the widow and younger children, some limit was imposed on the power to defeat its consummation. Yet, while not technically an estate, it cannot at this day be denied that inchoate dower is a valuable interest in land. It is an interest which the courts have repeatedly recognized. Its presence works a breach of the covenants against encumbrances."

The last utterance upon the subject is in *Fisher v. Browning,* 145

N. C., 71, where *Connor, J.*, speaking for a unanimous Court, says: "It is well settled that the right of dower is such an encumbrance upon land as works a breach of covenant against encumbrances."

Fortune v. Watkins, 94 N. C., 304, upon which the defense (76) mainly rests, is not in point, because an examination of the original record in that case discloses that there was no stipulation in the contract then before the Court against encumbrances.

Again, nothing can be found in the opinion in the *Fortune case* supporting the contention of defendant, except the quotation from Pomeroy, and that does not deal with a contract covenanting against encumbrances, and immediately following the question is the statement by the Court that, "While this is said of a vendee seeking to have the vendor's contract executed, and does not apply to a case where the relation of the parties is reversed, and relief is demanded by the vendor against the vendee, it nevertheless asserts a proposition not altogether foreign to the present controversy. The present action looks to a judicial appropriation of property in the hands of a creditor, retained as security for his debt contracted in the purchase, to the discharge of the debt, if necessary."

The *Fortune case* is cited in *Farthing v. Rochelle*, 131 N. C., 563, and in *Rodman v. Robinson*, 134 N. C., 504, in support of the proposition that the wife cannot be compelled to join in the conveyance of her husband, which is not doubted. The authorities elsewhere sustain our proposition. In *Shearer v. Ranger*, 39 Mass., 447, it was decided that, "An inchoate right of dower is an existing encumbrance on land, within the meaning of the covenant against encumbrances."

Townsend v. Blanchard, 117 Iowa, 41, holds that, "the plaintiff should have specific performance for the residue of the land, under either contingency suggested, by paying $1,100, the value found by the referee as the contract price, less the amount of any unsatisfied mortgage lien there might be resting upon it, and also less the $200 already paid on the purchase money at the time the contract was made, and also less the wife's contingent dower right."

Martin v. Merritt, 57 Ind., 41, says: "But it is insisted that if there be a general rule that specific performance may be decreed as to a part, with an abatement or compensation for the deficiency, the rules does not embrace cases where the interest that cannot be conveyed is an inchoate dower right. As matter of fact, we find the rule is applied in such cases. *Wright v. Younger*, 6 Wis., 127; *Park v. Johnson*, (77) 4 Allen, 259; *Presser v. Hildebrand*, 23 Iowa, 483."

In *Wright v. Young*, 6 Wis., 127: "In the present case there is nothing to show that the wife is unwilling to relinquish her right of

dower in the premises, and we do not feel authorized from the proof to presume that to be the fact. She may be entirely willing to sign the deed and release her dower upon being requested so to do by the husband; but if she would refuse to release her dower we are unable to see any good or satisfactory reason for denying the complainant a proper compensation for the right of dower left outstanding. What argument can be advanced to show that an abatement or equivalent should not be made in this case, which would not be equally cogent and weighty in any case, where the vendor's interest is less than what he professed to sell? Dart on Vendors, 501. There can be no doubt but the title of the vendee is defective, while the inchoate right of dower is left outstanding. If the wife should survive the husband, the vendee's title might be partially defeated by her taking a life estate in one third of the premises. In *Shearer v. Ranger,* 22 Pick., 447, it was held that an inchoate or contingent right of dower was an existing encumbrance amounting to a breach of the covenant, which extends to all adverse claims and liens on the estate conveyed, whereby the same may be defeated in whole or in part, whether the claims or liens be uncertain and contingent, or otherwise. Rawle on Covenants, 136 *et seq.,* and cases cited by him. We therefore conclude that in the present case the vendee can enforce a performance of the contract, and take such a title as the vendor can give, and have an abatement of the purchase money for the right of dower left outstanding. Some question has been made as to whether the value of this dower interest could be accurately calculated. There can be no difficulty, however, in ascertaining what this reversionary interest is worth." Also, *Porter v. Noyes,* 2 Greenl., 27; *Presser v. Hildebrand,* 23 Iowa, 483; *Jones v. Gordon,* 10 Johns., 266.

In 36 Cyc., 744, many authorities are cited in support of the text.

(78) "The usual rule as to specific performance with abatement from the price is applied in many of the States to the case of purchase from a married man whose estate is subject to his wife's inchoate dower right. The purchaser may have specific performance, with a deduction from the price of such sum as represents the present value of the wife's contingent interest estimated by the usual rules and tables."

We are, therefore, of opinion that his Honor held correctly that the plaintiff is entitled to an abatement of the purchase price to the extent of the value of the dower right. It is true, there is a double contingency that the wife may not survive her husband and the expectancy as to the life of each, but there are tables of calculations which can be used as a basis for the jury in estimating the value of the contingent interest of the inchoate right of dower.

The other exception is to decreeing an abatement by reason of the

alleged shortage in the acreage. As to that, the law in this State is well settled. In *Smathers v. Gilmer,* 126 N. C., 757, the Court held that where a definite tract of land was sold, or contracted to be sold, in the absence of fraud and false representation, a party purchases the tract agreed upon, and, in the absence of a guarantee as to quantity, is entitled to no abatement if there is a shortage, nor is the vendor entitled to an addition to the price if there is an excess.

In that case, as in this, the sale was of a solid body of land, and not by the acre. The definition was, "containing 500 acres, more or less." It turned out on survey that there were only 262 acres; but the court allowed the purchaser no abatement, because he could have protected himself by examination or survey, or he could have required a covenant as to the number of acres, citing *Walsh v. Hall,* 66 N. C., 233; *Etheridge v. Vernoy,* 70 N. C., 713, and cases there cited. *Smathers v. Gilmer, supra,* has been cited with approval in *Stern v. Benbow,* 151 N. C., 462. It would be otherwise if there was a covenant as to the acreage or if the purchase was by the acre and not for a definite tract of land as to which sources of information were open to both parties.

For the error pointed out the judgment must be modified. The (79) costs of this appeal will be divided.

Modified.

Cited: Higdon v. Howell, 167 N. C., 456; *Turner v. Vann,* 171 N. C., 129.

OLLIE HOYLE ET AIS. v. CITY OF HICKORY.

(Filed 10 December, 1913.)

1. Cities and Towns—Street Grading—Embankments—Adjoining Owners—Courts—Negligence.

Where a town has caused damage to the lands of adjoining owners on a street by filling in the street in the course of grading it, so as to cause an embankment 5 or 6 feet high to be made in front thereof, and it appears that the work was not negligently done and was in accordance with the plans of the town engineer, adopted by the city council, all acting in good faith, under powers conferred by the charter, such damages are not recoverable in an action therefor against the city, for the judgment of the town authorities in such matters is not reviewable by the courts.

2. Cities and Towns—Street Grading—Embankment—Trials—Negligence—Evidence.

The height of an embankment placed by a town in grading its streets in front of adjoining lots on one of them is not of itself evidence of

negligent construction for which damages are recoverable by the owners; and in the absence of further negligence therein, an instruction which leaves the question of actionable negligence to the determination of the jury is erroneous.

3. Cities and Towns—Street Grading — Embankments — Retaining Walls—Trials—Evidence—Negligence.

Where the owner of lands adjoining a street sues for damages arising from the dirt of an embankment constructed by the city in the grading of the street rolling down upon and damaging his land, and it appears that a retaining wall would have prevented the injury, evidence in behalf of the city is competent that at the request or instance of the plaintiff, ratified by the proper authorities of the defendant, the latter did not construct the retaining wall which it otherwise would have done.

4. Cities and Towns—Street Grading—Different Locations—Trials—Evidence—Negligence.

In an action by the owner of lands on a city street, brought against the city for the alleged negligent construction on that street of an embankment to the plaintiff's damages, erected in the grading thereof, evidence of construction at an entirely different place is not evidence of negligent construction at the place complained of.

HOKE, J., did not sit. ALLEN, J., dissents.

(80) APPEAL by defendant from *Cline, J.*, at July Term, 1913, of CATAWBA.

W. A. Self and C. L. Whitener for plaintiffs.
A. S. Whitener for defendant.

CLARK, C. J. The defendant in grading Ninth Avenue in that city found it necessary to place a fill between 5 and 6 feet high in front of a house, belonging to the plaintiffs, which was located in a depression. There was no condemnation proceedings, as the city did not take any portion of the property belonging to the plaintiffs. This action was brought, alleging that the fill was negligently constructed. The evidence is that the work was executed for the city in accordance with the plans, specifications, and directions of the city engineer. It was not denied that the city acted in good faith in grading the street.

In *Tate v. Greensboro,* 114 N. C., 401, it is said: "As against the lot owner, a city, as trustee of the public use, has an undoubted right, whenever its authorities see fit, to open and fit for use and travel the streets over which the public easement extends to the entire width; and whether it will so open and improve it, or whether it should be opened and improved, is a matter of discretion, to be determined by the public authorities to whom the charge and control of the public interests

in and over such easements are committed. With the discretion of the authorities courts cannot ordinarily interfere so long as the easement continues to exist. . . . The public use is a dominant interest, and the public authorities are the exclusive judges when and to what extent the streets shall be improved. Courts can interfere only in cases of fraud and oppression constituting manifest abuse of discretion. It necessarily follows that for the performance of this discretionary duty by the city officers in a reasonable and prudent manner no action (81) can be maintained against the city."

"Authority to establish grades for streets, and to grade them, involves the right to make changes in the surface of the ground which may injurously affect the adjacent property owners. But where the power is not exceeded there is no liability, unless created by special constitutional provision or by statute (and then only in the mode and to the extent provided) for the consequence resulting from the powers being exercised and properly carried into execution." 2 Dillon Mun. Corp., sec. 1040, cited and approved in *Dorsey v. Henderson,* 148 N. C., 426.

Dorsey v. Henderson also cites with approval from 10 A. & E. (2 Ed.), 1224ff, as follows: "A change of grade in streets made by a municipality, if made in accordance with the statute, is not such an injury to adjoining property as to require compensation to be made to owners, unless there is a statute rendering the municipality liable therefor." It is further said therein that this citation is based upon cases cited from England, the United States Supreme Court, and twenty-five States, and is recognized especially in *Transportation Co. v. Chicago,* 99 U. S., 635; *Smith v. Washington,* 20 Howard, 135.

Indeed, the whole subject is so fully discussed by *Mr. Justice Brown* in *Dorsey v. Henderson,* 148 N. C., 423, that nothing can be added. In that case it is said that "an abutting owner on a public street cannot recover damages for the diminution of the value of his property caused by the change in the grade of the street in the absence of any negligence in the construction of the work. . . . The law has been so held by this Court in a number of cases, and in such explicit terms that to adopt the plaintiff's theories would be to overrule a long line of well established precedents. The question was first considered in this Court in 1848, and exhaustively discussed by *Judge Pearson,* and the conclusion reached that where a municipal corporation has authority to grade its street it is not liable for consequential damages unless the work was done in an unskillful and incautious manner. *Meares v. Wilmington,* 31 N. C., 73. This case has been approved and followed in many adjudications of this Court in more recent years. *Salisbury v. R. R.,* 91 N. C., 490; *Wright v. Wilmington,* 92 N. C., 160; *Tate v. Greensboro,* (82)

114 N. C., 397; *Brown v. Electric Co.*, 138 N. C., 537; *Ward v. Commissioners*, 146 N. C., 538; *Small v. Edenton, ib.*, 527; *Jones v. Henderson*, 147 N. C., 120. In *Thomason v. R. R.* the subject is referred to as 'the settled doctrine of this State,' 142 N. C., 307."

In Cooley Const. Lim., 542, it is said that this doctrine is almost universally accepted by the State courts of this country. In *Transportation Co. v. Chicago*, 99 U. S., 635, it is said that the doctrine "rests upon the soundest legal reason," adding: "Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a 'taking' within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action. This is supported by an immense weight of authority."

There is no constitutional provision or statute which limits the right in this State, and, on the contrary, the defendant has full authority for its action under the provisions of its charter, chapter 242, Pr. Laws 1907. *Dorsey v. Henderson, supra*, was a carefully considered case, and has been cited and approved since. *Crowell v. Monroe*, 152 N. C., 401; *Harper v. Lenoir, ib.*, 726; *Earnhardt v. Commissioners*, 157 N. C., 236.

The plaintiffs were permitted to introduce evidence tending to show that the grade at another place on said Ninth Avenue was different from that opposite their property. The evidence of the three civil engineers, one of them subpœnaed by plaintiffs, was that the grade opposite plaintiff's property was necessary and proper. The evidence that the grade at another point was different was incompetent. It tended merely to raise another issue, not pertinent to this controversy. The city had the right to grade the street in accordance with the judgment of the civil engineers, subject to the approval of its board of commissioners, in the absence of oppression, misconduct, or bad faith, of which there was no evidence.

(83) The court also erred in instructing the jury that it was for them to say from the evidence whether or not the construction of the embankment at this point was negligent because of an unnecessary height, because there was no evidence to support this view. If there had been, it should have been submitted to the jury. *Harper v. Lenoir*, 152 N. C., 726. But the mere fact that the height of the embankment was an inconvenience to the plaintiffs and injured the value of their property was not of itself evidence to support the allegation of negligent construction. The jury have neither the skill nor the instruments to enable them to review the work of the engineers, nor have they the

experience or the opportunity to examine and criticise the work. There must be evidence of negligence.

The plaintiffs also contended that the work was negligently done because the dirt was permitted to roll down from the embankment upon their lot, covering up part of it and some of it rolling upon their porch. Whether it was negligence not to put in a retaining wall to prevent this might well be submitted to the jury unless the plaintiffs consented to the work being done without this. There was evidence that they objected to a retaining wall being put in, and also that they gave permission that the work should be done without such wall. If so, they cannot complain of the consequences. The court erred in refusing to admit evidence in corroboration of the alleged agreement on the part of the plaintiffs to this effect and the ratification of such agreement by the town authorities.

It was alleged in the complaint that the city cut down an oak tree on the plaintiffs' lot worth $25. This was denied in the answer, and the preponderance of the evidence seems to be that the tree was not cut down by the city, or by its authority, but by a negro with the permission of the plaintiffs. This controversy can scarcely be said to come within the terms of the issues submitted, for it was no part of the grading of the street. But as the case goes back for new trial, a separate issue as to this point can be submitted, if desired.

Our conclusion is that for any inconvenience or damage sustained by the plaintiffs' lot from placing the fill in the street opposite thereto under the advice and supervision of the civil engineer, whose (84) plans were approved by the city authorities acting in good faith, the plaintiffs cannot recover unless the work was done negligently. It is *damnum absque injuria.* The court erred in submitting to the jury the question whether the embankment was not negligently constructed, because unnecessarily high, without evidence to support it; in allowing the jury to consider evidence as to the nature of the grading on another block on said street and in not submitting to the jury for their consideration the evidence of the agreement of the plaintiffs to dispense with the erection of a retaining wall. If there was no such agreement, the plaintiffs were entitled to have the jury consider the damage, if any, caused by defendant's negligence in not erecting a retaining wall to prevent the dirt from rolling down upon the lot of the plaintiffs.

For the reasons above given, there must be a

New trial.

ALLEN, J., dissents. HOKE, J., did not sit.

Cited: *S. c.*, 167 N. C., 620; *Munday v. Newton, ib.*, 657; *Brinkley v. R. R.*, 168 N. C., 433; *Bennett v. R. R.*, 170 N. C., 391.

H. M. KADIS v. LIONEL WEIL.

(Filed 10 December, 1913.)

Trusts—Power of Sale—Cestui Que Trust—Written Request—Deeds and Conveyances—Purchaser—Application of Funds.

A deed in trust to lands to be held to the sole and separate use of another, with certain expressed limitations over, containing a power of sale in the trustee upon the written request of the *cestui que trust*, the proceeds to be invested and held by the trustee to the same uses and purposes, confers upon the trustee with such written consent, full power to convey to a *bona fide* purchaser, and the latter is not held to the proper application of the funds derived from the sale; and it is further held that the *cestui que trust* joining in the trustee's deed is a sufficient authorization.

(85) APPEAL by defendant from *Daniels, J.*, at November Term, 1913, of WAYNE.

Controversy without action. The plaintiff by mesne conveyances claims to be the owner in fee of certain property therein described in the following deed:

"This deed, made by William T. Griffin, of the county of Nash and State aforesaid, to A. B. Chestnutt, of the county of Sampson, State aforesaid, witnesseth:

"That the said William T. Griffin has, for and in consideration of the sum of $354 to him paid, bargained and sold to A. B. Chestnutt and his heirs a certain town lot in the town of Goldsboro, North Carolina, and known in the plan of said town as Lot No. ...., being a lot deeded by H. W. Burwell and wife to the said Griffin, and orignally purchased by said Burwell of John T. Kennedy by deed dated 1 December, 1855.

"Beginning on North Boundary Street at Mrs. Brockett's corner, now Mrs. Davis', thence along her line north 18 east 297 feet to the ditch, the Langston line; thence up the ditch westerly to a stake, a corner of the lot known as the James H. Griffin lot; thence along said lot 348 feet to the street; thence along the street to the beginning, being one-half of the whole front mentioned in deed of said Kennedy, dated 1 December, 1855, containing 1 acre and 14½ poles.

"To have and to hold the within conveyed town lot upon the following conditions, and for the following uses and purposes, for the sole and separate use and benefit of Martha J. Hollowell, wife of James Hollowell, exclusive of the contract of her husband, or of any contract or liability that he may at this time be bound, or for any future contract or liability, but to be held for her sole and separate use and benefit during her life, and, at her death, to such children as she may leave surviving

her, begotten of her present marriage, and to the issue of such as may be dead, such issue to take such share as the parent would have taken if living; and in case the said Martha J. Hollowell shall die leaving no child or children surviving her, then in that case the property in this deed conveyed shall be held and owned by her husband, James M. Hollowell.

"And it is further provided that should the said Martha J. (86) Hollowell die leaving children or a child surviving her, begotten by her present husband, that then in that case James M. Hollowell shall be allowed to live in the house and use the lot during his life, without paying any rent for the same; and it is further provided that the said A. B. Chestnutt or any future trustee shall, when requested in writing by the said Martha J. Hollowell, sell the within conveyed town lot and make a deed for the same and reinvest the proceeds of said sale as the said Martha J. Hollowell may in writing direct, which is to be held on the same terms and conditions, and for the same use and purposes as this town lot is held, and for no other.

"And it is further provided that should the said Chestnutt die, refuse to accept this trust, or become incompetent to act, that then in that case the said Martha J. Hollowell shall have power to appoint a trustee to hold the property in this deed conveyed; and it is further provided that the said Chestnutt or any future trustee shall not be held responsible for any rents or profits of said town lot while the said Martha J. Hollowell or her husband, James M. Hollowell, remains in possession of said town lot.

"And the said William T. Griffin, for himself, his heirs and executors, etc., do covenant and agree with the said Chestnutt, trustee, etc., to warrant, make, give and defend the title and right to said lot against the lawful claim or claims of any and all persons.

"In testimony whereof, the said William T. Griffin has hereunto set his hand and seal, this 8 December, 1876.

"Signed, sealed, and delivered in the presence of B. W. Heffum.

WILLIAM T. GRIFFIN. [SEAL]"

The court rendered judgment in favor of the plaintiff, and the defendant appealed.

E. A. Humphrey for plaintiff.
D. C. Humphrey for defendant.

BROWN, J. The plaintiff contends that he and his wife have a right to convey in fee simple, free from encumbrances, to the defendant, the land conveyed to the plaintiff by the said Martha J. Hollowell

(87) and George E. Hood, trustee, and described in the deed tendered to the defendant by the plaintiff.

We are of opinion that under the terms of the deed in trust above set out, the contention of the plaintiff is well founded. It is admitted that George E. Hood has been duly and legally substituted as trustee in place of A. B. Chestnutt, deceased, in said deed in trust.

By force of law, as well as by the express words of the deed, Hood is vested with all the powers conferred upon his predecessor. The language of the instrument is clear, and confers upon the trustee the power to sell the property, or any part of it, and execute a title in fee to the purchaser when requested in writing by the said Martha J. Hollowell, the *cestui que trust.* This consent is manifested when she joined in the deed with the trustee.

The contention of the defendant that it was the duty of the plaintiff to see to the application of the proceeds derived from the sale to him, and see that the same was reinvested in real estate by the trustee, cannot be sustained.

It was so held in England, but is not the law here as to a *bona fide* purchase for value. *House v. Shore,* 40 N. C., 357; *Whitted v. Nash,* 66 N. C., 590; *Grimes v. Taft,* 98 N. C., 198; *Hunt v. Bank,* 17 N. C., 60; 39 Cyc., pp. 378 and 379; 28 A. & E. (2 Ed.), 1130 and 1131.

Affirmed.

MODEL MILL COMPANY ET AL. v. D. H. WEBB ET AL.

(Filed 10 December, 1913.)

Banks and Banking—Correspondent Bank—Bills and Notes—Trials—Payment—Mail—Evidence.

Evidence that a letter has been mailed is some evidence that it was properly addressed, stamped, and received by the addressee; and where there is evidence that the drawer of a draft deposited it in his bank, which mailed it to its correspondent bank at a different town and that it was paid to some one by the drawee; this is sufficient to sustain a verdict in favor of the drawer in an action brought by him against the correspondent bank for collecting the money and failing to remit.

(88) APPEAL by defendant, American National Bank, from *Adams, J.,* at April Term, 1913, of BUNCOMBE.

Plaintiff Model Mill Company, of Johnson City, Tenn., had sold and shipped goods to the defendant D. H. Webb, at Asheville, N. C., drew a draft on him for the price ($62.78) with bill of lading attached, and

placed it with the National City Bank of Johnson City for collection. The draft and bill of lading were mailed by that bank to the defendant American National Bank of Asheville for collection. There was evidence that the latter bank did not receive the letter nor collect it. The draft was paid by defendant Webb, but he did not know to whom. He received the bill of lading and got the goods and admitted that he owed the Model Mill Company for them, but stated that he had paid the debt. The court charged that if Webb paid the money to the American National Bank, which held the draft, it was, in law, a payment to the plaintiff Mill Company and discharged defendant Webb; but if to any one else, not authorized to receive the money, it was not a payment by him to the Mill Company, and he would still be liable to it. The court left the question of payment to the defendant bank to the jury, instructing them to consider all the evidence and find as to the fact. The jury returned a verdict that Webb had paid the money to the bank, under the charge, by answering the first issue as to the indebtedness of Webb to the Mill Company "No," and the second issue, as to the indebtedness of the defendant bank, "$62.78."

Judgment for plaintiff, and appeal by defendant.

W. R. Whitson for plaintiff.

J. T. Merrimon for American National Bank, appellant.

WALKER, J., after stating the case: The only question is, Was there any evidence to support the charge and the verdict? The City National Bank, it appears, mailed the letter with the draft and bill of lading to the defendant bank. This was evidence of its receipt by the (89) latter, and raised a rebuttable presumption of the fact to be submitted to the jury, along with any evidence in the case tending to show that it was or was not in fact received. This is said to be founded upon another presumption, that officers of the Postoffice Department will do their duty, or upon the better reason, the regularity and certainty with which, according to common experience, the mail is carried. It is, at least, evidence from which the jury may reasonably infer the fact that the mail matter was received in due course of transmission and delivery. 16 Cyc., 1065; *Bragaw v. Supreme Lodge,* 124 N. C., 154; *Coile v. Commercial Travelers,* 161 N. C., 104; *Hollowell v. Insurance Co.,* 126 N. C., 398; *Huntley v. Whittier,* 105 Mass., 391; *Starr v. Torrey,* 22 N. J. L., 190; *Austin v. Howard,* 69 N. Y., 571; *Howard v. Daly, ibid.,* 362; *Dana v. Kemble,* 19 Pick., 112. This kind of remittance is according to the universal custom of banks in collecting drafts or other commercial papers. Farther or more certain proof of the receipt by the bank of the letter than is derived from the fact that it was properly

mailed would be wholly unnecessary, always difficult, and often impossible, as suggested by *Chief Justice Ames,* for the Court, in *Russell v. Buckley,* 4 R. I., 525 (70 Am. Dec., 167). If the law generally requires the best proof of which the particular fact in issue is susceptible, this is the best possible under the circumstances of this case. It is not conclusive. The contrary may be shown or may be inferred from all the testimony, but it is some evidence of the fact. "The burden of proving its receipt remains throughout upon the party who asserts it." *Huntley v. Whittier, supra.* Such a remittance, as is said in *Hollowell v. Insurance Co., supra,* is at the risk of the remitting bank, and if the letter was not actually received, the bank addressed is not liable. But this is not that question, but one merely of proof as to the receipt of the draft.

But defendant contends that there is no evidence that the letter inclosing the draft and bill of lading was properly addressed and stamped and deposited in the mails for transmission. The testimony is
(90) that the clerk in the Johnson City Bank "mailed the letter to the American National Bank of Asheville," and "it was forwarded by the (former) bank to the American National Bank of Asheville." These are the expressions used by the witness Samuel T. Millard. When a person says that he "mailed" a letter to another, it is commonly understood that the letter was in a mailable condition, properly addressed to that other, and stamped. We would not speak of a blank envelope deposited in the postoffice, neither stamped nor addressed, as having been mailed; and when the witness said the letter was mailed to defendant bank, the jury could, at least, infer that he meant it was addressed and stamped and deposited in the postoffice as is usual, that is, in the ordinary way. *U. S. v. Rapp,* 30 Fed., 818. At page 822 will be found the expression, "This letter was mailed precisely like other letters," and the word "mailed" is several times used by the Court in the sense we have given to it. Matter, in order to be mailable, must be stamped and addressed; otherwise, it will not be transmitted. 2 U. S. Compiled Statutes, p. 3663, sec. 3896. Besides, defendant D. H. Webb testified that he lived in Asheville, N. C., and paid the draft and got the bill of lading; that he did not pay the Model Mill Company, but paid some one. The letter inclosing the draft and bill of lading must have been transmitted to Asheville, which is some evidence that it was stamped. It was not addressed to Webb, because he paid the draft to some one else, who had it. The bank at Asheville is the only other person or corporation at Asheville connected with the transaction by the evidence. The jury could draw these conclusions, and from them make the further deduction that the bank collected the draft.

The charge of the learned judge was clear and explicit, and submitted the question fairly to the jury. There was strong evidence that the defendant bank did not receive the paper or handle it, but that it was really addressed to the defendant D. H. Webb by mistake, and that he used the bill of lading attached to get the goods from the railroad company, as he could not say to whom he had paid the draft. But the jury, unfortunately for the defendant bank, have decided (91) otherwise, and we cannot revise their verdict. It may be a hard case, and if justice has miscarried, we can do nothing more than regret it. On the other side, it may be said that a most able and enlightened judge, profoundly imbued with a strong sense of justice and right, has heard the witnesses and seen the actual occurrences of the trial, and is, therefore, far more competent to judge of the correctness of the verdict than we are. We should, therefore, hesitate to disturb it, even if we had the power, but rather defer to his better judgment.

No error.

Cited: Trust Co. v. Bank, 166 N. C., 117; *Lynch v. Johnson,* 171 N. C., 625.

R. A. ABERNATHY, ADMINISTRATOR, v. SOUTHERN RAILWAY COMPANY.

(Filed 13 December, 1913.)

1. Railroads—Pedestrians—"Look and Listen"—Reasonable Precautions—Negligence—Proximate Cause.

One walking on a railroad track is required to look and listen for approaching trains and to be reasonably alert for his own safety, which the employees on the train may assume that he has done, and that he will leave the track in time to avoid an injury, where it does not appear that he is incapacitated from appreciating the danger or avoiding it; and this without reference to the speed of the train at the time; therefore, when under such circumstances a pedestrian is killed or injured by being run upon or over by a railroad train, negligence is imputed to him as the proximate cause of the injury, whether the approaching train gave alarm signals or not, and he may not recover damages therefor.

2. Same—Evidence—Nonsuit.

In an action for damages for the alleged negligent killing of plaintiff's intestate while walking on defendant railroad company's pass-track, the uncontradicted evidence tended to show that at the time in question, of which the intestate was aware, the defendant's trains, going in opposite directions, were scheduled to pass there; that at that time one of these trains was on the main line waiting for the other to go upon the pass-

track, which had given the station and meeting-place sound of the whistle within easy hearing of the intestate, who was not looking or listening for its approach, which otherwise he would have seen, and that he was consequently run over and killed as it was running on the side-track upon which he was walking: *Held*, the negligence of the plaintiff's intestate was the proximate cause of his death, and a motion for a judgment as of nonsuit was properly granted.

(92) APPEAL by plaintiff from *Cline, J.*, at June Term, 1913, of BURKE.

It appears in this case that the intestate of the plaintiff and R. J. Hodge were walking on the main line of defendant near Bridgewater. They left the main line and went to the pass-track because they saw a train, headed east, at the depot. Trains from the east and the west passed at that place, and the inner side-track was the pass-track. The switch was open from the main line to the inner side-track, so that the train from the east could go onto the side- or pass-track and permit the train going east to pass. The pass-track was known to be used for that purpose. The intestate was killed and R. J. Hodge was injured by the train going west while it was moving on the pass-track towards the station. The engineer had given the station blow with the whistle, and also the "meeting point" blow, before the train entered upon the siding. Abernathy and Hodge could have seen the train if they had looked after they got upon the pass-track, in time to have left the track and avoided the accident.

Plaintiff's witness, S. W. Cannon, said: "I did not see them look around until the signal was given, and Abernathy turned his head. There was no obstacle to keep them from getting out of the way."

There was evidence that a train coming from the east, as this train was, could be seen some distance before it reached Abernathy and Hodge.

Plaintiff's witness, Ben Corpening, testified that it was about four minutes from the time he first saw the train until it struck Abernathy,

(93) and that the noise of the train, as it comes in, could be heard about half a mile. There are three tracks at the place, the main line, pass-track, and a shorter side-track further out to the southwest. A work engine was on the last mentioned track exhausting steam and making a loud noise. There were signboards near the place to warn travelers. There was much other evidence of the same kind in the case.

All the evidence was offered by the plaintiff, and at the close of it the court, on motion of defendant, ordered a nonsuit, under the statute, and plaintiff appealed.

A. A. Whitener, W. A. Self, Spainhour & Mull for plaintiff.

S. J. Ervin for defendant.

WALKER, J., after stating the case: We have repeatedly held, since *McAdoo v. R. R.* (105 N. C., 140) was decided in 1890, nearly a quarter of a century ago, that a person walking along the track of a railroad company must look and listen for approaching trains and take care of himself, and the engineer has the right to assume that he has done so and will leave the track in time to avoid any injury to himself, and having the right to act upon this assumption, he is not guilty of negligence in failing to give signals to the pedestrian. If any injury results to the latter, the law imputes it to his own negligence in not using proper caution for his own safety. We believe this to be a correct statement of the law applicable to such cases, and the one approved by *McAdoo's case,* as will appear from the following language of *Justice Avery:*

"When a person is about to cross the track of a railroad, even at a regular crossing, it is his duty to examine and see that no train is approaching before venturing upon it, and he is negligent when he can, by looking along the track, see a moving train, which, in his attempt to blindly pass across the road, injures him. *Bullock v. R. R., post,* 180; 2 Wood R. R., sec. 333. Even where it is conceded that one is not a trespasser, as in our case, in using the track as a footway from a foundry to his house, it behooves him to be still more watchful. The license to use does not carry with it the right to obstruct the road and impede the passage of trains. A railroad company has the right to the use of its track, and its servants are justified in assuming that a human being who has the use of all his senses will step off the track before a train reaches him. Wharton on Negligence, sec. 389a; *Parker* (94) *v. R. R.,* 86 N. C., 321; 2 Wood R. R., sec. 320."

The same doctrine has recently been stated by this Court in its latest opinion upon this question, by *Justice Hoke:* "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." *Talley v. R. R.,* 163 N. C., 567, citing *Beach v. R. R.,* 148 N. C., 153; *Exum v. R. R.,* 154 N. C., 408.

There may be circumstances where the otherwise absolute duty on the part of the track walker to look and listen and to keep constantly on the lookout for approaching trains may be qualified by circumstances, but they are not present in this case. Here the deceased, and his walking companion who testified in the cause, had notice of the invariable

custom that trains passed at that point, and they were in full view of a train "headed east," then standing at the station and waiting for the coming train to take the inner side-track (which they, for their own convenience, were using for a footway), in order that it might proceed by the main track on its journey. The approaching train gave every possible warning; it blew for the station (a single long blow) and for the "place to meet and pass" (two short, sharp blows). Other persons similarly situated to the intestate and Hodge heard these blows and knew the train was coming to the pass-track. The switch, which they had passed by, was set for the siding, so that the train bound west could enter upon it and wait for the one "headed east" to pass it. It was, therefore, a live track and a place of danger, and they looked not, neither did they listen, according to plaintiff's witness Cannon. The
(95) engineer was so sure that they knew of his approach that he did not again blow the whistle until it was too late, and in this, by all our cases, he was in no fault. If it was even negligence at all, it was not a culpable act of negligence. This track was being used by the railroad company every day for the passing of its trains. They were on time, and the moment for their passing had arrived. A court of the highest authority has said that under such circumstances "the track itself, as it seems necessary to repeat with emphasis, is itself a warning. It is a place of danger, and a signal to all on it to look out for trains. It can never be assumed that trains are not coming on a track and that there can be no risk to the pedestrian from them." But the same has been so often the utterance of this Court that the doctrine has become deeply imbedded in our jurisprudence. The facts of this particular case bring it squarely within it, and they so clearly point to the unfortunate negligence of the intestate as the active and efficient cause of his death—and this includes his companion as well—that it is impossible to distinguish it from the many cases decided here upon the same principle, such as *McAdoo v. R. R., supra; Parker v. R. R.*, 86 N. C., 221; *Meredith v. R. R.*, 108 N. C., 616; *Norwood v. R. R.*, 111 N. C., 236; *High v. R. R.*, 112 N. C., 385; *Syme v. R. R.*, 113 N. C., 538; *Bessent v. R. R.*, 132 N. C., 934; *Stewart v. R. R.*, 128 N. C., 518; *Wycoff v. R. R.*, 126 N. C., 1152; *Sheldon v. Asheville*, 119 N. C., 606; *Beach v. R. R.*, 148 N. C., 153; *Lea v. R. R.*, 129 N. C., 459. We said in *Beach's case* that "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 (96) 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."

It appeared in *High v. R. R., supra,* a leading case on this subject, which has been approved repeatedly, that 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. 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. The public could not be safely and adequately served upon any other principle. (97) If engineers must stop their trains to await the pleasure or convenience of foot passengers in leaving its tracks, when they can step off so easily and avoid injury and not obstruct or retard the passage of trains, the company cannot well perform its public duty as a carrier,

and the public convenience, though superior and of prior right, must give way to private interests, contrary to the just 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 a 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 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 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
(98) presume that he would leave the track in time to avoid the injury. "That he did not do so was his own fault, and he should suffer the consequences of his folly." The doctrine of the cases already cited and decided in this Court has been firm established in other jurisdictions, and notably in *R. R. v. Houston,* 95 U. S., 697, where it is said that a person using the track of a railroad company must look and listen, and any failure to do so will deprive him of all right to recover for any injury caused thereby. "A party cannot walk carelessly into a place of danger," said the Court in that case. See also *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; *Rich v. R. R.,* 31 Ind. App., 10.

This case is stronger for defendant than any of those last cited, be-

cause here the intestate and his friend knew that the train was waiting at the station and that the trains passed at that point, this being the schedule time. They were, therefore, in just as much danger as if they had been on the main track. It is almost incredible that men will take so many chances under such circumstances. The cases in our courts also hold that neither the fact of an engine being on the south siding and exhausting steam, nor the speed of the oncoming train, which was not, in this case, at all excessive, can make any difference. *Syme, McAdoo,* and *High cases,* and *R. R. v. Houston, supra.* The diagram accompanying the case would indicate that the speed of the train was slow. It was their plain duty, both by law and the instinct of self-preservation, not only to listen, but to look for the train, and they would have seen and heard it, if they had done so, as it was seen and heard by others in no better position for that purpose than they were; and yet plaintiff's witness, S. W. Cannon, says they did not do so, but walked along the track regardless of their personal safety. R. J. Hodges testified that if they had known the train was coming and had looked, they could have seen it at the bridge 800 yards distant. According to the uniform decisions of this Court, this was negligence on their part, which was the proximate cause of the intestate's death. The nonsuit, therefore, was proper. (99)

Affirmed.

Cited: Towe v. R. R., 165 N. C., 3; *Ward v. R. R.,* 167 N. C., 152; *Tyson v. R. R., ib.,* 216; *Treadwell v. R. R.,* 169 N. C., 697; *Hill v. R. R., ib.,* 741; *Davis v. R. R.,* 170 N. C., 584, 586, 587; *Horne v. R. R., ib.,* 656.

H. J. HARDIN ET AL. v. MATTIE J. GREENE, ADMINISTRATRIX OF L. L. GREENE, ET ALS.

(Filed 10 December, 1913.)

1. Limitation of Actions—Judgments—Pleadings.

Where judgment is rendered in the Superior Court upon judgments theretofore rendered, the statute of limitations as to the prior judgments should have been pleaded in the later action, if available, and it will begin to run only from the date of the last judgment.

2. Trials—Pleadings—Extension of Time—Further Orders—Court's Discretion—Limitation of Actions.

It is not within the discretion of the trial judge to order stricken out a part of an amended pleading simply because the statute of limitations

was pleaded in it when the judge holding a former term of the court has unconditionally allowed the pleader further time in which to file the amended answer.

ALLEN, J., dissenting.

APPEAL by defendant from *Daniels, J.*, at April Term, 1913, of WATAUGA. Action tried upon these issues:

1. In what amount, if any, is the defendant Mattie J. Greene, administratrix, indebted to the plaintiff H. J. Hardin? Answer: $2,000, with interest on $1,500 from 4 August, 1902.

2. In what amount, if anything, is defendant M. J. Greene, administratrix, indebted to plaintiff A. W. Beach, administrator? Answer: $479.63, with interest from 2 May, 1892.

3. In what amount, if anything, is defendant M. J. Greene, administratrix, indebted to plaintiff M. N. Horton, administrator? Answer: Nothing.

4. Is the debt of the plaintiff H. J. Hardin barred by the statute of limitations? Answer: No.

5. Is the debt of M. N. Horton, administrator, barred by the statute of limitations? Answer: No.

(100) From the judgment rendered, the defendant appealed.

L. D. Lowe for plaintiff.

F. A. Linney, T. A. Love for defendant.

BROWN, J. This is an action in the nature of a creditor's bill, brought to collect certain judgments set out in the record against the defendant's intestate in favor of H. J. Hardin, and A. W. Beach, administrator of John Ragan.

The assignments of error relate largely to the statute of limitations.

The judgment upon which plaintiff Hardin sues was rendered Fall Term, 1902, upon a number of small judgments against L. L. Greene in favor of W. T. Hayes and others. It is admitted that the judgment was duly assigned to plaintiff Hardin.

As the summons in this action was issued on 27 June, 1910, less than eight years have elapsed from the time of the rendition of the judgment until this action was commenced. We are unable, therefore, to see anything upon which to found the plea of the statute as to that judgment.

It is immaterial whether the small judgments upon which this judgment was rendered at Fall Term, 1902, were barred or not. The statute should have been pleaded as to them in that action. The matters determined by the judgment at Fall Term, 1902, cannot now be considered They are foreclosed by that decree.

We find no error as to the rulings of the court in respect to the Hardin judgment, and the judgment of the court in that particular is affirmed.

The defendant assigns error for that his Honor signed the order striking out defendants' amended answer in so far as it affected the plaintiff A. W. Beach, administrator. The order is as follows:

This cause coming on for trial, and the defendants, in answer to the complaint, read an amended answer setting up the statute of limitations, which was filed at Fall Term, 1912, under an order made by his Honor, Judge Biggs, at Fall Term, 1911, permitting the defendants to file an amended answer, and it appearing to the court that in (101) the original answer no plea of the statute of limitations has been pleaded, and at the time of making the said order there was no suggestion made that it was the purpose of the defendants to set up such plea in the amended answer authorized by said order, and it appearing to the court that neither the interpleader, A. W. Beach, nor his attorney, had notice that such plea was to be pleaded and set up until the pleadings were read at this term:

It is, therefore, on motion of E. F. Lovill, attorney for the interpleader, ordered by the court that such plea of the statute of limitations, so far as said plea would affect the interpleader, be stricken out, and to which said order the defendant excepted.

F. A. DANIELS,
Judge Presiding.

There was error in making this order. An unconditional and unrestricted right to file an amended answer had been granted by Judge Biggs, and the amended answer filed in pursuance of such order.

Judge Biggs had plenary power to make such order, and his successor at a subsequent term had no right to set it aside because in such amended answer the defendant set up the statute of limitations. Such plea is not immoral, and under the terms of the order the defendant has as much right to set it up as any other plea. *Smith v. Smith,* 123 N. C., 233; *Wilson v. Pearson,* 102 N. C., 306.

So much of the judgment as relates to the cause of action of Beach, administrator of Ragan, is set aside.

The costs of this appeal will be paid by A. W. Beach, administrator of John Ragan.

Partial new trial.

ALLEN, J., dissenting: I do not agree to the part of the opinion of the Court holding that there was error in striking out the plea of the statute of limitations in the amended answer. The judgment of his Honor is presumed to be correct (*Commissioners v. Gill,* 126 N. C., 87), and if the law

(102) vested him with discretion in the matter, he is presumed to have exercised it. *Pelletier v. Lumber Co.*, 123 N. C., 601; *Balk v. Harris*, 130 N. C., 381. The order of Judge Biggs allowing an amended answer to be filed was made at the Fall Term, 1911, and the answer was not filed until the Fall Term, 1912, more than one term of court having intervened between the making of the order and the filing of the answer. In *Sheek v. Sain*, 127 N. C., 271, the Court says: "It is well settled that the court has the right to give further time to parties to plead. But this extension of time is within certain limits and cannot extend beyond the next term of court, unless by the consent of the parties. To attempt to give further time than this would be to trench upon the prerogative of the judge succeeding him." It does not appear from the record that the parties consented to any extension of time beyond the next term of court after Judge Biggs made his order, or that any leave was obtained to file the answer after it was prepared, and upon the authorities cited it would seem that the right to answer had expired and that it was then discretionary with the judge to permit it to remain on the files or strike it out, and that he is presumed to have exercised this discretion. His Honor was doubtless influenced in his action by the fact that there had been a former suit between the parties, which was dismissed because of an effort to settle and compromise and under an agreement that the statute of limitations would not be pleaded.

W. H. BAIN v. CITY OF GOLDSBORO.

(Filed 10 December, 1913.)

1. Taxation—Cities and Towns—Bond Issues—Waterworks—Vote of the People—Constitutional Law—Necessaries—Interpretation of Statutes.

Bonds issued for purpose of enlarging and improving the waterworks system of a town and authorized by legislative enactment, are for a necessary expense and valid without the question of their issue having been submitted to the qualified voters of the municipality, when the statutes do not so require; and chapter 86, Laws 1911, and chapter 201, sec. 3, Public Laws 1913, have no application.

2. Taxation—Cities and Towns—Waterworks—Bond Issues—Injunction—Excessive Tax—Burden of Proof.

Where the issuance of municipal bonds for enlarging and improving the waterworks system of the town are sought to be enjoined by a taxpayer on the ground that the present tax rate is burdensome, and the issuance would increase this rate beyond the limitation placed by the

statutes, the burden is upon the plaintiff to show that the tax rate would be unlawfully increased, which in the present case would involve the question of the increase in revenue of the town by the receipts from the waterworks plant.

APPEAL by plaintiff from an order of *Daniels, J.*, rendered at (103) chambers, 1 December, 1913; from WAYNE.

The General Assembly, at its special session of 1913 (Private Laws, ch. 30), authorized the city of Goldsboro to issue bonds in the total sum of $20,000 for the purpose of completing the enlargement and improvement of its waterworks plant and system, said bonds to run for thirty years, and provided for a specified tax to pay accruing interest and the principal at its maturity. The defendants propose to issue the bonds thus authorized without submitting the question of their issue to the qualified voters of the city. It is alleged by plaintiff, in his complaint, he being a citizen and taxpayer of Goldsboro, that the term of the present members of the board of aldermen of the city will expire in May, 1915; that the population of the city is approximately 8,000 and the assessed valuation of all real and personal property within its corporate limits is approximately four and one-half millions of dollars and the rate of taxation at the present time 94 cents on the assessed valuation of real and personal property and $2.82 on each poll. Plaintiff asks for an injunction against the issuance of the bonds. The court, upon the pleadings, denied the application, and he appealed.

R. M. Robinson for plaintiff.
D. C. Humphrey for defendant.

WALKER, J., after stating the case: We think the judgment (104) was correct. No popular vote was required, as none is provided for in the act of 1913, and it was evidently contemplated by the Legislature, in passing the act, that there should be none. The act of 1911, ch. 86, was intended to apply to municipal corporations whose charters make no special provision for the establishment or improvement of waterworks, sewerage, or lighting plants and systems. *Murphy v. Webb,* 156 N. C., 402. This case also holds that the cost of the improvements for which the bonds in question are to be issued fall within the general class and description of necessary expenses, which do not require a favorable vote of the people before the bonds are issued. *Bradshaw v. High Point,* 151 N. C., 517; *Fawcett v. Mount Airy,* 134 N. C., 125; *Robinson v. Goldsboro,* 135 N. C., 382, to which may be added *Water Co. v. Trustees,* 151 N. C., 171, as involving the question we are now discussing.

The clause of the revenue act (Public Laws 1913, ch. 201, sec. 3), limiting the rate of municipal taxation to 1 per centum on the value of real and personal property, does not apply to our facts, as the Legislature has given special authority to levy the tax for the payment of the principal and interest of the bonds to be issued by the defendant, which brings this case within the exception of that section.

There is nothing in the facts, as now presented, to show that the issue of the bonds or the levy of the tax for the purpose of paying principal and interest is contrary to any prohibition, restriction, or limitation of the law as regards the power of municipal corporations to contract a debt or impose a tax upon its citizens. Plaintiff, being the actor and holding the affirmative, is required to take the burden of proving wherein any such conflict between the proposed action of defendant and the law exists. This he has not done, according to our view of the facts. The case seems to be fully covered by the reasoning in *Wharton v. Greensboro,* 146 N. C., 356, and especially by the decision in *Underwood v. Ashboro,* 152 N. C., 641, where the *Chief Justice* says: "It does not appear that, after deducting rentals and profits of the water system, the levy to pay interest on these bonds would probably swell the total (105) levy for other than special purposes (which are authorized by special statute) beyond the limitation in Revisal, sec. 2924, or Revisal, sec. 5110. The burden of showing this was on the plaintiff asking for an injunction." This places the burden where it properly belongs, and the same rule is applicable to Revisal, sec. 2977, as to the 10 per cent restriction upon the right of such a corporation to contract debts, pledge its faith, or loan its credit, which section was considered in *Wharton v. Greensboro, supra,* where *Justice Brown* says: "A special purpose within the meaning of the statute embraces all forms of debt not within the legitimate necessary expenses of the municipality." Where the facts do not appear, we must presume that they do not exist, or, otherwise, the party who asserts and relies on their existence would have brought them forward; and, besides, it is incumbent upon the appellant to show error affirmatively in such a case.

Affirmed.

G. W. FISHER v. J. C. FISHER AND TOXAWAY COMPANY ET AL.

(Filed 13 December, 1913.)

Appeal and Error—Notice of Appeal—Judgment Rendered Out of Term—Receipt by Clerk—Computation of Time—Certiorari.

Where by consent of the parties a judgment in the Superior Court is rendered after expiration of the term in which the action has been tried, and sent by mail to the clerk of the court, with mailed notice to the appellant from the judge that this has been done, the time within which notice of appeal to the Supreme Court may be given is computed from the time the judgment has been received by the clerk, and not from the time the appellant has received the judge's notification that he had signed the judgment; and where the judge improperly refuses to settle the case on appeal for want of statutory notice given to the appellee, a *certiorari* from the Supreme Court will lie.

CLARK, C. J., dissenting.

APPEAL by defendants from *Adams, J.,* at Spring Term, 1913, of TRANSYLVANIA.

This is a petition for a *certiorari* to require the judge of the Superior Court to settle the case on appeal, he having declined to do so upon the ground that the defendant had lost his appeal by failing (106) to serve his notice of appeal within the statutory time.

Upon the application to settle the case, his Honor found the facts and ruled thereon as follows:

1. On the last day of the term the exceptions to the report of the referee were fully argued by counsel, and at the conclusion of the argument counsel consented that the court might take the papers to Asheville and consider the arguments and the exceptions.

2. After considering the evidence, arguments, and exceptions, the court prepared a draft of the judgment and forwarded it to the plaintiff's attorney in June, requesting him to confer with an attorney for the defendant and ascertain whether they could agree on the commissioners to be appointed. Nothing was heard from the attorneys until after the close of the courts in the Fifteenth Judicial District, and the undersigned had returned to his home in Carthage.

3. After considerable correspondence it was finally agreed that the judgment might be signed anywhere in the State and in vacation.

4. The judgment was then immediately signed, and at the request of plaintiff's counsel was sent to him at Hendersonville, together with other papers in the cause, on 28 June, 1913. At the same time a letter was mailed to W. W. Zachary, one of the attorneys for the defendant, at Brevard, notifying him that the draft of the judgment originally sub-

mitted had been signed and sent to Judge Ewart, plaintiff's attorney. W. W. Zachary, attorney for the defendant, had previously written the undersigned that he had examined the judgment, and had consented that it should be signed, as heretofore stated.

5. That judgment and other papers in the cause were sent by Judge Ewart to the clerk of the Superior Court at Brevard, 30 June, 1913, by express, and were received the same day by the express agent at Brevard, who notified the clerk of their receipt through the postoffice, 1 (107) July, 1913.

6. On 30 June Judge Ewart wrote the clerk at Brevard to mark the judgment filed as of that date.

7. On 1 July Judge Ewart wrote Mr. Zachary that he had sent by express to the clerk at Brevard the judgment and other papers in the cause, and that he could, if he desired, serve notice of appeal on Judge Ewart or on the plaintiff.

8. That the papers sent by Judge Ewart to the clerk by express were not prepaid, and the clerk, for this reason, refused to take the papers out of the express office, and so notified the defendant's counsel. The clerk afterwards changed his mind and took the papers to his office on 8 July, but did not notify defendant's counsel until 12 July that he had done so.

9. On 17 July the defendant caused to be served on Judge Ewart a notice of appeal from the judgment, and on 31 July caused its statement of case on appeal to be served upon him.

10. On 8 August, 1913, the plaintiff's attorney prepared a "counter-case and exceptions" and placed this paper in the hands of an officer, who made the following return: "Executed the within by reading the contents to O. W. Clayton, of Zachary & Clayton, attorneys, for the defendant, The Toxaway Company. This 8 August, 1913. J. H. Pickelsimer, Sheriff, by W. H. Harris, D. S."

11. On 13 August the plaintiff caused to be served on the defendant's attorney notice that he would make a motion before the undersigned, at Monroe on 25 August, to "strike from the files of the clerk and to disallow the appeal on the ground that notice was not given within the statutory period."

12. At the same time and place, after notice, the defendant moved to adopt its statement and to disallow the exceptions or counter-case of plaintiff.

The court further finds:

13. That Judge Ewart reserved and did not waive his right to move to disallow defendant's statement of case on appeal, by causing the counter-case to be served, the counter-case containing the statement that

it was "not intended to waive any rights of plaintiff to move to strike appeal from the files of the clerk."

14. A letter mailed at Carthage, 28 June, would reach Brev- (108) vard, the residence of Mr. Zachary, in due course before 1 July.

15. A letter mailed at Hendersonville, the residence of Judge Ewart, would reach Brevard in due course within a few hours, there being daily trains between these places.

16. The court finds no evidence in the record that the defendant, appellant, caused its appeal to be entered by the clerk on the judgment docket.

17. The plaintiff did not return the defendant's statement of case on appeal with his exceptions or counter-case attached or indorsed, and that the same was served as hereinbefore stated within ten days after the appellant's statement of case was served on appellee.

The court further finds:

18. Conceding that the failure of the clerk to take the papers from the express office (although the defendant's attorney was notified on 1 July that the papers had theretofore been sent to the clerk by express) cannot be imputed to defendant as laches, still Mr. Zachary, attorney for defendant, knew the contents of the judgment, which had previously and before signing been submitted to him, and had actual notice of the rendition of the judgment by letter from the undersigned, written 28 June, and from plaintiff's counsel, written 1 July.

Conclusion of law:

The judgment having been rendered by consent out of term, and in vacation, it was the duty of the defendant, appellant, to take its appeal within ten days after notice of the judgment, and as notice of appeal was served on plaintiff on 17 July, more than ten days after notice of the judgment, and the statement of the case was served on 31 July, the court is of the opinion that neither the notice of appeal nor the statement on appeal was served within the time required by law, and for that reason disallows defendant's appeal, and orders it stricken from the files.

H. G. Ewart for plaintiff.
J. H. Merrimon for defendant.

ALLEN, J. If the defendant has lost the right to appeal by its (109) own laches, in failing to give the notice of appeal within the statutory time, the *certorari* ought not to issue; and, on the other hand, if the notice was served in time, it is entitled to the writ in order that the case may be settled and the appeal heard.

The defendant knew on 1 July, 1913, that a judgment had been signed

denying its claim; the judgment reached the office of the clerk of the Superior Court on 8 July, 1913, and the notice of appeal was served on 17 July, 1913.

If, therefore, time to be counted against the defendant from 1 July, when it knew that judgment had been signed, it has lost the right of appeal, because notice thereof was not served within ten days; but if from 8 July, when the judgment was filed with the clerk, the defendant has complied with the statute.

When a judgment is rendered out of term, the party desiring to review it must take his appeal "within ten days after notice thereof" (Revisal, sec. 590), and within this time must cause notice of appeal to be served on the adverse party. Revisal, sec. 591.

Within ten days after notice thereof, means ten days after notice of the rendition thereof, and the determination of the question before us depends on whether a judgment out of term is rendered when it is signed or when it is filed with the clerk.

If the latter is the correct construction, the defendant had notice that a judgment had been signed on 1 July, but did not have notice of the rendition of a judgment until 8 July.

The authorities furnish us very little aid, and as either construction is permissible, we are properly influenced by our conception of the safest and most convenient rule.

Many difficulties may arise, which will create confusion and uncertainty, if we hold that a letter from the judge that he has signed a judgment is notice of its rendition. Did he write the letter? When? Did he mail it? When? Did he change the judgment after writing? Did the attorney receive the letter, and when? and other question which, in the event of controversy, the judge, whose acts are being investigated, must pass upon.

Again, the careful and experienced lawyer cannot decide what (110) to do until he has seen and read the judgment. He takes no man's word as to what is in a contract, deed, will, or judgment, but must examine the paper before determining upon a line of action.

Judgments signed out of term are entered as of the term, and in *McDowell v. McDowell,* 92 N. C., 228, it is said: "The judgment must be entered as of the term of the court at which the question to be decided or the matter to be acted upon was presented to the court, and the day of entry should be noted on the record." And again in the same case: "When the judgment shall be entered, the appellants, if they shall then be dissatisfied with it, may thereafter, by some appropriate proceeding, have it reviewed in this Court."

It was also held in *Harrell v. Peebles,* 79 N. C., 32, that it should ap-

pear by the record when a judgment signed out of term was rendered and when recorded, and in *Shackelford v. Miller,* 91 N. C., 185, that the date of entering should always be noted on the record.

These cases are not authoritative upon the question before us, because it is necessary to make the entry upon the docket for other purposes than an appeal, but they serve to show that as the clerk is required to note the date of entry on the docket, this furnishes a definite and fixed period from which to complete the time.

That the entry on the docket is important in its relation to the appeal seems to be the opinion of the *Chief Justice,* who prepared the articles on "Appeal and Error," 2 Cyc. He says on p. 626: "In order that a judgment may be reviewed by an appellate court, it must be entered in permanent form as a record of the court. The entry must be intended as an entry of judgment." And he makes the following annotation upon the text: "On the consideration of the question as to when the time allowed within which to perfect an appeal begins to run, the following rulings have been made as to when a judgment is to be considered entered:

"*California*—When it is 'entered at length in the minute-book (111) of the court.' *Matter of Pearson,* 119 Cal., 27, construing Cal. Code. Civ. Proc., secs. 1704, 1715.

"*New York*—When it is left with the clerk to be copied into the records. *Gay v. Gay,* 10 Paige (N. Y.), 369.

"*Ohio*—At the date of filing in accordance with a direction to counsel to prepare and file a decree on lines stated, and not at the time of such announcement and directon. *S. v. Seward,* 16 Ohio Cir. Ct., 443; 9 Ohio Cir. Dec., 168.

"*Texas*—When it is entered on the minutes of the court. *New Birmingham Iron, etc., Co. v. Blevens,* 12 Tex. Civ. App., 410.

"*Wisconsin*—When it is entered in brief on the minute-book of the clerk, though not recorded at length upon the order book. *Uren v. Walsh,* 57 Wis., 98, construing Wis. Rev. Stat., sec. 3042."

We are, therefore, of opinion that it is the wiser rule, and so hold, that the time for service of notice of appeal begins to run when the judgment reaches the office of the clerk, and that the petitioner is entitled to the writ of *certiorari,* as prayed for.

Petition allowed.

CLARK, C. J., dissenting: This case was argued upon exceptions to the referee's report, and, by consent, Judge Adams was to render his decision in vacation and out of the district. The sole question is within what time the appeal must be taken from such judgment.

Revisal, 590, provides: "The appeal must be taken from a judgment rendered out of term, within ten days *after notice* thereof." The judge finds as a fact, "Mr. Zachary, attorney for defendant, knew the contents of the judgment, which had previously and before signing been submitted to him, and had *actual notice* of the rendition of the judgment by letter from the undersigned, written 28 June and from plaintiff's counsel, written 1 July."

The judge having found as a fact that the defendant had received "*actual notice*" of the rendition of the judgment 28 June, and again on 1 July, and knew the contents of the judgment, which had been (112) previously submitted to him, it would seem that under the provision of the statute, Revisal, 590, the appeal should have been taken "within ten days" after such notice.

His Honor's conclusion of law is as follows, which it seems to me ought to be sustained: "The judgment having been rendered by consent out of term, and in vacation, it was the duty of the defendant, appellant, to take its appeal within ten days after notice of the judgment; and as notice of appeal was served on plaintiff on 17 July, more than ten days after notice of the judgment, and the statement of the case was served on 31 July, the court is of opinion that neither the notice of appeal nor the statement on appeal was served within the time required by law, and for that reason disallows defendant's appeal and orders it to be stricken from the files."

It is true that entering the judgment on the docket would give constructive notice to all parties; but here the judge finds more than that. He finds that the appellant's counsel knew the contents of the judgment, having read it, and that afterwards he had *actual notice* of its rendition on 28 June from himself and also on 1 July by letter from the opposing counsel. This fact is not denied. If it had been, the judge would have passed upon the facts, which he did anyway. It is not a question, therefore, whether the appellant's counsel received the notice. He does not deny it, and the judge finds that he did receive it. What more could be required? It would be very inconvenient if in such cases nothing can be done until the clerk sees fit to record the judgment, which indeed would not be actual notice, but only constructive. When there is no notice except the constructive notice from filing the judgment in the clerk's office, the appeal must be taken within ten days thereafter. But when there is actual notice prior to that time, why should the appeal be delayed until there is a constructive notice?

It will be noted that when judgment is rendered at term time notice is given in open court or within ten days after its rendition, without any requirement that the clerk shall have recorded the judgment. By

what analogy or provision of law, when there is actual notice, must the appellant be given ten days after recording a judgment rendered by consent out of term? (113)

By the plain terms of the statute, Revisal, 590, the appeal should be taken "within ten days *after notice* of the judgment, when rendered out of term," and "within ten days after its rendition, when rendered in term." Why should the court change the plain letter of the statute? There is no ambiguity in the statute whatever.

Cited: *Fisher v. Toxaway Co.*, 165 N. C., 669.

R. B. DUNN ET AL. v. LOVITT HINES ET ALS.

(Filed 13 December, 1913.)

1. Wills—Interpretation—Intent—Rules of Construction.

In construing a will, where there is doubt or ambiguity, the true intent and meaning of the testator should be gathered from the entire instrument, in accordance with the rules of law established for the purpose.

2. Same—Heir at Law.

A will should not be so construed as to disinherit the heir unless this has been done by express devise, or from necessary implication from the terms of the will.

3. Wills—Interpretation—Intent—"Unmarried"—Words and Phrases.

Where a devise is made contingent upon the devisee being "unmarried," etc., the word used must be construed with the context and as a part of it; for expressions of this character are not inflexible in their meaning and by proper interpretation should carry out the intent of the testator as gathered from the will.

4. Wills—Interpretation—Intent—Devisee First Named.

The first taker in a will is presumably the favorite of the testator, and in doubtful cases the gift is to be construed so as to make it as effectual as to him as the language of the will, by reasonable construction, will warrant.

5. Wills—Interpretation—Intent—Contingent Limitations—Vesting of Estates.

The law favors the early vesting of estate, to the end that property may be kept in the channels of commerce. Hence a future or executory limitation under a devise in a will will not be construed as contingent, when, construing the will as a whole, it appears that the intent of the testator was that it should be deemed as vested.

6. Wills—Interpretation—Intent — Contingent Limitations — "Unmarried"—Children of Age—Vesting of Estates.

A testator devised his lands to his several children, and first, a certain tract of land to his wife for life, then to his daughter C. "during her natural life; and should she marry and have children to arrive at the age of 21 years, then to my said daughter and her children then living, etc.," in fee simple; and if my said daughter should die without marriage and children of the age of 21," etc., then with limitation over to a son who was later provided for in the will. The widow of the testator being dead, and the daughter C. being alive and having several children, one of whom had arrived at the age of 21 years, it is *Held*, that in accordance with the intent of the testator as gathered from the terms of the will, the fee simple had vested in C. and her children as tenants in common, and that they may convey an absolute fee-simple title to the land; and, further, that the arrival at full age of any one of the children was sufficient to vest the estate.

(114) APPEAL by defendants from *Whedbee, J.*, at December Term, of JONES.

Controversy submitted upon an agreed state of facts, as follows:

1. That E. B. Isler, late of the county of Jones, some time before 27 April, 1891, died, leaving a last will and testament, which was duly and regularly admitted to probate in said county, a copy of which is hereto attached and made a part of the case. The second item of the will, which is the material one in this matter, is as follows: "I give to my wife, Susan C. Isler, the tract of land in Jones County on which I live, during her natural life or widowhood, and in consideration thereof she is to raise and educate my daughter, Carrie F. Isler; and at the death or marriage of my said wife, then I give said tract of land to my said daughter, Carrie F. Isler, during her natural life; and if she shall marry and have children to arrive at the age of 21 years, then my said daughter and her children then living, together with the children of any deceased child, shall have tract of land absolutely in fee simple forever. And if my said daughter should die without marriage
(115) and children of the age of 21 years or bodily heirs of such children, then I give said tract of land to my son, William B. Isler, during his natural life, then to his children absolutely and in fee simple forever."

2. That Susan C. Isler, named in the second item of the will, is dead; Carrie F. Dunn, named in said item, intermarried with her coplaintiff, R. B. Dunn, and as a result of the marriage there have been born the following children: Paul W. Dunn, Lillian F. Lee, Robert I. Dunn, Maude Rountree Dunn, W. Edwin Dunn, Carrie May Dunn, and Sam Augustus Dunn, all of whom are made parties hereto; that of the children, Paul W. Dunn became 21 years of age on 24 October, 1913;

that the other children are all under the age of 21, and one of them, to wit, Lillian F. Lee, has intermarried with A. S. Lee, and the said A. S. Lee is also made a party plaintiff hereto; that further, the said R. B. Dunn and wife have had no children to die leaving children up to the date when Paul W. Dunn became 21 years of age, or to the date of this proceeding.

3. That the estate of E. B. Isler has been fully administered and settled, and in the course of such administration a portion of the lands set out in the second paragraph of his will was duly and legally sold for the purpose of paying his debts under a decree of the Superior Court of Jones County, entered at November Term, 1893, in an action therein pending, entitled "Mrs. S. C. Isler, executrix, v. W. B. Isler et al.," the lands so sold being fully set out and described in a deed from S. C. Isler, executrix, to Carrie F. Dunn, of record in Jones County, book 39, page 330, to which reference is made; and this action has no reference to the land contained in said deed, but has reference only to the remaining lands mentioned in the second paragraph of the will of E. B. Isler, deceased, after excluding the lands described in the above mentioned deed, which remaining lands it is agreed are susceptible of a specific and certain description, but are known as the lands on which E. B. Isler lived, or the E. B. Isler home place.

4. It is further alleged in the case agreed that proceedings have (116) been duly instituted and prosecuted for a sale of the said land so remaining unsold, which are in all respects regular and confer a good title, provided plaintiffs are the owners as tenants in common of the said land under the will of E. B. Isler, by a fair and legal construction of the second item of the same. That defendants have duly entered into an agreement to buy said land, under the order of the court appointing a commissioner to sell the same and make title to the purchasers, but decline to pay the purchase money and take a deed for the land, upon the ground that the title is defective, the estate of plaintiffs not being an absolute one in fee simple, but contingent upon the death of Mrs. Dunn unmarried and without children. The court adjudged that a good title can be made, as the plaintiffs are the owners of the land in fee simple absolute, and required the purchaser to accept the title and the deed therefor upon the terms as to payment of the purchase money stated in the judgment. Defendants appealed.

G. V. Cowper for plaintiffs.
Rouse & Land and Loftin & Dawson for defendants.

WALKER, J., after stating the case: The question turns upon the point as to what meaning we will give to the words of the settlement, "without

marriage and children of the age of 21 years or bodily heirs of such children," for there is an ulterior or alternative limitation in the form of an executory devise, to the testator's son, William B. Isler, and should those words be construed to mean that if Carrie F. Isler (now Mrs. Dunn) dies a widow and without leaving children, the estate could not vest absolutely in any one until her death, but would remain contingent until that event takes place. But we do not think this can possibly be the meaning, in view of the context of the will.

The main purpose in construing a will, where there is doubt or ambiguity, is to ascertain the true intent and meaning of the testator, and in doing so we must be governed by the rules of law established for the purpose; otherwise, we would be in no better case than if traversing an unknown sea without rudder or compass, and in each particular
(117) case the court deciding it would be a law unto itself, without anything reliable or stable to guide it. One of those rules is, that we must look at the whole will, so as to take a broad and comprehensive view of it, and not a narrow or partial one, which would so restrict its meaning as to defeat the clear intention. Underhill on Wills, sec. 464. There is a cardinal rule, also, that the heir should not be disinherited except by express devise or by one arising from necessary implication, by which the property is given to another, though the right of the testator to omit the heir from his will is not to be denied or curtailed. *Ibid.*, sec. 466. There are other rules of more or less importance. Applying those we have mentioned to this will, what is the result?

The principal objects of this testator's bounty in this devise were undoubtedly his wife, his daughter, and her descendants. His primary intention clearly was that the land should go to his daughter and her children after his widow's death. How will we best execute this dominant purpose? Surely not by holding that the quoted words mean the death of his daughter without *then* having a husband and children, for the happening of such an event would carry the estate to his son, who gets his share under another clause of the will, and might leave others who would have been the testator's descendants and lineal heirs and equally entitled to his bounty, reduced to penury and to become objects of charity. This, if not absurd, would be contrary to all rules of humanity and to those common instincts of love and affection which ordinarily control our actions. Not that a testator is required to be a humanitarian, but that he is supposed to be influenced by natural motives, and he was, because the manifestly leading idea of the will is equality among his children and their descendants. This testator has done what we would expect of him under his surroundings and circumstances. His evident intention

was to prefer his daughter and her children to his son, for whom he had already provided, and therefore in the first limitation he declared that if his daughter Carrie should marry and have children, who attained to the age of 21 years, *then* she and her living children and the children of any deceased child should have a fee simple in the land absolutely. What does this mean? What else can it mean than that (118) the estate is to vest absolutely in fee, in the lifetime of his daughter, when she married and had such children, for he says, in so many words, it shall "then" vest. The limitation over was clearly intended to refer to the nonhappening of the very same event, which is, that at her death, if she should not have been married and should not have had children, so that the estate had not already vested absolutely, then and in that case it should go over to his son. What reason can be assigned for his changing the nature of the event? If the first one named had happened, whereby the estate had vested, why should he wish to nullify this provision by substituting another and very different one? He may do so; but has he done so? is the question. We think not. But we are not confined to mere reasoning against such a probability, for the authorities are strongly with us in our view.

A limitation expressed in the same words was before the Court of Chancery of England in 1861 for construction, in the case of *Heywood v. Heywood,* 30 L. J. Equity, 155, where it was held, *Sir John Romilly,* Master of the Rolls, delivering the opinion, "that a gift over, in the event of daughters dying unmarried, meant 'without ever having married,' and that the superadded words, 'and without issue,' meant 'without ever having any issue,' and the event having happened, the interests had vested, and the children, on whose behalf appointment had been made, were entitled to the fund." But it must not be understood that these words, "unmarried" or "without marriage" and "without children," have this inflexible meaning. On the contrary, they must be construed with the context and as a part of it, in the light of all the words of the gift and according to the obvious intention of the party using them. "The word 'unmarried' (and any equivalent expression, of course) is a flexible term, and the meaning is to be ascertained, not by any strict rule applied to the term itself, but according to the sense of it where the word is used." *Maughan v. Vincent,* 9 L. J. (1840-41) Equity, 329 (opinion by *Lord Cottenham*). These words were there given the other meaning, that is, "a dying not then being in a state of (119) marriage," because to give it the ordinary meaning of never having been married would exclude the heir in favor of the ulterior devisee, who was the husband. It was held, though, in *Mertens v. Walley* (sub. nom. *In re Sergeant*), L. R. 26, ch. 575, decided in 1884: "Al-

though the word 'unmarried' is one of flexible meaning, and may mean either 'never having been married' or 'not having a husband,' at the time when a gift is to take effect, the former is the primary or natural meaning, and in the absence of any context showing a different intention, the word will be so construed." The word "unmarried," or its equivalent, was also held, in *Dalrymple v. Hall,* L. R., 16, Ch. (1880-81), p. 715, to mean "never having been married," according to the ordinary and primary sense of the term, and in the absence of context showing a contrary intention, "and the gift to the children of testator's brother, therefore, did not take effect." See Underhill on Wills, sec. 478. The authorities show that the courts have been influenced largely by the particular circumstances of the case and the terms in which the intention of the testator is expressed. Further reference may, therefore, be made to those cases as indicating a clear drift of sentiment towards our conclusion, although in some of them the other meaning was given to the words, because of qualifying words, such as "a dying without being married or leaving children." *Maberly v. Strode,* 3 Vesey, Jr., 450 (30 English Reports, Full Reprint, 1100); *In re Norman's Trust,* 3 De G., McN. & G., star p. 965; *Bell v. Phyn,* 7 Vesey, Jr., 435; *Wilson v. Bayly,* 3 Brown H. of L., 195 (1 Eng. Rep., Full Reprint, 1265).

In *Pinbury v. Elkin,* 1 Peere Wms., 564 (24 Eng. Reports, 518), the *Lord Chancellor (Park)* said the words "dying without issue" had several senses. Our case falls under the second of these, which is:

"Second. Another sense of dying without issue was, if the party died without ever having had issue, and that was the sense put upon these words in the case of *Brett v. Pildridge,* cited in 1 Sid., 102, and in 1 Keb., 248, 462, where a man gave a portion with his daughter (120) in marriage, and the husband covenanted with the father-in-law to repay him £500 part of the portion, if the daughter should die without issue within two years after the marriage; the daughter had issue within two years, but she, and afterwards her issue, died without issue in the two years; and the case coming on in chancery was referred to the opinion of four judges, who all held that the father should not have any of the portion back again, in regard there *once* had been an issue of the marriage. *Bell v. Phyn,* 7 Ves., 453."

We need not stop to consider whether the word "and" in the phrase, "should die without marriage and children," should be construed as a copulative or disjunctive conjunction, as in *Bell v. Phyn, supra,* for here both events have taken place, as the daughter, Carrie F. Isler, was married and had children, one of whom has attained to full age.

But there are other important rules of interpretation that should be applied to ascertain the real intention. The first taker in a will is pre-

sumably the favorite of the testator. *Rowalt v. Ulrich,* 23 Pa., 388; *Appeal by McFarland,* 37 *ibid.,* 300, and in doubtful cases the gift is to be construed so as to make it as effectual to him as possible or as the language will warrant. *Wilson v. McKeethan,* 53 *ibid.,* 79. And, too, the law favors the early vesting of an estate, to the end that property may be kept in the channels of commerce. Underhill on Wills, sec. 861; *Hilliard v. Kearney,* 45 N. C., 221; *Galloway v. Carter,* 100 N. C., 111, and cases there cited. "No future or executory limitation will be regarded as contingent which may, consistently with the intention of the testator gathered from the whole will, be deemed vested." Underhill on Wills, sec. 861.

If we construe this will according to these rules, we find that the testator favored his daughter and her children in preference to his son, as to particular property, and his first solicitation was for them and their interests. He therefore provided for an early vesting of their interests, when his daughter should marry and have children, and as soon as they (meaning, of course, one or more of them) should become of full age. These two events happened, and the limitation over is made to depend, not upon the situation at her death, whether married or (121) a widow, or then having children, but upon the prior happening of the two contingent events. If we should hold that there must be children of age at the death of their mother, it would altogether exclude them from the testator's bounty, if those left were under age at that time, in favor of his son, William B. Isler, who had already been fully provided for in other parts of the will. These facts show conclusively that the testator intended that the estate should absolutely vest in his daughter and her children as soon as there was a child of full age. This interpretation agrees with the rules, that there should be an early vesting of the estate; that the testator is not presumed to intend a disinheritance of a part of his heirs, the first objects of his bounty, by a contingent limitation, especially in favor of another, for whom, it seems, ample provision is made by the will. This is most in accordance with the intention, to be collected from the whole will, and is evidently what the testator really meant. It was the failure of the particular events described in the first limitation that was to render effectual the second or ulterior one. It was held in *Chrystie v. Phyfe,* 19 N. Y., 351, "that terms used in making a mere substitutional disposition of an estate should not be applied so as to alter what is before clearly expressed in reference to the same matter."

The persons interested in this vested estate have been made parties. If there were any contingent interests among those first designated as beneficiaries, excluding the ulterior devisees, the sale under the judicial

proceeding would pass a good title, under the doctrine of class representation and the acts of 1903, ch. 99; Revisal, secs. 1590, 1591. *Springs v. Scott,* 132 N. C., 563; *Anderson v. Wilkins,* 142 N. C., 159; *Trust Co. v. Nicholson,* 162 N. C., 257.

We conclude that the judgment was correct and that the defendants must comply with the same.

Affirmed.

Cited: Bullock v. Oil Co., 165 N. C., 68; *Bank v. Johnson,* 168 N. C., 309.

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(122)

STATE EX REL. J. P. ECHERD v. C. G. VIELE.

(Filed 10 December, 1913.)

1. Quo Warranto—Attorney-General — Consent — Trials — Correspondence—Evidence—Questions for Court.

A letter received, in due course of mail, from the addressee in reply to a letter mailed to him, is *prima facie* evidence, without further proof, of the genuineness of the letter so received; and where a relator, through his attorney, in *quo warranto,* has mailed a letter to the Attorney-General for authority to bring the action, a letter received by mail in reply, apparently from the Attorney-General, granting the request, is evidence sufficient that such consent had been duly obtained, and presents a question of fact for the court.

2. Quo Warranto—Election—Returns—Trials—Evidence—Prima Facie Case.

In an action of *quo warranto,* impeaching the result of an election to the office contested, the return of the poll-holders of the result is *prima facie* evidence of its correctness.

3. Elections—Quo Warranto—Electors—Qualification—Registration—Poll Tax—Interpretation of Statutes.

In an action of *quo warranto* in which the title to a municipal office depends upon the result of an election held therein, it is competent to show that certain votes for the relator were cast by persons disqualified by nonresidence, and that others cast against him were by persons who were ineligible for nonpayment of poll tax, required for valid registration by Revisal, sec. 2949, though these voters had been admitted to registration after challenge.

4. *Quære:* Whether the General Assembly must require the same qualifications for municipal suffrage as for electors in State and county elections.

ECHERD *v.* VIELE.

APPEAL by defendant from *Cline, J.,* at Fall Term, 1913, of ALEXANDER.

A. C. Payne for plaintiff.
J. H. Burke and L. C. Caldwell for defendant.

CLARK, C. J. This is a *quo warranto* for the office of mayor of the town of Taylorsville.

The first exception is to the admission of the paper purporting to be authority given by the Attorney-General to the relator to bring this action, and purports to be signed by the Attorney-General. The relator by his attorney placed in the post-office at Taylorsville (123) a letter addressed to the Attorney-General of the State, asking for permission to bring this action, together with the requisite bond, and received in due course of mail the permit with what purported to be the signature of that office attached. Though he does not testify that the signature is genuine, he testifies to the above facts. In *McConkey v. Gaylord,* 46 N. C., 94, it is held: "A letter received in due course of mail purporting to be written by a person in answer to another letter proved to have been sent him is *prima facie* genuine, and is admissible in evidence without proof of the handwriting or other proof of its authenticity." There being no evidence to the contrary, the court properly admitted the paper. There was not properly an issue for the jury. But they have found that the permit was genuine. It was a "question of fact" for the determination of the court. There is no error, however, as the court by its judgment adopted the finding of the jury.

The returns of the poll-holders showed 49 votes cast for the relator and 51 for the defendant. This action is brought to impeach this result, which is *prima facie* correct.

It was shown that 1 vote cast for the relator was by a party living outside of the town limits. This was properly disallowed, leaving 48 votes for the relator. The relator was permitted to prove that a certain number of voters, more than enough to change the result, though registered, had not paid their poll tax for the year ending 1 May, 1913, the election having taken place 6 May, 1913, and he showed by these voters and others that the ballots of the parties named who were between 21 and 50 years of age and had not paid their poll tax were cast for the defendant, and were allowed to vote, though challenged.

The defendant excepted (1) That the plaintiff was allowed to show how these parties voted. This exception does not require discussion. (2) That the Constitution does not require that voters in a municipal election shall be qualified voters of the State and county, nor is this

(124) required by any statute, and hence it was not necessary that these voters should have paid the poll tax.

It is not necessary to the decision of this case to pass on the power of the General Assembly to require different qualifications for electors in municipal elections from those required in State and county elections, and the question is too important to be decided without the most careful consideration. In point of fact, the General Assembly has prescribed for city and county elections the following:

"Rev., 2949. *Registration of voters.* It shall be the duty of the board of commissioners of every city and town to cause a registration to be made of all the qualified voters residing therein, under the *rules and regulations* prescribed for the registration of *voters for general elections.*"

From this it will be seen that the General Assembly has prescribed for municipal suffrage the same rules and regulations as for voters for general elections, and that under the statute voters at municipal elections must have the same qualifications as are required in general elections, *i. e.,* in elections for State and county. Among these qualifications is the payment of the poll tax.

The defendant further contends that the voters having been registered, it is not competent to show that they were not qualified voters. This point was discussed and settled in *Pace v. Raleigh,* 140 N. C., 65, in which it was held that where it was required that a petition should be signed by "one-third of the registered voters therein who were registered for the preceding municipal election to order an election," only those persons were entitled to sign the petition who, besides being lawfully registered, also possessed the necessary qualification of having paid the poll tax (if liable to poll tax). If, notwithstanding being registered, it could be inquired into upon the petition for an election whether they were qualified to register, it follows that upon an inquiry as to the true result of an election, it can be ascertained whether voters, notwithstanding their being registered, were qualified to register.

In *Pace v. Raleigh, supra,* the Court said that each person must not only be a *"registered* voter," but also "a registered *voter.*"

(125) The jury having found that a sufficient number of the registered voters to change the result had cast their ballots for the defendant, who had not paid the poll tax, though liable to such tax, 1 May, 1913, it is unnecessary to consider the other exceptions.

The verdict of the jury in favor of the relator and the judgment thereon in his favor must be sustained.

No error.

E. C. ARMSTRONG v. J. M. KINSELL AND NATIONAL BANK OF NEW BERN.

(Filed 10 December, 1913.)

1. Injunctions — Distinctions Abolished — Code Practice — Interpretation of Statutes.

Under our Code practice the difference between special and common injunctions has been abolished, and they are ancillary to the relief sought in the action, and dependent upon service of process upon the defendant therein in accordance with the modes recognized by statute.

2. Injunctions—Bills and Notes—Banks and Banking—Nonresident Defendant—Process—Attachment.

Where the maker of a note brings his action against a nonresident payee to impeach his note upon the ground of fraud or false representations in its procurement, and seeks an injunction restraining the payee from further negotiating it, and a resident bank, where it had been deposited, from parting with its possession, it is necessary to show personal service of the summons on the nonresident defendant or his duly authorized agent, or some act of his amounting to a waiver thereof; and the issuance of the restraining order on the bank, depending upon proper service of process on the payee, will likewise be dismissed where a special appearance has been entered for that purpose, and there has been no service or waiver of process by the nonresident defendant. The remedy is by attachment of the note in the hands of the bank, under the provisions of Revisal, sec. 777, and publication of notice to the nonresident defendant based thereon. *Bernhardt v. Brown*, 118 N. C., 701, cited and applied.

APPEAL by plaintiff from *Whedbee, J.*, at October Term, 1913, (126) of CRAVEN.

Ernest M. Green for plaintiff.
Charles R. Thomas for defendants.

CLARK, C. J. The plaintiff executed to defendant Kinsell two notes for $400 each, payable at the National Bank of New Bern, respectively, on 3 January, 1914, and 3 September, 1914, for the balance due on purchase of a "merry-go-round" on which he had made a cash payment. These notes were deposited with the defendant bank for collection. On arrival of the machine, being dissatisfied with its condition, the plaintiff brought this action, alleging false representation and breach of warranty and asking damages to the extent of the balance of the purchase money and an injunction against the defendant Kinsell from negotiating or transferring said notes and against the bank to prevent its parting with the custody thereof until the further orders of the court.

The defendant Kinsell entered a special appearance and asked to dismiss the action and to vacate and dissolve the restraining order,

upon the ground that there had been no personal service of the summons upon him and no appearance, or acceptance of service, and asking that the injunction be dissolved and that the action be dismissed.

Under the system of procedure prior to the adoption of The Code, injunctions were special or common. The former was where the injunction itself was the relief sought, while a common injunction was an ancillary proceeding; but under The Code all injunctions are simply ancillary proceedings and cannot issue except when there is an action pending in court, in which jurisdiction has been obtained in one of the modes recognized by the statute. These are fully discussed and distinguished in *Bernhardt v. Brown,* 118 N. C., 701. They are:

(1) Personal service, or, in lieu thereof, acceptance of service or a waiver by appearance.

(2) Proceedings *in rem,* in which the court already has jurisdiction of the *res* as to enforce some lien or a partition of property in its control, and the like. In these cases publication of the summons or notice may be made, but the judgment has no personal force, not even for
(127) the costs, being limited to acting upon the property.

(3) Proceedings *quasi in rem,* in which cases the court acquires jurisdiction by attaching property of a nonresident or of an absconding debtor (*Winfree v. Bagley,* 102 N. C., 515), and in similar cases, and the judgment has no effect beyond the enforcement of the judgment out of the property seized by the attachment. In such cases publication of the summons or notice may be made based upon the jurisdiction of the property attached. Revisal, 442 and 442 (3); *Grocery Co. v. Bag Co.,* 142 N. C., 174.

Proceedings in divorce are *sui generis,* as the judgment therein merely declares a personal status, and publication of the summons is allowed without the acquisition of jurisdiction by attachment of property, where the defendant is a nonresident, the court having jurisdiction of the person of the plaintiff.

The distinction between the above proceedings or methods of bringing parties into court is fully pointed out in *Bernhardt v. Brown, supra,* p. 706, with citation of authorities: *Pennoyer v. Neff,* 95 U. S., 714; *Winfree v. Bagley,* 102 N. C., 515; *Long v. Insurance Co.,* 114 N. C., 465; *Heilbetter v. Oil Co.,* 112 U. S., 294. *Bernhardt v. Brown* has been repeatedly cited; see Anno. Ed.

In this case there was no personal service on the defendant Kinsell nor acceptance of service nor waiver thereof by an appearance. He entered a special appearance and asked to dissolve the injunction and dismiss the proceeding. This is not a proceeding *in rem* to enforce any lien upon the property or to make partition thereof. Nor has jurisdic-

tion been acquired as in a proceeding *quasi in rem,* because there has been no attachment issued and levied. An injunction granted before the issuing of a summons is irregular and will be vacated on motion. *McArthur v. McEachin,* 64 N. C., 72; *Hirsh v. Whitehead,* 65 N. C., 516. For a stronger reason, it must be vacated when no summons has been served on Kinsell and jurisdiction has not been acquired either by attachment or by the court being in control of the *res.*

The injunction, therefore, was properly dismissed as to Kinsell (128) and also as to the bank, because as to the latter no cause of action was stated in the absence of the defendant Kinsell. We see no advantage to the plaintiff in an injunction against the bank nor even as against Kinsell, which cannot be had by the attachment when procured. Moreover, an injunction as to a nonresident is improvident, for it can have no effect—usually, at least—except *in personam. Warlick v. Reynolds,* 151 N. C., 606.

Jurisdiction can be acquired as to Kinsell by the service of an attachment upon the notes (Revisal, 777) and the publication of a *notice* based on the jurisdiction thus acquired. *Best v. Mortgage Co.,* 128 N. C., 351; *Grocery Co. v. Bag Co.,* 142 N. C., 180. In *Winfree v. Bagley,* 102 N. C., 515, it is held in a well considered opinion by *Shepherd, J.,* that "'*a chose in action is property,* and embraced in the terms of The Code which provides for service by publication' when the defendant is not a resident of the State, but has property therein." That case has been repeatedly cited since. See Anno. Ed.

In this case there was no publication of notice nor acquirement of jurisdiction by attachment of the notes. The plaintiff did not ask to amend his proceeding by making the attachment and publication, and the judgment below dismissing the action is

Affirmed.

A. S. REES ET AL. v. MRS. CHARLOTTE GRIMES WILLIAMS.

(Filed 10 December, 1913.)

Estates—Contingent Limitations—Deeds and Conveyances.

A devise of land to L. with limitation that if she "shall die leaving issue surviving her, then to such issue and their heirs forever," but if she "shall die without issue surviving her, then the property to return to my eldest daughter": *Held,* the vesting of the estate in remainder depended upon the contingency of the death of L. without leaving "issue" surviving her, and not upon the death of the testatrix (Revisal, sec. 1581); hence, during the lifetime of L. indefeasible title could not be conveyed, for should L. die leaving issue, the title would vest in them.

(129) APPEAL by defendant from *Cooke, J.*, at November Term, 1913, of WAKE.

This is a controversy without action, submitted upon the following facts:

1. Several years ago Mrs. Jennie L. Lee, mother of the female plaintiffs, and of Harry Lee, the other plaintiff, died leaving a last will and testament, which reads as follows, to wit:

WILMETTE, ILLINOIS, 30 June, 1905.

Know all men by these presents, I, Jennie Lind Lee, a citizen of the United State of America, residing at present in Wilmette, Illinois, do declare this to be my will and testament.

First. I hereby revoke and annul all wills and codicils by me heretofore made.

My house and lot situated on corner of East and Jones street in Raleigh, N. C., I leave to my daughter Jennie Lee; also $1,000 worth of stock at present invested in the Gibson Manufacturing Company of Concord, N. C.

In case my daughter Jennie Lee shall die leaving issue surviving her, then to such issue and their heirs forever; but if my said daughter Jennie Lee shall die without issue surviving her, then I desire said property to return to my eldest daughter, May Lee Schlesinger, and to my son, Harry Lee, to be equally divided between them, or to their heirs, share and share alike.

I bequeath my stock in the Commercial and Farmers Bank in Raleigh, N. C., to be equally divided between my daughter May Lee Schlesinger and my son Harry Lee.

I also bequeath the sum of $25, and this sum to be taken from the interest of said properties and to be paid over by my executor as he thinks best, to a colored man called John, who waited on my husband during his last illness.

I appoint Mr. Henry E. Litchford as my executor of this will, and with the power to change the investments if he thinks best for the interest of my children; also appoint Mr. Henry E. Litchfield guardian of my daughter Jennie Lee.

My son Harry Lee is not to have control of his stock, only to
(130) spend the interest on it, until he is 35 years old, and then said stock is to be turned over to him, if he so desires it.

JENNIE L. LEE. [SEAL]

Witnesses:

SIGMUND L. STRAUSS, Chicago, Ill.

HOWARD H. HITCHCOCK, Wilmette, Ill.

This will was duly admitted to probate and of record in Wake County, 13 April, 1906.

2. The plaintiff, Jennie Lee Rees, who has intermarried with A. S. Rees, is one of the devisees mentioned in said will, and said Harry Lee, also called Joseph Harry Lee, and Mary Lee Schlesinger, are the other devisees mentioned in said will.

3. The said Jennie Lee Rees and A. S. Rees have no issue now and never have had any. B. F. Schlesinger is the husband of Mary Lee Schlesinger, and Harry Lee is married, but he and his wife have separated and have lived separate and apart for some years.

4. The $25 bequeathed to John has been paid, and the stock in the Commercial and Farmers Bank of Raleigh has been sold and the proceeds divided under said will between Harry Lee and May Lee Schlesinger, said proceeds amounting to several thousand dollars.

5. The plaintiffs have agreed to sell the house and lot mentioned in said will on the corner of East and Jones street in Raleigh, North Carolina, to the defendant, Mrs. Williams, for $7,500, which is a fair and adequate price for said lot; but the said defendant refuses to take the said property at said price, because she fears that a deed executed to her and her heirs in due form by all the plaintiffs is not sufficient to give her a fee-simple title. The said purchaser had been advised that there is doubt as to whether the said plaintiff, Jennie Lee Rees, has a fee simple, and whether she, together with Harry Lee and May Schlesinger and her husband, can convey a fee simple, and therefore defendant refuses to take said deed.

6. The plaintiffs have executed a deed to the said lot to the defendant, it being in due form and in fee simple, with the usual covenants of warranty, and it has been deposited with the clerk for delivery when the said sum of $7,500 is paid, a copy being attached (131) hereto, marked Exhibit "A," and prayed to be taken as a part hereof.

His Honor held that the deed of the plaintiffs was sufficient to convey a valid title, and rendered judgment in favor of the plaintiffs, and the defendant excepted and appealed.

Winston & Biggs for plaintiffs.
Ernest Haywood for defendant.

ALLEN, J. The determination of this appeal depends upon the construction of the will under which the plaintiffs claim, in which the land in controversy is devised to the plaintff, Jennie Lee, now Rees, with the limitation that if she "shall die leaving issue surviving her, then

to such issue and their heirs forever," but if she "shall die without issue surviving her," then the property "to return to my eldest daughter," etc.

Do the words "die leaving issue" and "die without issue" refer to the death of the devisee in the lifetime of the testatrix, or to the time when the devisee dies, whether before or after the testatrix? Did the testatrix intend to say, I give this property to my daughter; but if she dies before I do, leaving issue, I give it to them; and if she die before I do, without issue, I give it to my eldest daughter, etc? or did she intend to give it to her, and if at her death she left issue, then to them, and if no issue, then to the eldest daughter?

The plaintiffs contend that the first is the correct construction, and that as the devisee has survived the testatrix, she is the owner of the property in fee.

The older authorities fully sustain the position of the plaintiffs, and a large number of them are collected and discussed in *Buchanan v. Buchanan,* 99 N. C., 311, where the reason for the rule is stated to be that as the limitation is upon an indefinite failure of issue, it is void for remoteness; but since the statute of 1827, now Revisal, sec. 1581, the rule is otherwise.

That statute privides that, "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or (132) without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person shall die, not having such heir, or issue, or child or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: *Provided,* that the rule of construction contained in this section shall not extend to any deed or will made and executed before 15 January, 1828."

Following this statute, it has been held in several cases, as was said by *Justice Hoke* in *Harrell v. Hagan,* 147 N. C., 113, that "the event by which the interest of each is to be determined must be referred, not to the death of the devisor, but to that of the several takers of the estate in remainder, respectively, without leaving a lawful heir. *Kornegay v. Morris,* 122 N. C., 199; *Williams v. Lewis,* 100 N. C., 142; *Buchanan v. Buchanan,* 99 N. C., 308," and this language was approved in *Perrett v. Bird,* 152 N. C., 220, and *Smith v. Lumber Co.,* 155 N. C., 389.

It appears, therefore, to be established that since the act of 1827 it cannot be determined who will take under the limitation until the death

of Jennie Lee Rees, and that if she should die leaving issue, they would be the owners of the property devised, and as they would not be bound by the deed tendered, it does not pass an indefeasible title.

If the defendant should accept the deed and Mrs. Rees should die leaving issue, the issue could defeat the deed and recover the land under the limitations in the will.

Reversed.

Cited: S. c., 165 N. C., 201; *Burden v. Lipsitz,* 166 N. C., 525; *Hobgood v. Hobgood,* 169 N. C., 489; *O'Neal v. Borders,* 170 N. C., 484.

IN RE WILL OF A. A. SHUFORD.

(Filed 13 December, 1913.)

1. Wills—Widow's Dissent—Qualification as Executrix—Right Not Barred, When.

A widow named in her husband's will as executrix with other executors, who has qualified, but received no benefits made under the provisions of the will, and who has acted under the advice of her son-in-law, an attorney, and with the assurance of the beneficiaries competent to make them, that she would be further provided for than the will directs, and by her coexecutors that they would use their best endeavors to procure a more adequate provision for her, is not barred of her right to dissent from the will within six months from the time it had been ascertained that this further provision could not be made; and the position of the executors, that they would not be protected from the claims of minor beneficiaries, under the circumstances in this case, is held a correct one.

2. Wills—Bequests—Vested Interest—Husband and Wife.

A bequest for the annual payment of a sum of money to a daughter of a testator, the beneficiary dying after the testator's death, leaving a husband and children, but no will, is held to vest the interest in the child named, and at her death the payment should be made to the husband.

APPEAL by executors of will from *Cline, J.,* at October Term, (133) 1912, of CATAWBA.

W. A. Self for executors.
Councill & Yount for Gordon Cilley.
B. B. Blackwelder for children.

CLARK, C. J. This case was submitted upon facts agreed, upon three propositions:

1. Whether the widow was estopped to dissent from the will on 2 November, 1912, because she had qualified as executrix on 11 May, 1912. It is agreed as a fact that immediately prior to her qualification she advised with her son-in-law, who was an attorney at law, and was advised by him and also by her son, a reputable business man, that by arrangement among the devisees a further and more adequate provision would be made for her than that in the will, and that if it was not done she would have a period of six months in which to make
(134) her election to dissent, and that just previous to her qualification she told the other executors that the amount provided for her support and maintenance in the will was insufficient, and that they assured her that they would use their best endeavors to procure a more adequate provision to be made for her, and that believing that this would be done, she qualified as administratrix; that since her qualification she has declined to accept the specific bequest made to her under the will, and in the management of the estate she has gone no further than to attend the meeting of the executors, discussing the affairs of the estate and signing certain checks for the disbursement of money for the estate. All the children now living have signed an agreement to increase the allowance of $2,000 per year to her, which is provided in the will, to $3,500 per year, but she is advised that said agreement is insufficient in law to protect the executors in making such additional provision for her, and it has been so held in this proceeding.

The widow having qualified as executrix, relying upon the advice of her son and son-in-law, the latter a member of the bar in active practice, and upon an assurance of the other executors by which she was led to believe that adequate provision would be made for her, which indeed the living children have endeavored to do, we think she was entitled to enter her dissent, notwithstanding her qualification, which she has done within the six months prescribed by the statute, upon finding that the assent of the living children would not be a protection to the executors in paying out the additional provision. *Richardson v. Justice,* 125 N. C., 410. In *Simonton v. Houston,* 78 N. C., 408, the widow was allowed to claim her dower sixteen months after her qualification as an administratrix, because she had not been aware that the estate was insolvent when she qualified. This last, it is true, was a very unusual case.

2. Under the third item of the will it was directed that $1,000 a year should be paid by the executors to each of testator's children annually during the lifetime of his wife. One of said children, Maud E. Cilley, has since died, leaving a husband and two children. The court properly held that this legacy was vested (*Guyther v. Taylor,*
(135) 38 N. C., 323; *Green v. Green,* 86 N. C., 546), and hence at her

death, intestate, the payment should be made to her husband (Revisal, 4; *In re Mayers,* 113 N. C., 545; *Neill v. Wilson,* 146 N. C., 245); subject in his hands, of course, to the payment of the debts of his wife, if any. *Bank v. Gilmer,* 116 N. C., 701; *Whitaker v. Hamilton,* 126 N. C., 468.

3. The paper-writing signed by all the living children, agreeing that the allowance of $2,000 in the will should be increased to $3,500 annually, was properly held "insufficient in law to empower the executors to change the directions of the testator in section 2 of his will, in which he directed $2,000 a year to be paid her in lieu of her dower and distributive share." There is, besides, no appeal as to this point, which is in favor of the executors, who are the sole appellants in the record.

The judgment is, therefore,

Affirmed.

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(136)

A. P. SMITH v. D. D. WILKINS.

(Filed 3 December, 1913.)

1. Taxation—Trade Tax—Peddlers.

The Legislature has the power to tax trades, which are defined to be a tax upon "any employment or business embarked in for gain or profit," and includes within the definition the tax upon peddlers imposed by section 44, ch. 201, Public Laws 1913.

2. Same—Classification—Legislative Powers—Constitutional Law.

In taxing trades the Legislature may divide them into several classes, with different rates of taxation, subject to the limitation that the difference in the various rates shall be reasonable and each rate uniformly applicable to its respective class, the reasonableness of the classifications, with their respective rates, being largely left to legislative discretion; and in the exercise of this discretion it is not required that all trades be taxed, but the Legislature may tax some of them and refuse to tax others.

3. Same Courts.

The power of the Legislature to provide regulations determining the different classes of trades and imposing a different tax on each class will not be interfered with unless utterly unreasonably exercised, and while the courts will interfere when this power has been exceeded, every presumption is in favor of its proper exercise, and the courts will not otherwise declare except in extreme cases and from necessity.

4. Taxation—Peddlers—Reasonable Classification.

It is held that the difference in classification of peddlers by section 44, chapter 201, Public Laws 1913, between those on foot and with vehicles

those selling proprietary medicines with free attractions and those without, etc., furnish reasonable grounds for the classifications made, and the several rates of taxation prescribed by the statute.

5. Taxation—Classification—Uniformity—Exemptions—Constitutional Law.

The Legislature having the power to tax trades, preserving the uniformity of classification, and to omit some of them, it is held that section 44, chapter 201, Public Laws 1913, exempting or excepting those engaged in the sale of books, etc., or those exchanging woolen goods for wool, is a valid exercise of the legislative discretion.

6. Same—Drummers.

Drummers selling by wholesale do not come within the definition of the word "peddler," and hence would not be required to pay the peddler's tax prescribed by section 44, chapter 201, Public Laws 1913, should they not have been expressly excepted from its provisions.

7. Constitutional Law—Legislative Acts—Void in Part—Intent—Interpretation of Statutes.

An act of the Legislature taxing trades will not be declared invalid by the Court because it exceeded its power in excluding trades of a certain class, unless it is evident from its subject-matter that the Legislature intended it to be construed only as a whole. Hence, section 44 is not construed as unconstitutional because it exempts from the peddler's tax, in the discretion of the board of county commissioners, "any poor and infirm person," and expressly exempts Confederate soldiers and blind residents of the State, if it be conceded that such exemptions would, as far as beneficial to the class of persons named, be unconstitutional.

8. Taxation—Exemptions—County Commissioners—Discretion—Constitutional Law.

It is held in this case that the discretion vested in the county commissioners to exempt from the peddler's tax the "poor and infirm" is necessary to the administration of statutes like section 44, chapter 201, Public Laws 1913, and will not be interfered with unless arbitrarily exercised; and that the plaintiff having received his license, could not complain if it were otherwise.

9. Commerce—Shipments in Bulk—Separate Packages—Taxation—Peddlers—Constitutional Law.

Where separate articles are shipped into this State in larger packages, they are not the subject of interstate commerce after the bulk has been broken here for distribution; and a peddler's tax imposed upon a person thus selling these separate articles which have in this manner been shipped to him from beyond the State is not an interference with the commerce clause of the Federal Constitution.

(137) APPEAL by plaintiff from *Webb, J.*, at July Term, 1913, of CLEVELAND.

This is a controversy without action, submitted on an agreed statement of facts, and involving the validity of the peddlers' license statute, section 44 of the Revenue Act, chapter 201, Public Laws 1913.

The plaintiff paid the tax under protest, and has brought this action against the sheriff to recover the amount paid.

The statement of facts shows that the plaintiff is engaged in Cleveland County in the business of selling proprietary medicines manufactured by the W. T. Rawleigh Medical Company, of Freeport, Ill. The goods are put up by the manufacturer in small bottles and packages for use, as is usual in the case of proprietary articles, and shipped in bulk to the plaintiff, who opens the packages and sells the small bottles and packages direct to his customers, traveling from place to place.

A correct analysis of the statute is given in plaintiff's brief as follows:

"First. Those who travel on foot, $25.

"Second. Each peddler with horse, ox, or mule, with or without vehicle, or with a vehicle propelled by any other power, $75.

"Third. Peddlers of medical and proprietary medicines, whether on foot or with a horse, mule, or ox, with or without a vehicle, or with a vehicle propelled by any other power, and no fee or paid (138) attraction, $100.

"Fourth. Those who peddle medicinal and proprietary preparations who have free or paid attractions, $150.

"Fifth. Every itinerant salesman who exposes for sale upon the street or in a house rented temporarily for that purpose, goods, wares, or merchandise, whether as principal or for another person, $100.

"Sixth. Each person other than a *bona fide* citizen of the county who shall expose for sale goods, wares, or merchandise in any building rented for such purpose for a period of less than one year shall be liable to the tax herein imposed upon itinerant dealers: *Provided, however,* that this sum shall be refunded to him if he continues to do business in the county for a period of one year."

Exemptions or exceptions in the section:

"First. It provides that 'this section shall not apply to those who sell or offer for sale books, periodicals, printed music, ice, fuel, fish, vegetables, fruits, or any article of the farm or dairy, or any article of their own individual manufacture, except medicines or drugs.'

"Second. The board of county commissioners shall have power, at their discretion, to exempt from tax under this section 'any poor and infirm person.'

"Third. And 'shall exempt Confederate soldiers, and such license shall be good in any county in the State.'

"Fourth. *Provided,* this section shall not apply to persons, or their agents, engaged in exchanging woolen goods for wool.

"Sixth. To *bona fide* residents who are blind."

The plaintiff contends that the statute is void, in that:

1. The various classifications of peddlers made in said section are unjust, without reasonable grounds therefor, and are arbitrary selections made, whereby the plaintiff in this case was required to pay a prohibitive license fee for doing a legitimate business.

2. That the exceptions made whereby certain persons were (139) relieved from the payment of said license fee are unconstitutional, in that they grant special privileges to persons engaged in the business of peddling, thereby relieving them of the burden of paying a license fee for peddling without any just or reasonable grounds therefor.

3. Sections 44 and 89, when enforced together, are unconstitutional and void, because they authorize the county commissioners of the various counties of the State to levy a peddler's license tax, in their discretion, of $100 for the State and $100 for the county, which said sum of $200 is excessive, confiscatory, prohibitive, and not warranted by the Constitution of the State of North Carolina as a revenue measure or as a police measure.

4. Said section is unconstitutional and void in that it delegates to the county commissioners of the various counties of the State power in their discretion to issue the license upon payment of the tax to the sheriff, as this clause in said section is obnoxious to the limitations on the legislative power contained in the Constitution of the State of North Carolna.

5. Sections 44 and 89, when enforced together, are unconstitutional and void as repugnant to that part of section 8, Article I of the Constitution of the United States, known as the "Commerce Clause," because said sections when so enforced together permit the commissioners of the various counties of the State of North Carolina to levy a peddler's license tax so high that it operates directly in restraint of trade; and the plaintiff in this case, A. P. Smith, charges that the sum of $200 levied upon him as a peddler's license tax by the commissioners of Cleveland County, North Carolina, is so excessive, prohibitive, and confiscatory that it restrains him from carrying on his business, which is the sale, in original packages, direct to the customer, of goods manufactured by the W. T. Rawleigh Medical Company of Freeport, Illinois, in compliance with the pure food and drug laws of the United States, and shipped to him in unbroken packages, in accordance with the intestate commerce laws of the United States.

Judgment was rendered in favor of the defendant, and the (140) plaintiff excepted and appealed.

John A. Barnes and Ryburn & Hoey for plaintiff.

D. Z. Newton and T. H. Calvert, Assistant Attorney-General, for defendant.

ALLEN, J. In *S. v. Worth,* 116 N. C., 1010, the Court defines the term "trades" as including "any employment or business embarked in for gain or profit," and while the Constitution, Art. V, sec. 3, is mandatory upon the General Assembly to levy a tax upon all *property* and by a *uniform rule,* the authority to tax trades is permissive only, and no rule as to the method is prescribed.

It has, however, been held that the rule of uniformity applies to the tax on trades, but only to the extent that it must be equal upon all persons belonging to the class upon which it is imposed. *Gatlin v. Tarboro,* 78 N. C., 122; *Lacy v. Packing Co.,* 134 N. C., 571.

The Legislature can lay a franchise or license tax on some callings, and it will not be illegal because some other occupations are not taxed. It can lay a fixed tax on some occupations and graduate the tax on others by the volume of business, or in any other mode it may deem fit. *Cobb v. Commissioners,* 122 N. C., 307; *S. v. Stevenson,* 109 N. C., 730; *S. v. Carter,* 129 N. C., 560; *S. v. French,* 109 N. C., 722; *Albertson v. Wallace,* 81 N. C., 479.

It is within the legislative power to define the different classes upon which license taxes are to be levied, and fix the tax required of each class. All the licensee can demand is that he shall not be taxed at a different rate from others in the same occupation, as "classified" by legislative enactment. *S. v. Stevenson,* 109 N. C., 730; *Rosenbaum v. New Bern,* 118 N. C., 83, holding that a separate license tax may be imposed on merchants and those dealing in second-hand clothing; *Schaull v. Charlotte,* 118 N. C., 733, holding brokers and pawnbrokers different classes upon which distinct license taxes may be imposed. Connor and Cheshire, p. 270.

Varying amounts may be assessed upon vocations or employments of different kinds (*Worth v. R. R.,* 89 N. C., 291; *S. v.* (141) *Worth,* 116 N. C., 1007), and the Legislature may make selection and is not required to tax all trades. *Lacy v. Packing Co.,* 134 N. C., 571.

The tax levied is presumed to be reasonable, and its reasonableness is usually within the discretion of the General Assembly. *S. v. Danenberg,* 151 N. C., 721.

Many illustrations of the exercise of this power in this State will be found in Connor and Cheshire on the Constitution, 263.

In *R. R. v. Matthews,* 174 U. S., 106, the Court, after recognizing the right to classify, says: "It is the essence of classification that upon the class are cast duties and burdens different from those resting upon the general public. The very idea of classification is inequality, so that it goes without saying that the fact of inequity in no manner determines the matter of constitutionality."

It was held in *Life Association v. Mutter,* 185 U. S., 327, that placing life companies in a different class from mutual benefit associations was not arbitrary and rested on sufficient reason, and in *Field v. Asphalt Co.,* 194 U. S., that it was not the purpose of the fourteenth amendment to prevent the States from classifying the subjects of taxation.

In the *Kentucky Railroad Tax case,* 115 U. S., 337, the Court said, in sustaining a classification of property: "There is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires that the same means and methods be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascer-
(142) tained.

It is also said in *Gundling v. Chicago,* 177 U. S., 188: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be, and to what particular trade, business, or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrarily, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

It must appear, however, that the classification has been made, and it must be based on some difference which bears a just and proper relation to the attempted classification. *R. R. v. Ellis,* 165 U. S., 165; *Lacy v. Packing Co., supra; S. v. Danenberg,* 151 N. C., 718.

The rule which should guide the courts in determining whether the legislative department has transcended its powers is also well established. In Ency. U. S. S. C. Reports, vol. 4, pp. 254-5, the author cites many authorities in support of the principle that, "The theory that parties have an appeal from the Legislature to the courts, and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former, is not true. Whenever, in pursuance of an

honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any Legislature, State or Federal, and the decision necessarily rests on the competency of the Legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not. But such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of a real, earnest, and vital controversy between individuals. . . . The judicial cannot prescribe to the legislative department of the Government limitations upon the exercise of its acknowledged powers. That power has been or may be abused, or that it has not been wisely exercised, or that the measures adopted are untimely and inexpedient and not the wisest, best, or most (143) appropriate means to a desired end, is no ground for declaring them void, so long as the Legislature had the power to do what it actually did. Within the limits of its powers, its discretion is absolute and subject to no review by the courts. Courts do not sit in judgment on the wisdom of legislative or constitutional enactments. This is a general principle; but it is especially true of Federal courts when they are asked to interpose in a controversy between a State and its citizens."

We deduce from these authorities:

(1) That the plaintiff is engaged in a trade within the meaning of the Constitution.

(2) That the General Assembly has the power to tax trades.

(3) That in the exercise of this power the General Assembly is not required to tax all trades, but may tax some and refuse to tax others.

(4) That the General Assembly has the power to make classifications subject to the limitation that the tax must be equal on those in the same class, and that there must be some reason for the difference between the classes.

(5) That it has the power to provide regulations determining the different classes, and that these will not be interfered with unless utterly unreasonable.

(6) That if the General Assembly has exceeded its power, it is the duty of the courts to so declare, but that every presumption is in favor of the proper exercise of the power of the General Assembly, and the courts will not declare otherwise except in extreme cases and from necessity.

Applying these principles, we are of opinion that the differences between peddlers on foot, and with vehicles, peddlers of proprietary medicines with free attractions and those without, itinerant salesmen who expose for sale on the streets or in a house rented temporarily (144)

for that purpose, and the other salesmen mentioned, furnish reasonable grounds for the classifications made in the statute. A similar statute was considered in *Servonitz v. State,* 133 Wis., 231, where the Court gives the reasons underlying the classifications made: "No reason which appeals very strongly to our judgment is advanced why peddlers should not be classified, as in the law in question, according to their facilities for going from place to place and carrying their wares. The perils to be guarded against in respect to the occupation and the contributions that may reasonably be required to the public revenue, strongly suggest, if they do not demand, such classification. Certainly the Legislature, within the boundaries of reason, way well have thought that a person traveling about the country plying the vocation of a peddler with an equipment consisting of a span of horses and a wagon should, both as a matter of police regulation and taxation, pay a greater license fee than a person plying the same trade, but traveling about from place to place on foot. Not because the former would be more liable to be dishonest than the latter, but because of the greater opportunity and liability thereof in the one case than in the other, and the corresponding greater liability in the one case than in the other of the harm, if committed, being difficult of redress or going entirely without remedy; again, not because the person, as such, traveling with a team should be taxed more than one traveling on foot, but since the one in all reasonable probability would conduct a much greater business than the other, the tax exaction should bear some practical relation thereto."

The first and fourth exceptions or exemptions may be considered together.

Keeping in mind that the General Assembly has the power to classify, and that it is not required to tax all trades, these exceptions or exemptions amount to no more than the exercise of the power of classification.

In other words, if the General Assembly has the power to classify, based on the difference in the business engaged in, it may place proprietary medicines in one class, and books, fuel, etc., in another; it
(145) may tax one of these classes one amount and the other a different amount; or it may tax one and refuse to tax the other.

It will also be observed that no one engaged in selling the articles enumerated in these exceptions can come in competition with the plaintiff, who is licensed to sell medicinal and proprietary medicines.

The same reasoning applies to the fifth exception or exemption, and further as to this, that "drummers selling by wholesale" do not come within the definition of the term "peddler" and would not have been included if not specially exempted.

The second, third, and sixth exemptions will be considered together.

In 21 Cyc., 365, the author says: "It is generally held to be allowable to exempt from the operation of the statute certain persons who peddle their own products or manufactures, such as farmers, butchers, and manufacturers; persons under physical disability, and soldiers. So it is held to be proper for the Legislature in the enactment of such statutes to discriminate in favor of certain articles by not requiring a license to peddle them," and many cases are cited in the note to support the text; but there is also much authority to the contrary, which is referred to and discussed in the learned brief of the appellant, notably *S. v. Garbroski,* 11 Ill., 496; *S. v. Sherdoi,* 75 Vt., 277; *S. v. Whitcomb,* 122 Wis., 110, holding the exemption of Union soldiers from a peddler's tax to be void, and *Laurens v. Anderson,* 75 S. C., 62, where there is a like holding as to Confederate soldiers. But it is not necessary for us to determine the constitutionality of these provisions, as we are of opinion they are not so intimately connected with the other parts of the statute that they determine the validity of the whole, and courts, out of deference to a coördinate department of Government, always refrain from passing on a constitutional question except from necessity.

In *Riggsbee v. Durham,* 94 N. C., 800, the Court approves the doctrine stated by Judge Cooley, that "the unconstitutional do not affect the constitutional parts of a statute, 'unless all the provisions are (146) connected in the subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed that the Legislature would have passed the one without the other.' Const. Lim., 178, 215, with cases cited in notes 2 and 3."

The same principle is declared in *Supervisors v. Stanly,* 105 U. S., 312, where the Court says: "The general proposition must be conceded, that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded. In *R. R. Companies v. Schutte* (103 U. S., 118), decided at the last term, this point was pressed upon us with much earnestness, and its decision was necessary to the judgment of the Court. 'It is contended,' said the Court, 'that as the provision of the act in respect to the execution and exchange of the State bonds is unconstitutional, the one in relation to the statutory lien on the property of the company is also void and must fail. We do not so understand the law.' And yet this was a case in which the scheme of exchanging the bonds of the State for the bonds of the company, in order that the company might get the benefit of the better credit of the State, was

accompanied by a mortgage created alone by the statute in favor of the State as her security; and the Court, while holding that the exchange of bonds was void, as being in conflict with the Constitution of the State of Florida, held that the mortgage which secured the bonds of the company, and which was only a mortgage by operation of the same statute, was valid."

The Confederate soldier is entitled to consideration and recognition at the hands of the General Assembly, and of the State; but it is now nearly fifty years since the close of the war, and the gray line has grown so thin that those in it bear so small a proportion to the population of the State that we cannot think the General Assembly would have refrained from taxing all peddlers because to do otherwise might impost a tax on the few soldiers who might wish to follow the
(147) occupation of a peddler; and the same may be said of the infirm and blind.

We are also of opinion that there is no interference with the commerce clause of the Federal Constitution, as it appears from the agreed facts that the articles were shipped in large packages to the plaintiff, which were opened and the separate articles disposed of. *Machine Co. v. Gage,* 100 U. S., 675; *May v. New Orleans,* 178 U. S., 497; *Austin v. Tenn.,* 179 U. S., 352; *Cook v. Marshall,* 196 U. S., 269.

In the *Machine Company case* a Connecticut corporation, manufacturing sewing machines in that State, maintained an office in the State of Tennessee. The company sent out, for the purpose of selling or peddling machines, an agent who traveled through the country exhibiting and offering for sale the company's machines, and it was held that the agent was liable for the payment of a peddler's license tax. The distinctive fact in that case was that the agent would either sell the machine he was exhibiting or would send an order to be filled from stock in the possession of the State agency within the State of Tennessee. The machine being within the State at the time of the sale or contract of sale, the transaction was not one of interstate commerce.

In the *May case* May & Co., merchants at New Orleans, were engaged in the business of importing goods from abroad and selling them. In each box or case in which they were brought into this country there would be many packages, each of which was separately marked and wrapped. The importer sold each package separately. The city of New Orleans taxed the goods after they reached the hands of the importer (the duties having been paid) and were ready for sale. *Held,* that the box, case, or bale in which the separate parcels or bundles were placed by the foreign seller, manufacturer, or packer was to be regarded as the original package, and when it reached its destination for trade or

sale and was opened for the purpose of using or exposing to sale the separate parcels or bundles, the goods lost their distinctive character as imports and each parcel or bundle became part of the gen- (148) eral mass of property in the State and subject to local taxation.

In the *Austin case* it was held that cigarettes, put up ten to the package and shipped in a large package or basket, became the subject of State tax and regulation when the large package reached its destination, and this is approved in the *Cook case.*

The discretion vested in the commissioners is necessary in the administration of statutes like the one before us, and will not be interfered with unless exercised arbitrarily; but the plaintiff cannot complain of this feature of the statute, as license has been issued to him.

The questions presented have not been free from difficulty, but upon the whole record we are of opinion that the judgment must be affirmed.

Affirmed.

Cited: *S. v. Davis,* 171 N. C., 813.

J. W. HENSLEY v. McDOWELL FURNITURE COMPANY.

(Filed 3 December, 1913.)

1. Pleadings—Orders—Definiteness — Court's Discretion — Interpretation of Statutes.

While the trial judge is authorized in the exercise of his discretion to order that a pleading be made more definite under the provisions of the Revisal, sec. 496, he may not direct the manner in which this may be done.

2. Same—Indemnity Companies—Copies of Policies—Findings—Direction for Pleadings.

In an action to recover damages for an injury alleged to have been negligently inflicted on the defendant's employee, an indemnity company was made a codefendant and moved that the complaint be made more definite, under the provisions of the Revisal, sec. 496, and to an affidavit of its president attached a copy of a policy it alleged to have been in force at the time, and under which no recovery could be had (*Jarrett v. Trunk Co.,* 142 N. C., 466). The trial judge stated in his order that no denial was made of the truth of the affidavit, and found as a fact the copy set out was a true copy of the policy in force at the time of the injury. *Held,* an order of the judge that a copy of the policy as thus ascertained be attached to the complaint as a part thereof exceeded his authority and was reversible error on appeal therefrom, as plaintiff had the right to show what was the contract. The extent of the discretion vested in the trial judge and the manner of its exercise discussed by WALKER, J.

(149) APPEAL by plaintiff from *Justice, J.*, at September Term, 1913, of MCDOWELL.

Plaintiff sued for damages resulting from personal injury to himself, alleged to have been caused by the negligence of the furniture company, one of the defendants. Afterwards the Maryland Casualty Company was made a defendant. The following order appears in the case: "The defendant (casualty company) then offers the affidavit of L. J. P. Cutlar, which is filed in the record together with the policies, and the same not being denied by affidavit, and the court having found same to be true, it moves for a bill of particulars making the pleading as to the contract certain, and that the pleading be made more definite and certain, which motion is granted and order made that plaintiff be required to append such contract or copy thereof to the allegation in his complaint relating to said company, and that all proceedings in this cause be stayed until the complaint is so amended." The affidavit mentioned simply alleged that two policies, copies of which are attached, were the only indemnity or insurance contracts the company issued during the period stated in them, and one of them was in force at the time of the injury. As stated above, the court, upon this simple allegation, required the plaintiff to make his complaint more definite and certain under Revisal, sec. 496, and also that he annex thereto a copy of the contract set out in affidavit and exhibit. Plaintiff excepted and appealed.

W. F. Morgan, Johnston & McNairy, and C. R. McBrayer for plaintiff.

Pless & Winborne for defendant.

WALKER, J., after stating the facts: If the facts are truthfully stated in the affidavit of L. J. P. Cutlar, it is apparent that the Mary-
(150) land Casualty Company has made no such contract with its codefendant, McDowell Furniture Company, as is alleged in the complaint, for the reason that the policy, which is set out in full and annexed to the affidavit, will bear no such construction as the plaintiff has put upon it, but a very different one in fact and in law; and it may be further said that if the contract subsisting between the defendants at the time of the injury is correctly set forth in the copy annexed to the affidavit, then the casualty company has been improperly joined as a defendant, and if, at the trial, the facts should so appear, the court should enter judgment in its favor and against the plaintiff for its costs, and continue the case against the other defendant, or take such other measure for its protection, if it shall appear to have been prejudiced by the joinder in making its defense before the jury then impaneled to try the cause. We must leave these matters largely to the exercise of the

presiding judge's discretion, who can better understand the exigencies of the particular case, under the circumstances, than we can. He should, and no doubt in all cases will, use this discretion with judgment, not timidly, but with firmness and courage, and yet judiciously, for the purpose intended, so that each of the parties may have a fair and impartial trial under the law and facts, without any extraneous influences or considerations which may tend to defeat the true and even administration of justice, which is the ultimate and principal object of all well ordered judicial systems.

Judicial discretion, said Coke, is never exercised to give effect to the mere will of the judge, but to the will of the law. The judge's proper function, when using it, is to discern according to law what is just in the premises. *"Discernere per legem quid sit justum." Osborn v. Bank,* 9 Wheat., 738. When applied to a court of justice, said *Lord Mansfield,* discretion means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular. 4 Burrows, 2539. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment, in an effort to attain the end of all law, namely, (151) the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited. We do not interfere unless the discretion is abused. *Jarrett v. Trunk Co.,* 142 N. C., 466.

These observations seem to be necessary in view of what we said (by *Justice Hoke*) in *Clark v. Bonsal,* 157 N. C., 270, a suit brought upon a like policy: "In construing contracts of this character, the courts have generally held that if the indemnity is clearly one against loss or damage, no action will lie in favor of the insured till some damage has been sustained, either by payment of the whole sum or some part of an employee's claim; but if the stipulation is, in effect, one indemnifying against liability, a right of action accrues when the injury occurs, or, in some instances, when the amount and rightfulness of the claim have been established by judgment of some court having jurisdiction—this according to the terms of the policy; but unless the contract expressly provides that it is taken out for the benefit of the injured employees and the payment of recoveries by them, none of the cases hold that an injured employee may, in the first instance, proceed directly against the insurance company. In all of them, so far as examined, a right of action arising on the policy is treated and dealt with as an asset of the insured employer, and, in the absence of an assignment from him, the employee cannot appropriate it to his claim, except by attachment or bill in the nature of an equitable *fi. fa.* or some action in the nature

of final process, incident to bankruptcy or insolvency. Certainly this position is supported by the great weight of authority," citing many authorities to support the proposition thus stated by him.

A declaration of defendant's president, that the company was insured and would have to pay the loss, was held incompetent and excluded by this Court in the following language of *Justice Brown,* in *Lytton v. Manufacturing Co.,* 157 N. C., 331: "In addition to the incompetency of Little's declarations as mere hearsay, the subject-matter of the declaration is universally held to be incompetent and disconnected (152) with the inquiry before the court. Evidence that the defendant in an action for damages arising from an injury is insured in a casualty company is entirely foreign to the issues raised by the pleadings and is incompetent. By some courts it is held to be so dangerous as to justify another trial, even when the trial judge strikes it from the record," citing many cases.

There may, of course, be cases where it can readily be seen that no prejudice has arisen, and, perhaps, others where it will plainly appear to be otherwise. It is the highest prerogative of the judge, in any court, and his bounden duty as well, to see that rights of parties before the law are not prejudiced or impaired by irrelevant or foreign matters of any kind, and for this purpose he is endowed with plenary authority. If it be the judge sitting at *nisi prius,* who is exercising this power of the law to do justice, we will not review or revise his orders, but sustain them, as in no case do we review the exercise of discretion unless there appears clearly to have been some abuse of it which is prejudicial to one of the parties, which, if it ever arises, must be of very rare occurrence. But, in this case, the learned judge, intending doubtless to enforce what appeared to him to be the legal rights of the defendant, went too far, and required the plaintiff to do something not within his power to require, and thereby transcended the limit of his jurisdiction. He properly ordered him to amend the complaint by making it more definite and certain. Pell's Revisal, sec. 406 and notes; Clark's Code (3 Ed.), sec. 261; *Wood v. Kincaid,* 144 N. C., 393; *Smith v. Summerfield,* 108 N. C., 284; *Conley v. R. R.,* 109 N. C., 696; *Allen v. R. R.,* 120 N. C., 548; *Best v. Clyde,* 86 N. C., 4. These cases also hold that the motion to make a pleading more definite and certain must be made in apt time, and if made after answering or demurring, it comes too late, and then falls within the discretion of the judge, who may allow it or not, as he may deem best. His refusal to allow it will not be reviewed (*Best v. Clyde, supra*), unless it is based upon his supposed want of power. *Henderson v. Graham,* 84 N. C., 496. This rule is analogous to the one which prevails in the courts of equity, that for (153) mere impertinence a reference is not granted after defendant has

answered or submitted to answer by obtaining an order for time, though a reference was allowed for scandal, and, under the later Code System, motions to make a pleading more definite and certain are denied if defendant has answered or obtained an extension of time to plead, or has done any act legally admitting that a sufficient issue is raised.

But here, the judge has required plaintiff not only to make his pleading more definite and certain, which was within his power, but has required him to annex a copy of the contract as stated in the affidavit offered by defendant. He can direct the plaintiff generally how he shall plead, but he cannot plead for him, nor take from him the right to plead and show by proof what the contract really is. He is not bound to accept the defendant's version of it. The judge, though, as we have said, may act afterwards, when it does appear certainly what the contract is, and prevent any prejudice to the defendant by reason of the improper joinder, as a defendant, of the casualty company. He cannot, of course, deny to the plaintiff the right to have any disputed fact passed upon by the jury. It is only when the nature of the contract is either admitted or appears beyond question that his discretion, in the interest of a fair trial, may be exercised. But whenever this is disclosed, the judge may, at any stage of the trial, exercise the discretion lodged in him, as justice may require.

The order is, therefore, modified by sustaining it so far as plaintiff is required to make his complaint more definite and certain, and vacating the other requirements. Each party will pay one-half of the costs in this Court.

Modified.

Cited: Walters v. Lumber Co., 165 N. C., 390; *Starr v. Oil Co., ib.*, 595; *Speed v. Perry*, 167 N. C., 128; *Medlin v. Board of Education, ib.*, 246; *Lowe v. Fidelity Co.*, 170 N. C., 447.

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(154)

C. C. HUMPHRIES v. D. D. EDWARDS.

(Filed 3 December, 1913.)

1. Malicious Prosecution—Probable Cause—Malice.

In an action to recover damages for malicious prosecution the plaintiff must show a want of probable cause in the criminal action, and malice in its prosecution.

2. Same—Malice Inferred.

In an action to recover damages for malicious prosecution, malice may be inferred from the absence of probable cause, or it may be otherwise

established, though malice alone, without the want of probable cause, is not sufficient; and where it appears that the criminal prosecution was with probable cause, the civil action will not lie.

3. Malicious Prosecution—Probable Cause—Trials—Questions for Court.

When the facts are admitted or established in an action to recover damages for malicious prosecution, the question of probable cause for the prosecution of the criminal action is one of law.

4. Malicious Prosecution—Assaults—Threats—Evidence.

Where one is engaged in doing a lawful act, and is compelled to desist therefrom and retreat by the threats of violence and display of force by another having the reasonably apparent present capacity and means of carrying his threats into execution or inflict injury, the acts of such person will be held to be the commission of an assault, as a matter of law, in the absence of further evidence as to a pacific intent on the part of the aggressor.

5. Same—Evidence—Questions for Court.

In an action to recover damages for malicious prosecution the only evidence upon the question of probable cause for the prosecution of the criminal action for an assault was that the defendant was marking the line between his land and that of an adjoining owner, which had been plowed over by the tenant of the latter, when the plaintiff appeared, and without provocation, and with rocks in each hand, and in a threatening attitude, using aggressive language, demanded that he desist from his occupation, which, being influenced by the plaintiff's attitude, he did and left the place: *Held*, as a matter of law the evidence established a probable cause for the prosecution of the criminal action of assault, and a judgment as of nonsuit in the civil action was properly granted.

6. Malicious Prosecution—Participation—Evidence—Questions for Court.

It is necessary, in an action to recover damages for malicious prosecution, that the plaintiff show that the defendant authorized the prosecution of the criminal action; and the evidence in this case is held insufficient for that purpose, it appearing that on appeal from the justice's court the judgment there taxing the defendant with costs was reversed in the Superior Court, whereupon the solicitor voluntarily sent a bill to the grand jury, marking the defendant a State's witness, for the same assault, resulting in a trial and acquittal, and that the court declined the request of the solicitor to adjudge the defendant to be the prosecutor.

(155) APPEAL by plaintiff from *Justice, J.*, at August Term, 1913, of RUTHERFORD.

Action for malicious prosecution. Defendant had prosecuted the plaintiff before a magistrate for an assault upon him, under the following circumstances: Plaintiff was son-in-law of one Dycus, the latter having formerly rented land from defendant, and so ploughed it that the furrows obliterated the boundary line between the lands which adjoined. Defendant went with one Johnson to mark or stake off the

line again, and broke some slats of a fence to use for stakes. While they were engaged in "sighting" the line, Dycus approached them and told defendant "to get back." Defendant said, "You must move your road off my land," and at that time Humphries went in the direction of the place where they were standing, with a mowing scythe in his hand, dropped the scythe and picked up some rocks and advanced towards defendant until he got about 8 feet from him, when he ordered him "to get back, and he got back." Plaintiff testified: "One rock might have done, but I wanted a plenty in case I needed them. I did not throw the rocks. I got up two of them. They were pretty good size little rocks. I just held them in my hands." Dycus, plaintiff's witness, testified: "When Humphries came up, I heard something right behind me, and I looked and it was Mr. Humphries. He said: 'You get back over the line.' Edwards replied: 'Who are you?' and Humphries then said, 'It's none of your business; get back over the line,' and Edwards went back." And again: "Edwards was not trying to assault any one with the slat. He did not attempt to (156) assault any one, but had the slat sighting to locate the line. As Humphries came up with the rocks, Edwards began to come back off and get away from there—he backed off a piece and left. After Edwards got off, he hallooed back and asked, 'Who is that fellow?' but Humphries would not tell him."

The court, at the close of the evidence, ordered a nonsuit, on motion of defendant, and plaintiff appealed.

Quinn, Hamrick & McRorie for plaintiff.
Webb & Mull for defendant.

WALKER, J., after stating the case: The first question is, whether there was any evidence that defendant prosecuted the plaintiff for the assault without probable cause, for in an action of this kind it is necessary to allege and prove malice, a want of probable cause, and the termination of the former suit or proceedings. *R. R. v. Hardware Co.*, 138 N. C., 174.

Malice may be inferred from the absence of probable cause, or may be otherwise established. *Johnson v. Chambers*, 32 N. C., 287; *Kelly v. Traction Co.*, 132 N. C., 369; *Merrell v. Dudley*, 139 N. C., 57. And then there is general malice and particular malice, defined and carefully distinguished by *Justice Hoke* in *Stanford v. Grocery Co.*, 143 N. C., 419; *Downing v. Stone*, 152 N. C., 525. But it is not sufficient that there should be malice alone; there must be a want of probable cause for the original proceeding, as this is an essential element of his case when a party is seeking recovery in this form of action, "and at every stage of that proceeding." The very foundation of the action is

that the previous proceeding was resorted to or was pursued causelessly. 26 Cyc., 20.

When it appears that there was probable cause to induce such original suit, the action will not lie, it being a full justification that the defendant had good reason for proceeding in it. *Ibid.*, 20, 21; *Jackson v. Telegraph Co.*, 139 N. C., 347; *Fetty v. Huntington Loan Co.*, 70 W. Va., 688. This probable cause is defined in *Moore v. Bank*, 140
(157) N. C., 293, to be (quoting from the cases) "the existence of circumstances and facts sufficiently strong to excite, in a reasonable mind, suspicion that the person charged with having been guilty was guilty; it is a case of apparent guilt, as contradistinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced; but the guilt should be so apparent as that it would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others as well as his own, to institute a prosecution," citing *Cabiness v. Martin*, 14 N. C., 454; *Smith v. Deaver*, 49 N. C., 513; Jaggard on Torts, 616. And again: "A reasonable or well grounded suspicion of the guilt of the accused, based on circumstances sufficient to justify a reasonable belief thereof in the mind of a cautious and prudent man, is sufficient defense to the action," citing 19 A. & E. Enc. (2 Ed.), 659; *Stacey v. Emery*, 97 U. S., 642; *Ferguson v. Arnow*, 142 N. Y., 580.

When the facts are admitted, or otherwise established, what is probable cause becomes a pure question of law. *Swaim v. Stafford*, 25 N. C., 289; *Moore v. Bank, supra.* This is so thoroughly settled by the authorities that very recently we reiterated it with emphasis in *Wilkinson v. Wilkinson*, 159 N. C., 265, quoting from *Panton v. Williams*, 2 Ad. & El. (N. S.), 169, where it is said: "In an action of this sort, the judge must determine whether the facts, if proved, or any of them, constitute such cause, leaving it to the jury to decide only whether the facts, or those inferred from them, exist; and as that is so when the facts are few and the case simple, it cannot be otherwise when the facts are numerous and complicated. It would seem, then, that making a question on this subject must be regarded as an attempt to move fixed things, and cannot be successful either in England or here."

In the light of these principles, let us examine the facts of this case and determine their legal character with respect to the cause of action under consideration. It must be borne in mind that we are dealing with a nonsuit, and we must construe the evidence most favorably
(158) for the plaintiff, and if there is any reasonable inference to be drawn therefrom which will authorize his recovery, the judge erred in ordering a nonsuit. But we think that there is clearly not any such permissible view of the evidence. It was said in *S. v.*

Hampton, 63 N. C., 13: "An assault is an offer to strike another. In the case before us, the defendant placed himself immediately in front of the prosecutor, assumed an attitude to strike, within striking distance, in an angry manner, and turned the latter out of his course. This was an offer of violence, and constituted an assault, unless there was something accompanying the act which qualified it and indicated that there was no purpose of violence. The only accompaniment of the act was the declaration, 'I have a good mind to strike you.' If the declaration had been, 'I intend to strike you,' that would not have qualified the act favorably for the defendant. Nor if he had said, 'I have a mind to strike you.' It is suggested, however, that the expression, 'I have a great mind to strike,' is used to express indecision," but the Court held it would not avail the defendant. And in *S. v. Myerfield,* 61 N. C., 108, assault is thus defined: "An offer to strike is an act which is the beginning of the act of striking, and most usually results in a blow, as if one draws back his fist or raises a stick, it is violence begun to be executed, and amounts to an assault, being 'an offer to strike.'" It was there held that there was no assault; first, when the offer is explained by a declaration showing that there is no intention to strike, and, second, when there is no intention, provided a certain condition is performed which the party has the right to impose; but if he has no right to impose the condition, it is an assault, or if the offer to strike is made with a deadly weapon, the law does not allow it to be thus explained, whether defendant had the right or not to impose the condition. We extract the following principle from *S. v. Daniel,* 136 N. C., 571: "The principle is well established that not only is a person who offers or attempts by violence to injure the person of another guilty of an assault, but no one by the show of violence has the right to put another in fear and thereby force him to leave a place where he has the right to be. *S. v. Hampton,* 63 N. C., 13; *S. v. Church,* 63 N. C., 15; *S. v.* (159) *Rawles,* 65 N. C., 334; *S. v. Shippman* 81 N. C., 513; *S. v. Martin,* 85 N. C., 508; 39 Am. Rep., 711; *S. v. Jeffreys,* 117 N. C., 743."

It is not always necessary to constitute an assault that the person whose conduct is in question should have the present capacity to inflict injury, for if by threats or a menace of violence which he attempts to execute, or by threats and a display of force, he causes another to reasonably apprehend imminent danger, and thereby forces him to do otherwise than he would have done, or to abandon any lawful purpose or pursuit, he commits an assault. It is the apparently imminent danger that is threatened, rather than the present ability to inflict injury, which distinguishes violence menaced from an assault. *S. v. Jeffries* and *S. v. Martin, supra.* It is sufficient if the aggressor, by his conduct, lead another to suppose that he will do that which he apparently attempts

to do. 1 Archb. Cr. Pr., Pl. and Ev. (8 Ed. by Pomeroy), 907, 908. A concrete example is there stated as follows: "If, therefore, the defendant had threatened the prosecutor with violence, and the threat had been accompanied by any show of force, such as drawing a sword or knife, or if he had advanced towards the prosecutor in a menacing attitude, even without any weapon, and had been stopped before he delivered a blow, and the prosecutor had been put in fear and compelled to leave the place where he had the lawful right to be, the assault would have been complete, although he was not at the time in striking distance."

In the most favorable view of the evidence, we find that defendant Edwards was in the quiet and peaceful performance of a perfectly lawful act, with his associate, Mr. Johnson. He had the right to restore the obliterated marks of his line so as to distinguish his land from his neighbor's and preserve the evidence of his title and the extent of his boundary. While thus engaged, he is approached in a menacing manner by two men younger than himself, one much younger, and told to stand back, and one of them, the plaintiff in this action and defendant in the former prosecution, advances towards him, first with a scythe and then with large rocks, and, when within 8 feet of where he
(160) was standing, orders him to get back, and defendant Edwards "got back" or retreated from his position, that is, went away from and left the place where he had a right to be. There were no qualifying words used by Humphries. Besides, he had a deadly weapon, which could have been used effectively in an instant. As we have said, there were no explanatory words, showing an intention not to strike, as in *Myerfield's case,* but, on the contrary, Humphries' attitude towards Edwards was a distinctly hostile and aggressive one, and his interference was, in law, unjustifiable. His language clearly shows that he intended to use the rocks if Edwards had not retreated and complied with a demand he had no right to make. "One rock might have done, but I wanted plenty, in case I needed them." He was an intermeddler, when his presence and services were not solicited or needed.

To the facts of this case the language of the Court in *S. v. Rawles,* 65 N. C., 334, is most appropriate: "The prosecutor was where he had a right to be, and had just been engaged in repairing his fences, which some one had knocked down, and no one had the right by numbers, manner, language, weapons, or otherwise to drive him home by a different path or at a different pace than that which he chose to take. What was the prosecutor to do? Was he to stand still and submit to a battery? Can the defendants stand in a more favorable light before a court of justice merely because their violence was not fully consummated in consequence of the flight of the prosecutor? Some stress

seems to be laid upon the fact that the gun and other weapons were not taken from the shoulders of those carrying them. As is said in *S. v. Church,* 63 N. C., 15, that makes no difference, for 'that would have been but the work of an instant, and was not needed to put the prosecutor in fear and to interfere with his personal liberty.'"

The plaintiff, without any legal provocation, assumed an aggressive attitude towards defendant, causing him to do what otherwise he would not have done, by putting him in fear if he refused to comply with orders. His intention was clearly manifest, that is, to use the rocks offensively, if defendant did not back away from his posi- (161) tion, which he had the right to occupy. But if his hidden intention was actually pacific, the law judges him by what he did—his acts and words—and by the necessary consequences of his conduct. Any rational and prudent man would have concluded that he was in danger, when confronted so suddenly by such a peremptory demand, accompanied by such a defiant mien, and this was sufficient to justify the prosecution of plaintiff in the Superior Court, if defendant was responsible for it or its moving spirit. Plaintiff did not approach him at the fence line, so as to inspire confidence in his good intentions, as a peacemaker, but he came towards him as a broiler, with the avowed purpose of stirring up strife and of doing violence, if he did not yield his rights, and he, therefore, deliberately brought the trouble upon himself.

But we are of the opinion that the nonsuit was right on another ground. There was no sufficient evidence that defendant Edwards instituted the prosecution for which he is now sued. He charged the plaintiff before a magistrate, and the plaintiff was acquitted, and defendant taxed with the costs. Upon appeal by him, the order of the justice was reversed, and he was discharged of the costs. The solicitor, it appears, then voluntarily, so far as the case shows, sent a bill to the grand jury, for the same assault, marking defendant Edwards as a State's witness. The court was asked to adjudge him to be the prosecutor, which he declined to do. While he was acquitted, it was incumbent upon plaintiff to show that defendant prosecuted the indictment or authorized its prosecution at some stage of it, and this he has failed to do.

So that, in any view of the facts, the judge correctly ordered a nonsuit.

Affirmed.

(162)

A. S. ABERNETHY v. W. C. STARNES AND THE HENKEL LIVE-STOCK COMPANY.

(Filed 3 December, 1913.)

Mortgages—Incorrect Registration—Notice—Subsequent Mortgage—Action.

A chattel mortgage of a bay horse, incorrectly recorded as a bay steer, does not give notice to a subsequent mortgagee of the horse of the prior encumbrance, and the lien of the second mortgage is prior to that of the first, though subsequently registered; and where the first mortgagee has obtained possession of the horse under a judgment rendered in claim and delivery before a justice of the peace, has sold the horse, satisfied his debt and turned the balance of the proceeds over to the second mortgagee, and the justice's judgment has been reversed on appeal, the latter may recover so much of the proceeds of sale of the horse from the former as will satisfy the balance due on his lien.

APPEAL by plaintiff from *Daniels, J.*, at May Term, 1913, of CALDWELL.

Appeal from justice's court to the Superior Court and heard upon the following agreed facts:

1. That on 7 July, 1908, W. C. Starnes executed a chattel mortgage to A. S. Abernethy, which mortgage was registered in Caldwell County on 11 March, 1908, in Book X on page 331, and the following is a copy thereof as the same appears of record:

STATE OF NORTH CAROLINA—CATAWBA COUNTY.

I, W. C. Starnes, of the county of Caldwell, in the State of North Carolina, am indebted to A. S. Abernethy, of Catawba County, in said State, in the sum of $94, for which they hold my note to be due on 7 July, A. D. 1909, and to secure payment of the same, I do hereby convey to them these articles of personal property, to wit: One top new Decatur buggy, one set single buggy harness, both this day bought of A. S. Abernethy; also one pair of bay steers, about 6 and 7 years old.

The above described property is free from encumbrance.

But on this special trust, that if I fail to pay said debt and
(163) interest on or before 7 July, A. D. 1909, then they may sell said property, or so much thereof as may be necessary, by public auction for cash, first giving twenty days notice at three public places in the county, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay any surplus to me.

Given under my hand and seal, this 7 July, A. D. 1908.

W. C. STARNES. [SEAL]

Witness: F. A. ABERNETHY.

2. That the one pair of bay steers, as appears upon said record, was not correctly transcribed from the original, but was written in the original "one pair of bay horses."

3. That on 26 January, 1909, the said W. C. Starnes executed a mortgage to the interpleader, which was correctly copied upon the record, and the same is in words and figures as follows:

$370.40.

STATE OF NORTH CAROLINA—CATAWBA COUNTY.

I, W. C. Starnes, of the county of Caldwell, in the State of North Carolina, am indebted to the Henkel Live-stock Company, of Iredell County, in said State, in the sum of $370.40, for which they hold my note, to be due on 1 November, A. D. 1909, and to secure payment of the same, I do hereby convey to them these articles of personal property, to wit: One pair of brown mare mules about 7 years old, stoutly built, with brown noses, weight about 1,800 pounds; one set of double wagon harness, made by Flanigan Harness Company (the above this day received of them); one pair bay horses, about 7 and 8 years old, with white hind feet, weight about 2,700 pounds, bought of company, worth about $500; one eight-disk Bickford & Huffman grain drill, bought of company, worth about $70.

The above described property is free from encumbrance.

But on this special trust, that if I fail to pay said debt and interest on or before 1 November, A. D. 1909, or fail to properly feed or care for the above property, then they may sell said property, or so much thereof as may be necessary, by public auction for cash, at the First National Bank, Hickory, N. C., or in the county of the (164) undersigned mortgagor, first giving twenty days notice at three public places in the county where said sale is to take place, as per terms of mortgage, and apply the proceeds of such sale to the discharge of said debt and interest on same, and pay any surplus to me.

Given under my hand and seal, this 26 January, A. D. 1909.

W. C. STARNES. [SEAL]

4. That one of the bay horses described in the said mortgage to Henkel Live-stock Company was one of the same horses that was conveyed to the plaintiff, A. S. Abernethy.

5. That the justice of the peace rendered a judgment in favor of the plaintiff for the possession of the said horse referred to in the next preceding paragraph, and the plaintiff, after due advertisement, sold the same, under the terms of his mortgage, at which sale the said horse was purchased by Henkel Live-stock Company for the sum of $140.

6. That the amount of plaintiff's debt, with cost of sale, and advertisement, was the sum of $70.20, and the Henkel Live-stock Company

receipted for the residue of the amount said horse brought at said sale by its paper-writing in the following words and figures:

A. S. ABERNETHY,
DEALER IN
Horses, Mules, Carriages, Wagons, Harness, Etc.

HICKORY, N. C., 18 September, 1909.

Received of A. S. Abernethy $69.80 after deducting the amount of his claim ($70.20), which was secured by first mortgage on one bay horse, 7 years old, said mortgage given by W. C. Starnes.

This horse was this day sold by the said first mortgage at A. S. Abernethy's stable. The Henkel Live-stock Company being the purchasers of said horse, they agree to arrange any other claims or suits or mortgage against said horse or A. S. Abernethy, while he, A. S. Aber-
(165) nethy, was in possession of the horse. The horse was sold and turned over to the Henkel Live-stock Company with the above amount of money.

HENKEL LIVE-STOCK COMPANY,
By W. I. CALDWELL.

7. That the plaintiff, A. S. Abernethy, is a resident of Hickory, N. C., and his mortgage was transmitted by mail to the register of deeds of Caldwell County, who registered same as hereinbefore set forth, and returned same to plaintiff by mail.

8. That the Henkel Live-stock Company, at the time of taking their mortgage, did not actually examine the records of the office of the register of deeds for the purpose of ascertaining whether or not any liens or encumbrances were against W. C. Starnes for the property described in their mortgage.

The foregoing is agreed between the parties to be a true statement of the facts necessary to a decision of this cause, and it is agreed that the judge presiding and holding this term of court may decide the same either in or out of the district as of this term.

MARK SQUIRES,
Attorney for Plaintiff.
LAWRENRE WAKEFIELD,
Attorney for Interpleader.

Upon the foregoing facts, it is considered and adjudged by the court that Henkel Live-stock Company recover of plaintiff the sum of $70.20, with interest thereon from 18 September, 1909, and the costs of the interpleader, Henkel Live-stock Company, to be taxed by the clerk.

F. A. DANIELS,
Judge Presiding.

The plaintiff excepted and appealed.

Mark Squires for plaintiff.
Lawrence Wakefield for interpleader.

BROWN, J., after stating the case: This action, with the ancillary claim and delivery, was brought to recover one bay horse from the defendant Starnes. The Henkel Live-stock Company interpleaded, claiming the horse under its mortgage, also executed by said defendant.

The justice of the peace rendered judgment, giving the horse to plaintiff, and the interpleader appealed to the Superior Court. (166)

Pending the trial of the case in the Superior Court, the plaintiff, having obtained possession under the justice's judgment, sold the horse at public sale under the power contained in the mortgage, and the Henkel Live-stock Company purchased it for $140.

The plaintiff applied $70.72 to his own mortgage debt, claiming it to be the first mortgage, and paid the remainder, $69.80, to the Henkel Company. This being insufficient to discharge the Henkel debt and mortgage, the litigation is over the $70.72 retained by the plaintiff from the proceeds of the sale of the horse.

It is plain that the plaintiff's mortgage on one pair of bay horses was not properly recorded. As registered, it described one pair of bay steers. This would not give notice to a subsequent mortgagee that the plaintiff's mortgage conveyed horses instead of steers.

As the Henkel mortgage, although subsequent in execution to the plaintiffs, was properly registered, it gave the Henkel Live-stock Company the prior lien on the bay horses.

Nor is there anything in the receipt dated 18 September, 1909, which estops the Henkel Company from pursuing its claim to the $70.72, the proceeds of sale of the bay horse.

Had the horse not been sold, the Henkel Company would have recovered the horse itself. As it holds the prior valid mortgage, it is entitled to the proceeds necessary to satisfy its mortgage.

Affirmed.

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(167)

BLUE RIDGE INTERURBAN RAILROAD COMPANY v. R. M. OATES AND HENDERSONVILLE LIGHT AND POWER COMPANY.

(Filed 13 December, 1913.)

1. Corporations—Repeal of Charter—Legislative Powers—Constitutional Law.

By express provision of Article VIII, sec. 1, of our Constitution all legislative powers conferred upon corporations are taken by them subject to the legislative power of repeal.

2. Statutes, Interpretation — Vested Rights — Condemnation — Summons— Prosecution Bond.

In order to acquire a vested right under a statute to condemn lands, which has subsequently been repealed, it is necessary to show a finality by judgment in the proceedings before the later act had become effective; and where it appears that the summons was served in time, but that the prosecution bond, made a prerequisite by Revisal, 450, was not, no vested right in the former statute can be acquired by the further prosecution of the condemnation proceedings.

3. Same—Railroads—Water Rights.

Chapter 94, Laws 1913, ratified 8 March, 1913, amending chapter 302, Laws 1907, excepts from the provisions of the prior act the condemnation of "any water-power, right, or property of any person, firm, or corporation engaged in the actual service of the general public, where such power, right, or property is being used or held to be used or developed for use in connection with or in addition to any power actually used by such person, etc., serving the general public." *Held*, no vested right was acquired under the acts of 1907 by an "interurban railroad company" so as to except it from the provisions of the act of 1913, which had only issued the summons in condemnation proceedings before the later act had become effective. A vested right could have been acquired only by final judgment prior to the repealing act.

4. Condemnation—Trial by Jury—Procedure.

While ordinarily a jury trial is not required in condemnation proceedings, except as to the assessment of damages, the general rule does not apply where the pleadings put at issue the question as to whether the character of the lands is such as to be embraced within the right conferred or within an exception to that right under the terms of a statute.

5. Condemnation—Verdict, Directing—Issues of Fact—Appeal and Error— Procedure.

Where the judge erroneously holds that an issue answered by the jury was a "question of fact" and not an issue of fact, in condemnation proceedings, and strikes out the answer found and enters one directly opposite, not as against the weight of the evidence or in his discretion, it will be held for reversible error, and in proper instances the Supreme Court will order that the answer of the jury be reinstated.

WALKER, J., dissents; BROWN, J., concurs in dissenting opinion.

(168) APPEAL by defendants from *Lyon, J.*, at May Term, 1913, of HENDERSON.

Manning & Kitchin, Smith & Shipman, and Tillett & Guthrie for plaintiff.

James H. Merrimon, Michael Schenck, Britt & Toms, Staton & Rector for defendants.

CLARK, C. J. The Hendersonville Light and Power Company was chartered in 1904 for the purpose of supplying electric lights and power

to Hendersonville and the surrounding community. Its power plant is located on Big Hungry Creek near Hendersonville; its lands consisting of three small tracts known as Power No. 1, Power No. 2, and Power No. 3, the first only being fully developed and supplying the electric power used at this time. The second is partly developed, and the third held for development in connection with the others. The company has furnished for ten years electric light and power to the people of Hendersonville and the vicinity. In 1912 George E. Laidlaw and others obtained a charter in South Carolina under the name of the Manufacturers' Power Company, but finding that they could not condemn water-power under our laws, it being prohibited to any water-power company to do this by Laws 1907, ch. 74, they organized the Blue Ridge Interurban Railroad Company, claiming that under the laws of 1907, ch. 302, having the power to construct an interurban railroad, they could condemn water-powers for that purpose.

The plaintiffs instituted this proceeding to condemn for their purposes the tracts No. 2 and No. 3 above described, belonging to the defendants. The summons was dated 27 February, 1913, but the prosecution bond which is required by Revisal, 450, to be given "before issuing the summons" is dated 10 March, 1913, and (169) summons was served on that day on the defendants.

Chapter 74, Laws 1907, conferring the power of condemnation on telephone and electric light and power companies, contains the following provisos: "*Provided,* that the power given under this act shall not be used to interfere with any mill or power plant actually in process of construction or in operation; and *Provided further,* that water-powers, developed or undeveloped, with the necessary land adjacent thereto for their development, shall not be taken." Chapter 302, Laws 1907, authorizes street and interurban railway companies "owning land on one or both sides of a stream" as follows: "Whenever such company shall not own the entire water front, or all the lands, water rights, or other easements necessary to be used in fully developing such water-power, then such railroad company shall have the power to acquire any other lands, water rights, or easements which may be needed to fully develop such water-power; and if such company cannot agree with the owner or owners for the purchase of such lands, water rights, or other easements, the same may be condemned, appropriated, and taken by such railway company for that purpose, and the procedure shall be the same as that provided by chapter 61, Revisal 1905, entitled 'Railways' and relating to the condemnation of lands for railroads."

It would therefore seem that if a company needed a water power to produce electric power, and styled itself an electric light and power company, it could not condemn the water-power of another for that pur-

pose. Chapter 74, Laws 1907. But if it styled itself "a street and inter-urban railway company," and should "own land on one or both sides of a stream which can be used in developing water-power," it might have condemned the additional lands "needed to fully develop such water-power." Chapter 302, Laws 1907. *Power Co. v. Whitney,* 150 N. C., 34, held that water-powers could not be condemned in this State, being against our public policy as declared by chapter 74, Laws 1907.

While matters were in this state, the Legislature enacted chap-
(170) ter 94, Laws 1913, ratified 8 March, 1913, which was entitled "An act to amend chapter 302, Laws 1907, relating to the right of eminent domain." The amendment consisted in the addition to said chapter 302, sec. 1, Laws 1907, of the following words: *"Provided further,* that such company or companies shall not have the power to condemn any water-power, right, or property of any person, firm, or corporation engaged in the actual service of the general public, where such power, right, or property is being used or held to be used, or to be developed for use in connection with or in addition to any power actually used by such persons, firms, or corporations serving the general public." This act, ratified 8 March, 1913, was subsequent to the date in the summons issued by the plaintiff in this proceeding (27 February), but was prior to giving the prosecution bond in that case, which is required to be done "before the summons is issued," and was also prior to the service of the summons in this case. At that time the plaintiff had acquired no vested right in the land sought to be condemned, and the Legislature had the power to withdraw, or repeal, any provision of law under which the plaintiffs could have acted, if indeed they were authorized to condemn this property by chapter 302, Laws 1907.

In *Dyer v. Ellington,* 126 N. C., 945, it is said: "Until the right becomes vested, we think it can be destroyed by the Legislature. As the laws of one Legislature do not bind another, except in so far as they may be absolute contracts, we must take Revisal, 2830, as merely a rule of construction, having no application where the intention of the Legislature clearly and explicitly appears to the contrary." In *Williams v. R. R.,* 153 N. C., 365, the Court said: "Where the suit is brought during the life of a statute, and is pending at its repeal, without having gone to judgment, the Legislature may, by express terms, take away the right of action. *Dyer v. Ellington, supra.* The power of the Legislature to destroy, by a repealing act, a penalty before it has become vested by a judgment, is placed upon the ground that it is a right
(171) created by statute—a favor conferred by legislative act which may be withdrawn by express provision before judgment."

In *Pearsall v. R. R.,* 161 U. S., 637, cited and approved in *Bank v. Glenn,* 163 U. S., 425, it is said: "Where no act is done under the pro-

vision and no vested right is acquired prior to the time when it is repealed, the provision may be validly recalled without thereby impairing the obligation of the contract." To same effect *R. R. v. Texas,* 107 U. S., 240.

The Legislature may alter a provision of law at any time before the rights of parties are settled. *Phifer v. Commissioners,* 157 N. C., 150; *S. v. Cantwell,* 142 N. C., 616. In *R. R. v. Nesbitt,* 10 Howard (U. S.), 395, it was held that even after the acts required to condemn had been performed, except payment of compensation assessed, it was competent for the Legislature to repeal. *Wilson v. Jenkins,* 72 N. C., 9.

A man's land should stand condemned when, and only when, every step which the law prescribed to that end has been complied with. *S. v. Jones,* 139 N. C., 639. There is no vested right under any general statute until all necessary steps have been taken. *Gaslight Co. v. Hamilton,* 146 U. S., 269. A right is vested when judgment is entered. *Dunham v. Andrews,* 128 N. C., 213. It is when the right becomes absolute that no subsequent repeal can invalidate it. *Copple v. Commissioners,* 138 N. C., 134.

Even if the right to condemn water-powers had been conferred upon the plaintiff company by a special act of the Legislature, it was competent for the Legislature to repeal it. The Constitution of North Carolina, Art. VIII, sec. 1, prescribes: "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes, and in cases where, in the judgment of the Legislature, the object of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed." This provision was placed in our Constitution, as it has been placed in the constitutions of all the other States, to avoid the effect of the *Dartmouth College* decision, which held that the charters of corporations were con- (172) tracts, and not privileges revocable at the will of the State. This provision in our Constitution fixes every corporation taking out a charter since 1868 with notice that the State has the right to repeal or alter such charter at will. *Wilson v. Leary,* 120 N. C., 92; *Ward v. E. City,* 121 N. C., 2; *Coleman v. R. R.,* 138 N. C., 354.

At the time the act of 8 March, 1913, was enacted, the plaintiff had filed no prosecution bond nor complaint, and the summons was not served. It goes without saying that it had acquired no vested right to condemn the defendants' land and could not do so until judgment had been obtained in such proceeding. The matter turns, therefore, on the question whether upon the terms of chapter 94, Laws 1913, the land in question is subject to condemnation.

It is true that from the decision in *R. R. v. Davis,* 19 N. C., 451,

down to the present it has been held that as to property within the scope of condemnation proceedings a jury is not required except as to the assessment of damages. But whether or not land comes within the scope of property subject to condemnation is a matter of law depending upon the finding of fact by a jury as to the nature of the land sought to be condemned, when that is put in issue by the pleadings, as in this case.

If, therefore, the tracts Power No. 2 and Power No. 3 were either "a water-power, right, or property of any person, firm, or corporation, engaged in the actual service of the general public, where such power or right of property is used or held to be used, or to be developed for use in connection with or in addition to any power actually used by such person, firms, or corporations serving the general public," it is specifically withdrawn from the power of condemnation by chapter 94, Laws 1913, as is also a graveyard or other property also exempted from condemnation by the statute.

The essence of the defense in this proceeding is that tract, Power No. 2, was such property as was exempted from condemnation by plaintiff under chapter 94, Laws 1913. This was an issue of fact which the judge properly submitted to the jury, and the jury found that it (173) was property which "could be developed as a water-power or used as such in connection with or in addition to the power actually in use by the defendant company." Upon this verdict judgment should have been entered for the defendant on that issue.

There was ample evidence to submit that issue to the jury. The judge did not set aside the verdict as being against the weight of the evidence nor as a matter of discretion, but erroneously held that this was a "question of fact," and not an issue of fact, and thereupon struck out the response of the jury "Yes" to the tenth issue, that it was such property, and entered his own response "No" to that issue as a matter of law, or rather as a finding of a question of fact which was for the court. In this he erred.

The action of the court in this respect is reversed, and the verdict of the jury as to the tenth issue must be restored, with directions to enter judgment thereon in favor of the defendants as to the tract Power No. 2. It seems that there is no real controversy over the other tract.

The defendants need this water-power for their own use, as the jury find, upon the evidence.

Reversed.

WALKER, J., dissenting: This is a proceeding to condemn a water-power for the use of the plaintiff, a public-service corporation. No question is raised as to its general right to condemn, as the use is a

public one, but defendant avers that the particular property is not the subject of condemnation under the terms of Acts of 1913, ch. 94. Ever since the case of *R. R. v. Davis,* 19 N. C., 451, was decided in 1837, this Court has held with singular unanimity that all questions involved in the proceedings are for the court to decide without a jury, unless otherwise directed by the Legislature. There is no such provision in this instance. There are many cases to this effect, the latest being *Luther v. Commissioners, post,* 241. Even the assessment of damages is not required to be made by a jury, it not being a controversy respecting property within the meaning of the Constitution. *Davis v. R. R., supra,* per *Ruffin, C. J.* In *Abernathy v. R. R.,* 150 N. C., 87, (174) where the question was presented, *Justice Connor* said for a unanimous Court: "While in other special proceedings, where an issue of fact is raised upon the pleadings, it is transferred to the civil-issue docket for trial, in condemnation proceedings the questions of fact and law are passed upon by the clerk, to whose rulings exceptions are noted, and no appeal lies until the final report of the commissioners comes in, when, upon exceptions filed, the entire record is sent to the Superior Court, where all of the exceptions are passed upon and questions may be then presented for the first time. *R. R. v. Stroud,* 132 N. C., 413; *R. R. v. Newton,* 133 N. C., 132; *Porter v. Armstrong,* 134 N. C., 447; *Durham v. Riggsbee,* 141 N. C., 128. The reason for this practice is discussed in these cases. Pursuant to these decisions, the clerk should have found whether the plaintiff was the owner of the land before ordering the appraisement. If he had found that plaintiff was such owner, the clerk would have dismissed the proceeding, and plaintiff could have appealed. If the clerk had found the plaintiff to be the owner, the defendant could have excepted, the clerk would have appointed the commissioners, and upon the coming in of the report and exceptions the entire record would have been open to review. Assuming that the clerk found that plaintiff was the owner, the case was properly in the Superior Court for all purposes. We have held that in proceedings instituted by the corporation the only issue of fact to be submitted to the jury was the amount of compensation. *R. R. v. R. R., supra,*" citing *R. R. v. R. R.,* 148 N. C., 61; *R. R. v. Lumber Co.,* 132 N. C., 644; *Durham v. Riggsbee,* 141 N. C., 128. He then says that the judge can, at his discretion, call a jury to his aid, but as we know by the settled rule, he is not bound by the verdict, but may accept or reject it.

There are statutes which provide for a jury trial on the question of compensation, and some of the decisions proceed upon this ground, when referring to it as an issue for a jury.

This Court has held, contrary to the decisions in some other jurisdictions, that in the absence of legislation, even the matter of compensation

(175) may be tried without a jury. The order of condemnation, as to facts, is not reviewable in this Court, we being bound by the finding of the court below. *Luther v. Commissioners, supra,* where the cases are cited; *Newton v. School Committee,* 158 N. C., 186. The question was fully discussed in *S. v. Jones,* 139 N. C., 613. In that case this Court held that the landowner is not entitled to a jury trial upon the question of compensation, unless given by statute, citing *R. R. v. Newton,* 133 N. C., 134, and *S. v. Lytle,* 138 N. C., 738, in both of which the opinions were delivered by the *Chief Justice.* It was also held that the condemnor was not required even to wait until compensation was made before The Code, sec. 946, was enacted, requiring payment before entry. The *Newton case* is a strong and decisive one. The Court, by the *Chief Justice,* clearly and emphatically denies the right to a jury, even as to compensation, unless it is conferred by statute, and says that "our decisions are uniform" upon the subject. The object of the law is to expedite the construction of works of internal improvement without interruption, says the Court in that case, and especially in the same case upon an application for a writ of prohibition. *R. R. v. Newton,* 133 N. C., 136. It cites the case of *R. R. v. R. R.,* 83 N. C., 499, with approval, and that involved the very question we have here, that it is a question of fact and not an issue of fact, as the defendant sought to condemn a part of plaintiff's right of way, and the latter denied that it was condemnable. In the *Newton case* numerous decisions of this Court are cited in support of the conclusion of the Court. I have no time, at this late hour in the term, to discuss the case more at large, and to demonstrate the similarity between this case and our former decisions. It is sufficient to say that even a cursory examination will show that we are making a wide departure from this settled principle, so important to be preserved for the public good and convenience. The Legislature may give the right of trial by jury; but let us wait for its action.

BROWN, J., concurs in the dissenting opinion.

Cited: *S. v. Haynie,* 169 N. C., 281; *R. R. v. Power Co., ib.,* 472, 473, 474, 476, 478; *s. c.,* 171 N. C., 318, 319, 321.

(176)

J. A. WATSON, GUARDIAN, v. BLACK MOUNTAIN RAILWAY COMPANY.

(Filed 3 December, 1913.)

1. Trials—Continuances—Court's Discretion—New Parties.

The question of continuance is ordinarily a matter appealing to the discretion of the trial judge, and his action in refusing a motion for a continuance as a matter of right, for making a new party to the action at the instance of the appellant, where no change has thereby been made in the pleadings and the issues, and no suggestion that it would be prejudicial to him to immediately proceed with the trial, is not held erroneous.

2. Same—Prejudice of Rights—Appeal and Error.

There is no change of parties to an action, in a legal sense, where a guardian *ad litem* is appointed on the ground of mental incompetency of one of them; and where such guardian is appointed and made a party at the trial term of the action, without change of pleading, it does not give the opposing party a legal right to continue the cause, and the refusal of the trial judge to grant his motion is not reviewable on appeal.

3. Corporations—Negligence—Independent Contractor—Master and Servant—Production of Books—Evidence—Trials.

Where a defendant corporation relies upon the defense of an independent contractor in an action to recover damages for a personal injury alleged to have been negligently inflicted, and upon notice produces at the trial the minutes of the stockholders and directors bearing upon the employment of the alleged independent contractor, the production of the books is at least sufficient evidence of genuineness to justify their admission on the part of the plaintiff, and are properly received in evidence when tendered by him; and it is held in this case that evidence which tended to show that one who substantially owned the defendant company and was in a position to change the contract made by it with him, was not such an independent contractor as would relieve the company from liability for his negligent acts.

4. Master and Servant—Negligence—Dangerous Work—Independent Contractor—Vice-Principal—Instructions to Employees—Trials—Evidence—Nonsuit.

The plaintiff was engaged at the time of his injury for which this action to recover damages was brought, in drilling holes for blasting a right of way for defendant's road, using dynamite and powder, and there was evidence tending to show that the injury was caused by his having been directed, by the vice-principal, to drill into a hole in a rock which had failed to explode, to clear it out, while the safe method, followed up to that time, was to use a sharpened stick or the hands for the purpose; that in using the drill the plaintiff relied upon the knowledge or judgment of the vice-principal, though he was an experienced man in such work: *Held*, (1) the evidence was sufficient upon the question of defendant's negligence to take the case to the jury; (2) the character of this class of work is so intrinsically dangerous that the defense of independent contractor will not avail. *Arthur v. Henry*, 157 N. C. 402, cited and applied.

5. Trials—Compromise—Evidence—Witness—Bias.

The defendant corporation was sued to recover damages for personal injury to an employee, and under cross-examination its president was required to testify, under its objection, as to conversations with the plaintiff and his attorneys, in an attempt to compromise the suit before trial, and especially as to his statements that plaintiff's attorneys were holding up the compromise because of their contingent fee; that under the plaintiff's arrangement with his attorneys he had agreed to pay too much; that he had approached the plaintiff, when he agreed at a prior term of the court not to do so, etc.: *Held*, the evidence was competent as bearing upon the bias of the witness in being unduly zealous in the defendant's behalf, and having been properly restricted by the trial judge to this purpose, its admission was not error.

(177) APPEAL by defendant from *Daniels, J.*, at April Term, 1913, of MITCHELL.

This is an action to recover damages for personal injury.

When the case was called for trial, the defendant asked leave to file a plea since last continuance, alleging that a guardian had been appointed for the plaintiff since the last term of the court on the ground of the mental incompetency of the plaintiff.

The motion was allowed; the guardian, John A. Watson, came into court and adopted the complaint heretofore filed.

The defendant then moved for a continuance on the ground that a new party had been made at this term, but in the exercise of its discretion the court overruled the motion and directed the cause to proceed, and the defendant excepted.

The plaintiff testified, among other things: "I had worked on
(178) the Carolina, Clinchfield and Ohio Railway, off and on, about eight years. I generally drilled, put the loads in holes and shot. I worked mostly with the rock crew. They used dynamite mostly as an explosive on the C. C. and O.; sometimes black powder. I had seen a great deal of blasting done with dynamite, and had helped to do it. I had about eight years experience in this kind of work. I had blasted in mica mines. I had full control and use of the dynamite. I know the danger of dynamite and knew the danger when I worked in mica mines and used the dynamite myself, and I had worked on other roads than the C. C. and O. I had right smart experience in work on the Tennessee Central below Knoxville. I worked on the steel gang most of the time. The biggest portion of my life since I have been big enough to do public work, I have worked on the rock crew. I have farmed a little. On all of these jobs we used dynamite. We used powder in the top of the hole generally. We put in powder sometimes to shoot with a fuse. I have loaded a good many of these fuses myself or loaded the powder. All are supposed to go off at once, if there ain't nothing wrong. I have had a great deal of experience in helping to

clean out holes that had been shot. I have been helping to clean out holes when they failed to fire, for a number of years. I was injured on 16 May, 1911. I have never been able to see anything since that date. I do not go about in the country from house to house when court is not in session. I never go from one house to another by myself. I never have since I was injured without some one with me. I knew it was dangerous to drill into a hole that had been loaded with dynamite without it having been cleaned out. I knew it was dangerous if you go down to the dynamite. If you happened to strike it, it would explode. The proper method of cleaning out a hole is to clean it out carefully with a swab pole until you get down in order to see if there is any dynamite in there. You would take a sharp stick, sometimes take a little spoon with a little scraper on it, and sometimes take your hands. There was no danger if you used a sharp stick. Sometimes you would use your hands. There was no danger in this method. The only dangerous method was drilling in there. I recollect Mr. Buckley (179) coming along before I was injured. He was my foreman. He hired and discharged the men. Mr. Buckley gave orders as to how the work was to be done. Mr. Buckley hired me. Buckley put me to do the work at this hole. I was there when the blast was put off. There were five or six holes. They were drilled on the Saturday before that and loaded that morning and fired and then they came back and put us on that hole and blowed up. Mr. Buckley put us on that hole. The first time Mr. Buckley put us to work, he told us to put that hole down. He told us how far to put it. He told us to put them holes about a foot below grade. Manassa Thomas was working with me. We then started to clean the gravel out. Cleaned it out with the stick. Mr. Buckley came along and said, 'Boys, you can't get it done that way. Gus, you will have to get a drill and hammer it down.' We got a drill and Mr. Thomas was holding and I was drilling; we struck five or six licks, and it exploded. After that explosion I didn't know anything. We didn't have any drill when he first came there—kinder swabbing it out. There was no drill close to the hole. Mr. Thomas went for the drill and brought it back. He was holding the drill and I was hammering. I stopped cleaning it out the way I was cleaning and put the drill in and went to hammering because I was going to rely on him. I thought if there had been any dynamite in that hole, he knew it. I was relying on his word. I knew I was working under him, and if I didn't obey his orders he would turn us off. I didn't know whether there was any dynamite in there or not. I 'lowed he knew or else he would never have put me on."

One of the defenses relied on by the defendant was that the work, in doing which the plaintiff was injured, was in charge of Charles L.

Ruffin, an independent contractor, and to meet this defense the plaintiff served notice on the defendant to produce in court the minutes of the meetings of the stockholders and directors of the defendant company. Books purporting to be such minutes were produced in response to the notice, and offered in evidence by the plaintiff.

The defendant excepted upon the ground that the books were (180) not produced under order of court, but in response to notice.

The president of the defendant company was examined as a witness, and among other things testified on cross-examination: "I am a lawyer and practice in this county, in Yancey, and in other counties. I have risen in this case and made objections more by intuition than anything else. I did state at the last term of the court that I knew of no effort to settle this case, and that none would be made. And I would not have made any attempt unless conditions had radically changed. As I understand the law, the law wants you to compromise. I approached the man to compromise after notice to you and Mr. McBee, and I felt at liberty under all legal ethics to come and approach your client. I offered you an amount that your client said was ample, but was not able to accept because he had to pay you so much. I told him that all you were after was his money, and I believe it. The negro is being maintained by you and Mr. McBee. I said you were after the railroad's money. I think that it is professional, after I went to see you gentlemen, and you told me that you and I would part right then. I don't think his Honor could take a right from me authorized by the statutes of North Carolina which encourages compromises. I offered your client the amount you had made to me over there as we got on the train at Toecane. I don't want to go into these things. I want to state in regard to the professional ethics—I don't want to go into this thing. You know what has actuated me in this cause, and as a matter of fact, I hold the signed statement that this man Forney gave to me and that his attorneys wanted to hold upon the amount. That they would not ratify the statement over there. I don't know but that I told your client that he had an improvident contract. I may have stated the amount I offered you is ample. He wanted to take it, but by reason of having to pay you men, he said he was held by your contract. I wanted to pay that negro all that was right, but I don't think I violated the ethics when I attempted to settle it with him. I think I offered him and his lawyers what is fair. I think I was justified in going to (181) him. I refer to what I offered you down at the coal station."

The defendant objected to the foregoing evidence in regard to the attempt to compromise the case. Objection overruled. Exception taken, the court stating: "This evidence is offered as having bearing on

the weight the jury will give the testimony of the witness, and for no other purpose, and the jury is not to consider it in any other way."

At the conclusion of all the evidence the defendant moved for judgment of nonsuit, which was denied, and the defendant excepted.

There are also several exceptions taken to the rulings upon the question whether Ruffin was an independent contractor.

Verdict and judgment for the plaintiff, and the defendant appealed.

Hudgins & Watson, John C. McBee, and Pless & Winborne for plaintiff.

James J. McLaughlin and J. Bis Ray for defendant.

ALLEN, J. The guardian was entered upon the record as a party upon the motion of the defendant, and it cannot well say that it was taken by surprise, nor does it claim that it was not ready for trial, or urge any reason for the continuance except as a matter of legal right upon a new party being made.

If new parties are made or amendments allowed, which change the issues, and a party is not prepared with his evidence to meet the changed conditions, he is entitled to a continuance as a matter of right (*Dobson v. R. R.*, 129 N. C., 291), but ordinarily the ruling of the judge upon a motion for continuance is a matter of discretion and not reviewable, and in this case it appears that there was no change in the pleadings or issues, and no suggestion that it would be more prejudicial to the defendant to try at that time than at any other.

We are also of opinion there was no change of parties in a legal sense by marking the name of the guardian on the record.

It was said in *Tate v. Mott*, 96 N. C., 23: "Generally, an infant can maintain an action if he has a just cause of action, just as an adult may do, the only difference being in the mode of conducting it. His action must be brought and prosecuted in his own name, and (182) it is in all respects his, just as if he were of full age; but it must be managed and prosecuted, not by himself, but by his guardian or next friend, under the supervision and control of the court. This is necessary, because of his presumed lack of discretion and want of capacity to understand and manage his own affairs, his inability to bind himself and to become liable for costs. The guardian or next friend is not in a legal sense a party to the action, although his name appears in the record," and this has been approved several times.

The minutes of the meetings of the stockholders and directors of the defendant were properly admitted in evidence.

They were produced by the defendant pursuant to notice, and this

is at least sufficient evidence of genuineness to justify their admission, and the defendant does not say now they are not the minutes.

These minutes not only furnish evidence that Ruffin was not an independent contractor, but they go far to establish that he substantially owned the defendant company, and, as testified to by the president of the company, that he was in a position to change the contract under which it was claimed he was working, at will, as he owned a majority of the stock.

If, however, the evidence was incompetent, it would be no ground for a new trial, because the doctrine is well established and is applicable here, that the work at which the plaintiff was engaged is so intrinsically dangerous that protection from liability will not be afforded by an independent contract, and this also disposes of the various exceptions to the rulings of his Honor, and the exceptions to his charge on the question of independent contractor. *Arthur v. Henry,* 157 N. C., 402.

The position of the defendant is undoubtedly true that compromises are favored, and that usually evidence of what has been said or done in an attempt to settle is not competent, but in this case it was not offered as an admission of liability nor to attack the general character of the witness, but to show that although his motives might be commendable to protect a railroad which had been recently organized,
(183) and which he believed meant much for the development of his section, which had theretofore had no railroad facilities, he was unduly zealous, and had gone so far as to approach the client for the purpose of compromising, after agreeing at a prior term of court that this would not be done.

For this purpose the evidence was competent, as bearing on the bias of the witness, who had testified to important and material facts in behalf of the defendant, and his Honor properly restricted the evidence at the time it was introduced and again in his charge.

The motion for judgment of nonsuit ought not to have been allowed.

The evidence is stronger in behalf of the plaintiff that in *Harris v. Quarry Co.,* 137 N. C., 204, because in this case there is evidence that the plaintiff was pursuing a method which was safe, when he was directed by the party in charge for the defendant to adopt another and more dangerous method, which caused his injury. The authorities sustaining this proposition are collected in *Lynch v. R. R., post,* 249.

We have examined all of the exceptions, including those not assigned as errors in accordance with the rules of Court, and find

No error.

Cited: Steele v. Grant, 166 N. C., 648; *Dunlap v. R. R.,* 167 N. C., 670; *Morton v. Water Co.,* 168 N. C., 586; *Strickland v. Lumber Co.,* 171 N. C., 756.

CHARLES S. RICHARDS v. SAM T. HODGES.

(Filed 10 December, 1913.)

1. Contracts, Written — Parol Agreement — Promissory Notes — Statute of Frauds.

Where a promissory note expresses payment to be made in money, a parol contemporaneous agreement that it was otherwise to have been paid, as in this case, by the acceptance of a note of a third person, would vary or contradict the writing, and is inadmissible under the statute of frauds; but where the evidence tends to show that this note was accepted by the payee in discharge of the original note, it would establish an executed agreement if found to be true, and in that event evidence of the parol agreement would be competent as tending to show that the note of the third person when accepted was in payment or discharge of the original one.

2. Same—Corporations—Insolvency—Consideration.

Upon evidence tending to show that the payee of a promissory note expressed as payable in money, and given for stock in a corporation, subsequently received and held the note of the corporation for the payment of the same debt, and upon the insolvency of the corporation, proved his claim in bankruptcy proceedings and obtained his dividend thereon; in an action brought by him upon the original note it is *Held*, that it was competent for the defendant to show a parol agreement, made contemporaneously with the making of his note, that the payee should accept the corporation note in payment and discharge of his obligation, though this note accepted ultimately proved to have been valueless.

APPEAL by plaintiff from *Lyon, J.*, at May Term, 1913, of (184) HENDERSON.

Civil action to recover the amount of certain notes secured by the defendant to the plaintiff for stock in the Bell-Richards Shoe Company. The defense is that at the time the stock was purchased and the notes given, plaintiff agreed with the defendant that he would accept four notes of the company in full payment and satisfaction of the notes so given for the stock, and that this agreement was afterwards carried out, and the debt, evidenced by the sixteen notes, thereby settled and discharged. The following synopsis of the evidence is taken from the record: Plaintiff and defendant were the majority stockholders in the Bell-Richards Shoe Company, a corporation, with places of business at Spartanburg, S. C., Chattanooga, Tenn., and Rocky Mount, N. C. On 6 August, 1907, they entered into a contract by which plaintiff sold and defendant bought the former's stock in said corporation, paying therefor $100 in cash and executing sixteen notes, one for $150 and fifteen for $250 each, and stipulating that he would assume all of the liabilities of Mr. Richards in the company. One of said notes was

payable every three months, commencing 6 November, 1907. Defendant was permitted to prove that, at the time of the sale and as part of the consideration, plaintiff agreed to take four notes of the Bell-
(185) Richards Shoe Company in substitution for the other notes and in satisfaction of the same, as the stock was really bought for the benefit of the company. A few days after the defendant purchased the stock, he sold the Spartanburg store to the other stockholders of the corporation, leaving the corporation with places of business at Chattanooga and Rocky Mount. On October, 1907, the corporation was adjudged a bankrupt. On 7 November, 1907, the first note matured and was protested for nonpayment. The defendant delivered to plaintiff four $1,000 notes of the company, dated 29 April, 1907, and due one, two, three, and four years after date, respectively. The notes were retained by plaintiff and his attorneys for about two years, and were then returned to defendant. These four notes purport to be signed by the Bell Richards Shoe Company, a corporation then in bankruptcy, by the defendant as secretary and treasurer. The notes were payable to plaintiff, and bore date more than four months preceding the bankruptcy and more than six months preceding delivery. In January, 1908, the plaintiff filed a claim in bankruptcy against the Bell-Richards Shoe Company, basing it, not on the four $1,000 notes made by Hodges in December, 1907, but on the sixteen notes of 6 August, 1907, aggregating $3,900, which, in the proof of his claim, he alleged were given for the stock in the company. In the proof of claim appears the statement: "That the only security held by Charles S. Richards for said debt is the following: The signature of Sam T. Hodges to the notes above referred to, and the certificates of stock, amounting to $4,000, in the Bell-Richards Shoe Company, which have been deposited by the said Sam T. Hodges in the First National Bank of Hendersonville, N. C., and on which the said Charles S. Richards has a lien." The claim was afterwards withdrawn by plaintiff, and he received $98.52 on the capital stock sold to Hodges and deposited in the First National Bank of Hendersonville, as security for the notes sued on. This action is brought to recover $3,750, alleged to be due by defendant on the notes of 6 August, 1907, which were made by him to plaintiff in accordance with the contract entered into between them on that date. The defense is that
(186) the sixteen notes of 6 August, 1907, were paid and satisfied by the four $1,000 notes of the corporation given to plaintiff.

Plaintiff duly objected to all evidence tending to change, vary, or contradict the original contract of the parties, which was in writing, and it being admitted, he excepted. The following verdict was returned by the jury:

1. Were the notes sued on given with the understanding and agreement that the notes of the Bell-Richards Shoe Company in the sum of $4,000 should be received and accepted by the plaintiff in the payment of the notes sued on? Answer: Yes.

2. Did the defendant deliver to the plaintiff notes of the Bell-Richards Shoe Company for $4,000 in pursuance of such agreement? Answer: Yes.

The judge charged the jury as follows:

"1. Were the notes sued on given with the understanding and agreement that the notes of the Bell-Richards Shoe Company, in the sum of $4,000, should be received and accepted by the plaintiff in payment of the notes sued on? That is a plain question of fact; the issue presents the clear-cut question of fact for you to determine from the evidence, and if you find therefrom and by the greater weight thereof, the burden being on the defendant Hodges to so satisfy you, that this was the agreement, that is, that he and the plaintiff Richards agreed and contracted, at the time the notes in suit were signed and delivered to Richards, that they should be paid off and discharged by the substitution of the notes of the Bell-Richards Shoe Company for $4,000, then you will answer the issue 'Yes'; but if the defendant has not so satisfied you from the evidence and all the evidence and circumstances, you will answer the issue 'No.'

"2. If you answer the first issue 'Yes,' the second issue is, Did the defendant deliver to the plaintiff notes of the Bell-Richards Shoe Company for $4,000 in pursuance of such agreement? The burden of this issue is one the defendant to satisfy you that he had not only delivered the notes of $1,000 each to Richards, the plaintiff, but that he delivered them in pursuance of the contract made 6 August, (187) 1907, and not only that he delivered them, but that they were accepted by Richards in pursuance of the prior contract, and, if the defendant has so satisfied you, you will answer the second issue 'Yes'; but if he has not so satisfied you, you will answer 'No.'" He further charged that, while the four $1,000 notes would not be good against the creditors of the company, or its stockholders, or in the bankruptcy court, that was not the question, but the jury should simply inquire and find whether or not they were made, delivered, and accepted in execution of the prior contract of Richards with the defendant; but the jury were told that they might consider the nature of this transaction in passing upon the credibility of the defendant, who had testified in the case in his own behalf.

Judgment was entered upon the verdict, and plaintiff appealed.

Mark W. Brown and Britt & Toms for plaintiff.
Michael Schenck for defendant.

WALKER, J., after stating the case: The general rule is readily admitted, that a contract in writing, complete on its face, cannot be altered by parol evidence of inconsistent agreements previously or contemporaneously made, in the absence of fraud, accident, or mistake. The terms of a written contract cannot be varied or contradicted in such a way, but all such negotiations are conclusively presumed to have been merged into the final agreement, of which the writing is, in law, the only memorial. The difficulty arises always in the application of this rule and the determination in any given case of the question whether the proposed evidence does tend to vary or contradict it, or shows merely a collateral and independent agreement having no such tendency.

In recent years we have decided numerous cases with reference to the bearing and application of this rule to their special facts, and some in which were involved the consideration whether the terms of the instrument were essentially varied or contradicted, and the obliga-
(188) tions of parties under the contract thereby changed or modified. *Cobb v. Clegg,* 137 N. C., 153; *Evans v. Freeman,* 142 N. C., 61; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97; *Medicine Co. v. Mizell,* 148 N. C., 384; *Basnight v. Jobbing Co.,* 148 N. C., 350; *Walker v. Venters,* 148 N. C., 388; *Woodson v. Beck,* 151 N. C., 144; *Pierce v. Cobb,* 161 N. C., 300; *Carson v. Insurance Co., ibid.,* 441; *Ipock v. Gaskins, ibid.,* 673, and many others; but those cited, if carefully examined, will serve to illustrate the force and extent of the rule in its application to cases of varying phases.

We should give proper heed to the admonition of *Justice Shepherd* in *Moffitt v. Maness,* 102 N. C., 457, quoting the words of *Judge Taylor* in *Smith v. Williams,* 5 N. C., 46, and those of other eminent jurists, that the written memorial is far more trustworthy than oral statements of witnesses, "the sages of the law having said that the fallability of human memory weakens the effect of that testimony which the most upright mind and one fully impressed with the solemnity of an oath may be disposed to give to it." He counsels us that in some of the cases we have approached close to the verge of the law, and that there is great danger that we may pass beyond it. But we apprehend no such danger in this case, for the charge of the court may well be sustained, and safely, too, upon an unquestioned principle of the law.

There is no attempt here to vary or contradict the written agreement, but only to show that the plaintiff has accepted the new notes in full payment and satisfaction of the original ones. If the original parol

stipulation, that they should be thus received as a discharge of the first obligation, changes the contract as evidenced by the writing, that is, the sixteen notes, which we need not decide, Richards afterwards took the new ones, kept them, proved them in bankruptcy, and, as the jury found under the evidence and the verdict as interpreted by the charge, he so received them in substitution for the other notes as a satisfaction thereof. In this view, it can make no difference whether the oral stipulation was made contemporaneously with or subsequently to the date of the original notes, as he afterwards voluntarily submitted to a performance of it by accepting the new notes. It then became an executed (189) contract. The previous agreement to accept the notes of the company in substitution for or as a satisfaction of the defendant's notes in other words, to explain his act of receiving them.

The case of *Rugland v. Thompson,* 51 N. W. Rep. (Minn.), 604, seems to be exactly in point. It appeared there that the payee and was, at least, competent to show that they were delivered to plaintiff and retained by him for that purpose, that is, to satisfy the others, or, holder of a promissory note had accepted from the maker certain personal property and services, and it was held admissible to prove an oral agreement when the note was made, that whatever should be thus supplied to the payee should be applied in payment on the note; such evidence being admissible, not to vary the agreement expressed in the note, but only as bearing upon and characterizing the subsequent delivery and acceptance of the property and services. And so is the case of *Buchanon v. Adams,* 49 N. J. L., 636 (60 Am. Rep., 666), where the defendant proposed to prove that the plaintiff had orally agreed with the defendant, at the time of giving the note in suit, that he would receive lumber in payment of it, and that it would not be negotiated. The Court decided that whole this evidence, by itself, was incompetent, as we held in *Walker v. Venters, supra,* yet "that the testimony offered, when supplemented by proof that such agreement was executed, on the part of the defendants, by the delivery of more than sufficient lumber to pay the note, was admitted for the purpose of showing that the lumber was in fact received in payment and satisfaction of the note, and not for the purpose of varying the terms of the written promise to pay. The rule is well settled that evidence of contemporaneous declarations is inadmissible to vary the terms of a written contract," citing several cases in support of the ruling. See, also, *Bank v. Osborne,* 81 Minn., 276; *Braly v. Henry,* 71 Cal., 481; *Honeycut v. Strother,* 2 Ala., 135. The last three cases go even beyond the necessities of our case. Reference is also directed to a number of cases of a like tenor, to be found in a valuable note to *Woodson v. Beck, supra,* as reported in 31 L. R. A. (N. S.), 235. (190)

The Court, in *Middleton v. Griffith,* 57 N. J. L., 442, after referring to the case just cited, *Buchanon v. Adams,* said: "It was held in *Chaddock v. Van Ness,* 6 Vroom, 517, that parol evidence of a contemporaneous agreement between the parties as to the mode of payment, which has been executed in satisfaction of the debt, is admissible in an action by the payee against the maker. The principle upon which such evidence is admissible in an action by the payee is that it goes to establish the fact of payment or satisfaction. *Oliver v. Phelps,* 1 Zab., 597, 603. If this offer of evidence in this case was to establish a contemporaneous agreement as to its mode or manner of payment between the plaintiff and defendant, and which had been executed in satisfaction of the note or debt secured thereby, then it was admissible to defeat the action; but in order to be admissible, the offer must tend to show this result."

Parol evidence will not be received for the purpose of engrafting upon a promissory note, which appears upon its face to call for the payment of a definite sum of money at a specified time, absolutely and unconditionally, a promise which contradicts its terms and subverts its legal effect; but in *Zimmerman v. Adee,* 126 Ind., 15, the Court, while fully recognizing and adopting that principle, held, upon a state of facts like ours, "that the rule which precluded proof of prior or contemporaneous agreements did not prevent proof of an executed agreement made at the time of the making of a note to the effect that the instrument should be surrendered upon the performance of certain conditions, which had been fully performed. Where the object of parol evidence is to show that a note has actually been satisfied in some other way than by the payment of money, it is perfectly competent for the maker to prove that contemporaneously with the making of the note it had been agreed that it might be paid or satisfied by delivering another note, and that the other note had actually been delivered in pursuance of the agreement," citing *Hagood v. Swords,* 2 Bailey, 305; *Crosman v. Fuller,* 17 Pick., 171; *Low v. Treadwell,* 12 Me., 441; *Bradley v. Bemtly,* 8 Vt., 243; *Buchanon v. Adams,* 9 Cent. Rep., 120. Citations to this (191) point might easily be multiplied indefinitely, but we will content ourselves with a reference to only a few of them. *Sutton v. Gabriel,* 118 Iowa, 78; *Howard v. Stratton,* 64 Cal., 487; *Tucker v. Tucker,* 113 Ind., 272, where the Court held: "This rule (of exclusion) does not, however, prevent the maker of a promissory note from alleging and proving an *executed* agreement, made at the time of the execution of the note, that it should be delivered up upon the performance of certain conditions by the maker. The effect of averments and proof of that nature is not to vary, contradict, or add to the note, but to show

that, according to the terms of a collateral agreement, made at the time, and since fully executed, the note has been paid and satisfied." See, also, an elaborate note to *Gas Co. v. Wood,* 43 L. R. A. (O. S.), at page 483, where many cases to the like effect are collected, especial attention being called to *Juilliard v. Chaffee,* 92 N. Y., 529, and *Patrick v. Petty,* 83 Ala., 420.

We may consider it as settled by the authorities that where the collateral agreement, though in parol, has actually been performed, or passed from the executory to the executed stage in the negotiations between the parties, it is competent to show the oral agreement, not for the purpose of varying or contradicting the writing, but to explain and characterize that part of the transaction by which the collateral agreement was executed; and, too, apart from the prior oral agreement, it would be competent to show, independently, as an isolated fact, for what purpose the subsequent notes were given by defendant and received by the plaintiff, as it does not alter any written contract. The parties can voluntarily stipulate as to the method of performing their contract (*Typewriter Co. v. Hardware Co.,* 143 N. C., 97), and it is binding upon them, at least, when the agreement is executed, as much so as if the original contract had been performed identically as stated therein, the new method being substituted for the old.

It does not appear clearly in the record at what time the new notes were actually delivered. When an oral contract of this kind is made with respect to performance of the written contract, the creditor who accepts one set of notes in satisfaction of the other and (192) prior one cannot object that the new notes turned out to be uncollectible. On this point the law is thus stated in 2 Greenleaf on Ev. (14 Ed.), sec. 523: "Proof of the acceptance of the promissory note or bill of a third person will also support the defense of payment. But here it must appear to have been the voluntary act and choice of the creditor, and not a measure forced upon him by necessity, where nothing else could be obtained. Thus, where the creditor received the note of a stranger who owed his debtor, the note being made payable to the agent of the creditor, it was held a good payment, though the promisor afterwards failed. So, where one entitled to receive cash receives instead thereof notes or bills against a third person, it is payment, though the securities turn out to be of no value," citing in support of the text *Wiseman v. Lyman,* 7 Mass., 286, and other cases.

There was no fraud or suppression of the facts, and no necessity forced upon the plaintiff to take the new notes, and certainly no duress. It was his free and voluntary act, with full knowledge of all the circumstances. Taking an abstractly equitable view of the matter, he has lost

nothing, really; as, if he had kept the stock, it would have been practically worthless; and the defendant conversely acquired nothing of value by the purchase. Under the circumstances, if we required defendant to pay the original notes, when plaintiff agreed to take the company's notes in satisfaction of them, it would not be just from a moral standpoint, even if, in strictness, it is the correct legal aspect of the case. But we consider the case only as it is affected by the law, and not by any moral question involved.

There were no requests for special instructions, presenting any other feature of the case, and under the charge and the evidence the jury have found that plaintiff actually received the notes of the company in performance of his prior contract, and this makes a complete defense to his recovery upon the sixteen notes, there being ample evidence to sustain the charge.

No error.

Cited: Buie v. Kennedy, post, 299.

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JOSEPHINE HARTSELL v. CITY OF ASHEVILLE AND MARIA BEALE AND HUSBAND.

(Filed 10 December, 1913.)

1. Cities and Towns—Ordinances—Streets and Sidewalks—Adjoining Owner—Negligence—Trials.

Where a city ordinance requires the owners of lots adjoining the streets to keep the sidewalks in front of their premises, under penalty, free from ice, snow, etc., it is for the city to enforce its ordinance, and a property owner is not liable in damages to a pedestrian injured by falling on a sidewalk in front of his premises, alleged to have been caused by his negligence in failing to observe the ordinance. Instances distinguished in which the city has made a contract for the benefit of its citizens, as in *Gorrell v. Water Co.*, 124 N. C., 328.

2. Cities and Towns—Negligence—Presenting Claims—Interpretation of Statutes—Notice—Exceptions.

No actual notice is required to be given of a provision of a city charter that no action for damages for a personal injury shall be instituted against it unless notice be given in writing, in a certain manner, within ninety days after the happening or infliction of the injury complained of, and a provision of this character being to protect the city from unjust claims or demands, is held valid; and no exception thereto is shown when it appears that a plaintiff was not mentally incapacitated from giving the notice, and had ample opportunity to have done so, though physically unable during the period specified.

HARTSELL *v.* ASHEVILLE.

APPEAL by plaintiff from *Bragaw, J.*, at August Term, 1913, of BUNCOMBE.

J. H. Merrimon and Merrimon, Adams & Adams for plaintiff.
S. G. Bernard and Harkins & Van Winkle for defendants.

CLARK, C. J. This action is for the recovery of damages for an injury sustained from a fall on ice and snow which had been permitted to accumulate on the sidewalk in Asheville along the front of the property owned by the defendant, Maria Beale.

Upon the close of all the evidence the court held that there was no evidence sufficient to go to the jury as to the liability of the defendant Beale, and that all the evidence tended to show only (194) physical disability on the part of the plaintiff as an excuse for a failure to file notice within ninety days of her claim, as required by the charter of Asheville, and she could not maintain this action against the city, and judgment of nonsuit was duly entered as to both defendants.

There was evidence that the plaintiff fell on ice which was on the sidewalk in front of the property of Maria Beale, and was seriously injured. She was taken to the hospital and was practically helpless for three months, but she was not unconscious during that time except for one period of two hours, when ether was administered. Her daughter visited her every day while in the hospital.

The ordinances of Asheville made it the "duty of all occupants or tenants of improved property and of the owners of all vacant property within the city of Asheville in front of which the sidewalks have been paved, to keep said sidewalks clean and to do such sweeping and scraping as may be necessary to keep such sidewalks clean and free from snow, ice, dirt, and trash, and to render the same passable, comfortable, and sightly, and the gutter next to and along such sidewalk open and free from obstructions for the full width of their respective fronts, and no further. And any person failing, neglecting or refusing to comply with the provisions of this section shall be subject to a penalty of $10 for each and every such offense." It was in evidence that the Beale property was unoccupied at the time of the injury. But that would not release the owner from the duty to observe the requirements of this ordinance. The failure to obey it subjected the owner of the property to a penalty of $10 for each offense. We know, however, of no principle of law, nor have we been able to find any precedent where the owner of property failing to obey such ordinance became liable to any passer-by who might be injured by slipping upon the ice or snow accumulated on the sidewalk. It was the duty of the city to see that the sidewalks were kept clear, and the penalty upon the abutting owner for failure to

(195) observe the requirement of the city is prescribed in the ordinance. There was no obligation created thereby upon the abutting owner for injuries accruing to the plaintiff under such circumstances.

It is true, we have decisions that when a contract is made for the benefit of a third party the beneficiary therein is entitled to maintain an action for its breach. *Gorrell v. Water Supply Co.*, 124 N. C., 328, and cases therein cited, and citations to that case in Anno. Ed. This principle does not apply to actions of tort where one is injured by failure to obey a town ordinance, which was enacted as a part of the town system of government. It is for the town to enforce its own ordinances, and the failure of a citizen to obey an ordinance creates no contractual or other liability on him in favor of one who has been injured by the failure of the town to enforce its regulations. We find no precedent extending the doctrine to such cases, and it would open a wide and dangerous field of liability for abutting owners of property if liability should accrue against them in such cases. In *Gorrell v. Water Supply Co., supra; Peanut Co. v. R. R.*, 155 N. C., 148, and like cases, there was no question as to the liabilty of the defendant upon the facts alleged. The question was whether the plaintiff, as beneficiary, could maintain the action. But unless it were held that the defendant Beale was liable to the city for the damages, the plaintiff could not sustain this action.

Section 97 of the charter of Asheville prescribes: "No action for damages against said city of any character whatever, to either property or persons, shall be instituted against said city unless within ninety days after the happening or infliction of the injury complained of, the complainant, his executors or administrators, shall have given notice to the board of aldermen of such city of such injury in writing, stating in such notice the date and place of the happening or infliction of such injury, the manner of such infliction, the character of the injury, and the amount of damages claimed therefor; but this shall not prevent any time of limitation prescribed by law from commencing to run at the date of the happening or infliction of such injury, or in any manner interfere with its running." This section was set out and sustained as valid in *Cresler v. Asheville*, 134 N. C., 315. It is, besides, (196) a most necessary requirement that the city should have prompt notice of the circumstances attending the injury and the damages claimed, in order that the matter may be investigated while the injury is fresh and the evidence obtainable.

A similar provision in regard to claims for damages sustained from the nondelivery of telegrams, express, and freight has been sustained in this Court, though not required by any statute, as in this case, and

though the period is restricted to sixty days. *Sherrill v. Telegraph Co.*, 109 N. C., 531, and cases there cited and citations thereto in Anno Ed. Such provision neither restricts nor interferes with the statute of limitations as to the time within which the action may be brought. It is a reasonable regulation, in this case, indeed, expressly authorized by statute, to give opportunity for prompt investigation of the circumstances attending the alleged injury. It is not necessary, therefore, that the plaintiff should be shown to have had actual notice of the requirement.

It is contended that the plaintiff is relieved from giving notice by the decision in *Terrell v. Washington,* 158 N. C., 281. But upon examination it will be found that in that case the condition of the plaintiff was such, both mentally and physically, that he was unable during that period to transact ordinary business or present his claim. In this case the plaintiff was during the whole time, both mentally and physically, able through her friends to give notice of her claim, and was no more disabled from doing so than are those injured in the vast majority of cases for which the limitation of the time for notice is prescribed. Every person who is at all seriously injured is in more or less pain and more or less confined for some period thereafter. The provision applies to them. The statute in this case prescribed that in case of the death of the party injured such notice must be given by the personal representative within said ninety days, who must therefore be appointed and qualified. The object is to protect the city from unjust claims. In this case the plaintiff was unconscious for only two hours, and, besides, had the daily attendance of her daughter, who looked after her personal comfort, and through her the plaintiff could have given (197) at any time the notice required by the statute, which is a mere formulation of what is reasonable and proper, without any statute, for all who have just claims for injuries.

The judgment of nonsuit must be sustained as to both defendants.

Affirmed.

Cited: *S. c.,* 166 N. C., 633.

S. R. MORRISON ET AL. v. J. H. PARKS.

(Filed 3 December, 1913.)

Contracts—Offer—Acceptance.

For the acceptance of an offer to become a binding contract, it must be absolute and unconditional, and identical with its terms in all respects; and where an offer to sell lumber is made, and the acceptance is for a lower price, with further specification as to kinds, etc., the acceptance is a conditional one, and does not make a contract of sale.

APPEAL by plaintiffs from *Daniels, J.*, at May Term, 1913, of CATAWBA.

A. A. Whitener for plaintiffs.
W. A. Self and Spainhour & Mull for defendant.

CLARK, C. J. This is an action to recover $320 on account of defendant's failure to execute an alleged contract for the sale of certain lumber. At the close of plaintiffs' evidence the court sustained the motion for a nonsuit.

The defendant addressed a letter to the plaintiff as follows:

"GENTLEMEN:—I have about 80,000 feet of oak left yet, for which I will take $16 per M, delivered on cars at Bridgewater 'log-run.' I will take $8 per M for the mill culls I have at Bridgewater, as that is what it cost me; cut and deliver same."

To this the plaintiff replied:

"DEAR SIR:—Your letter of the 20th received, and would say, we will take your ¼ oak, at $16, mill culls out, delivered on cars at Bridgewater.

We will handle all your mill culls, but not at the price you are (198) asking. We are buying from A. L. & Co. for $4.50 on board the cars. We would be glad to handle yours at this price. How soon will you have some ¼ ready to load? We will take the $80,000 feet and will depend on this, and will load it out as soon as you can put it on the railroad. Please write us at once how soon you will have some of this stock ready to load."

The alleged contract being in writing, the construction of this written evidence was a matter for the court. In order to make the offer and reply a contract, "The acceptance must be (*a*) absolute and unconditional, (*b*) identical with the terms of the affer, (*c*) in the mode, at the

place, and within the time expressly or impliedly required by the offer." Clark on Contracts (2 Ed.), 25; *Sumrell v. Salt Co.*, 148 N. C., 552.

The plaintiff Morrison testified that "4/4" means lumber "an inch thick, of any length or width," and that "log-run" means "any thickness, with culls out." He further testified that the market price of 4/4 lumber, of that character, at that place and time, was $18.50.

It is apparent that the reply was not an acceptance of the terms of the offer of the defendant. (1) The defendant offered to take $8 per M for mill culls. The plaintiff replied, offering $4.50. (2) The defendant offered 80,000 feet of oak "log-run" at $16. The plaintiff replied, offering $16 per M for 4/4 oak—an entirely different article, and which he himself testified was then worth in the market $18.50 at the same place.

There was no contract. The offer of the defendant was not accepted, but a counter offer of an entirely different nature was made. The minds of the parties never met. The judgment of nonsuit must be

Affirmed.

(199)

J. D. HALL v. H. C. JONES.

(Filed 10 December, 1913.)

Contracts—Offer to Sell—Acceptance—Place of Payment.

An acceptance of an offer to sell must unconditionally be in accordance with the full terms of the offer, to make a binding contract; and where the proposed vendor and purchaser reside in different towns or places, an offer to sell lands at a certain price implies that payment should be made in cash at the residence of the former, and an acceptance by the latter specifying payment at his own place of residence is a variation from the terms of the offer, and no contract is thereby effectuated.

APPEAL by plaintiff from *Daniels, J.*, at Spring Term, 1913, of WILKES. From a judgment of nonsuit, the plaintiff appealed.

Finley & Hendren for plaintiff.
No counsel for defendant.

BROWN, J. The plaintiff alleges that he entered into a valid contract with the defendant by which the defendant contracted to sell the plaintiff a certain tract of land; the defendant refused to perform his contract, and plaintiff seeks to recover damages for its breach. The alleged contract is contained in certain letters, as follows:

MR. J. D. HALL, BLUEFIELD, W. VA., 7 January, 1909.
Halls Mills, N. C.

MY DEAR SIR:—I am just in receipt of your letter, inquiring for cash price on the Calloway farm. I will take fifteen hundred dollars ($1,500) cash for it.

I am offered $1,600, with $700 cash and the other in payments. Let me hear from you at once if you want the place.

Yours very truly,
(200) H. C. JONES.

HALLS MILLS, N. C., 11 January, 1909.

DR. COMMODORE JONES,
Bluefield, W. Va.

DEAR SIR:—I accept your offer of $1,500 for the Calloway farm, and inclose you $1 to bind the trade.

I will have the deed fixed up within fifteen or twenty days and mail to you; then you can sign the deed and send it to the Deposit and Savings Bank, at North Wilkesboro, N. C., with instructions to deliver to me upon the payment of $1,500; or, if you prefer, I will come to Bluefield, which would add to my cost.

So if this is satisfactory, let me know, and acknowledge receipt of the $1.

Yours very truly,
J. D. HALL.

There is some further correspondence between the parties subsequent to the above, which it is unnecessary to set out. If there was a valid contract between the parties, it is contained in the above letters.

We agree with his Honor that there was no proper acceptance of the defendant's offer. It is familiar learning that to make a valid sale, the acceptance must be in the terms of the offer. 7 A. & E. Enc., 125. No especial formalities are required, but the offer and acceptance must agree. The buyer has no right to attach any conditions, if he purposes to hold the seller upon the original offer. *Tanning Co. v. Telegraph Co.*, 143 N. C., 376.

The defendant offered to sell for cash. This required the buyer to pay at the seller's residence. It was the seller's right and duty then to prepare and deliver the deed at that place.

This case is very much like *Sawyer v. Brossart,* 56 Am. Rep., 372, in which a resident of California at Los Angeles addressed a letter to the plaintiff at his residence in Iowa, offering to sell him certain land at a certain price. The plaintiff telegraphed that he would take the property at the price, but added: "Money at your order at the First National Bank here."

The Supreme Court of Iowa held that it was not an acceptance; (201) that defendant's offer entitled him to have the money paid to him at Los Angeles, his residence, and to deliver the deed there. See, also, *Northwestern Iron Co. v. Meade,* 21 Wis., 474; *Baker v. Holt,* 56 Wis., 100; 1 Parsons on Contracts (6 Ed.), 475.

Affirmed.

JOHN BUCKNER v. MADISON COUNTY RAILROAD COMPANY.

(Filed 10 December, 1913.)

1. Trials—Notes of Evidence—Judge's Notes.

It is not required that the presiding judge shall take down the evidence upon the trial of an action, and though Revisal, 554 (2), does require that so much of the evidence as may be material to an exception taken shall be reduced to writing and entered by the judge upon the minutes of the court and filed with the clerk, the judge may require a stenographer or some one else to do so; and where the attorney for the appellant has been previously informed and given ample time on the trial to do this, and his notes with exceptions have been fully adopted in the case on appeal, he cannot be heard to complain either of its insufficiency or the failure of the judge to take the notes himself.

2. Negligence—Trials—Evidence—Measure of Damages.

In an action to recover damages for a personal injury, it is competent for the plaintiff to testify the regular price the defendant promised to pay him for the work in which he was engaged, as an element of damages involving the loss of compensation.

3. Negligence—Inexperienced Employees—Trials—Evidence.

Where damages for a personal injury is alleged to have been negligently inflicted by a railroad company, the negligence alleged being that of a fellow-servant, it is competent for the plaintiff to testify to a conversation had by him and the defendant's foreman, tending to show that the fellow-servant was inexperienced in the work; and while this testimony was held unnecesary in this case, its admission is held as immaterial.

4. Trials—Negligence—Evidence—Nonsuit—Questions for Jury.

In an action to recover damages for a personal injury alleged to have been negligently inflicted, there was evidence that while the plaintiff was engaged in loading logs for the defendant company, operating a logging road, the defendant's log-loader, without any signal or warning, suddenly and unexpectedly jerked the log at which plaintiff was at work, and thus caused the injury complained of by throwing it upon him: *Held,* evidence sufficient to take the case to the jury, and a motion as of nonsuit was properly denied.

5. Appeal and Error—Brief—Exceptions Abandoned—Trials—Evidence—Negligence.

Exceptions not noted in the brief are taken as abandoned, but held, in this case, the refusal to give an instruction excepted to was not error, as it barred the right of recovery for an injury inflicted by the unexpected movement of a log resulting from a negligent act of the defendant.

6. Fellow-servant—Logging Roads—Interpretation of Statutes.

Logging roads are railroads within the meaning of the fellow-servant act, Revisal, sec. 2646, and the provisions of the act apply to an injury negligently inflicted by a fellow-servant in any department of a railroad being operated.

(202) APPEAL by defendant from *Carter, J.*, at September Term, 1913, of MADISON.

Martin, Rollins & Wright and J. D. Murphey for plaintiff.
Merrick & Barnard and Guy V. Roberts for defendant.

CLARK, C. J. This is an action for personal injuries. The court suggested that counsel should arrange to have a stenographer to take notes on the trial. They failed to do so, and the court finds as a fact that "counsel were notified at the beginning of the trial that they would be *given ample time* to record all exceptions, and they *were given such ample time,* and in this case on appeal the appellant is allowed every exception claimed by it in its statement of the case on appeal."

The defendant excepts because the judge did not take notes of the evidence and did not himself make a record of the exceptions taken by the defendant on the trial. The statute does not require that the judge shall take down the evidence. It is true that Revisal, 554, sub-
(203) sec. (2), does provide: "If an exception be taken on the trial, it must be reduced to writing at the time, with so much of the evidence or subject-matter as may be material to the exception taken; the same shall be entered on the judge's minutes and be filed with the clerk as a part of the case upon appeal." This provision does not require that the judge shall reduce the exceptions to writing himself, but merely that they shall be reduced to writing and entered on his minutes. It is competent for the judge to require the stenographer, or some one else for him, to take down the exceptions and evidence pertinent thereto. It was, therefore, competent for him to authorize the defendant's counsel themselves to take down their own exceptions. He finds as a fact that he promised them ample time to do so, and that they had it. The defendant certainly cannot except to this privilege. The other side might possibly feel aggrieved. Even if it was error, the defendant could not complain, for it could not be and was not preju-

dicial error to that side. It is found that the "appellant is allowed every exception claimed by it in its statement of case on appeal." It is not alleged that there were any other exceptions of which the appellant was deprived from lack of time, and the judge finds the contrary to be the fact. His statement is necessarily conclusive of what occurred at the trial. *Cameron v. Power Co.*, 137 N. C., 100, and cases there cited.

Exception 2 is that the plaintiff was allowed to testify what was the "regular price" for the work which he was doing, stating that he was promised the regular price. This was competent, and if incorrect as to amount, the defendant could have shown it. Exception 3 is to the admission of a conversation between the plaintiff and the defendant's foreman and vice-principal prior to the injury. This tended to show that Thomas, the log-loader, was an inexperienced man. The negligence complained of in this case is the act of the log-loader, who was running the engine, in suddenly and unexpectedly and without warning jerking a log into which the plaintiff had hooked the tongs, without giving the plaintiff an opportunity to get out of the way. Although it was not necessary to put in this testimony, at most it was immaterial.

The motion for a nonsuit was properly refused. The allegation in the amended complaint is: "The defendant, Madison County Railroad Company, without any signal, suddenly, and without (204) any notice to the plaintiff, moved the log to which the plaintiff had attached the tong hooks, and carelessly and negligently threw or caused said log to be thrown, upon the plaintiff, and seriously and permanently injuring him." The testimony of the plaintiff upon this point was: "After I had hooked the tongs to the log, Marion Thomas, the log-loader, without any signal or warning, suddenly and unexpectedly jerked the log with the crane and log-loader and threw the same over on me and injured me before I had time to get out of the way."

Exception 5 was for refusal to charge that if the jury believed the evidence, to find the issue of negligence "No."

Exception 6 is for the refusal of the court to give the following instruction: "If the jury shall find from the evidence that at the time Thomas started to pull on the log he did not know, and had no reasonable ground to believe, that the log was caught or that it would follow other than the usual direction, the act of Thomas in pulling on the log would not be negligent, and the jury would answer the first issue 'No.' "

This exception and the next are abandoned because not set out in the defendant's brief. Rule 34 provides: "Exceptions in the record not set out in appellant's brief will be taken as abandoned by him." But if it had been insisted on in the brief, it could not be sustained, for though Thomas did not know, or had no reason to believe, that the

log was caught or would follow other than the usual direction, it was, notwithstanding, negligence, if, as charged in the complaint and shown in the evidence, he jerked the log, without warning and unexpectedly, without giving the plaintiff an opportunity to gain a place of safety, as he should have done, whereby he was injured.

It was held in *Hemphill v. Lumber Co.*, 141 N. C., 487, that lumber roads are "railroads" within the meaning of Revisal, 2646, and this ruling has been followed ever since. In *Nicholson v. R. R.*, 138 N. C., 516, and in many other cases it has been held that this section (205) applies to an injury suffered by an employee in any department of work of a railroad which is being operated.

No error.

CORPORATION COMMISSION v. BANK OF JONESBORO.

(Filed 3 December, 1913.)

Banks and Banking—Collateral Notes—Provisions as to Future Loans—Creditors.

Where a bank takes a note with collateral security whereon it is stated that the collateral hypothecated should not only be held to secure the amount of the note, but any amount that may at any time become due which the pledgor may have borrowed from the bank, with reference to these further loans contemplated the collateral used in their payment is not for a preëxisting debt, but for a present consideration existing at the time of making the loans. Hence, when a bank is the pledgor and has become insolvent and in a receiver's hands, its creditors can acquire no right to the collateral superior to that of the pledgor thereof.

APPEAL by Mrs. F. C. Jones *et als.*, exceptors, and Banking, Loan and Trust Company, from *Daniels, J.*, at July Term, 1913, of LEE.

This is a petition to rehear, based upon the ground that the Court overlooked and did not consider a question raised by the appeal, relating to the right of the Loan and Trust Company to retain certain collaterals deposited with it as security for the indebtedness due.

The facts are, that on 18 September, 1911, the Bank of Jonesboro owed the Loan and Trust Company $11,831.60; that on 19 September, 1911, it paid said trust company in money and notes $15,162.31; that of this amount of $15,162.31 the sum of $7,000 was a note of the Bank of Jonesboro secured by the collaterals in controversy, which were deposited under an agreement that they should be held, not only as security for the note of $7,000, but also to secure any other indebtedness the

Bank of Jonesboro might at any time owe the trust company; (206) that the amount paid on 19 September, 1911, including the $7,000 note, gave the Bank of Jonesboro a credit with the Trust Company of $3,330.71; that this credit was exhausted on 16 October, 1911; that the sum of $2,000 was paid on said $7,000 note; that from 16 October, 1911, to the suspension of the Bank of Jonesboro on 6 February, 1912, the indebtedness of the bank to the trust company was increased from time to time until at the latter date it amounted to $16,581.10; that this amount was made up of money advanced by the trust company to enable the Bank of Jonesboro to pay its depositors and to remit for collections made by it; that said collaterals were deposited by Huntley, cashier and manager of the Bank of Jonesboro, and president of the trust company; that during these different transactions the Bank of Jonesboro was insolvent, but this fact was not known to the trust company except as it was affected by the knowledge of its president, Huntley, who did know of the insolvency.

McIver & Williams and H. A. London & Son for Banking, Loan and Trust Company.

Hayes & Bynum, U. L. Spence, and Hoyle & Hoyle for exceptors.

ALLEN, J. The former opinion in this action was prepared for the Court by the writer of this opinion, and it is true, as alleged in the petition to rehear, that the point now presented as to the right of the trust company to retain the collaterals deposited with it was then made and dismissed, and was not considered by the Court.

It appears, however, from the first brief filed that the ground then chiefly relied on by the appellant was that the deposit of the collaterals was in effect an assignment, and therefore void as a preference, and that this position is now practically abandoned, because it does not appear that the collaterals formed any considerable portion of the assets of the bank; and if a preference, it was made more than four months prior to the suspension of the bank.

The appellant now urges that the deposit of the collateral was (207) to secure a preëxisting debt; that in this transaction Huntley was acting for the trust company, and not against it; that therefore his knowledge of the insolvency of the bank is to be imputed to the trust company; and that as he was the cashier and manager of the bank and president of the trust company, the deposit of the collaterals is fraudulent as to the other creditors.

There is much force in this contention, if the premises are admitted; but it rests upon the assumption that the collaterals were deposited to secure a preëxisting debt, which does not appear to us to be true.

The agreement at the time of the deposit was that the collaterals should not only be held to secure the amount then due, but any amount that might become due at any time, and it appears from the findings of fact that in addition to the balance of $5,000 due on the $7,500 note, the trust company has advanced since that time $11,581.50 on the faith of the collaterals, which has been used in paying depositors of the Bank of Jonesboro, and in remittances for collections. If so, the debt of the trust company, for which the collaterals are held, is not preëxisting.

An agreement in reference to collaterals securing other indebtedness in all material respects like that before us was sustained in *Norfleet v. Insurance Co.,* 160 N. C., 330, and a deposit of collaterals by an insolvent to secure a debt then created was upheld against creditors in *Godwin v. Bank,* 145 N. C., 325, under facts not more favorable to them than those in this case.

The trust company has advanced, under any contention of the appellants under the facts found by the Court, more than $11,000 on the faith of the collaterals, which has been used in payment of depositors and other *bona fide* creditors, and it is no wrong or injustice, upon these facts, to permit it to retain its security according to the agreement of the parties.

We are, therefore, of opinion that the judgment of the Superior Court should be affirmed and

Petition dismissed.

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(208)

ISOM PATRICK v. GIANT LUMBER COMPANY.

(Filed 3 December, 1913.)

Master and Servant—Contracts—Independent Contractor—Trials—Evidence—Control by Employer.

In determining the liability for a tort alleged by the defendant to have been committed by an independent contractor, the question is determinative as to whether the employer has the right to control the employee in respect to the work from which the injury arose, whether he exercised the right or not; and where there is evidence of this character of employment and *per contra,* the question of independent contractor should be submitted to the jury under proper instructions, and a motion for judgment as of nonsuit denied.

APPEAL by defendants from *Cline, J.,* at August Term, 1913, of WILKES.

Civil action, tried upon these issues:

1. Did the defendant lumber company set fire to its woodland adjoining the lands of the plaintiff without giving any notice of its intention to do so? Answer: Yes.

2. If so, did such fire escape from defendant's land to and burn over the plaintiff's land, injuring and destroying the plaintiff's fence, timber, and undergrowth, as alleged in the complaint? Answer: Yes.

3. What damage is the plaintiff entitled to recover of the defendant, Giant Lumber Company? Answer: $300.

The defendant appealed.

Benbow & Caviness, T. C. Bowie for plaintiff.
Finley & Hendren, W. W. Barber for defendant.

BROWN, J. This action was brought to recover damages caused to the plaintiff's land by the negligent setting out of fire of the defendant without giving due notice. The fire spread to the plaintiff's lands and destroyed his timber.

The action was originally brought against W. H. Taylor and Ham Miller, as well as the defendant company, but a nonsuit was taken as to them. The only assignment of error is the refusal of the court to allow the motion to nonsuit.

The defendant contends that the negligence complained of was (209) that of Taylor and Miller; and that they were independent contractors, and that under the evidence as a whole it is not liable for the tort complained of, and that, therefore, the court below should have allowed its motion, under the statute, to nonsuit plaintiff.

The plaintiff, on the other hand, contends that Miller and Taylor were not independent contractors, but that they were sufficiently under the general control of the defendant company to make it liable for the tort complained of.

The sawmill and lands where the fire originated belonged to the defendant company, and the mill was operated by Will Taylor. He testified that he operated the mill from which location the fire got out; that the Giant Lumber Company paid him for it. It was Will Palmer's mill, and George Palmer was foreman.

There is evidence amply sufficient to go to the jury that the control of the operations of Taylor in operating the mill and of Miller in logging it was exercised by the defendant company, and that it retained supervision and control over the servants employed and the methods of work.

The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for. If the employer has the right of control, it is immaterial whether he actually exercises it. 16 A. & E. Enc., 188.

In denying the motion to nonsuit, there was

No error.

(210)

JAMES HUDDLESTON ET ALS. v. A. F. BAXTER HARDY.

(Filed 3 December, 1913.)

1. Deeds and Conveyances—Escrow—Delivery—Evidence.

Where a deed is executed and given to a third person to be held in escrow and to be given by him to the grantee after the death of the grantor, the latter retaining no control over it and no right to recall it, it is a valid delivery; and when the deed is once delivered without reservation, the grantor cannot by any subsequent act of his, defeat the rights of the grantee.

2. Same—Intent—Trials—Questions for Jury.

Where a deed is executed and given to a third party to be held in escrow, to be then given to the grantee after the death of the grantor, and the evidence is conflicting as to whether, at the time of the delivery in escrow, the grantor did so without reservation or without retaining control over it, the controlling test is the intent of the grantor, at the time, to part with the deed and put it beyond his control, which raises an issue of fact to be determined by the jury.

3. Same—Subsequent Writing in Escrow.

In an action involving the question of delivery of a deed, a witness testified that the deceased grantor had told him he wished the grantee to have the lands, and on the following day the grantor came to his office, executed the deed, saying he wanted it to be held in escrow, and passed it across a desk at which he was sitting, saying, "There is the deed," and the witness placed the deed under an inkstand on his desk; that about an hour and a half later the grantor signed written instructions as to the conditions of the escrow, reciting therein that he "did execute and deliver the deed," before which time there was no suggestion of the right of the grantor to retain or lose control of the deed: *Held*, upon this evidence it was for the jury to determine whether or not the grantor parted with the possession of the deed, intending at the time to surrender all power or control over it.

WALKER, J., concurring in result.

APPEAL by defendant from *Justice, J.*, at July Term, 1913, of McDOWELL.

Action to recover land. The plaintiffs are the heirs at law of A. F. Huddleston. The defendant claims under a deed from the said
(211) A. F. Huddleston, and the question in controversy is whether there is any evidence of the delivery of this deed.

During the trial of the cause the plaintiffs introduced as a witness one L. A. Haney, who testified as follows: That he had talked to old man Huddleston more than once about preparing a deed for him to sign to defendant; that on Sunday, 3 May, 1903, he went over to his house

and asked him if he had prepared the deed; that he wanted to sign the said deed to Hardy and place it in his hands as an escrow; that on Monday, 4 May, the next day, he went to his (Huddleston's) house and wrote deed and he signed it and pushed or threw it across the table to witness, and told him there it was, and witness took deed and folded it up and laid it down and put inkstand on it, and then went on to talk about the history of his life for an hour and a half; that he (Huddleston) said he did not want Hardy put in possession to turn him off the land, and either Huddleston or witness suggested that witness had better put in writing what he was to do with the deed, when witness wrote the other paper dated 4 May, 1903, at his own suggestion, one and a half hours after Huddleston had signed deed. Then deceased (Huddleston) signed it. The deed and other paper were both witnessed by L. A. Haney and L. A. Owens. The deceased, at different times, told witness that he intended for Baxter Hardy, the defendant, to have the land.

The other paper referred to it as follows:

This writing witnesseth, that whereas A. F. Huddleston did on 4 May, 1903, execute and deliver a certain deed bearing even date herewith, made by said A. F. Huddleston to one A. F. Baxter Hardy, and whereas the said Huddleston is desirous of obtaining his support from land during his natural life: Now, therefore, he places the above described deed in escrow with one Lewis A. Haney to be delivered by the said Haney on the following conditions:

1st. The said L. A. Haney is to deliver the above described deed to A. F. Huddleston at any time at the request of said A. F. Huddleston.

2d. At the request of said A. F. Huddleston, the said Haney is to deliver the said deed to A. F. Baxter Hardy. (212)

3d. That immediately at my death the said L. A. Haney shall at once deliver the said deed to the said A. F. Baxter Hardy, should it not be delivered by him as above set forth before my death.

In witness I have set my hand and seal, this 4 May, 1903.

A. F. HUDDLESTON.

His Honor instructed the jury if they believed the evidence to answer the first issue "Yes" and the second issue "No," to which the defendant excepted, and under this instruction the jury returned the following verdict:

1. Are the plaintiffs the owners of the land described in the complaint? Answer: Yes.

2. Was the deed to the defendant executed and delivered by A. F. Huddleston? Answer: No.

Judgment was rendered in favor of the plaintiffs, and the defendant excepted and appealed.

James Norris and W. T. Morgan for plaintiff.
D. L. Carlton and Hudgins & Watson for defendant.

ALLEN, J. If there is any evidendce of a delivery of the deed to Haney for the defendant, the ruling of his Honor is erroneous, and *Weaver v. Weaver,* 159 N. C., 18, would be decisive in favor of the contention of the plaintiffs that there is no such evidence, if the paper-writing executed after the deed was signed, by which the control of the deed remained with the grantor, had been incorporated in the deed, or had passed from the grantor at the same time with the deed.

It was held in the *Weaver case* that there is no delivery if the grantor reserves the right of recall, although the deed is placed in possession of a third person, to be delivered to the grantee at the death of the grantor, if not recalled; but the Court also quoted with approval from *Tarlton v. Griggs,* 131 N. C., 216, that, "There must be an intention of the grantor to pass the deed from his possession and beyond his control, and he must actually do so, with the intent that it shall be taken by grantee or some one for him. Both the intent and the act are necessary to
(213) the valid delivery. Whether such existed is a question of fact to be found by the jury."

The Court also approved *Fortune v. Hunt,* 149 N. C., 360, where it is said: "When the maker of a deed delivers it to some third party for the grantee, parting with the possession of it, without any condition or any direction to hold it for him, and without in some way reserving the right to repossess it, the delivery is complete and the title passes at once, although the grantee may be ignorant of the facts, and no subsequent act of the grantor or any one else can defeat the effect of such delivery."

These authorities establish the following propositions:

(1) If the deed is given to a third person for the grantee, and the grantor retains control of it and the right to recall it, there is no delivery.

(2) If the deed is given to a third person for the benefit of the grantee and the grantor retains no control over it and no right to recall it, there is a delivery.

(3) If the deed is once delivered, without the reservation of any control over it, the grantor cannot by any subsequent act of his defeat the rights of the grantee.

(4) That the controlling test of delivery is the intention of the grantor to part with the deed and put it beyond his control, and that this intent is an issue of fact, to be passed on by a jury.

Applying these principles, we are of opinion, not that the deed has been delivered, but that there is evidence of delivery which should be considered by a jury.

The grantor told Haney the day before the deed was signed that he wanted to sign a deed to the defendant and place it in his (Haney's) hands as an escrow; on the next day, after signing the deed, he pushed or threw it across the table and said there it was, and Haney took it, folded it, and placed it under an inkstand, and in the paper executed one hour and a half later he recites that he "did *execute* and *deliver*" the deed. It also appears from the evidence that after the deed was signed and given to Haney, the grantor talked an hour and a half about the history of his life before the right to retain control of (214) the deed was suggested or considered.

If the jury find upon this evidence that the grantor parted with the possession of the deed, intending at the time to surrender all power or control over it, there has been a delivery, which could not be affected by the execution of the paper thereafter.

On the other hand, if the grantor did not part with the possession of the deed until after the second paper was signed, and it was left on the table while he and Haney were discussing his history and what was best to be done, or if it was not the intention of the grantor at the time he pushed or threw the deed to Haney to part with its possession and control, then there is no delivery.

These are questions for the jury, and to the end that they may be considered, a trial before a jury is ordered.

Reversed.

WALKER, J., concurring in result: I yield my assent fully to the general principles stated in the Court's opinion. There must not only be a physical delivery of a deed as the final act of execution, but it must be accompanied by an intent of the grantor to perfect the instrument. The question of delivery is a mixed one of law and fact. When the facts are admitted or establishedd, it is one of law. No special formulary of words or acts is prescribed as essential to the completeness of the instrument as the deed of the party sealing it, but when a present unqualified or unconditioned delivery has been made, the deed becomes immediately operative and is placed beyond the grantor's recall. It can make no difference how long afterwards it is when he changes his mind, whether the interval be very short or very long, it will not change the result; the act of delivery is instantaneous, and the deed becomes irrevocable. This is what we decided in *Fortune v. Hunt*, 149 N. C., 358, where *Justice Brown* says: "When the maker of a deed delivers it to

some third party for the grantee, parting with the possession of it, without any condition or any direction as to how he shall hold (215) it for him, and without in some way reserving the right to repossess it, the delivery is complete and the title passes at once, although the grantee may be ignorant of the facts, and no subsequent act of the grantor or any one else can defeat the effect of such delivery." The facts in this case are not disputed. The deed was written by L. A. Haney, signed by the grantor, A. F. Huddleston, on 4 May, 1903, at his home, "who pushed or threw it across the table to Haney," saying, at the time, "There it is." He had stated that he wanted to "sign the deed to Baxter Hardy" and place it in his hands, for his use and benefit, and at different times told witness "that he intended for Baxter Hardy, the defendant, to have land." Henry took the deed, folded it up, and laid it down, and put the ink-stand on it. The matter was then dropped for a full hour and a half, when, for the first time, he referred to the possibility that "his son might turn him off the land." But the act of delivery was then complete, as much so as if the new matter had not been mentioned for a month afterwards. If nothing more had been said after the delivery to Haney, we would not hesitate to declare that a legal delivery had been effected, and that no *locus penetentiæ* was left to the grantor, or power of recall. Why is not the same true, as to this deed, if after delivery the grantor "cannot by a subsequent act defeat the effect of the delivery," as *Justice Brown* said in *Fortune v. Hunt?* It did not require one and a half hours to ripen the delivery into a perfect one. It was already a finished act. I might cite authorities without number to sustain these views, but they need no such support. Our own decisions are quite sufficient for the purpose, and they are perfectly familiar to us. Some of them will be found in *Robbins v. Rascoe,* 120 N. C., 80; *Hall v. Harris,* 40 N. C., 303. The grantor delivered the deed and Haney took possession of it, at his request, for his son. It is the same as if the son had been there and received it in person. There was nothing to explain or qualify this unequivocal act of delivery, and the law, therefore, adjudges it to be, in itself, sufficient to perfect the deed. The judge should have reversed his instruction (216) and told the jury to answer the first issue "No" and the second issue "Yes," if they believed the evidence or found the facts according to the testimony. The case falls manifestly within the second and third classes stated in the Court's opinion. *Bond v. Wilson,* 129 N. C., 325, 330. What the grantor said after the execution of the deed was clearly an afterthought.

Cited: *Lee v. Parker,* 171 N. C., 151; *Lynch v. Johnson, ib.,* 620.

RICHARD WILLIAMS v. HUTTON & BOURBONNAIS COMPANY ET AL.

(Filed 10 December, 1913.)

1. Judgments—Estoppel—Pleadings—Issues—Trials—Forms — Interpretation of Statutes.

Under our Code system of pleading, forms which do not make for the speedy trial of a cause of action upon its merits are abolished, and our statute, Revisal, sec. 479, does not require that new matter constituting a defense must exist at the time of the commencement of the action, and inconsistent defenses may be pleaded. Hence, a judgment rendered in another jurisdiction after the present cause had been commenced and is at issue may be taken advantage of by amendment, and pleaded as an estoppel, to be determined at the trial by the court alone if presenting only a matter of law, and by the jury if issues of fact are raised by the pleadings.

2. Same—Pleas—"Puis Darrein Continuance."

After pleadings were filed in an action involving the disputed title to lands, the defendant filed a plea *puis darrein continuance*, alleging an estoppel by judgment rendered in the Federal Court, to which the plaintiff replied, denying the jurisdiction of the Federal Court and alleging that there was no identity of or privity among the parties to that action with those of the present one: *Held*, the defendant's plea should be considered as an amendment to the answer, which, not being in the nature of a counterclaim, required no further pleading by the plaintiff to be considered as denied. The practice of the common-law plea of *puis darrein continuance*, and its effect, discussed by ALLEN, J.

APPEAL by defendant from *Lyon, J.*, at February Term, 1913, (217) of McDOWELL.

This is an action to remove a cloud from the title to land, described in the complaint, in which Richard Williams is plaintiff and the Hutton-Bourbonnais Company and fifteen others, including A. G. Olmstead, M. E. Olmstead, and F. L. Bartlett, are defendants.

The action was commenced in Burke County, and was removed to McDowell County for trial.

After the complaint and answers were filed and issues joined, the defendant filed the following plea, which was verified.

"The defendants filing this special plea, since the last continuance, allege and say:

"1. That this action, as they are advised and believe, cannot be maintained, or further prosecuted by the plaintiff, Richard Williams, for that since the commencement of this action a final decree has been rendered in the United States Circuit Court, at Statesville, N. C., and a copy of the same duly filed and recorded and docketed in the office of the Superior Court of Burke County, in an action brought by Herman Bon-

ninghausen, who is in privity with some of the defendants in this action, and holds the title to the lands in controversy as trustee for some of these defendants, against Richard Williams, the plaintiff herein, and others, in which it is adjudged that the plaintiff Bonninghausen is the owner of the identical land sued for in this action, and in which the identical grants sued on in this action, to wit, Grant 17,226, dated 9 July, 1908, and Grant 17,302 to Richard Williams, dated 3 February, 1909, are ordered to be delivered up and canceled of record, and that the same under said decree have been duly canceled of record in the office of register of deeds of Burke County, and by said decree the said R. Williams and each and all persons claiming under or through him are perpetually enjoined and restrained from interfering with, trespassing upon, or asserting any claim of title to any part of said land within the boundary of plaintiff's land, as therein established, a copy of which said decree of the Circuit Court of the United States for the Western
(218) District of North Carolina is hereto attached and asked to be taken as a part of this special plea.

"2. And the defendants plead, allege, and aver that in said decree it is specifically adjudged that the plaintiff, Herman Bonninghausen—who claims under the William and James Erwin and James Greenlee grant, No. 2125, issued in 1795, and by mesne conveyances from said James Greenlee, William and James Erwin, through a special proceeding between their heirs, a trust deed by G. P. Erwin, in said special proceeding appointed trustee to Joshua Kidd, and from Joshua Kidd to William Battye and others, and from William Battye and others to the North Carolina Estate Company, and by judgment of J. M. Barnhardt and others v. the North Carolina Estate Company and others, and from J. M. Barnhardt and others to South Mountain Land Company, and from South Mountain Land Company to A. G. Olmsted, M. E. Olmstead, and F. L. Bartlett, defendants in this action, and through said A. G. Olmstead, M. E. Olmstead, and F. L. Bartlett to the said Herman Bonninghausen—is the owner of all the unsold lands in the said Grant No. 2125, and that the said two grants sued on in this action, to wit, Grant 17,226, dated 9 July, 1908, and Grant 17,302, dated 3 February, 1909, both to Richard Williams, are parts of said Grant No. 2125, and are void and ordered to be delivered up and canceled of record, together with any mesne conveyances under the same, and the said R. Williams perpetually enjoined and restained from asserting any claim of title to any part of said land in said Grant No. 2125; and these defendants plead the same, a copy of which is hereto attached, in bar of any further prosecution of this action, and that the said plaintiff herein will be in

contempt of the said order and decree of the Circuit Court of the United States if said action is further prosecuted.

"Wherefore these defendants pray that this action be dismissed and that they recover of the plaintiff and his sureties their costs of the same, to be taxed by the clerk of this court."

And the plaintiff filed the following verified reply thereto:

"The plaintiff, Richard Williams, acting by virtue of the leave and direction of the court, appearing in the minutes of the court of 26 January, 1912, says in reply to the paper filed as an amended (219) answer to the complaint:

"1. That reserving his exception entered upon the minutes of the term on 26 January, 1912, to the order allowing the defendants to set up the defense of estoppel as a bar to plaintiff's action by refiling as an amendment to their answer on said 26 January, 1912, a formal plea rendered since the last continuance filed theretofore on 23 December, 1911, purporting to be setting up a decree of the Circuit Court of the United States rendered since the last continuance as a bar to the further prosecution of this action, the plaintiff says he denies that the Circuit Court of the United States at Statesville entered and rendered any decree and order in a cause pending in said Circuit Court, wherein it appeared from the record in any such case that the court had jurisdiction of the subject-matter involved in such controversy, constituting the cause of action, and of the parties thereto, and avers and alleges that it appeared upon the face of the pleadings and upon the evidence offered by the complaint in the suit wherein said decree purports to have been rendered that said Circuit Court did not have jurisdiction of the parties and subject-matter in said suit, and that the Circuit Court at Statesville had no jurisdiction or authority to render any such decree, the plaintiff specially avers and pleads that he is advised, and therefore avers, that a full copy, duly certified, of the whole record in said suit brought by Herman Bonninghausen will show upon inspection of the record of the pleadings in said suit, with exhibits and report of the master, Hayden Clement, together with the evidence reported by him, that the said Circuit Court had no jurisdiction or authority to render the decree purported to be rendered by it, and that said decree set up in said paper filed on 26 January, 1912, is not a bar to the further prosecution of this action, and that it is the right and the duty of this court to disregard the said decree, treat it as null and void, and proceed to hear and try this action by a jury.

"2. That the plaintiff denies that the record of the said suit (220) in equity, in which said decree was rendered, will show upon inspection that the said suit involved a controversy, as alleged, between

the plaintiff, Richard Williams, and others as defendants, and the defendants to this action as plaintiffs or complainants, and their privities and estates, as to the title of the land in dispute in this action, and demands that the defendants herein produce and file in this court a certified copy of all the pleadings, with exhibits filed as a part of said pleadings in said Circuit Court of Appeals, together with all interlocutory orders entered in said suit, together with the report of Hayden Clement mentioned in the affidavit of defendants, and all of the evidence accompanying said report of Hayden Clement to said Circuit Court in said suit as an exhibit to said report; and the plaintiff demands the production of testimony relied on to prove that Herman Bonninghausen, named as plaintiff in the suit wherein said decree purports to have been rendered, was or is a privy in estate as to the land purporting to be described in said decree or the land described in the complant in this action as that to which the plaintiff claims title.

"3. That the plantiff denies the jurisdiction of the said Circuit Court at Statesville to order that the grant to the land in controversy in this action be delivered up and canceled of record, and says that since the paper now filed as an amended answer was filed on 23d December in this court, the plaintiff has ascertained that J. T. Perkins, counsel for the defendant, went into the office of the register of deeds, and, without authority so to do, induced the register of deeds to deface the record of plaintiff's grants under the pretense of authority so to do contained in said judgment of the Circuit Court of the United States at Statesville, which the plaintiff is advised purported upon the face of the record, pleadings, and exhibits to have been rendered in a cause of which the said court at Statesville had no jurisdiction and no authority to make the said decree binding, and a bar by way of estoppel upon the plaintiff.

"Wherefore plaintiff prays judgment:

(221) "(1) That he is the owner in fee of the land in controversy, which is described in the complaint. (2) For cost of action. (3) For such other and further relief as the nature of the case may permit and as to the court may seem just."

At February Term, 1913, of McDowell Superior Court the defendants moved for judgment upon the pleadings. Motion was by consent continued to be heard at Morganton, N. C., and the motion came on for hearing 19 March, 1913, and being heard upon the pleadings, was denied, and defendants excepted and appealed, and it was ordered that the cause remain on the civil-issue docket of McDowell for trial in its regular order.

Spainhour & Mull, W. T. Morgan, and A. C. Avery for plaintiff.
J. T. Perkins for defendant.

ALLEN, J. The appeal in this case is the result of a misconception of the nature of the pleadings filed by the defendants.

Under the common law, defenses arising after the commencement of the action could not avail the defendants for the purpose of adjudging the rights of the parties, and were only effective to dismiss the action then pending. If they arose after the commencement of the action and before the defendant filed his plea, he could take advantage of them in the plea, and after plea filed by a plea *puis darrein continuance.*

The pleas had to be under oath, and if since the last continuance, were a waiver of other pleas. 1 Chitty Pl., 657-9; *Yeaton v. Lynn,* 5 Pet., 231; *White v. Guest,* 6 Blackf. (Ind.), 231; *Rowell v. Hayden,* 40 Me., 585; *Bank v. Bank,* 32 Ind., 429; *Allen v. Newberry,* 8 Iowa, 69; *Mount v. Scholes,* 120 Ill., 399.

In the last case, which is based on Chitty and Tidd, the Court summarizes the procedure and its effect: "The rule upon this subject, at common law, is that any matter of defense arising after the commencement of the suit cannot be pleaded in bar of the action, generally. If such matter arise after the commencement of the suit and before plea, it must be pleaded to the further maintenance of the action. But if it arise after plea, and before replication, or after issue joined, whether of law or fact, then it must be pleaded *puis darrein con-* (222) *tinuance.* A plea of this kind involves grave legal consequences that do not attach to an ordinary plea. It only questions the plaintiff's right to further maintain the suit. When filed, it, by operation of law, supersedes all other pleas and defenses in the cause, and the parties proceed to settle the pleadings *de novo, just* as though no plea or pleas had theretofore been filed in the case. By reason of pleas of this kind having a tendency to delay, great strictness is required in framing them. In this respect they are viewed much like pleas in abatement, and, for the same reason they must, like those pleas, be verified by affidavit."

Under the Code system, which prevails with us, forms which do not make for the trial of causes upon the merits as speedily as possible are abolished, and instead of the pleas referred to, which, if true, would only defeat the action pending, the defendant may have the benefit of defenses arising after the commencement of the action by supplemental answer.

In 31 Cyc., 506, the author correctly states the new rule: "As a general rule, defendant may, with leave of court, file a supplemental answer alleging any facts which may have arisen or become known since the commencement of the suit and which may have a material bearing on the final determination of the suit, such as a settlement between the parties or a discharge in bankruptcy. Such new matter must be in addition to, or in continuance of, the original matter alleged, and the

court may refuse to file a proposed supplemental answer when the allegations contained therein are not material, or do not show a defense to plaintiff's claim, or are of facts which occurred previous to the filing of the original answer. Any defense which defendant could, as a matter of right, have pleaded *puis darrein continuance* under the old procedure should be allowed under The Code as a supplemental answer. If the sufficiency of a supplemental answer is doubtful, the court will not determine on a motion the validity of the defense set up by it, but will allow it to stand."

(223) The Revisal, sec. 479, does not require that new matter constituting a defense must exist at the time of the commencement of the action, and a defense arising thereafter was recognized in *Puffer v. Lucas,* 101 N. C., 285, and in the later case of *Smith v. French,* 141 N. C., 2, it was held that, "A counter-claim connected with the plaintiff's cause of action or with the subject of the same (Revisal, sec. 481, subsec. 1) should not necessarily or entirely mature before action commenced, nor even before answer filed."

It is also permitted under our practice to plead inconsistent defenses (*McLamb v. McPhail,* 126 N. C., 218), and matter alleged as a defense not constituting a counterclaim is deemed to be denied without a reply. *Smith v. Burton,* 137 N. C., 79.

An estoppel by judgment is new matter constituting a defense which must be pleaded, and when relied on, it must be established like other defenses, at the time of trial by the verdict of the jury, unless the facts relating to the plea are admitted, when it may be passed on by the judge as matter of law. *Harrison v. Hoff,* 102 N. C., 126; *Blackwell v. Dibbrell,* 103 N. C., 270.

It follows, therefore, that the plea filed by the defendants has no other legal effect than to allege another defense by supplemental answer, in addition to those theretofore relied on, to which it was not necessary to reply, as it has none of the elements of a counterclaim, and which must be passed on by a jury, unless all the facts are agreed to.

The parties to the two actions are not the same, and when we turn to the reply, filed unnecessarily by the plaintiff, we find not only a denial of jurisdiction in the Federal Court, which *may* be a question of law to be determined by the Court, but also a denial of any privity between the defendants in this action, and the plaintiff in the judgment relied on, which is an issuable fact, and if there is no privity, the defendants cannot rely upon the judgment.

An interesting and important case upon the question of privity, as applied to the facts before us, is *Bryan v. Malloy,* 90 N. C., 510.

We are, therefore, of opinion that his Honor correctly held that the

defendants were not entitled to judgment on the pleadings or to (224) one dismissing the action.

The "consent" referred to in the rulings of the court was not a consent that the judge should find the facts and adjudicate the rights of the parties, but that he might hear the motion of the defendants at another place, instead of at the place where the motion was first returnable.

Affirmed.

W. N. JEANS v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 10 December, 1913.)

1. Carriers of Goods—Refusal to Deliver—Valid Excuse—Burden of Proof.

Where a consignee brings his action to recover the value of a shipment of goods from the carrier, shows that the shipment was addressed to him, was prepaid, in the carrier's possession at destination, and a demand for delivery, the burden is on the carrier to show a valid reason for its refusal to deliver the shipment.

2. Carriers of Goods—Contracts of Shipment—Parol Contracts.

A parol contract of shipment made with a common carrier is valid in law.

3. Carriers of Goods—Refusal to Deliver—Demand of Bill of Lading—Valid Excuse—Burden of Proof.

The failure or refusal of a consignee to produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession is ordinarily a valid defense to an action to recover of the carrier the value of a shipment, which has never been delivered, but the burden is upon the carrier to prove that such demand has been made and not complied with.

4. Same—Fraudulent Transfer—Presumptions.

Where a prepaid shipment of goods is in the carrier's possession at its destination; addressed to the consignee, and he demands delivery thereof to him, he is entitled to the goods, nothing else appearing; for while the bill of lading is assignable, it will not be presumed that in a given instance it has been assigned, without evidence thereof, and the burden is upon the carrier to prove the consignee's fraudulent intent in making his demand without producing his bill of lading, when such is relied on by it as a reason for refusing delivery.

5. Carriers of Goods—Interstate Commerce—Federal Questions—Practice—Penalties.

In an action to recover the penalty for the refusal of the carrier to deliver an interstate shipment of goods, the exception that such recovery would impose a burden upon interstate commerce must be taken upon

the trial and in the appellant's brief in order for the Federal question to be made available; but it is *Held*, that a penalty recoverable for the refusal of delivery and the failure to settle a claim based thereon after the arrival here of the shipment and while in the carrier's possession, does not raise a Federal question. Revisal, secs. 2633, 2634.

6. Carriers of Goods—Penalty Statutes—Actions.

A recovery of the value of a shipment of goods and the penalties for the refusal of the carrier to deliver (Revisal, sec. 2634) and for the failure to settle the claim within the statutory period, may be united in the same action.

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

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

Gulledge & Boggan for plaintiff.
W. E. Brock and Murray Allen for defendant.

CLARK, C. J. This is an action begun before a justice of the peace to recover for the loss of a shipment of goods (molasses) of the value of $18.75, and the penalty of $50, under Revisal, 2633, for failure and refusal of the defendant to deliver said goods upon demand of plaintiff while it was lying in their station after arrival at Wadesboro, N. C., and also for the penalty of $50 under Revisal, 2634, for the failure of the defendant to settle and pay for the loss of said goods its value ($18.75) within four months from the time the claim was filed with the defendant.

(226) By agreement, the issue as to the value of the goods was answered $18.75.

The plaintiff's evidence is that in March, 1912, he went to the Seaboard station, saw his goods lying in the station, and requested delivery; that the agent did not demand a bill of lading of him, but said he could not deliver because his waybill had not been received; that in fact he did not get a bill of lading till it was mailed to him from Charlotte, 30 December, 1912. He offered to pay freight, but the defendant admits that the molasses came freight prepaid. It was also in evidence that the plaintiff filed his bill for the loss of the goods, $18.75, on 15 October, 1912, and this bill had not been paid yet. The goods were not delivered to plaintiff, but were sold by the defendant.

The sole controversy seems to arise upon the evidence of the defendant's agent, who in contradiction to the plaintiff testified that he demanded the bill of lading of the plaintiff. He testified that the molasses

came on a "stray shipment," and that he himself had received no waybill, and that they had no evidence whence the shipment came, as the bill was sent out from Charlotte. It was afterwards ascertained that the goods in fact were shipped from New Orleans, and were received by the defendant at Charlotte and transported over its line to Wadesboro.

The defendant excepted because the court charged the jury: "If you find that these goods were in the possession of the defendant, and were the same goods that the plaintiff purchased, that is, if you answer the second issue 'Yes,' then the burden is on the defendant on this third issue to satisfy you that it demanded of Mr. Jeans that he produce the bill of lading, and that it was because of his failure to produce the bill of lading that they failed and refused to deliver the shipment of goods." The jury by their answer found that the defendant did not demand the bill of lading, and that its nonproduction was not the cause of its failure and refusal to deliver the molasses. The plaintiff testified that the reason given by the agent was that the defendant itself had not received its waybill.

It is not clear that any bill of lading was issued, for the defendant testified that he received none till one was sent him from Charlotte, 30 December following. There being no "waybill," the goods were rebilled from Charlotte to Wadesboro.

As the goods were lying in the station at Wadesboro, and it is (227) not contradicted that they were the property of the plaintiff, and the defendant's testimony is that the freight was prepaid, the burden, as the judge correctly charged, was upon the defendant to show good cause for a refusal to deliver. Whether the failure to produce the bill of lading on demand was such good cause or not, does not arise, as the jury found that it was not demanded and was not the reason for the failure to deliver. A shipment without bill of lading and by parol is valid at common law.

In *Dunie v. R. R.*, 161 N. C., 522, *Brown, J.*, says: "The burden of proof of delivery of the goods, the receipt thereof being admitted, is cast by law on the defendant. And upon failure to satisfy the jury by the preponderance of evidence that the case of goods was delivered, the defendant is liable for its value." It follows, therefore, that the goods being in the possession of the defendant, and it being admitted that the plaintiff made demand for delivery and they were not delivered, the burden must be on the defendant to show cause for its refusal.

There is no presumption that the bill of lading had been assigned by the plaintiff. The goods directed to him were lying on the floor of the warehouse, marked in his name. It is admitted that the freight was prepaid. When, therefore, he demanded possession of the goods, nothing

else appearing, he was entitled to them. If there is any reason why they should not have been delivered, the burden was upon the defendant, as warehouseman, to show it. The defendant had a right to require a bill of lading, and if it did, and the plaintiff had refused to produce same, this would have been an excuse, unless the plaintiff had shown, as he could, that he had not received any bill of lading, and, therefore, had not assigned it. There is no presumption that the plaintiff had assigned the bill of lading and was endeavoring to get possession of the goods by false pretenses, a penitentiary offense. While the defendant had a right to demand the bill of lading, or proof of its nonreceipt, the burden was upon the defendant, as the judge properly charged, to show that fact in excuse of his failure to deliver goods addressed to the
(228) plaintiff, on which all charges had been prepaid. Any other ruling would reverse the rule, that the plaintiff having made out a *prima facie* case by demanding goods addressed to him, matters in excuse must be shown by the bailee. It would be very inconvenient in practice if farmers and other consignees in the country sending their wagons, often many miles, to the railroad station for fertilizers and meat or other articles should have the wagons sent back without any excuse, when if the bill of lading had been demanded, it would be produced. A bailee who refuses to deliver goods belonging to the bailor, *prima facie* by virtue of its receipt addressed to him, must show matters in excuse.

It is not suggested in defendant's brief here, nor by any exception taken on the trial below nor in this Court, that the failure to deliver, after the receipt of the goods in the warehouse at Wadesboro, raises a Federal question. Such question cannot be raised in any other way. But as the point is suggested, it is only necessary to say that it has been often passed on in this Court.

In *Harrill v. R. R.*, 144 N. C., 537, *Walker, J.*, says: "A railroad company owes it as a common-law duty to deliver freight upon the payment of charges by the consignee (here they were prepaid), and in the absence of a conflicting regulation by Congress, Revisal, 2633, imposing a penalty upon default of the railroad company therein, is constitutional and valid, and is an aid to, rather than a burden upon, interstate commerce," citing United States decisions.

In *Morris v. Express Co.*, 146 N. C., 167, *Hoke, J.*, held that the failure to deliver freight after its arrival at the destination in this State and after being placed in defendant's warehouse is not interstate commerce, citing *R. R. v. Solan*, 169 U. S., 137, and many other United States decisions.

In *Hackfield v. R. R.*, 150 N. C., 422, it is held by a unanimous Court: "The penalty imposed by the Revisal, 2633, has nothing to do

with interstate transportation, but deals only with the neglect of duty of the defendant after the transportaion was fully completed and the goods lay in its warehouse—not in the cars—at Durham. The plaintiff demanded his goods again and again (as in this case), (229) but the defendant would not make out its freight charges nor deliver the goods. The penalty laid by the Revisal, 2633, has been held not a burden on interstate commerce (*Harrill v. R. R.*, 144 N. C., 532); and, indeed, the failure to deliver freight is not interstate commerce. *Morris v. Express Co.*, 146 N. C., 171."

"There is no exception as to the penalty of $50 for failure to settle the claim within four months after filing, as authorized by Revisal, 2634. But if it had been, this has been held not a violation of interstate commerce, in *Iron Works v. R. R.*, 148 N. C., 470, citing *Efland v. R. R.*, 146 N. C., 135; *Morris v. Express Co., ib.*, 167; *Harrill v. R. R.*, 144 N. C., 540; *Cottrell v. R. R.*, 141 N. C., 383, in all which that point has been thoroughly discussed.

It may be noted that Revisal, 2634, has been somewhat changed and amended by Laws 1911, ch. 139, in which it is expressly provided (though it was not necessary to do so, *Robertson v. R. R.*, 148 N. C., 323) that "causes of action for the recovery of the possession of the property shipped, for loss or damage thereto, and the penalties herein provided for, may be united in the same complaint."

No error.

ALLEN, J., concurring: No question is raised upon the record as to the rights of a shipper under a parol contract of shipment, as it appears that the plaintiff introduced a bill of lading as evidence of his title to the goods. Nor is the right involved of the carrier to require the production of the bill of lading, when one has been issued, in order that the correct freight charges may be ascertained, because it is alleged in the complaint and admitted in the answer that the freight charges were prepaid. Nor is any Federal question raised, as the defendant has not invoked the protection of the commerce clause of the Constitution. Nor has any exception been taken to any issue submitted to the jury.

It does appear, however, that the defendant excepted to the refusal of his Honor to substitute for the third issue the following: "Did the plaintiff make a proper demand on the agent of the defendant for the delivery of said syrup?" and to his charge on the third issue as to the burden of proof, and these exceptions present the questions (230) in controversy.

I agree to the proposition that when a bill of lading is issued, it is evidence of the shipper's title to the goods, and it is to the interest of

the carrier and the shipper that it should be presented before the delivery of the goods, because, as it is assignable, it is only in this way that the carrier can be protected against a delivery to the wrong person, and that the shipper may be sure to get his goods. It is, therefore, I think, under the authorities, the right of the carrier to require the presentation of the bill of lading when the goods are demanded; but this right may be waived.

I therefore think that, ordinarily, the issue tendered is the proper one, but in this case it is admitted that the goods were shipped, that the freight was prepaid, and that they were in possession of the defendant marked as the property of the plaintiff, and the issue submitted to the jury presented the only excuse relied on in the answer for nondelivery, that the agent of the defendant demanded the bill of lading and it was refused.

The issue follows very closely the language of the answer, and under it both parties had ample opportunity to present their contentions.

His Honor charged the jury on the second and third issues as follows: "The second issue, 'Was said shipment of goods received by defendant railroad at Wadesboro, as alleged?' You have heard the evidence on that issue. The only question for you to determine is whether or not the goods admitted by the defendant to have been in its warehouse at Wadesboro, marked to the plaintiff and sold by it, was the same shipment for which the plaintiff contends. If you are satisfied that it was, then you should answer the second issue 'Yes'; otherwise, answer it 'No.' The third issue is, 'Did the defendant, the railroad company, demand the production of the bill of lading for said goods by the plaintiff as a condition precedent to delivery, as alleged by the defendant?' If you find that these goods in the possession of the defendant were the same goods which the plaintiff purchased, that is, if you answer the second issue 'Yes,' then the burden is on the defendant on this third issue to satisfy you that it demanded of Mr. Jeans that he produce the bill of lading, and that it was because of his failure to produce the
(231) bill of lading that they failed and refused to deliver the shipment of goods," and the defendant excepted to the last paragraph.

The charge is based on an admission or a finding of the jury that the goods were shipped to the plaintiff; that the freight charges were prepaid; that they were in possession of the defendant, marked to the plaintiff, and that delivery had been refused upon demand; and, so understood, was not, I think, erroneous.

These facts, if proven, would establish *prima facie* ownership in the plaintiff and entitle him to a delivery of the goods, and the burden would then be on the defendant to justify nondelivery.

BROWN, J., dissenting in part: This action is brought to recover $18.75, the value of a shipment of syrup made to the plaintiff over the defendant's railway, and for $50 penalty under section 2634 for delay in settling the claim, and also for an additional penalty of $50 under Revisal, sec. 2633, for refusal of defendant's agent to deliver the goods upon plaintiff's demand.

I am of opinion that the plaintiff is not entitled to recover the additional penalty last named.

The plaintiff's evidence tends to prove that in March, 1912, Penick & Foard shipped to him by the defendant's railway six crates of syrup. The plaintiff received the bill of lading for the syrup for the shipment, which he introduced in evidence. The plaintiff testifies that he does not remember when he received the bill of lading, but the evidence shows he never presented it to the defendant's agent.

The goods were received by the defendant at Wadesboro, and when the plaintiff called for them, they were in the defendant's warehouse. The plaintiff did not have a bill of lading for the goods then, and did not present it.

Plaintiff offered to pay any freight charges, but defendant's (232) agent stated he had no waybill for the goods, and could not tell what the charges were. There is no evidence that the plaintiff ever presented a bill of lading to defendant's agent for the goods, accompanied by a demand for the same.

There is evidence that the defendant's agent demanded the bill of lading before delivering the goods. The goods were sold by the defendant some time afterwards for the freight money.

I agree with the majority of the Court that the plaintiff is entitled to recover the value of the goods and the $50 penalty for failure to settle the claim within the statutory period. But I do not think the plaintiff is entitled to recover the additional penalty for failure to deliver the goods, under Revisal, sec. 2633. That section reads as follows:

"Paid at classified rates; penalty for overcharge. All common carriers doing business in this State shall settle their freight charges according to the rate stipulated in the bill of lading, provided the rate therein stipulated be in conformity with the classification and rates made and filed with the Interstate Commerce Commission in case of shipments from without the State, and with those of the Corporation Commission of the State in case of shipments wholly within this State, by which classifications and rates all consignees shall in all cases be entitled to settle freight charges with such carriers; and it shall be the duty of such common carriers to inform any consignee or consignees of the correct amount due for freight according to such classification and rates,

and upon payment or tender of the amount due on any shipment which has arrived at its destination according to such classification and rates such common carrier shall deliver the freight in question to consignee or consignees, and any failure or refusal to comply with the provisions hereof shall subject such carrier, so failing or refusing, to a penalty of $50 for each such failure or refusal, to be recovered by any consignee or consignees aggrieved by any suit in any court of competent jurisdiction."

To my mind, the statute does not warrant the recovery of the penalty upon the facts of this case in any view of them. The statute does not purport to cover all cases of refusal to deliver freight. If it is so construed, a great hardship would be worked on the carrier, because
(233) its good faith in refusing to deliver freight upon any other ground than failure to pay freight charges would be no defense.

The statute makes no exception, because in its entirety it constitutes an exception. Generally, the carrier is liable in damages for refusal to deliver freight unless such refusal can be justified, but in the *specific case* of refusal of delivery because the consignee refuses to pay more than the amount due for freight according to the published classification and rates, the law imposes a penalty of $50.

By its very terms the section applies only when the carrier refuses to deliver the goods and settle the freight "according to the bill of lading." And manifestly it is intended to cover only those cases in which the refusal to deliver is because of a dispute about freight rates, and then the bill of lading must control.

This statute has been construed in *Harrill v. R. R.*, 144 N. C., 533. In that case the consignees offered to pay freight charges according to the bill of lading produced by them. The agent refused to deliver because he had received no waybill accompanying the shipment.

Referring to this section, the Court says: "It does not provide that the penalty for a refusal to deliver freight shall be recoverable only where rates have been made and filed with the Interstate Commerce Commission . . . but the meaning of the section is that upon a tender of the stipulated charges, *as stated in the bill of lading,* which shall not exceed the amount fixed in the classification and table of rates published and filed with the Commission, and upon refusal to deliver the freight, the penalty shall accrue."

The opinion goes on to declare that in the absence of such classification the settlement of freight must be made according to the terms of the bill of lading, and says:

"The legislation embodied in section 2633 was intended to recognize and enforce the observance of the rates as fixed under the requirement

of the Federal law where it is applicable. The provision was made for the protection of the consignee, so that the carrier cannot exact from him, as a condition of the delivery of freight, the (234) payment of excessive freight charges."

Mr. Justice Walker, speaking for the Court, further says: "If the defendant did not know what the charges were as fixed by the bill of lading, because it did not have the waybill, it should have known, and it was not the fault of the plaintiffs that the waybill did not accompany the goods, and was not received with them, or in the usual course of business."

In the case at bar there was neither waybill nor bill of lading, and nothing indicating what the proper charges were. The bill of lading is always given to the shipper, and he mails it in the course of business to the consignee.

In this case it had not been received, and has never been presented to the defendant, accompanied with a demand for the goods. The agent of defendant was not required to deliver the goods without prepayment of the freight charges, and he could not lawfully fix those in the absence of the bill of lading.

The *Harrill case, supra,* is an example of the proper application of the statute. There the consignees produced the bill of lading, offered to pay freight charges, and demanded the delivery of the goods. The agent refused for the reason that he did not know what the freight charges were, having received no waybill.

Section 2633 expressly provides that refusal to deliver subjects the carrier to the penalty when the freight charges are tendered. But the statute does not say that when delivery is refused upon any other ground that the penalty will be imposed. The hardship of such a view can be illustrated:

If the carrier delivers freight to one who does not present the bill of lading, it does so at its peril. If it is the wrong person, the carrier is liable in damages. If the carrier refuses to deliver freight when the proper charges are tendered, a penalty of $50 is imposed. If the proper charges are tendeed by one who does not present the bill of lading, the carrier must either deliver at its peril or incur the penalty.

The defendant excepted to each issue submitted, and tendered other issues. The third issue submitted is as follows: "Did the defendant demand the production of the bill of lading for said goods (235) as a condition precedent to delivering?"

This issue was erroneously submitted under a wrong conception of the legal relations of the parties. Our statute, Revisal, sec. 1111, in unmistakable language, puts the burden upon the consignee to produce

and present his bill of lading before the carrier is required to deliver the goods. It reads as follows:

"*Duplicate freight receipts; charges stated; freight delivered on payment of charges.* All railroad companies shall on demand issue duplicate freight receipts to shippers, in which shall be stated the class or classes of freight shipped, the freight charges over the road giving the receipt, and, so far as practicable, shall state the freight charges over the roads that carry such freight.

"*When the consignee presents* the railroad receipt to the agent of the railroad that delivers such freight, such agent shall deliver the articles shipped, upon payment of the rate charged for the class of freight mentioned in the receipt."

The bill of lading is the evidence of the title to the goods, and an indorsement of it by the shipper, if made out to his order, or by the consignee, if made out to him, confers a good title upon the indorsee.

Therefore, the statute fixes clearly the condition upon which the carrier is required to deliver freight. It provides that delivery must be made *when the consignee presents the railroad receipt, which is the bill of lading, to the agent.* It is essential that the consignee show that he has complied with the equirements of this statute before he can complain of the carrier's failure to deliver freight.

We have a very exhaustive discussion of the question of the duty of the carriers to deliver only to one who has the bill of lading, by *Mr. Justice Walker* in his dissenting opinion in *Clegg v. R. R.*, 135 N. C., 149. The position taken by the dissenting justices, *Walker* and *Connor,* on this point, was not controverted by the Court in the opinion. The case went off on the point that the defendant waived the right to
(236) require presentation of the bill of lading. I quote from the dissenting opinion:

"Passing to the question as to the legal duty of a carrier with respect to the delivery of goods, we find it to be well settled that an obligation to deliver to the party having title under he bill of lading is imposed by law on the carrier, and is absolute and imperative, and a delivery to any other person is a conversion. *R. R. v. Barkhouse,* 100 Ala., 543.

"The duty of a common carrier is not only to carry safely, but to make a true delivery to the person to whom the goods are consigned (*Houston v. Adams* (Tex.), 30 Am. Rep., 119), and a delivery to any other is made at the peril of the carrier, unless that person surrenders the bill of lading either made or indorsed to himself. *Gates v. R. R.,* 42 Neb., 379; *Weyand v. R. R.,* 75 Iowa, 573; 1 L. R. A., 650; 9 Am. St.; *M. T. D. Co. v. Merriman,* 111 Ind., 5; *Bank v. R. R.,* 160 Ill., 401.

"One reason for this rule is that the bill of lading is the symbol of

ownership of the property, and though not negotiable, in the ordinary sense, is assignable. *Gates v. R. R., supra.*

"The carrier can require the production for an inspection of the bill of lading at any time before delivery. Porter on Bills of Lading, sec. 379. The same right belongs to his agent for his own security and protection, and he may exact production of the bill before he gives up the property. Until the carrier can deliver to the shipper, or some one showing authority from him (the bill of lading duly indorsed and delivered being evidence of that authority), it is his duty to retain the goods, and if they are delivered to one not legally entitled, the carrier will be liable to the true owner for their value.

"He has no right under any circumstances to deliver them to a stranger. *The Thames,* 14 Wall., 98. The carrier is bound not to deliver to any one who has not the bill or symbol of ownership. Portner B. of L., sec. 414.

"The pledgee of the bill of lading is not divested of his right or title by any delivery to the consignee, though that delivery was obtained upon presentation by the latter of a duplicate bill or invoice, which the carrier treats as sufficient authority in him to receive the (237) goods. Section 530.

" 'The carrier takes the risk of a delivery to the person entitled to the goods by the bill of lading and its indorsement. Too great caution cannot, therefore, be exercised in respect to the right of the person to whom the delivery is made. No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law will allow, in fact, of no excuse for a wrong delivery except the fault of the shipper himself.' Hutchison on Carriers (2 Ed.), secs. 130, 340, and 344, *et seq.*"

To the same effect is *Bank v. R. R.,* 153 N. C., 346. Assuming that the agent could have done so, it is not claimed in this case that he did waive the production of the bill of lading, because if he had waived it, he would have delivered the goods; and, therefore, no issue as to waiver was tendered or submitted.

It is only claimed by the plaintiff that the burden was on the agent to demand the production of the bill of lading. In this instance, if the agent had demanded it, the plaintiff could not have produced it, for he did not have it then, and did not get it until long afterwards. There is no evidence that the plaintiff ever at any time presented a bill of lading to the defendant and at same time demanded the goods.

But I think I have shown by the terms of our statute, section 1111, as well as by the authorities, that it was the consignee's duty to present the bill of lading as a condition precedent to demanding the goods. It

was as much his duty to do so as it is the duty of a payee in a draft to present it before he can demand the money it calls for.

For these reasons, I am of opinion that section 2633 of the Revisal was intended to apply only in those cases in which the refusal to deliver the goods is due to a dispute about the amount of the freight charges, where the carrier demands more than the consignee is required to pay upon the face of the bill of lading. Certainly, this is the construction placed upon the statute by this Court in the *Harrill case.*

In our case no freight charges were tendered, and none demanded, for the consignee did not have the bill of lading, and the agent had (238) no waybill, and neither knew then what they were or whether they were prepaid.

The plaintiff in his testimony admits that he did not receive the bill of lading mailed to him from Charlotte on 30 December, 1912, until after the goods were sold.

I admit that this Court has held in several cases cited in the opinion that section 2633 of the Revisal is not obnoxious as an interference with interstate commerce. But those decisions were made before the recent decisions by the Supreme Court of the United States reversing the majority of this Court in *R. R. v. Reid,* 222 U. S., 424; *R. R. v. Reid,* 222 U. S., 444; *R. R. v. Lumber Co.,* 225 U. S., 99.

Under those decisions it would seem to be very clear that section 2633 is void as a regulation of interstate commerce.

MR. JUSTICE WALKER concurs in this opinion.

Cited: Thurston v. R. R., 165 N. C., 599; *Smith v. Express Co.,* 166 N. C., 159; *Grocery Co. v. R. R.,* 170 N. C., 248.

A. L. ARUNDELL COMPANY v. IVEY MILL COMPANY.

(Filed 10 December, 1913.)

1. Justices' Courts—Appeal Docketed in Superior Court—Notice of Appeal—Discretion of Court.

After an appeal from a judgment rendered by a justice of the peace has been duly docketed in the Superior Court, without notice thereof to the appellee, it is within the discretion of the Superior Court judge then to allow such notice to be given.

2. Contracts, Written—Vendor and Vendee — Trials — Evidence — Copies—Harmless Error.

Where the controversy rests upon a written order or contract for the sale of goods, and a carbon copy of this order offered by the vendee has

been admitted in evidence, the original being in the hands of the vendor, the error, if any, is cured by the introduction of the original order by the vendor, identical with the copy.

3. Contracts, Written—Vendor and Vendee—Warranties—Parol Evidence—Trials—Evidence.

Where a written order for the purchase of oil, accepted by the vendor, provides that if the "goods prove unsatisfactory after a thorough trial by the purchaser within thirty days after delivery the remaining quantity may be returned, without any charge for what has been used in the test," evidence is competent on behalf of the vendee, tending to show that the sales agent, at the time of the sale, informed him that the vendor would send a demonstrator and that the vendee should not use the oil until he arrived; for such evidence is not a variance with or contradiction of the written order, and in this case is competent to explain the vendee's delay in returning the unsatisfactory goods under the provision of the contract.

APPEAL by plaintiff from *Cline, J.*, at July Term, 1913, of (239) CATAWBA.

This is an action to recover $81.50, the price of certain oil, which the plaintiff alleges it sold to the defendant, which was tried in the Superior Court on appeal by the defendant from the judgment of a justice of the peace.

At a term of court prior to the one at which the action was tried, the plaintiff moved to dismiss the appeal "on account of no notice being given." His Honor denied the motion and allowed notice to be given *nunc pro tunc,* and the plaintiff excepted.

During the trial, the defendant introduced a duplicate or carbon of the order for the oil, which he gave the salesman of the plaintiff, which contains the following clause:

"NOTICE.—It is hereby understood and agreed to by and between the Standard Oil Leather Dressing Company and the purchaser, that should these goods prove unsatisfactory after a thorough trial by the purchaser up to or within thirty days after the delivery, the remaining quantity may be returned, without any charge for what has been used in the test."

The plaintiff excepted, and afterwards introduced the original order.

George F. Ivey testified in behalf of the defendant as follows: "I am superintendent of defendant company. In May, 1912, Applebanner, salesman of the plaintiff, came to see me. He said he had a very fine quality of belt oil—best ever invented; wanted me to buy (240) some. The order is in the possession of the plaintiff. Applebanner said it was necessary for us to be shown how to apply the oil, and that the company could send a demonstrator; to be sure not to use the oil till the demonstrator arrived."

Plaintiff objected to this evidence. Objection overruled; plaintiff excepted.

The oil was unsatisfactory to the defendant, and was returned to the plaintiff.

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

A. A. Whitener for plaintiff.

B. B. Blackwelder, Charles W. Bagby, and W. A. Self for defendant.

ALLEN, J. It was within the discretion of the judge to allow the notice of appeal to be given after the case was docketed in the Superior Court. *Marsh v. Cohen,* 68 N. C., 283; *Wells v. Johnson,* 109 N. C., 852. In the last case the Court says: "Any hardship which might, under any circumstances, be entailed on an appellant by failure to serve notice in a legal manner and within the statutory time is removed by the discretion reposed in the appellate court to permit notice to be given after that time."

Abell v. Power Co., 159 N. C., 348, and others like it, relied on by the plaintiff, are not applicable, because in them the motion to dismiss was on the ground that the appeal had not been docketed according to law, and in this case the basis of the motion is that notice of appeal was not given.

If there was error in admitting carbon copies of the written order, it was cured when the plaintiff, in order to make out its case against the defendant, introduced the original.

The evidence of the conversation with the salesman of the plaintiff is competent. It does not vary or change the written order, and is important and material only as explanatory of the delay in making a
(241) test of the oil, in order that the defendant might avail itself of the provision in the order to return if unsatisfactory after a test.

If the evidence is competent, it follows that there was no error in adverting to it in the charge.

No error.

S. J. LUTHER ET ALS. v. COMMISSIONERS BUNCOMBE COUNTY.

(Filed 10 December, 1913.)

1. County Commissioners—Roads and Highways—Discretionary Powers—Power of Courts.

Where the county commissioners under authority of statute, and in exact accord with its provisions, lay out and establish a public road, the courts will not interfere with the exercise of the discretion conferred,

except to the extent of preserving to the landowner, when necessary, his constitutional right of compensation for thus taking his land for a public use.

2. County Commissioners—Roads and Highways—Condemnation—Notice—Due Process—Interpretation of Statutes.

The presumption is in favor of the validity of a statute, and it is held that section 16, ch. 80, Laws 1909, authorizing the county commissioners of Buncombe County to lay out and establish a public road, is not unconstitutional in failing to provide that notice be given the landowner sufficient to protect him in asserting his right to receive compensation for his land thus taken, as he is expressly given thirty days after the order of the commissioners to make the road in which to assert his rights, which clearly implies that notice should be given him thereof.

3. Same—Actual Notice—Misapprehension of Rights.

One who has had actual and ample notice of an order of the board of county commissioners to lay off a public road in accordance with the provisions of a statute cannot successfully set up the invalidity of the statute in failing to provide for giving the notice, upon the ground that the road as laid out ran upon his land and did not afford him opportunity to appeal from the assessment of his damages for his property thus taken; or that it deprived him of reasonable time in which to appeal under its provisions, when it appears that he had ample and sufficient time except for a misapprehension of his remedy.

APPEAL by plaintiffs from order of *Carter, J.*, rendered at (242) chambers, 15 November, 1913; from BUNCOMBE.

The commissioners of the county of Buncombe, after due compliance with the provisions of Public Laws 1909, ch. 80, as the court finds, ordered a public road to be laid out over the plaintiff's lands. The proceedings were regularly conducted. Plaintiff applied for an injunction against further action by them, and a restraining order was granted. At the hearing, *Judge Carter* found the facts to be as above stated, and denied the application for an injunction. It appears also that the order was made and recorded on 3 November, 1913, and plaintiffs, the next day, appeared before the board and prayed an appeal therefrom, which was disallowed by the board. They did not move for any appraisement of the damages.

Mark W. Brown for plaintiff.
Wells & Swain for defendant.

WALKER, J., after stating the case: The plaintiffs were not entitled to an appeal from the order to lay out the road, unless given by the statute, as such an order is not, in such case, reviewable. This has been settled in *Brodnax v. Groom,* 64 N. C., 244; *S. v. Lyle,* 100 N. C., 497;

S. v. Jones, 139 N. C., 614; *Durham v. Riggsbee,* 141 N. C., 128; *Jeffress v. Greenville,* 154 N. C., 492; *Newton v. School Committee,* 158 N. C., 186. We held in *Durham v. Riggsbee, supra,* that the method of taking property for the public use is exclusively within the control of the Legislature, except in so far as it is restricted by the organic law. The exercise of the power of eminent domain being a political and not a judicial act, the courts can afford no aid to the landowner, in a case like this, where the statute has been strictly followed, until the question of compensation is reached. The advisability of opening a road or street or of widening the same is committed by law to the sound discretion of the local authorities, charged with the duty of determin-
(243) ing what is best for the public in that respect, and with the exercise of this discretion the courts will not interfere. "The landowner is not even entitled to notice of the order of condemnation or to be heard thereon," unless so provided by the law. 2 Lewis Em. Dom., sec. 66; *Durham v. Riggsbee,* and other cases, *supra.*

The act in question does not provide for any notice, nor does it grant a hearing to the landowner until the time comes for the assessment of his damages and the ascertainment of the compensation which by the law and of right he is entitled to have in return for the contribution he thus makes of his property to the public good and welfare.

Plaintiffs complain that they were deprived of a constitutional right, because Laws 1909, ch. 80, sec. 16, requires their "claim for damages" to be preferred within thirty days after the order for the laying out of the road and the appropriation of their property was made, without requiring any notice of the order to be given, and for that reason their land could not be taken for public use without giving them any adequate remedy for compensation, as they might not, within thirty days, so fixed by the act, acquire any knowledge of the order, no provision being made for a "claim for damages" after the expiration of the time so prescribed.

If plaintiffs are in a position to raise this question, having had notice and full opportunity to be heard, upon a proper motion, on 4 November, 1913, when they appealed improperly from the order of condemnation, we think this Court has, nevertheless, settled the question, upon its merits, against them in *Jones v. Commissioners,* 130 N. C., 455, where it was held that if the landowner was prevented from duly claiming his damages because of the impossibility of his having received notice of the order, not attributable to his fault, he is entitled by the rules of law and fairness to a reasonable time within which to make his said claim. It is reasonable that landowners affected by such an order should have notice of it, in order that they may assert their right of compensation; but this question is not before us, as the appeal is based upon the ground

that plaintiffs were denied the right to review the order itself by appeal therefrom, and they also had actual and very early notice of the same. Parties should prosecute their rights seasonably and dili- (244) gently, for by laches they may sometimes lose them.

We are, however, of the opinion that the act impliedly requires notice of the order to be given to those affected by it. We should not impute to the Legislature an intention to do injustice by depriving a person of his property without due notice. The fact that he is allowed thirty days to make his claim implies that he should have such notice, as otherwise he could never avail himself of this provision of the law.

"All questions relating to the exercise of the eminent domain power and which are political in their nature and rest in the exclusive control and discretion of the Legislature may be determined without notice to the owner of the property to be affected. Whether the particular work or improvement shall be made or the particular property taken are questions of this character, and the owner is not entitled to a hearing thereon as a matter of right." 2 Lewis Eminent Domain, sec. 66.

"It is not upon the question of the appropriation of lands for public use, but upon that of compensation for lands so appropriated, that the owner is entitled of right to a hearing in court and the verdict of a jury." *Zimmerman v. Canfield,* 12 Ohio St., 463. To the same effect, see *People v. R. R.,* 160 N. Y., 225.

"It is, however, held in most of the cases which have given the subject careful consideration that a statute will be valid which determines without any interference a question of the necessity for the appropriation, or submits it without providing for notice to an inferior tribunal, but that a statute which undertakes to determine the question of compensation or to submit it to commissioners or appraisers, without providing for notice, is unconstitutional." Elliott on Roads and Streets, sec. 260. The same author says in section 198: "There are some courts of high authority which hold that although notice is indispensable, it is not essential to the validity of the statute that it should provide for notice, and that it is sufficient if due notice is actually given."

"A condemnation proceeding which does not provide for notice (245) seems to be considered in some decisions as essentially defective, But the better view is that such act may be made effective by actually giving the proper notice. Thus it has been held that notice is plainly intended where the act contemplates the participation of the owner in the proceedings, as where it authorizes him to assist in striking a jury or gives him the right to appeal." Randolph Em. Domain, sec. 338.

These and many other authorities are cited and approved in *S. v. Jones, supra,* where it is said: "In Lewis on Eminent Domain, sec. 368,

it is recognized as settled law, by repeated adjudications, that statutes authorizing condemnation and making no provision for notice are valid if actual notice is given. Lewis on Eminent Domain, sec. 368. But at the same time he says: 'By far the greater portion of the cases proceed upon the principle of implying a requirement to give notice from the provision of the statute itself.' "

The notice there referred to is the one as to the time and place of fixing the compensation or assessing the damages and benefits, but the principles apply just as well to this case. Laws 1909, ch. 80, sec. 16, provides for notice of the time and place for assessing the damages to the landowner and ascertaining the benefits to him, but it fails expressly to require notice of the order, so that the landowner may proceed with his claim for compensation. It sufficiently does so, however, by the clearest implication. Why give him thirty days after the making of an order, of which he has no notice and may never have any?

But further discussion would be futile, as plaintiff had actual notice, as shown by his own conduct the next day, and his appearance before the board in the cause is a waiver of any formal notice to him by it. *Penniman v. Daniel,* 95 N. C., 341; *Wheeler v. Cobb,* 75 N. C., 21; *S. v. Jones,* 88 N. C., 683; *Roberts v. Allman,* 106 N. C., 391. This is the general rule, and is not affected by the fact that he may have made the wrong motion or proceeded otherwise improperly or erroneously, as will appear from the foregoing cases. The only inquiry that arises is, Did he have a fair opportunity to present his case? No doubt, if the plaintiffs had made their claim for compensation and a request
(246) that proceedings be taken for that purpose, the board would have granted the application. If they had refused, they could have appealed, and if they had denied them this right, they then could have applied for remedial process to the Superior Court, and to the judge for an injunction meanwhile, if necessary to protect their rights *pendente lite. Blair v. Coakley,* 136 N. C., 405.

Laws 1909, ch. 80, sec. 16, gives the right of appeal from the finding of the jury as to the damages or benefits, but denies it as to the order of condemnation. We would suggest that hereafter the commissioners, or those having charge of such matters, give notice of the order of condemnation to those affected thereby, so that they may certainly know when they are expected to file their claim for compensation.

In this suit, as there appears to have been some doubt as to the proper course of procedure in such cases, we will direct that plaintiffs be allowed to file their claim for damages before the commissioners, or in such way as they may be advised, within thirty days after the certification of this opinion and the judgment of this Court to the court below, and the

receipt of the certificate by the clerk of the latter court, that time having been considered reasonable by the Legislature. But this order is not, hereafter, to be taken as a precedent.

There was no error in the order denying the injunction.

Affirmed.

Cited: *Wood v. Land Co.*, 165 N. C., 370; *Bennett v. R. R.*, 170 N. C., 392.

ZOE BARRINGER AND HUSBAND v. E. M. DEAL.

(Filed 3 December, 1913.)

1. Slander—Ulterior Purpose—Trial—Evidence.

While in an action for slander it is competent for the defendant to testify that the slanderous words were uttered by him without malice, it is incompetent for him to testify as to the purpose with which he did so, uncommunicated at the time.

2. Slander—Compensatory Damages—Evidence.

Compensatory damages may be recovered in an action for slander without specific proof that they have been suffered, when the words are libelous *per se*, their falsity is admitted, justification not pleaded, and privilege not claimed.

3. Trial—Instructions, When Submitted—Appeal and Error.

The refusal of the trial judge to give special instructions requested is not reviewable on appeal when it appears that they were submitted to the judge after the close of the evidence. Rev., secs. 536, 538.

APPEAL by defendant from *Cline, J.*, at July Term, 1913 of CATAWBA.

W. A. Self, George McCorkle, R. R. Moose for plaintiff. (247)
Council & Yount for defendant.

CLARK, C. J. This action is to recover damages for the slander of the *feme* plaintiff. The charge, if not true, was a cruel and malicious slander. The defendant in his answer does not plead justification, but admits that at the time of making the libelous statement he did not know that it was true, and in his evidence admits that it was not true. He does not plead privilege, and it was not an occasion for privilege.

The first exception is because the judge excluded the following question: "You admit in your answer using the language charged for

a purpose. Tell what your purpose was." This question was properly excluded. The language on its face was grossly libelous *per se.* It was not competent for the defendant to testify as to his purpose, which was only a mental conclusion, unless he had stated his purpose at the time of the making the libelous utterance. Not having done so, it could not lessen the damage and wrong done the plaintiff that the defendant may have had a concealed ulterior motive. In *Fields v. Bynum,* 156 N. C., 413, the Court said: "The defendant must show something more than honest belief in the truth of his utterances, for he must show that the communication was made in good faith on an occasion which justified his making it." None of these things were shown.

It was competent to ask the witness whether he had any malice
(248) toward the plaintiff. This was done, and the defendant testified that he did not have any malice. But it is not open to him to testify that he had a motive which he did not make known at the time of his utterance. The rule is thus stated in Folkard's Starkie on Slander, 398, note 2: "A defendant in an action for slander has a right to explain the meaning of the words used by him and rebut the presumption of malice if his explanation is by reference to matters occurring when the words were spoken, so that those hearing them ought to have understood them as explained." But this does not permit the defendant to testify that he had a hidden, uncommunicated motive, when at the time of using the words it was not made known to those who heard him make the slanderous statement.

The exception that the court permitted the plaintiff to recover compensatory damages without proof of having actually suffered any, cannot be sustained. In *Hamilton v. Nance,* 159 N. C., 56, it is held: "In an action for slander, where justification is not pleaded and privilege is not claimed, the jury, upon finding an affirmative answer to the first issue, implies as a matter of law that the charge complained of is false and malicious, and compensatory damages should be awarded; and additional punitive damages may also be given if the jury find actual malice." To same effect, *Fields v. Bynum,* 156 N. C., 414, where the Court says: "When general damages are sought in an action of slander for words spoken which are actionable *per se,* compensatory damages may be awarded which embrace compensation for those injuries which the law will presume must naturally, proximately and necessarily result, including injury to the feeling and mental suffering endured in consequence; and it is not incumbent on the plaintiff to introduce evidence that he has suffered special damage in such instance." This was excepted to, but is a *verbatim* quotation from that opinion.

The defendant requested certain prayers which the court declined to

give, for the reason that they were "handed up after the conclusion of the charge." Revisal, 536, 538, require such prayers to be handed up at or before the close of the evidence, and it was not error for the judge to refuse to consider them. *Craddock v. Barnes,* 142 (249) N. C., 89; *Biggs v. Gurganus,* 152 N. C., 173.

We cannot pass over without notice that the assignment of errors are insufficiently made, in that they merely refer to the exceptions, without giving the substance of the matters excepted to. *Thompson v. R. R.,* 147 N. C., 412; *Smith v. Manufacturing Co.,* 151 N. C., 260; *Keller v. Fiber Co.,* 157 N. C., 576.

No error.

Cited: Hardware Co. v. Buggy Co., 170 N. C., 301.

V. G. LYNCH v. CAROLINA, CLINCHFIELD AND OHIO RAILWAY COMPANY.

(Filed 3 December, 1913.)

1. Master and Servant—Dangerous Work—Assumption of Risk—Safe Appliances—Duty of Master—Negligence.

It is the duty of the employer to furnish his employee such tools and appliances to do the work required of him as are reasonably safe, under the rule of the prudent man; and where the character of the work is dangerous, the employee only assumes the risk incident to its dangerous character, and not that caused by the omission or neglect of the employer in the performance of the duties required of him for the employee's greatest security.

2. Same—Trials—Negligence—Evidence—Nonsuit.

In an action to recover damages from an employer for a personal injury alleged to have been negligently inflicted upon its employee, there was a motion as of nonsuit upon evidence tending to show that the plaintiff was employed at the time of the injury in unloading coal from a gondola car, opening at the bottom and dumping the coal into the tender of a locomotive beneath; and while he was using a pick for the purpose, as was customary with him, he was peremptorily instructed to use a shovel instead, the latter being a more dangerous method, and in consequence thereof he received the injury: *Held,* under this evidence, viewed in the light most favorable to the plaintiff, as required, a judgment of nonsuit was properly disallowed, there being sufficient evidence of defendant's actionable negligence to take the case to the jury; and, further, there was no evidence of contributory negligence. *Orr v. Telephone Co.,* 132 N. C., 691.

(250) APPEAL by defendant from *Justice, J.,* at February Term, 1913, of RUTHERFORD.

Action for personal injury and damages caused by defendant's negligence. Plaintiff was employed by defendant as hostler helper, and assigned by his superior, or boss, to empty coal from a car or gondola, which was tanding on a trestle. The coal was piled up in the hopper car, which had an opening in the bottom, through which the coal would drop into the chute and thence into the tender of the engine underneath. The coal was of a large size. He had been doing this kind of work safely with a pick for ten months before the day of this injury. He was ordered to unload a car and proposed to use a pick, when he was told to use a shovel. He then said, "I will take a pick," whereupon his boss gruffly ordered him to use the shovel. Plaintiff preferred to use a pick, which, he said, is safer than a shovel in doing the particular work, and he stated in his testimony in what respect it is safer. It renders the work easier and increases the chances of safety by affording a better opportunity than would the shovel-method of preventing the coal from striking you as it slides down the sides of the hopper, through the bottom of the car and the chute, into the tender. Defendant moved for a nonsuit, which the court refused, and defendant excepted. Verdict as follows:

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? Answer: No.

3. What damages, if any, is plaintiff entitled to recover of defendant? Answer: $250.

Judgment thereon, and appeal by defendant.

Pless & Winborne and York Coleman for plaintiff.

J. J. McLaughlin and Quinn, Hamrick & McRorie for defendant.

WALKER, J., after stating the case: It seems clear to us that the question of defendant's negligence was one for the jury. There is but one exception, that the court denied the motion for a nonsuit. We must, therefore, view the evidence most favorably for the plaintiff,

(251) and if there is any phase of it which, if found by the jury, entitles him to recover, it presents a case for them, instead of one for a nonsuit.

We have said in numerous decisions that the master owes the duty to his servant, which he cannot satisfy neglect, to furnish him with proper tools and appliances for the performance of his work, and he

does not meet fully the requirement of the law in the selection of them, unless he uses the degree of care which a person of ordinary prudence would exercise, having regard for his own safety, if he were supplying them for his own use. *Marks v. Cotton Mill,* 135 N. C., 287; *Avery v. Lumber Co.,* 146 N. C., 595; *Mercer v. R. R.,* 154 N. C., 399. The master should, in the exercise of such care, provide reasonably safe tools, appliances, and surroundings for his servant while doing the work. *Dorsett v. Manufacturing Co.,* 131 N. C., 254; *Witsell v. R. R.,* 120 N. C., 557; *Orr v. Telephone Co.,* 132 N. C., 691.

We have said that the rule which calls for the care of the prudent man is, in such cases, the best and safest one for adoption. It is perfectly just to the employee and not unfair to his employer, and is but the outgrowth of the elementary principle that the employee, with certain statutory exceptions, assumes the ordinary risks and perils of the service in which he is engaged, but not the risk of his employer's negligence. When the injury to him results from one of the ordinary risks or perils of the service, it is the misfortune of the employee, and he must bear the loss, it being *damnum absque injuria;* but the employer must take care that ordinary risks and perils of the employment are not increased by reason of any omission on his part to provide for the safety of his employee. To the extent that he fails in this plain duty, he must answer in damages to his employee for any injuries the latter may sustain which are proximately caused by his negligence, and not by the negligence of the employee. *Marks v. Cotton Mill, supra.* These principles are familiar, and the difficulty generally arises in their application; but we do not think there is any in this case.

Here the employee wanted to use a safe implement, one which (252) he had been using for some time with safety and efficiency, and the employer interfered and compelled him, under a menace of discharge (for the plaintiff, as it appears, knew and realized the consequence of disobedience), to use one which was not so well adapted to the work and was more dangerous to the employee, who was proximately injured thereby. This makes out, at least, a case for the jury.

It appeared in *Simpson v. R. R.,* 154 N. C., 51, and *Warwick v. Ginning Co.,* 153 N. C., 262, relied on by appellant, that the work was simple, and the servant was permitted to do it in his own way, without compulsion by the master as to any particular method of doing it, which distinguishes them from this case, where he was peremptorily ordered to use the shovel. It is, therefore, the case of a master requiring the servant to do his work in a dangerous way, by which he is hurt.

In *Whitson v. Wrenn,* 134 N. C., 86, the master had instructed the servant to do the work in a way that was safe, and he elected to disobey

the order and do it in a dangerous way, and we held that he could not recover for the injury caused by a departure form his instructions, because the fault was all his own.

Not so here, but the contrary. It is the converse of that case. The servant selected a safe method of doing the work, and the master ordered him to desist and do it in a dangerous way. The injury was, therefore, caused by the master's fault, and fixes him with responsibility for it. There is no pretense that the servant was guilty of any contributory negligence, and could not be, under the facts. *Orr v. Telephone Co., supra.*

We have just decised a case at this term, which is analogous to the one at bar (*Breeden v. Manufacturing Co.,* 163 N. C., 469), where the plaintiff was injured in cleaning a tentering machine. He was performing the work in a safe way, when his boss ordered him to stop and change his method to one which was dangerous. We held the master liable, there being no contributory negligence, as he had substituted a hazardous for a safe method of doing the work by an order which the servant was bound to obey. There was some evidence of negligence, and this is sufficient upon a motion to nonsuit.

(253) The case is free from any error that we have been able to discover.

No error.

Cited: Lloyd v. R. R., 166 N. C., 32; *Steele v. Grant, ibid.,* 647; *Deligny v. Furniture Co.,* 170 N. C., 201, 203.

ASHEVILLE AND EAST TENNESSEE RAILROAD COMPANY
v. W. A. BAIRD AND J. E. JOHNSON.

(Filed 13 December, 1913.)

1. Railroads—Car-load Shippers—Bailment—Negligence—Trials—Evidence—Damages.

Where a railroad company has placed a car on its track and turned it over to the shipper to be loaded by the shipper, the relation of bailor and bailee is established between them; and where the car is damaged through the negligence of the shipper's employees, the shipper is responsible to the company for the amount of such damages.

2. Same—Ownership of Car.

Where under through traffic arrangements a railroad company furnishes its shipper a car belonging to another railroad company, to be

loaded by the shipper, the relation between the two companies is that of bailor and bailee; and where the shipper, through the negligence of his employees, injures the car, the bailee railroad company may recover the damages from the shipper, though it was not the owner of the car furnished him.

3. Trials—Contributory Negligence—Issues Submitted.

It is not error for the trial judge to refuse to submit an issue upon the question of contributory negligence when such has not been tendered by the defendant.

4. Railroads—Car-load Shipper—Bailment—Trials — Damages — Evidence—Burden of Proof.

In such cases, where it is shown that the car was delivered to the shipper in good condition and returned by him damaged, the burden is upon him to show that he had used ordinary care in caring for the property while under his control.

APPEAL by defendant from *Foushee, J.*, at November Term, 1912, of BUNCOMBE.

Civil action tried upon these issues: (254)

1. Did the plaintiff deliver to the defendants, or either of them, a railroad freight car, as alleged in the complaint? If so, to whom? Answer: Yes; as to W. A. Baird.

2. Was said car injured and damaged by the negligence of the defendants, or either of them, as alleged in the complaint? If so, by whom? Answer: Yes; W. A. Baird.

3. What damage, if any, is the plaintiff entitled to recover by reason of such negligence? Answer: $354.28, with interest from date of payment of bill.

The court rendered judgment against the defendant W. A. Baird, who appealed.

Merrimon, Adams & Adams for plaintiff.
W. P. Brown, J. D. Murphy for defendant.

BROWN, J. This record contains thirty-one exceptions, seventeen of which are to the rulings of the court upon the admission of testimony.

Impressed by the earnestness of the learned and able counsel for the defendant, Judge Murphy, we have scrutinized each of these assignments of error with great care, but are unable to find any error which warrants another trial of this case.

The weight of the evidence tends to prove very clearly that the plaintiff, at the instance of the defendant Baird, delivered to him a freight car, and placed it securely chocked on a sidetrack to be loaded by Baird with acid wood for shipment over plaintiff's road and it connections.

During the progress of the loading of said car by the servants of the said Baird they undertook, after the car had been practically loaded, to move it, and in order to do so they negligently removed all the scotches placed under said car by the plaintiff for the purpose of holding the same.

The car had been placed on a side-track of the plaintiff in a location convenient for the loading of the wood by the said Baird, on a grade of about 2 per cent, and when the scotches and brakes were removed by the servants of the defendants, the car got from under their control and was permitted to run out on the main line of the plaintiff, and finally, after running along the main line for some distance, left (255) the track and was thereby injured and damaged.

The car was the property of the Southern Railway Company, and was being used by the plaintiff under its traffic arrangements with the Southern. The plaintiff paid the Southern the sum of $354.28 damages to the car.

It is contended that the plaintiff cannot recover because the car was not the property of the plaintiff, but of the Southern Railway Company, and that if the real owner had brought the action, the defendant could have successfully defended against it.

The jury has found that the car was delivered by the plaintiff, Asheville and East Tennessee Railway Company, to the defendant W. A. Baird, and the relation existing between the plaintiff and the defendant was that of bailor and bailee. It is well settled that under these facts the defendant Baird could not take advantage of the fact that the title to the property was outstanding in the Southern Railway. *Lain v. Gaither,* 72 N. C., 234.

Where a third party has deprived baliee of the possession of the property, or injured it, the baliee may recover the whole value of the property, unless the bailor interposes by a suit for his own protection, and will hold the excess beyond his special interest in trust for the bailor. 5 Cyc., 223, sec. 8.

It has been uniformly held that the bailee has a right of action against a third party, who by his negligence causes the loss of or any injury to the bailed articles, and this right has been held to be the same, even though the bailee is not responsible to the bailor for the loss. 5 Cyc., 210.

It is contended "that the plaintiff was guilty of contributory negligence in any view of this case, and an issue should have been submitted by his Honor for this purpose, as set out in exception 21."

It does not appear, however, either from the record proper or from the case on appeal, what this issue was. It, therefore, cannot be relied

on as error. Contributory negligence is a defense, and it was the duty of the defendant to tender such issue, and except in case the court refused to submit it. *Gross v. McBrayer,* 159 N. C., 374. (256)

In any view of the evidence, it appears that the proximate cause of the injury to the car was the negligent removal of the "scotches or chocks." Consequently, had such issue been submitted, it would not have availed the defendant.

As to the burden of proof, the charge of the court was in some respects more favorable to defendant than he was entitled to.

The car, according to the evidence, was delivered to the defendant in good condition, for defendant's use. Under these circumstances, it also appearing that the car had been returned in a damaged condition, there was a presumption that the defendant was negligent, and the burden was upon him to show that he had used ordinary care in caring for the property. The court, however, in its charge, placed this burden upon the plaintiff. 5 Cyc., 217; sec. 7; *Simmons v. Sikes,* 24 N. C., 100.

The rule is laid down in Cyc., *supra,* as follows: "Where negligence is the foundation of the action between the bailor and bailee, the burden of proving negligence is ordinarily on the former. *The burden is on the bailee, however, to show that he has exercised such degree of care as the bailment called for, where the subject-matter was in good condition when placed in the hands of the bailee, and in a damaged condition when returned,* or where it was lost and not returned at all, or where he refused to give any account of how the injury occurred."

No error.

(257)

W. C. PENNELL, TRUSTEE IN BANKRUPTCY, v. L. W. ROBINSON AND M. M. WORLEY, INDIVIDUALLY, AND AS PARTNERS, DOING BUSINESS AS ROBINSON & WORLEY.

(Filed 13 December, 1913.)

1. Vendor and Vendee—Sales—Merchandise in Bulk—Void Transactions—Interpretation of Statutes.

Where the provisions of chapter 623, Laws 1907, regulating the sale of the whole or a large part of a stock of merchandise other than in the usual course of the seller's business, have not been complied with, in making a sale of this character, as to giving notice to creditors, making inventory or giving bond, etc., the sale is absolutely void, the question of *bona fides* in the transaction arising only when the conditions of the statute are met.

2. Bankruptcy—Partnership Exemptions—Consent of Partner—Jurisdiction.
Where one has been adjudicated a bankrupt under the laws of the United States, his right to homestead and personal property exemption under State laws is to be adjudicated in the bankruptcy court.

APPEAL by plaintiff from *Bragaw, J.*, at August Term, 1913, of BUNCOMBE.

Action tried upon these issues:

1. Did the defendants purchase the stock of merchandise of M. J. McElreath & Son otherwise than in the ordinary course of trade and the usual prosecution of their said business, while they were indebted to various creditors, without giving any notice of said purchase and sale to said creditors? Answer: Yes.

2. Did the defendants purchase said goods in good faith and for a fair price, paying for the same, without knowledge of the insolvency of said M. J. McElreath & Son, or that they owed debts? Answer: Yes.

3. What was the value of said goods at the time of said sale on 7 March, 1912? Answer: $268.

4. Are the defendants indebted to the plaintiff, and if so, in what amount? Answer: No.

Fourth issue answered "No" as a matter of law by the court.

It is agreed that upon application of C. H. McElreath, one of
(258) the bankrupts, for a personal property exemption, in the bankruptcy court, he was denied his personal property exemption. The other bankrupt did not ask for his personal property exemption, or consent in apt time for C. H. McElreath to have any exemption. Upon the issues as found by the jury, the court rendered judgment against the plaintiff, who excepted and appealed.

Mark W. Brown for plaintiff.
Lee & Ford for defendants.

BROWN, J. This is an action brought by the plaintiff as trustee in bankruptcy of M. J. McElreath & Son, bankrupts, to recover possession of, or the value of, the stock of merchandise sold by M. J. McElreath & Son to the defendants.

It is admitted that the defendants purchased the stock of goods at the time plaintiffs were indebted to various creditors, without a compliance with the provisions of the statute regulating "sales in bulk," and that they paid a fair price for the same; that the same was purchased in good faith, and without legal knowledge or notice of the insolvency of the bankrupts, or that the bankrupts owed debts, at or before the time of the sale or the delivery of the goods. The only question presented is the construction of the "sale in bulk" statute.

The statute is chapter 623, Laws 1907, and is brought forward in Pell's Revisal, sec. 964a.

The plaintiff contends that under the "sale in bulk" law, the sale of the whole or a large part of a stock of merchandise otherwise than in the regular course of the seller's business is void, absolutely, as to the seller's creditors, unless he shall observe the provisions of the statute as to giving notice to creditors, making inventory or giving bond as provided in said act.

The defendants maintain that a failure to observe the provisions of the statute as to the notice to creditors or bond does not render the transaction void, but merely raises a presumption of fraud which may be rebutted by proof that (*a*) they purchased in good faith, (*b*) paid a fair price, (*c*) and were without knowledge of the fraud or of the insolvency of the bankrupt.

We think the construction of the statute contended for by the (259) defendants would practically destroy its beneficial effect. Its purpose is to prevent the purchase of a stock of merchandise from various persons on a credit, and then selling it out in bulk for the purpose of defeating the rights of the creditors who extended the credit.

The statute effectually protects such creditors, not only by making it easier to establish fraud, but by declaring the "sale in bulk" absolutely void unless the provisions of the law are complied with.

As we construe the act, the sale in bulk of a large part, or the whole, of a stock of merchandise, otherwise than in the ordinary course of trade, and in the regular and usual prosecution of the seller's business, renders the transaction *prima facie* fradulent, and open to attack on such ground by creditors, even though the provisions of the act are fully complied with.

But in case they are not complied with, then the "sale in bulk" is absolutely void as to creditors, without any further evidence of a fradulent purpose.

The construction contended for by the defendants, if allowed to prevail, not only renders the act nugatory, but gives to the creditor no greater protection than he had prior to its enactment.

A sale in bulk of a stock of merchandise was *prima facie* evidence of fraud under some circumstances before the passage of this act.

The Supreme Court of the United States, in referring to such a sale, says: "But it is wholly a different thing when he sells his entire stock to one or more persons. This is an unusual occurrence, out of the ordinary mode of transacting such a business, is *prima facie* evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase." *Scammon v. Cole,* 5 Bank Reg., 257; *Graham*

(260) *v. Stark,* 3 Bank Reg., 95; *Kingsbury v. Hale,* 3 Bank Reg., 84 *Driggs v. Moore,* 3 Bank Reg., 149; *Tuttle v. Traux,* 1 Bank Reg. 169.

If the defendants had known of the insolvency of McElreath, and that the sale of the stock of merchandise to them was for the purpose of defeating the rights of creditors, then the sale could have been avoided irrespective of bankruptcy or of the "sale-in-bulk" law, even though appellees paid full value for the merchandise. Revisal of 1905, secs. 960-964; *Cox v. Wall,* 132 N. C., 730.

Any other construction than the one we place on the act of 1907 would leave the law practically as it stood under the Revisal of 1905, secs. 960-964, for under that law, as demonstrated by *Mr. Justice Walker,* the burden of proof is on the purchaser of property conveyed to defraud creditors to show that he bought for a valuable consideration and without notice. *Cox v. Wall,* 132 N. C., 731.

The act of 1907 declares in explicit and unmistakable terms that such sales are (*a*) "*prima facie* evidence of fraud, and (*b*) void as against the creditors of the seller."

There must have been some purpose in inserting the comma after the declaration "*prima facie* evidence of fraud," and adding "and void as against the creditors of the seller."

But if the construction contended for by the defendant is adopted, the words "and void as against the creditors of the seller" must be stricken from the statute. The General Assembly will then have done a vain thing, and the purpose of the enactment destroyed.

In construing a similar statute, the Supreme Court of Mississippi in *Dry Goods Co. v. Rowe,* 99 Miss., 30, held that "a sale in violation of the bulk sales law, declaring that sale of a stock of merchandise in bulk shall be presumed to be fraudulent as against the seller's creditors, unless specified conditions are complied with, is *prima facie* fraudulent, and unless the purchaser shows a compliance with the conditions as to inventory and notice to creditors, the sale is *absolutely void,* the word presumed having no fixed meaning, and in one instance the presumption declared may be only *prima facie,* while in another conclusive."

(261) See, also, *Contrell v. Ring,* 125 Tenn., 480; *Jacques v. Warehouse Co.,* 131 Ga., 15.

It is well known that the business of retailing goods, wares, and merchandise is conducted largely upon credit, and furnishes abundant opportunity for the commission of fraud upon creditors, not usual in other classes of business. Therefore, many other States have adopted similar statutes, the purpose being to provide, in general, protection against a class of sales to which fraud most frequently attaches. Such

statutes have received different constructions by the courts of the several States, depending largely upon the language employed in the act. We will not undertake to review the various decisions. They are referred to, and the different views taken by the courts commented on, in that valuable publication, vol. 28, Am. and Eng. Annotated Cases, pages 1214-1216.

We prefer to adopt the view taken by several of the courts construing such statutes, to the effect that, while these statutes have the object to prevent persons in debt who own stocks of merchandise from selling the same in bulk for the purpose of defrauding their creditors, its subject-matter is not fraud in such sales, but the regulation of them.

The statute prescribes certain duties which must be performed by the buyer and certain correlative duties which must be performed by the seller. This is regulation, pure and simple.

Unless these duties are complied with, and the requirements of the statute observed, such sale or transfer, as to any and all creditors of the vendor, is conclusively presumed to be fraudulent in law, whatever it may have been in fact.

Whether McElreath is entitled to a personal property exemption now is a question for the bankruptcy court. It is well settled in this State that a copartner is not entitled to a personal exemption in the partnership property without the consent of the other copartner.

We are of opinion that the plaintiff is entitled to judgment for the value of the merchandise as assessed by the jury. Let such judgment be entered in the Superior Court.

Reserved.

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(262)

SARAH MAY v. MANUFACTURING AND TRADING COMPANY.

(Filed 3 December, 1913.)

1. Limitation of Actions—Adverse Possession — State's Title — Evidence—Marked Lines.

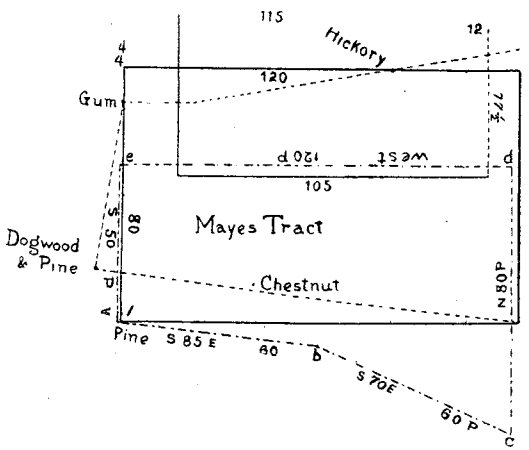
One relying solely upon adverse possession and without color of title to establish his title to lands in controversy must show title out of the State by actual possession for thirty years, not necessarily continuous occupancy of the property, but of a hostile character sufficiently definite and observable to apprise the true owner that his property rights have been invaded and to the extent of the adverse claim. And where there is a physical occupation with claim extending to certain marked boundaries, there must be some evidence tending to connect such occupation with the boundaries claimed or some exclusive control or dominion over the unoccupied portions of the land.

2. Trials—Expression of Opinion by Court—Deeds and Conveyances—Acreage —Evidence.

In an action of trespass, involving title to lands, it appeared that to locate the land in accordance with plaintiff's contention the boundaries would include 60 acres, whereas the successive deeds he relies on to show paper title purports to convey 50 acres only; and under the boundaries contended for by the defendant, 50 acres would be included, according to the acreage expressed to be conveyed in plaintiff's deeds; on the facts presented: *Held*, this discrepancy between the number of acres embraced under the boundaries contended for by plaintiff and the number of acres stated in his deeds, under the circumstances, was a relevant circumstance to be passed upon by the jury; and the charge of the court that it would be of no great value as an aid to the jury, was an expression of opinion forbidden by the statute.

APPEAL by defendant from *Cline, J.*, at June Term, 1913, of BURKE.

Action to recover damages for trespass to realty, involving also an issue as to title. The plaintiff introduced the following deeds:



1. Deed from H. H. Walton and wife to Alex Sisk, dated 4 October, 1899, containing the following description: Beginning on a pine and runs south 85 east 60 poles to a chestnut; thence south 70 east 60 poles to a white oak; thence north 80 poles to a stake; thence west 120 poles to a stake; thence south 50 poles to the beginning, containing 50 (263) acres, represented on the annexed plat under its calls of course and distance by the letters a, b, c, d, e.

2. Deed from Alex Sisk and wife to William Maloney, dated 18 November, 1901, containing substantially the same description and calling for same acreage; 50 acres.

3. Deed from William Maloney and wife to Sarah A. May, dated 11 May, 1903, containing the following description: Being a tract of 50 acres, more or less, beginning on a pine on the south side of a road and runs east 60 poles to a chestnut; same course 60 poles to a large white oak; thence north 80 poles to a black oak; thence west 120 poles to a stake; thence south to the beginning, being a tract of land bought of H. H. Walton by Alex Sisk and conveyed by Sisk to William Maloney and wife, which said tract lies and is situated on one prong of Hall's Creek, reference hereby made to deeds to said Walton and Sisk for more specific calls and boundaries, represented on the annexed plat according to the calls by course and distance by the figures 1, 2, 3, 4.

Plaintiff then offered evidence tending to show title out of the State, and also that plaintiff and her more immediate grantors had occupied and possessed the property covered by the above deeds for seven consecutive years next before action brought. There was also (264) evidence tending to show the cutting of timber, complained of, by defendant in a lot of woodland in the northeastern part of the land between the lines 3 and 4 and d and e near the eastern boundary as claimed by plaintiff. It was admitted on the argument here that the deed from William Maloney and wife to plaintiff covered the land in controversy; that the deed from Walton and wife to Sisk and from Sisk and wife to Maloney did not cover the land in the calls by course and distance, unless their correct location was made to embrace the *locus in quo* by marked and recognized lines and corners.

The annexed cut is inserted as an aid to a proper understanding of the point presented.

The jury rendered the following verdict:

1. Has the defendant trespassed and cut timber on the lands of the plaintiff, as alleged in the complaint? Answer: Yes.

2. If so, what damages has plaintiff sustained thereby? Answer: $138.

Judgment on the verdict, and defendant excepted and appealed.

J. T. Perkins for plaintiff.
Avery & Ervin for defendant.

HOKE, J., after stating the case: The plaintiff, relying in great measure on showing title by seven years adverse occupation of land under color, was required to prove title out of the State, and endeavored to meet this requirement by showing thirty years adverse possession and also by evidence tending to prove that the *locus in quo* was embraced within a grant of the State to Erwin and Greenlee, bearing date in 1795, and both phases of the inquiry were submitted to the jury on the issue as to plaintiff's title.

Adverse possession for thirty years is one of the recognized methods of showing title out of the State, and it is not necessary to prove that such possession has been continuous one year with another, and, in cases coming within the former law, it was not required to show any privity of estate between the different occupants, this last position (265) having been changed by our statute on the subject and as to causes coming within its provisions. *Phillips v. Pierce,* 94 N. C., 518; *Price v. Jackson,* 91 N. C., 11-15; Revisal, sec. 380. The possession referred to, however, within the meaning of the principle, is actual possession, not necessarily continuous occupation of the property, but there must be some possession of a hostile character sufficiently definite and observable to apprise the true owner that his proprietary rights are being invaded, and of the extent of the adverse claim.

Where one is in possession under color of title, having definite lines and boundaries, the calls and descriptions of the deed may be sufficient, but where there is no deed or color giving description of the property, there actual possession must be shown. It is not always required for this purpose that there should have been an inclosure or a clearing defining the full extent of the claim. As indicated by the statute, it may be sufficient to show possession "ascertained and identified under known and visible lines and boundaries." Revisal, sec. 380. But when it is sought to extend the effect of an adverse occupation beyond an actual inclosure or clearing and up to marked lines and boundaries, there must be some evidence tending to connect the physical occupation with the boundaries claimed or some exclusive control and dominion over the unoccupied portion sufficiently definite and observable, as stated, to apprise the true owner of the extent of the adverse claim. *Davis v. McArthur,* 78 N. C., 357; *Wallace v. Maxwell,* 32 N. C., 110; *s. c.,* 29 N. C., 135-137; *Bynum v. Thompson,* 25 N. C., 578; *Ill. Sled Co. v. Belot,* 109 Wis., 408; *De Frieze v. Quint,* 94 Cal., 653; *Wade v. McDougle,* 59 W. Va., 113; *Porter v. Kennedy,* 23 S. C., 352.

In *Bynum v. Thompson* the correct principle is stated as follows: "It is admitted that, upon a long possession, all necessary assurances may and ought to be presumed. But the question is, What is possession for that purpose? Plainly, it must be actual possession and enjoyment. It is true, indeed, that if one enters into land under a deed or will, the entry is into the whole tract described in the conveyance, *prima facie,* and is so deemed in reality, unless some other person has posses- (266) sion of a part, either actually or by virtue of the title. But when one enters on land without any conveyance or other thing to show what he claims, how can the possession by any presumption or implication be extended beyond his occupation *de facto?* To allow him to

say that he claims to certain boundaries beyond his occupation, and by construction to hold his possession to be commensurate with the claim, would be to hold the ouster of the owner without giving him an action therefor. One cannot thus make in himself a possession contrary to the fact."

Smith v. Bryan, 44 N. C., 180-182, in no wise militates against this principle; on the contrary, serves the better to illustrate it; the evidence in that case tending to show clearing and exercise of control up to the known and visible lines and boundaries. On careful examination of the record, we fail to find evidence in the facts, as now stated, tending to connect the earlier and actual occupation or possession, relied upon by plaintiff to show title out of the State, with the lines and boundaries in the northeastern portion of the land claimed and necessary to cover the *locus in quo.* There is testimony of long possession at an old house place in the western part of the tract and a clearing of several acres around it, but there is nothing to connect such an occupation with the lines referred to. There seems to be no satisfactory evidence of marks through that woodland of sufficient age to answer the requirement. The witness Denton, a surveyor, said he observed some marked lines out there, on a survey made by him something like eight or nine years before the trial, and they seemed to be fifteen or twenty years of age. Marks, therefore, which of themselves could have had no connection with the old settlement in the western part of the plat, where the clearing was, and we find no evidence of any exercise of control or dominion of the unoccupied portion of the land in any way connected with the occupants of the old clearing or the title they professed to assert. On this phase of the inquiry, therefore, we must hold there was reversible error in allowing the jury to determine title out of the State by adverse possession and by reason of an old settlement and clearing on the western portion of the land, when there was not color of title (267) defining the limit of the claim and no evidence tending to extend the force and effect of such occupation to the woodland on the eastern part of the land, and which was necessary to include the *locus in quo.*

Again, in effort to establish the title in herself by seven years adverse possession under color, the immediate deed to plaintiff was insufficient for the purpose, being only six years old at the time of action brought, and it was necessary, therefore, for plaintiff to show that one or both of the preceding deeds, under which she claimed, covered the land in controversy. The plaintiff contended and offered evidence tending to show that the northern boundary of these two preceding deeds was the line 3-4, and which would include the land in dispute, while defendant contended that the true location was the line d-e, as indicated by

the course and distance of the deeds, and which would not include the land.

All of these deeds purported to convey 50 acres. If located as plaintiff contended, they would include 60 acres, and if as defendant claimed, the quantity would be in accord with the deeds, and defendant referred to this excess of acreage as a circumstance in support of its position, and asked his Honor to so instruct the jury. The court responded to the request, but in doing so, among other things, said: "I will state very frankly that I do not think the acreage is of so great value to aid you in the determination of this location, but you can consider it if it is of any aid according to your finding," etc. His Honor may have been correct in his estimate, but if it were a revelant circumstance at all, and it has been so held in cases of disputed boundary (*Baxter v. Wilson,* 95 N. C., 137), the question of its weight in value, under our statute, was for the jury, and not for the court. For the errors indicated, the defendant is entitled to a

New trial.

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(268)

J. S. HOILMAN ET ALS. v. WALDRON JOHNSON.

(Filed 10 December, 1913.)

1. Deeds and Conveyances—Minerals—Surface of Lands—Adverse Possession —Limitation of Actions.

Where the mineral interest in lands and the surface thereof are conveyed to different grantees, each constitutes a different and distinct estate in the lands from the other, and adverse user or possession of the one sufficient to ripen title will not alone apply to the other.

2. Same—Trials—Evidence—Questions for Jury.

The acts of the owner of the surface of the lands in mining for mica and other mineral interests therein which had separately been conveyed are held sufficient in this case upon the question of adverse possession, under conflicting evidence, to be submitted to the jury upon the issue of title thereto.

3. Deeds and Conveyances—Minerals—Adverse Possession of Part—Limitation of Actions—Trials—Evidence.

Where the mineral interests in lands have been separately conveyed, and there is sufficient evidence of adverse possession to ripen title in the occupant and defeat the grantee's paper title, it applies to all of the mineral interests conveyed by the deed, and is not confined to the particular mineral or minerals which had been mined.

APPEAL by plaintiff from *Cline, J.,* at July Term, 1913, of MITCHELL. Action tried upon this issue:

"Are the plaintiffs the owners and entitled to the possession of the mineral interests in the lands described in the complaint? Answer: No."

The plaintiffs appealed from the judgment rendered.

A. Hall Johnson, Black & Wilson, Pless & McBee for plaintiffs.
W. L. Lambert, Charles E. Green for defendant.

BROWN, J. This action, as the issue indicates, is brought to recover the mineral interests in a certain tract of land which formerly belonged to Simeon Slagle. The plaintiff introduced a connected chain of deeds for the mineral interests from Slagle to the plaintiffs (269) antedating the deed of the defendant.

The defendant claimed title to the entire fee, including the mineral interests, by deed from Simeon Slagle to the defendant, dated 29 January, 1903.

It is admitted that the defendant owns the surface, and to show title to the mineral interests, the defendant relies on his deed as color of title, and undertakes to show seven years possession.

In apt time the plaintiffs asked the court to instruct as follows:

"You are instructed that in all the evidence the defendant has not shown sufficient evidence of adverse possession or user of the mineral interests involved in this suit, and you will answer the issue 'Yes.'"

His Honor refused to give the prayer; plaintiff excepts.

It is well settled that the surface of the earth and the minerals under the surface may be severed by a deed, or reservation in a deed, and when so severed, they constitute two distinct estates. *Outlaw v. Gray,* 163 N. C., 325. The mineral interests being a part of the realty, the estate in them is subject to the ordinary rules of law governing the title to real property.

The presumption that the party having possession of the surface has the possession of the subsoil containing the minerals does not exist when these rights are severed. *Armstrong v. Caldwell,* 53 Pa. St., 284.

The owner of the surface can acquire no title to the minerals by exclusive and continuous possession of the surface, nor does the owner of the minerals lose his right or his possession by any length of nonsuer. He must be disseized to lose his right, and there can be no disseizin by any act which does not actually take the minerals out of his possession. 1 Cyc., 994; *Armstrong v. Caldwell,* 53 Pa. St., 284; *Caldwell v. Corpening,* 37 Pa. St., 427; 87 Amer. Dec., 436; *Wallace v. Coal Co.,* 57 W. Va., 449; *Newman v. Newman,* 7 L. R. A. (N. S.), 370; *Plant v. Humphries,* 26 L. R. A. (N. S.), 558.

As *Mr. Justice Strong* says in *Armstrong v. Caldwell, supra,*

(270) "The owner of the surface can acquire title against the owner of the minerals underneath by no acts or continuous series of acts that would not give title to a stranger."

Although the evidence as to continuous possession of the mineral interests is conflicting, measured by the above rule, we think his Honor properly refused the plaintiff's requested instruction.

The defendant testifies that he took possession in January, 1903, and commenced to mine at once; that he bought the land and mineral interests, not knowing that the latter had been previously sold.

Witness continues: "I used the land for farming, mining, timber, and all other purposes I needed it. I began to prospect and mine some in two or three months. Mined on it five or six days the first year, and have mined some on it every year since. Did this in fall and wniter at leisure times. Made some dumps. Took some mica out of side veins. Worked over the vein for 20 feet, tunneled for 20 or 30 feet. This was on the 3½-acre tract.

"Then we ran a tunnel on the south side of my house on the 50-acre tract. This was two years after I moved there. Worked two or three days at that place. Mined and hunted mica all over the land. When I went there, very little mining had been done. Looked like a little prospecting after I went there. The place was torn all to pieces, hunting for mica.

"Leased it for mining to Thomas, and his father, about a year after I bought it. They worked for about two years; then I leased to Wilt Davis. He worked along for some five years. I leased it to Logan Davis last time; was in 1910, when I gave him a written lease.

"We got a good deal of small mica, and sold it first to Mr. Willis. Then James Hoilman came there about five years ago to my house, bought our mica and gave checks for it; made no claim to it. There are thirty-five openings on the 50-acre tract made between 1903 and 1912. One opening on the 3½-acre tract.

"Have paid taxes on the land and mineral. Have not per-
(271) mitted any one to work on the land except under me. Have not, myself, worked for any one else on the land since I bought it. The general custom of mining is to work in fall and winter at leisure times, opening up mines and hunting for better prospects. No regular time for working.

"Before I bought land, I worked under lease from Mr. Slagle. Wilt Davis had the lease, and I went in with him. Paid some royalty. Mr. Edwin C. Guy came to my house about five years ago. Said he was hunting for a piece of land that Mr. Willis had in possession. Then pulled out a paper and asked me if I knew certain calls. I told him

'No.' He asked to see my deed. I showed it to him. Three or four years later he came back; he said, 'Let's look over that Willis title.'

"He offered me $50, then $100, for my mineral interest in my land. At last I offered to take $1,000. Said if he did no take my offer, I could sell to whoever I pleased, and he would try to sell what he held in that neighborhood.

"Reuben Grindstaff worked 400 yards from my house, and I did not see him. Never saw him or Reuben Hoilman work on my land since I bought it. In 1912 Reuben Grindstaff was at my house to buy mica. We were threshing wheat. Said he did not know if he could show us where he once worked; that he had not been there in fifteen years."

There is much other evidence unnecessary to recite introduced by the defendant tending to show an adverse actual use and occupation of the mineral interests continuously for over seven years from the time the defendant acquired the deed from Slagle prior to the commencement of this action.

Taking all the evidence into consideration, we think his Honor properly submitted the question of adverse possession to the jury. His instructions relating thereto are in line with the decisions of this Court.

The plaintiff further requested the court to charge the jury:

"You are instructed that there is no evidence to be considered by you of any adverse possession to any marble on the land involved herein, and if you find that the defendant has ripened title to the mica and other minerals, then your answer to the issue would be 'Yes,' (272) but only the mica, etc."

His Honor refused to give the prayer, as requested. The plaintiff excepts.

This position is untenable. The defendant was not required to mine for every known mineral in order to give notice that he claimed the mineral interests. The mineral interests in land means all the minerals beneath the surface, and when the defendant sunk his shaft or opened his mines, he gave notice of his claim to all such interests included in his deed, and not to one particular mineral only.

We have been cited to no authority by plaintiffs in support of this contention, and deem further discussion of it unnecessary.

We have examined the remaining assignments of error, and find them without merit.

No error.

Cited: Jefferson v. Lumber Co., 165 N. C., 50; *Reynolds v. Palmer*, 167 N. C., 455.

JOHN M. COOKE v. M. IRENE COOKE.

(Filed 3 December, 1913.)

1. Marriage and Divorce—Statutes—Constitutional Law.

The only limitation on powers of the Legislature in enacting statutes relating to divorce is found in Article II, sec. 10, of the Constitution, which prohibits legislation of this character which is passed for any individual case.

2. Same—Interpretation of Statutes—Party at Fault—Power of Courts—Living Separate and Apart—Divorce a Mensa—Computation of Time.

It being in the exclusive power of the Legislature to regulate the questions of divorce, the courts may not by interpretation interpolate a provision which does not appear in a clearly expressed legislative act; and the Legislature having added a new cause for absolute divorce by chapter 89, Laws 1907, as amended by chapter 165, Laws 1913, as follows: "If there shall have been a separation of husband and wife, and they shall have lived separate and apart for ten successive years; and the plaintiff in the suit for divorce shall have resided in this State for that period and no children be born of the marriage and living," the plaintiff in an action for divorce under the conditions named is entitled to a decree in his or her favor, without reference to the question whether the one or the other party was in fault in bringing about the separation; and should a part of the statutory period have been covered by a decree *a mensa et thoro*, this will not be excluded from the computation of the period of time required.

3. Marriage and Divorce—Interpretation of Statutes—Separation by Consent.

It is not necessary to a divorce under the provisions of chapter 89, Laws 1907, amended by chapter 165, Laws 1913, that the separation between husband and wife should have been by mutual consent.

4. Marriage and Divorce—Interpretation of Statutes—Judgments for Divorce a Mensa—Absolute Divorce—Estoppel.

The cancellation of the marriage tie is not included within the scope of the inquiry, issues, verdict, or judgment in an action for divorce *a mensa et thoro*, and such may not be successfully pleaded as an estoppel in a suit for absolute divorce brought under the provisions of chapter 89, Laws 1907, amended by chapter 165, Laws 1913.

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

(273) APPEAL by defendant from *Peebles, J.*, at May Term, 1913, of ALAMANCE.

Action for divorce. The action was to obtain a divorce *a vinculo*, under section 1561, Revisal, subsection 5 of Pell's Revisal, by reason of separation of husband and wife existent for ten successive years, etc.

The suit was originally instituted in Alamance County by summons dated in 1910, and served, returnable to November Term, 1910, of said court, and complaint thereon was duly filed. Pending such suit, the present defendant instituted her action for a divorce from bed and board by reason of wrongful abandonment on the part of plaintiff. That suit was commenced by summons duly served and returnable to September Term, 1911, of the Superior Court of Wake County. At said term the defendant therein, the present plaintiff, appeared and pleaded in abatement the pendency of the proceedings in Alamance, and further answered, denying the abandonment, etc. The court below (274) held that the answer over had the effect of destroying the plea in abatement, and on issue joined there was verdict and judgment for divorce from bed and board in favor of the plaintiff therein. On appeal, while disapproving the position that to answer over necessarily destroyed the plea in abatement, the judgment on the verdict was affirmed for reasons stated in the opinion. See *Cook v. Cook,* 159 N. C., 46.

The judgment on that appeal having been certified down, the plaintiff suffered a judgment of nonsuit in the original action in Alamance Court, and instituted the present suit by summons served and returnable to Superior Court of said county at April Term, 1913, and complaint having again been duly filed for divorce *a vinculo* under section 1561, Revisal, subsection 5. The defendant appeared, and among other things pleaded the proceedings and judgment of divorce from bed and board obtained in Superior Court of Wake County in bar of plaintiff's suit.

A transcript of the proceedings and judgment in the Wake Court having been put in evidence and admitted by plaintiff in open court to be a true copy, his Honor intimated "that he would charge the jury that the plea of *res adjudicata* as set up in the answer was a finality of the action, and precluded the plaintiff from bringing or maintaining the present suit."

Thereupon the plaintiff, having duly excepted, submitted to a nonsuit and appealed.

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

R. N. Simms, Brooks, Sapp & Hall for defendant.

HOKE, J., after stating the case: Subject to the constitutional restriction that "it may not grant a divorce nor secure alimony in any individual case" (Const., Art. II, sec. 10), the question of divorce is a matter exclusively of legislative cognizance, and in the exercise of its powers over the subject the General Assembly of 1907 (chapter 89)

added a new cause for absolute divorce, as follows: "If there shall have been a separation of husband and wife, and they shall have lived
(275) separate and apart for ten successive years, and they shall have resided in this State for that period, and no children shall have been born of the marriage."

By chapter 165, Laws 1913, this section was amended by "striking out all after the word 'years' in line six (line two of Pell's Revisal, sec. 1651, subsec. 5) and inserting, 'and the plaintiff in the suit for divorcce shall have resided in this State for that period, and no children be born of the marriage and living.' "

This statute, express in terms and plain of meaning, is broad enough to include, and clearly does include, any kind of separation by which the marital association is severed and which may be made the subject of further judicial investigation. There is nothing in the law to indicate that the right conferred is dependent on the blame which may attach to the one party or the other, nor that the time which may be covered by a judicial decree of divorce from bed and board shall be excluded from the statutory period, nor which permits the interpretation chiefly insisted upon by defendant, that the statute only applies when there has been a separation by mutual consent of the parties. But in the language of the statute, this cause for divorce shall prevail whenever—

"1. That has been a separation of husband and wife.

"2. When they have lived apart for ten successive years.

"3. When the plaintiff shall have resided in this State for that period.

"4. No children be born of the marriage and living."

And the Legislature having thus formally and clearly expressed its will, the Court is not at liberty to interpolate or superimpose conditions and limitations which the statute itself does not contain.

This being the correct construction of the law, we are of opinion that the proceedings and judgment in the Superior Court of Wake County offered in evidence by the present defendant, and in which she was awarded a divorce from bed and board on the ground of wrongful abandonment on the part of plaintiff, her husband, cannot be
(276) allowed to affect the course or results of the present trial. Not the decree, for it does not profess to sever the martial tie; that was not the question then presented, and on that record the court had no jurisdiction to award it. Not the verdict, on which the decree was based, for the fact of abandonment being, as we have seen, irrelevant to the present issue, the judicial ascertainment of such fact would lend it no significance. As heretofore indicated, it was chiefly urged for the defendant that the statute under which present proceedings are instituted only applies when the separation has been by mutual consent

of parties, citing certain decisions from the Wisconsin courts, *Thompson v. Thompson,* 53 Wis., 153; *Cole v. Cole,* 27 Wis., 531, and the definition of the word, "separation" appearing in Black's Law Dictionary, etc. From a perusal of the Wisconsin decisions, it appears that the statute of that State contained express provision that the separation must be by mutual consent; and while the term "separation" has obtained the restricted meaning of a voluntary separation from being frequently so used in judicial proceedings, in its more usual sense it extends to and includes any kind of separation by which the martial association is severed: "The living asunder of a man and wife." 25 A. & E. Enc., 432, citing Wharton and Jackson Law Dictionary. "If there shall have been a separation of husband and wife" is the language of the statute, and it clearly contemplates the primary and broader acceptation of the term.

Again, it was contended that a proceeding for divorce deals with and is designed to affect the status of the parties, and that the judgment in Wake has established this status to be legal separation from bed and board, and not otherwise; and further, that the time of such separation under and by virtue of that decree may not be properly counted as part of the statutory period. The premise here is undoubtedly sound. Divorce proceedings concern chiefly the status of the parties, but this action in Wake County did not deal, and the court acquired no jurisdiction to deal, with the marriage tie. The decree only established a legal separation of the parties for the time, and it is very generally held that such a decree does not bar the right to an absolute (277) divorce when the statutory conditions for such a divorce are properly established. *Evans v. Evans,* 43 Minn., 31; *Edgerly v. Edgerly,* 112 Mass., 53; *Green v. Green,* L. R. Courts, Pro. Div., 121; *Mason v. Mason,* L. R., Pro. Div., 121. True, in some of these cases it is held that such divorce can only be obtained on facts subsequent to the former decree, and that as to all former facts the parties are concluded. But this limitation should only prevail when such former facts have legal bearing on the second inquiry, and does not affect the case presented here, where, as we have seen, neither the decree itself no the fact on which it is predicated is relevant to the issue.

It is suggested, in this connection, that decrees for absolute divorce in a proceeding of this character will likely and at times necessarily bring about perplexing conflicts with the terms and conditions imposed by former decrees of divorce from bed and board, and more particularly in reference to allowances for alimony and certain proprietary rights still existent in cases of such decrees.

We do not now see that any such conflicts will necessarily arise; but, if they do, the relief sought and the changes required in the law may not be made here. And so, as to the time covered by these decrees, the law, as we have seen, makes no such exception, and the courts are not at liberty to add to the statute what the Legislature has not seen fit to provide.

And the same answer may be made to another position submitted for defendant: that the plaintiff wrongfully abandoned defendant, and should not be allowed to take advantage of conditions brought about by his own misconduct. This general principle has been recognized in some of our former decisions, but, in the recent case of *Ellett v. Ellett,* 157 N. C., 161, it was held to be unsound where, as in the present case, the Legislature has conferred the right of absolute divorce on the existence of certain specific facts or conditions, and it appears from the provisions of the law that the incipient blame of the one party or the other is not to affect the question.

The public policy which finds expression in this statute rests on the assumption that it is not well for persons in these circumstances
(278) to be absolutely deprived of all right to marry again; and where it has been sufficiently demonstrated by ten years separation that a reconciliation will not occur, and there are no living children to be affected, the lawmakers have deemed it expedient and right to establish this as a cause for absolute divorce. They have not seen fit to make any exception in favor of the injured party nor to exclude the time covered by decree for a limited divorce; and, this being true, we must administer the law as we find it, and if it proves to be unwise in policy or undesirable in results, it must be changed by the legislative department, which is given full and exclusive cognizance of the subject.

Reversed.

BROWN, J., concurring: I concur fully in the opinion of the Court by *Justice Hoke.* It clearly demonstrates that under the act of 1907, as amended, the fact of separation for ten successive years, the residence of the plaintiff within this State for that period, and that there are no living children of the marriage, are all the facts required to be alleged or proved to support a decree for divorce *a vinculo.*

It is contended that the plaintiff must allege and prove that the plaintiff is the injured party. There are no such words in the act, although they are and have been in the Revisal long prior to the act of 1907.

I think those words plainly apply only to those causes of action which grow out of the personal misconduct of the parties. They would be out of place in the act of 1907, and are entirely inconsistent with its spirit

and purpose. That act does not create a cause for divorce, so to speak, but only a ground for the annulment of the marriage tie.

As the opinion of the Court points out, this act differs in its language from other somewhat similar statutes, in that it uses the past tense: "and they shall have lived apart for ten successive years."

It is impossible to conceive that after the expiration of so long a period the Legislature intended that the married life of the parties should be opened up and the dread skeleton of an unhappy past be (279) resurrected and displayed in all its nakedness to the public gaze.

Cui bono? The parties have been separated so long that reconciliation is hopeless, and there are no children to be concerned. Why expose their unhappy past? There may have been no disgraceful wrong on the part of either, only irreconcilable differences.

It is plain to me that the object of the act is to annul the marriage tie, and to give such unfortunate persons an opportunity to marry again, and perchance to make a happy and congenial union, as such relation leads to virtue and unselfishness and makes better and more useful citizens.

After ten long years of separation, why inquire into whose fault it was? Why dig up from their graves the buried memories of broken lives?

It is better to let the dead past bury its dead, and not disturb the remains. Such was evidently the wise and humane purpose of the Legislature.

WALKER, J., dissenting: It is always a matter for regret when I am called upon, even by my sense of duty and a strong desire that justice may always prevail, to differ with my brethren. This is a very important question, and the result which has been reached by the majority, if in accordance with the law and compelled by its edict, as supposed, is not in harmony with right and equity.

I think the opinion of the Court is erroneous in several respects:

1. The Legislature, as I will presently show, and try to demonstrate, expressly provided that a suit of this kind can be brought only by the party injured.

2. If this were not so, the amendment of 1907 should be confined strictly to separation of husband and wife, and not extended to those who have been previously divorced.

3. The time elapsing since the Wake decree of divorce from bed and board should not be counted, in which event, ten years had not expired at the commencement of this action.

First. The act of 1907, being chapter 89, amends, and purports (280)

on its face to amend, section 1561 of the Revisal, and Judge Pell, in his annotated edition, has given this enactment its proper place in that section. (Pell's Rev., sec. 1561, subsec. 5). Section 1561, in its first paragraph, and before enumerating the causes for divorce *a vinculo,* each being placed separately in the five succeeding subdivisions, provides as follows: "Marriage may be dissolved and the parties thereto divorced from the bond of matrimony on application of the party injured, made as by law provided, in the following cases." Among the "following cases" occurs the cause for divorce given by the act of 1907, it being in the fifth subsection. So that if interpreted according to its setting in that section, and controlled and qualified by what precedes and is applicable to all the causes alike, the provision of the act of 1907 is subject to the restriction contained in the first clause of the section, which requires that the application for the dissolution of the marriage and the divorce of the parties shall be made only by "the party injured."

The act of 1907, provides that "Revisal, sec. 1651, be amended by adding thereto the following," and then comes the new enactment as to ten years separation. The law in regard to such an amendment and the future construction of the section thus amended has been conclusively settled by the highest authority. 36 Cyc., 1165, says that an amended act is to be construed "as if the original statute had been repealed, and a new and independent act, in the amended form, had been adopted in its stead; or, as frequently stated by the courts, so far as regards any action after the adoption of the amendment, it is the same as if the statute had been originally enacted in its amended form." We find this familar doctrine stated explicitly and concisely in Black's Inter. of Laws, p. 356 *et seq.,* secs. 130, 132. He says: "(1) An original act and an amendment to it should be read and construed as one act. (2) An amended statute is to be construed as if it had read from the
(281) beginning as it does with the amendments added to it or incorporated in it. (3) An amendatory statute is to be confined, in its scope and operation, to the limits of the act to which it is an amendment, unless the intention of the Legislature to give it a wider field of operation is manifest." And again: "4. In the construction of a statute, in order to determine the true intention of the Legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts." Page 166, sec. 74.

There are many cases sustaining the validity and universality of these rules of interpretation. *Dimpfel v. Beam,* 41 Col., 25; *McGuire v. R. R.,* 131 Iowa, 340; *People v. R. R.,* 145 Mich., 140; *Kamerick v. Castleman,* 21 Mo. App., 587; *Campbell v. Youngson,* 80 Neb., 322; *Cortesy v.*

Territory, 7 N. M., 89; *McKibbon v. Lester,* 9 Ohio St., 627; *Holbrook v. Nichol,* 36 Ill., 161; *S. v. Express Co.,* 171 Ind., 138; *Epperson v. Insurance Co.,* 90 Mo. App., 432; *Farrell v. State,* 54 N. J. L., 421. Some of these decisions have applied the principle concretely to cases just like this one. "As to subsequent events, an amendment to a statute is considered as a part of the original act." *S. v. Express Co., supra.* "An amendment of a statute operates precisely as though the subject-matter of the amendment had been *originally* embodied in the statute amended, as regards any action had after its adoption." *Holbrook v. Nichol, supra.* "A statute which is amended is thereafter, and as to all acts subsequently done, to be construed as if the amendment had always been there; and the amendment itself so thoroughly becomes a part of the original statute that it must be construed, in view of the original statute, as it stands after the amendments are introduced." *Farrell v. State, supra.* "An amendment to a statute will generally be considered as a part of the original act, and the entire act as amended be given the construction which would be given if the amendment were a part of the original act." *People v. R. R., supra.* The case of *McKibbon v. Lester, supra,* holds that where there is an amendment of an act having originally a clause of restriction or limitation, the matter introduced into it by the amendment is, of course, subject to the same (282) restriction or qualification as the other parts of the act.

The clear result from these authorities is that the fifth clause, as shown in Pell's Revisal, sec. 1561, it being the act of 1907, is subject to the qualification which pervades the entire section, namely, that the action for divorce *a vinculo* must be brought by the injured party; and this is in consonance with right and justice. The Legislature had no idea of changing the rule heretofore settled by this Court (*Tew v. Tew,* 80 N. C., 316; *Moss v. Moss,* 24 N. C., 55; *Setzer v. Setzer,* 128 N. C., 170), and give an action to the one who may have been flagrantly in fault; and therefore it did not pass a separate and independent act allowing a divorce after ten years of separation (if even that would have changed the result), but adopted it as an amendment to the original statute, so that it would be subject to its beneficent restrictions and work no wrong or oppression to the faithful and blameless spouse.

But if there could be any doubt as to the correct meaning of the act, we are admonished by other rules of statutory interpretation that the law should be so construed as to prevent "absured or unjust consequences." With regard to a doubtful or ambiguous statute, the presumption should always be indulged that the legislative intention was to enact "a valid, sensible, and just law, and one which should change the prior law no further than may be necessary to effectuate the specific

purpose of the act in question, and the construction should be in harmony with this assumption." Black Int. of Laws, secs. 41, 46, 47. There is also a presumption against an intention to cause a private hardship (sections 47), or to enact contrary to a sound public policy and interests of public morality, or to make any changes in the present law except only to the extent specified in the amendment (sections 47, 50, 52). There is also a presumption that the Legislature did not intend that the law should be inconsistent or discriminatory, but that it should be consistent in all its provisions, and that the amendment should be in harmony with the preëxisting body of the law (section 44).

(283) In the construction of the statute, as amended, and in order to determine the real intention of the Legislature, and its true meaning, the statute should be construed as a whole, each part being given its proper function, and its bearing upon the entire act or section, if such it be. Black, sec. 74. In applying these principles to the facts of this case, we must not forget that the provision of 1907 as to separation is not an independent act, to be construed and to operate as such, but it is an amendment to section 1561 of the Revisal, and is so expressly declared to be. This was purposely done, so that the just rule of the law, giving the action to the party injured, might prevail in this case as in others of a like kind. What sound reason for restricting the right of action for the other four causes to the injured party that does not equally apply to the fifth, which is created by the act of 1907? None at all. It makes no difference what the nature of the offense may be upon which the application is based, the cause of action should, in good morals and in simple justice, belong only to the party who has been wronged. Applying these rules, or any of them, to the statute, and it should read, that a marriage may be dissolved and divorce granted in the following five cass, provided the "application is made by the party injured." This is what the Legislature has plainly said; it is what is manifestly meant, and it is in harmony with prior decisions of this Court and with the eternal principle of right and equity.

Unless we are compelled to do so by inevitable interpretation, we should not give this cause of action to one who has done his wife so grave a wrong, of which he has been convicted by a court of justice and a partial divorce granted therefor. The record imports verity, and it finds that he "unlawfully, unjustly, and cruelly abandoned his wife"—deserted her without cause and refused to support her. He caused the separation himself, and now asks that it be made permanent. We shrink from the contemplation of such injustice, even if his case is accidentally good in law, and turn instinctively to inquire if such it can be. But happily, for the sake of offended justice, it is found that the statute, in

plain terms, as I think, bars his right to any relief. The law is still strong to protect this woman against his iniquitous pursuits of her, taking advantage of his own wrong, and drives him back (284) at the very door of the temple.

We think the meaning and intention of the Legislature are clearly expressed in the way I have indicated; but if not, and the act is ambiguous, the Court should resort to the established rule of presumption, that the lawmaking body never intends to do injustice or to make unfair discrimination among those equally entitled to its favorable consideration, and the courts should adopt that construction which will avoid any such result. Black Inter. of Law, p. 100, sec. 46. And for this purpose it has recourse to the original statute, which is amended, and considers the amendment with reference to its general scope and purpose. Black, p. 356, sec. 130.

Second. But he should go out of court on another ground. The lexicographers define a separation as a cessation of cohabitation by husband and wife by the act of the parties or one of them (Black's Dict., p. 1080), and not by the act of the law, which is technically and legally considered as a *divorce.* Black, at p. 382, defines divorce as "the legal separation of a man and wife, effected, for cause, by the judgment of a court, and either totally dissolving the marriage relation or suspending its effects so far as concerns the cohabitation of the parties." And this is the popular notion. Besides, the statute itself makes a clear distinction between the two—divorce and separation. Revisal, secs. 2110, 2111, 2116. "Words found in the original act will be presumed to be used in the same sense in the amendment." 36 Cyc., 1165. The two are really placed in separate chapters. Certain rights are incident to a divorce which do not pertain to a voluntary separation or one brought about by the wrongful act of either spouse.

If "separation" includes divorce *a mensa,* and stands upon the same footing, it is a strange inconsistency that the statute allows the complaint in a divorce *a mensa* to be made only by the injured party, and it does not require it in this case.

But whatever may be said about it, there is plenty of room for a construction that will prevent such an anomaly, if not enormity, as to permit this plaintiff to take advantage of his own willful wrong in causing the separation and convert it into a good and lawful (285) cause of action. We believe the law is plainly the other way, on its face, and by every pertinent and well settled rule of statutory interpretation. How utterly contrary to our ideas of judicial procedure, that the law should decree a thing to be lawful, in favor of one of the parties, and then make that same thing an instrument in the hands of the wrong-

doer to undo its own work and permit him to use it for his own gain and advantage, to the oppression of the other party! That is turning a wrong into a right, and as to her, "it is holding the promise to the ear and breaking it to the hope."

Third. The time which elapsed under the operation of the divorce decree should not be counted. We have shown what a strange anomaly it would produce; but apart from this consideration, the very language of the statute shows that it was not intended to be applied in such cases, and only to those where the separation has been caused by a nonjudicial act. It is true that although a partial divorce has been granted, the injured party may afterwards obtain an absolute divorce or one *a vinculo,* for sufficient cause. In the cases cited by the Court in its opinion, the decree was given only to the injured party, and he was not allowed to set up any cause involved in the first suit. One of the allegations in the former suit by the defendant against the plaintiff in Wake Superior Court was the desertion and separation of the husband and his cruel treatment of her. This passed into the issue and the decree.

Ellett v. Ellett, 157 N. C., 161, is easily distinguished from this case, and rests upon a peculiar ground which does not underlie it. Here the wife has done no such positive wrong as was shown to have been committed by the wife in *Ellett's case.* She is perfectly innocent of any wrongdoing, and is altogether the aggrieved party. It was only held in *Ellet's case* that the previous conduct in banishing his wife from their home did not justify her in afterwards committing adultery, no more than it would be justifiable for a widow or a single woman to do so. In regard to the two offenses, this Court held that of the husband merely trivial in comparison with the graver and more serious offense (286) of his wife, which was not excused, if palliated, by his act, the evil consequences of which, it was said, could largely be prevented or offset by requiring the husband to provide for her maintenance and support under the statute, and by order of the court, if she cared to apply for it, relying upon *Steele v. Steele,* 104 N. C., 636. It is not necessary to inquire whether this is a valid reason, for suffice it to say that neither those facts, the reason, nor the decision have any relevancy to this case. The defendant has done nothing contrary to her duty and obligation as a wife, and her husband has, by the decree of the court, been found recreant to his duty and false to his marriage vow. The two cases, as we see, are widely separated in principle by their distinctive facts. *Ellet v. Ellet,* therefore, is not in the way, and aside from the plain meaning of the statute and its positive requirement, the plaintiff should be required, under our decisions, to show himself blameless, or, at least, that he is the wronged and not the guilty party.

There can be no question, it seems to me, that plaintiff is estopped by the Wake decree. So far as the record shows, the issue as to the abandonment of his wife in August, 1900, was fairly raised by the pleadings in that case, and fairly submitted to the jury, and they found against him. It was suggested that the court refused to hear his plea of former suit pending unless he first withdrew his answer to the merits. That does not appear; but if it did, there would be no difference wrought by it in the result, for he did not withdraw it, and he then had a fair opportunity to present his defense upon the issues submitted. We must assume conclusively that the trial was conducted regularly and according to the usual course and practice of the court, in the absence of any finding in the record to the contrary or any motion or any proceeding to vacate the judgment. It cannot be impeached collaterally. "The general rule is that the judgment or decree of a court having general jurisdiction over the subject-matter, subsisting unreversed, must be respected, and in collateral suits sustains all things done under it, notwithstanding any irregularity in the course of the proceedings or error in the decision." *Yarborough v. Moore,* 151 N. C., 116; *Millsaps v.* (287) *Estes,* 137 N. C., 536; *Doyle v. Brown,* 72 N. C., 393; *Williams v. Harrington,* 33 N. C., 616; *Harrison v. Hargrove,* 120 N. C., 96; *Rackley v. Roberts,* 147 N. C., 201; *McDonald v. Hoffman,* 153 N. C., 254. It is established, by the estoppel of the judgment or the principle of *res judicata,* that plaintiff is not the injured party, but the one who caused all the trouble, and he should not be allowed to profit by his wrongdoing. This decision will be a precedent for any evilminded husband to desert or abandon his wife for the very purpose of benefiting by the statute after ten years of his wrongful separation. The Legislature never intended any such result, or contemplated the spectacle of a man reaping the benefit and reward of his own betrayal, and cruel treatment, of his wife with the sanction of law.

Why should the law favor the husband, who deliberately and cruelly (as the jury found) abandons his wife, without just cause or excuse, and leave her without support, in preference to one who commits any other offense against his wife, or violates his marital duty, and for which she is entitled to an absolute divorce? There is no reason for any such distinction, and the Legislature adopted the form of an amendment to section 1561 to prevent it, and to bring all faithless husbands under the same rule of exclusion from the courts, by requiring that a suit may be brought *only* by him or her who has been wronged.

JUSTICE ALLEN concurs in this opinion.

Cited: Pinnell v. Burroughs, 168 N. C., 320.

A. D. RABY v. M. E. COZAD.

(Filed 13 December, 1913.)

1. Contracts—Breach—Quantum Valebat—Benefits.

The recovery on a *quantum meruit* or *quantum valebat* is allowed upon breach of a special contract between the parties where the defendant has been properly apprised that it would, in the event of the breach, be insisted upon, and where substantial or appreciable benefit has been received and enjoyed by the party charged under the circumstances, which renders it inequitable that any and all recovery should be denied.

2. Same—Instructions—Appeal and Error.

When the evidence is conflicting and the defendant contends that the contract sued on was that the plaintiff was to have obtained options on certain lands and his services therefor paid only if the defendant sold the lands to a certain contemplated purchaser; that such sale had not been made and no benefit had consequently been received by him, it is error for the judge to charge the jury, if they found that the minds of the parties had not come together in making the alleged contract, the plaintiff was entitled to recover upon a *quantum valebat*, and reversible error when it appeared from the verdict that the instruction influenced the finding upon the issue.

(288) APPEAL by defendant from *Ferguson, J.*, at Fall Term, 1913, of GRAHAM.

Civil action on a money demand for $700. On issue submitted, the jury rendered the following verdict:

"In what sum is defendant M. E. Cozad indebted to plaintiff, if anything? Anwer: $350."

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

M. W. Bell for plaintiff.

Zebulon Weaver and J. N. Moody for defendant.

HOKE, J. The plaintiff alleged and testified in effect that he entered into contract with defendant, by which the latter agreed to pay plaintiff at the rate of 50 cents per acre for all the options he would obtain on certain lands in the county of Graham; that pursuant to said contract he obtained options on not less than 1,400 acres of the land referred to, and turned them over to defendant, and had received nothing for same, and there was due him not less than $700, as per terms of contract.

Defendant denied any and all liability on the demand, and testifying in his own behalf, said among other things: "That he wished to obtain options on certain lands in said county adjacent to or near the property

of the Whiting Manufacturing Company for the purpose of sell- (289) ing the same to said company, and he agreed with plaintiff to pay him the amount per acre for obtaining the options on all the lands that the Whiting Company would take, and not otherwise. That the Whiting Company had refused to take any of the lands, and that according to the contract and agreement, there was nothing due from defendant to plaintiff."

The court submitted to the jury the opposing views presented by this evidence, and in addition charged the jury as follows: "Or if you shall find from the evidence that the plaintiff, at the instance of the defendant and at his request, procured the options on the lands adjoining the Sumner lands, and in contemplation of the sale of these lands to the Whitings, and that their minds did not come together, and the defendant understood that he was to have pay for it regardless of whether the Whiting Company accepted the lands or not, then there will be no agreement as to when or how the payment should be made. And if you should so find, and having found, if you so do, that the plaintiff undertook the work for the defendant, then the plaintiff would be entitled to the value of his services in getting up options, although the Whiting Company may not have taken the options on the lands."

The jury rendered a verdict for $350, and defendant excepted and appealed, assigning for error the portion of the charge as specified.

There are many decisions in this State upholding recoveries on a *quantum meruit* or *quantum valebat,* notwithstanding the existence of a special contract between the parties, as in *Dixon v. Gravely,* 117 N. C., 84; *Simpson v. R. R.,* 112 N. C., 703. But this principle has been allowed to obtain in cases where, as in the authorities cited, either from the pleadings or nature of the demand itself the defendant has been properly apprised that this position would be insisted on, and where substantial or appreciable benefit has been received and enjoyed by the party charged and under circumstances which render it inequitable that any and all recovery should be denied. In absence of the conditions suggested, the proper rule is that where there is definite and specific agreement controlling the contract relation between the (290) parties, their rights must be adjusted and recoveries allowed or denied according to the agreement between them. *Corinthian Lodge v. Smith,* 147 N. C., 244; *Pullen v. Greene,* 75 N. C., 215; *Russell v. Stewart,* 64 N. C., 487; *Winstead v. Reid,* 44 N. C., 76.

In the present case plaintiff claimed that under the contract he was to be paid for the options a definite sum. The defendant, that payment was to be made only in case the lands were bought by the Whiting Company, and that the company has failed or refused to take over any

of the property, and that no benefit whatever had accrued to him by reason of plaintiff's work.

Neither side contended that recovery could be allowed on the common counts, and under the authorities and on the facts in evidence the case is not one which required or permitted that such a view be submitted to the jury. It is evident, too, that the portion of the charge excepted to has affected the result, the jury having rendered a verdict for just one-half the amount due by the terms of the alleged contract, if there was a breach. For the error indicated the defendant is entitled to a

New trial.

M. A. BUIE ET AL. V. ANGUS KENNEDY ET AL.

(Filed 13 December, 1913.)

1. Partnership — Dissolution — Profits — Diminution of Assets—Liability for Losses.

Where a partnership was formed for the purpose of engaging in the business of making turpentine, the partners agreeing to divide the profits in the proportion of three-fourths and one-fourth, and one-half of the capital was lost in the business in depreciation of the property contributed by the partners which was caused by its use in the business: *Held*, that as the firm was indebted to each partner for the share of capital furnished by him, the amount of capital so lost should be deducted from the gross returns, along with the costs and expenses of operation, in order to ascertain if any profits had been realized, and if any, to what amount. And this would be so whether the firm is to be considered as indebted to the partners in their contribution to the capital or whether there was merely a loss of capital by user of the property so contributed, and which is to be regarded as making a part of the gross returns in its converted form and to be taken therefrom, in like manner as debts of the firm, and to be deducted, in ascertaining whether there are any profits.

2. Contracts, Writing—Deeds and Conveyances—Consideration—Guaranty—Parol Contracts—Trials—Evidence.

The plaintiff and defendant having agreed to form a copartnership for producing turpentine on the lands of the latter, an undivided one-half interest in the lands was conveyed to the former for a monetary "and a further consideration." It was found as a fact that the entire contract was not reduced to writing, but that it was stipulated by parol that the defendant would pay the amount of shortage in the "crop boxes" should the actual number thereof be less than that specified in the conveyance: *Held*, the parol part of the contract did not vary or contradict the writing (the deeds) in this case, and is admissible as evidence; and that this agreement to refund was a part of the consideration of the deed.

3. Appeal and Error—Assignments of Error—Exceptions Valid in Part.

Where there is a single assignment of error to several rulings of the trial court, and one of them is correct, the assignment must fail; and in this case it is held that the assignment, being general, was not taken as required by the rule of this Court.

APPEAL by plaintiff from *Ferguson, J.*, at February Term, 1913, of ROBESON.

This action was brought by the plaintiff to enjoin the sale of certain real property under a power of sale contained in a mortgage given by them to the defendants. The real controversy, though, arose out of the settlement of their partnership dealings. Defendants being the owners of lands, chattels, and turpentine leases in the State of Florida, conveyed a one-half undivided interest therein to the plaintiffs for the sum of $8,000, under an existing agreement to form a copartnership for the purpose of carrying on a turpentine business, and (292) this was to constitute the capital of the firm. This was in November, 1907, The mortgage was given to secure the payment of $5,000 of the $8,000 indebtedness. The business was entered upon and continued by the firm of Kennedy Brothers & Buie until 18 April, 1910, when it was dissolved. The partners contributed equally to the capital, but agreed to share unequally in the profits, M. A. Buie to receive three-fourths thereof and defendants the other fourth, the excess of one-fourth over defendant's share going to Buie on account of personal services to be rendered by him.

The case was referred to Mr. S. F. Mordecai, to take and state an account of the copartnership, the sale having been enjoined until the amount due on the $5,000 note could be ascertained. The referee found the balance due 1 December, 1912, to be $4,778.25. Exceptions were duly taken to his findings of fact and law, and upon a review of his report, under the exceptions, the court found the balance to be $5,394.03.

The principal items in dispute between the parties were as to what constituted profits of the business, and whether, in estimating the same, depreciation of the capital by its use in the business should be counted as a loss, or whether the profits to be divided should be ascertained simply by deducting the costs and expenses of operation from the gross returns of the business.

The referee was of the opinion that no loss or depreciation of capital should be considered in making the computation, and upon this basis he found the profits to be $1,279.60, while the judge was of the opposite opinion, and held that, under the facts of the case as found by the referee and approved by him, the amount by which the capital had been reduced in value by use in the business should be considered and deducted

from the gross returns, and under this view he found the profits to be $174.03.

There was another question of importance in the case, which, perhaps, does not enter strictly into the partnership account, but should be considered as a separate and independent item of charge against the defendants, if plaintiff's claim is held to be well founded. They alleged
(293) that at the time they entered into the partnership arrangement the defendants orally represented and agreed, as a part of the terms of the purchase of the land, chattels, and turpentine interests or leaseholds, that the timber on the land would "cut not less than thirteen crops of 10,000 boxes each, and that any deficiency in this amount would be deducted from the purchase price; that the timber failed by actual test to cut more than ten crops of 10,000 boxes each, and by reason thereof plaintiffs are entitled to a credit of $4,500 on the price, leaving only a balance of $3,500 due originally thereon, without any deduction on account of their subsequent partnership transactions. The referee held, the court affirming the finding, that the claim for the deficiency in the crops varied or contradicted the writing, and, therefore, excluded it from consideration. Evidence as to it was taken under objection by defendants, but finally ruled out for the reason just given.

There are some other subsidiary questions, which will be noticed in the further development of the case. The court gave judgment against the plaintiffs for $5,394.03, with interest on the principal, $5,000, from 10 April, 1910, and the costs, and ordered a sale of the property described in the mortgage. Plaintiff, having assigned errors, appealed to this Court.

Cox & Dunn for plaintiffs.

McIntyre, Lawrence & Proctor and McLean, Varser & McLean for defendants.

WALKER, J., after stating the case: The first question presented is the one in regard to the profits. The authorities seem to hold it to be clear that an important distinction exists between the terms "profits" and "gross returns." Profits are the excess of returns over advances; the excess of what is obtained over the cost of obtaining it. Losses, on the other hand, are the excess of advances over returns; the excess of the cost of obtaining over what is obtained. The expressions "net profits" and "gross profits" are met with in the books, but they are inaccurate. "Profits" and "net profits" are, for all legal purposes, synonymous expressions. All profits are necessarily net, and no profits can possibly be gross. But the term "gross profits" is some-
(294) times used to designate the returns. This use of the term, however,

is inaccurate. A business is susceptible of "gross returns" and "net returns," and "profits" is the synonym of "net returns." The distinction between profits, on the one hand, and gross returns on the other hand, is obvious. George on Partnership, p. 64. It is said by the same author that an agreement to share gross returns does not create a partnership, for the reason that such an agreement is inconsistent with the joint ownership of the profits. In a partnership the profits are shared because the partners are joint owners of them. If no profits have been made, no partner is entitled to any share as against the others, for there is nothing to share. But where the agreement is to share gross returns, the share is independent of the existence of profits, and may be taken when there is a loss. It necessarily follows that an agreement to share gross returns creates a debt between the parties, and not a joint proprietorship in the profits. He then quotes Parsons on Partnership, sec. 62, as follows: "Though the sum may come out of profits, if they are sufficient, it will, nevertheless, come out of somebody, though there be no profits. The fixed amount, which is independent of the success or failure of the business, betrays a stranger's interest, and not a principal's. A proprietor's share springs out of the business, and varies according to its vicissitudes. A principal who made no contribution himself could never take his copartner's, and make gain out of his copartner's loss and the failure of the business." George on Partnership, pp. 64, 65. We deduce the principle, from what is there said, that the word "profits," when used in relation to the final distribution of the partnership effects or to the shares of the members upon a settlement of its affairs, means "net returns," that is, the gross returns after paying its liabilities and taking off the losses in the business and the costs and expenses of operation. But in this case the vital question is, whether the amount of the reduction in the value of the capital contributed by the partners by the use of it, that is, by cutting and scraping the boxes, and in other respects, should be deducted from the gross returns.

The partnership, as an entity distinct from its individual mem- (295) bers, becomes indebted to them for the capital they advance, and upon a settlement this debt should be paid just as any other liabilty of the firm, except that it is subordinate to the prior claims of creditors. As between the members and the partnership, it is a debt, and it makes no difference whether the capital was contributed in money or in money's worth, such as property. Upon this subject the rule is thus stated in George on Partnership, p. 116. "Where the business has resulted in a loss impairing the capital, such loss is *prima facie* to be equally borne, notwithstanding the fact that the capital was unequally contributed. Thus, in *Whitcomb v. Converse* the articles of partnership provided

that A. and B. should contribute the whole capital in unequal proportions; that B., C., and D. should contribute all their time to the business, and A. 'such time as he may be able to give'; and that each should receive one-fourth of the net profits. The business resulted in a loss of a portion of the capital. It was held that the capital constituted a debt of the partnership, to which all the partners were bound to contribute equally. The fact that the partner contributing services loses them does not affect the question. The doctrine here presented is sustained by the great weight of authority, though there are some *contra* cases. Of course, the agreement of the parties determines the proportions in which losses are to be shared, and what losses are to be shared. But *prima facie,* a loss of capital is like any other loss, and is to be borne in like proportions." And at p. 117: "Any advances of money to the firm by a partner in excess of his contribution agreed to be made in the contract do not come within the designation of capital, the same being nothing other than a loan to the partnership, whereby the loaner becomes a creditor of the firm, though, of course, not of equal standing with outside creditors in respect of payment in case of the firm's insolvency." And again at p. 115: "When the amount of each partner's contribution is shown, there is no room for presumptions, and upon a dissolution each partner must be repaid the amount contributed
(296) by him, before there is any distribution of profits."

It is apparent here, from the facts and circumstances, though the terms of the partnership were not all reduced to writing, that the partners mutually intended that the property contributed by them, as capital, should belong to the firm and be made good to the partners at its dissolution, and not merely that the firm should have the use of it, and for this reason defendants conveyed one-half interest in it to the plaintiff Buie. "Where, as is usual in an ordinary mercantile partnership transaction, a partnership is created, not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter." *Whitcomb v. Converse,* 119 Mass., 38, 43. This was directly held by the same Court in *Livingston v. Blanchard,* 130 Mass., 241. Some authorities treat the impairment of the capital as a loss to be borne by the parties in the same proportion as they share the profits. "If there are no profits, and the capital has been impaired or wholly lost, in dividing losses the deficit must be repaid like any other loss, for impairment of capital is a loss the same as any other, and is not to be reimbursed out of profits merely. That the capital has been contributed unequally and losses are to be equal makes no difference, or if the capital has been wholly paid by one partner, the other contributing

services and skill, the latter who has lost his time owes to the former the same proportion of a loss of capital that he would be chargeable with had the losses not reached the capital, but had simply diminished the profits." 2 Bates on Partnership, sec. 813. He gives several concrete examples of this principle in the notes to the text. Under this view, *Hasbrouck v. Childs,* 3 Bosw., 105, is an apt illustration, and its facts are very much like those in this case. H. and C. formed a partnership, each contributing $2,000, H. giving his whole time and C. a small part of his time, H. to receive three-fourths of the profits and C. one-fourth; but nothing was said as to losses. There were no profits, but the capital was heavily impaired, only $879.80 being left. It was held that this must be equally divided; that H.'s excess of profits was for extra services and payable only out of the profits, if any (297) were made, and that losses were to be shared equally.

It would be strange if we should hold in this case that there had been a net profit, when the firm had lost half of its capital, which really represented nearly all of its gross returns, having been converted into money by a sale of the manufactured product. The agreement was to divide net profits, and not any part of the capital. But whichever view we take, whether the amount contributed to capital is to be considered as a debt of the firm, or whether if capital is impaired, it is to be regarded as a loss, the ruling of the judge was correct. The defendant has not appealed, but is satisfied with that decision, and the plaintiff cannot complain of it.

But we think the court erred as to the other question. The oral stipulation that defendants would pay the amount of the shortage in the "crops of boxes," if there turned out to be less than thirteen of them, was but a part of the entire contract between the parties, the other part of which, namely, the deeds, was reduced to writing. It did not contradict or vary the written part. Besides, the deed for the land and leasehold and timber boxes, dated 19 November, 1907, recites that it is given in consideration of $100 (and a further consideration)," showing that the whole consideration was not set forth. The referee finds, and the court approved his findings of fact, that the partnership agreement was not in writing and the misunderstanding of the parties grew out of this fact. It is true the deeds for the property were in writing, but what the finding means is that the entire contract between the parties was not written, but a part of it rested in parol. The facts in *McGee v. Craven,* 106 N. C., 351, were that a tract of land was sold with the understanding between the parties that if there should be a deficiency in the acreage, the grantor would pay back the difference or the value of the deficiency. The deed conveyed 111 acres of land for $900, and not by

the acre. Plaintiff, the grantor, sued on one of the purchase-money notes, representing the balance alleged to be due; defendant counterclaimed upon the ground that there were only 82½ acres in the
(298) tract, the difference being $230.85. The jury so found, and this Court affirmed the judgment upon the verdict, and held that there was no contradiction or alteration of the written part of the contract, and that the stipulation as to the deficiency was enforcible, not being in violation of the rule excluding oral evidence to vary or contradict a written agreement. That case is strictly analogous to ours. It is "on all-fours with it," as we sometimes say in order to express an exact similitude. Not only is this case like that one, so far as there are facts common to both, and to the extent that the legal principle involved in both is the same, but the facts of this case more clearly, if anything, exclude the application of the rule of law in regard to parol testimony which is now involved, and present a much stronger case than did those in *McGee v. Craven.* At any rate, the rule of exclusion does not apply here. A case much like ours is *Sherrill v. Hagan,* 92 N. C., 345, in which it is held, *Justice Ashe* delivering the opinion: "Where it is agreed between the vendor and purchaser of a tract of land that the purchaser shall have it surveyed at his expenses, and if it shall be found to contain a smaller number of acres than is called for by the deed, that the vendor shall refund a pro rata part of the purchase money: *Held,* that such contract is founded on a sufficient consideration, and that it is not within the provisions of the statute of frauds. In such case parol evidence is admissible to establish the contract," citing *Manning v. Jones,* 44 N. C., 368; *Howe v. O'Malley,* 1 Minn., 387; *Twidy v. Saunderson,* 31 N. C., 5; *Daughtrey v. Boothe,* 49 N. C., 87, and *Terry v. R. R.,* 91 N. C., 236. It was said in *Colgate v. Latta,* 115 N. C., 127, quoting Abbott Tr. Ev., 294: "A written instrument, although it be a contract within the meaning of the rule on this point, does not exclude evidence tending to show the actual transaction, where it appears that the instrument was not intended to be a complete and final settlement of the whole transaction, and the object of the evidence is simply to establish a separate oral agreement in the matter as to which the instrument is silent and which is not contrary to its terms nor to their legal effect."

(299) In classifying cases exempt from this rule of evidence, the Court, in *Thomas v. Scott,* 127 N. Y., 133, said: "The second class embraces those cases which recognize the written instrument as existing and valid, but regard it as incomplete, either obviously or at least possibly, and admit parol evidence, not to contradict or vary, but to complete the entire agreement, of which the writing was only a part."

And in *Batterman v. Pierce,* 11 Hill, 171, which was an action for purchase of wood, a verbal agreement was made at the time that if anything happened to the wood through plaintiff's means, or by setting fire to his fallow, he would guarantee the purchaser against any loss. The Court held that the evidence was competent, and to the objection that this contravened the rule, said there was "nothing in it." See, also, *Currie v. Hawkins,* 118 N. C., 594; *Walton v. Jordan,* 65 N. C., 170; *Johnson v. R. R.,* 116 N. C., 926; *Kelly v. Oliver,* 113 N. C., 442. We said in *Typewriter Co. v. Hardware Co.,* 143 N. C., 97, quoting with approval *Evans v. Freeman,* 142 N. C., 61: "Numerous other 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."

The subject was considered in *Richards v. Hodges, ante,* 183, with full citation of authorities, though the facts of that case were not, in all respects, identical with those of this one. Reference is also made to a valuable note to *Woodson v. Beck,* 31 L. R. Anno. (N. S.), 235, cited in *Richards v. Hodges,* where there are many authorities collected which sustain our view in this case. One of the cases cited there is *Brady v. Henry,* 71 Cal., 481 (60 Am. Rep., 543), where a parol agreement made at the time of giving a note, that if the quantity of hay for which it was given, not then known, should fall below the given amount, a credit should be allowed to the extent of the deficiency, and it was held by the Court to be admissible, as not contradicting or varying the (300) writing. Other cases to be found there, and which agree with our decision in *Evans v. Freeman, supra,* and *Typewriter Co. v. Hardware Co., supra,* are the following: *Hansen v. Yturria,* 48 S. W., 797; *Bank v. Cook,* 125 Iowa, 111; *Mitchell v. Sellman,* 5 Md., 376; *Insurance Co. v. Smucker,* 106 Mo. App., 304; *Saffer v. Lambert,* 111 Ill. App., 410.

In this case it was agreed that if the timber on the land did not cut thirteen crops, the amount of the shortage should be deducted from the price for which the note was given. This comes within the principle of the above authorities, and the judge erred in not submitting the question to the jury. This will be done unless the parties can agree as to the amount, or to some other method of ascertaining it. The case of *Walker v. Venters,* 148 N. C., 388, is not applicable, for there the writing was contradicted or varied, but our case is more like *Brown v. Hobbs,*

147 N. C., 73, which cites, *Mitchell v. Foil,* 100 N. C., 178, and *Sprague v. Bond,* 108 N. C., 382, where this Court held the parol agreements for a division of the profits, upon a sale of the land conveyed, not to be within the rule of exclusion, nor within the statute of frauds. The agreement to pay a part of the proceeds or to refund a portion of the price was a part of the consideration upon which the deed was obtained. *Brown v. Hobbs, supra; Trowbridge v. Wetherbee,* 93 Mass. (11 Allen), 364; *Hess v. Fox,* 10 Wendell, 436; *Sprague v. Bond, supra.* These cases are in principle like *Richards v. Hodges, supra,* decided at this term.

Assignment of error No. 4 is not taken as required by this Court. *Porter v. Lumber Co., post,* 396. Besides, it is a general assignment to several distinct rulings of the court, one of which at least, we have decided to be correct. In such a case the assignment of course, must fail, as we held in *S. v. English, post,* 497. It is the same as if taken to several portions of a charge, it must be good as a whole (*Bost v. Bost,* 87 N. C., 477; *Insurance Co. v. Sea,* 21 Wall, 158); or as if taken to a mass of evidence, some of which is competent. *Barnhardt v. Smith,* 86 N. C., 473. In *S. v. Ledford,* 133 N. C., 722, we held: "The (301) objections are general, and the rule is well settled that such objections will not be entertained if the evidence consists of several distinct parts, some of which are competent and others not. In such a case the objector must specify the ground of the objection, and it must be confined to the incompetent evidence. Unless this is done, he cannot afterwards single out and assign as error the admission of that part of the testimony which was incompetent," citing the cases. Without conclusively determining the question as to what is called the "high boxes," and the refusal of the referee and court to allow it as a part of the profits, as they are embraced in the general assignment, we may say that it appears to be without any real merit.

Some assignments are made to the findings of fact, but we are bound by those of the judge, or, rather, we do not review them in matters of account and certain other cases not necessary now to enumerate. *McCullers v. Cheatham,* 163 N. C., 61, and authorities there cited.

There was error as to the parol agreement and no error as to other mattes. Costs of this Court to be divided equally.

Modified.

Cited: Sigmon v. Shell, 165 N. C., 585.

BOARD OF COMMISSIONERS OF RUTHERFORD v. SECURITY TRUST COMPANY.

(Filed 10 December, 1913.)

Taxation—Bond Issues—Polling Places—Notice.

While it is required, for the purpose of submitting to the vote of the people the question of issuing bonds, that a correct notice of the polling places be given, this requirement is fully met when the voting places have been established and are well known to the entire electorate of the county, and the voters were fully and formally notified that the election would be held on the specified date "at the various voting precincts of the county as they are now established. Revisal, sec. 4305.

APPEAL by defendant from *Justice, J.*, at Fall Term, 1913, (302) of RUTHERFORD.

Controversy without action, involving the validity of a proposed bond issue, submitted to Judge M. H. Justice, holding court in the Eighteenth Judicial District. An election having been held under an act of the General Assembly on the question of issuing bonds for road improvement in the county for the sum of $250,000, the measure was approved by the voters; the bonds prepared and contracted to defendant company, who refused to accept same, on the ground that in giving the general notice of election the polling places were not specially named. The notice, otherwise full and sufficient, notified the voters that an election would be held on the day stated, "at the various voting precincts of said county as they are now established, and upon said date the polls will be opened at sunrise and closed at sunset, when and where said voters are requested to cast their votes." They did appear at the various precincts of the county, a full vote was cast, and the issuance formally approved. His Honor gave judgment as follows:

This cause coming on to be heard on statement of case in submitting controversy without action, and the same being heard, the court finds the facts as set out in such statement.

It is adjudged, ordered, and decreed, that the notice of election published by the county commissioners, and signed by W. G. Harris, chairman of said board, and dated 8 March, 1913, is in all respects valid and in accordance with law. It was not necessary to state the polling places in said notice under the circumstances under which the election was held. The polling places were fixed and permanent and had been used as such in previous elections, and all electors knew or were presumed to know the polling place in the precinct where they resided and were entitled to vote. The court adjudges that the notice of said election was legal and ample for the purpose of said bond election.

And it is further ordered, that the defendant accept and pay for said bonds and pay the costs of this proceeding. M. H. JUSTICE
This 18 November, 1913. *Judge Superior Court.*

Defendant excepted and appealed.

S. Gallert for plaintiff.
S. M. Wetmore for defendant.

HOKE, J. The judgment of his Honor is fully approved. It (303) is well understood that a correct notice of the polling places is considered of the substance, and must be properly given; but the notice in this instance fully meets the requirements of the law. These voting precincts must be formally established, and can be moved or changed only after due inquiry and notice fully given. Revisal, sec. 4305. They are known to the entire electorate of the county, and when the voters were publicly and formally notified that the election would be held on the specified date, "at the various voting precincts of the county as they are now established," the notice conveyed as full and ample information as could well be given, and on the facts in evidence we think his Honor was fully justified in declaring that the polling places were fixed and permanent and had been used as such in previous elections, and that all electors knew or were presumed to know the polling places in the precinct where they resided and were entitled to vote," a position which finds further support in the full expression had from the voters on the question submitted.

The judgment of the lower court approving the validity of the bonds is affirmed. This will be certified, that the contract between the parties may be properly enforced.

Affirmed.

FIRST NATIONAL BANK OF OXFORD v. CLAUD KING ET AL.

(Filed 10 December, 1913.)

Bills and Notes—Sale of Collaterals—Credits—Payments—Limitation of Actions.

K. executed his note to plaintiff bank and assigned certain collateral to H., cashier, to secure the same, with power to H. to sell, and as K.'s agent to apply the proceeds to payment of note, with specific agreement by K. to pay any deficiency. H. sold the collateral and so applied proceeds. *Held*, that the statute of limitations was repelled and that K. was liable for the deficiency.

CLARK, C. J., dissents; HOKE, J., concurs in dissent.

BANK *v.* KING.

APPEAL by defendants from *Connor, J.*, at August Term, (304) 1913, of GRANVILLE.

Civil action, tried upon these issues:

1. Did the defendants execute the note, as alleged, and make the payments down to April, 1907, as alleged? Answer: Yes.

2. Did the plaintiff sell the stock for $1,500, and apply the proceeds thereof on the note, as alleged in the pleadings, on 25 February, 1913? Answer: Yes.

3. Is the plaintiff's cause of action barred by the statute of limitations? Answer: No.

4. Are the defendants indebted to the plaintiffs, as alleged; if so, in what sum? Answer: $1,036.36, with interest on $1,005.58 from 2 May, 1913.

The defendants excepted to the charge of the court upon the third issue, and appealed.

Hicks & Stem, T. T. Hicks for plaintiff.
John W. Hester, D. G. Brummitt for defendant.

BROWN, J. The part of the charge excepted to is as follows: "Inasmuch as the note contains a provision authorizing the plaintiff bank, its president or cashier, to sell the stock mentioned in the note of 18 July, 1906, and apply the proceeds of such sale to the note, the court holds and charges you that in making the sale of the twenty shares of stock of the King Buggy Company, mentioned in the note sued on, to E. H. Crenshaw, on 25 February, 1913, W. H. Hunt, cashier of plaintiff bank, was acting as the agent of defendants, and the application of the proceeds of such sale on said date by plaintiff bank to said note was such a voluntary payment as revived the debt and created a new promise or obligation upon the part of defendants to pay said note. Thereupon the court charges you, if you find the facts to be as testified to in the evidence, to answer the third issue 'No.'"

The uncontradicted evidence proves that the defendants executed their obligation to plaintiff, of which the following is a (305) copy:

$2,000. OXFORD, N. C., 18 July, 1906.

On 1 September, 1906, after date, for value received, we promise to pay to the First National Bank of Oxford, N. C., or order, $2,000, negotiable and payable at said bank, with interest at the rate of 6 per cent per annum after maturity, having deposited with said bank as collateral security for payment of this or any other liability or liabilities

of ours to said bank, due or which may be hereafter contracted, the following property, viz.:

Certificate No. 15, twenty shares King Buggy Company stock attached as collateral. It is hereby understood and agreed that we are to pay $75 per month on this note until paid in full, with such additional collaterals as may from time to time be required by the president or cashier of the First National Bank of Oxford, N. C., and which additional collaterals I hereby promise to give at any time on demand, and if not so given when demanded, then this note to become due and payable at once, with full power and authority to said bank to sell, assign, and deliver the whole or any part thereof, or any substitutes therefor, or any additions thereto, at any broker's board, or at public or private sale, at the option of said bank, or its president or cashier, or its or their or either of their assigns, on the nonperformance of this promise, or the nonpayment of any of the liabilties above mentioned, or at any time or times thereafter, without advertisement or notice, which are hereby expressly waived; and upon such sale the holder hereof may purchase the whole or any part of such securities, discharged from any right of redemption; and by these presents we do hereby constitute and appoint W. H. Hunt, cashier, and his successors in office, our true and lawful attorney, for us and in our name and behalf, to assign and transfer said securities to the purchasers thereof, and after deducting all legal or other costs and expenses for collection, sale, and delivery, to apply the residue of the proceeds of such sale or sales so to be made to pay any, either, or all of said liabilities to said bank, or its
(306) assigns, as its president or cashier, or its or their or either of their assigns, shall deem proper, returning the overplus, if any, to the undersigned. And the undersigned agree to be and remain liable to the holder thereof for any deficiency.

CLAUD KING,
MOSES A. KING,
JESSE KING.

The defendants afterwards made the following payments on said note, to wit: 6 August, 1906, $60; 1 September, 1906, $30; 12 October, 1906, $70; 23 April, 1907, $15; and 25 February, 1913, from sale then made of the stock deposited as aforesaid, $1,500.

There is a conflict of authority on the question of the effect of applying the proceeds of collaterals left with the creditor by the debtor as part payment of the debt. In some jurisdictions it is regarded as sufficient to interrupt the statute, provided the collaterals are realized on within a reasonable time. This is the rule laid down in Maine, Massachussetts, Nebraska, New Jersey, and Vermont.

In others it is ineffectual to stop the bar of the statute in the absence of evidence of notice to or assent by the debtor. This is held in Alabama, New York, and Minnesota. 25 Cyc., page 1379 and notes.

The author of Cyc. says: "If the debtor constitutes a *third person* his agent to hold, and, in case of default, to realize on collateral and apply the proceeds to his debt, payment of such proceeds by such agent will interrupt the statute." 25 Cyc., page 1379 and notes.

This distinction is based upon the idea that when the debtor's duly constituted agent makes the sale of the collateral and applies the proceeds to the payment of the note, it is the debtor's own act.

This principle seems to be supported by all the authorities. In the case before us the defendants not only appointed Hunt as their agent to hold the collateral, sell it and apply the proceeds to the payment of the note, but they specially bound themselves to pay (307) any deficiency remaining after such application.

The words, "and the undersigned agree to be and remain liable to the holder hereof for any deficiency," constitute a contract to pay such deficiency when ascertained, and that could not be ascertained until the defendants' agent sold the collateral and applied the net proceeds to the note.

No error.

CLARK, C. J., dissenting: Revisal, 371, provides: "No acknowledgment or promise shall be received as evidence of a new or continuing contract from which the statutes of limtations shall run unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." It is evident from this that such payment shall be made under circumstances which shall be equivalent to a new promise in writing, *i. e.*, it must be voluntary payment by a party who at the time is free to make his election and who by the payment intends to expressly recognize the debt as existing. A sale under a previous authorization to an agent or trustee to sell collaterals and apply the proceeds on the debt can no more have the effect of a voluntary new promise than the agreement itself in the face of the note or bond to pay it. The payment must not only be made in recognition of debt, but there must be an agreement to pay the balance. *Battle v. Battle,* 116 N. C., 161; *Supply Co. v. Dowd,* 146 N. C., 196.

In this case the sale of the collaterals by the trustee and the payment were made after the debt was barred. A payment is a renewal of the debt as to the principal (*Garrett v. Reeves,* 125 N. C., 529), but not as to partners after partnership dissolved (*Wood v. Barbour,* 90 N. C.,

79), nor as to indorsers (*Garrett v. Reeves, supra*), It follows, therefore, that it cannot be construed as a voluntary payment constituting a new promise by the debtor where the trustee makes the sale under authority given seven years prior thereto to sell the collaterals. When such authority was conferred, the debtor was bound for any deficiency, (308) because he was not yet protected by the statute. When the sale was made, and the proceeds were applied, this was valid as a sale and payment, but no inference of a new promise could be drawn therefrom, the debt having become barred.

In *Battle v. Battle,* 116 N. C., 164, it is said: "Partial payment is allowed this effect only when it is made under such circumstances as will warrant a clear inference that the debtor recognizes the debt then existing and his willingness, or at least his obligation, to pay the balance," citing *Hewlett v. Schenck,* 82 N. C., 234. This is reaffirmed and amplified by *Mr. Justice Walker* in *Supply Co. v. Dowd,* 146 N. C., 196. A new promise cannot be implied except when the payment is made with the consent of the debtor—not therefore authorized merely, but given at the time. "The principle is that by the part payment the party paying intended thereto acknowledge and admit the greater debt to be due, and upon this the inference may be drawn of a promise to pay the balance, or the payment by its own vigor revives the debt." 25 Cyc., 1369; 19 A. & E., 326-328.

The doctrine is best and most clearly stated by *Rapallo, J.,* in *Harper v. Fairley,* 53 N. Y., 422, in a case almost identical with that now before the Court. He said: "That a part payment, whether made before or after the debt was barred by the statute, does not revive the contract, unless made by the debtor himself, or by *some one having authority to make a new promise on his behalf, for the residue.*" The bank, as trustee here for itself, did not have the authority to make to itself a new promise for the debtor to pay the debt. The authority given it was no more than to sell the stock and apply the proceeds.

There must be a conscious, voluntary, intentional act upon the part of the debtor, contemporaneous with the payment, before the implication of a new promise will arise. Not every payment, if made even by the debtor himself, will have the effect of reviving the debt, because such payment may be made as a compromise and settlement, as in *Supply Co. v. Dowd,* 146 N. C., 193. The intention to pay the balance in such case would be lacking, and no new promise could be im- (309) plied. *U. S. v. Wilder,* 13 Wall., 254. In this case the authority given seven years before to sell the collaterals and apply the proceeds cannot be construed as equivalent to a new promise in 1913 to pay the balance of the debt when the sale did not take place till that time.

"Where a debtor owes two notes to the same creditor, one of which is barred and the other is not, and a payment is made without any direction as to which note it shall be applied, the creditor may apply it upon the barred debt, but such application does not revive the debt nor imply a new promise. No inference of such intention to pay the balance can be drawn from the act and no new promise will arise." *McBride v. Noble,* 40 Col., 372; *Ramsey v. Warner,* 97 Mass., 8, and cases cited in notes to *U. S. v. Wilder,* 20 U. S. (Law Ed.), 681.

No *ex parte* action on the part of the creditor is sufficient, but the payment must be made either by the debtor voluntarily or by some one clothed with authority, not only to make the payment, but to make it as a new promise in his behalf. The creditor cannot credit upon the note a debt owing by him to the debtor and thus revive the debt. *Bank v. Harris,* 90 N. C., 118.

This Court has held that the payment by a trustee, who is selected as a disinterested party, at the time the debt is contracted, to hold the legal title, will not operate to revive the debt or toll the statute. *Battle v. Battle, supra.* In *Cone v. Hyatt,* 132 N. C., 810, the true rule is laid down: "The reason why a part payment is allowed to prevent the bar of the statute is that it is deemed an admission of a subsisting liability from which a promise, as of the date of the payment, to pay the balance of the debt will be implied. But in order to raise this implication there must be a *voluntary* payment by the debtor or by some one authorized to make the payment for him." The sale of collaterals and application of proceeds under authority given seven years prior thereto cannot be considered a voluntary payment that will raise the implication of a new promise.

This debt became barred on 24 April, 1910. The authority to sell the collaterals upon default was given when the note was executed and the collaterals deposited, 18 July, 1906. The sale of the collaterals was not made till February, 1913. Whether such sale and appli- (310) cation would be valid after the debt was barred is a matter about which the decisions differ, but none go so far as to say that such act will *revive* the debt. 25 Cyc., 1379.

In 1 Wood Statute of Limitations (2 Ed.), 282, it is said that a part payment derived from collateral security and its application to the debt without the debtor's assent at the time does not remove the bar, citing *Harper v. Fairley,* 53 N. Y., 442; *Brown v. Latham,* 58 N. H., 30, and other cases.

In *Jones v. Langhorne,* 19, Col., 206, it is held: "A new promise to pay a debt barred by the statute of limitations will not be implied from part payment where the circumstances of the payment rebut the inference

of such promise; and where the part payment is money realized from assets transferred by the debtor to the creditor, the new promise is not to be implied as of a later date than the transfer." This date in this case was July, 1900.

Again in *Gold v. Ehrilich,* 67 Kansas, 1, it is held that "to revive a debt there must be a voluntary payment, and collection from collaterals cannot have this effect, but such collection must be referred back to the date of the deposit of the collaterals."

The strongest case probably is *Ferris v. Curtis,* 53 Col., 340, where it is said. "It has also been repeatedly held in this Court that the efficiency of the payment to avert the effect of the statute as a bar rests in the conscious and voluntary act of the defendant when explainable only as a recognition and confession of the existing liability. To raise such implied promise it must be voluntarily made by the debtor to the creditor. It must be shown to be a payment of a portion of an admitted debt paid to and accepted by the creditor as such, accompanied by circumstances amounting to an absolute, unqualified acknowledgment of more being due, from which a promise must be inferred to pay the remainder." The Court then held that, in this aspect, the sale of collaterals under a prior authority, to me applied to the debt, while an authorized, is not a *voluntary,* but an involuntary sale, from (311) which no new promise can be implied.

In *Banks v. Barnaby,* 197 N. Y., 210, the paper and authority were indentical with those in this case, and the Court, reviewing all the authorities, held: "Few lawyers will have the courage to argue that under a general authority to sell securities and apply the proceeds a pledgee will have power to revive a debt against his pledgor already barred by the statute."

A part payment to bar the statute and revive the debt must be made with the intention of making a new promise and acknowledging the debt. The above authorities hold that such intention cannot be implied from the sale of collaterals and their application under authority given prior thereto, and most especially this could not be the effect when the debt in meantime has become barred. There was no express evidence offered in this case of such intention, and if there had been, it should have been submitted to the jury. 25 Cyc., 1369, and notes.

HOKE, J., concurs in this dissent.

JOSEPH RAY v. N. E. ANDERS ET ALS.

(Filed 13 December, 1913.)

1. Deeds and Conveyances—Color of Title—Boundaries—Adverse Possession—Limitations of Actions—Trials—Nonsuit.

Where one enters on a tract of land under a deed having known and visible lines and boundaries, and occupies any portion of the tract, asserting ownership of the whole, there being no adverse occupation of any part, the force and effect of such occupation will be extended to the outer boundaries of his deed, and if exclusive and continuous for seven consecutive years, the title being out of the State, such possession will ripen into an unimpeachable title to the entire tract.

2. Same—Intermittent Possession—Trespasser—Trials—Nonsuit.

A casual or intermittent interruption of the possession of one who occupies land under a deed conveying it under known and visible boundaries is insufficient to defeat his title when otherwise his possession for seven years has ripened it to the whole of the lands thus conveyed; nor can this right be defeated by one occupying adjacent lands without evidence of claim of color, whose actual possession extends only to a clearing not included in the *locus in quo* (*Haddock v. Leary*, 148 N. C., 378, cited and distinguished); and upon the evidence in this case a judgment of nonsuit should not have been granted.

APPEAL by plaintiff from *Carter, J.*, at October Term, 1913, (312) of BUNCOMBE.

Action to recover land. At the close of plaintiff's evidence, on motion, there was judgment of nonsuit. Plaintiff excepted and appealed.

Lee & Ford for plaintiff.
Zeb V. Curtis for defendant.

HOKE, J. Plaintiff introduced a grant of the State covering the land in controversy to Alexander Penland, dated 12 December, 1832, registered 22 February, 1837. And further, two deeds, also covering the land in controversy, one from J. A. Brookshire, sheriff of Buncombe County, to Charles Moore and others, dated 8 September, 1893, and the second from Moore *et al.* to plaintiff, 12 September, 1893.

Plaintiff, a witness in his own behalf, testified that at the time he purchased the land in 1893 he entered into possession under his deed, put a tenant on it, had some of it cleared, and has been in continuous possession every year from that date, renting it to Mr. Hodge and Frank Lunsford, who cultivated it. That he had been in possession of the whole tract, had cut timber on it and used it ever since he had it, with the exception hereinafter stated. That a part of the land, to the amount of

about 13 acres, lay on the west side of a mountain ridge, the plaintiff's clearing being on the eastern side, and there was no marked line on the top of this ridge which divided the property; but not long after the plaintiff entered and made his clearing, that is, about seventeen years ago, one Mose Fox entered on that portion of the land lying west of the mountain ridge and cleared about 3 acres; that soon after this clearing was abandoned and the land thrown out; that since that time (313) there had been casual trespassers on the land, and part of that clearing may have been cultivated for a short time; that there had been only about 4 or 5 acres in the clearing, and the rest of the 13 acres were in wood. But there had been no entry or assertion of ownership as to the entire portion of land lying west of the ridge until the spring of 1912, when the defendants entered on the land, took possession of it to the top of the mountain, putting the same under fence.

On these, the facts chiefly relevant, we think the issue should have been submitted to the jury.

It is the established principle in this State that when one enters on a tract of land under a deed having known and visible lines and boundaries and occupies any portion of the tract, asserting ownership of the whole, there being no adverse occupation of any part, the force and effect of such occupation will be extended to the outer boundaries of his deed, and if exclusive and continuous for seven consecutive years, the title being out of the State, such possession will ripen into an unimpeachable title to the entire tract. *Simmons v. Box Co.*, 153 N. C., 257; *Currie v. Gilchrist*, 147 N. C., 648.

Accepting the testimony making for plaintiff's claim as true, and we are required so to accept it when an order of nonsuit has been entered, the title to this land was shown to be out of the State, and the plaintiff has been in possession, asserting ownership under his deeds from their date in September, 1893. True, the portion of land actually in cultivation by him and his tenant was on the eastern side of the ridge, but he exercised acts of ownership of different kinds throughout the entire boundary. And there is nothing in the facts brought out on a cross-examination of the plaintiff which necessarily interrupts the operation of the principle as stated, or prevents the maturing of his title to that portion of land within his boundary lying west of the ridge.

As to the land cleared by Moses Fox, it seems to have been abandoned the first year after it was made, and if there was further occupation of this clearing, the evidence permits the interpretation that it was (314) of such a casual and intermittent character that it would not necessarily serve to break the continuity of plaintiff's possession. Speaking to this question in *Simmons v. Box Co., supra*, the Court said:

"The principle stated is not affected by the casual entry of a mere wrongdoer. Our cases hold that one in the exclusive possession of a tract of land under color can maintain trespass *quare clausum fregit* against such a person even before title matures. *Myrick v. Bishop,* 8 N. C., 485; *Osborne v. Ballew,* 34 N. C., 373. In *Myrick's case, supra, Taylor, C. J.,* said: "The plaintiff having a deed covering the land where the trespass was committed and being in possession of a part within the boundaries of his deed, was in the actual possession of the whole." And in *Osborne v. Ballew, supra,* it was held: "That an entry under a deed into a part of a tract of land shall as against a mere wrongdoer be considered as an entry into the whole, it not appearing that any one else has possession of any part." And if a different view should be allowed to prevail as to this clearing on the west of the mountain, there was no deed or color of title shown by defendants which defined or limited his claim, nor was there any evidence of a marked line along the top of the ridge dividing the property, and on the facts in evidence the occupation of this clearing, even if it existed, would be confined to the clearing itself, the *possessio pedis,* and the plaintiff would have shown a *prima facie* title to the remaining portion of the land. *Bynum v. Thompson,* 25 N. C., 578.

The position is not affected by *Haddock v. Leary,* 148 N. C., 378, to which we are referred by defendant's counsel. In that case the parties had agreed upon a line defining the limits of the claim, and it was held that the claimant of the land under color will not be presumed to be in possession coextensive with the boundaries of the deed under which he claims when it is made to appear that by agreement of the one under whom he claims and within the statutory period, a division line was run excluding therefrom the land in dispute. But there is nothing of this kind in the present case. Plaintiff testifies that he entered under his deed, asserting claim to the whole tract, and, as stated, there is nothing developed in the cross-examination of the plaintiff which neces- (315) sarily prevents the operation of the general principle that his occupation of the property under such a claim will extend to the outer boundaries of his deed, certainly not as to a portion of the disputed land. The judgment of nonsuit must be set aside, and the cause submitted to the jury.

Reversed.

CITY OF ASHEVILLE v. H. L. NETTLES.

(Filed 10 December, 1913.)

1. Health Laws—Taxation—Cities and Towns — Boards of Health — Dairy Products—Trials—Reasonable Taxation.

A tax authorized to be levied by the health board of a city upon those selling milk products therein of $1 upon each cow kept for the purpose is a license tax and not one upon the property; and when the statute requires that the tax shall be reasonable and applied to the expense of this department, and that the amount received is insufficient for that purpose, the tax will not be held an unreasonable one, without further proof thereof.

2. Same—Business Unprofitable.

The fact that a vendor of milk in a city is a good business man and has lost money in his dairy business for a certain year does not establish as a further fact that his losses occurred by reason of an authorized tax of $1 on each cow for that year ordered by the board of health of the city to be collected, or furnish evidence that the tax was unreasonable when the statute required that it should be reasonable.

3. Health Laws—Taxation—Cities and Towns—Boards of Health—Dairy Products—Reasonable Taxation—Trials—Evidence.

Where the unreasonableness of the tax ordered levied by the board of health of a city on each cow used for producing milk to be sold within its limits is brought in question, and it appears that the taxes thus received are inadequate, and the statute directs they shall be applied to the payment of such expenditures, extravagance of the board of health will not be considered in an action brought by the city for the penalty for the violation of its ordinance, the proper remedy being first on application to the authorities to remedy the matter, and then, upon their refusal, and upon proper proceedings, to have the matter determined in the courts.

4. Health Laws—Taxation—Cities and Towns—Dairy Products—Sale Within the City—Outside Dairies—Sale to One Person.

Where authority is conferred upon a city board of health to levy and collect a tax upon each milk cow used for the purpose of selling milk within its corporate limits, the fact that the cows are kept on a dairy farm near to the city and their milk sold to one person within the city, who distributed or sold it therein, will not avoid the collection of the tax on the cows thus used.

S. G. Bernard for plaintiff.
Wells & Swain for defendant.

(316) CLARK, C. J. The charter of Asheville, Private Laws 1901, ch. 100, sec. 32, prescribes the powers and duties of the board of health of that city, and among other things provides: "Said

joint board shall have authority, and power is hereby expressly given it, to prescribe and adopt rules and regulations governing and controlling the *production and marketing* of milk and other dairy products *sold within said city,* and rules and regulations for the visitation, examination, inspection, and condemnation of all premises, stables, cows, milk, and other dairy products, utensils, and other property and things used in connection with the production and marketing of milk and other dairy products sold within said city, and to prescribe and fix fines and penalties for the violation of any of said rules and regulations, and to license the sale of milk and other dairy products within said city; and to levy and collect special taxes of reasonable amount upon persons or corporations offering milk and other dairy products for sale in said city, for the purpose of defraying the expense of the examinations and inspections herein authorized."

Under authority of the above provision in its charter, the city adopted Ordinance 521, which provides that "Every person, firm, or corporation, before selling milk or offering it for sale, or before conveying milk in carriages or otherwise for the purpose of selling it, or delivering it in said city, shall, annually, before 1 January, procure a license (317) from the joint board of health of the city of Asheville to sell milk within the limits thereof; and a license fee of $1 per cow in the dairy herd shall be paid in advance to the city clerk and by him turned over to the city treasurer"; and further adopted Ordinance 525: "Any firm, corporation, city official, employee, agent, or other person whatsoever violating any of the provisions of any section of this chapter of this code, or failing, neglecting, or refusing to comply with its requirements or acting contrary to the same, where no specific penalty is hereinbefore in said section or in this chapter prescribed, shall be subject to a penalty of $25 for each and every such offense."

In pursuance of the provisions above cited from the charter, the board of health prescribed a very full and careful system of rules and regulations, providing that every producer of milk should have his dairy herd inspected; the turberculin test applied to all his herd; that the milk men should wear certain kinds of clothing, milk their cows in vessels with tops to prevent dirt falling into the milk; the owners must have concrete floors in their dairies; that the food of the dairy cattle should be inspected; that persons exposed to diseases of a communicable nature should not be allowed around the barn or to handle the milk; that the milk in the wagons should be inspected, and, in short, regulations in accordance with the latest requirements of science to prevent the dissemination of typhoid fever, consumption, and other diseases which are known to be most readily communicated by means of impure milk.

This inspection and the enforcement of these regulations require considerable expenditure, and to defray in part at least the expense thereof the ordinance above set forth requires a license fee of $1 per cow in each dairy herd. It is agreed as a fact in this case that defendant during the year 1912 was engaged in the dairy business in the county outside of Asheville, and was selling and delivering milk in said city to Brown's Creamery, who resold it at wholesale and retail in said city,

but that the special license tax of $1 per cow required of this (318) defendant was not paid for the year 1912.

It is further agreed as a fact that the city of Asheville employs a chief milk and dairy inspector, and an assistant dairy inspector, and that a part of the salary of a clerk to the health department, whose duty it is to keep all dairy records of inspection, etc., is charged against this account, the total cost thereof amounting to $1,030.23 per annum, and that for the year 1912 the total of license fees at $1 per cow to which owners of dairy herds were liable under the terms of said ordinance amounted to $862.

The defendant contends that said tax is invalid, and that if it is not, it is excessive, because it is admitted as a fact in the record that though he is a competent dairyman and good business man, he actually lost money in the dairy business for 1912.

The city is authorized by its charter to prescribe regulations in regard to the sale of milk in order to safeguard the health of its citizens, and is to be commended for the care which it has shown in so doing. It is also authorized by its charter to levy a license tax to provide for the necessary expenditure in making the inspections and enforcing its regulations. Besides, Revisal, 2924, authorizes every city to lay a license tax "on all trades, professions, and franchises carried on and enjoyed within the city, unless otherwise provided by law."

The license tax of $1 per cow is not a tax upon property, but a license tax to provide funds for the expense of supervising the business, and, in the language of the charter above quoted, it seems to be of a reasonable amount, as the aggregate of the license taxes does not equal the cost. The defendant contends that the expenditure by the city is excessive in that it has too many employees, *i. e.*, a chief inspector and an assistant, and part of the salary of the clerk is also charged up. But if this is true, it is not found as a fact in this case, and it is not a matter of law of which we can take notice. It is agreed as a fact that though the defendant is a good business man, he lost money in conducting the dairy business for that year; but it does not follow as a matter of law that this

was due to the requirement of $1 per cow as a license fee. It could (319) not be so, seeing that this prosecution is because he has not paid it.

While license fees in this case are for the purpose of "defraying the expenses of the examinations and inspections herein authorized," and therefore should not exceed a reasonable amount for that purpose, all license taxes authorized by Revisal, 2924, are not so restricted. See cases cited under that section in Pell's Revisal. As to the license tax in this particular instance, which is thus restricted by section 32, chapter 100, Laws 1901, if the costs of the inspections and supervisions are extravagant, the parties interested should make complaint to the city authorities, and if not corrected they can upon proper proceedings have the fact determined in an action for that purpose, and the Court will make appropriae orders to correct the evil. If such defense could be set up for the nonpayment of a license fee which is required to be paid in advance it might seriously interfere with the execution of the regulations of the board of health. Such fact is neither alleged, admitted, nor found as a fact in this case.

The defendant upon the facts agreed was engaged in selling milk in the city of Asheville in contemplation of its charter and ordinances. He sold and delivered milk, it is true, to only one customer, Brown's Creamery. But this required the same inspection and regulation of the defendant's herd and of his milk as if he had sold to numerous customers. We find nothing in the statute which restricts the inspection of such dairy herds and milk to those located within the corporate limits. Probably all the herds are, like this, outside of, but near the corporate limits. Where milk is shipped in from other States or distant points *ex necessitate* the inspection is restricted to the milk when put on sale; but not so when the dairy is located in the same county and in the suburbs or near the city to which the milk is sent. The object of the law is to give the board of health supervision of the source of milk supply, its production and sale, so far as is practicable, in order to protect the lives and health of its citizens. We can find nothing in this record which authorizes us to hold as a matter of law that a license tax assessed at the rate of $1 per head upon each cow in a dairy herd is an unreasonable tax. (320)

The judgment that the ordinance aud the license tax therein provided for are valid and adjudging the defendant liable to the penalty prescribed for failure to pay the tax is

Affirmed.

W. C. AND G. H. JONES v. JULIA E. JONES AND TENNIE E. JONES.

(Filed 13 December, 1913.

1. Deeds and Conveyances—Trusts—Exceptions.

A parol trust, excepting one in favor of the grantor, may be established by parol declarations contemporarily made with the making of a deed to lands, or prior thereto and existent at the time it was executed and title passed, where, as in North Carolina, there is no controlling statute to the contrary; but the exception as to the grantor in engrafting on his deed a parol trust in his own favor does not extend to his children when it is properly shown and established that the title to the land passed to grantee, to be held in trust for them. Revisal, sec. 979 (Laws 1715, ch. 7, sec. 21).

2. Same—Consideration Recited.

The consideration recited in a conveyance of lands is open to explanation by parol, and does not conclude the parties from showing the actual consideration passed, except in so far as to prevent a resulting trust in favor of the grantor in the deed; and hence such deed reciting a valuable consideration does not prevent engrafting a parol trust on the lands conveyed when not in favor of the grantor, and sufficiently and properly proved and established.

3. Deeds of Conveyances—Parol Trusts—Statute of Frauds—Equity.

Engrafting a parol trust upon lands conveyed is not a contradiction or variance of the terms of the writing as expressed in the deed in contemplation of the statute of frauds, for such is an incident attached to the title conveyed affecting the conscience of the grantee thereof.

(321) APPEAL by defendant from *Adams, J.*, at April Term, 1913, of BUNCOMBE.

Action to establish a parol trust in a tract of land.

There was allegation with evidence on part of plaintiff tending to show that in March, 1897, G. T. Jones, now deceased, by deed of bargain and sale, reciting a valuable consideration paid, in the sum of $200, conveyed to his daughter, Julia, a valuable tract of land, the tract in controversy, and at the time of conveyance made no consideration was paid, and the daughter took and held the land with the understanding and agreement existent at the time, that she would hold the land in trust for the grantor and then for his children, the present plaintiff and defendants; that said G. T. Jones having died, the defendant repudiated the said trust, insisting that the deed conveyed to her an absolute estate, and the present action was instituted to enforce the said trust in favor of the other children.

The allegations of complaint were fully denied in the answer, and motion for nonsuit was duly made and overruled.

The following issues were submitted and verdict rendered:

1. Was there a parol agreement between G. T. Jones and the defendant Julia E. Jones, at or before the delivery of the deed of 19 March, 1897, to the effect that said Julia E. Jones would accept said deed and hold the lands therein described for the benefit of said G. T. Jones during his lifetime? Answer: No.

2. Was there a parol agreement between G. T. Jones and the defendant Julia E. Jones, at or before the delivery of the deed of 19 March, 1897, to the effect that said Julia E. Jones would hold the lands therein described for the benefit of the children of G. T. Jones, after his death, to wit, W. C. Jones, G. H. Jones, Julia E. Jones, and Tennie Jones? Answer: Yes.

3. Is plaintiffs' action barred by the statute of limitations? Answer: No.

4. What is the annual rental value of said land? Answer: Nothing.

Judgment on verdict for plaintiff, and defendant Julia E. Jones appealed. (322)

Wells & Swain for plaintiff.

James H. Merrimon and Harkins & Van Winkle for defendant.

HOKE, J., after stating the case: It was earnestly insisted for defendant, as we understood the position, that a trust of this character could not be engrafted on a deed of bargain and sale, because the deed itself contained a declaration of the use in favor of the grantee, and, being in writing, the same could not be contradicted by parol evidence.

2. That the recital of a valuable consideration of $200, contained in the written deed, would prevent the establishment of such a trust by parol; but a long series of authoritative decisions in this State are against defendant on both of these positions.

In *Gaylord v. Gaylord,* 150 N. C., 227, the Court said: "The seventh section of the English statute of frauds, forbidding 'the creation of parol trusts or confidences of land, tenements, or hereditaments, unless manifested or proved by some writing,' not being in force with us, and no statute of equivalent import having been enacted, these parol trusts have a recognized place in our jurisprudence and have been sanctioned and upheld in numerous and well considered decisions," citing *Avery v. Stewart,* 136 N. C., 436; *Sykes v. Boone,* 132 N. C., 199; *Shelton v. Shelton,* 58 N. C., 292; *Strong v. Glasgow,* 6 N. C., 289.

In *Gaylord's case* the effort to establish the trust in favor of the grantor in the deed failed, the controlling principle on that question being stated as follows: "Upon the creation of these estates, however, our authorities seem to have declared or established the limitation that

except in cases of fraud, mistake, or undue influence, a parol trust, to arise by reason of the contract or agreement of the parties thereto, will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass."

(323) It was no doubt in deference to this principle that a verdict on the first issue was rendered in favor of defendant, that issue being addressed to the interest alleged in favor of G. T. Jones, the grantor in the deed; but as to the children who were not directly parties to the instrument, it is well established that a parol trust of this kind may be established by parol declarations cotemporary with the making of the deed or prior thereto, and existent at the time the same was executed and title passed. See cases referred to of *Sykes v. Boone,* and *Avery v. Stewart, supra,* and *Wood v. Cherry,* 73 N. C., 110, and the numerous authorities therein referred to.

In reference to defendant's position that the deed itself contained a written declaration of the use in favor of the grantee: in former times interests of this kind ordinarily arose and were made effective in conveyances at common law and operating by transmutation of possession as in case of feoffments, etc.; but as early as 1715 and by subsequent statutes it was provided that "written deeds conveying land in this jurisdiction, when properly proved and registered, shall operate to all intents and purposes as if such title had been made by fine, common recovery, livery of seizin, attornment, or in any other ways used and practiced within the kingdom of Great Britain." Laws 1715, ch. 7, sec. 2; 1 Potter's Statutes, p. 105; Revised Statutes, ch. 37, sec. 1; present Revisal, sec. 979.

Since the enactment of this statute, the courts, in administering the doctrine of parol trusts, have treated these deeds of bargain and sale and other written instruments formally conveying land, when properly proved and registered, as feoffments, and have upheld these interests when established by proper testimony.

In *Rowland v. Rowland,* 93 N. C., 221, *Ashe, J.,* speaking to the position now urged for defendant, said: "But it may be objected that as the deed is one operating under the statute of uses, no further use can be raised by it, for a use cannot be limited on a use. To this we have to say, that since the year 1715 our courts have been gradually receding from the rules of the common law in the construction of deeds.

(324) By the act passed that year, it was enacted that the registration of deeds should pass lands without livery of seizin. The construction first put upon this act was, that it only applied to such deeds as operated at common law by livery of seizin. *Hogan v. Stray-*

horn, 65 N. C., 279. But our courts, in their policy of relaxing the rigid and technical rules of common law, have since extended the construction so as to bring all of our deeds of conveyance within the purview of that statute. Thus it has been held that deeds of bargain and sale and covenants to stand seized to uses are put on the same footing with feoffments at common law, with respect to seizin, the declaration of uses thereon, and the consideration. *Love v. Harbin,* 89 N. C., 249, and *Ivy v. Granberry,* 66 N. C., 223. Prior to that statute, and the more recent interpretation upon it, if there was a deed of bargain and sale upon a consideration, the consideration raised a use for the bargainee, and then the statute transferred the legal estate to the use, that is, to the bargainee, but no further use could be declared by the deed, for it was held a use could not be mounted upon a use. But there is no reason now why it may not be done, since the registration of the deed has all the effect of livery of seizin."

And, on the second position contended for by defendant, that the recital of a valuable consideration of $200 in the written deed should prevent the enforcement of the trust as claimed, it was held in *Barbee v. Barbee,* 108 N. C., 581, that the recital of consideration paid, in a written deed, was not contractual in character and did not conclude except in so far as it may serve to prevent a resulting trust in favor of the grantor; otherwise, and even as between the parties to the deed, such recital is open to denial or explanation by parol, and while the actual payment of a valuable consideration to the grantor of a deed or by the grantee may, under some circumstances, be allowed as controlling, the mere recital of such consideration is, as stated, always open to explanation. It is further held in numerous cases that, in the absence of a statute dealing specifically with parol trusts, the general provisions of our statute of frauds, requiring contracts concerning land to be in writing, in no way affect their validity, nor the evidence by which they may be established. Speaking directly to this question in (325) *Shelton v. Shelton, supra, Chief Justice Pearson,* delivering the opinion, said: "It was suggested on the argument that a declaration of trust falls within the operation of the act of 1819, Rev. Code, ch. 50, sec. 11, 'All contracts to sell or convey land or any interest in or concerning land shall be in writing.' The construction of this statute is fully discussed in *Hargrave v. King,* 40 N. C., 430; *Cloninger v. Summit,* 55 N. C., 513. A bare perusal of the statute will suffice to show that it cannot, by any rule of construction, be made to include a declaration of trusts, so as to supply the place of the section of the English statute of frauds in regard to a parol declaration of trusts, which our Legislature has omitted to reënact. It was also suggested that a verbal

declaration of trust cannot be proved without violating the rule of evidence, 'A written instrument shall not be altered, added to, or explained by parol.' The reply is, if this position be true, the English statute in respect to the declaration of trusts was uncalled for, and the doctrine of verbal declaration of trusts would not have obtained at common law. The truth is, neither the declaration nor the implication of a trust has ever been considered as affected by that rule of evidence. The deed has its full force and effect in passing the absolute title at law, and is not altered, added to, or explained by the trust, which is an incident attached to it, in equity, as affecting the conscience of the party who holds the legal title." A position qualified to some extent, as we have seen, in *Gaylord's case,* where it is sought to establish a trust in favor of the grantor in the deed, but otherwise still effective and controlling. This has been the uniform ruling in this jurisdiction and is now too firmly established to permit of further question. There is

No error.

Cited: Trust Co. v. Sterchie, 169 N. C., 22; *Campbell v. Sigmon,* 170 N. C., 351; *Price v. Harrington,* 171 N. C., 133.

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(326)

Z. F. FISHER, ADMINISTRATOR OF S. BALLLARD, v. W. H. BALLARD ET AL.

(Filed 10 December, 1913.)

Executors and Administrators—Interrupted Administration — Judgments—Proceedings to Make Assets—Limitations of Actions—Interpretation of Statutes.

Where a judgment has been obtained in 1893 against an administrator upon a debt due by deceased, the administrator dies in 1898 without further administration until 1911, when proceedings are commenced against the heirs at law to sell lands to make assets to pay the judgment debt, there being no personal assets, a plea of the statute of limitations as a defense should be sustained under the express requirements of the Revisal 1905, sec. 367, that letters of administration shall issue "within ten years of the death of such person," and the period of interrupted administration will not be counted. *Smith v. Brown,* 99 N. C., 386, cited and approved.

APPEAL by defendant from *Carter, J.,* at November Term, 1913, of MADISON.

This is a proceeding to sell land for assets, in which the following judgment was rendered:

"This cause coming on for hearing before his Honor, Frank Carter, judge, and a jury, at the November Term, 1913, of the Superior Court of Madison County, the parties, by consent, agreed upon the following statement of facts, the same appearing from the allegations of the petition and the admissions in the answer:

"1. That Stanhope Ballard died intestate in the year 1892, leaving surviving him Lucinda Ballard, his widow, and the defendants as next of kin and hers at law.

"2. That on 5 December, 1892, Lucinda Ballard, widow of Stanhope Ballard, deceased, was duly appointed and qualified as administratrix of the said Stanhope Ballard, and entered upon the discharge of her duties.

"3. That on 18 March, 1893, Roberson Brothers obtained judgment before J. M. Oliver, a justice of the peace of Madison County, against Lucinda Ballard, administratrix of Stanhope Ballard, for the sum of $113.38, and the same was duly docketed in the office of the (327) clerk of the Superior Court of Madison County on 10 April, 1893.

"4. That Lucinda Ballard, administratrix of Stanhope Ballard, deceased, died intestate in the year 1898 without ever having made her final settlement.

"5. That at the time of his death the said Stanhope Ballard was seized in fee simple of certain lands in the county of Madison, set out and described in the petition in this cause.

"6. That on 3 July, 1911, the plaintiff, Z. V. Fisher, was duly appointed administrator *de bonis non* of the estate of the said Stanhope Ballard, deceased, and at once qualified and entered upon the discharge of his duties.

"7. That on 11 July, 1911, the plaintiff instituted a special proceeding before the clerk of the Superior Court of Madison County to sell the real estate described in the petition and the amendment thereto, for the purpose of making assets to pay off the judgment of Roberson Brothers rendered on 18 March, 1893, it being agreed that there are no personal assets belonging to said estate.

"8. That said judgment has never been paid, and is a valid claim against the estate of the said Stanhope Ballard, deceased, unless the same is barred by the statute of limitations, the defendant having pleaded the three, six, seven, and ten years statutes of limitations, no proceedings having been taken on said judgment except as hereinbefore recited.

"Upon the foregoing findings of fact the court is of the opinion that the defendants' pleas of the statute of limitations cannot be sustained, and is further of the opinion that said judgment in favor of Roberson

Brothers is a valid claim against the estate of the said Stanhope Ballard, deceased.

"It is, therefore, ordered, adjudged, and decreed that all interests of the said Stanhope Ballard, of which he died seized, in the lands set out and described in the petition in this cause, and in the amendment thereto, be sold in order to pay said debt due Roberson Brothers, except so much of said lands as may have been vested in the hands of innocent purchasers prior to the institution of this proceeding.

"It is further ordered and decreed that Z. V. Fisher be and he is hereby appointed commissioner to sell the aforesaid interest of
(328) the said Stanhope Ballard in said lands at the courthouse door of madison County, to the highest bidder at public auction for cash, after first giving thirty days notice at the courthouse door and in some newspaper published in Madison County, and report his proceedings in the premises to this court.

"It is further ordered and adjudged that the defendants pay the costs, to be taxed by the clerk."

The defendants excepted and appealed.

C. B. Marshburn and P. A. McElroy for plaintiff.
Martin, Rollins & Wright for defendants.

ALLEN, J. On 18 March, 1893, Roberson Brothers obtained a judgment against Lucinda Ballard, administratrix of Stanhope Ballard, for $113.38. About five years thereafter, in 1898, the administratrix died.

There was no further administration upon the estate until 3 July, 1911, eighteen years after the rendition of the judgment, and eleven years after the death of the first administrator.

This proceeding was commenced on 11 July, 1911.

Is the right of action barred by the statute of limitations? Clearly so, unless the time elapsing between the death of the first administrator in 1898 and the appointment of the second in 1911 is eliminated, and the authorities are to the effect that prior to 1905 the time between the two administrations must be excluded from the computation under that part of section 367 of Revisal which reads as follows: "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration." *Smith v. Brown,* 99 N. C., 386; *Brawley v. Brawley,* 109 N. C., 524.

The letter of this statute does not cover the case of an administration interrupted by the death of the first administrator; but, as was

said in *Smith v. Brown, supra:* "This clause uses language (329) appropriate to actions against a debtor personally and not barred by the statute at the time of his death, and not verbally to a case where one representative dies, or is removed, and another succeeds to his place and carries on the work of administration left unfinished; yet the analogy is so complete and the spirit, if not the letter, of the act, reasonably interpreted, so closely applicable to the present facts, that we feel constrained to bring them under its provisions, so as to embrace them."

It would seem, therefore, that prior to 1905 the statute was applicable to administration interrupted by the death of the first administrator, and that the time between the two administrations would not be counted; but an important change in the statute was made by the General Assembly of 1905 by adding thereto, *"Provided,* such letters are issued within ten years of the death of such person."

The effect of this proviso was considered in *Matthews v. Peterson,* 150 N. C., 132, and it was there held that a delay of ten years in taking out letters of administration, was a bar to a proceeding to sell land for assets with which to pay judgments.

The facts in the *Matthews case* were: The plaintiff's intestate, Haywood J. Peterson, died 12 July, 1895. The plaintiff took out letters of administration 25 September, 1905. The proceeding was begun 23 March, 1906, to make assets to pay five judgments taken before a justice of the peace 13 November, 1888, and docketed in the Superior Court the same day. These judgments were presented to the administrator a few weeks after his qualification, and were admitted by him to be valid claims against the estate. No personal property of the estate came into the hands of the administrator, and the Court said on these facts: "Revisal, sec. 367, which suspends the running of the statute upon the death of a debtor till one year after the issuing of letters to his personal representative (*Winslow v. Benton,* 130 N. C., 58), contains this clause, inserted by the Revisal commissioners: *'Provided,* such letters are issued within ten years after the death of such person.' The Revisal was enacted 6 March, 1905, but to go into effect 1 August, 1905. The plaintiff took out his letters thereafter on 23 September, 1905, which was more than ten years after the death of the judg- (330) ment debtor, the plaintiff's intestate. . . . The claim is not meritorious. More than seventeen years had elapsed after judgments taken, with no effort to enforce collection, and more than ten years after they had ceased to be *causa litis. Daniels v. Laughlin,* 87 N. C., 433. As to such stale claims, evidence of payment may well have been lost. The Revisal, sec. 367, was a wise provision. The plaintiff, nevertheless,

waited more than a year after its enactment and nearly eight months after the future day set for it going into effect before beginning this proceeding. Not having moved 'in a reasonable time' after the passage of the act, he is justly barred."

We are, therefore, of the opinion that the facts presented come within the statute, and that under the construction placed upon the amendment of 1905, the action is barred.

Reversed.

JAMES D. DONNELL v. CITY OF GREENSBORO.

(Filed 13 December, 1913.)

1. Cities and Towns—Nuisance—Sewerage—Permanent Damages—Taking of Property—Constitutional Law.

An act which directs or authorizes the taking of private property, in whole or in part, without compensation, is unconstitutional; and the creation of a nuisance by a city which permanently damages the riparian owner of lands on a stream below the place where the city sewage is emptied, by reason of offensive matter cast upon the lands, and odors affecting the convenience and health of the owner's home, is actionable, permitting a recovery against the city for such damages as are thereby permanently caused and which are evidenced by the depreciation in value of the lands.

2. Same—State Board of Health.

Where a city has created a nuisance to the permanent damage of the land of a riparian owner on a stream into which the city sewage is emptied, the owner may recover such damages, though the city has therein complied with all the regulations of the State Board of Health, under authority conferred upon the latter by statute. Laws 1909, ch. 793. Distinction is made by HOKE, J., between the application of this principle to our own statutes and Constitution and those of England.

3. Cities and Towns—Nuisance—Trials—Damages—Evidence—Instructions—Harmless Error—Appeal and Error.

In this action to recover damages against a city for permanent injury to lands of a riparian owner upon a stream into which the city sewage is emptied there was evidence that the plaintiff's land was also injured by objectionable matter being emptied into the stream from mill settlements located beyond the city limits: *Held*, the court properly intructed the jury to confine their inquiry as to damages to those arising by reason of the operation of defendant's sewerage system, and exclude damages which may otherwise have been caused, and no reversible error is found.

4. Verdicts, Inconsistent—Interpretation.

While a conflict in a verdict on essential and determinative matters will vitiate it, yet the verdict should be liberally and favorably construed

with a view to sustaining it; and to obtain a proper apprehension of its meaning, resort may be had to the pleadings, evidence, and the charge of the court, and it thus appearing that the verdict and judgment in this case could be properly sustained upon two of the issues answered, and that injunctive relief had been refused upon other issues apparently in conflict, the judgment rendered below is sustained.

APPEAL by defendant from *Shaw, J.*, at August Term, 1913, of GUILFORD.

Action to obtain an injunction restraining defendant from emptying its sewage into Muddy Branch and North Buffalo Creek and to recover damages on account of same.

There was evidence on part of plaintiff tending to show that he lived 4½ miles east of Greensboro and was the owner of about 434 acres of land lying on or adjacent to North Buffalo Creek and Muddy Branch, a tributary of same, and flowing into North Buffalo Creek above plaintiff's land. That the land consisted of three tracts. One of 177 acres bought in 1870, lying on both sides of Buffalo Creek, having 20 acres bottom on one side and 30 acres on the other. A second tract of 197 acres adjoining the former. This tract does not abut directly upon the creek, but extends at one point to within 10 feet of (332) same, and on this tract plaintiff's residence is situate, being about one-half mile from the creek. And a 60-acre tract adjoining the others, situate one half mile from the creek and bought by plaintiff since institution of this present suit. That some time prior to the institution of the present suit the defendant had installed a permanent sewerage system, and was thereby discharging a large portion of its sewage into said streams above the lands of plaintiff, and by reason of same large quantities of offensive matter was cast out and upon plaintiff's bottom-lands, spoiling the grass and other produce of said lands and rendering same for certain purposes unfit for profitable use, and further causing most offensive smells and odors, thereby creating a nuisance and rendering the said lands, and particularly the home of plaintiff, most uncomfortable, threatening the health of his family and causing great and permanent damage to his property.

Plaintiff further alleged and there was some evidence tending to show that before discharging the sewage into said stream defendant had not subjected the same to proper and adequate treatment or complied with the regulations in reference thereto, and by reason of the city's negligent default in this respect there had been increase in the damage suffered by plaintiff.

The defendant denied the existence of any nuisance, and alleged that if any damage was suffered by plaintiff, it was not near so great as

claimed. It was alleged, further, that the defendant had constructed its sewerage system under authority conferred by the Legislature upon the city, and before emptying its sewage into said stream it was adequately and properly dealt with and subjected to treatment by septic tanks established and operated pursuant to regulations made by the State Board of Health under an act of the Legislature conferring full power to make the same. See Laws 1909, ch. 793, Pell's Supplement, sec. 3058a. By reason of said treatment the said sewerage was rendered comparatively harmless and caused no appreciable damage to plaintiff's land.

(333) It was further alleged that these streams afforded the natural drainage for all that portion of the city's sewage which was discharged into same, and that there was no increase of the damage by reason of said discharge. And further, that a large part of the conditions complained of were due and owing to the existence of two extensive mill settlements in the northern part of the city, from which the dyestuffs and other objectionable matter are also emptied into said streams above the lands of plaintiff.

There was much testimony introduced in support of defendant's different positions, and it was insisted that on the facts in evidence no actionable wrong against the city had been shown.

The court charged the jury, excluding from their consideration any and all damages claimed by reason of the 197- and 60-acre tracts, it appearing that neither of these abutted on the creek, and the following verdict was rendered:

1. Has the plaintiff's property been damaged on account of the manner and method employed by the defendant in disposing of its sewage in North Buffalo Creek, as alleged? Answer: Yes.

2. What permanent damages is plaintiff entitled to recover of the defendant on account of construction and operation of its said sewerage system and disposal plant? Answer: $1,000.

3. Has the defendant constructed its sewage disposal plants upon North Buffalo Creek and Muddy Branch in accordance with plants approved by the State Board of Health? Answer: Yes.

4. If not, did the defendant's failure to so construct said disposal plants create a nuisance, as alleged in the complaint? Answer: .....

5. Are said plants being operated in accordance with the rules and directions of the State Board of Health? Answer: Yes, in regard to Muddy Branch. No, in regard to Buffalo Creek septic tank.

6. If not, is the manner in which said plants are being operated creating a nuisance, as alleged in the plaintiff's complaint? Answer: No.

Judgment on verdict that plaintiff recover the $1,000 and costs, (334) etc., and defendant excepted and appealed.

Justice & Broadhurst for plaintiff.
A. Wayland Cooke and A. L. Brooks for defendant.

HOKE, J., after stating the facts: On the first and second issues and by reference to the pleadings, the evidence and the charge of the court, the plaintiff has been allowed to recover $1,000, the damage done his property by the creation and maintenance of an actionable nuisance on the part of defendant, and on careful consideration of the record we find no reason for disturbing the result of the trial.

The decisions of this State are in approval of the principle that the owner can recover such damage for a wrong of this character, and that the right is not affected by the fact that the acts complained of were done in the exercise of governmental functions or by express municipal or legislative authority, the position being that the damage arising from the impaired value of the property is to be considered and dealt with to that extent as a "taking or appropriation," and brings the claim within the constitutional principle that a man's property may not be taken from him even for the public benefit except upon compensation duly made. This decision, announced in *Little v. Lenoir,* 151 N. C., 415, in an opinion by *Associate Justice Manning,* was reaffirmed and applied in the more recent cases of *Moser v. Burlington,* 162 N. C., 141; *Hines v. Rocky Mount,* 162 N. C., 409, and is sustained, we think, by the great weight of authority in this country. *Winchell v. Wauseka,* 110 Wis., 101; *Bohan v. Port Jervis,* 122 N. Y., 18; *Manufacturing Co. v. Joplin,* 124 Mo., 129; *Dwight v. Hayes,* 150 Ill., 273; *Mackwordt v. Guthrie,* 18 Okla., 32; *Platt v. Waterburg,* 72 Conn., 531.

The courts of Indiana and probably cases in one or two of the other States seem to have adopted the contrary view. In the case from Indiana to which we were more particularly referred, *Valparaiso v. Hagen,* 153 Ind., 237, the question more directly presented was the right of certain riparian owners to an injunction against the discharge of the sewage into the streams, rather than the right of recovery for (335) damages suffered. To the extent, however, that this and other cases of like kind tend to uphold the position that any and all recovery is denied for wrongs of this character where the acts complained of are done pursuant to governmental authority, they are not, in our opinion, in accord with the better reason, nor, as stated, with the weight of well considered authority.

We do not understand that the decision of the United States Supreme

Court in *Northern Transportation Co. v. Chicago,* 9 U. S., 635, in any way militates against our present ruling. In that case the city of Chicago on the extension of LaSalle Street, acting under proper legislative authority, was excavating a tunnel under the Chicago River. The work was being done with due care and skill and, so far as appears, in the only feasible manner. The plaintiff sued, claiming damages because the city in doing the work had obstructed certain entrances giving access to plaintiff's property. Recovery was denied on the recognized ground that mere consequential damage arising from the lawful use of one's own property or in the lawful exercise of governmental functions is not recoverable. And the Court, adverting to the principle, held that a temporary inconvenience arising from work of that character and done in this way was not such an encroachment upon the plaintiff's property as could be considered a taking within the meaning of the constitutional principle. But not so here; the verdict, as we have seen, on the first and second issues having established that defendant has created and maintained an actionable nuisance, constituting a direct invasion of the proprietary rights of the owner and permanently impairing the value of his property to the amount of $1,000. In such case, and except as affected by the existence of certain rights peculiar to riparian ownership, a recovery does not seem to depend on whether the damage is caused through the medium of polluted water or noxious air; the injury is considered a taking or appropriation of the property to that extent, and compensation may be awarded. *Brown v. Chemical Co.,* 162 N. C., 83.

If it be conceded, therefore, as defendant contends, that the (336) entire right of supervision and control of all streams in cases of this kind has been conferred on our State Board of Health by Laws 1909, ch. 793, and that defendant has complied with all of the regulations made pursuant to the statute, the right of plaintiff to recover to the extent allowed in this instance would be in no wise affected. On this subject the decisions of the English courts in apparent contravention of the position are not entitled to that persuasive force usually and deservedly allowed them here, for the reason that in England the power of Parliament is supreme. It is not under the constitutional restraints protecting the rights of individuals which prevail in this country and which are made the basis of our present decision. Recognizing this, these acts in almost all instances make provision for compensation to individuals who are injured in carrying out their measures; but where they do not, and are clearly incapable of such interpretation, no recovery of any kind may be allowed in the courts. This constitutes, perhaps, the chiefest difference in our systems of government, and the decisions

of the English courts, therefore, interpreting acts of Parliament in reference to this and kindred questions, are not as a rule safe guides to correct conclusion with us.

There is no objection open to defendants on their evidence to the effect that Buffalo Creek and Muddy Fork afford the natural drainage to all that portion of the city of Greensboro from which the sewage is empted into said streams, nor by reason of the fact that there are, north of the city and outside of the corporation, two extensive mill settlements from which objectionable matter is also emptied into these streams. In the careful and comprehensive charge of the court these sources of contamination, and any and all effects from them were excluded from consideration, and the jury were confined to the damages arising by reason of operation of defendant's sewerage system, and not otherwise.

The only perplexity presented in the record arises from the apparent conflict in the findings of the jury on the first and second and on the fifth and sixth issues. It is well understood that a conflict in a verdict on essential and determinative issues will vitiate, but it is also well recognized that a verdict should be liberally and favorably (337) construed with a view to sustaining it if possible, and that in order to a proper apprehension of its significance resort may be had to the pleadings, the evidence, and the charge of the court (*Richardson v. Edwards,* 156 N. C., 590; *S. v. Murphy,* 157 N. C., 614), and in this instance, on persual of the record, it will clearly appear that the fifth and sixth issues were framed and submitted with a view chiefly of determining the plaintiff's right to injunctive relief, his Honor being of opinion that this right would only exist in case of substantial damage arising from the negligent failure of the defendant and its agents to properly operate the system in accordance with the authoritative regulations established by the State Board of Health. We are not prepared to differ from this view of his Honor (see *Morse v. Worcester,* 139 Mass., 389). But as no injunction was allowed in the case, the question is not presented, and it further appears that his Honor was careful in directing the jury that their finding on the fifth and sixth issues should not be allowed to affect their consideration of the first and second.

We are not unmindful of the suggestion also appearing from the facts in evidence that there are thirty or forty suits of like kind against the city dependent on the determination of the present action, and if recoveries are allowed, a burdensome liability may be established.

Recognizing the importance of the principle involved and the practical effect of its application in the present instance, we have given the cause our most careful consideration, and, having done this, we must administer the law as we are enabled to see it, and trust to the moderation and good

sense of our juries to make fair and righteous adjustment of the conflicting interests involved.

There is no error, and the judgment as entered on the verdict is Affirmed.

Cited: Rhodes v. Durham, 165 N. C., 680, 681; *Snider v. High Point,* 168 N. C., 610.

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(338)

W F. SMITH, ADMINISTRATOR, v. THE HARRIS GRANITE QUARRIES COMPANY.

(Filed 10 December, 1913.)

1. Removal of Causes—Federal Courts—Diversity of Citizenship—Fraudulent Joinder—Complaint—Allegations.

Where a complaint in an action to recover damages for a personal injury against a nonresident and resident defendant sufficiently alleges a joint wrong against them as the cause of the injury, in good faith, the allegations must be passed upon as the complaint presents them; and no severable controversy being presented, the petition for removal to the Federal court filed by the nonresident defendant in the State court, upon the ground of diversity of citizenship, will be denied.

2. Same—Jurisdictional Facts.

Where a nonresident defendant seeks to have the cause removed to the Federal court from the State court, wherein a resident defendant has been made a party, for a fraudulent joinder of the resident defendant, and in his petition or affidavits filed therewith matters relating to the fraudulent joinder are sufficiently alleged, which matters are traversed by the plaintiff, the latter must proceed in the Federal court to have the jurisdictional fact determined.

3. Same—Specific Averments.

Where a nonresident defendant and a resident defendant, in this case being employer and employee, are sued in the State court for an alleged joint wrong as causing the damages complained of, and the former seeks to remove the cause to the Federal court on the ground of diversity of citizenship, with allegation of a fraudulent joinder for the purpose of ousting the original jurisdiction of the Federal court, it is necessary for the movant to allege the facts and circumstances constituting the alleged fraud with such definiteness as may be sufficient for the court to base its own conclusion therefrom that a fraudulent joinder has been made, and no averments, however positive, that merely alleged the fraudulent joinder will be sufficient to transfer the cause to the Federal court for the determination of the jurisdictional facts there.

4. Same—Corporations—Principal and Agent.

The plaintiff's intestate, a boy of 14 or 15 years of age, was killed while employed by the defendant nonresident corporation, operating a granite quarry in this State, in drilling holes for blasting the rock, and the negligence alleged was the employment of a young and inexperienced boy to do dangerous work of this character, without instruction and with inefficient assistants. The resident managers or superintendents of the corporation were made parties defendant. The nonresident defendant filed petition and bond for removal of the cause to the Federal court upon the ground of diversity of citizenship, alleging generally a fraudulent joinder of parties, with further averment that the resident defendants were not charged with any duties respecting the intestate, but it appeared that one of them had, a short time prior to the death of the intestate, given him instructions with reference to the use of the drill he was required to use, and generally with regard to the safe methods of doing this work: *Held*, the traversible facts were not sufficiently full and definite to raise the issue of fraudulent joinder within the meaning of the removal act.

APPEAL by defendant from *Long, J.*, at September Term, (339) 1913, of ROWAN.

Application to remove the cause to the Federal Court.

The action was to recover damages for an alleged joint tort on the part of the defendant company, a foreign corporation, and C. L. Welsh and Julius Eller, two of its resident employees and agents, having charge and control of the company's operations in this State, by reason of the negligent killing of plaintiff's intestate.

The complaint, stating the grievance with great fullness of detail, alleges in effect that the intestate at the time was a mere child, between 14 and 15 years of age, and in the employment of defendant company as tool carrier, a position of comparative safety, and was under the supervision and control of the two resident defendants as managers and agents of defendants' work at their quarries in Rowan County. That the intestate, a boy without experience or training in such work, was by negligence of the defendant company and its said employees put to drilling holes in a pit at the quarry for the purpose of blasting out the rock, a work of greatly increased danger and entirely unfitted for him to do. That he was there given careless and incompetent associates and improper and negligent orders, and by reason of this wrong on the part of the defendants there was an unexpected or premature explosion, causing the death of the intestate.

Making further statement of the wrong complained of, the com- (340) plaint alleges:

"That plaintiff's intestate was a mere child, inexperienced and ignorant of the dangers incident to operating a monkey drill and the explosion and blasting of rock and stone by means of dynamtite, and that

it was gross negligence and carelessness on the part of the defendants to place said intestate of such immature years and experience about, in, and near such dangerous work and premises; and that it was negligence and carelessness on the part of the said defendants to remove said intestate from a place of safety to one of danger; that it was further negligence and carelessness on the part of the defendants to order and command and require said intestate to do work of a man and operate a monkey drill, and it was further negligence and carelessness on the part of the defendants to fail to warn and instruct intestate of the danger incident to the performance of the new duties, and that it was gross negligence and carelessness on the part of the defendants to place said intestate to drill holes in a stone that was then already loaded and charged with dynamite and to fail to inspect and see that said stones were free from dynamite; and it was further carelessness and negligence on the part of the defendants to fail to unload and remove said dynamite from the holes in said stones before requiring said intestate to drill new holes therein; that defendants were negligent and careless in that their orders and commands given to said intestate were dangerous and unsafe and improper for a mere child of inexperience to obey; that defendants were also negligent in that they placed incompetent and reckless superintendents and boss men over said intestate and other employees and required said intestate to obey the same; that the defendant the Harris Granite Quarries Company was further negligent and careless in that the defendant Julius Eller was an incompetent, improper, and unsafe man to have in charge of the quarry pit and be over said intestate and other employees therein; that the said defendant was negligent in that it placed as general superintendent over its quarries and the employees working therein one C. L. Welsh, who was inexperienced and in-
(341) competent to give orders and instructions, and in that it required its employees and plaintiff's intestate to obey said orders of the said Welsh and the said Eller."

Defendant company having given proper bond in time, filed its application for removal to the Federal Court, duly verified and accompanied by supplemental affidavits, made part of the petition, in terms as follows:

"That your petitioner, the Harris Granite Quarries Company, is a corporation duly and originally created, organized, and existing under and by virtue of the laws of the State of Maine, and respectfully shows to this honorable court:

"That it is one of the defendants in the above entitled civil action, which was begun against it in the Superior Court of Rowan County, North Carolina, by the issuance and service of summons. That the plain-

tiff has filed a complaint in the above entitled action. That your petitioner files this its petition at and before the time it is required to answer or demur to the complaint in said action.

"That the matter and amount in dispute and in controversy in the above entitled action exceeds the sum of $3,000, exclusive of interest and cost, and it is a civil action for the recovery of damages for an alleged personal injury resulting in wrongful death. That the controversy in said action is, and was at the time of the commencement of this action, between citizens of different States, the defendant, the Harris Granite Quarries Company, your petitioner, being at the time of the commencement of the action, and being still, a resident and citizen of the State of Maine, and a nonresident and not a citizen of the State of North Carolina, and the plaintiff W. F. Smith being then, and still, a resident and citizen of the county of Rowan and State of North Carolina; both the plaintiff and your petitioner being actually interested in said controversy at the time of the beginning of this action, and at this time.

"That the defendants C. L. Welsh and Julius Eller, citizens of the State of North Carolina, were not, at the time of the alleged accident or personal injury resulting in death, and prior thereto, personally charged with the duty of providing the plaintiff's intestate with (342) reasonably safe, suitable, and proper tools and appliances, and reasonably safe premises and places to perform his duties, reasonably skilled and experienced foremen, superintendents, boss men, and fellow-servants, sufficient in number and diligence, especially to look out after a blast alleged to have been made and ascertain whether all the dynamite in any blast made had been discharged before requiring the plaintiff's intestate to enter or go where any explosion had been made or attempted; and your petitioner further avers that it did in all respects comply with and perform its said duty with respect to the safety of plaintiff's intestate; and your petitioner further avers that these duties devolved upon your petitioner alone, and are and were nonassignable, and that the defendant Julius Eller and C. L. Welsh never, in any manner, assumed the performance of said duties, and that they were never in any manner charged with the performance of said duties, and that they were not in any manner jointly liable with your petitioner for any alleged negligence in these respects.

"Your petitioner especially avers that the defendant C. L. Welsh had nothing whatever to do with the employment of plaintiff's intestate, or with the employment of tool carriers or hole drillers, and that he did not on 2 July, 1913, or on 1 July 1913, or at any other time, remove the plaintiff's intestate from a place of safety to one of danger; and

further avers that he had only a casual acquaintance with plaintiff's intestate, and knew nothing of his employment in the capacity of a monkey driller at the time and place alleged in the complaint, and was not present or in any wise connected with the alleged injury causing the death of the plaintiff's intestate.

"That the rights of the real parties in interest to this controversy can be finally adjudicated without the presence of the defendant C. L. Welsh; that the defendant C. L. Welsh is an improper party to this proceeding; that he had no connection therewith, and that he is an unnecessary party. That the defendant C. L. Welsh has been improperly and fraudulently joined as defendant in this action for the purpose of fraudulently (343) and improperly preventing, or attempting to prevent, your petitioner from removing this cause to the United States District Court, and that the plaintiff well knew at the time of the beginning of this action that C. L. Welsh was not charged with the duties aforesaid, as alleged in the complaint, and that he was joined for the sale and only purpose of preventing the removal of this cause, and not in good faith.

"And your petitioner further avers that the plaintiff's intestate was employed more than six months prior to his alleged death, with the written consent of his parents or guardian, to work in your petitioner's quarry. That he was a young man above the average in intelligence, and well developed physically, and he continued as an employee in your petitioner's service as tool carrier more than six months from the time he entered said service, during all of which said time he became familiar with the operations in and about your petitioner's quarry, and was associated daily with the employees in your petitioner's quarry, who were engaged in the operation of handling monkey drills, or compressed-air drills, and that the position of compressed-air driller was one of natural promotion from that of tool carrier; that the plaintiff's intestate some two weeks prior to his alleged death urged upon your petitioner that he desired to be promoted to the position of monkey driller, and stated that he was fully qualified and capable of handling a monkey drill, and fully understood its operation, which said operations are of a very simple nature and character. By reason of and in consequence of this request, your petitioner employed the plaintiff's intestate as a monkey driller, and gave him careful and specific instructions as to the performance of his duties, which duties he performed daily up to the time of his death. Your petitioner further avers that the plaintiff administrator in the aforesaid action was at the time of filing his complaint, and at the time of the alleging a joint and concurrent negligence on the part of the defendants in said action, well acquainted with the facts

herein set out, and well knew that the allegations set forth in paragraph 7 of his complaint were false and untrue, and well knew the facts to be as heretofore alleged in this petition, and well knew that the plaintiff's intestate was not suddenly changed from the capacity (344) of tool carrier on 2 July, 1913, to that of monkey driller, and well knew that this alleged change was not made under the immediate orders, command, and control of the defendants C. L. Welsh and Julius Eller.

"Your petitioner particularly avers that the said allegations set forth in said paragraph 7 of the plaintiff's complaint, of joint and concurrent negligence on the part of the defendants C. L. Welsh and Julius Eller, and your petitioner, were made by the plaintiff administrator for the sole purpose of fraudulently defeating your petitioner in its effort to have the case removed to the United States Court under the acts of Congress made and provided in such cases. That the rights of the real parties in interest in this controversy can be finally adjudicated without the presence of either of the defendants Julius Eller and C. L. Welsh, and that the said defendants Julius Eller and C. L. Welsh are improper parties to this proceeding, and have no connection therewith, and are unnecessary parties; that the defendants Julius Eller and C. L. Welsh have been improperly and fraudulently joined as defendants in this action, and that said plaintiff, administrator, knowingly made false and fraudulent allegations in his complaint of joint and concurrent negligence on the part of the defendants in said action for the purpose of fraudulently and improperly preventing or attempting to prevent this petitioner from removing this cause to the United States District Court, and that the plaintiff well knew at the time of the beginning of this said action that the said defendants Julius Eller and C. L. Welsh were not necessary or proper parties, as alleged in the complaint, and that they were joined as parties defendant for the sole and only purpose of preventing the removal of this cause, and not in good faith.

"Your petitioner further alleges that its codefendant Julius Eller was not present at the time of the accident resulting in the death of plaintiff's intestate, and did not give at that time any order or command to plaintiff's intestate, but, on the contrary, the said Julius Eller at the time the plaintiff's intestate was first employed as a monkey driller, which was about ten days prior to his death, gave the plaintiff's intestate specific instructions as to the use of the monkey drill, and as (345) to all his duties connected with said employment, and especially warned him never to drill in any old holes, or in any old rock or boulder of granite that had holes in it or that were charged with dynamite or other explosives. That the plaintiff's intestate had been employed about

six months as a tool carrier, and that his duties as such tool carrier required him to visit places where holes were being drilled, and in this way the plaintiff's intestate became thoroughly acquainted with the duties and work of a monkey driller, and well knew from his experience and observation and from the instructions he received from the defendant Julius Eller that a monkey driller was required to drill only new holes, and was forbidden by the rules of the company to tamper with the holes that had been charged with dynamite or other explosive. That your petitioner employs specially trained men for the purpose of inspecting and cleaning out all old holes that have been exploded, or that have been filled with dynamite or other explosive, and had formulated and published rules forbidding monkey drillers to work on any granite, rock, or boulder until after the old holes had been inspected and cleaned out, and the plaintiff's intestate had been thoroughly instructed as to these matters, and well knew that a monkey drill was never used, and never allowed to be used, for cleaning out old holes, but that such holes were cleaned out with tools made of wood. Your petitioner further avers that plaintiff's intestate had been working as a monkey driller for about ten days prior to his death, and was well acquainted with the conditions of the boulders of granite in the pit in which he was working at the time of the injury resulting in his death, and the plaintiff's intestate was thorougly acquainted with the work; and if he was, at the time of the accident resulting in his death, drilling or tampering with any old holes in which dynamite was placed, he well knew the fact at the time, and also well knew that he was violating a rule of the company forbidding monkey drillers to tamper with such holes, having received specific instructions as to these matters from the codefendant Julius Eller.

"Your petitioner specially avers that its codefendant Julius
(346) Eller was not present when the accident occurred, resulting in the death of plaintiff's intestate, and had given him no order requiring him to do any dangerous work, and had given him no order to do any specific work within several days prior to said time. That the work which plaintiff's intestate was employed to do was not dangerous work, but was perfectly safe, and the said Julius Eller never at any time gave plaintiff's intestate any order to do dangerous work, or to drill in any boulder of granite containing dynamite or other explosive.

"Your petitioner further says that the plaintiff, W. F. Smith, administrator of John P. Smith, after the employment of the plaintiff's intestate as a monkey driller, gave his consent in writing to the employment of the said intestate as a monkey driller.

"Your petitioner further alleges that this codefendant Julius Eller is

utterly insolvent, as your petitioner is informed and believes. And your petitioner offers herewith a bond with good and sufficient surety for $500 for its entering into the District Court of the United States for the Western District of North Carolina, on the first day of the next session, a copy of the record in this action and for paying all costs that may be awarded by the said District Court, if said court shall hold that this action was wrongfully or improperly removed thereto. That your petitioner further prays this honorable court that it proceed no further herein except to make order required by law, and to accept the said surety and bond, and to cause the record herein to be removed into the said District Court of the United States in and for the Western District of North Carolina. And your petitioner will ever pray."

Affidavit of George R. Collins follows:

George R. Collins, being duly sworn, deposes and says: That the Harris Granite Quarries Company is a corporation duly and originally created, organized, and existing under and by virtue of the laws of the State of Maine. That it is one of the defendants in the above entitled civil action begun against it in the Superior Court of Rowan County; that the Harris Granite Quarries Company was at the time of the commencement of the action, and still is, a (347) citizen and resident of the State of Maine and a nonresident of the State of North Carolina; and the plaintiff W. F. Smith, administrator of John P. Smith, is and was at the time of the commencement of this action a citizen of the county of Rowan and the State of North Carolina, and the Western Federal District thereof. This deponent further says that he is the manager director of the said corporation, and has his office in the city of Salisbury, N. C. This deponent further says that the defendant C. L. Welsh is a citizen and resident of the State of North Carolina, county of Rowan, and was not at the time of the alleged accident and injury resulting in the death of the plaintiff's intestate, charged with duty of providing the plaintiff's intestate with reasonably safe premises and place to perform his duties and reasonably skilled and experienced foremen, superintendents, boss men, and fellow-servants, sufficient in number and diligence especially to look out after a blast alleged to have been made, and ascertain whether all the dynamite had been discharged before requiring or permitting the plaintiff's intestate to go where said alleged explosion had been attempted, or had actually taken place, and that he had no oversight, superintendence, or control of plaintiff's intestate. That he was not acquainted with the fact that plaintiff's intestate was working at the quarry at the time of the alleged injury resulting in death, as monkey driller, and that he did not employ the plaintiff's intestate. GEORGE R. COLLINS.

Affidavit of C. L. Welsh:

C. L. Welsh, being duly sworn, deposes and says: That the Harris Granite Quarries Company is a corporation duly and originally created, organized, and existing under and by virtue of the laws of the State of Maine. That it is one of the defendants in the above entitled civil action begun against it in the Superior Court of Rowan County. That the Harris Granite Quarries Company was at the time of the commencement of the action and still is a citizen and resident of the State
(348) of Maine, and a nonresident of the State of North Carolina; and the plaintiff, W. F. Smith, administrator of John P. Smith, is and was at the time of the commencement of this action a citizen of the county of Rowan and State of North Carolina, and the Western Federal District thereof.

This deponent further says that he is a citizen and resident of the State of North Carolina, county of Rowan, and is employed by the Harris Granite Quarries Company, but that he was not, at the time of the alleged accident and injury resulting in the death of the plaintiff's intestate, charged with the duty of providing the plaintiff's intestate with reasonably safe, suitable, and proper tools and appliances, and reasonably safe, suitable, and proper premises and places to perform his duties, and reasonably skilled and experienced foremen, superintendents, boss men, and fellow-servants, sufficient in number and diligence especially to look after a blast alleged to have been made, and ascertain whether all the dynamite had been discharged before requiring or permitting the plaintiff's intestate to go where said alleged explosion had been attempted, or had actually taken place, and that he had no oversight, superintendence, or control of plaintiff's intestate. That he was not acquainted with the fact that the plaintiff's intestate was working as a monkey driller at the quarry at the time of the alleged injury resulting in the death, and that he did not employ the plaintiff's intestate.

C. L. WELSH.

Affidavits of Julius Eller:

Julius Eller, being duly sworn, deposes and says: That the Harris Granite Quarries Company is a corporation duly and originally created, organized, and existing under and by virtue of the laws of the State of Maine. That it is one of the defendants in the above entitled civil action begun against it in the Superior Court of Rowan County. That the Harris Granite Quarries Company was at the time of the commencement of the action, and still is, a citizen and resident of the State of Maine, and a nonresident of the State of North Carolina; and the plaintiff, W. F. Smith, administrator of John P. Smith, is and

was at the time of the commencement of this action a citizen of (349) the county of Rowan and State of North Carolina, and the Western Federal District thereof. And this deponent further says that he is a resident of the county of Rowan, State of North Carolina, and that he is employed by the Harris Granite Quarries Company at the Balfour Pink Quarry near Granite Quarry, N. C., and that his position with that company is that of a foreman. That he has been in the employment of the Harris Granite Quarries Company and predecessors for about five years.

That this deponent was well acquainted with plaintiff's intestate, John P. Smith, and that the father of this deponent married the mother of the said John P. Smith, and that the said John P. Smith was living with the deponent's father at the time of the alleged injury, which resulted in the death of the said John P. Smith. The said John P. Smith was about 15 years old and well grown physically and mentally, and on or about 1 January, 1913, he solicited employment of this deponent as a tool carrier for the Balfour Quarry Company near Granite Quarry, N. C., and that such employment was given him. That among other things his duties required him to carry tools to the employees who were engaged in the business of monkey drilling and hand drilling, to furnish the said employees with new drills when needed, and that as such tool carrier he became well acquainted with all the operations in connection with the business of the hand drillers or monkey drillers, and frequented the pits in which they worked and knew of the method and manner of handling said hand drills.

That on or about 20 June, 1913, the plaintiff's intestate, John P. Smith, came to this deponent and asked to be given the position of monkey driller, and stated that he was anxious to be promoted to this position, and that he knew all about the handling of a monkey drill. This deponent gave him the position of monkey driller, and at the time of his promotion, as was his custom, he gave to plaintiff's intestate specific instructions as to his duties, and pointedly instructed him that he was never to drill in any old holes that had been drilled in boulders or blasted granite, and that he was only to drill new (350) holes in rocks and boulders that never had been filled with dynamite or other explosive. That this deponent has knowledge of the fact that the Harris Granite Quarries Company keeps in its employment specially trained men whose business it is to inspect and clean out all old holes that have not been exploded, and that the plaintiff's intestate knew this fact, and knew that it was against the rules to work on any granite or rock or boulder until after the old holes had been thoroughly cleaned out and after inspection had been made. That the plaintiff's

intestate was well acquainted with the fact that the tools furnished for the purposes of cleaning out old holes were not made of metal, but were made of wood. This deponent further says that plaintiff's intestate was not engaged for the purpose of cleaning out old holes, or for the purpose of using the instrument to clean old holes, but was employed to use a monkey drill in drilling new holes in new boulders. This deponent further says that the handling of a hand drill or monkey drill by an employee in drilling new holes is an absolutely safe work, and simple in its nature and character.

This deponent further says that at the time of the said injury resulting in the death of the plaintiff's intestate that he was not present, and that he had given said plaintiff's intestate no orders or instructions to bore into any boulder containing old holes or unexploded dynamite, or to bore into any boulder which had turned over, and in which the dynamite had not exploded, but, on the contrary, at the time he was originally employed as a monkey driller, and frequently afterwards, he was instructed never to drill in any boulder or rock in which there were old holes.

This deponent further says that plaintiff's intestate had been working as monkey driller for about ten days and was thoroughly well acquainted with the condition of the boulders in the pit in which he was working at the time of the alleged injury which resulted in his death, and that the plaintiff's intestate knew that his duty was solely that of drilling new holes in new boulders in said pit; and that if the plaintiff's (351) intestate was drilling in any hole in which the dynamite was not exploded, he well knew the fact, and also well knew that he was violating the explicit orders of the deponent, and the rules of the Harris Granite Quarries Company. J. A. ELLER.

On considering the facts stated in the petition and accompanying affidavits, the application for removal was denied, and defendant company, having duly excepted, appealed.

Theo. F. Kluttz and R. Lee Wright for plaintiff.
Jerome & Price and Flowers & Jones for defendant.

HOKE, J. It is the approved position with us that actions of this character may be prosecuted as for a joint wrong, and authoritative decisions hold that when so stated in the complaint and made in good faith the allegations, "viewed as a legal proposition, must be considered and passed upon as the complaint presents them, and in such case no severable controversy is presented which requires or permits a removal to the Federal courts. *R. R. v. Dowell,* 229 U. S., 102; *Ala.,*

etc., R. R. v. Thompson, 200 U. S., 206; *Hough v. R. R.,* 144 N. C., 701; and *Tobacco Co. v. Tobacco Co.,* 144 N. C., 352. The petitioner recognizes that this is the principle obtaining here, and makes his application on the ground that there has been, in this instance, a fraudulent joinder of the resident defendants. On such petition filed, when the fraudulent joinder is sufficiently alleged, the case must be removed to the Federal Court, and if the plaintiff desires to traverse the jurisdictional facts, he must proceed in that tribunal.

But the cases referred to, and others of like import, are to the effect that a petition on that ground will not be allowed on allegations general in terms, that the resident defendant has been joined for the mere purpose of avoiding a removal or with no honest intent of seeking relief against such resident, or by general allegations of fraudulent joinder, however positive in terms. This question of fraud may not, as a rule, be raised by a simple averment, as in the case of diversity of citizenship, but there must be alleged usually a series of facts and circumstances indicating the fraudulent purpose, and the decisions of the (352) Supreme Court of the United States, as interpreted in this jurisdiction, require that in order to a valid petition of this character the facts and circumstances constituting the alleged fraud must be fully set forth with such definiteness as to show that there has been a fraudulent joinder. The position should appear as a conclusion of law from the facts stated. *R. R. v. Dowell, supra; R. R. v. Willard,* 220 U. S., 413; *R. R. v. Shegogg,* 215 U. S., 308; *Lloyd v. R. R.,* 162 N. C., 485, and *Rea v. Mirror Co.,* 158 N. C., 24.

Speaking to this question in the recent case of *Lloyd v. R. R.,* the Court said: "On this question the authorities are to the effect that when viewed as a legal proposition, the plaintiff is entitled to have his cause of action considered as he has presented it in his complaint (*R. R. v. Miller,* 217 U. S., 209; *R. R. v. Thompson,* 200 U. S., 206; *Dougherty v. R. R.,* 126 Fed., 293); and while a case may in proper instances be removed on the ground of false and fraudulent allegations of jurisdictional facts, the right does not exist, nor is the question raised by general allegations of bad faith, but only when, in addition to the positive allegation of fraud, there is full and direct statement of the facts and circumstances of the transaction sufficient, if true, to demonstrate "that the adverse party is making a fraudulent attempt to impose upon the court and so deprive the applicant of his right of removal." *Rea v. Mirror Co.,* 158 N. C., 24-27, and authorities cited, notably *R. R. v. Herman,* 187 U. S., 63; *Foster v. Gas and Electric Co.,* 185 Fed., 979; *Shane v. Electric R. R.,* 150 Fed., 801; *Knutts v. Electric R. R.,* 148 Fed., 73; *Thomas v. R. R.,* 147 Fed., 83; *Hough v. R. R.,* 144 N. C., 701; *Tobacco Co. v.*

Tobacco Co., 144 N. C., 352; *R. R. v. Houchins,* 121 Ky., 526; *R. R. v. Gruzzle,* 124 Ga., 735; and *Huchill v. R. R.,* 72 Fed., 745.

True, it is now uniformly held that when a verified petition for removal is filed, accompanied by a proper bond, and same contains facts sufficient to require a removal under the law, the jurisdiction of the State court is at an end. And in such case it is not for the State (353) court to pass upon or decide the issues of fact so raised, but it may only consider and determine the sufficiency of the petition and the bond. *Herrick v. R. R.,* 158 N. C., 307; *Chesapeake v. McCabe,* 213 U. S., 207; *Wecker v. Enameling Co.,* 204 U. S., 176, etc. But this position obtains only as to such issues of fact as control and determine the right of removal, and on an application for removal by reason of fraudulent joinder, such an issue is not presented by merely stating the facts of the occurrence showing a right to remove, even though accompanied by general averment of fraud or bad faith; but, as heretofore stated, there must be full and direct statement of facts sufficient, if true, to establish or demonstrate the fraudulent purpose. *Hough v. R. R.,* 144 N. C., 692; *Tobacco Co. v. Tobacco Co.,* 144 N. C., 352; *Shane v. R. R.,* 150 Fed., 801. And referring to a former decision of the Court on the subject of *Rea v. Mirror Co.,* the opinion in *Lloyd's case* said further: "In *Rea v. Mirror Co., supra,* the principle was applied where plaintiff had sued a nonresident corporation, doing a manufacturing business in this State, to recover for physicial injuries suffered by the plaintiff and alleged to be by reason of some negligence of the company in the operation of its machinery, and a resident employee was joined as codefendant. The nonresident company in apt time filed its duly verified petition, accompanied by proper bond, setting forth the facts of the occurrence with great fullness of detail, charging a fraudulent joinder of the resident employee, and containing averment further, that "said employee was a member of the company's clerical force in the office of the company, having nothing whatever to do with the machinery or its management, and that he was not present in the factory at the time of the injury." The petition for removal was allowed, the Court being of opinion that, if these facts were established, it would make out the charge of fraudulent joinder and bring the case within the principle of *Wecker v. Enameling Co.,* 204 U. S., 176."

Considering the petition in the light of these principles, we do not think that the issue as to fraudulent joinder of the two resident defendants has been sufficiently raised. True, there is a full and (354) positive allegation of such fraud in general terms, and petitioner in denying responsibility on the part of these defendants makes averment that they were not "personally charged with the duty of pro-

viding plaintiff's intestate with reasonably safe, suitable, and proper tools and appliances and reasonably safe places and premises to perform his duties, reasonably skilled and experienced foremen, superintendents or boss men, and fellow-servants sufficient in number and diligence especially to look after blasts alleged to have been made and ascertain whether all dynamite had been discharged before requiring or permitting plaintiff's intestate to enter or go where such alleged explosion had been attempted or actually taken place," etc. These averments present the petitioner's legal conclusion arising from the position of these individual defendants rather than the positions held and the authority actually exercised by them. A corporation must necessarily act through its agents and employees, and if a nonresident company seeks a removal on the ground of fraudulent joinder, it should be required to show the facts of the occurrence and which of their agents had the control and management at the time; and if the employees sued had duties in reference to the company's work at the time and place where the injury occurred (which they evidently did, in such instance), these positions and duties should be stated so that the court, apprised of the facts, could draw its own conclusion as to their responsibility.

And while the petition, speaking more directly to the alleged connection of the defendant C. L. Welsh, alleges that "he was joined as a party defendant for the sole and only purpose of preventing removal," and that "he knew nothing of the employment of the intestate in the capacity of monkey driller at the time and places mentioned in the complaint, and was not present or in any wise connected with the alleged injury causing the death of plaintiff's intestate," and as to the defendant Eller, "that he was not present when the accident occurred, resulting in the death of plaintiff's intestate, and had given him no order requiring him to do dangerous work, and had given him no order to do any specific work within several days prior to said time, and "that said work (355) was not dangerous, but perfectly safe," etc., we do not think that either or both of these averments should be allowed to affect the result. It is not infrequently true that a general manager or an agent having general charge and active control of work employing large numbers of men does not know the name or present occupation of each individual employee, and yet he may be responsible for the methods pursued in conducting the work and the care required in the selection of competent workers. For aught that appears in this petition, defendant may have had such position here, and the authority as actually exercised by him may be fully sufficient to charge him with responsibility for intestate's death, though he may not have been personally present at the time and may not have known his name. And as to defendant

Eller, it appears both in the petition and accompanying affidavits that when the intestate was first employed as monkey driller, which was about ten days prior to his death, the said defendant had given him specific instructions as to the use of the monkey drill and as to all his duties connected with said employment, and especially warned him not to drill in any old holes, or in any rock or boulder of granite that had holes in it, or that were charged with dynamite or other explosive. It appears, therefore, by fair intendment from the facts stated in the petition itself that this defendant had some position in this work, giving him authority over the intestate, and was charged with some responsibility concerning him.

On careful persual of the petition and accompanying affidavits, the Court is of opinion that they only present a general denial of liability, accompanied by general allegations of fraudulent joinder, etc., and that the traversable facts, as stated, are not sufficiently full and definite to raise the issue of fraudulent joinder within the meaning of the removal acts.

On the record, we hold that the ruling of his Honor is in accord with the decisions to which we have referred as controlling, and that his judgment denying the application must be

Affirmed.

Cited: Pruitt v. Power Co., 165 N. C., 418, 420; *Cox v. R. R.*, 166 N. C., 659.

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ELLEN G. BRADSHAW ET AL. v. CYNTHIA STANSBERRY.

(Filed 17 September, 1913.)

Appeal and Error—Failure to Print Record—Briefs.

This appeal is dismissed, under the rule, for failure of appellant to print record and brief, and the importance of observing this rule impressed upon the profession.

APPEAL by plaintiffs from *Lane, J.*, at January Term, 1913, of HALIFAX.

E. L. Travis and J. M. Picot for plaintiff.

Joseph P. Pippen, R. C. Dunn, and Elliott Clark for defendant.

CLARK, C. J. The motion of the appellee to dismiss the appeal for failure to print the record and briefs in accordance with the rules of this Court is allowed.

The number of appeals has been increasing year by year under conditions heretofore existing, and with the additional facilities for trials in the Superior Courts, brought about by four new judicial districts, we may reasonably expect a further increase of from 15 to 20 per cent.

It is, therefore, necessary to have rules of procedure and to adhere to them, and if we relax them in favor of one, we might as well abolish them.

We have, however, examined the record, and are of opinion no error was committed on the trial. The term "surviving children" in the deed under which the plaintiff claims means children living at the death of the life tenant, and would not include the plaintiff, a grandchild, under *Lee v. Baird,* 132 N. C., 755.

Appeal dismissed.

CORPORATION COMMISSION v. BANK OF JONESBORO.

(Filed 24 September, 1913.)

1. Principal and Agent—Adverse Interest—Imputed Knowledge.

The knowledge of a cashier of a bank of his own transaction made in his defalcation of the bank's funds, not known to the other officers or to the directors of the bank, will not be imputed to the bank, his principal; for the cashier has therein acted exclusively in his own interest and behalf.

2. Banks and Banking—Defalcation — Insolvency — Correspondence Bank—Balance Due—Valid Debt.

One H. was cashier of bank J., and president of bank S., the former of which became insolvent and went into receivers' hands through his defalcation. It was found that H., as the president of bank S., had customarily remitted for collections sent to bank J., by out-of-town banks, using the form of check of bank S., and the amount claimed by bank S. was for money consequently taken from its own funds: *Held,* this amount constituted a valid indebtedness of the insolvent bank in the receivers' hands.

3. Appeal and Error—Facts Found by Consent—Pleadings—Amendments.

Where it appears that by consent of the parties the trial judge has found the facts in dispute, and awarded damages in a greater sum than claimed by a party, no reversible error will be found on appeal; and when necessary a pleading may be allowed to be amended in the Supreme Court so as to demand such larger amount.

APPEAL by defendant from *Daniels, J.,* at July Term, 1913, (357) of LEE.

CORPORATION COMMISSION *v.* BANK.

This is a contest between creditors over the distribution of assets in the hands of A. A. F. Seawell, receiver of the Bank of Jonesboro. The receiver finds and allows a debt due the Banking, Loan and Trust Company in the sum of $15,867.85, and in a subsequent report filed allowed said debt in the sum of $16,581.00 to share pro rata in distribution of assets in his hands. His Honor, F. A. Daniels, judge, under agreement of parties that he should find the facts and enter judgment thereon, rendered judgment.

The creditors other than the Banking, Loan and Trust Com-
(358) pany excepted and appealed.

McIver & Williams and H. A. London & Son for Banking, Loan and Trust Company.

Hayes & Bynum, U. L. Spence, and Hoyle & Hoyle for exceptors.

PER CURIAM. The controlling facts are that A. W. Huntley was cashier of the Bank of Jonesboro and president of the Banking, Loan and Trust Company; that the said A. W. Huntley paid all checks drawn on the Bank of Jonesboro by its depositors, and forwarded to the Bank of Jonesboro for payment by out of-town banks, by checks drawn upon the correspondent banks of the Banking, Loan and Trust Company, in its name, and upon its check forms, and signed by the said A. W. Huntley as its president; that the said Huntley made remittance for all collections made by the Bank of Jonesboro by exactly similar checks; that the money so paid amounted to $16,581.10; that the said Huntley misappropriated the funds of the Bank of Jonesboro and caused it to become insolvent; and that none of the officers of the Banking, Loan and Trust Company except Huntley had any knowledge of such misappropriation.

The knowledge of Huntley, if material, would not be imputed to the Banking, Loan and Trust Company, because he was acting in his own interest and adversely to his principal. *Bank v. Burgwyn,* 110 N. C., 267; *Bank v. School Committee,* 118 N. C., 383.

These cases were cited with approval in *Brite v. Penny,* 157 N. C., 114, and the Court there says: "We recognize the general doctrine held by all courts, that a corporation is not bound by the action or chargeable with the knowledge of its officers or agents in respect to a transaction in which such officer or agent is acting in his own behalf, and does not act in any official or representative capacity for the corporation."

But in any event, it appears that the money of the Banking, Loan and Trust Company was used to pay checks drawn on the Bank of Jonesboro by its depositors, and to cover remittances for collec-

tions made by the bank, which we must hold constituted a valid (359) indebtedness.

It was within the power of the judge, under the terms of submission to him, to correct the finding as to the amount due, and if necessary the pleadings would be amended in this Court to conform to the finding.

Affirmed.

Cited: *Shuford v. Ins. Co.*, 167 N. C., 551.

BRYANT LUMBER COMPANY v. COPPOCK-WARNER LUMBER COMPANY.

(Filed 10 September, 1913.)

Debtor and Creditor—Compromise and Settlement—Acceptance.

The debtor transmitted to his creditor his check or letter, which stated that according to his books it covered a statement said to have been inclosed, and which was omitted, with the request that the creditor should "go over the statment, and if it did not agree with his books, he would take the matter up with him later": *Held*, the acceptance of the check did not preclude as a compromise the creditor from recovering a larger amount found to be due him, this by the terms of letter being left open to future adjustment. *Aydlett v. Brown*, 153 N. C., 334, cited and distinguished.

APPEAL by defendant from *Cline, J.*, at May Term, 1913, of WILSON.

This action is to recover $829.71, alleged to be due the plaintiff for lumber delivered and services rendered to the defendant.

By consent, the issues raised were tried by a referee, who filed the following report:

1. That on or about 1 July, 1910, plaintiff and defendant had a settlement and adjustment of their mutual accounts, except as to the "Booth cars" hereinafter noted and explained.

2. That at the time of said settlement and adjustment the defendant owed the plaintiff the sum of $910.85 (not including (360) the "Booth cars"), and paid to plaintiff at said time the sum of $900, leaving a balance due to the plaintiff of $10.85.

3. That thereafter defendant became indebted to plaintiff as follows:

July 18.	Work on lumber	$ 18.24	
July 20.	Work on lumber	30.93	
July 21.	Work on lumber	37.39	
July 21.	Car lumber, No. 18104	286.28	
July 21.	Car lumber, No. 23157	232.95	
July 22.	Car lumber, No. 26268	231.68	
July 27.	Car lumber, No. 4441	228.96	
July 30.	Car lumber, No. 70121	354.10	
Freight advanced		15.00	
Amount previously due and unpaid		10.85	
Total indebtedness for above items			$1,446.95

4. That on account of the above, defendant paid to plaintiff as follows:

July 28.	Check for	$ 773.01	
Sept. 28.	Check for	162.40	
Freights admitted by plaintiff in evidence		202.40	1,137.81
Leaving balance due to plaintiff on above			$ 309.14

5. That as to the "Booth cars," defendant owes plaintiff therefor the sum of $340.95. As to these cars, the referee finds in connection therewith that these cars, not containing the quality of lumber ordered and bought by defendant of plaintiff, plaintiff agreed with defendant that they might sell same to the best advantage they could and pay the net proceeds therefor to plaintiff, and the referee finds the net proceeds thereof to be $340.95, and this sum is now due by defendant to plaintiff on account thereof.

(361) CONCLUSIONS OF LAW.

1. That the check of 28 September, 1910, from defendant to plaintiff for $162.40, was in full settlement of all sums due by defendant to plaintiff (except the "Booth cars") to that date, and being accepted by plaintiff, was, as a matter of law, full payment as stated. (*Aydlett v. Brown,* 153 N. C., 334, and citations.)

2. That defendant is indebted to plaintiff only for the sum of $340.95, the net proceeds of the "Booth cars," with interest thereon and costs.

The check for $162.40, referred to in the first conclusion of law, and which is the payment referred to in finding of fact No. 4, was inclosed in a letter, which is as follows:

BRYANT LUMBER COMPANY, 28 September, 1910.
Wilson, N. C.

GENTLEMEN:—We beg to inclose herewith our statement and check for $162.40, balance due you on this statement. According to our books, this includes all the shipments which you have made since we squared up your old account the latter part of March. This statement also includes the cars on which we paid you $900 when you were here on 1 July. Of course, when we say this takes in all your cars to the present date, we mean with the exception of the two Booth cars. We paid you on account of one of the Booth cars, amounting to $150, and we applied this amount on car No. 20020, which you billed us on 15 June. This latter car is included in this statement. Kindly go over this statement very carefully, and if same does not agree with your books, advise us, and we will take the matter up with you later.

Yours truly,
COPPOCK-WARNER LUMBER COMPANY.

The statement referred to in said letter was not inclosed in the letter, nor was there any evidence that the books mentioned therein included the items in finding of fact No. 3.

The plaintiff excepted to the first conclusion of law, which was sustained, and the defendant excepted and appealed from the judgment rendered.

Daniels & Swindell and W. A. Lucas for plaintiff. (362)
Finch & Connor for defendant.

PER CURIAM. So far as the record discloses, the defendant does not deny that it owes the plaintiff $650.09, the amount of the judgment appealed from, but it says it cannot be compelled to pay $309.14 of this amount, made up of the items in finding of fact No. 3, because the plaintiff accepted the check of $162.40, inclosed in the letter of 28 September, 1910.

The principle relied on, as illustrated by *Petit v. Woodlief,* 115 N. C., 125; *Kerr v. Saunders,* 126 N. C., 638, and *Aydlett v. Brown,* 153 N. C., 334, is well settled, but it has no application when the amount accepted does not purport to cover the amount in controversy, or when it is transmitted under circumstances showing that it was not the purpose to pay an amount admitted by the party charged to be due, but to make a payment on an indebtedness which was thereafter to be adjusted by the parties.

In the record before us, as the statement referred to in the letter of 28 September, 1910, was not inclosed, and the books were not introduced

in evidence, there is nothing to show that the check of $162.40 purported to cover the items in finding of fact No. 3, nor is there anything that would justify us in denying to the plaintiff the right to recover $309.14, which the referee finds the defendant owes the plaintiff, to which finding the defendant does not except.

Again, the latter part of the letter of 28 September shows that the check was not sent in adjustment of account, or in payment of balance due, but "on account," the amount actually due to be thereafter adjusted by the parties.

We have carefully examined the record, but it was not necessary to do so, as the appeal might be dismissed for failure to assign errors.

Affirmed.

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(363)

IN RE WILL OF ALONZO CHERRY.

(Filed 17 September, 1913.)

APPEAL from *Whedbee, J.*, on an issue of *devisavit vel non*, at May Term, 1913, of BEAUFORT, upon a *caveat* filed by V. R. Cherry and others.

This issue was submitted:

"Is the paper-writing propounded for probate, or any part thereof, and if so, what part, the last will and testament of Alonzo Cherry, deceased?" Answer: "Yes; as a whole."

The caveators appealed.

Ward & Grimes for propounders.

Small, McLean & Bryan for caveators.

PER CURIAM. We have examined the record and the four assignments of error, and are unable to find any error which necessitates another trial.

The case was made to turn upon the due execution of the will and the mental capacity of the testator. In his rulings his Honor followed the well settled decisions of this Court.

No error.

EDNA B. SEDBURY v. SOUTHERN EXPRESS COMPANY.

(Filed 17 September, 1913.)

Appeal and Error—Case Agreed—Omissions—Procedure—Case Remanded.

A necessary finding in an action to recover money from an express company, alleged to have been lost from a valise which had been intrusted to the defendant for shipment, is that the money was taken

while the valise was in the defendant's care or control, and such finding being omitted from an agreed case submitted to the Superior Court, it is remanded so that the omission may be supplied.

APPEAL from *Lyon, J.*, at June Term, 1913, of EDGECOMBE. (364)

Action, heard on appeal from a justice's court. The action was to recover the sum of $13 and interest, being an amount of money lost from a valise which had been intrusted with defendant company for shipment from Fayetteville to Tarboro, N. C., and for a penalty in failing to adjust the claim within the time required by law, as provided by ch. 139, Laws 1911.

In the Superior Court the case was submitted on case agreed upon, and judgment having been entered in plaintiff's favor for the claim and the statutory penalty, defendant excepted and appealed.

G. M. T. Fountain & Son for plaintiff.
F. S. Spruill for defendant.

PER CURIAM. We are unable to determine the questions at issue in this cause for the reason that the facts agreed upon contain no finding that the money was taken while the valise was in the care or control of defendant company. In its ordinary acceptation, a judgment is the conclusion of the law upon facts admitted or in some way established, and, without this essential fact, the Court is not in a position to make final decision on the rights of the parties. *Bryant v. Insurance Co.*, 147 N. C., 181. The cause will be remanded, that the determinative facts may be established. The costs will be equally divided between the parties.

Remanded.

DANIEL PAGE v. JAMES SPRUNT ET AL.

(Filed 22 October, 1913.)

Negligence—Fellow-servant—Master and Servant.

Held, in this action to recover damages for personal injury, if there was evidence of negligence it was that of a fellow-servant, for which no recovery could be had.

APPEAL by plaintiff from *Justice, J.*, at May Term, 1913, of (365) NEW HANOVER.

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

clusion of the evidence, judgment of nonsuit was entered upon motion of the defendant, and the plaintiff excepted and appealed.

Ricaud & Jones and E. K. Bryan for plaintiff.
J. O. Carr for defendant.

PER CURIAM. Upon an examination of the evidence, it is doubtful if there is any evidence of negligence; but if there is, it is the negligence of a fellow-servant, for which the defendant is not responsible. The judgment of the court is

Affirmed.

A. M. KISTLER v. SOUTHERN RAILWAY COMPANY.

(Filed 29 October, 1913.)

Moot Questions—Spirituous Liquors.

Upon the question presented in this case as to whether the defendant railroad company can legally transport spirituous liquor into the State and deliver it to the plaintiff here, it appears from the briefs filed that only a moot question is raised, which the Court, for that reason, refuses to consider on appeal.

APPEAL by defendant from *Cline, J.*, at June Term, 1913, of BURKE.

This is an action to recover one barrel of beer, consigned to the plaintiff, and heard upon an agreed statement of facts. There was judgment in favor of the plaintiff, and the defendant excepted and appealed.

W. A. Self for plaintiff.
S. J. Ervin for defendant.

(366) CLARK, C. J. This is a proceeding to obtain a determination of the question whether the defendant can legally transport a barrel of beer from a point beyond the State to Morganton, N. C., and there deliver it to the plaintiff. The plaintiff files a brief contending that chapter 24, sec. 3, Laws 1907, forbidding such act, and the act of Congress ratified 3 March, 1913, cannot deprive him of the right to receive such consignment. The defendant in its brief avers that it is ready to obey the law if it knows what it is, and files a brief in accordance with the contention of the plaintiff. It is apparent that both parties are interested on the same side, and that this is really a proceeding to ask the advice or opinion of the Court on practically a "moot case,"

though there is no doubt as to the facts. There was no stay of execution, and the beer was doubtless delivered and long since consumed.

In *Parker v. Bank,* 152 N. C., 253, this Court held that the object of the suit was evidently to procure a construction of section 4, chapter 150, Laws 1909, and that it was instituted solely for the purpose of obtaining the opinion of the Court, and dismissed the action. That case referred to *Blake v. Askew,* 76 N. C., 327, in which it was attempted in a similar way to obtain the opinion of the Court as to the validity of the special-tax bonds, and where the same action was taken. In this case it would be necessary to construe the above statutes of the State and of the United States, and we are not willing to pass upon a question of such importance without the benefit of a *bona fide* controversy and full argument by opposing counsel. The Court has refused to entertain a controversy submitted to obtain the opinion of the Court upon the administration of the public school system, *Board of Education v. Kenan,* 112 N. C., 567; or to advise a sheriff as to the application of moneys. *Milliken v. Fox,* 84 N. C., 107; *Bates v. Lilly,* 65 N. C., 232.

Appeal dismissed.

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(367)

W. T. MOTT v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 5 November, 1913.)

Carriers of Passengers—Wrongful Ejection—Negligence.

In this action against a railroad company for wrongfully ejecting the plaintiff from the train, there was conflicting evidence, and in behalf of the plaintiff that while asleep on the train he was carried by his destination to which he had purchased a ticket, and at his insistence, the conductor carried him to the next station, where, changing his destination for his home beyond, he procured a ticket to that place from the railroad agent, again boarded the train and the conductor took up his ticket. Thereafter the conductor insisted that he would retain the ticket as a part payment for his fare from his original destination to the place he had bought his second ticket, and demanded a cash fare from the latter place to his then destination. Upon his refusal to pay the cash fare, he was put off the train at a place where there was no station or people living: *Held,* (1) A motion as of nonsuit upon the evidence was properly refused; (2) Under a correct instruction, upon the evidence, the verdict in this case established as a fact that the plaintiff was wrongfully ejected from the train, after the conductor had accepted and retained his ticket, at a place forbidden by statute, and actionable negligence has been found.

CLARK, C. J., concurring.

MOTT *v.* R. R.

APPEAL by defendant from *Ferguson, J.*, at April Term, 1913, of COLUMBUS.

This is an action to recover damages for the wrongful ejection of the plaintiff from the defendant's train.

According to the plaintiff's evidence, he bought a ticket from the defendant's agent at Wilmington, N. C., on 20 April, 1905, for his passage from Wilmington to Farmers, N. C., on defendant's road; that he boarded the train at Wilmington on that date, and before he reached Farmers he went to sleep and did not get off the train there, because he was asleep; that he had on that day been discharged from the hospital, and took the train to go to his father's, who lived at Farmers. After the train passed Farmers the conductor come to him about the time the train reached Hallsboro station and said: "Your ticket read Farmers. Why didn't you get off there?" That he told the conductor he
(368) was asleep and did not know when he reached Farmers; conductor told plaintiff that he would have to pay his fare or get off the train; the plaintiff told the conductor: "He guessed he would have to carry him until he met the next train and bring him back to Farmers." When the train reached Whiteville, plaintiff got off and bought a ticket from Whiteville to Cerro Gordo; got back on train to go to Cerro Gordo, where he lived. After the plaintiff boarded the train, the conductor came through to take up tickets. Plaintiff gave conductor his ticket bought at Whiteville; conductor punched it and put it in his pocket. Conductor came back and said: "Now, if you don't pay your fare from Farmers to Whiteville, I will put you off the train." The plaintiff refused to pay fare from Farmers to Whiteville; conductor then said he would keep the ticket for a part of fare from Farmers to Whiteville; conductor had train stopped and put plaintiff off train about 3½ miles from Whiteville, where there were no houses and no people living, and no depot or station. Plaintiff asked conductor to let him go in the baggage car and get his bicycle in order that he might not be forced to walk to the next station, which the conductor refused to do. Plaintiff had to walk from where he was put off the train to Chadbourn, a distance of 3½ miles. The plaintiff came to Whiteville the next day and went to the railroad agent and asked him if he had record of the ticket he bought the day before. It is 14 miles from Whiteville to Cerro Gordo. Plaintiff was not drunk, but had taken a drink. Plaintiff was the only witness offered in his own behalf. At the close of the plaintiff's evidence the defendant moved under section 539 of the Revisal of 1905 for judgment as in case of nonsuit. Motion overruled. Defendant excepted.

His Honor charged the jury, among other things: "If the jury find

from the greater weight of the evidence that the plaintiff, after purchasing this ticket at Whiteville, got back on the same train at Whiteville and gave the conductor this ticket for his passage on from Whiteville to Cerro Gordo, and the conductor took the ticket, and then demanded of the plaintiff his fare from Farmers to Whiteville, and the conductor stopped the train and put plaintiff off because he re- (369) fused to pay his fare from Farmers to Whiteville, then the defendant wrongfully ejected the plaintiff from his train, and you should answer the first issue 'Yes.'" Defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

Jackson Greer and Lewis & Lyon for plaintiff.

George B. Elliott, A. C. Chalmers, Davis & Davis, and Schulken, Toon, & Schulken for defendant.

PER CURIAM. There is ample evidence to sustain the plaintiff's cause of action, and we find no error in the trial.

The verdict establishes the fact that the plaintiff was ejected from the train at a place forbidden by statute, and after the conductor had accepted and retained his ticket, and upon either ground the judgment should be affirmed.

No error.

CLARK, C. J., concurring: The complaint alleges that on 20 April, 1905, the plaintiff bought a ticket at Whiteville for Cerro Gordo, and was put off the train halfway between Whiteville and Chadbourn, at a place where there were no houses or people living nearby and which was not a usual stopping place; that he had a bicycle in the baggage coach, which he asked to get, that he might ride to the next station, 3½ miles off; that this was refused, and he had to walk to said station, where he got a conveyance to take him home, to Cerro Gordo. These allegations were not contradicted by any evidence. The defendant relied on the defense set up in the answer, that the plaintiff had bought a ticket that day at Wilmington, on the same train, to Farmers, 14 miles from Wilmington; that he did not get off at Farmers, and the conductor permitted him to go on 32 miles further to Whiteville, where he got off and purchased the ticket to Cerro Gordo; that after the train left Whiteville the conductor demanded the fare from Farmers to Whiteville, and being refused, he put the plaintiff off, stopping the train to do so.

The plaintiff's evidence is that when he got to Farmers he was asleep, but he admits that he was drinking some, and left a quart of liquor on the train when he was put off. He says that the conductor (370)

carried him on to Whiteville because he insisted he should be carried on to meet the next train going back to Farmers. He further testified that the conductor took up his ticket from Whiteville to Cerro Gordo, punched it and put it in his pocket, and then, after going a few feet, returned and told him that he must pay the fare from Farmers to Whiteville or he would put him off; that he had no money to do this, and the conductor put him off. The conductor says that he did not take up the ticket, but that he demanded full pay from Farmers to Whiteville, and put him off because it was not paid. The conductor says that he first discovered that the plaintiff had overpassed his station at Hallsboro, which was 7 miles west of Farmers; but that he carried him on to Whiteville and told him to get off there.

The court charged the jury that if "the plaintiff got off the train and bought a ticket of defendant's agent at Whitevile for passage to Cerro Gordo, that this was a new contract which entitled the plaintiff to travel on defendant's train to Cerro Gordo, and that if the jury should find from the greater weight of evidence that the conductor took up this ticket and then afterwards demanded of the plaintiff his fare from Farmers to Whiteville, and on his failure to pay the same the conductor stopped the train and ejected the plaintiff, the jury should answer the first issue "Yes." This seems to be the only controverted fact, and the jury responded "Yes."

The defendant requires payment of fare in advance. Whether the plaintiff passed the station at Farmers because he was asleep, as he says, or because he was drunk or shamming, as the defendant contends, when the conductor ascertained at Hallsboro, the next station, as he says he did, that the plaintiff was still on the train, it was his duty then and there to require him to leave, and this controversy would not have arisen. That he permitted the plaintiff to ride to Whiteville, 32 miles beyond Farmers, constituted a debt from plaintiff to the company,

(371) unless, as the plaintiff seems to contend, this was done because proper notice was not given at Farmers, and the conductor allowed him to come on to meet the train going back to Farmers.

The defendant relies upon *Pickens v. R. R.*, 104 N. C., 312. In that case the Court held that when a passenger refuses to pay his fare and the conductor is forced to stop the train, at a station where it would otherwise not have stopped regularly, thus causing a delay, the conductor may refuse the tender of the fare unless it is made before the passenger puts him to the trouble of stopping. The Court then adds: "When the passenger gets off at a regular depot and gets a ticket, this constitutes a new contract, and will entitle him to passage—certainly if he tenders the money due for a passage up to that point; and according to some

authorities without such tender." The defendant quotes *Manning v. R. R.,* 16 L. R. A., 55, where the Court held that the conductor was not required to accept the ticket unless the passenger tendered the back fare. On the contrary, in *R. R. v. Bryan,* 90 Ill., 133, the Court held: "If the company could debar appellee from traveling on that trip for such reason, it could do so on any subsequent trip." But we do not need to pass on this point, in this case, for the jury find that the conductor accepted the ticket.

The train was not stopped at Whiteville to put the plaintiff off, as in the *Pickens case.* On the contrary, he got off when the train stopped at the regular station, and bought the ticket which entitled him to be carried to Cerro Gordo, and the jury find that the conductor accepted the ticket. He was rightfully on the train, and hence his ejectment was wrongful.

The ejectment was also wrongful, if it had otherwise been rightful, because the plaintiff was put off (his bicycle which was in the baggage car being also refused him) at a place which was not a "usual stopping place, nor near any dwelling-house." This is forbidden by Revisal, 2629. These facts are alleged in the complaint, and the testimony of the plaintiff to that effect is not controverted.

The Constitution, Art. IV, sec. 8, gives this Court "general (372) supervision and control over the proceedings of the inferior courts." We should not, therefore, pass over without notice the fact that it appears in this record that the occurrence, which is the foundation of this action, took place 20 April, 1905, and though the summons was issued 9 August, 1905, this appeal comes up from a trial in April, 1913, a delay of eight years. Such delays bring reproach upon the administration of justice, costs accumulate, and the memory of witnesses becomes dim. We recently had an appeal from that section of the State which had been pending fifteen years, but in that instance there had been four trials. So far as the record shows, this case has remained on docket without action and accumulating costs for eight years. Judges of the trial courts should not permit causes to remain on docket, unacted on, for an inexcusable length of time. They should require causes to be tried or dismissed, unless there is good cause, which cannot exist for such an unreasonable length of time.

Cited: Nelson v. R. R., 167 N. C., 191; *McNairy v. R. R.,* 172 N. C.,——

J. E. CAVENAUGH v. H. A. JARMAN.

(Filed 29 October, 1913.)

1. Deeds and Conveyances—Parol Trusts—Grantor—Beneficiaries—Parties.

A grantor in a deed may not establish, contrary to the terms of his deed, a parol trust in himself to the land conveyed, nor can other beneficiaries of the alleged trust have the trust established in their behalf, when they are not parties to the suit.

2. Judgments—Nonsuit—Adjudication.

Where a judgment of nonsuit is entered upon demurrer, the judgment should only adjudicate that the complaint does not state a cause of action and deny the right of recovery.

3. Pleadings—Amendments—Court's Discretion—Appeal and Error.

The refusal of the trial judge, in his discretion, to allow an amendment to a pleading is not reviewable on appeal.

4. Judgments—Mortgages—Foreclosure Suits—Estoppel.

The plaintiff alleged that a decree of foreclosure was entered against him, and the mortgaged premises sold at a price insufficient to pay off the amount of the mortgage; that an action was then instituted, which adjudged the amount due, condemning the land to its payment, and, after it was docketed, the plaintiff, an ignorant man, conveyed a certain other tract of his land to another, who then conveyed it to plaintiff's wife, under advice and belief that this was the only way to secure a homestead to himself; that a homestead in this land was allotted, to which exceptions were filed, eventuating in a judgment denying the homestead right. The defendant demurred: *Held*, the plaintiff is estopped by the former judgment from claiming his homestead in this action.

5. Pleadings—Demurrer—Judgment Objectionable—Costs.

The demurrer to the complaint in this action is sustained and the form of the judgment held objectionable, and the judgment is modified and the plaintiff and his surety on his prosecution bond taxed with costs.

(373) APPEAL by plaintiff from *Connor, J.*, at July Term, 1912, of ONSLOW.

The only parties to this action are J. E. Cavenaugh, the plaintiff, and H. A. Jarman, the defendant.

The complaint alleges, in substance, that in 1905 the plaintiff and his wife executed a mortgage to one Mills, conveying certain lands, to secure a debt; that upon default in the payment of the debt, an action was instituted against the plaintiff and his wife in the Superior Court of Onslow County, in which a decree was rendered at July Term, 1908, adjudging the amount due, and condemning the land to be sold to pay

the same; that the land was sold under the decree and the proceeds applied to the judgment, leaving a balance of $382.52 due thereon; that after said judgment was docketed the plaintiff conveyed another tract of land of 25 acres, which belonged to him, to his son-in-law, and on the same day the son-in-law conveyed the land to the wife of the plaintiff; that execution issued on the judgment of 1908 to collect the balance due thereon and was levied on the said 25 acres; that a homestead was allotted under said execution and exceptions thereto were filed, which were passed on at April Term, 1912, and a judgment was then rendered substantially holding that the plaintiff was not entitled to a home- (374) stead and directing the land to be sold; that said land was sold under execution on 1 July, 1912, and the defendant became the purchaser at the price of $530, and took a deed therefor; that protest was made against the sale, upon the ground that it had not been properly advertised and was not being offered for sale at the hour allowed by law.

There was also allegation that the plaintiff was an ignorant man, and that the deed to his son-in law and from him to the wife were executed in good faith and under advice that this was the best way to secure a homestead, and that the price paid by the defendant was inadequate.

The defendant demurred to the complaint, upon the ground that it failed to stated a cause of action against any one, and also that it showed no title or interest in the plaintiff.

The demurrer was sustained, and the plaintiff excepted.

The plaintiff then moved the court to allow him to amend the complaint by alleging in substance specifically that the plaintiff made the conveyance of the tract of land mentioned in the complaint, under which his wife obtained the deed therein mentioned, being ignorant of the true manner of securing to himself, his wife and children their homestead rights, and that the true purpose and intent of the transaction was that the said property should be held in trust for the purpose of securing to the said plaintiff, his wife and children the homestead allowed by the Constitution of North Carolina; that there was no intent to defraud any creditors in so doing, but that the plaintiff, through ignorance and advice of others, honestly believed that this was the proper way to obtain his homestead rights for the benefit of his wife and children, and such was the expressed trust attached to the said deeds therein mentioned. The court declined to permit the plaintiff to amend the complaint as above, holding also as a matter of law that such amendment was immaterial and could not affect the result of the action.

To the court's declining to allow such amendments and to its ruling the plaintiff excepted.

The judgment also contains an adjudication of title, an order for a writ of possession against the plaintiff, and for an assessment of damages against the plaintiff and the surety on his bond.

(375) The plaintiff excepted and appealed.

G. V. Cowper and Duffy & Koonce for plaintiff.

McLean, Varser & McLean and Frank Thompson for defendant.

PER CURIAM. The ruling of his Honor on the motion to amend seems to have been in the exercise of his discretion, and would not be reviewable, but we concur in the opinion that if the amendment had been allowed, the complaint as amended would not have stated a cause of action.

The facts are not clearly stated, but as they appear, the judgment of 1912 would be an estoppel, and if there was no estoppel, the plaintiff could not establish a parol trust in his own favor against the grantee in his deed, under *Gaylord v. Gaylord,* 150 N. C., 222, and his wife and children, alleged to be the other beneficiaries of the trust, are not parties.

The exceptions to the form of the judgment are well taken. No answer has been filed by the defendant, and no facts are admitted, and the judgment upon the demurrer should do no more than adjudicate that the complaint does not state a cause of action and that the plaintiff has no right to sue.

It also appears that the bond of the plaintiff does not purport to cover anything except costs.

The judgment will, therefore, be modified to the effect that the demurrer be sustained, the action be dismissed, and that the defendant recover of the plaintiff and his surety his costs.

Modified and affirmed.

Cited: Trust Co. v. Sterchie, 169 N. C., 22; *Buchanan v. Hedden, ib.,* 224; *Campbell v. Sigmon,* 170 N. C., 351.

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(376)

J. A. STYLES v. WHITING MANUFACTURING COMPANY.

(Filed 13 December, 1913.)

Principal and Agent—Declarations of Agent—Trials—Evidence.

Declarations of an agent made within the scope of the agency and concerning the very business about which the declaration is made, whether the principal be a person or corporation, is competent in evi-

dence to the same extent as the declaration of the principal would be; and this is held applicable to the declaration of an agent as to the amount of hauling and delivering logs done by the plaintiff upon which he was to receive compensation in commission of a certain per cent.

APPEAL by defendant from *Ferguson, J.,* at Fall Term, 1913, of GRAHAM.

This action is to recover money alleged to be due on certain logging contracts. The plaintiff offered evidence tending to prove that he logged 92,437 feet at $3.55 per 1,000 feet; that his contract was that he was to have 75 per cent of the money when his logs were cut and skidded by the side of the railroad track, and was to have the other 25 per cent when loaded on cars; he admitted that he had been paid the 75 per cent on the 92,437 feet, but contended that they had held back $82.03, or 25 per cent, and as the logs had been loaded and hauled away, he was entitled to this; that he had logged 9,900 feet at $3.50 per 1,000 feet, for which he had not been paid anything; that the defendant owed him $34.14 on this; that he sold out his contract to Bryson & Griffith, and that they logged 92,661 feet, and that they afterwards turned the contract back to him, agreeing with him that he could have the 25 per cent held back on these logs. It was admitted by the plaintiff that if Bryson & Griffith had been paid, he could not recover on that account.

In order to fix the amount of logs skidded by Bryson & Griffith, the plaintiff was allowed to testify, over the objection of the defendant, that some one, whose name he could not remember, who, he stated, was scaling logs for the defendant, had given him a slip of paper, and that this paper showed that Bryson & Griffith had logged 92,661 feet, and that 25 per cent of same amounted to $80.97.

The defendant requested his Honor to charge the jury that the plaintiff could not recover anything on the Bryson & Griffith account, which was refused, and the defendant excepted. (377)

His Honor charged the jury, among other things: "The work which was done by Bryson & Griffith, if he was to have the 25 per cent retained on that, and you find that it was not paid to Bryson & Griffith, the 25 per cent which was retained is still due and unpaid, then he would be entitled to recover that amount."

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Dillard & Hill for plaintiff.
Morphew & Phillips for defendant.

PER CURIAM. The natural interpretation of the evidence of the

plaintiff as to the declaration of the agent of the defendant is that the declaration was made while the agent was engaged in the work of scaling logs for the defendant, for the purpose of ascertaining the true measurement, and so understood, is competent.

The rule as to the admissibility of such evidence is stated in *Gazzam v. Insurance Co.*, 155 N. C., 340, to be that, "The competency of the declarations of an agent of a corporation rests upon the same principle as the declarations of an agent of an individual. If they are narrative of a past occurrence, as in *Smith v. R. R.*, 68 N. C., 107, and *Rumbough v. Improvement Co.*, 112 N. C., 752, they are incompetent; but if made within the scope of the agency and while engaged in the very business about which the declaration is made, they are competent. *McComb v. R. R.*, 70 N. C., 180; *Southerland v. R. R.*, 106 N. C., 105; *Darlington v. Telegraph Co.*, 127 N. C., 450."

His Honor properly refused to give the instruction prayed for. If the defendant owed Bryson & Griffith on the logging contract, and at the time they assigned the contract to the plaintiff they agreed that the plaintiff should have the amount due them, he was entitled to recover it.

No error.

Cited: Robertson v. Lumber Co., 165 N. C., 5; *Morgan v. Benefit Society*, 167 N. C., 265.

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(378)

CURA L. WHEELER v. ROMULUS R. COLE.

(Filed 10 December, 1913.)

1. Appeal and Error—Assignment of Error—Motion to Affirm—Alternative Motion.

A motion to affirm the judgment of the Superior Court is the proper one for the appellee to make when the appellant has not properly assigned the alleged errors in the case on appeal according to the rule of the Supreme Court; and a motion of this character made in the alternative is sufficient in form.

2. Appeal and Error—Assignment of Error — Judgment Affirmed — Record Proper.

The Supreme Court will affirm the judgment of the lower court where the appellant has not assigned his errors in the case appealed, according to the rule, when no error, upon examination, is found in the record proper.

3. New Trial—Newly Discovered Evidence.

A motion for a new trial based upon allegations of newly discovered evidence is denied under the authority of *Johnson v. R. R.*, 163 N. C., 431.

WHEELER *v.* COLE.

APPEAL by defendants from *Adams, J.*, at March Term, 1913, of BUNCOMBE.

Mark W. Brown for plaintiff.
J. H. Merrimon for defendant.

CLARK, C. J. Plaintiffs, appellees, moved in this Court to dismiss the appeal or to affirm the judgment, because the errors alleged by the appellants were not properly assigned in the case on appeal and in accordance with the well settled rule of this Court. The proper motion is to affirm, as we are required to examine the record, even if no errors are assigned in the case on appeal or there is no case on appeal at all. But plaintiff has submitted his motion in the alternative, which is usual, and it is sufficient in form. Upon examination of the record, we find there are fifteen exceptions, and nine of them are taken to the charge of the court, when it is not in the record, and, therefore, not before us (*Todd v. Mackie,* 160 N. C., 352), but only the exceptions to it. The first exception is to the rejection of issues tendered, which are not in the record, and therefore we cannot review this ruling. (379) One of the exceptions, the eleventh, is to the modification of a request for an instruction, and two, the twelfth and thirteenth, are to the refusal of instructions, and the last two are merely formal. None of them, however, complies with the rule of this Court, and we must affirm the judgment for this reason, as we find no error in the record. We have gone carefully through the record, examined the exceptions as they appear in the body of the record, and we find no substantial error.

One of the principal grounds of complaint, as stated in the brief, but not in the assignment or the exception, is that the judge submitted the issues to the jury upon testimony separately as to the execution of the notes by George W. Cole and wife to the plaintiffs, and that Romulus Cole accepted the deed to himself upon an agreement to pay them at the death of his father and mother, when there is no allegation or sufficient proof of these matters, and in the defendant's brief attention is directed to what was said by the witness J. B. Hyder, which it is contended is the only testimony on the point, and fails signally to prove the said facts so stated to the jury or to be any evidence of them.

There are several answers to this exception, though one is sufficient:

1. The exception is taken to several distinct matters, some of which are clearly correct, and it is not pointed to the alleged infirmity in the proof alone.

2. The judge, at that part of his charge, was evidently stating the contentions of the parties as to the force and effect of the evidence taken as a whole, and his reference to Hyder's testimony was not intended to

restrict the consideration of the jury to it alone, but was merely one part of an entire recital of the contentions made by the respective parties, with a subsequent direction to weigh all the testimony. It may be added that if the suggested allegation was not made in the complaint, the proof was hardly a substantial variance from the one that was there; the question, at last, being whether Romulus Cole had agreed to pay the plaintiff the several amounts mentioned, and if he did, the particular form of the agreement was not essential. The charge (380) is to be considered as a whole, and when thus viewed, if it appears that the jury must have understood it, error in a single expression of the judge is not sufficient ground for a reversal. *Aman v. Lumber Co.*, 160 N. C., 369; *Penn v. Insurance Co., ibid.*, 399. As well as we can infer what was the substance of the whole charge from the portions detached and excepted to, we think that it fully covered the legal merits of the case and was delivered by the judge with his usual clearness and accuracy.

We are compelled to affirm the judgment upon another ground already stated, if we follow the numerous precedents in this Court. But we have examined the record with the greatest care, to see if any substantial injustice has been done, and our opinion is that the case is free from error, and, at least, from any reversible error, and that it has been fairly tried upon its real merits.

We deny the motion for a new trial, based upon the allegation of newly discovered evidence, because we do not think it has been brought within the rules which govern in such cases and which were restated in *Johnson v. R. R.*, 163 N. C., 431; and among other reasons covered by these rules, it does not appear to us probable, under the circumstances disclosed in the papers, that if a new trial were ordered the result would be changed.

While we have commented upon the principal exceptions to some extent, we will not repeat what has been said by us in many similar cases. The appellant failed to comply with the rule which requires errors to be assigned by stating in a clear and intelligible manner those to which exceptions were taken during the course of the trial. We are not required, therefore, to consider the case upon its merits, but only to examine the record, which we have done, and find no error therein. The appellee moved to affirm the judgment under the rule as construed by this Court in *Davis v. Wall*, 142 N. C., 450; *Marable v. R. R.*, 142 N. C., 564; *Lee v. Baird*, 146 N. C., 361; *Thompson v. R. R.*, 147 N. C., 412; *Ullery v. Guthrie*, 148 N. C., 417; *Smith v. Manufacturing Co.*, 151 N. C., 260; *Pegram v. Hester*, 152 N. C., 765; *McDowell v. Kent*, 153 N. C., 555; *Jones v. R. R., ibid.*, 419; *Hobbs v. Cashwell*, 158 (381) N. C., 597.

As the case is now presented to us, we must allow the motion and affirm the judgment. This rule has been frequently called to the attention of counsel throughout a long period of years. It has been substantially adopted by all other courts, and, perhaps, in all of them it is enforced more rigidly than with us. It bears equally on all, and should be observed, as it is intended for the benefit of litigants and counsel as well as for the better transaction of business in this Court and the more intelligent disposition of causes. It is easily complied with, if our brethren of the bar will endeavor to meet its requirements. There is no hardship imposed by it, unless we follow the implied suggestion that it be not enforced in some cases, whereas it should be in all equally and with absolute impartiality. If we should fail the least in this respect, it would, of course, be intolerable. But it is sufficient to say that it is a rule of this Court of many years standing, and while it continues as such, it must be enforced alike as to all.

Affirmed.

Cited: Steeley v. Lumber Co., 165 N. C., 32; *Haddock v. Stocks*, 167 N. C., 71; *Carter v. Reaves, ib.*, 132.

F. C. FISHER v. MONTVALE LUMBER COMPANY.

(Filed 13 December, 1915.)

APPEAL by plaintiff from *Long, J.*, at October Term, 1912, of SWAIN.

Civil action tried upon this issue:

1. Did the female plaintiff and defendant corporation make the contract as alleged in the fifth allegation of the first cause of action of the complaint? Answer: No.

The plaintiff appealed.

F. C. Fisher for plaintiff.

Frye, Gantt & Frye, W. L. Taylor, and Bryson & Black for defendant.

PER CURIAM. When this appeal was before us at last term the (382) plaintiff was granted a *certiorari* to bring up a corrected case on appeal. This is now before us in a very imperfect form, consisting practically of a copy of the judge's notes of the evidence.

Nevertheless, we have considered what purports to be the plaintiff's exceptions. We find them to be without merit. The controversy appears to be one almost exclusively of fact, and is settled by the finding of the jury.

No error.

SCHOOL TRUSTEES OF ANDREWS SCHOOL DISTRICT v. J. Q. BARKER ET AL.

(Filed 13 December, 1913.)

APPEAL by defendant from *Ferguson, J.*, at August Term, 1913, of CHEROKEE.

Civil action, heard upon demurrer to the complaint.

The demurrer was overruled, and the defendants ordered to answer over. Defendants appealed.

Witherspoon & Witherspoon and H. W. Bell for plaintiffs.
Dillard & Hill for defendants.

PER CURIAM. Upon a consideration of the appeal, the Court is of opinion that the demurrer was properly overruled.

Affirmed.

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(383)

ADAM MCARTHUR ET ALS. v. COMMONWEALTH LAND AND TIMBER COMPANY ET ALS.

(Filed 13 December, 1913.)

Mortgages—Foreclosure—Equity—Creditor's Bill—Writ of Supersedeas.

On appeal from the refusal of the Superior Court judge to presently render a decree of foreclosure of a mortgage on which he had entered judgment for the amount of the debt, the plaintiff moved in the Supreme Court for a writ in the nature of a *supersedeas*, restraining the enforcement of a decree in another pending action, in the nature of a creditor's bill, involving the property subject to the mortgage, in which a receiver had been appointed to take charge of the lands. *Held*, the rights of the petitioning plaintiff are fully protected in the proceedings sought to be restrained by him, and the motion is denied.

APPEAL by plaintiff from *Lyon, J.*, at October Term, 1913, of CUMBERLAND.

Shaw & McLean for plaintiffs.
Winston & Biggs, Robinson & Lyon, and Cox & Cox for defendants.

PER CURIAM. This was an action instituted in the Superior Court of Cumberland County to foreclose a mortgage, given by J. Sprunt Newton and wife, on a tract of land in said county to secure the sum of $25,000, and held by Adam McArthur, one of the petitioners. That on

verified complaint, duly signed, there was judgment for the debt, the court declining, for reasons appearing of record, to enter a present judgment of foreclosure. From this refusal to presently decree foreclosure, the plaintiffs appealed and moved in this Court for a writ in the nature of a writ of *supersedeas,* restraining the enforcement of a decree in another action pending in said county, in which a receiver has been appointed to take charge of the lands, have the timber thereon cut and disposed of for the benefit of the creditors, including the plaintiffs, and the proceeds paid to said creditors, under the order and supervision of the court.

The latter action was in the nature of a creditor's bill against the owners of the property and others, seeking to enforce the collection of their claims, and seems to have been instituted before any complaint was filed or other notice given in the present suit, as to (384) the nature of or extent of plaintiff's claim.

On perusal of the record and the facts appearing in the present petition, the Court is of the opinion that as the matter now appears the petitioners have an ample opportunity to assert their claims by making themselves parties to the creditor's bill in which the receiver has been appointed, and that they should take this course if they should deem it necessary to properly protect their interests.

Even when allowable, a writ of this kind is only granted in case of necessity. The application of the writ is therefore denied.

Motion denied.

LYDIA L. STOUT, ADMINISTRATRIX, v. SOUTHERN RAILWAY COMPANY.

(Filed 10 December, 1913.)

Railroads—Negligence—Trials—Evidence—Nonsuit.

In this action against a railroad company for damages for the negligent killing of plaintiff's intestate by defendant's train, the evidence tending to show that at sundown the intestate was seen sitting on a crosstie of the track over which the train passed, with his elbows on his knees and his head bent down, and that alarm signals of the approaching train were several times given at a distance of aobut 150 to 200 feet: *Held,* the decision is controlled by *Holder v. R. R.,* 160 N. C., 6.

APPEAL by plaintiff from *Peebles, J.,* at May Term, 1913, of ALAMANCE.

This is an action to recover damages for the alleged negligent killing of the plaintiff's intestate. The evidence offered upon the part of the

plaintiff tends to prove that on 17 October, 1910, the plaintiff's intestate, at about sundown, was seen sitting on a cross-tie on the south side of the railroad track, with his elbows on his knees and head bent down.

There was also evidence that the train, while approaching the (385) deceased, blew the alarm signals several times when about 150 or 200 feet distant.

There was judgment of nonsuit, and the plaintiff excepted and appealed.

Dameron & Long for plaintiff.
Parker & Parker for defendant.

PER CURIAM. This case falls within the principles laid down in *Holder v. R. R.*, 160 N. C., 6, and the cases there cited, and upon these authorities the judgment of nonsuit is

Affirmed.

Cited: *Tyson v. R. R.*, 167 N. C., 218.

LUCY THOMPSON POTTS, EXECUTRIX, v. CLOY A. POTTS ET AL.

(Filed 13 December, 1913.)

Wills—Construction—Intent Clearly Expressed.

In this controversy to construe the will of the deceased, it is held that the intention of the testator is clearly and unambiguously expressed, leaving nothing to interpretation.

APPEAL by defendants from *Long, J.*, at September Term, 1913, of MECKLENBURG.

This is an action brought to obtain the construction of the following will:

"I, William A. Potts, of the county of Mecklenburg, State of North Carolina, being of sound mind, do make and declare this my last will and testament:

"1st. I hereby appoint my beloved wife, Lucy Thompson, executrix of my estate. It is my desire that she settle all just debts out of the first moneys that come into her hands belonging to my estate.

"2d. I give to my wife, Lucy Thompson, my home place (in the town of Davidson), in which we now live, containing 24 acres, more or less, valued at $10,000, to have and to held in fee simple; also all other

property belonging to my estate after paying just debts, as I am (386) not able to say what it will bring. I think it will be about $10,000.

"3d. It being my desire to divide the remainder of my property between each of my eight children, provided my wife shall remain in possession of said property until each child becomes 21 years of age, and have the rents from said property for the support of said minor children, as long as she remains my widow. If she should marry again, each child is to have charge of his or her property, and my wife will be provided for as mentioned in item 2d. It is my will and desire that each child, after receiving his or her property at the age of 21 years, each child shall pay a rental of $35 each year to my wife as long as she remains my widow. If any of them fail to pay this rent, she can take charge of his or her property, and collect said rent.

"4th. I will now divide the remainder of my property between each of my eight children as best I know, giving each share and share alike.

"Item 1. I will to my son Cloy Alexander my Wilson place, in Lemley Township, Mecklenburg County, N. C., valued at $5,000, containing 133 acres, more or less. It is my desire that he pay my estate $500; also that his mother shall have the use of the proceeds for the term of eight years of all the land west of the pasture and north of road leading from (Gamble's Road) into house. This tract does not include any building.

"Item 2. I will my son William Marshall my old home, known as the Sheriff Potts place, also in Lemley Township, near Bethel Church, described in deed given me by Brevard Knox, known as 114¾ acres, more or less, except 10 acres, more or less, cut off of this 114¾ acres by Gamble survey. This place, 104¾ acres, value at $5,000. It being my desire that my son Marshall pay my estate $1,000, paying one-third the place makes each year until paid. It being my desire that my estate cover said house and repair windows and steps.

"Item 3. I will to my son Louis tract of land known as the Henderson land, bought from Andy Sherrill, adjoining the Potts place (Volger place), including also a tract of land known as a part of the Potts land, surveyed and platted by James Gamble, 10½ acres, (387) more or less. This place contains 40 acres, and is valued at $1,500. I will my son Louis lot No. 5 in the town of Cornelius, beginning at a stone near railroad, J. R. Withers' corner; thence with Withers' line to macadam road; thence with said road 150 feet to Summers' corner; thence with Summers' line and line of lot belonging to my estate to a stone near railroad; thence 150 feet to the beginning, valued at $1,000. It is my desire that my estate pay my son Louis $1,500.

"Item 4. I will my daughter Madge Wayland tract of land No. 6,

described on plat made by Robert Reives, known as a part of the Hanner land, containing 132 acres, more or less, valued at $3,000, also lot No. 2, in the town of Cornelius, beginning at a stake on corner of street near Joe Sherrill's house; thence with said street to Harvell's corner; then with Harvell's line 125 feet to a stake; thence with line of lot No. 1, 200 feet to Front Street; thence with Front Street 105 feet to the beginning. This lot contains one house and one vacant lot on corner, also one barn. This lot is valued at $1,000.

"Item 5. I will my daughter Mary Winifred tract of land No. 7, as described on pat made by Reives, and known as the Hannah home place, containing 94 acres, more or less, valued at $2,000; also lot No. 1 in the town of Cornelius, described in deed bought from P. A. Stough, beginning at Harvell's corner, center railroad; thence with Harvell's line 175 feet to corner of lot No. 2 to street; thence with said street to center of railroad, 200 feet with railroad to the beginning, valued at $1,500.

"Item 6. I will my daughter Nancy Catherine tract No. 5, as described in plat drawn by Reives, known as the old Torrence home place, containing 160 acres, more or less, valued at $4,000.

"Item 7. I will my daughter Lucy Elizabeth tract No. 3, as described on plat made by Rob Reives, containing 103 acres, more or less, valued at $2,500; also lot No. 3 in town of Cornelius, known as the H. M. Sloan lot, and described in a deed from Sloan to W. A. Potts,
(388) valued at $1,500. It being my desire that my estate build a house and barn on this 103 acres, worth $300.

"Item 8. I will my son Francis Lawson tract No. 4, as described in plat made by Reives. This tract contains 139 acres, more or less, valued at $4,000.

"I hereby declare this to be my last will and testament, and do revoke all other wills made by me. This 15 November, 1909.

"W. A. POTTS."

The following judgment was rendered:

"1. That under paragraphs 2, 3, and 4 of said will, Lucy Thompson Potts, the widow of the testator, takes in fee simple all of the property of said estate, both real and personal, including any and all property not specifically mentioned in said will, excepting the lands devised in paragraph 4 thereof, subject to the payment of the debts due by the testator, and the legacies and the repairs to be made, set forth in the items under paragraph 4 of said will.

"2. That Cloy Alexander Potts, under item 1 of paragraph 4 of said will, takes the land mentioned therein in fee simple, subject to the provisions contained therein, and the provisions contained in paragraph 3 of said will, and to the payment of $500 to said estate; and he is hereby

directed to pay, and the plaintiff is authorized to collect, said amount from him.

"3. That under item 2 of paragraph 4 of said will, William Marshall Potts takes the land mentioned therein in fee simple, subject to the provision contained in paragraph 3 of said will, and to the payment of $1,000 to said estate, as provided therein; and he is directed to pay the said amount to said estate, and the said executrix is authorized to cover the house and repair the windows and steps as provided therein.

"4. That under item 3 of paragraph 4 of said will Louis Potts takes the land mentioned therein in fee simple, subject to the provisions contained in paragraph 3 of said will, and the executrix of said estate is directed to pay the said Louis Potts the sum of $1,500 out of the assets of said estate, as provide in said item.

"5. That under items 4, 5, 6, and 8 of paragraph 4 of said will (389) the said Madge Wayland Potts, Mary Winfred Potts, Nancy Catherine Potts, and Francis Lawson Potts take the respective lands mentioned in said items, in fee simple, subject to the provisions contained in paragraph 3 of said will.

"6. That under item 7 of paragraph 4 of said will Lucy Elizabeth Potts takes the land mentioned therein in fee simple, subject to the provisions contained in paragraph 3 of said will; and the executrix of said estate is authorized under said item to build a house and barn on the land mentioned therein, worth $300.

"The cost of this action will be taxed against the plaintiff and be paid out of the estate of W. A. Potts, deceased.

B. F. LONG,
"Judge Presiding."

From this judgment the defendant excepted and appealed.

Maxwell & Keerans for plaintiffs.
No counsel contra.

PER CURIAM. If it be conceded that the plaintiff, as executrix of W. A. Potts, is entitled to the opinion and instructions of the court upon the questions submitted in the complaint, we think the ruling of the court was correct, and that the proper construction has been placed upon the provisions of the will, which is expressed very plainly, and seems to be free from any doubt.

The judgment is, therefore,

Affirmed.

(390)

E. H. FRANKS, ADMINISTRATOR, v. CHRISTINE NOLOP ET AL.

(Filed 14 December, 1913.)

1. Corporations—Officers—Principal and Agent—Purchase of Land—Equity—Consideration Advanced by Third Person—Trials—Pleadings—Issues.

Where a corporation sues for the title to lands upon the ground that the grantor and the grantee in the deed were officers and acted for the company in the transaction, it cannot invoke the equitable jurisdiction of the court without repaying money advanced for the purchase by a third and innocent person, a party to the action, and used in procuring the title and for the organization of the corporation; and an issue thereon may be submitted though not raised by the pleadings.

2. Instructions—Contentions—Exceptions—Appeal and Error.

The exception to a statement of the contentions of the parties made in the judge's charge is not held for reversible error in this case.

APPEAL by Mica Company, interpleader, from *Ferguson, J.,* at August Term, 1913, of MACON.

This is a proceeding to sell lands for assets, in which the Standard Mica Company intervened, upon the allegation that it is the owner of the land described in the petition.

There was evidence tending to prove that the Standard Mica Company was duly incorporated and purchased the "Lyle Mill Knob Mica Mine" in Macon County, and within a few months after it was organized, A. L. Roberts, director, obtained a judgment against the corporation, and under this he had the property sold and bought it in; that he sold the property to William B. Angle, the secretary of the corporation; that Angle died; that Christine Nolop brought action against Angle's administrator in North Carolina, and obtained a judgment for debts claimed to have been contracted by his last illness; that the administrator brings this proceeding to have the property subjected to Angle's debts, and the Standard Mica Company intervenes and pleads that it is the owner of the property.

It was admitted that Roberts and Angle were officers of the company, and Mrs. Nolop testified in substance that she advanced to them $850 and $250 to enable them to organize the company and procure
(391) title to the land in controversy, under an agreement that the title should be held by Angle until these sums were repaid to her.

The jury returned the following verdict:

1. Was William B. Angle secretary of the Standard Mica Company of North Carolina before and at the time of the execution of the deed from A. L. Roberts to William B. Angle? Answer: Yes.

2. What sum, if any, did Mrs. Christine Nolop advance to William B. Angle for the purpose of purchasing the property in question from Roberts? Answer: $850.

3. What amount did said William B. Angle pay A. L. Roberts as consideration of the deed from Roberts to Angle? Answer: $850.

4. Was it agreed before and at the time of the advancement so made and the taking of the deed from A. L. Roberts by William B. Angle that the property was to be held in trust by the said Angle for Mrs. Christine Nolop until the amount advanced, together with $2,500 theretofore put into the company by Mrs. Christine Nolop, was repaid to her; and if so, was such agreement made between the officers of the Standard Mica Company of North Carolina and Mrs. Christine Nolop and William B. Angle? Answer: Yes.

The Mica Company excepted to the submission of the fourth issue.

Judgment was entered upon the verdict, and the Mica Company appealed.

R. D. Sisk for plaintiff.
Johnston & Horne for defendant.
Robertson & Benbow and Francis V. Dobbins for Mica Company.

PER CURIAM. The fourth issue is not directly raised by the pleadings, but as the Mica Company is proceeding upon the idea that when its officers bought the land they held the title in trust for the company, it cannot invoke the jurisdiction of the court without repaying the money advanced by a third and innocent party, in procuring the title to the property and completing the organization of the company. (392)

It does not appear that either party has been deprived of the opportunity of offering evidence, and if necessary, we would permit an amendment now in the interest of justice.

The exception to the charge is to a statement of the contentions of the parties, and is without merit.

The other exceptions are formal.

No error.

A. D. JONES v. SOUTHERN RAILWAY COMPANY.

(Filed 13 December, 1913.)

1. Appeal and Error—Verdicts—Judgment—Variance—Penalty Statutes.

A judgment recovered against a carrier for damages and statutory penalty for failure to deliver a shipment or make payment of loss within ninety days was obtained in a magistrate's court in the sum

of $14.82. Upon appeal, the plaintiff was permitted to amend so as to claim 2 cents less than the amount of the judgment, and upon verdict for $14.80 judgment was entered for $14.82: *Held*, the judgment in the Superior Court should be modified in accordance with the verdict, and no reversible error is found.

2. Appeal and Error—Pass Briefs—Rules of Court.

Briefs which merely state with reference to the exceptions taken of record, "Exception No. 1. This question and answer are incompetent," etc., afford no assistance to the Court. They are merely pass briefs, and do not conform to the rules.

APPEAL by defendant from *Long, J.*, at October Term, 1912, of JACKSON.

The plaintiff had a shipment of cotton-seed meal and cotton-seed hulls shipped to him at Barkers Creek from Murphy, N. C. Part of this shipment was lost or was stolen, and the plaintiff filed a claim with the agent of the defendant at Dillsboro for $14.80, covering that (393) portion of the shipment which was lost or destroyed. The claim was not paid within ninety days, and the plaintiff brought suit before a justice of the peace for $14.82, and for $50 penalty, and recovered judgment for the amount sued for, and the defendant appealed to the Superior Court. While the case was on trial in the Superior Court the plaintiff, by permission of the court, amended the summons so as to demand $14.80 damages instead of $14.82.

The jury answered the issue assessing his damage for lost goods at $14.80, and gave him $50 penalty, and the plaintiff took judgment against the defendant for $14.82 for lost goods and for $50 penalty, and the defendant appealed.

No counsel for plaintiff.
Moore & Moore and Martin, Rollins & Wright for defendant.

PER CURIAM. We have examined the record, and find no merit in the exceptions taken, except that the defendant has the right to have the judgment modified to conform to the verdict, by striking out two cents of the recovery.

Counsel for the defendant have probably filed as valuable a brief as could have been prepared, but we call the attention of the profession to the fact that it is no compliance with the rules to say, "Exception No. 1. This question and answer were incompetent." "Exceptions 4 and 5. These portions of the charge here excepted to are erroneous."

Briefs, to be helpful to the Court and to litigants, should contain a succinct statement of the facts and the reasons for the exceptions taken, and the authorities relied on. A "pass brief" does no good to either.

No error.

(394)

FLORA RHYNE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 3 December, 1913.)

Telegraphs—Telegrams—Stipulations Limiting Liability.

A stipulation on the back of a telegram limiting the liability of telegraph company, which received it for transmission and delivery, to a sum not exceedings $50, whether it may be negligent or not in its duties, unless a greater value is stated in writing thereon, and an additional sum paid or agreed to be paid in proportion to its greater value, is void.

APPEAL by defendant from *Justice, J.*, at July Term, 1913, of McDOWELL.

Civil action tried upon these issues:

1. Was the defendant guilty of negligence in respect to the transmission and delivery of the telegram to Flora Rhyne, as alleged in the complaint? Answer: Yes.

2. What damage, if any, has the plaintiff sustained on account of mental anguish, caused by such negligence? Answer: $500.

From a judgment for the plaintiff, the defendant appealed.

Pless & Winborne for plaintiff.

George H. Fearons, Alf. S. Barnard for defendant.

PER CURIAM. The defendant seeks to limit its liability for negligence by the following stipulation, printed upon the back of the telegraph blank:

"In any event, the company shall not be liable for damages for any mistakes or delay in the transmission or delivery, or for the nondelivery of this message, whether caused by the negligence of its servants or otherwise, beyond the sum of $50, at which amount this message is hereby valued, unless a greater value is stated in writing hereon at the time the message is offered to the company for transmission, and an additional sum paid or agreed to be paid, based on such value equal to one-tenth of 1 per cent thereof."

This question has been settled adversely to the defendant's contention by the decisions of this Court, and needs no further discussion. *Pegram v. Telegraph Co.*, 97 N. C., 57; *Williamson v. Telegraph Co.*, 151 N. C., 223.

The negligence of the defendant is not disputed, and it was admitted upon the argument that there was a *prima facie* case made out.

We have examined the several exceptions to the evidence, and charge of the court, and filed no reversible error.

No error. (395)

ABERDEEN AND ASHBORO RAILROAD COMPANY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 10 Decemebr, 1913.)

Trials—Appeal and Error.

This action was tried in accordance with the decision in the former appeal, and no reversible error is found.

APPEAL by defendant from *Bragaw, J.*, at May Term, 1913, of MOORE.

This is an action to recover damages, and the facts are fully stated in the former appeal. There was a judgment for the plaintiff, and the defendant appealed.

Douglass & Douglass, Jerome & Price, R. L. Burns, and W. H. Lyon for plaintiff.

W. H. Neal for defendant.

PER CURIAM. This action was tried in accordance with the principles laid down in the former appeal, 157 N. C., 369, and upon an examination of the entire record we find no reversible error.

No error.

(396)

J. A. PORTER v. AMERICAN CIGAR BOX LUMBER COMPANY.

(Filed 10 December, 1913.)

Appeal and Error—Assignments of Error—Purport of Exception—Appeal Dismissed.

Supreme Court Rule of Practice 19, sec. 2, requiring the exceptions of record to be grouped and numbered, must be complied with to have the appeal considered by the court; and where the assignments of error each simply refers to the exception of record by number, without giving the purport or text thereof, it is insufficient, and the judgment of the trial court will be affirmed.

J. H. Merrimon and Zebulon Weaver for plaintiff.

C. C. Cowan and Martin, Rollins & Wright for defendants.

PER CURIAM. This is a motion to dismiss the appeal and to affirm the judgment for failure to comply with Rule 19, sec. 2. An examination shows that the motion is well founded. In *Thompson v. R. R.*, 147 N. C., 413, the alleged assignments of error were such as are herein set out. In that case *Hoke, J.*, in dismissing the appeal, said: "These rules

refer to exceptions which have been properly assigned for error, in accordance with Rule 27 and Revisal, 561, and the proper observance of all of them is required for the orderly and efficient disposition of causes on appeal. These rules are not complied with by making a short excerpt from the stenographer's notes incomplete in themselves and giving no indication of their real bearing upon the question involved. . . . Just what will constitute a sufficiently specific assignment must depend upon the special circumstances of the particular case; but always the very error relied upon should be definitely and clearly presented, and *the Court not compelled to go beyond the assignment itself to learn what the question is. The assignment must be so specific that the Court is given some real aid,* and a voyage of discovery through an often voluminous record not rendered necessary."

In dismissing the appeal in *Lee v. Baird,* 146 N. C., 361, for failure to comply with this same rule, the Court said: "These rules, published in 140 N. C., 660, have been adopted after extended and careful reflection and because they were found necessary to a proper per- (397) formance of the public business of the Court."

In *Calvert v. Carstarphen,* 133 N. C., 28, the Court said: "The rules of this Court are mandatory, not directory." In *Smith v. Manufacturing Co.,* 151 N. C., 260, *Walker, J.,* in dismissing the appeal for failure to comply with this rule, said: "We must insist upon a strict compliance with this rule. . . . It places before the Court in condensed form the entire case, so that we can the more readily understand the argument of counsel and consider the case more intelligently as the discussion before us progresses. We have more than once held with some degree of emphasis that this, as well as the other rules of the Court, will be enforced, reasonably, of course, but according to their plain intent and purpose."

In *Davis v. Wall,* 142 N. C., 453, in dismissing the appeal for failure to comply with this rule, it was said: "Ordinarily, hereafter, such motions will be allowed upon a failure to comply with the rules of this Court, without discussing the merits of the case."

In *Ullery v. Guthrie,* 148 N. C., 418, it is said: "This is a reasonable and just rule. . . . It is indispensable in all courts that there should be some rules of practice, else there would be hopeless disorder and confusion. It is, for the same reason, not so important what the rules are as that they shall be *impartially applied to all.*"

As far back as *Sigman v. R. R.,* 135 N. C., 181, the Court said emphatically that thereafter appeals would be dismissed in cases of nonobservance of the rules.

In *Marable v. R. R.,* 142 N. C., 564, the Court said: "We again especially direct attention of the profession to those rules and to that de-

cision (*Davis v. Wall,* 142 N. C., 450) as being very proper for their careful consideration when preparing cases on appeal."

In *Jones v. R. R.,* 153 N. C., 421, the profession was again warned that the rules would be rigidly enforced, and the Court said: "Nothing could be *more arbitrary* than a principle or a rule which *should* (398) *be enforced against some litigants and not as to others.*"

In *McDowell v. Kent,* 153 N. C., 556, the Court said, in affirming the judgment below for failure to comply with this rule: "Though this matter has been often called to the attention of the profession, and our determination expressed to enforce the rule, such cases as this occasionally occur. It is of the utmost importance that any rule shall be *impartially applied.* It would be the greatest injustice to apply it to some cases and not in all. . . . This Court is decidedly adverse to deciding any case upon a technicality or disposing of any appeal otherwise than upon its merits. But having adopted this rule from a sense of necessity, and having put it in force only after repeated notice, and having uniformly applied it in every case since we began to do so, it is absolutely necessary that we observe it *impartially in every case.*"

There are other decisions to the same effect, besides many cases in which the motion to dismiss has been allowed without burdening the reports with further repetition of opinions to that purport. In this case the assignments of error each simply refer to an exception by its number, without giving the purport or the text of the exception. This necessitates the Court turning back and hunting up the exceptions in the record. This the Court could have done without any assignment of errors, and, if permitted, makes an "assignment of errors" entirely useless and deprives the Court of the benefit intended to be derived from such assignment. The Court has so often reiterated the reason for the rule and its intention to enforce it that it is to be trusted that no other case of such disregard of the rules shall arise, which shall compel us to dismiss an appeal, or affirm the judgment below, for failure to comply with this plain requirement of the rules.

Motion allowed and motion to reinstate denied.

Cited: Register v. Power Co., 165 N. C., 235; *Wynn v. Grant,* 166 N. C., 55.

STATE v. D. E. EVERITT.

(Filed 10 September, 1913.)

1. Judgment Suspended—Terms Imposed—Power of Courts.

The Superior Court judge may, in his reasonable discretion, suspend judgment in a criminal action upon submission or conviction of the defendant, and require the defendant to appear from term to term, for the next ensuing two years, and show that he has demeaned himself as a good and law-abiding citizen.

2. Same—Indefinite Suspension.

A suspension of judgment against a defendant in a criminal action in the Superior Court requiring him to appear from term to term for the next ensuing two years, etc., is not objectionable as an indefinite suspension of judgment.

3. Judgment Suspended—Power of Court—Implied Consent.

Where a defendant submits or is convicted of a criminal offense and is present when the judge, in the exercise of his reasonable discretion, suspends judgment upon certain terms, and does not object thereto, he is deemed to have acquiesced therein, and may not subsequently be heard to complain thereof; and in proper instances it will be presumed that the court exercised such discretion.

4. Judgment Suspended—Terms—Costs—Part Compliance—Sentence—Power of Courts.

Where judgment against a defendant in a criminal action has been suspended upon payment by him of the costs, and other conditions, such payment is not a full compliance by him with the terms of the suspension and does not take from the court the power to subsequently proceed to judgment should the defendant violate the further conditions upon which the judgment was suspended.

5. Judgment Suspended—Terms—Costs—Alternate Judgments.

A suspension of judgment in a criminal action upon payment of costs, requiring the appearance of the defendant at subsequent terms of the criminal court and show that he has demeaned himself as a good, law-abiding citizen, is certain in its terms and not objectionable as imposing alternate duties or obligations.

6. Judgment Suspended—Subsequent Sentence—Original Offense—Trial by Jury—Court's Discretion—Appeal and Error.

Where judgment in a criminal action has been suspended upon payment of costs, imposing further terms as to the conduct of the defendant and at a subseqquent term of the criminal court the judge finds upon affidavits or otherwise that the defendant has violated the terms upon which the judgment had been suspended, and passes sentence, the sentence is imposed as a punishment for the original offense of which the defendant stands convicted, and not for the subsequent miscon-

duct, and the proceedings to ascertain whether the defendant has complied with terms imposed being directed to the reasonable discretion of the judge, are not within the province of the jury, and not appealable unless the judge's discretion has been grossly abused.

7. Judgment Suspended—Subsequent Sentence—Court in Term.

Where a judgment has been suspended against a defendant in a criminal action upon certain terms imposed, any further proceedings to ascertain whether those terms have been complied with must be in term and not in vacation.

8. Same—Appeal and Error.

This power of the court to suspend judgment upon terms should not be exercised so as to prejudice or embarrass the defendant's right to review the judgment and proceedings of the court upon which it is based, by appeal, if he elects to do so.

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

The defendant was indicted in three cases for unlawfully selling liquor, and pleaded guilty to each indictment at September Term, 1911. Judgment was prayed by the solicitor, and the court adjudged that defendant pay a fine of $150 and the costs in the first case, suspended judgment on payment of the costs in the second, and entered the following order in the third: "It is ordered that judgment be suspended on the payment of costs, and further, that the defendant enter into a bond in the sum of $200 for his appearance at each criminal term of this court for the next two years and show that he has demeaned himself as a good and law-abiding citizen."

The defendant appeared from term to term of the court, and at March Term, 1913, on the suggestion of the solicitor that the defendant had violated the terms imposed by the court for the suspension of judgment at September Term, 1911, by unlawfully selling liquor, the court, in the presence of defendant, heard testimony from both sides upon the accusation, and, on due consideration thereof, found as a fact that the
(401) defendant had engaged in the unlawful sale of liquor, in violation of the condition upon which the judgment of the court had been suspended. The court thereupon, and for the same cause, adjudged in said case that defendant be imprisoned in the county jail for the term of nine months, with directions that he be assigned by the county commissioners to work on the public roads; and from this judgment he appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

John L. Bridgers for defendant.

WALKER, J., after stating the case: The practice of suspending judgment upon convictions in criminal cases and upon reasonable terms has so long prevailed in our courts that we would be loath to disturb it, except for the most convincing reason, supported by the clearest authority showing its illegality. We are satisfied, after the most careful examination of the question, that no such reason can be presented, and that no such precedent can be found. Recent decisions of this Court are strongly in favor of the power as existing in the court, when it is fairly and not unreasonably or oppressively exercised. In this case the learned and enlightened judge who presided and imposed the sentence proceeded with great caution after a final hearing of both sides, and we concur in his finding of fact and his conclusion that this was a proper case for the use of the power residing in him, in order to punish the defendant for a violation of the criminal law, which he had confessed in open court and of which he had been adjudged guilty, he having shown himself no longer entitled to the clemency of the court.

Before discussing the general question as to the power of the court to suspend judgment upon terms and conditions imposed at the time, it will be well to notice the objections made by the learned counsel for the defendant in his brief and argument. As we understand, they are the following:

1. If the court can suspend the judgment, it may do so indefinitely.

2. That supension was really, and in law, conditioned upon the payment of costs only, and when the costs were paid, the power of the court to proceed further was terminated, for the condition annexed was no part of the punishment. (402)

3. The conditional terms imposed render the judgment uncertain, as in the case of alternative judgments.

4. The court has punished the defendant for what he has done since the suspension of the judgment, and not for the original offense, and for which he has not been tried upon indictment and convicted by a jury.

We do not think any of these objections are tenable. It would be useless for us, in this case, upon a suspension for only two years, to inquire what would be the legal effect of an indefinite suspension, as there has been no such exercise of the conceded power. It must not be overlooked that the suspension of judgment, upon terms expressed therein, at September Term, 1911, was entered with the defendant's implied assent at least, he being present and not objecting thereto.

This Court said in *S. v. Crook,* 115 N. C., 760, that such an order is not prejudicial, but favorable to a defendant, in that punishment is put off, with the chance of escaping it altogether; and it is presumed that he was present and assented thereto, if he did not ask for it as a measure of relief from impending punishment. The Court also expressed some

surprise at the suggestion that the rights of a defendant are infringed or his interests impaired by allowing him to escape for the present the toils of the law, by suspending immediate action and affording him an opportunity for reformation as a basis for permanent clemency, instead of requiring him at once to undergo the punishment of the law for the offense of which he had been convicted. And we repeat, that it is strange he should complain of the merciful consideration which the law thus extends to him.

The practice of suspending judgment upon terms prescribed has been sanctioned in our courts for a long time, and it seems to have been recognized in England, for in 4 Bl. Com., 394, it is said that "A reprieve (from *reprende,* to take back) is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. This (403) may be, first, *ex arbitro judicis,* either before or after judgment, as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy, or, sometimes, if it be a small felony, or any favorable circumstance appear in the criminal's character, in order to give room to apply to the Crown for either an absolute or conditional pardon." And to the same effect we find the law thus stated in Chitty's Cr. Law, 75: "The more usual course is for a discretionary reprieve to proceed from the judge himself, who, from his acquaintance with all the circumstances of the trial, is most capable of judging when it is proper. The power of granting this respite belongs, of common right, to every tribunal which is invested with authority to award execution. And this power exists even in cases of high treason, though the judge should be very prudent in its exercise." "At common law every court invested with power to award execution in criminal cases has inherent power to suspend the sentence." Clark's Cr. Pro., 496.

In *Com. v. Dowdican's Bail,* 115 Mass., 133, it was held to be proper and within the power of the court, after conviction in a criminal case, "when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and the attorney for the Commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file; and this practice has been recognized by statute. Such an order is not equivalent to a final judgment, or to a *nolle prosequi* or discontinuance, by which the case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the dockets, and leaves it within the power of the court

at any time, upon the motion of either party, to bring the case forward and pass any lawful order or judgment therein. Neither the order laying the indictment on file nor the payment of costs, therefore, in any of the four cases, entitled the defendant to be finally discharged." Sometimes the judge reprieves, said *Lord Hale,* "as where he is (404) not satisfied with the verdict, or the evidence is uncertain, or the indictment is insufficient, or doubtful whether within clergy. Also when favorable or extenuating circumstances appear and when youths are convicted of their first offense. And these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their sessions be adjourned or finished, and this by reason of common usage." (2 Hale P. C., ch. 58, p. 412.)

Our courts, of course, can only act in such matters during their sessions, and not in vacation. The power of suspending or respiting the sentence belonged of common right to every tribunal invested with authority to award execution in a criminal case. *People v. Court of Sessions,* 141 N. Y., 292, citing 1 Chitty Cr. Law (1 Ed.), 617, 758; Bishop's New Cr. Pro., sec. 1299; *Com. v. Maloney,* 145 Mass., 245; 2 Hawkins Pleas of the Crown, p. 657, sec. 8. It was held in *Fults v. State,* 2 Sneed, 232, that the courts have control of their judgments in criminal cases, so far as to suspend the execution thereof on sufficient reason appearing. And if such suspension be had upon application of defendant, it constitutes no error of which he can take advantage. The courts will be presumed to have exercised such discretion in a proper case.

We have already seen that there is a presumption that the order of suspension was made with the defendant's consent, if not at his request. The record here evidently implies that the order in question was made at defendant's solicitation, as an act of mercy to him, so that he might qualify himself by his good behavior to receive further clemency from the court, and thus avoid the rigor of the law. *Allen v. State,* 8 Tenn., 294; *S. v. Addy,* 43 N. J. Law, 113. In the case last cited the Court said: "It would seem that it is stating the matter too broadly to assert that it is always the imperative duty of a court to render judgment upon a conviction of crime, unless some legal proceeding for review be interposed. Considerations of public policy may induce the court to stay its hand." *S. v. Hilton,* 151 N. C., 687, does not controvert these views, but is in perfect harmony with them. The capital (405) distinction between the two cases is that in *Hilton's case,* the court had previously investigated the conduct of the defendant, and after finding as a fact that he had fully complied with the condition of the suspension, he was discharged, while here, unfortunately for the defendant, the court has found the other way, after hearing both sides: that is,

it has declared, after hearing the evidence, that the defendant has sold liquor unlawfully, in clear violation of the terms of suspension, to which he agreed.

In the *Hilton case* the Court fully recognized the existence of a valid power in the court to suspend judgment on condition that the good behavior of the defendant, and his obedience to the law, be shown by him from term to term, for a reasonable period, citing many authorities to sustain the ruling by which it approved the long-standing practice of our tribunals in this respect. *Justice Hoke,* for the Court, thus comments upon this method of procedure in our criminal courts: "In this State, as shown in *S. v. Crook,* 115 N. C., 760, the power to suspend judgment and later impose sentence has been somewhat extended in its scope, so as to allow a suspension of judgment on payment of costs, or other reasonable condition, or continuing the prayer for judgment from term to term to afford defendant opportunity to pay the cost or to make some compensation to the party injured, to be considered in the final sentence, or requiring him to appear from term to term, and for a reasonable period of time, and offer testimony to show good faith in some promise of reformation or continued obedience to the law. These latter instances of this method of procedure seem to be innovations upon the exercise of the power to suspend judgment as it existed at common law; and while they are well established with us by usage, the practice should not be readily or hastily enlarged and extended to occasions which might result in unusual punishment or unusual methods of administering the criminal law." He refers to the cases hereinbefore cited, and also to *S. v. Bennett,* 20 N. C., 43; *Com. v. Maloney,* 145 Mass., 205; *Gibson v. State,* 68 Miss., 241; *Ex parte Williams,* 25 Fla., 310; Revisal of
(406) 1905, secs. 1293 and 1294. See, also, *S. v. White,* 117 N. C., 804; *S. v. Crook,* 115 N. C., 760; *S. v. Sanders,* 153 N. C., 624.

There was no indefinite suspension of judgment in this case, but only for a definite time with the consent of the defendant, upon a condition which he impliedly promised to perform, but which he most flagrantly disregarded. We need not, therefore, decide upon the lawfulness of an indefinite suspension, for we have no such case. There was no abuse of the court's discretion, and this is a sufficient answer to the first contention.

Nor has the second any greater force. The payment of the costs was not a full compliance with the terms of the suspension, and did not take away the power of the court to proceed to judgment, if it found that the defendant had not complied with the condition, but, on the contrary, had become, since the date of the judgment, a common retailer of liquors, in open violation and defiance of the law. The next contention, that

the condition rendered the judgment uncertain, as in the case of alternative judgments, cannot be sustained. The judgment is certain and definite in its terms, and does not impose alternative duties or obligations.

Nor can it be well argued that the judge had, by the judgment, punished the defendant for his subsequent conduct. This is a misapprehension of its legal effect. He has simply punished him for the crime he had confessed, because he has violated the terms upon which clemency was impliedly promised. But this is merely the reason for awarding punishment in the original case, and is no part of the offense for which it was inflicted.

This very point was urged in the similar case of *Sylvester v. State,* 65 N. H., 193, where the defendant was indicted for the illegal sale of liquor, and the mittimus was ordered to be stayed "while he does not sell liquor," and it was held that "the enforcement of the judgment of mittimus was not a punishment for subsequent offenses, or for breach of the condition on which execution was stayed."

It must be clear that the defendant was not entitled to a jury trial to determine whether or not he had violated the conditions upon which the judgment had been suspended. He was not on trial for any new offense, nor for any offense whatever. When the judgment (407) was suspended defendant assumed the obligation of showing, to the satisfaction of the court, from time to time, that he had demeaned himself as a good citizen and was worthy of judicial clemency. Whether or not he had so demeaned himself was not an issue of fact to be submitted to a jury, but a question of fact to be passed upon by the court. It was a matter to be determined by the sound discretion of the court, and the exercise of that discretion, in the absence of gross abuse, cannot be reviewed here.

S. v. Sanders, 153 N. C., 627, cited by the defendant in support of the position that the defendant must have been convicted of the subsequent offense and that the record of conviction is the only competent evidence of the violation of the condition, is not in point. The Court, in that case, was deciding as to the forfeiture of a recognizance given for a defendant's appearance, where the statute prescribes the method of proving a breach, that is, by the record of a conviction. It was not a proceeding to enforce a former suspended judgment by punishing the defendant.

The power to suspend judgment exists, but should be exercised fairly and reasonably, so as not to deprive the defendant of the right to assign errors and review the proceedings in the court below, if he desires to do so, and with due regard to his other rights. He must not be oppressed

or unduly burdened by the suspension. There was no abuse of discretion in this case, nor did the court exceed its authority. The suspension was made with the consent of the defendant, and for his benefit, and he has now no reason to complain, having violated his own voluntary promise to demean himself as a good citizen should do.

No error.

Cited: S. v. Tripp, 168 N. C., 152.

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(408)

STATE v. M. T. WHITE, JR.

(Filed 17 September, 1913.)

1. Criminal Law—Recognizance—Acknowledgment—Court's Minutes.

A recognizance is a debt of record acknowledged before a court of competent jurisdiction, with condition to do some particular act, and need not be formally executed by the principal and his surety, but it is sufficient if acknowledged by them and is entered by the court upon its minute-docket.

2. Criminal Law—Recognizance—Scope of Obligation.

A recognizance binds the defendant in a criminal action to appear and answer, and also to stand and abide the judgment of the court; hence, the surety on a recognizance is not relieved of liability because the principal appeared at the trial and entered a submission, and while the sentence of the court was being considered for several days, departed from the State; for the appearance of the defendant at the trial is not a full compliance with the obligation of the surety in respect to the recognizance.

3. Recognizance — Principal and Surety — Special Appearance — Merits — Process.

Where a defendant has defaulted under his recognizance to abide by the sentence of the court in a criminal action, etc., and the surety has appeared and resisted the judgment of the court fixing him with liability under the recognizance, the appearance is general, affecting the merits of the controversy, though he may have called it a special appearance, and it is not required that he should have been served with process.

APPEAL by defendant from *Lane, J.,* at April Term, 1913, of HERTFORD.

The defendant was recognized by a justice of the peace to appear at the next term of the Superior Court. In lieu of bond, a certified check for $200 was deposited by his surety, the Old Dominion Distributing

Company. The defendant appeared before the Superior Court and pleaded guilty. The judge did not immediately dispose of the case, but a day or two later the defendant was called for the purpose of being sentenced, when it appeared that he had left the court and the State. Judgment *nisi* was entered, and *sci. fa.* issued against the defendant and the Southern Distributing Company. (409)

Upon the return of the *sci. fa.* the Old Dominion Distributing Company, the surety, filed a petition, on which appears the following: "Special appearance on part of surety." The petition sets out the facts fully and says, among other things:

"5th. Your petitioner is informed and believes, and so avers, that his Honor, Judge Webb, did not impose sentence at the time of the plea or during said day, though the defendant was in court, but permitted said matter to remain undisposed of until Wednesday or Thursday of said court, when the defendant left the court and returned to his home in Virginia without the sentence of the court having been pronounced against him, as should have been done.

"6th. Your petitioner is informed and believes that after said defendand had been permitted by the court to remain in and at the bar for so long a time without having pronounced sentence against him, and after defendant having left the court, as before set out, and his said bail declared forfeited.

"7th. Your petitioner is informed and believes that when said defendant came into court, waived bill of indictment and entered a plea of guilty, and by so doing he put himself in custody, and said waiver and plea were accepted by the court, he by said acts complied with the law and the terms and conditions of the said bail, and said bail was thereby discharged.

Wherefore your petitioner prays the court:

"1st. That the former order of forfeiture be reversed by this court.

"2d. That said bail be discharged and the deposit heretofore made by your petitioner be returned to him."

The case on appeal states that the surety entered an appearance.

Judgment was rendered condemning the deposit, and the surety excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Roswell C. Bridger for defendant.

ALLEN, J. A recognizance is a debt of record acknowledged before a court of competent jurisdiction, with condition to do some particular act. *S. v. Smith,* 66 N. C., 620. (410)

It need not be executed by the parties, but is simply acknowledged by them, and a minute of the acknowledgment is entered by the court. *S. v. Edney,* 60 N. C., 471.

It binds the defendant to three things:

(1) To appear and answer either to a specified charge or to such matters as may be objected to.

(2) To stand and abide the judgment of the court.

(3) Not to depart without leave of the court. *S. v. Schenck,* 138 N. C., 562.

It follows, therefore, upon these well settled principles, that the judgment *nisi* is regular and valid, as the defendant and his surety entered into the recognizance, and the defendant departed without leave of the court.

The surety contends, however, that no final judgment can, in any event, be entered condemning the deposit, because it entered a special appearance, and it has not been served with process.

The answer to this position is twofold. In the first place, the case states that the surety entered an appearance, which, nothing else appearing, would mean a general appearance, and would be a waiver of the service of process; and in the next place, if the appearance had been entered special, it was in legal effect general, because the motion of the surety affected the merits. *Scott v. Life Association,* 137 N. C., 517.

It is said in *Grant v. Grant,* 159 N. C., 531, that it was held in the *Scott case,* "that a special appearance cannot be entered except for the purpose of moving to dismiss for want of jurisdiction, and that if the motion affects the merits, the appearance is general," and the Court then quotes from the same case with approval, as follows: "The test for determining the character of an appearance is the relief asked, the law looking to its substance rather than to its form. If the appearance is in effect general, the fact that the party styles it a special appearance will not change its real character. 3 Cyc., pp. 502, 503. The question always is, what a party has done, and not what he intended to do.
(411) 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."

We are, therefore, of opinion there is no error.

Affirmed.

Cited: Comrs. v. Scales, 171 N. C., 526.

STATE v. LEVY HYMAN.

(Filed 17 September, 1913.)

1. Constitutional Law—Trial by Jury—Appeal.

Where an appeal from a recorder's court is provided by statute, a a jury trial is afforded the accused in the Superior Court, and hence he is not deprived of this, his constitutional right. Art I, sec. 13.

2. Recorders' Courts—Jurisdiction—Misdemeanors—Definition — Interpretation of Statutes.

Where a statute confers original and exclusive jurisdiction on a recorder's court over petty misdemeanors, the question as to the extent of the jurisdiction conferred is resolved under Revisal, sec. 3291, which defines the line between felonies and misdemeanors to be that a felony is one punishable by death or imprisonment in the State's Prison, and that all other crimes are misdemeanors.

3. Interpretation of Statutes—Conflicting Terms — Perjury — Constitutional Law.

Revisal, 3615, calls perjury a misdemeanor, but makes it a felony by the punishment imposed thereon. Jurisdiction thereof cannot be given to a recorder's court, where the statute specifies that it shall have jurisdiction of misdemeanors; while the two sections of the Revisal should ordinarily be construed together, yet if one provision is unconstitutional and the other is not, the latter will be held as controlling. Const., Art. I, secs. 12 and 13.

4. Constitutional Law—Indictment—Grand Jury—Recorder's Court—Jurisdiction.

The offense if perjury is a felony, and where a conviction thereof is had in the Superior Court, upon appeal from a recorder's court, without indictment found by the grand jury, it is unconstitutional. Const., Art. I, sec. 12. *S. v. Cline*, 146 N. C., 640, and other like cases cited and distinguished.

6. Statutes—Criminal Law—Jurisdiction—Misdemeanors—Legislative Powers—Courts—Jurisdiction.

The Legislature may prescribe different punishments for the same offenses, in different counties, and it may reduce the punishment for all offenses so as to make them misdemeanors; but when the punishment has fixed the grade of the offense, it may not be altered by the name given it in the statute.

WALKER and ALLEN, JJ., concur in result.

APPEAL by defendant from *Cline, J.*, at June Term, 1913, of (412) EDGECOMBE.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

G. M. T. Fountain & Son for defendant.

S. *v.* HYMAN.

CLARK, C. J. The defendant was convicted of perjury in the recorder's court of Edgecombe. On appeal to the Superior Court, he was tried on the original warrant and again convicted. The defendant excepted on the ground that he could not be tried for this offense except upon a bill of indictment found by a grand jury. He relies upon the provision in the Constitution, Art. I, sec. 12: "No person shall be put to answer a criminal charge, except as hereinafter allowed, but by indictment, presentment, or impeachment." Section 13 of the same article which guarantees the right of trial by jury is complied with by a jury trial being given on appeal. *S. v. Lytle,* 138 N. C., at page 742. The requirement of an indictment, presentment, or impeachment is not dispensed with "except as hereinafter allowed" in section 13 in these words: "The Legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal."

The question presented, therefore, is whether perjury is a petty misdemeanor in Edgecombe County. Public-Local Laws 1911, ch. 472, provides that the recorder's court "shall have exclusive original jurisdiction of all other criminal offenses committed within the county below
(413) the grade of felony, and the same are hereby declared to be petty misdemeanors."

Revisal, 3291, defines the line between felonies and misdemeanors as follows: "A felony is a crime which is, or may be, punishable by death or imprisonment in the State's Prison. Any other crime is a misdemeanor." The State, however, relies upon Revisal, 3615, which styles perjury a misdemeanor, though it further provides that it may be punished "by a fine not exceeding $1,000 and imprisonment not more than ten years in the State's Prison." There is a palpable contradiction in the two sections, and while the Revisal must be construed together, yet if one provision leads to a conflict with the Constitution, and the other does not, we must take the latter.

At common law perjury and forgery were misdemeanors, it is true, but there was no imprisonment in the State's Prison prescribed. Revisal, 3615, is a statute which was enacted in 1791 and conformed to the common law, which at that time made perjury a misdemeanor, and the words "State's Prison" were written into this section in The Code of 1883, sec. 1092. The statute which is now Revisal, 3291, defining the line between felonies and misdemeanors, was enacted in 1891, just one hundred years later, and is the latest expression of the legislative will. The words in section 3615 making perjury a "misdemeanor," which was enacted in 1791, evidently retained that definition in Revisal, 3615, by inadvertence, notice not being taken of the fact that imprison-

ment in the State's Prison, which had been added to the punishment in 1883, made it a felony under Revisal, 3291.

In *S. v. Shaw,* 117 N. C., 765, the Court recognized that under Laws 1891 (now Revisal, 3291) any offense "punishable by death or imprisonment in the State's Prison" was a felony, and hence that the word "feloniously" should be used in the indictment for such crimes. In *S. v. Harris,* 149 N. C., 513, *Hoke, J.,* held that the words "feloniously" was not necessary in an indictment for perjury, not because perjury was not a felony, but because the Legislature had prescribed in Revisal, 3247, a form of indictment for perjury, in which that word was omitted, and *Walker, J.,* held to the same purport and on the same ground, in *S. v. Cline,* 146 N. C., 640. (414)

In *S. v. Fesperman,* 108 N. C., 770, we held that the measure of punishment is the test of jurisdiction, and that the Legislature could not confer upon a justice of the peace exclusive jurisdiction of certain offenses unless it restricted the punishment for such offenses to the limit allowed a justice of the peace. That case has been repeatedly cited with approval. See citations to 108 N. C., 772, in Anno. Ed. For the same reason, while the Legislature can reduce any offense whatever to a misdemeanor, or even to a petty misdemeanor, it can only do so effectively by reducing the punishment to that allowed for such offenses. It cannot authorize punishment by imprisonment in the State's Prison for ten years and yet declare such offense to be a petty misdemeanor.

In *S. v. Holder,* 153 N. C., 606, chiefly relied upon by the State, it is held (at p. 610) that perjury is "still a felony," though the word "feloniously" is dispensed with by statute in an indictment for that offense. It was further held that as to the offense charged in that case (throwing stones at a train) the word "feloniously" was not essential. The ruling in substance was that when the statute has styled an offense a misdemeanor which is yet punishable by imprisonment in the State's Prison, the effect is to dispense with the word "feloniously" in the indictment; but it was not held in that case, nor has it been held in any other, that when the Legislature styles an offense a misdemeanor, but leaves it punishable by imprisonment in the State's Prison, that the constitutional requirement of an indictment by a grand jury is dispensed with. Dispensing with the word "feloniously" in no wise impinges upon any constitutional requirement.

The Legislature may prescribe different punishments for the same offense, in different counties, and it may reduce the punishment for all offenses, even those now punished capitally, to an extent that would make any offense a "petty misdemeanor." But calling an offense a petty misdemeanor does not make it so, when the punishment imposed makes

it a felony. In *S. v. Lytle,* 138 N. C., 738, the Court held: "The Constitution not having defined 'petty misdemeanors,' it was com-
(415) petent for the Legislature to define the offenses which should be so classified, *provided the punishment therein is not that of felonies.*" We now reaffirm this. In that case (on page 743) the Court states that misdemeanors at common law were divided into two classes: "(1) Those which by reason of their heinous nature might be punished corporally, and (2) those which could not be so punished." It is then held that the latter can be termed petty misdemeanors, but that the former could not be so held unless the punishment was reduced by statute to what would be the punishment for petty misdemeanors. The Court said (p. 744): "The General Assembly can reduce the punishment of any and all offenses, and leave no offense above the grade of petty misdemeanors; but the punishment must not be that of felony, for the punishment controls the definition. *S. v. Fesperman,* 108 N. C., 770." That case has been cited and approved, *S. v. Jones,* 145 N. C., 460; *S. v. Shine,* 149 N. C., 480; *S. v. Dunlap,* 159 N. C., 491, and in several other cases. In the last named case the Legislature had made the larceny of goods "less than $20 in value" punishable "not to exceed imprisonment in the county jail, or on the public roads, not more than one year," and the Court held that a statute making such offense a petty misdemeanor and putting it within the jurisdiction of the recorder's court was constitutional, for the punishment was that of a petty misdemeanor.

We are therefore of opinion that the offense of perjury being punishable in the county of Edgecombe by imprisonment in the State's Prison, that it is not an offense "below the grade of felony," and that the statute, Public-Local Laws 1911, ch. 472, does not declare it to be a "petty misdemeanor." Hence the recorder's court had no jurisdiction thereof, and on appeal to the Superior Court the defendant could not be tried, unless a bill had been found by a grand jury.

Judgment arrested.

WALKER and ALLEN, JJ., concur in result.

Cited: *S. v. Tripp,* 168 N. C., 156; *S. v. Tate,* 169 N. C., 374.

(416)

STATE v. JAMES RUFFIN.

(Filed 24 September, 1913.)

Criminal Law—Bailee—Larceny—Trespass.

One who is intrusted by a person to mail a letter given by another for that purpose, and breaks open the letter before mailing and extracts and appropriates money therefrom, is guilty of larceny, upon the principle, if considered as a bailee, that he has broken "bulk and appropriated the goods or a part of them to his own use." *Semble*, a conviction of larceny could be sustained upon the ground that the defendant had only the care or custody of the property, and not the legal possession. Hence the position cannot be sustained that a conviction of larceny could not be had because the defendant had acquired possession with the consent of the owner.

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

Prosecution for larceny. The facts in evidence tended to show that on a certain Sunday night, 1913, Robert Royster had several letters written, and same were put in envelopes, sealed and addressed to the respective parties; that one of these letters so inclosed and sealed was addressed to his father, Spot Royster, Virgilina, Va., and in that one said Robert had put $10 in bills. Next morning Robert gave these letters to Eugene Sandiford to mail, and Sandiford handed them to defendant for like purpose. There was further evidence tending to show that defendant having opened the envelope and taken the money, resealed and mailed the letter at the post-office in Henderson. The court charged the jury that if they should find beyond a reasonable doubt that defendant secured the letter from Sandiford for mailing and undertook to mail same at his request, that the money was then in it and he broke open the letter and took it out and appropriated it to his own use, they would render a verdict of guilty; that the breaking of the letter was a sufficient taking within the proper definition of the crime. There was a verdict of guilty, and from sentence to jail for eight months, defendant excepted, assigning for error that on the facts in evidence defendant could not be convicted of larceny, having acquired possession by consent of owner or his bailee.

Attorney-General and Assistant Attorney-General for the State (417)
Thomas M. Pittman for defendant.

HOKE, J., after stating the case: At common law it was regarded as an essential feature of the crime of larceny that the party charged should have acquired possession of the property against the will of the owner and ordinarily with intent to steal at the time. The taking considered

necessary to make out the offense involved the idea of a trespass on the possession of the owner, either actual or constructive. The principle was held to include cases where possession was acquired from the owner *animo furandi,* by trick or fraudulent contrivance. *S. v. McRae,* 111 N. C., 665; *People v. Miller,* 169 N. Y., 339, reported with instructive editorial note, 88 Amer. St., 546. And convictions were upheld when the party charged had only the custody of the property, the constructive possession remaining with the owner. Instances of this occurring when a servant or employee intrusted by the master with goods or money for a specific purpose, in breach of this purpose appropriates same to his own use with felonious intent. *S. v. Jarvis,* 63 N. C., 528.

There is high authority for the position that the conviction in the present case could very well be sustained on the ground that defendant had only the care or custody of the property, and not the possession. *Murphy v. People,* 104 Ill., 528; *Walker v. State,* 9 Ga. App., 863.

We are not called on to determine whether this view is in accord with our decisions more directly relevant to the question presented, the defendant not being the servant or employee of the prosecutor (*S. v. Copeland,* 86 N. C., 692-695; *S. v. England,* 53 N. C., 399; *S. v. Martin,* 34 N. C., 157), being of opinion that on the record the defendant has been properly convicted, whether considered originally as bailee or only as custodian. It is the well established principle that "a bailee who breaks bulk and appropriates the goods or a part of them to his own use with felonious intent is guilty of larceny." 18 A. & E., 479; *Robinson v. State,* 1 Coldwell, 122; *S. v. Faircloth,* 29 Conn., 47; *Rex v.*
(418) *Jones,* 32 Amer. Com. Law, 474; *Rex v. Jenkins,* 38 Eng. Com. Law, 27.

In *Faircloth's case, supra,* citation is made from *my Lord Coke* as follows: "If a bale or pack of merchandise be delivered to carry to one at a certain place, and he goeth away with the whole pack, this is no felony; but if he open the pack and take anything out, *animo furandi,* this is larceny." 3 Coke's Inst., 417.

In *Robinson's case, supra,* the principle was applied where the prosecutor left his room and trunk unlocked in charge of defendant, who in prosecutor's absence opened the trunk and took money out of it with felonious intent.

And again in *Rex v. Jones, supra,* to a case where defendant broke open a letter intrusted to him to mail and abstracted money from same, the very case we have here, and is recognized as the correct position in *S. v. England, supra,* an authority to which we were referred by counsel.

There is no error, and the judgment is affirmed.

No error.

STATE v. A. W. COBB.

(Filed 24 September, 1913.)

1. Homicide—Murder—Evidence Sufficient.

Evidence in this case is held sufficient for conviction of murder in the first degree for waylaying and killing the deceased with a pistol shot at night, when he was going from his store to his home with a sum of money, accompanied by his son, which tends to show that the prisoner knew of the custom of the deceased, conspired with another to do the act, agreeing to use bicycles to keep from being trailed by bloodhounds; that they borrowed bicycles and that the bicycle tracks leading from the place of the crime corresponded with the tires of the one borrowed by the prisoner; that the foot tracks at this place corresponded with the size and shape of the prisoner's shoes, and were successfully trailed by bloodhounds; that it was too dark for the son of the deceased to identify the prisoner at the time of the crime, but that the size of the prisoner was that of the murderer, and that the latter wore a cap, such as the prisoner usually wore.

2. Homicide—Murder—Admissions—Instructions—Appeal and Error.

Where one of two prisoners on trial for murder is released, his admissions cannot be held for error, on the ground of duress, on an appeal from the conviction of the other, as the objection was only competent against the one making it, and became irrelevant, upon the instruction of the trial judge that the admissions should not be considered by the jury against the other defendant.

3. Homicide—Murder—State's Witness—Custody—Accessory—Evidence—Instructions.

The mode of examination of witnesses is a matter within the sound discretion of the trial judge, and not reviewable on appeal, in the absence of a gross abuse thereof; and where one of two defendants being tried for murder has been used as a State's witness, and as to him a verdict of not guilty has been entered, it will not be held for error on appeal from conviction of the other that the trial judge, in the presence of the jury, and at the solicitor's request, ordered him taken into custody to be held for an indictment of accessory before and after the fact.

APPEAL by defendant from *Lane, J.*, at June Term, 1913, of (419) HALIFAX.

The defendant Cobb and Henry Gurkins were jointly indicted and tried for the murder of Thomas Shaw. During the trial the State agreed to a verdict of not guilty as to Gurkins. The defendant Cobb was convicted of murder in the first degree and sentenced to death. The defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert and E. L. Travis for the State.

R. C. Dunn, Joseph P. Pippen for defendant.

BROWN, J. There are sixty exceptions in the case on appeal. We have examined each one of them and the entire record with that care which the importance of the case demands, but will not undertake to comment on them *seriatim,* as it would unduly lengthen this opinion, and would be threshing over again much "old straw."

The most important contention of defendant is that the court should have allowed his motion to nonsuit or direct a verdict of not
(420) guilty at conclusion of the evidence, upon the ground that the evidence is insufficient to convict.

The State's evidence tends to prove that the deceased was a merchant, living about 2 or 3 miles from Rosemary, and his store was situated about 100 yards from his dwelling. He was in the habit of closing the store about 10 o'clock at night on Saturdays, and carried the money with him from the store to the house. On the night of the homicide he left the store about 10 o'clock with his son, Shelton Shaw.

It was a dark night and they had just come out of the light of the store. When they reached the corner of the house porch a man, who was sitting on the ground, stood up and said, "Hands up!" The deceased ordered him to get away, and the man then shot.

The son of the deceased testified that he could not recognize the man, or tell whether it was a white or a black man, on account of the darkness of the night, but that he was wearing a cap and that he was of the height and size of the defendant. There was other testimony that the defendant usually wore a cap.

There is testimony tending directly to prove the conversation of Cobb and Gurkins, that they were planning to rob the deceased, and if necessary kill him; that they were to borrow bicycles so as to escape being trailed by hounds; that the agreement was made; and that Cobb said, "I will put a gun in his face, and we will get that kit. We will get on the bicycles and ride back to town. Dam sure thing, bloodhounds can't track a bicycle."

The deceased was shot and killed after this, on Saturday night, 3 May.

C. O. Byrd testified that on 2 May he saw Cobb sitting on the steps of the church, and that he engaged the witness in conversation. This witness testified: "He told me, 'I saw a thing that looked good to me out in the country yesterday, and all it takes is nerve, and what it takes to get it, I got it.' I said 'Yes, and you will get got, too.' He said, 'Why, can't you get a job?' I said, 'Yes; I have several jobs here to

finish, and cannot save any money in Norfolk.' He said, 'I am (421) going Sunday morning, if things have come out as I have planned.'"

There is evidence that defendant borrowed two bicycles on the evening of the homicide, and that the bicycle track leading from the scene of homicide had eight ridges in the tires, corresponding exactly with the wheel defendant borrowed the same evening from Claude Taylor.

There was evidence of successful trailing with hounds and evidence that the shoe tracks leading from the scene of the homicide were carefully measured and corresponded exactly with those of defendant.

Then there is the evidence of Gurkins, and much circumstantial evidence tending strongly to establish defendant's guilty, which it is unnecessary to set out.

The whole evidence taken together well warranted his Honor in denying defendant's motion, and in submitting the question of his guilt to the jury.

A dozen exceptions were taken to the admission of the declarations of Gurkins. It is first contended that these were made while Gurkins was in custody, and under circumstances tending to show that Gurkins made them under duress.

This objection is open to Gurkins only, and cannot be made by this defendant. As Gurkins was acquitted, they are now irrelevant.

It is contended that these declarations were incompetent as against Cobb, and should have been excluded. They were admitted while Gurkins was on trial, and were competent as against him. His Honor very explicitly and repeatedly told the jury that Gurkins' declarations were competent against him only, and cautioned them not to let them weigh against Cobb.

We think his Honor's directions fully complied with the rulings of this Court. *S. v. Collins,* 121 N. C., 667; *S. v. Brite,* 73 N. C., 26.

Eight exceptions are taken to the mode of examination of witnesses, leading questions, etc. This is a matter within the sound discretion of the trial court, and this Court will not review it except in cases of very gross abuse of such discretion. *Bank v. Carr,* 130 (422) N. C., 481; *Crenshaw v. Johnson,* 120 N. C., 271.

The defendant also complains that when the State rested its case, the solicitor, in the presence of the jury, requested the court to hold Henry Gurkins until the solicitor could send a bill charging him as accessory before and after the fact of the murder of Shaw.

This was asked after the State had entered a verdict of "not guilty" as to the defendant Gurkins, and had used him as a witness for the State. The request was granted, and the court ordered the sheriff to take Gur-

kins into custody. This exception is taken to the action of the court in allowing this to be done, and in ordering Gurkins into custody in the presence of the jury. The mode of conducting the trial is in the discretion of the trial judge, and the exercise of discretion is not reviewable unless it appears that there has been an abuse of the discretion. There is nothing in this record to show that there was an abuse of discretion or that the action of the court was prejudicial to the defendant. *S. v. Moore,* 104 N. C., 743.

It appears to us from an examination of the voluminous record in this case that the defendant has had a fair trial, and that he has no just reason to complain of the rulings or charge of the court.

No error.

STATE AND MOREHEAD CITY v. ATLANTIC AND NORTH CAROLINA RAILROAD AND NORFOLK SOUTHERN RAILROAD COMPANIES.

(Filed 1 October, 1913.)

1. Railroads—Lessor and Lessee.

A lessee railroad is bound to the observance of any municipal regulation binding upon its lessor.

2. Railroads—Charter—Roadbed—Conditions Implied—Cities and Towns—Police Powers—Ordinance—Street Grading.

A railroad company in accepting its charter does so upon condition, necessarily implied, that it will conform at its own expense, to all reasonable and authorized regulations of towns existing along its route or those which thereafter may grow up thereon, relative to the safe and proper use of the streets and thoroughfares; and where a roadbed of such company lies along the streets of a town, an ordinance is enforcible, as within the exercise of the police powers of the town, requiring the railroad, at a reasonable expenditure under the conditions existing, to make the roadbed conform to the grade of the streets and so maintain it with reference to its drain ditches that it may be crossed at all points with ease and safety.

(423) APPEAL by defendant from *O. H. Allen, J.,* at March Term, 1913, of CARTERET.

Defendants were convicted of violating the following ordinance of Morehead City:

"Be it ordained, that all railroad companies having ditches along its right of way and along Arendell Street are hereby required to fill the same up to a grade with the streets, and further required to maintain

such right of way in a reasonable grade with said street as to render it in a condition that it can be crossed at all points with ease and safety."

The defendants appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

E. H. Gorham for Morehead City.

J. F. Duncan, L. I. Moore for defendants.

BROWN, J. The only matter of law presented by the several assignments of error relates to the validity of the above ordinance.

The defendant the Atlantic and North Carolina Railway was incorporated in 1854 and constructed its railroad in 1858. The defendant the Norfolk Southern is its lessee, and of course bound to observe any municipal regulation that would bind its lessor.

At the time the road was constructed, Morehead City was not in existence. It was incorporated in 1860, and has since grown up on both sides of the railroad for some considerable distance, until it has become a flourishing town of 3,000 inhabitants.

All the evidence shows that from Twelfth Street to the cor- (424) porate limits of the town, at Twenty-fourth Street, ditches were opened on each side of the railroad track, on the right of way, and that these ditches were necessary for the drainage of the roadbed, but that they could be covered and closed up or tiled at moderate expense.

This would not only beautify the town by closing up unsightly ditches, but would render the crossing of the railroad at any point by pedestrians very much safer.

When the defendant accepted its charter from the State, it did so upon the condition, necessarily implied, that it would conform at its own expense to all reasonable and authorized regulations of the town as to the use of the streets and thoroughfares rendered necessary by its growth for the safety of the people and the promotion of the public convenience.

It is settled beyond controversy that railroad corporations, although operating under a legislative franchise, come necessarily within the operation of all reasonable police regulations that are lawfully enacted for the protection of life and property. *Railway v. Connersville,* 218 U. S., 336.

The Supreme Court of the United States has said: "The power, whether called police, governmental, or legislative, exists in each State, by appropriate enactments not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and there-

fore to provide for the public convenience and the public good." *R. R. v. Chicago,* 99 U. S., 635; *R. R. v. Ohio,* 173 U. S., 285.

We think the validity of this ordinance and its reasonableness is fully sustained by the decision of this Court in *R. R. v. Goldsboro,* 155 N. C., 356.

It is no great hardship upon the defendants to require them to tile these ditches at their own expense.

Railways not only expect cities and towns to grow up along their lines, but they do much to promote their development, because they get the benefits to be derived from such growth in greatly increased business.

It is simple justice, therefore, to require them to conform to such
(425) reasonable regulations of such municipalities as are necessary for the safety and convenience of the public.

No error.

STATE v. OSCAR WATKINS.

(Filed 22 October, 1913.)

1. Indictment—Spirituous Liquors—Persons to Jurors Unknown—Actual Sale—Trial—Evidence.

To convict under an indictment of sale of intoxicating liquors "to some person to the jurors unknown, it is as necessary to offer evidence of an actual sale to the unknown person as if his name had been inserted in the indictment.

2. Same—Identification of Defendant—Verdict, Directing.

On a trial upon indictment for the unlawful sale of spirituous liquor alleged to have been made prior to the operative effect of chapter 44, Laws 1913, there was evidence only that a barrel, marked to defendant's address, was found at his railroad shipping point, containing 30 gallons of whiskey; that the barrel was receipted for and and was delivered to some person by the railroad agent, but the signature to the receipt was not identified as the handwriting of the defendant and the defendant was not identified as the one who received the barrel. The rule of evidence that the possession of more than one quart of whiskey shall be *prima facie* evidence of sale not applying to the county wherein the sale is alleged to have been made, it is *Held,* the court should have instructed the jury, upon the evidence, to return a verdict of not guilty.

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

APPEAL by defendant from *Ferguson, J.,* at February Term, 1913, of COLUMBUS.

S. *v.* WATKINS.

Indictment for the sale of liquor to persons whose names are to the jurors unknown.

At the conclusion of the evidence, the defendant requested the court to instruct the jury to return a verdict of not guilty. Refused. Defendant excepted. Verdict of guilty. From the judgment rendered, defendant appealed.

Attorney-General and Assistant Attorney-General for the State. (426) *Schulken, Toon & Schulken for defendant.*

BROWN, J. The following is all the evidence introduced on the trial of this case:

G. W. Rushing, witness for the State, testified: "I saw one barrel in the railroad depot at Hallsboro, marked O. Watkins. This barrel had whiskey marked on it. The barrel looked like it would hold about 30 gallons. I do not know what was in the barrel."

H. O. Harvel, witness for the State, testified as follows: "I am agent for the Atlantic Coast Line Railroad Company at Hallsboro, N. C. On 5 August, 1912, a barrel containing about 30 gallons, marked 'O. Watkins,' and also marked on the barrel 'Whiskey,' was put off the train at Hallsboro, N. C. Some time after the arrival of this barrel, and while I was agent, some one came to the railroad office and receipted for this barrel. I do not know whether Oscar Watkins carried the barrel away or not. I do not know who got the barrel. I only know that some one receipted for it in the name of Oscar Watkins. I do not know where the defendant lives. I did not know Oscar Watkins at the time the barrel was receipted for."

C. L. Benton, witness for the State, testified as follows: "I saw a barrel of whiskey, containing about 30 gallons, in the railroad warehouse at Chadbourn, N. C., marked 'O. Watkins.' When I saw the barrel of whiskey in the warehouse it was in bad order and the whiskey was leaking out. I saw some parties catching the whiskey as it was leaking out of the barrel, drinking it, and others catching it in buckets and carrying it away. The defendant Watkins was not there when I saw it. I do not know what became of the barrel of whiskey. Oscar Watkins lives at Pine Log, about 5 miles from Chadbourn and about 8 miles from Hallsboro."

It is to be observed that the defendant is indicted for selling whiskey to some person to the jurors unknown. While this form of indictment is recognized, yet it is as much incumbent on the State to offer evidence tending to prove an actual sale to the unknown person (427) as if his name had been inserted in the indictment. *S. v. Dowdy,* 145 N. C., 432; *S. v. Dunn,* 158 N. C., 654; *S. v. McIntyre,* 139 N. C., 599.

There is no evidence that the defendant in this bill ever received the whiskey, much less sold it. The evidence wholly fails to identify this Oscar Watkins with the person who received the whiskey.

The receipted book was not put in evidence, and there was no attempt to prove the defendant's handwriting, as well as no attempt to prove that he ever sold any of it.

This case seems to have been tried as if the act of 1913, ch. 44, had been in effect. That act creates two new offenses in respect to intoxicating liquors as well as a new rule of evidence contained in section 5; but that act went into effect on 1 April, 1913.

This bill was returned in November, 1912, and the trial took place and judgment was pronounced in February, 1913. Therefore, the act of 1913 can have no bearing upon this case, and it must be determined under the law in force prior to that act.

Nor does the act considered by us in *S. v. Barrett,* 138 N. C., 630, apply. This statute declared that the possession of more than one quart of whiskey should be *prima facie* evidence that the party in whose possession it was found had it for the purpose of sale.

The act applied only to Union County, and there was no such special act in force in Columbus County when this offense is alleged to have been committed. His Honor erred in refusing the instruction.

New trial.

CLARK, C. J., dissenting: There was ample evidence to go to the jury tending to show possession of the barrel of whiskey by the defendant. The agent of the railroad testified that on 5 August, 1912, a barrel of whiskey containing about 30 gallons, marked "Whiskey" and addressed to O. Watkins, was put off the train at Hallsboro; that soon after, some one came to the railroad office, signed the receipt for this barrel,
(428) in the name of Oscar Watkins, and carried it off. Another witness testified that he saw a barrel of whiskey containing about 30 gallons in the railroad warehouse at Chadbourn, N. C., marked O. Watkins. It is also in evidence that the defendant Oscar Watkins lived about 5 miles from Chadbourn and about 8 miles from Hallsboro. There is no evidence that any other Oscar Watkins lived in that section. Nor is there any evidence tending to show that the man who got the barrel of whiskey at Hallsboro was not the consignee, nor that his signature on the books of the company receipting for the same was a forgery.

Unless such signature was a forgery, and unless the party who committed the forgery and received the whiskey was guilty also of larceny, then there was evidence to go to the jury that the defendant was in possession of 30 gallons of whiskey, and possibly of 60 gallons, for there

was one barrel consigned to him at Hallsboro and another at Chadbourn. This evidence was more than a scintilla.

There is no presumption of law that any one committed two felonies, larceny and forgery. The entry was made in due course of business. Receipting for the whiskey on the railroad books in the name of Oscar Watkins and taking it away, in the absence of any evidence to the contrary, was certainly sufficient to go to the jury on the question of possession. This was all the evidence that the State can reasonably be called on to trace the whiskey to his possession. It was easy for the defendant to negative this fact if he did not receive the whiskey; and he would have done so, if he could. There is no evidence to show that there was another O. Watkins in that section. The evidence was sufficient to satisfy the jury, and did satisfy them, that the defendant was the party who got the whiskey. It was addressed to him and receipted for in his name.

His Honor correctly charged the jury: "The possession of one barrel of whiskey shipped to the defendant at one depot, if you find that it was shipped to him and receipted for by him, and the shipping of another barrel to him at another date, if you so find, are circumstances tending to show that the defendant sold whiskey as charged; but that is for you to say." In *S. v. Barrett,* 138 N. C., 630, which was an (429) indictment under the Union County statute which made the possession of more than 1 quart of whiskey *prima facie* evidence of an intent to sell, *Walker, J.,* says in his concurring opinion that, independent of the statute (the defendant having in possession two 5-gallon kegs, a half-gallon jug, and 1 pint bottle), "having with him so large a quantity of liquor in packages of different sizes and covered over with a laprobe was sufficient of itself to constitute *prima facie* evidence of the defendant's guilty possession. . . . The mere fact that reference was made to the statute did not prejudice the defendant when his possession under the circumstances, clearly shown by the evidence, and not disputed, was sufficient to carry the case to the jury."

In this case there was ample evidence to satisfy a jury that the defendant was in the possession of 30 gallons receipted for and carried away in his name; and if the possession in the *Barrett case* of 10¾ gallons was sufficient to carry the case to the jury, certainly there was more than sufficient in this case.

In *S. v. Barrett, Brown, J.,* in his dissenting opinion, says: "Irrespective of the provisions of the act, I am of opinion that there was sufficient evidence to be submitted to the jury that the defendant did have in his possession liquor with the intent to sell it." Under our decisions, proof of possession supports the charge of selling as effectively as it does the charge of having possession with the intent to sell. *S. v. Dunn,* 158 N. C., 654.

There was evidence to satisfy the jury that this defendant was receiving whiskey in large quantities, a barrel at a time, and in the absence of any evidence tending to show the character of the possession of so much whiskey, the jury was warranted in finding, as they did, that the defendant was engaged in selling whiskey to persons unknown, as charged in the bill of indictment. *Hoke, J.*, in *S. v. Dowdy,* 145 N. C., 432; *S. v. McIntyre,* 139 N. C., 399. For what other purpose, if unexplained did he have it?

The court carefully and correctly charged the jury that they "must be satisfied beyond a reasonable doubt that the defendant sold liquor to persons unknown; that the possession of the whiskey, if the jury should find that it was shipped to and receipted for by him, was a circumstance tending to show that the defendant sold whiskey; but that it was (430) for the jury to say what was the weight to be given to those circumstances."

The jury found the defendant guilty. There being no evidence that there was any other O. Watkins in that neighborhood, and not the slightest evidence tending to show that any one committed forgery or larceny to get possession of the whiskey, nor that the railroad company would have delivered the barrel without the identification of the consignee, could the jury find otherwise than that the defendant obtained possession of the whiskey? Under the authority of the concurring opinion of *Walker, J.*, and the dissenting opinion of *Brown, J.*, in *S. v. Barrett, supra,* the possession of one barrel was the possession of three times as much as was necessary to constitute sufficient possession to submit the question of having the liquor to sell. If the defendant received both barrels, which he did not deny by any evidence, then the case was six times as strong against the defendant as in *Barrett's case.*

The public policy of a State is declared by the Legislature, which is the lawmaking body. The policy of this State in regard to suppressing the traffic in intoxicating liquor was clearly declared by the Legislature of 1907 and ratified on a *Referendum* in 1908 by an overwhelming majority at the ballot box. The province of the courts is to construe the law in accordance with the intent with which it was enacted. Whenever the courts in this State have found a defect that would interfere with the enforcement of this law, the Legislature has promptly corrected it. And the public intent to do this has been declared in the most explicit way, in the "Search and Seizure" law of 1913, ch. 44, whose title is "To secure the enforcement of the laws against the sale and manufacture of intoxicating liquor."

It is doubtful if a jury could be impaneled in this State who would not find upon this uncontradicted evidence that the defendant received this

whiskey, and that the presumption which, under the opinions (431) in *S. v. Barrett* above cited, was raised from the possession of this quantity of liquor, was not rebutted. Indeed, there was no evidence whatever tending to rebut either the possession of the whiskey by the defendant or that he sold it. Certainly this "jury of the vicinage" had "no reasonable doubt," and the defendant sought to get the court to hold him not guilty as a matter of law and not of fact.

His Honor did not charge, as he might have done, under the authority of the opinions in *S. v. Barrett,* above cited, that the possession of so large a quantity of whiskey raised a presumption that he had the whiskey for sale, nor that the whiskey being consigned to the name of the defendant and receipted for in his name raised a presumption that he received it. The Court merely charged that the jury should consider these as evidence, and unless they were satisfied beyond a reasonable doubt that the defendant sold whiskey, to find him not guilty. The court might well have charged that the delivery of the barrel to the person who receipted for it in the name of the defendant and consignee raised a presumption that such consignee received the whiskey. 16 Cyc., 1072. But he did not do so, and left the evidence on both points to the jury, not as presumptions, but merely as circumstances to be weighed by them.

ALLEN, J., concurs in dissenting opinion.

NOTE. Not necessary to allege a sale to any particular person. Laws 1913, ch. 44, sec. 6; *S. v. Little,* 171 N. C., 805.

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(432)

STATE v. ZIP WILKERSON.

(Filed 5 November, 1913.)

1. Spirituous Liquor—Unlawful Sale—Possession—Prima Facie Case—Burden of Proof—Interpretation of Statutes.

Chapter 44, Laws 1913, making it unlawful, with certain exceptions, for any person, etc., to keep in his possession for the purpose of sale, spirituous liquors, etc., enacting that the possession of more than one gallon thereof shall constitute *prima facie* evidence of the violation of the statute, does not relieve the State from the burden of the issue and of proving that the one in whose possession more than one gallon of whiskey was found, under its "search and seizure" provision, and who was indicted and tried under this statute, was guilty of the violation of the law, beyond a reasonable doubt, and while the *prima facie* case, unexplained, is sufficient to sustain a verdict of guilty, yet the

defendant is not required to show, by the greater weight of the evidence, that the whiskey was in his possession for lawful purposes, for such, in effect, would require him to establish his own innocence, and relieve the State of the burden of the issue, which is placed upon it.

2. Spirituous Liquor—Burden of Proof—Prima Facie Case—Instructions, Conflicting—Trials.

Where a defendant is tried for the violation of the prohibition laws of this State, under chapter 44, Laws 1913, making the possession of more than one gallon of spirituous liquor *prima facie* evidence of its violation, an erroneous instruction which placed upon him the burden of showing that he did not have the spirituous liquors for an unlawful purpose, is not cured by also placing the burden upon the State to show that he was guilty of the offense charged beyond a reasonable doubt.

3. Spirituous Liquor—Unlawful Sale—Principal and Agent—Trials—Questions for Jury—Interpretation of Statutes.

It is not in violation of our prohibition law for one to receive here money from another as his agent and go to another State by private conveyance or otherwise, and purchase spirituous liquor there, and deliver it here, when his act as agent is *bona fide* (Revisal, sec. 3534); and he is entitled to receive a reasonable compensation, at least, for the services thus rendered, but not as any part of the purchase price, the intent and the true nature of the transaction, in proper instances, being questions for the jury under instructions from the court on the law applicable.

4. Same—Instructions.

Upon a trial for a violation of our prohibition law, there was evidence tending to show that the defendant was found in possession of eleven gallons of whiskey, which possession, under chapter 44, Laws 1913, was made *prima facie* evidence of an intent to unlawfully sell the same or of keeping it for sale, contrary to the statute. There was evidence in behalf of the defendant that he had received from each of ten customers at his store the price for one gallon of whiskey, for which he agreed to go to Virginia and make the purchase as their agent, charging 25 cents a gallon for his services as such. He was returning from his trip with eleven gallons of whiskey, having purchased one gallon for his own use, when he was seized and searched and the whiskey was found in his possession: *Held*, it was reversible error for the court to instruct the jury that the defendant must show *by the preponderance of the evidence* that he was acting *bona fide* as the agent for others, as testified, in order to acquit him.

5. Spirituous Liquor—Offense Charged—Conviction—Constitutional Law.

Where one is indicted for the sale of spirituous liquor, and tried under chapter 44, Laws 1913, making possession of a certain quantity *prima facie* evidence of a guilty purpose in having it, he may not be convicted under the provisions of chapter 133, Laws 1911, known as the "Club Act," for it would be a violation of his constitutional rights to charge him with the commission of one crime and convict him of a different one.

S. *v.* WILKERSON.

6. Criminal Law—Burden of Proof—Directing Verdict.

The burden of proof being on the State to show that a defendant committed the criminal offense with which he stands charged, it is error for the court, under any circumstances, to direct a verdict of guilty.

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

APPEAL by defendant from *Cline, J.*, at October Term, 1913, (433) of VANCE.

The defendant was arrested upon a warrant issued by the recorder of Vance County, and based upon the following affidavit of M. N. Parrish:

M. N. Parrish, being duly sworn, complains and says that at and in said county on or about 28 April, 1913, Zip Wilkerson did unlawfully and willfully have in his possession 11½ gallons of whiskey for sale, contrary to the statute in such case made and provided, and against the peace and dignity of the State. M. N. PARRISH.

He was tried before the recorder, convicted, and appealed to the Superior Court. The evidence at his trial in the latter court tended to show that defendant had been employed by ten men near Henderson in Vance County, who were customers at his store, to go to Virginia and buy for them 10 gallons of whiskey, 1 gallon for each man. He agreed to do so if they would pay him $2.50 for the service. Each (434) of them gave him $2 to pay for the whiskey, and 25 cents for buying and hauling it. He hauled for the public, and kept a horse and buggy and also a wagon for the purpose. He went to Virginia in his buggy, bought the liquor there with the money, and was hauling it back for delivery to them, when, on the way to his home, he was arrested by the officer, with the whiskey in his possession. He bought a gallon for himself, and had in his wagon, at the time of the arrest, 11 gallons of corn liquor in three kegs and two bottles. The gallon which he bought for himself was for his personal use and not for sale, nor did he know that any of the other persons for whom he bought the liquor intended to sell it or any of it. He received only 25 cents from each man for buying and hauling it.

Upon this evidence, which in the main was the testimony of the defendant himself, at least the material parts of it, the court charged the jury that if they found, beyond a reasonable doubt, the defendant had in his possession more than one gallon of spirituous liquor at the time of his arrest, and he was not a druggist and had no medical depository, the law made it *prima facie* evidence of the violation of the act passed by the General Assembly in 1913, known as the "Search and Seizure Law";

that is to say, if those facts had been proven to them beyond a reasonable doubt, that statute puts upon the defendant the duty of going forward and satisfying the jury by the greater weight of the evidence that, in fact, he did not have the liquor in his possession for the purpose of sale, and, further, that if he bought the liquor as above set forth, and it was taken while in his possession before the bulk was broken or there had been any distribution among the men for whom he bought it, then, as matter of law, he was guilty of violating the act of 3 March, 1913, known as the "Search and Seizure Law," and they should convict; but if they had a reasonable doubt about it, they should acquit. The jury returned a verdict of guilty. Judgment was entered thereon, and defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Cal-
(435) *vert for the State.*

Henry T. Powell and T. M. Pittman for defendant.

WALKER, J., after stating the case: The defendant was charged with a violation of the act of 1913, it being chapter 44, entitled "An act to secure the enforcement of the laws against the sale and manufacture of intoxicating liquors," ratified 3 March, 1913. The act makes it unlawful for any person, firm, association, or corporation, other than druggists or medical depositories, duly licensed, "to have or keep in his, their, or its possession, for the purpose of sale, any spirituous, vinous, or malt liquor," and makes proof of any one of certain facts *prima facie* evidence of the violation of the act; and, among others, it is provided that "the possession of more than one gallon of spirituous liquors at any one time, whether in one or more places," shall constitute such *prima facie* evidence of the fact that it is kept for sale in violation of the act.

Having clearly before us the nature of the particular charge against the defendant, the law alleged to have been violated and the proof offered in support of the charge, we are prepared now to consider the objection urged by the defendant's counsel to the charge of the court.

The jury were instructed that the fact of his having in his possession more than one gallon of the liquor made out a *prima facie* case against the defendant. If the court had stopped here, and not qualified this instruction, it would have been correct; but it did not do so, but went beyond the terms of the statute and the law when it further charged that it *then* was the duty of the defendant "to go forward and satisfy the jury, by the greater weight of the evidence, that he did not have the liquor in his possession for the purpose of sale." In this further instruction we think there was error. The defendant, as we have shown, is charged, under the act of 1913, with unlawfully having spirituous liquor

in his possession for the purpose of selling it, and nothing else, and proof of the possession of more than one gallon of such liquor is made *prima facie* evidence of the unlawful act, which is, that it is held by him for the purpose of sale, an act forbidden by the general law. It (436) is not made unlawful for a person to have more than one gallon of spirituous liquor in his possession, but it is criminal to have possession of that quantity for the purpose of sale, and while the bare possession of so much may, in itself and as a fact, be innocent, it is yet made *prima facie* evidence of guilt under the statute, as in *S. v. Barrett,* 138 N. C., 630. But it is only evidence, and while it has the added force or weight of being *prima facie,* the latter means no more than that it is sufficient for the jury to convict upon it, alone and unsupported, if no other proof is offered; but upon the whole evidence, whether consisting of the mere fact of possession or of additional facts, the jury are not bound to convict, but simply may do so if they find, beyond a reasonable doubt, or are fully satisfied that the defendant is guilty. *Prima facie* means at first; on the first appearance; on the face of it; so far as can be judged by the first disclosure; presumably. These are the definitions of the law, as we learn from the books. Black's Dict. (1 Ed.), 539.

The jury are no more required to convict upon a *prima facie* case than they are to acquit because of the presumption of innocence. They must judge themselves as to the force of the testimony and its sufficiency to produce in their minds a conviction of guilt. In civil cases the rule is the same (with a difference in the quantum), as *prima facie* evidence only carries the case to the jury, and does not entitle the party in whose favor it has been offered to a verdict as matter of right.

Referring to this rule, as applied to civil cases, and the presumption, or *prima facie* case, arising under the maxim, *res ipsa loquitur,* which presents one of the strongest of such cases, the Supreme Court of the United States has recently said: "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking; but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipso loquitur,* where (437) it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well considered judicial opinions." *Sweeney v. Erving,* 228 U. S., 233. The Court cites with

approval the numerous cases decided by this Court on the same subject. *Womble v. Grocery Co.*, 135 N. C., 474; *Stewart v. Carpet Co.*, 138 N. C., 60; *Lyles v. Carbonating Co.*, 140 N. C., 25; *Ross v. Cotton Mills, ibid.*, 115; *Board of Education v. Makely*, 139 N. C., 31; *Overcash v. Electric Co.*, 144 N. C., 572; *Winslow v. Hardwood Co.*, 147 N. C., 275.

Justice Hoke says, for the Court, in *Furniture Co. v. Express Co.*, 144 N. C., at p. 644: "It may be well to note here that, in using the terms *prima facie* and presumptive, the terms do not import that the burden of the issued is changed, but that on the facts indicated the plaintiff is entitled to have his cause submitted to the jury under a proper charge as to its existence or nonexistence and the effect of any presumption which may attach, as indicated in the cases," citing several of the cases to which we have already referred.

It may, therefore, be taken as settled in this Court, at least, and we believe the same may be said of most, if not all, of the courts, that *prima facie* or presumptive evidence does not, of itself, establish the fact or facts upon which the verdict or judgment must rest, nor does it shift the burden of the issue, which always remains with him who holds the affirmative. It is no more than sufficient evidence to establish the vital facts without other proof, if it satisfies the jury. The other party may be required to offer some evidence in order to prevent an adverse verdict, or to take the chances of losing the issue if he does not, but it does not conclude him or forestall the verdict. He may offer evidence, if he chooses, or he may rely alone upon the facts raising the *prima facie* case against him, and he has the right to have it all considered by
(438) the jury, they giving such weight to the presumptive evidence as they may think it should have under the circumstances.

The defendant is not required to take the laboring oar and to overcome the case of the plaintiff by a preponderance of evidence, is what we said in *Winslow v. Hardwood Co., supra,* and substantially the same thing was said in the other cases we have cited. This is undoubtedly the rule in civil actions, and it applies with greater force to criminal cases, where the defendant has the benefit of the doctrines of reasonable doubt and the presumption of innocence. How can we say that *prima facie* evidence, or that which is apparently sufficient, excludes all reasonable doubt of guilt, and by its own force overcomes the presumption of innocence? The bare statement of the proposition is sufficient to show its fallacy. It would destroy the presumption of innocence and take away the protection of the other rule as to reasonable doubt. The presumption of innocence attends the accused throughout the trial and has relation to every essential fact that must be established in order to prove his guilt beyond a reasonable doubt. *Kirby v. U. S.*, 174 U. S., 47. He is

not required to show his innocence; the State must prove his guilt. No valid conviction can be had in law which is based solely upon *prima facie* evidence as conclusive and foreclosing the verdict, or which even casts upon the defendant the burden of showing his innocence by the greater weight of the evidence. We know of no such rule, and it finds no warrant in the language of the statute. The decisions are all the other way, when rightly interpreted. In a case very similar to this one, the Court held that the jury must consider all the circumstances, whether introduced by the State or the accused, in connection with the evidence proving the possession of the liquor, taking into account as well the presumption of the defendant's innocence. *S. v. Cunningham,* 25 Conn., 195.

But directly to the point, and one which exactly fits this case, is the case of *People v. Cannon,* 139 N. Y., 32, where the Court thus sets forth with great force and clearness the limitations upon the power of the Legislature to create such presumptions, their extent and scope, and the rights of the defendant, notwithstanding them: "It cannot be disputed that the courts of this and other States are committed (439) to the general principle that even in criminal prosecutions the Legislature may with some limitations enact that when certain facts have been proved, they shall be *prima facie* evidence of the existence of the main fact in question. (See cases cited in 103 N. Y., 143, *supra.*) The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved must not be merely and purely arbitrary, or wholly unreasonable, unnatural, or extraordinary, and the accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt. It, in substance, enacts that, certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction. Even in that case the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury, and it could have the right, after a survey of the whole case, to refuse to convict unless satisfied beyond a reasonable doubt of the guilt of the accused, even though the statutory *prima facie* evidence were uncontradicted. The case of *Commonwealth v. Williams* (6 Gray, 1) supports this view."

In *Board of Excise v. Merchant,* 103 N. Y., 143, the Court in dealing with this very question says that by the presumption or *prima facie* case arising by statute from possession of the liquor, "the burden of proof is not even really changed," and then adds that the case must be submitted to the jury, notwithstanding the presumption, upon the evi-
dence, whatever it is, "with the burden still resting upon the
(440) prosecution to establish the guilt," the offense in that case being an unlawful sale of liquor.

It is also stated as law in Black on Intoxicating Liquors that "the Legislature has undoubtedly a very extensive power in respect to fixing or modifying the rules of evidence to be applied by the courts. The exercise of this power, however, in relation to criminal proceedings, is subject to certain important limitations, among which are the following: (1) The Legislature, in enacting rules of evidence, must not usurp judicial functions; (2) such rules must not be of the nature of *ex post facto* laws, or illegally retroactive in their operation; (3) they must not deprive the accused of his constitutional right to be confronted with the witnesses against him; (4) the Legislature cannot compel a defendant to furnish evidence against himself; (5) nor deprive him of his right to a trial by jury; (6) it would be unlawful to make any given fact or state of facts *conclusive* evidence of guilt, in negation of the common-law presumption of innocence. The rules of evidence in prosecutions under the liquor laws have frequently been the subject of legislative attention, and the changes made have sometimes shown a wide departure from common-law principles. All such statutes—which for the most part are designed to facilitate convictions by admitting presumptive or indirect proof of certain facts—must be brought to the test of constitutional principles such as those above enumerated. If found to be in violation thereof, they are not defensible on any ground of public policy or the welfare of the community. As a rule, however, these acts have been so framed as to escape constitutional objection. Thus, a provision that, in prosecutions for the common selling of intoxicating liquors, delivery in or from any building or place other than a dwelling-house shall be deemed *prima facie* evidence of a sale, is constitutional and valid. This neither conclusively determines the guilt or innocence of the party who is accused nor withdraws from the jury the right and duty of passing upon and determining the issue to be tried. And the same is true of a statute providing that, whenever an unlawful sale of liquor is alleged, and a
delivery proved, it shall not be necessary to prove a payment, but
(441) such delivery shall be sufficient evidence of sale. So if a law enacts that where a person is seen to drink intoxicating liquor on the premises of one who has simply a license to sell liquor for consump-

tion off the premises, it shall be *prima facie* evidence that the liquor was sold by the occupant of the premises with the intent that it should be drunk thereon."

This Court has fully sustained this principle and approved these authorities by citing and relying upon them in *S. v. Barrett,* 138 N. C., 630. It was held in *Barrett's case* that notwithstanding the statute expressly declares that the possession of more than a gallon of spirituous liquor shall be *prima facie* evidence of the purpose to sell it, it is, at last and in its essence, but evidence of guilt, and not conclusive or determinative of defendant's guilt even by itself and unexplained. It further holds that there is no shifting of the burden to the defendant, but it rests upon the State to establish the accusation of the bill of indictment beyond a reasonable doubt.

It will be observed that, in our case, the court placed the entire burden upon the defendant to show his innocence, for the instruction to which exception was taken is that the statute requires him to satisfy the jury by the greater weight of the evidence that in fact he did not have the liquor in his possession for the purpose of sale, whereas, according to all the authorities, and especially in *Barrett's case,* the burden is on the State throughout the trial. The defendant profited little or nothing by the subsequent charge that, if the jury had a reasonable doubt about the facts recited by the court, being those which the defendant must prove by the greater weight of the evidence, they should acquit. This, to say the least of it, was very confusing, if not contradictory. What advantage did he gain by the charge as to reasonable doubt, after the jury had been told that there was a presumption against him and he must "satisfy them by the greater weight of evidence" of his innocence? It deprived him of the presumption of innocence, and practically eliminated the benefit of the doctrine as to reasonable doubt by so weakening it that it amounted to nothing; and all of this was done under a statute (act of 1913) which merely establishes a *prima facie* case for the State, sufficient, it is true, to carry the case to the jury, with the (442) right to convict, but leaving in full force the doctrine of reasonable doubt and also the presumption of innocence; for a man, even under our present laws, may have more than a gallon of liquor in his possession for a perfectly lawful and innocent purpose. It is not the possession that is unlawful, but the forbidden purpose for which it is held.

The Attorney General admitted that there was error in the charge, under the decisions in *S. v. Barrett,* 138 N. C., 645; *S. v. McIntyre,* 139 N. C., 600; *S. v. Dowdy,* 145 N. C., 432; *S. v. Dunn,* 158 N. C., 654, and *S. v. Mostella,* 159 N. C., 461; but he argued that what defendant

did and proposed to do with the liquor, in law, constituted a sale, by his own admission on the stand. We do not assent to this position. It was lawful to buy the liquor in Virginia, and if he made the purchase there, acting solely and in good faith as agent for the other persons, who sent him there for the purpose of buying it for them, he would not be guilty of selling liquor if he had delivered it. It was so decided in *S. v. Whisenant,* 149 N. C., 515, as we think, where it appeared that the defendant, as agent, had ordered some whiskey for the prosecuting witness, which was to be shipped from another State, where our laws did not operate, and when it arrived, he delivered it to the witness. It was held, if defendant acted *bona fide,* that he was not guilty, although he ordered the whiskey as agent and received the money for it; and it was further said to be a transaction of interstate commerce. Under either view, defendant could buy liquor for another, as his agent, if he acted in good faith and was not concealing, under the guise of an agency, a transaction which was in fact a sale. If liquor can thus be ordered through an agent from another State, without violating the law, if done *bona fide,* why cannot the agent go into that State in person and buy it, where it can be lawfully sold, and then transport and deliver it himself? An agent may also receive at least a fair compensation for his services, provided the money is paid to him strictly as such, and not as any part of the price for the liquor. His intent and the true nature of the transaction were questions for the jury, under a
(443) proper charge from the court. *S. v. Allen,* 161 N. C., 226, supports this view directly, and the facts were much like those in this case. *S. v. Johnson,* 139 N. C., 641, is not in point, for there the jury found that the prosecuting witness, Brown, had paid the *price* of the liquor, which was fixed by the defendant beforehand. There was no agency. He was not buying for another, but selling to him.

Nor is the defendant indictable under Revisal, sec. 3534, as he procured the liquor in Virginia, where it was lawful to sell it. *S. v. Smith,* 117 N. C., 809; *S. v. Burchfield,* 149 N. C., 537. The case of *S. v. Smith,* just cited, seems to be decisive of the point here raised, and, we think, is fatal to the judge's charge. It is there held that it is no more unlawful to buy through one's agent than to buy directly himself, and the agent, when he buys lawfully, is just as innocent as his principal would be if he had bought himself, the real question being whether there was a *bona fide* agency or a sale in disguise. It is a question of intent, without regard to the fair appearance of the transaction. What is it, in fact or in substance and legal effect, is the question; and in this view, which is the true one, we are forcibly reminded of what *Justice Ruffin* observed in *S. v. Gilbert,* 87 N. C., 527, with regard to an indict-

ment for carrying a concealed weapon. He said the offense of which the defendant is charged forms no exception to the general rule, that to constitute a crime there must be a criminal intent, and the Court perceived no good reason why it should be. "The law is a wholesome one, and its constant enforcement according to its true spirit and intention meets the desires and expectations of every well disposed and peaceable citizen; but some care should be used, lest by pushing its requirements too far it may result in a reaction of sentiment against it."

If it be said that defendant is guilty under Laws 1911, ch. 133, known as the "Club Act," it is quite enough to say that he was not indicted, nor was he convicted, under that law, and he has not had any opportunity to defend himself against any such charge. The Attorney-General concedes that he is charged only with violating the act of 1913, and the judge below so expressly charged the jury. Besides, if the indictment had been framed upon the act of 1911, ch. 133, there is (444) no fact made presumptive or *prima facie* evidence by it, and the charge would, if possible, be more erroneous than if confined to the act of 1913, as it should be. It may be, as argued by counsel, that upon the evidence in this case the jury would be warranted, under proper instructions, in convicting the defendant of the offense created by the act of 1911, ch. 133, if he had been charged with a violation of that act. We need not give any opinion on that question, it not being raised on this record, as there is no allegation upon which such a conviction could be based, and no reference whatever to the act. The allegations and proof must correspond. It would be contrary to all rules of procedure and violative of his constitutional right to charge him with the commission of one crime and convict him of another and very different one. He is entitled to be informed of the accusation against him and to be tried accordingly. *S. v. Ray,* 92 N. C., 810; *S. v. Sloan,* 67 N. C., 357; *S. v. Lewis,* 93 N. C., 581; Clark's Cr. Proc., 150.

We think that there is evidence sufficient to sustain a conviction upon the present indictment, but the jury must be so guided by the court as to find the facts essential to establish his guilt.

The question here is as to the *bona fides* of the defendant. Was he really acting solely in the capacity of agent when he purchased the liquor, or was that a mere pretense, under cover of which he was violating the law by selling liquor, or having it for sale? The case should have been submitted to the jury in this aspect, with the burden on the State to make out its case to their full satisfaction. If defendant was acting honestly and not deceptively, he had the right to buy liquor in Virginia, where it was lawful to sell to him, and to return to this State with it for the purpose of making delivery to the parties for whom

he bought it, and if this was all, it would not constitute a sale of the liquor or the possession of it with the unlawful purpose to sell, within the meaning of the act of 1913. *S. v. Allen,* 161 N. C., 226. The possession of the liquor, though, would carry the case to the jury.

The rule as to the legal effect or significance of *prima facie*
(445) evidence has long prevailed in this and other courts, and we are not aware of any decision of this Court which has stated it or has applied it otherwise than is done in this case.

There was error in the charge of the court in the respect pointed out, for which another trial is ordered.

New trial.

ALLEN, J., concurring: I believe in the enforcement of the prohibition law, as I do in the enforcement of all law; but I cannot agree to convict of one offense when the defendant is charged with another, because intoxicating liquors are the subject of investigation.

The Search and Seizure Law (ch. 44, Laws 1913, sec. 2) says: "It shall be unlawful for any person to have or keep in his possession, for the purpose of sale, any spirituous, vinous, or male liquors."

The charge in the warrant is that the defendant "did unlawfully and willfully have in his possession 11½ gallons of whiskey for sale."

The warrant follows the language of the statute, and there can be no doubt that the defendant was charged with a violation of the act of 1913. But if there is any doubt about the charge against the defendant, there is none as to how he was tried, because the presiding judge, in his charge to the jury, said: "Gentlemen of the jury: The defendant, Zip Wilkerson, is indicted here, charged with the violation of an act passed by the General Assembly in 1913, known as the Search and Seizure Law. He is charged in the bill as having in his possession for the purpose of sale more than one gallon of liquor."

He then charged the jury as to the effect under the act of 1913 of the *prima facie* case made by the possession of more than one gallon of intoxicating liquors; and of this charge the Attorney-General, who prosecutes in behalf of the State, says in his brief: "Under the decisions of this Court, there was error in this instruction. *S. v. Barrett,* 138 N. C., 645; *S. v. McIntyre,* 139 N. C., 600; *S. v. Dowdy,* 145 N. C., 432; *S. v. Dunn,* 158 N. C., 654; *S. v. Mostella,* 159 N. C., 461."

All of these cases, cited by the Attorney-General to show that
(446) the charge of his Honor was erroneous, were concurred in by the *Chief Justice.*

It is certain, therefore, if the rule upon which the opinion of the Court rests was adopted in an ill-advised moment to accord with a highly

technical conception of the doctrine laid down by a text-writer, and is a mere metaphysical proposition, it has been reiterated time and again, with the consent of all the members of the Court; and as it has been used at least twice (*S. v. Barrett; S. v. Dowdy*) for the conviction of those charged with violating the prohibition law, it is hardly fair or legal to change it now to enable the State to convict under one statute, when the defendant is charged under another.

The defendant has not been charged with an offense under the Club Act of 1911, nor has he been tried under that act, and there is no contention that he was tried according to law, as heretofore declared by this Court, under the Search and Seizure Law of 1913.

It should be kept in mind that neither life, nor limb, nor liberty, nor property, has any security or abiding place except by adhering to the Constitution, and that it provides that, "In all criminal proceedings every man has the right to be informed of the accusation against him"; that "No man shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment," etc.; that "No man ought to be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land"; and that if a citizen can be tried in the Superior Court before a jury, and when he has been tried illegally, can be convicted here, without a jury, of another and different charge, the safeguards of the Constitution amount to nothing.

CLARK, C. J., dissenting: The warrant in this case charges that the defendant "did unlawfully and willfully have in his possession 11½ gallons of whiskey for sale." There is no reference to any particular statute.

Upon the defendant's own evidence, he had in possession 11 (447) gallons of whiskey, for which he had been paid in advance, and which in return for the money he was to divide out among ten men. Upon this, the judge should have simply told the jury that if they believed the defendant's testimony, he was guilty. Anything that the judge said other than this was simply surplusage, harmless and immaterial, for upon the defendant's own testimony the verdict of guilty was correct, and should be sustained.

We can pass by, for the present, the exception to the judge's charge on the effect of a *prima facie* case. If the instruction was erroneous, it was harmless, for upon the defendant's own showing the judge should have charged the jury to find him guilty. On the stand, the defendant testified that he had in his possession 11 gallons of whiskey in three kegs; that for a fee of $2.50 he went to Virginia and bought this whiskey

in bulk; that he brought it back to North Carolina and was going to divide and deliver it to the ten men who had "chipped in" $2.50 each to buy it with, when he was arrested. The possession of the whiskey and his purpose in having it are thus admitted.

S. v. Johnson, 139 N. C., 641, is *exactly in point.* There Johnson agreed to go from Charlotte to Salisbury and get half a gallon of whiskey, bring it back to Charlotte and deliver it to Brown, who before he left Charlotte paid him $1, the purchase price of whiskey. *Brown, J.,* said: "We think the facts set out in the special verdict disclose an agreement or contract to deliver to Tom Brown half a gallon of whiskey, entered into in the city of Charlotte on 15 July by the defendant, and a receipt of the agreed price; also a deliver of the whiskey next morning, in pursuance of agreement. These facts constitute a sale of liquor upon the part of the defendant within the prohibition territory."

This is exactly the case here. The defendant received the money from the other parties, to go to Virginia, where he got the whiskey in bulk and brought it back for the purpose of dividing it and delivering it to the several purchasers, according to contract. If, as the Court said in *S. v. Johnson, supra,* "These facts constitute the sale of liquor" after the delivery, then unquestionably, having it in possession for such (448) purpose is having it "in possession for sale."

The question, therefore, taking defendant's testimony as true, is, when a number of persons have raised a fund and put it in the hands of an agent to buy whiskey, and he has such whiskey in his possession, to be afterwards divided out by him to them in proportion to the money that each had paid in, whether this is having it in possession for an illegal purpose.

The identical question was raised in *S. v. Colonial Club,* 154 N. C., 177, and the Court there held by a vote of three to two that this did not constitute "having liquor in possession for the purpose of sale." The Legislature at the first ensuing session enacted (Laws 1911, ch. 133) that such a condition should constitute having liquor in possession for an illegal purpose, and a misdemeanor. That is conclusive of this case.

Chapter 133, Laws 1911, provides as follows (leaving out the verbiage which is not pertinent to this defendant): "Any corporation, club, association, person or persons that shall directly or indirectly . . . in any manner aid in keeping . . . a clubroom *or other place* [here a buggy] where intoxicating liquors are received, *kept,* or stored, for barter, sale, exchange, *distribution or division,* among the members of any such club or association or aggregation of persons by any means

whatever, or that shall act as *agents* in *ordering, procuring, buying,* storing, or keeping intoxicating liquors for any such purpose, shall be guilty of a misdemeanor." Upon the defendant's evidence, he was an agent in procuring intoxicating loquor for sale or division among the aggregation of persons who furnish him the money for that purpose. He was therefore guilty of a misdemeanor under said chapter. He had, in the language of the warrant, "unlawfully and willfully in his possession 11 gallons of whiskey," and was guilty of a misdemeanor under that chapter. It was mere surplusage to charge further that he had it for sale.

It is true that the title of the act is "To prohibit the sale or *handling* of intoxicating liquors by clubs or *associations.*" But the body of the act, as above stated, is broader, and makes it a misdemeanor for any agent to procure intoxicating liquor for distribution or divi- (449) sion among the members of any aggregation of persons.

There is no question of interstate commerce involved, as in *S. v. Whisenant,* 149 N. C., 515 (if indeed the latter case is law since the passage of the Webb-Kenyon Act). The whiskey was not ordered from a Virginia house. When the whiskey was delivered to the defendant in Virginia he received the full title to the property. Under his contract made in North Carolina, and to be performed in North Carolina, he took the whiskey home with him, and it was found in his possession in this State, and he admitted that he had it for the purpose of division among the ten men who had paid him the money, which act was to be done here. It makes no difference that they paid him in advance. The sale was not completed until a division among the aggregation of persons for whom he had bought the whiskey. No one of them had any title or ownership in the whiskey till such partition should be made, and he had it in possession for the unlawful purpose of a sale by means of such division.

There could be but one inference from the evidence, and the judge might well have charged the jury that if they believe the evidence to return a verdict of guilty. *S. v. R. R.,* 149 N. C., 508.

In *S. v. Herring,* 145 N. C., 418, the Court held (*Hoke, J.*) that taking orders and procuring whiskey to be thereafter delivered to the parties who had furnished the agent with the money for such purchase made the defendant guilty of a sale if the whiskey was delivered. It follows that if the whiskey is intercepted before the division and delivery, such agent is guilty of "having it in possession for sale."

In *S. v. Burchfield,* 149 N. C., the Court held (*Walker, J.*) that under Revisal, 3534, it was a misdemeanor for any one "to procure for or deliver spirituous liquors to another, and that such agent was punish-

able even though he had no interest in the sale other than as agent of the purchaser, and that his acting solely as agent for the buyer was no defense."

It follows that upon the defendant's own testimony he was
(450) guilty of a misdemeanor, both under Revisal, 3534, and Laws 1911, ch. 133.

It is therefore unnecessary to review the charge of the court as to the effect of *prima facie* evidence. It is certain that the judge's charge was correct under the uniform rulings of this Court until a very recent period, when the Court, in what may be well termed an ill-advised moment, changed its former clear ruling to accord with a highly technical conception of the doctrine laid down by a text-writer. It may well be doubted if any jury has ever been impaneled in North Carolina which would be affected by the difference in the formula, whether that formerly in use or that which is now considered more correct is used. In this day, when the American Bar Association and the demands of a practical age, and indeed the opinion of all the leading courts, are in favor of abolishing useless distinctions which can be of no use in the better administration of justice, it is unfortunate that stress should be laid upon this. It would be well to return to the older and more logical formula, or at least to hold that the variance is immaterial, for the difference can never be understood or appreciated by a jury, whose object should be simply to ascertain the real facts of the controversy submitted to them.

But whatever may be said in favor of the change which has been made, the failure to use it was absolutely immaterial in this case, for upon the defendant's own testimony he is guilty of a misdemeanor embraced within the terms of the warrant, "the unlawful possession of the 11 gallons of whiskey." The defendant testified that he had it in possession, undivided, for the purpose of division and distribution. The judge charged the jury that they must find beyond a reasonable doubt the facts, which he recited and which under the statute would "constitute *prima facie* evidence," and added that "if they found those facts beyond a reasonable doubt, then the duty was on the defendant to go forward and satisfy the jury by the greater weight of the evidence that he did not have such liquor in his possession for the purpose of sale." This was the long recognized and logical method of expressing to the jury the legislative meaning of a *prima facie* case. There is no
(451) logical ground to contest its correctness. It can only be criticised on highly metaphysical grounds.

There is nothing in the Constitution which consecrates this or any other technicality or formula. The repetition of an error which has been found injurious or unnecessary does not make it any less harmful.

Hoke v. Henderson, 15 N. C., 1, had been repeated countless times and endured for seventy years. But it was founded in error, and, like all other errors, was fated to pass away. *Mial v. Ellington,* 134 N. C., 131. The same is true of many other decisions which have been reversed. Most technicalities that prove harmful are abolished by legislation, because the courts are very slow in reforms of this kind. In the present case the formula used by the judge below is in accordance with that which was recognized thoroughout this State till a very short time ago, and no harm, but great good, would follow a return to our former rulings on that subject. The public policy of a State is expressed by the lawmaking power, and the sole object of the courts should be to construe and execute the law in the spirit in which it was enacted. The only way to enforce the law is to enforce it, and in its integrity.

In this State the defendant made the contract to furnish ten men with whiskey; in this State they paid him the money for it; in this State he had the whiskey ready to divide and deliver to them. Is there no law yet that makes possession of whiskey under these circumstances "unlawful and willful," as charged in this warrant?

To small avail is the act of the General Assembly of 1908 and its approval on a refrendum, and to small avail are the acts of Congress and the subsequent acts, both State and Federal, curing all defects discovered by the courts, if this transaction can escape the condemnation of the law. There was one who said he could "drive a coach and six through any act of Parliament." It seems that legislators and Congressmen are still unable to use language effectively to express their meaning when that language is subjected to the critical eyes of courts.

Cited: *S. v. Russell, post,* 485, 486, 489; *S. v. Denton, post,* 532; *S. v. Lee, post,* 535, 537; *Trust Co. v. Bank,* 166 N. C., 117; *Hanes v. Shapiro,* 168 N. C., 35; *S. v. Davis, ib.,* 145; *S. v. Bailey, ib.,* 170; *S. v. R. R.,* 169 N. C., 302; *In re. Allred,* 170 N. C., 160; *Drainage Commrs v. Mitchell, ib.,* 326; *S. v. Blauntia, ib.,* 750; *S. v. Randall, ib.,* 758; *S. v. Cathey, ib.,* 796.

(452)

STATE v. WALTER SPEAR.

(Filed 5 November, 1913.)

1. Burglary—Felonious Intent—Punctuation—Interpretation of Statutes.

In order to convict, under Revisal, sec. 3333, of any of the offenses therein enumerated, it is necessary to show that the breaking into the

dwelling, etc., of another was done "with the intent to commit a felony or other infamous crime therein."

2. Verdicts—Burglary—Felonious Intent—Judgments—Acquittal.

Upon a trial under an indictment for burglary, the jury was instructed by the court that, under the evidence, their verdict should be guilty thereof in the first degree; or of breaking into the dwelling-house of another otherwise than by a burglarious breaking; or not guilty. The verdict rendered was that "the defendant (was) guilty of housebreaking, with no intent to commit a felony": *Held*, the verdict was equivalent to an acquittal, under section 3333, Revisal, upon which judgment of not guilty should have been entered by the court, and the defendant discharged.

CLARK, C. J., dissenting.

APPEAL by defendant from *Lane, J.*, at July Term, 1913, of FORSYTH.

This was indictment for capital offense of burglary. There was evidence on the part of the State tending to support the charge as made. Evidence *contra* on part of defendant. The court, among other things, charged the jury that on the bill of indictment and testimony they could render either of three verdicts:

1. Guilty of burglary in the first degree.

2. Guilty of breaking and entering the dwelling-house of another otherwise than by burglarious breaking. Revisal, sec. 3333.

3. Not guilty.

The jury rendered the following verdict:

"We, the jury, find the defendant guilty of housebreaking, with no intent to commit a felony. The jury especially asks the mercy of the court."

On the verdict there was motion to discharge prisoner as on (453) verdict of acquittal. Motion overruled, and defendant excepted.

His Honor being of opinion that the verdict as rendered amounted to a conviction of the second offense under section 3333, Revisal, sentenced the prisoner to twelve months on the public roads, and defendant excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Watson, Buxton & Watson for defendant.

HOKE, J., after stating the case: Section 3333 of the Revisal is in the following words: "If any person shall break or enter a dwelling-house of another otherwise than by a burglarious breaking; or shall break and enter a storehouse, shop, warehouse, banking house, counting

house, or other building, where any merchandise, chattel, money, valuable securety, or other personal property shall be; or shall break and enter any uninhabited house, with intent to commit a felony or other infamous crime therein; every such person shall be guilty of a felony, and imprisoned in the State's Prison or county jail not less than four months, nor more than ten years."

So far as the form is concerned, it has been held that under an indictment charging the capital crime of burglary, a conviction may be had of the offense constituted and described in this section of the Revisal, and the question presented by this appeal is on the proper significance of the verdict rendered by the jury. This same law is in The Code of 1883, sec. 996, except that in the clause in section 996, "or shall break and enter any uninhabited house with intent to commit a felony or other infamous crime therein," there is a semicolon between the words "uninhabited house" and the words "with intent to commit a felony," instead of a comma, the divisional pause in the present law. Construing the law as it appeared in section 996 of The Code, the Court has expressly held that the "intent to commit a felony or other infamous crime" was an essential ingredient of the offense (*S. v. Christmas,* 101 N. C., 749; *S. v. McBride,* 97 N. C., 393), and we are of opinion that a like construction should prevail in reference to the present statute. If the Legislature had intended that the criminal purpose specified (454) should be confined to the last substantive clause of the statute, to wit, the "breaking into an uninhabited house," there was no occasion for a pause of any kind between these words and the criminal intent which follows; as a matter of strict interpretation, a comma as well as a semicolon would serve to prevent such a meaning and to attach the intent to all of the former clauses of the section. And if there were doubt about this as a mere matter of punctuation, the character of the offense and serious nature of the punishment would impel the Court to its present conclusion. This section of the Revisal is grouped with the crime of burglary and other kindred offenses in which the technical "breaking" may be effected by lifting a latch or the turning of a knob, the house being otherwise closed (Clark's Criminal Law (2 Ed.), p. 262); and it cannot be that the Legislature had any purpose to make it a felony where a wayfarer or a neighbor had so entered an unlocked shop or warehouse, seeking shelter from a storm or other hindrance.

Again, the first portion of this section is in the disjunctive, "If any one shall break or enter the dwelling-house of another," the design evidently being to afford greater protection to the dwelling, and to hold such an entry a crime in itself, detached from the felonious intent

in the later clause of the law, would make it a criminal offense to enter the dwelling of another for the most innocent purpose, even to make a social call. It is clear, therefore, that the present statute should receive the same construction as the former; that the crime is only committed when the houses designated are entered or broken into "with intent to commit a felony or other infamous crime therein"; and the verdict of the jury having negatived this, an essential feature of the crime, amounts to a verdict of not guilty.

It was not controverted on the argument for the State that this was the proper construction of the statue, but it was insisted that the verdict of the jury was irresponsive and insensate, and this being true, that the prisoner should be held for further trial on the present bill.

In Clark's Criminal Procedure, p. 486, it is said: "A verdict
(455) is not bad for informality or clerical errors in the language of it, if it is such that it can be clearly seen what is intended. It is to have a reasonable intendment, and it is to receive a reasonable construction, and must not be avoided except from necessity."

As far back as 7 N. C., 571, *S. v. John Arrington,* this principle was applied to a case where a defendant was indicted for horse stealing, and "the jury returned a verdict that the prisoner was not guilty of the felony and horse stealing, but guilty of a trespass. The trial court desired them to reconsider their verdict and say guilty or not guilty, and no more, and the jury thereupon retired and returned a verdict of guilty generally," and the Supreme Court on appeal ordered that the first finding of the jury be recorded as their verdict and the prisoner discharged; and in that case it was held further, "That whenever a prisoner in terms or effect is acquitted by the jury, the verdict as returned by them should be recorded." This decision was referred to in terms of approval in *S. v. Godwin,* 138 N. C., 586, and was again applied in the subsequent case of *S. v. Whisenant,* 149 N. C., 515.

In the present case, the jury having expressly negatived the existence of any criminal intent on the part of the prisoner, and this, as we have seen, being an essential constituent of the offense charged, it must be held as the correct deduction from these decisions that the verdict is on of acquittal, and the motion of the prisoner for his discharge should have been allowed.

We have been referred to *S. v. Hooker,* 145 N. C., 582, as an authority directly opposed to our present position; but an examination of that case will disclose that this is not necessarily true. In *Hooker's case* the defendant had been acquitted on an indictment for larceny of certain goods, and he was then tried on a bill for breaking into a store with intent to steal the goods, and was convicted. On appeal, the question

chiefly presented was whether the defendant's plea of former acquittal should be allowed by reason of the first verdict. The plea was held bad on the ground that these were two entirely separate and distinct offenses, and the acquittal of one was therefore no bar (456) to the prosecution of the other. Having rested the decision on that ground, there was no cause to further construe the statute, and the portion of the opinion saying that the words of the present statute, "with intent to commit a felony or other infamous crime therein," should only apply to a "breaking into an uninhabited house," may well be considered as *obiter dictum*. As an authoritative construction of the statute, the position is not approved.

Reversed.

CLARK, C. J., dissenting: Revisal, 3269, provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein, or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

Revisal, 3333, under the sub-title "Burglary," provides: "If any person shall break or enter a dwelling-house of another otherwise than by a burglarious breaking; or shall break and enter a storehouse, shop, warehouse, banking house, counting house, or other building, where any merchandise, chattel, money, valuable security, or other personal property shall be; or shall break and enter any uninhabited house, with intent to commit a felony or other infamous crime therein; every such person shall be guilty of a felony."

It will thus be seen that this section denounces three distinct classes of offenses, which classes are separated appropriately by a semicolon. Each of these offenses is a lesser degree of the offense of burglary being found, as stated, in the subtitle appropriated to that offense. Clark Cr. Law, 269.

The jury for their verdict found the defendant "guilty of housebreaking, with no intent to commit a felony." This brings the offense exactly under the second class of offenses marked out in section 3333, in which no intent to commit a felony is required. *S. v. Hooker*, 145 N. C., 581. The verdict distinguishes this offense from the first class of offenses in Revisal, 3333, by its not being termed a "dwelling-house," and distinguishes it from the third class of offenses which embraces only breaking into "an uninhabited house with intent to commit a (457) felony."

The verdict is therefore clearly a conviction of the offense of breaking into a house without such intent, which constitutes the second class of offenses, above set out.

Under section 3269, this being a less degree of the crime, the defendant was properly convicted upon the evidence, under the charge for burglary. *S. v. Fleming,* 107 N. C., 909. So it has been held that under an indictment for murder the conviction can be of murder in the first degree, of murder in the second degree, of manslaughter, of an assault and battery, or even of a simple assault. *S. v. Fleming, supra.* Indeed, under an indictment for burglary the prisoner can be convicted of larceny. *S. v. Grisham,* 2 N. C., 13; *S. v. Allen,* 11 N. C., 356. These decisions were at common law and before the passage of our present statute. Revisal, 3269.

Indeed, this very case has already been decided in *S. v. Hooker,* 145 N. C., 581, where the Court held that the offenses charged in the second class of section 3333, under which this verdict comes, if the words "with intent to commit larceny" were inserted, they were "surplusage," because "unnecessary to be proven," and any proof offered of such intent was merely "irrelevant and harmless." It follows, therefore, that the jury finding "no intent to commit a felony" cannot vitiate the verdict when the verdict would be good on a charge for this offense even if the indictment had contained those words and insufficient proof of intent was offered. This for the very simple reason that the offense of "breaking and entering a house" is complete without any felonious intent. It follows, therefore, that a verdict of "guilty of housebreaking," adding, "with no intent to commit a felony," is simply finding every element that the subsection charges to constitute the crime. This addition to the verdict is the merest surplusage, and neither the judge below nor jury are chargeable with a miscarriage of justice in turning loose a man found "guilty of housebreaking."

As construed by the Court, it is no offense in this State to
(458) unlawfully and willfully "break and enter the dwelling of another otherwise than by burglarious breaking," or to "break and enter any other house where there is valuable property," without showing further that there was an intent to commit a felony therein; which is not easy to show, and which the law does not require to be shown. The statute, as written (Revisal, 3333), requires such intent only when there is the otherwise comparatively harmless act of breaking and entering an uninhabited house.

STATE v. JOHN FOGLEMAN.

(Filed 5 November, 1913.)

1. Court's Discretion—Witnesses Recalled—Appeal and Error.

Where a witness in an action has been examined and cross-examined, it is within the discretion of the trial judge to permit his recall at the request of one of the parties, and his refusal to do so is not reviewable on appeal.

2. Homicide—Outside Influences—Appeals to Feelings—Trials—Instructions.

Where upon the trial for murder the circumstances warrant it, it is not error for the judge to instruct the jury that the father and mother of the prisoner had a right to be in court, but that the jury should not consider them, it appearing from his further charge that this instruction was to eliminate any appeals to the feelings of the jury in their behalf, in making up their verdict.

3. Trials—Statement of Contentions—Objections—Appeal and Error—Practice.

An incorrect statement by the trial judge of a contention of the appellant will not be held for error when it does not appear that his counsel called it to the attention of the court at the time and that the judge failed or refused to make the proper correction.

4. Homicide—Facts at Issue—Evidence—Killing by Another.

The question at issue upon a trial for murder, where the killing is denied by the prisoner, is whether the prisoner killed the deceased as alleged, and it is not allowable to show by circumstances or insinuations that some one else had done so.

5. Homicide—Witnesses—Father and Mother—Weight of Evidence—Trial—Instructions.

Where upon a trial for murder the father and mother of the prisoner have testified in his behalf, an instruction to the jury is proper that they may consider the relationship, partiality, and the effect of the prisoner's conviction on the witnesses, and then to ascertain what influence that would have on the truthfulness of their evidence, and to ascertain, under all the circumstances, the weight this testimony should be given.

6. Homicide—Murder—Defendant a Witness—Trials—Instructions—Weight of Evidence.

Where upon a trial for murder the prisoner has testified in his own behalf, it is not error for the judge to comment upon the history of such evidence before 1881, when it was inadmissible, and afterwards, it appearing that he immediately thereafter correctly charged as to the scrutiny testimony of this character should be subjected to by them, and that after considering it the jury should determine, as best they could, his interest in the result, and then to give his testimony that

weight and effect which, under all the circumstances, they thought it entitled to; and should they believe the prisoner told the truth, it was their duty to give "his testimony the same weight and effect you would give to the testimony of any disinterested witness."

WALKER, J., concurring in results. BROWN, J., concurs in concurring opinion.

(459) APPEAL by defendant from *Lane, J.*, at July Term, 1913, of FORSYTHE.

Attorney-General Bickett for the State.
John A. Barringer and W. P. Bynum for prisoner.

CLARK, C. J. The defendant was convicted of murder in the second degree. The homicide occurred in Greensboro on the night of 9 April, 1913. The deceased and the prisoner had been drinking, and just before the homicide were arguing and tussling. The deceased was crossing the street near an electric light, the prisoner following closely behind, when, as several testified, the latter, taking a pistol from his right-hand pocket, fired it at the deceased, who walked on a few steps and fell. This the prisoner denied. The wound was on the left side of the head, near the back. The prisoner was engaged in business in the city, and the
(460) officers being unable to find him the next morning, went out to his father's house, about 6 miles from town, and found him in the woods about 300 or 400 yards from the house. He had a bedquilt and overcoat with him and was getting up from the quilt. This was between 11 and 12 o'clock. The prisoner testified that he was near the place of the homicide at the time of the shooting, and heard the shot, but denied that he fired it. He admitted that he had been indicted several times for retailing; that the shooting took place about ten days after the last trial, and a number of such cases were still pending against him. There was evidence tending to show that the deceased was supposed to be a detective.

The first exception is that after a witness had been examined by the State and cross-examined, and then again examined by the State and stood aside, the counsel for the prisoner asked permission to examine the witness on matters which had already been gone into by counsel on both sides, and the court "declined to allow the question, as a matter of discretion." This was in the discretion of the court. *S. v. Groves,* 119 N. C., 822; *S. v. Jimmerson,* 118 N. C., 1173; *Sutton v. Walters, ib.,* 495; *Olive v. Olive,* 95 N. C., 486; *Pain v. Pain,* 80 N. C., 322.

In the latest case, *In re Abee,* 146 N. C., 273, the Court said that the recalling of witnesses for further examination is a matter resting in the discretion of the trial judge, and is not subject to review.

The prisoner excepted to the following charge: "The prisoner's mother and father had a perfect right to come in the courthouse and manifest an interest in his defense. But you have no right, in making up your verdict, to take them into consideration at all." This, however, must be read in connection with the context. The court just before this had said: "The wife of the deceased has been before you as an exhibit, and the mother and father of the prisoner have been before you all they could, and appeals have been made to you to take into consideration their feelings in making out your verdict, and the effect it would have upon them. Mrs. Tucker (the wife of the deceased) had a perfect right to come into the courthouse and manifest an interest (461) in this prosecution." And just after the paragraph above excepted to, the court said: "You are sworn to decide this case according to the evidence, and not according to sympathy or feeling for anybody at all."

The court was not referring to the testimony which had been given by the father and mother of the prisoner, but was properly warning the jury against being influenced in their verdict by sympathy for either side. As *Chief Justice Merrimon* said, the "judge is not a mere moderator, but he is an integral and essential part of the court, and should see that justice is impartially administered."

Exception 3 is because the judge stated one of the contentions of the prisoner's counsel. It does not appear from the case on appeal that this was an incorrect statement or that it prejudiced the prisoner, but it has been held that if the court does not correctly state such contention, it is the duty of counsel at the time to call the matter to the attention of the court or it will not be considered on appeal. *Jeffress v. R. R.*, 158 N. C., 215; *S. v. Cox,* 153 N. C., 638.

Exception 4 is to the following charge: "It is not allowable when one man is charged with a crime to show by circumstances or insinuations that some one else killed deceased." The charge was correct. It is not a question of some one else killing him, but whether the prisoner killed the deceasd or not.

In *S. v. Lambert,* 93 N. C., 623, it was held that evidence cannot be admitted to show that a third party had malice to the deceased, a motive to take his life, opportunity to do so, and had threatened to do so. In that case *S. v. Davis,* 77 N. C., 483, to the same effect is quoted.

The prisoner further excepts because the court charged the jury: "When you come to consider the testimony of his father and mother, it is your duty to consider their relationship to him, their partiality to him, and the effect that it would have on them to have him convicted; and then ascertain as best you can what influence that would have upon the truthfulness of their testimony, and then give to the testimony of

(462) each one that weight and effect which under all the circumstances you think he is entitled."

We find no error in this instruction. It calls fairly to the attention of the jury the attendant circumstances which might bias their testimony, and left the jury to judge what weight and effect they should give it.

The last exception is that the court charged the jury: "When you come to consider the testimony of the prisoner, you must remember that prior to 1881 the law did not regard the testimony of a man charged with a crime as fit to go before the jury, but they found that there were some very hard cases, and in order to obviate any trouble of that sort, in 1881, the Legislature very properly passed a law allowing anybody charged with a crime, even though a conviction would forfeit his life, to go upon the witness stand and testify in his own behalf." This was merely the history of the legislation on this subject, and the court added immediately, "but at the same time the law imposes upon the jurors the duty of carefully scrutinizing his testimony and, after considering it, to determine as best they can what influence his interest in the result of the prosecution will have upon his testimony, and then give to his testimony that weight and effect which under all the circumstances you and your conscience think it is entitled to. If you think he told the truth, it is your duty to give to his testimony the same weight and effect you would to the testimony of any disinterested witness." This instruction is correct. *S. v. Byers,* 100 N. C., 512, and cases there cited and citations to that case, in Anno. Ed.

No error.

WALKER, J., concurring in the result: I think the opinion of the Court in this case states the correct rule with respect to the credit a jury should give to a witness likely to be biased by his interest in the cause or his relation to it or to the parties, when it says: "The prisoner further excepts because the court charged the jury: 'When you come to consider the testimony of his father and mother, it is your duty

(463) to consider their relationship to him, their partiality to him, and the effect that it would have on them to have him convicted; and then ascertain as best you can what influence that would have upon the truthfulness of their testimony, and then give to the testimony of each one that weight and effect which under all the circumstances you think he is entitled.' We find no error in this instruction. It calls fairly to the attention of the jury the attendant circumstances which might bias their testimony and left the jury to judge what weight and effect they should give it." This, as I understand the law, and have always understood it, is substantially the correct rule. It provides against undue

influence upon the jury by bias, and, at the same time, gives to the testimony of the interested witness its proper weight, if not thus influenced, and also subjects it to further examination and scrutiny by the jury, as regards any other circumstance, such as character, demeanor, opportunity for knowledge, and so forth, which may be calculated to strengthen or weaken it, so that finally the jury, upon full consideration of them all, may intelligently consider the testimony and extract the truth from it. I also concur in this statement, when referring to the defendant's own testimony: "The law imposes upon the jurors the duty of carefully scrutinizing his testimony, and, after considering it, to determine as best they can what influence his interest in the result of the prosecution will have upon his testimony, and then give to his testimony that weight and effect which under all the circumstances you and your conscience think it is entitled to." I do not assent to the qualification of it in these words: "If you think he told the truth, it is your duty to give to his testimony the same weight and effect you would to the testimony of any distinterested witness." If the jury find that a witness has told the truth, they should, of course, decide according to his testimony, without the necessity of any comparison with others. The truth is what they are required to find. If it is meant that if they find that the witness was not influenced by his natural bias, they should give his testimony the same weight and effect as the testimony of the other witnesses who are disinterested and impartial (and that is what I suppose is meant), it is clearly erroneous, because, his bias removed, the (464) interested witness may still not be entitled to the same weight as the others, as they, by their greater intelligence, knowledge of the facts, demeanor in the witness box, and so forth, may have entitled themselves to the greater confidence of the jury and their testimony to greater weight.

We had better follow the long line of precedents established by this Court throughout many years, and adopt the first rule stated in the opinion, without the added qualification. *S. v. Nash,* 30 N. C., 35; *S. v. Nat,* 51 N. C., 114; *Flynt v. Bodenhamer,* 80 N. C., 205; *S. v. Byers,* 100 N. C., 512; *Hill v. Sprinkle,* 76 N. C., 353; *S. v. Vann,* 162 N. C., 534; *S. v. Graham,* 133 N. C., 652; *Herndon v. R. R.,* 162 N. C., 317, and numerous other cases decided by us to the same effect.

The qualification of the rule, though, as made by the court below, was in favor of the defendant, and he, therefore, cannot complain.

BROWN, J., concurs in this opinion.

Cited: S. v. Lance, 166 N. C., 413; *Lloyd v. Venable,* 168 N. C., 536.

STATE v. CLEVE DANIELS.

(Filed 12 November, 1913.)

1. Trials—Continuance—Court's Discretion.

The refusal of the trial judge to grant a continuance of a case because of the absence of a witness is a matter within his discretion, and not reviewable on appeal unless this discretion has been abused; and where the trial is for murder in the first degree, and defended upon the theory that the prisoner was under the influence of a drug, at the time, which rendered him incapable of premeditation, and no evidence thereof has been offered, though it appears that opportunity under the circumstances was afforded, the refusal of a motion to continue for the absence of a witness to testify as to this fact is not reviewable.

2. Homicide—Murder—Premeditation—Evidence—Questions for Jury.

Where there was evidence that the prisoner immediately before the homicide went up to a group of negroes, among whom was the deceased, and said, "What did you say, old nigger?" repeated the remark, after a silence, whereupon the deceased asked him to whom he was speaking, and the prisoner replied with an oath that he was speaking to him, the deceased, saying further, "I don't like you, nohow, and what it takes to kill you I got it," and then took a pistol from his pocket, fired twice at the deceased, snapping empty cartridges several times, the firing causing the death; that the prisoner after the homicide expressed a regret that he had not had another shot at the deceased; and there was no evidence that the prisoner at the time was drunk or under the influence of a drug, it is held sufficient upon the question of deliberation and premeditation for conviction of murder in the first degree. *S. v. McCormac*, 116 N. C., 1036,, cited, approved, applied.

(465) APPEAL by defendant from *Bragaw, J.*, at May Term, 1913, of DURHAM.

This is an indictment for murder, and the prisoner, being convicted of murder in the first degree, appealed from the sentence of death.

The prisoner moved for a continuance on account of the absence of Richard Cash, who was with the prisoner before and at the time of the killing, and by whom he expected to prove that he was under the influence of cocaine to such an extent that he was incapable of premeditation and deliberation. The motion was overruled, and the prisoner excepted.

The deceased, Jim Dunnegan, was killed in the daytime in the city of Durham, on 26 January, 1913.

Ed Cain, offered by the State, testified: "Was living, in January, 1913, on Glendale Avenue in the northern part of the city of Durham; knew Cleve Daniels and Jim Dunnegan. Had known them for ten or fifteen years. Jim Dunnegan is dead; was shot. Saw the shooting take place on Sunday; thinks deceased died on Monday morning. Went to the burial. Shooting took place about 50 yards from my house on Glen-

dale Avenue. I was about 10 feet away from them. Was standing up against a tree on that street before the shooting. Garland Smith, Aaron Hobbs, and Joe Hayes were with us. Saw Jim Dunnegan and Robertson coming up from Corporation Street, coming towards where I was standing. They stopped and went to talking. These two joined (466) us and made six of us there in all. Cleve Daniels and a white fellow named Cash was on Geer Street at a house called Agnes Leathers', about 40 or 50 yards from where I was. Cleve Daniels went to Agnes Leathers' house, and afterwards he came to where we were standing. When he came up, Cleve Daniels says: 'What did you say, old nigger?' Never spoke to any one particularly; was talking to the whole crowd, and no one gave him any answer, and he said so a second time, 'What did you say, old nigger?' Jim Dunnegan asked him who he was talking to, and he said: 'I am talking to you, damn you. I don't like you, nohow, and what it takes to kill you I got it.' He pulled out his pistol and fired, and Jim moved his leg like that; and he shot again, and by that time Jim grabbed his hand. He took his pistol out of his pocket and pointed it right level at Jim Dunnegan. Don't know whether he hit him the first time or not; knew he hit him on the second time, because Jim Dunnegan said so, then grabbed him. The shot hit him somewhere about the abdomen in the direction the pistol was pointed. It was a black pistol. I think a Smith & Wesson. [Identifies the pistol, which is here offered in evidence.] Nothing had been said between Jim Dunnegan and Cleve Daniels before Daniels stepped up and asked the question, 'What did you say, old nigger?' Jim Dunnegan had been with me about five minutes before Cleve Daniels came up. After the second shot, Jim Dunnegan grabbed Cleve Daniels by the wrist, and after he caught his wrist he snapped three more times, but the pistol failed to go off. Jim Dunnegan did not have any weapon, only he took the pistol away from Cleve Daniels in the struggle. Afterwards Cleve Daniels got up and went down to his house about as far as from here to the back side of the courthouse. Jim Dunnegan lived on Corporation Street, about as far as from here to the corner of Roxboro Street. The only other words spoken were, Aaron Hobbs, Cleve Daniels' brother, said to Jim Dunnegan, 'He has shot you once; why don't you beat hell out of him?' Jim Dunnegan did not do anything after he got Cleve Daniels down and struck him two or three times. (467) Jim Dunnegan did not get his hand on Cleve Daniels until after the second shot was fired; they were about 6 feet apart then. Jim Dunnegan had both hands in his pocket. Cleve Daniels got the gun from back here somewhere [indicating his hip pocket]. He had on an overcoat. Don't know whether he got it out of his overcoat pocket or his hip pocket. When Cleve Daniels walked up, he said, 'What did you

say, old nigger?' and didn't anybody say anything to him, and then he spoke a second time, and said, 'What did you say, old nigger?' and Jim Dunnegan said, 'Who is he talking to?' and Cleve Daniels said, 'I am talking to you, God damn you; I don't like you, nohow, and what it takes to kill you, I got it.' Then he drew his pistol."

Cross-examination: "The oath was not supplied. He cursed when he told Jim Dunnegan he did not like him, nohow. I told it at the trial before. I don't know that I told that before. I know he cursed. Know there was a damn in the oath. Pistol was aimed at Jim Dunnegan, and the shots were bam, bam—just like that; in the same direction both times. Jim Dunnegan did not catch hold of Cleve Daniels' hand after the first shot; did not tell that downstairs. Pistol was pointed in the same direction both times, one shot right after the other, and the range of the pistol was not changed between the shots; pointed both times at Jim Dunnegan; fired twice, and if both bullets left the pistol, it hit him both times; did not swear downstairs that Jim Dunnegan ran to Cleve Daniels and said, 'Look! the negro shot me,' and grabbed him by the hand as he shot the second time. After he shot the second time, Jim Dunnegan grabbed him. They had had no trouble at all, that I know of. Don't remember that he said, 'What did you say when I passed here before?' He went by the first time with Mr. Cash, but Jim Dunnegan was not there; only me, his brother, Garland Smith, and Joe Hayes were there. Jim Dunnegan wasn't there. Don't know how long it was from the first time he went there until he came back. When Cleve Daniels first came by there, Jim Dunngan wasn't there, and Aaron had two dogs playing or fighting, and Cleve Daniels came by there (468) and asked Garland Smith about the dogs, and told him he would get him when he came back, and Jim Dunnegan wasn't anywhere about there. He did not have any words before with Jim Dunnegan. There was no trouble with Smith, only Cleve Daniels told Garland Smith he would fix him when he came back down there. Don't remember the exact words; he told him something about fixing him, damn him, when he came back. Don't know what Cleve Daniels' condition was. He did not look drunk to me. He did not look like he was under the influence of morphine or cocaine. He looked like he always looked. I have not had any trouble with Cleve Daniels; just had fusses like negroes always do. I did not dislike him. We are just as much friends as we always were. Did not have any trouble the day before that; had just cut his hair on Saturday. I was over to his house on that Saturday. I have been up for taking money away from Jim Strudwick and fighting seven or eight times. Did not get mad with Cleve Daniels the day I cut his hair. Cut his hair on Saturday."

Redirect: "When Cleve Daniels passed by, Mr. Cash was with him,

and went about as far as from here to the station-house before he came back. They were walking along."

Bud Robertson, another witness, testified to substantially the same facts.

Mary Holman, a sister of the deceased, testified that she went to the home of the prisoner after the shooting; "that Cleve Daniels was standing on the porch with his wife, Bedie, as I walked up, and said, 'Cleve Daniels, what did you shoot Jim Dunnegan for?' and he said, 'I have not shot no damn Jim.' And I looked up and saw Mr. Stone and another man, and I said, 'There comes the policeman now.' At that time Cleve Daniels shot out of the door and went through the front door and out of the back door, and tried to get over the fence. I saw him after they arrested him, and he said he wished he had gotten one more damn shot at the Dunnegan nigger."

The prisoner requested his Honor to charge the jury that there was no evidence of premeditation and deliberation, which was refused, and he excepted.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State. (469)

J. C. L. Harris and Manning, Kitchin & Everett for defendant.

ALLEN, J. We have given careful consideration to the entire record, and find no error in the proceedings in the Superior Court. The motion for a continuance was addressed to the discretion of the court, and the ruling of his Honor, denying the motion, is not reviewable, unless there has been an abuse of discretion, and we find none.

The killing was on the streets of Durham, in the daytime, in the presence of several witnesses, and immediately before the shooting the prisoner was at the home of Agnes Leathers, and just after was at his own home with his wife.

No evidence was offered by the prisoner, and nothing was developed upon the examination of the witnesses for the State indicating that the prisoner was not in full possession of his faculties.

His Honor was, therefore, fully justified in concluding that, if the prisoner was under the influence of cocaine at the time of the killing, as he alleged, he could prove the fact by other witnesses, and that he was not dependent upon the evidence of Bud Cain, a fugitive from justice, who might never return.

There was, in our opinion, sufficient evidence of premeditation and deliberation to sustain a conviction of murder in the first degree.

The absence of provocation, the preparation of a deadly weapon, the language used before the killing, "I am talking to you, damn you; I don't like you, nohow, and what it takes to kill you, I got it," and after,

"that he wished he had got one more damn shot at the Dunnegan nigger," are circumstances tending to prove premeditation and deliberation, fit to be considered by the jury, and this evidence was submitted to them in a clear charge, which fully protected the rights of the prisoner.

In *S. v. McCormac,* 116 N. C., 1036, the Court says: "While premeditation and deliberation are not to be inferred as a matter of course from the want either of legal provocation or of proof of the use of provoking language, yet all such circumstances may be considered (470) by the jury in determining whether the testimony is inconsistent with any other hypothesis than that the prisoner acted upon a deliberately formed purpose. *S. v. Fuller,* 114 N. C., 885. Kerr (in his work on Homicide, sec. 72) says: 'The question whether there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. It has been said that an act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense.' The test is involved in the question whether the accused acted under the influence of ungovernable passion, or whether there was evidence of the exercise of reason and judgment. The conduct of the accused just before or immediately after the killing would tend at least to show the state of mind at the moment of inflicting the fatal wound. In passing upon the question whether the facts in a given case are sufficient to show beyond a reasonable doubt that the killing was done with deliberation and premeditation, while sudden passion aroused by provocation that would neither excuse nor mitigate to manslaughter the killing with a deadly weapon, is sufficient, if the homicide is committed under its immediate influence, yet the want of provocation, the preparation of a weapon, proof that there was no quarreling just before the killing, may be considered by the jury, with other circumstances, in determining whether the act shall be attributed to sudden impulse or premeditated design."

This case has been approved in *S. v. Lipscomb,* 134 N. C., 694; *S. v. Daniel,* 139 N. C., 552; *S. v. Stackhouse,* 152 N. C., 808, and in other cases.

No error.

Cited: S. v. McClure, 166 N. C., 332; *S. v. Cameron, ib.,* 384.

(471)

STATE v. THEODORE LUCAS.

(Filed 29 October, 1913.

1. Homicide—Murder—Self-defense.

Self-defense may not be successfully maintained where the prisoner has wrongfully assaulted the deceased or provoked a fight resulting in the latter's death.

2. Same—Unprovoked Assault—Necessity to Kill—Trials—Questions for Jury.

Where an assault is unprovoked and made with the intent and present ability to kill, the person assaulted is not required to show that he endeavored to withdraw from the conflict before making the necessary resistance to protect his life or save himself from great bodily harm, before taking the life of his assailant, though it is otherwise if the assault is not felonious, for then he is required to retreat to the wall, as far as consistent with his own safety; and in order to establish self-defense in either case, the necessity to kill is required to be shown; but in the first instance it is to be determined by the jury in view of the fact that the assailed may stand his ground, and in the other, in view of the fact that it is required that he show that he had retreated as far as consistent with his own safety.

3. Instructions—Murder—Self-defense.

In this case it is held that the judge's erroneous instruction upon the doctrine of self-defense on a trial for murder was not cured by construing it with a former portion of his charge, such former portion referring in general terms to the doctrine of self-defense as being a killing from necessity, and it is in the part objected to that he lays down the rule on the subject for the jury's guidance, and it is the only place he intends or professes to do it.

APPEAL by defendant from *Ferguson, J.*, at May Term, 1913, of CUMBERLAND.

Indictment for murder. On the trial below it was proved that on 15 March, 1912, in Cumberland County, the prisoner, Theodore Lucas, shot the deceased, Gilbert McDougal, with a pistol, inflicting wounds from which he shortly died.

There was evidence on part of the State tending to show that at the time there was altercation between the prisoner and deceased, when the latter was seen to put his hand on the prisoner's shoulder, when the latter drew his weapon and fired the shots which resulted fatally,
and there was no adequate provocation or legal excuse for the (472) homicide on the part of the defense.

The prisoner, witness in his own behalf, testified in part as follows: "I am the defendant in this action. I shot Gilbert McDougal. When I shot him, he came up to me, he did, and asked me what was that about me sending for him not to come up there. He was a married man, and

I had done discussed the matter, and said they just couldn't be together so much, and I was the same as her brother. He made threats that he was going to get drunk, and what he was going to do to me. When I shot him he was making towards me with a knife. He caught my arm. I was trying to keep him from striking me, and was running backwards, and the first time I shot him I shot myself through the arm. He struck at me and caught and pulled me this way, and I shot myself through the arm. He run me ten or fifteen steps after he was shot three times, and the last one he said: 'You damn son of a bitch, you better run. If I get you I will kill you.'"

There was other testimony from eye witnesses of the occurrence, tending to support this statement and tending to show that the homicide was committed by the prisoner in his necessary self-defense. There was evidence also to the effect that a knife was found near the deceased when he fell, one witness saying when so found it was shut, and another that it was open.

The court being of opinion that there was no evidence to justify a conviction of murder in the first degree, the case was submitted on murder in the second degree, manslaughter, or excusable homicide.

There was verdict, Guilty of murder in second degree. Judgment, and prisoner excepted and appealed.

Attorny-General Bickett and Assistant Attorney-General Calvert for the State.

Shaw & McLean for defendant.

(473) HOKE, J., after stating the case: After charging the jury correctly as to murder in the second degree and manslaughter, the court below, in reference to the prisoner's claim of self-defense, stated the rule as follows: "But if you are satisfied he was without fault at the time, that he did not enter into the quarrel willingly, that he did not enter into the fight maliciously, but that, having entered into the fight, he quit it and went as far as he could with safety, and was followed by the deceased and then pushed to the wall, and shot and killed the deceased, then he would be acting in self-defense"; and to this the prisoner duly excepted.

It is held for law in this State that when an unprovoked and murderous assault is made on a citizen, he is not required to retreat, but may stand his ground, and take the life of the assailant if it is necessary to do so to save himself from death or great bodily harm. *S. v. Hough,* 138 N. C., 663; *S. v. Blevins,* 138 N. C., 668; *S. v. Dixon,* 75 N. C., 275.

In the *Hough case* the doctrine is stated as follows:

"If an assault be committed under such circumstances as to naturally

induce the defendant to believe that the deceased was capable of doing him great bodily harm, and intended to do it, then the law will excuse the killing, because any man who is not himself legally in fault has the right to save his own life, or to prevent enormous bodily harm to himself."

"4. There is a distinction between an assault with felonious intent and assault without felonious intent; in the former a person attacked is under no obligation to fly, but may stand his ground, and kill his adversary, if need be; in the latter, he may not stand his ground and kill his adversary if there is any way of escape open to him."

In *Blevins' case,* speaking to the position, the Court said: "It has been established in this State by several well considered decisions that where a man is without fault, and a murderous assault is made upon him—an assault with intent to kill—he is not required to retreat, but may stand his ground, and if he kill his assailant, and it is necessary to do so in order to save his own life or protect his person from great bodily harm, it is excusable homicide, and will be so held (*S. v. Harris,* 46 N. C., 190; *S. v. Dixon,* 75 N. C., 275; *S. v. Hough,* (474) *ante,* 663); this necessity, real or apparent, to be determined by the jury on the facts as they reasonably appeared to him. True, as said in one or two of the decisions, this is a doctrine of rare and dangerous application. To have the benefit of it, the assaulted party must show that he is free from blame in the matter; that the assault upon him was with felonious purpose, and that he took life only when it was necessary to protect himself. It is otherwise in ordinary assaults, even with deadly weapon. In such case a man is required to withdraw if he can do so, and to retreat as far as consistent with his own safety. *S. v. Kennedy,* 91 N. C., 572. In either case he can only kill from necessity. But, in the one, he can have that necessity determined in view of the fact that he has a right to stand his ground; in the other, he must show as one feature of the necessity that he has retreated to the wall."

It will be noted from these citations (and they are in accord with the doctrine prevailing here) that when one is subjected to an unprovoked assault, felonious or otherwise, he is not always required to quit the combat in order to maintain the position of self-defense. As we have seen, if the assault is unprovoked and with intent to kill, the person may stand his ground; and if an ordinary assault, he must retreat to the wall, that is, withdraw as far as safety permits. This principle of requiring one to quit the fight in order to maintain self-defense obtains only when the person who slays another has provoked the dispute or entered into it unlawfully."

In the first part of this excerpt, therefore, the court was correct in holding that in order to establish self-defense the prisoner must be with-

out legal fault in entering upon the difficulty; but, having said this, and on the facts in evidence, he committed error in imposing on the prisoner, as he did, the further burden of showing he *"quit the fight,"* went as far as he could with safety, and was followed by deceased, and then, being pushed to the wall, he shot and killed the deceased.

It is urged for the State that while this direction, while stand-
(475) ing alone, may be subject of criticism, it should not be held for reversible error, because in the charge as a whole the position of self-defense has been fairly presented. We are fully mindful of this wholesome rule for construing a judge's charge, which has been approved in several of our recent decisions, but are not at liberty to adopt the suggestion of the learned counsel in the present instance. While his Honor in a former part of the charge made one reference in general terms to the doctrine of self-defense as being a killing from necessity, it is in this present portion that he lays down the rule on the subject for the jury's guidance, and it is the only place he intends or professes to do it. There is nothing in any other portion of the charge that corrects or tends to correct or qualify the rule as stated, and, in our opinion, it amounts to reversible error, entitling the prisoner to a new trial. It is so ordered.

New trial.

Cited: S. v. Robertson, 166 N. C., 362; *S. v. Johnson, ib.,* 401; *S. v. Ray, ib.,* 431.

STATE v. JOHN A. SMITH.

(Filed 15 November, 1913.)

1. Abandonment—Burden of Proof.

To convict the husband of abandonment (Revisal, sec. 3355), it is necessary for the State to allege and prove the act of abandonment and the failure of the husband to provide adequate support for the wife and their child or children of the marriage; and that the act of abandonment was willful and without just cause.

2. Abandonment—Consent of Wife.

Where the wife has consented to a separation from her husband, his leaving her is not an abandonment within the meaning of the statute, Revisal, sec. 3355.

3. Appeal and Error—Briefs—Exceptions Abandoned.

An exception not appearing in appellant's brief is considered as abandoned in the Supreme Court (Rule 34, 140 N. C., 498); nor will it

be sustained when it is not made to appear by the record that the alleged error was prejudicial to the appellant's rights.

4. Abandonment—Evidence—Harmless Error.

Where it is not contested that the husband had actually abandoned his wife, on a trial under an indictment for abandonment (Revisal, 3355), the admission of testimony of the sheriff that he could not find the husband to serve his process is immaterial and harmless.

5. Abandonment—Evidence—Willful Act.

Upon a trial under an indictment for abandonment (Revisal, sec. 3355), there was evidence that the husband had offered to make a home for his wife and child in another town, and that she refused to go there with him. There was evidence that this offer was not made in good faith, and that it was the husband's purpose to make the surroundings of his wife such as to entrap her and lead her into conduct that would give him ground for divorce, and to separate her from her near relations and friends for the purpose. The jury having accepted the version of the prosecutrix, the verdict against the prisoner is not affected, the abandonment being nevertheless willful on the part of the husband.

6. Appeal and Error—Prejudicial Error—New Trial—Evidence—Pleadings—Husband and Wife.

Evidence erroneously admitted upon a trial must be prejudicial and not merely theoretical error in order to entitle the complaining party to a new trial; and where the act of abandonment (Revisal, sec. 3355) and the failure to support are not contested, it is not prejudicial error for the court to admit a part of the defendant's answer forbidden by Revisal, sec. 493, in an action for divorce brought by his wife, to the effect that the husband had sold his property, etc., and had gone to certain places beyond the State.

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

Attorney-General for the State.
Adams, Armfield & Adams and Redwine & Sikes for defendant.

WALKER, J. This is an indictment against the defendant for abandonment of his wife without providing adequate support for her and their child, under Revisal, sec. 3355. The evidence unfolds a very sad, but revolting, story of this unhappy marriage, caused (477) by the persistent indifference of the defendant towards the prosecutrix and his constant neglect of her, which finally culminated in his desertion of his home and his refusal to perform his marriage obligations. He had seduced this woman before their marriage, "with studied, sly, ensnaring art," and pleaded scriptural authority for his betrayal of her and her consequent ruin. He went through the form of redeeming his promise, it is true, and married her, but with evident intent of dis-

solving the unhallowed union. He plied her with false and repeated accusations of infidelity to him, and refused to support her, in the studied execution of his preconceived design of breaking off their marital relations and forcing her to set him free by suing for a divorce. He saved himself from a prosecution for this seduction by the formal ceremony of marriage, for so far as he is concerned, it really had no moral sanction. A child was born to them. Shortly after the marriage he began his persecution of his wife by baseless charges of her intimacy with other men, which he himself must have known were without foundation in fact. He proposed that he debauch himself, so that she could get a divorce, and failing in this, he indecently proposed that she do the same thing and give him grounds for severing the marital tie—adding that he would give her $500 to release him in that way. He told her that he had a wife and children in Florida; but this was not true, and seems to have been said to frighten her into submission to his will.

The jury might well have found from the evidence, not only that he deserted her willfully after the marriage, and failed to furnish her and their child an adequate support, but that he clearly intended, when he married her, to separate himself from her, and to add the crime of abandonment to that of antenuptial seduction, which she had condoned by the marriage and which stood as a bar to his criminal indictment. She scornfully resented all of his immoral suggestions and wicked solicitations and indignantly protested against his evil course towards her, which had grown from bad to worse. When baffled by her steady refusal to

(478) defile herself for his vile purposes, or even to listen to his base proposals, he then tried to subject her to temptation, and offered a bribe for the purpose of placing her in a compromising position so that he could use the testimony of his accomplice against her virtue. But he again failed, and finally offered to take her to a neighboring city to live; but she declined to go, as his previous treatment and his conduct had convinced her that he was not acting in good faith, after a change of heart and promise of repentance and reform, but solely for the purpose of removing her from the protection of her friends and family, and so isolating her that he might the more easily and successfully continue in his efforts to destroy her character out of the mouths of suborned witnesses of low degree; and, if the evidence is credible, she had good reason to think so and to take counsel of her fears. He complained of her extravagance, when she had spent none of his money. For some weeks after the marriage they lived at her grandmother's home. The evidence shows that during this period, as the Attorney-General puts it, "he squandered on her the sum of 30 cents. Not being able to stand such excessive cost of living, the defendant made arrange-

ments for him and his wife to live in the home of the wife's father. He carried his wife and all of their belongings to the father's home, but after eleven days, during which time he spent only one night with his wife, he moved his own things away, and has never lived with her since." He finally left for Florida, remaining away several months, and stating, while there, that he never expected to live with his wife again, and that the people at his home could do nothing with him, as "if it got hot he could go somewhere else and stay," and he repeated this declaration several times, and once admitted that he married the prosecutrix to get rid of trouble he had brought upon himself, alluding to his seduction of her.

The defendant introduced no evidence; but this failure on his part to explain the damaging facts we have recited (and there are more of the same kind in the testimony sent up) cannot be used against him, and should prejudice him in no degree.

The abandonment must be willful, that is, without just cause (479) or excuse—unjustifiable and wrongful. *S. v. Hopkins,* 130 N. C., 647; *S. v. Toney,* 162 N. C., 635. If she consented to the separation, his departure from her home and living apart from her would not be an abandonment. *Witty v. Barham,* 147 N. C., 479.

There are two ingredients of this crime—abandonment and failure to provide adequate support for wife and child; and both must be alleged and proved. *S. v. May,* 132 N. C., 1021. The State offered ample evidence to establish the completed offense.

Defendant's offer to provide a home for his wife in Charlotte is no defense, if it was not genuine or made in bad faith. The court submitted this view of the case to the jury by fair, full, and correct instructions, and they found against the defendant. The verdict, in that particular, is well warranted by the evidence, and the defendant has alleged no error with respect to it.

He assigns in the case on appeal four errors: The first, as to the introduction of the complaint filed in a divorce suit brought by his wife, is abandoned, as it does not appear in his brief. Rule of Court No. 34 (140 N. C., 498); *Rogers v. Manufacturing Co.,* 157 N. C., 484. But if it was before us, we could not sustain it, as the contents of the pleading is not set out, and we therefore cannot see that the ruling was prejudicial. *S. v. Pierce,* 91 N. C., 606; *Whitmire v. Heath, ibid.,* 204; *Fulwood v. Fulwood,* 161 N. C., 601; *In re Penny's Will,* 21 Minn., 280; *In re Smith's Will,* 163 N. C., 464.

The section exception, which was taken to the testimony of the sheriff that he could not find defendant in the county when he attempted to serve his process, was only relevant upon the ground that there was evidence he was trying to evade the service and had absented himself.

But in the view we take of the case, it is an immaterial fact, and was harmless. It was not disputed, either here or below, so far as appears, that defendant had intentionally abandoned his wife, that is, left her and his child without any adequate support, and he is guilty, unless he was justified in so doing, which we have seen was not the case.

The same may be said of the third exception relating to the (480) same subject.

The fourth exception, as to the introduction of part of the answer in the divorce suit, would give us some trouble if the record admitted by the court were at all essential as a link in the chain of evidence, but we think it is not, and if error there be, it is harmless. If material evidence is improperly admitted, there should of course be a reversal, even though there be enough, or an abundance, of other proof upon which the verdict could have been found for the State. *Church v. Hubbert,* 2 Cranch. (U. S.), 187.

A defendant is entitled in law to hear the particular accusation against him; to have the prosecution restricted to that accusation, and consequently the proof, and not to be convicted of any other offense than the one specially charged in the indictment. This is his natural and constitutional right. But there must be prejudicial and not merely theoretical error.

Verdicts and judgments should not be lightly set aside upon grounds which show the alleged error to be harmless or where the appellant could have sustained no injury from it. There should be at least something like a practical treatment of the motion to reverse, and it should not be granted except to subserve the real ends of substantial justice. Hilliard on New Trials (2 Ed.), secs. 1 to 7. The motion should be meritorious and not frivolous. The commentators on New Trials, 3 Graham and Waterman 1235, thus state the prevailing rule:

"The foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered, there is nothing to be relieved against. The injury must be positive and tangible, not theoretical merely. For instance, the simple fact of defeat is, in one sense, injurious, for it wounds the feelings. But this alone is one sufficient ground for a new trial. It does not necessarily involve *loss* of any kind, and without loss or the probability of loss there can be no new trial. The complaining party asks for redress, for the restoration of rights which have first been infringed and then taken away. There must be, then, a probability of (481) repairing the injury, otherwise the interference of the Court would be but nugatory. There must be a reasonable propsect of placing the party who asks for a new trial in a better position than

the one which he occupies by the verdict. If he obtains a new trial, he must incur additional expense, and if there is no corresponding benefit, he is still the sufferer. Besides, courts are instituted to enforce right, and restrain and punish wrong. Their time is too valuable for them to interpose their remedial power idly, and to no purpose. They will only interfere, therefore, where there is a prospect of ultimate benefit." Tried by this rule, we do not think any reversible error was committed.

Defendant says that such evidence is forbidden by Revisal, sec. 493: "The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading." If defendant's construction of this statutory provision is conceded, we are yet of opinion there was no substantial error. We do not see how the admission in the answer that defendant had sold his property and paid a part of his debts can have any material bearing upon the issue in this case, nor how the fact that he went to Florida and other places could have prejudiced him in his defense. It made no difference that he went to other States. The fact was not denied that he left his wife in this State, before he went elsewhere, and it was immaterial to inquire as to his whereabouts afterwards. If the pleading was introduced to contradict defendant's admission therein by showing that he did not visit those places, we would order a new trial if we could see that he had been harmed by it, but it clearly appears from a careful review of the whole case that such has not been the result. The uncontroverted facts showed a plain case of guilt under the statute, and there was no pretense of legal excuse, apart from the promise of a home in Charlotte, which the jury have found to have been a mere attempt to lure his wife, who was pure and had been faithful, to her own ruin, that he might have cause to put her away. She was too wary for him, and declined to walk into the net he had so vainly spread for her. (482)

No error.

Cited: Brogden v. Gibson, 165 N. C., 25; *Steeley v. Lumber Co., ib.,* 32; *S. v. Heavener,* 168 N. C., 161, 163; *Ferebee v. Berry, ib.,* 282; *In re Craven,* 169 N. C., 564; *Schas v. Assurance Society,* 170 N. C., 424.

STATE AND CITY OF CHARLOTTE v. LEWIS RUSSELL.

(Filed 19 November, 1913.)

1. Spirituous Liquor—Prospective Laws—Conflict—Interpretation of Statutes.

Public Laws of 1913, ch. 44, called the "Search and Seizure" law, ratified 3 March, is by its provisions effective 1 April of the same year, and having a prospective effect, is not in conflict, as to acts committed before then, with chapters 819 and 992, Laws 1907, making the possession by one person in Mecklenburg County of more than 2½ gallons of spirituous liquor *prima facie* evidence of the unlawful intent to sell. *S. v. Perkins*, 141 N. C., 797.

2. Spirituous Liquors—Co-ordinate Branches of Government—Presumptions of Innocence—Constitutional Law—Statutes.

The provision of chapters 819 and 992, Laws 1907, making the possession by one person of more than 2½ gallons of spirituous liquor in Mecklenburg County *prima facie* evidence of an unlawful intent to sell, is not an unconstitutional assumption by the Legislature of the judicial power, nor does it deprive the citizen of the common-law presumption of innocence, or of the benefit of the doctrine of reasonable doubt. *S. v. Barrett*, 138 N. C., 630; *S. v. Wilkerson, ante*, 431.

3. Spirituous Liquors—Burden of Proof — Reasonable Doubt — Prima Facie Case—Instructions.

Where the statute makes the possession by one person of a certain quantity of spirituous liquor *prima facie* evidence of an unlawful intent to sell, the burden of the issue remains on the State to show the guilt, as charged in the indictment, beyond a reasonable doubt; and when the *prima facie* case has been established, under the provision of the statute, it does not forestall the verdict, for it only means that as evidence it is sufficient to establish the ultimate fact of guilt, and the jury may convict if they find that it is not explained or rebutted. The presumption of innocence is still with the prisoner, and the burden continues to rest upon the State to show guilt beyond a reasonable doubt. The charge of the court in this case is approved. *S. v. Wilkerson, ante*, 431.

CLARK, C. J., concurs in the result.

(483) APPEAL by defendant from *Webb, J.*, at April Term, 1913, of MECKLENBURG.

The defendant was charged before J. L. Brown, a justice of the peace, upon the affidavit of a police office, with the crime of having in his possession, on 18 January, 1913, more than 2½ gallons of intoxicating liquor for the purpose of sale and with keeping intoxicating liquor for the same purpose. He was arrested under the justice's warrant, which was returnable before the recorder of the city of Charlotte, before whom he was tried and convicted. Appealing to the Superior

Court from this judgment, he was tried before Hon. James L. Webb, and a jury, and having been again convicted, he appealed from the judgment to this Court.

Attorney-General Bickett for plaintiff.
Barry & Henry for defendant.

WALKER, J., after stating the case: The prisoner's counsel has raised several questions, by a motion to quash the proceeding, by demurrer to the evidence, and by prayers for instruction.

First. The indictment is under the Public Laws of 1907, chs. 819 and 992, which together prohibit the keeping for sale any spirituous liquor in Mecklenburg County, with certain exceptions not applicable to this case, and provide that the possession of more than 2½ gallons of such liquor shall be *prima facie* evidence of the unlawful intent to sell. Section 1 of chapter 819 of the Laws of 1907 seems to be substantially the same as section 2 of chapter 992 of the Laws of 1907.

The prisoner's counsel contends that these laws, so far as pertinent to this case, are repealed by what is sometimes called the "Search and Seizure" law (Public Laws 1913, ch. 44).

There are two conclusive answers to this contention: (484)

By the decision in *S. v. Perkins,* 141 N. C., 797, we held that a statute (Laws of 1905, ch. 497) prohibiting the sale of spirituous liquor in Union County and repealing all laws in conflict with it, and further providing that it should take effect on 1 June, 1905, did not work a repeal of the act of 1903, ch. 434, which also prohibited the keeping for sale spirituous liquors in that county and made the possession of more than one quart of such liquor *prima facie* evidence of the unlawful act. The purport of the ruling was that the two acts were not necessarily in conflict, but could easily be reconciled by confining the earlier one to offenses committed before the passage of the later one, and the latter to offenses committed after it took effect on 1 June, 1905; the legal effect of which was to hold that the last act was prospective in its operation. That case and this are practically alike in their facts and the legal questions involved, and, in this respect, the decisions must be the same, except it may be said that the language of the act of 1913 more strongly favors the continued operation of acts of 1907, ch. 819 and 992, relating to Mecklenburg County, than did the act of 1905 in respect to the former act of 1903, relating to Union County. The *Perkins case* stands plainly in the way of this contention and meets it at every point.

2. The other answer is, that the act of 1913, by sections 8 and 9, distinctly excepts cases of this class, where the offense was committed before

its enactment, from its operation. Section 8 provides: "That all laws or parts of laws in conflict with this act be and the same are hereby, to the extent of such conflict, repealed: *Provided, however,* that nothing in this act shall operate to repeal any of the local or special acts of the General Assembly of North Carolina prohibiting the manufacture or sale or other disposition of any of the liquors mentioned in this act, or any laws for the enforcement of the same, but all such acts shall continue in full force and effect and in concurrence herewith, and indictment or prosecution may be had either under this act or any special or local act relating to the same."

Second. The prisoner's counsel then fall back upon the position, which they defend with an able and learned argument, that the (485) acts of 1907, chs. 819 and 992, making the bare possession of 2½ gallons of liquor *prima facie* evidence that it is kept for sale, is invalid as in violation of the constitutional rights of the citizens, for two reasons: (*a*) It is an assumption by the Legislature of judicial power, and, therefore, an invasion by it of the province assigned to another and coördinate branch or department of the Government. (*b*) It deprives the prisoner of the common-law presumption of innocence and of the full benefit of the doctrine of reasonable doubt; and, besides, it casts upon him the burden of showing his innocence.

Without admitting that the act has the effect, in law, thus imputed to it, we must decline to enter upon a discussion of the questions thus pressed upon our attention, and for the very good reason that we have squarely decided against a similar contention in *S. v. Barrett,* 138 N. C., 630, and again in *S. v. Wilkerson, ante,* 431. In both cases, after an exhaustive consideration of the matter, we have deliberately decided that a like provision of the law (in the acts relating to Union County, and in the law of general application in the State, passed at the last regular session of the General Assembly, Laws of 1913, ch. 44, the "Search and Seizure" law) are constitutional and valid, both as to their criminal feature and the rule of evidence established by them. In the *Barrett case* we upheld the Union County law, and in the *Wilkerson case* we sustained the "Search and Seizure" law. The legal effect of those two decisions is so plain and unmistakable that there can be no fair or reasonable doubt of it. So far a this Court is concerned, they are valid laws of the State and will be enforced strictly and rigidly, according to the intention of the Legislature in passing them.

The prisoner reserved certain exceptions to the instructions of the court to the jury; but we may say with absolute correctness and propriety, that the law as declared by this Court in *Barrett's case* and *Wilkerson's case* (not decided at the time) could not have been more

clearly stated, or with greater precision and conciseness, than was done in the charge of Judge Webb in response to the prisoner's request, which was as follows: "That notwithstanding all the laws prohibiting the keeping in possession of or sale of spirituous, vinous, or malt (486) liquors or intoxicating bitters, it is, nevertheless, lawful for any one to keep, or have on hand, any quantity of such liquors or to have same under his control, provided he has same, or controls same, for his own use, or to give to others. And that this is true, whether such liquors so kept for his own use or for transfer by gift are bought in this State or shipped into from some other State. The statutory presumption in this case, to the effect that keeping or having on hand or under one's control more than 2½ gallons of intoxicating liquor, shall be *prima facie* evidence of an intent to sell same contrary to law, is not binding upon the jury, though the defendant does not see fit to introduce any testimony or to go on the stand as a witness for himself. The jury is still at liberty to acquit the defendant, if they find his guilt is not proved beyond a reasonable doubt." The court also, in its general charge, explained to the jury the nature and legal force of *prima facie* evidence, and distinctly told them that neither upon such evidence, by itself or in connection with other circumstances that strengthened it, could they convict the defendant, unless they were satisfied beyond a reasonable doubt of his guilt. This was the proper instruction, as the Legislature has not, for a very good reason, attempted to make the bare possession of liquor conclusive as evidence fit to be considered by the jury upon the question of guilt, and sufficient to convict, even standing alone and unsupported by any other circumstance. The judge did not shift the burden to the defendant, as was done in *S. v. Wilkerson,* but kept it where it belonged, upon the State. We said in *Wilkerson's case:* "It is not made unlawful for a person to have more than one gallon of spirituous liquor in his possession, but it is criminal to have possession of that quantity for the purpose of sale, and while the bare possession of so much may, in itself and as a fact, be innocent, it is yet made *prima facie* evidence of guilt under the statute, as held in *S. v. Barrett,* 138 N. C., 630. But it is only evidence, and while it has the added force or weight of being *prima facie,* the latter means no more than that it is sufficient for the jury to convict upon it alone and unsup- (487) ported, if no other proof is offered, but upon the whole evidence, whether consisting of mere fact of possession or of addition facts, the jury are not bound to convict, but simply may do so if they find, beyond a reasonable doubt, or are fully satisfied that the defendant is guilty. The jury are no more required to convict upon a *prima facie* case than they are to acquit because of the presumption of innocence. They must

judge themselves as to the force of the testimony and its sufficiency to produce in their minds a conviction of guilt." The words *"prima facie,"* as used in connection with the force and effect of evidence, means no more than that the latter, on its face or at first view and without contradiction or explanation, tends to prove the fact in issue—not that it does necessarily establish it. Perhaps a more legal definition is, that it is such as is, in judgment of law, sufficient to establish the ultimate fact, and, if not explained or rebutted, remains sufficient for that purpose. It does not, in law, forestall the verdict, but leaves the inference of guilt, as in this case, for the jury to find, after excluding all reasonable doubt.

We have examined the prayers for instruction most carefully, and the charge, and conclude that the judge fairly and fully explained the law to the jury. We said in *Barrett's case:* "This (*prima facie* evidence) neither conclusively determines the guilt or innocence of the party who is accused nor withdraws from the jury the right and duty of passing upon and deciding the issue to be tried. The burden of proof remains continually upon the State to establish the accusation which it makes, as *prima facie* evidence does not change or shift the burden," citing *Com. v. Williams,* 72 Mass. (6 Gray). When proof of a certain fact is made *prima facie* evidence of the main fact to be established, the law does not mean that there is any conclusive presumption of guilt thereby created, but that there is sufficient evidence to go to the jury and upon which they may convict if there is no countervailing testimony. It does not shift the burden of the issues, but the State is still required to prove its case beyond a reasonable doubt. Wig. Ev., sec. 2494 (2); *Womble v. Grocery Co.,* 135 N. C., 474.

(488) Liquor cases are no exception to the rule, which every one will recognize, that trials should be conducted strictly according to the settled principles of the law. A good cause is never aided, but, on the contrary, retarded, by forcing the law to suit our individual conceptions of right and wrong, in an effort to advance it beyond the limit at present fixed by the Legislature. Such a course is not only wrong in itself and unjustifiable, but it would be contrary to the recorded will of the people and the intent of the lawmaking body, which alone is invested with the power of legislation. Its intention should be fully executed, without straining its language to extend it beyond what is authorized by its written words. Parties have the common-law right, which has been guaranteed by our Constitution, to be heard by us impartially and with cold neutrality, so that exact justice may be done within the law. As said by a learned and just judge, in his charge to the jury, which was recently reviewed by us, the safe guide for us is the one laid down by the great Law-giver to the judges of Israel: "Thou shalt do no unright-

eousness in judgment. Thou shalt not respect the person of the poor, nor honor the person of the mighty, but in righteousness shalt thou judge thy neighbor." It is not what *we* may think the law should be, but what it is, that furnishes the true rule of procedure, discarding from our minds any mere personal view of the law's policy, and not embodying in the law, for the purpose of enforcing them, our own ideas of right and wrong. If we unsettle the foundations of the law, by substituting our own individual opinion of what is right, often biased and prejudiced, for the safer, wiser, and more temperate rule of the law, we will surely bring discredit upon our decisions and justly merit, as we will certainly receive, the condemnation of the people. We cannot, therefore, consider any matters unless based upon the facts and law of the case, instead of our individual notions of justice and expediency. Such action on our part would be a wide departure from the true course which has been set for us by the Constitution and the laws.

Even a cursory review of the charge, before examining it more critically, has satisfied us that the prisoner had the full benefit of the doctrine of reasonable doubt and the presumption of innocence, (489) to the extent that he was entitled to it, and also a fair and correct instruction concerning the effect of the possession of liquor as *prima facie* evidence of his keeping it for sale, under the statute.

In conclusion, we hold the act of 1907 valid, as we did the act of 1913, in *S. v. Wilkerson, ante,* 431; and we further decide that the prisoner was tried according to the provisions of the former statute and the general rules of law applicable to the case. His conviction, therefore, must be sustained.

The difference between this case and the *Wilkerson case* is this: In the *Wilkerson case* the judge charged the jury erroneously as to the effect of *prima facie* evidence, and we ordered a new trial. In this case the judge gave a correct charge as to the effect of such evidence, and we affirm the judgment of conviction. In both cases the prohibition act and the "Search and Seizure" act are declared to be valid and enforcible; but we decide that a man charged under either must be tried according to law.

No error.

CLARK, C. J., concurring in the result: I agree with the following definition of *prima facie,* given in the opinion of the Court, that it is "in judgment of law sufficient to establish the ultimate fact, and if not explained or rebutted remains sufficient for that purpose."

I also agree cordially with the statement in the opinion that the Search and Seizure law and the other prohibition statutes "are the laws of this

State and should be enforced strictly and rigidly according to the intention of the Legislature in passing them"; and further, that, as is so well said in the opinion, "If we unsettle the foundation of the law by substituting our own individual opinion of what is right, often biased and prejudiced, for the safer, wiser, and more temperate rule of the law, we will surely bring discredit upon our decisions and justly merit, as we will certainly receive, the condemnation of the people."

When the Legislature saw fit to make the possession of liquor, more than one gallon in quantity, *prima facie* evidence of an intent to
(490) sell, it was acting within its powers, and in ascertaining the meaning of the Legislature we must take it that they meant to use words in their ordinary and general acceptation. The words *"prima facie* evidence" are defined in Webster's International Dictionary as meaning "evidence sufficient, in law, to raise a presumption of fact or establish the fact in question, unless rebutted." We must presume that the Legislature had such meaning in mind when such words were used in the statute.

Indeed, the Court in the opinion in this case uses that very definition. Not until very recent years has a different idea been advanced and a distinction between "the burden of the issue" and the "burden of proof" been introduced. Such distinction, it seems to me, is unnecessary (though we have used it more than once) and not easy to be understood by a jury. Such change has not been required by any statute and is entirely judge-made. To my judgment, it is an unnecessary distinction, calculated to confuse a jury. In view of the better tendency in these days to abolish, and not to create, subtle distinctions, it ought not to be longer recognized. An inadvertent disregard of this distinction by a judge in his charge may sometimes result in the acquittal of a guilty man. But it is hardly conceivable that its use will ever militate to the better ascertainment of the truth, when a *prima facie* case has been established in the manner required by the statute. The facts should be ascertained upon the evidence unhampered by overrefinements in the charge.

Cited: S. v. Denton, post, 532; *S. v. Lee, post.* 537; *S. v. Randall,* 170 N. C., 758.

(491)

STATE v. DAVID ISLEY.

(Filed 19 November, 1913.)

Criminal Law—Promise to Work—Intent—Presumptions—Statutes—Constitutional Law.

The defendant was indicted (Revisal, sec. 3431) for promising to work, etc., and obtaining money, goods, etc., upon the strength of that promise, and for failing to do the work, etc., and there was evidence in support of the charges in the indictment: *Held*, this case is controlled by *S. v. Griffin*, 154 N. C., 611, and the motion to dismiss the action is sustained under chapter 73, Laws 1913.

APPEAL by defendant from *Long, J.*, at July Special Term, 1913, of RANDOLPH.

The defendant was indicted under the following bill of indictment:

"The jurors for the State, upon their oaths, present that David Isley on 1 June, A. D. 1912, did willfully and unlawfully and with intent to cheat and defraud J. A. Ellis obtain certain advances in money, fertilizers, corn, flour, provisions, goods, wares, and merchandise from said J. A. Ellis, upon and by color of a certain promise and agreement that the said David Isley would begin work and labor for said J. A. Ellis, from whom said David Isley obtained said money, goods, provisions, merchandise, etc., and the said David Isley, making said promise and agreement, did unlawfully and willfully fail to commence and complete said work as aforesaid according to contract, without a lawful excuse, contrary to the form of the statute in such case made and provided."

The defendant entered the plea of not guilty, and on the trial the following evidence was introduced:

J. A. Ellis, witness for the State, testified that defendant was his tenant; that he let defendant have certain advances in merchandise, etc., upon defendant's promise to pay for same in work; that defendant failed to do said work, and when witness asked him why he did not come and do the work, defendant said that he had to get some shoes for his children.

State rested, and the defendant demurred to the evidence and moved to dismiss under the act of 1913. Motion overruled; de- (492) fendant excepted.

There was a verdict of guilty, and from the judgment pronounced, the defendant appealed.

Attorney-General Bickett for the State.
R. C. Kelly for the defendant.

ALLEN, J. The decision of this appeal is controlled by *S. v. Griffin,* 154 N. C., 611, in which the statute under which the defendant is indicted was fully discussed in an elaborate and learned opinion by *Associate Justice Brown,* and upon the authority of that case the judgment is reversed, with directions to dismiss the action under chapter 73, Public Laws 1913.

Reversed.

STATE v. K. L. LAWING.

(Filed 26 November, 1913.)

1. Cities and Towns—Fire Districts—Police Powers — Legislative Power—Constitutional Law.

It is within the valid exercise of the police power of the State for the Legislature to confer authority upon an incorporated town to establish fire limits for the protection of the property of its citizens, wherein houses of wood may not be erected or repaired; and where the town has accordingly passed an ordinance establishing a fire district within its business section, it is an unlawful violation thereof to replace with iron or metal roofing the old and worn-out shingles on an old frame structure; for a repair of this character looks to the continued use of the kind of building prohibited, and is not such slight repairs as are necessary to make it habitable, such as putting in broken windows or hanging a shutter, etc.

2. Cities and Towns—Fire Districts—Discretionary Powers—Courts.

The courts will not pass upon the reasonableness of fire limits established by an incorporated town under authority conferred by the Legislature, at least where the limits established appear to be reasonable, and without palpable oppression or injustice done.

(493) APPEAL by State from *Webb, J.,* at September Term, 1913, of LINCOLN.

The Attorney-General and A. L. Quickel for the State.
L. B. Wetmore for defendant.

CLARK, C. J. The charter of Lincolnton, Laws 1899, ch. 369, sec. 70, provides: "Said board of aldermen may establish fire limits in said town, within which it shall be unlawful for any person to erect, construct, or *repair* any building of wood or other material inflammable or peculiarly subject to fire."

Under authority of above provision of law, the aldermen enacted Town Ordinance, sec. 34, as follows: "No person shall erect any build-

ing or structure unless the outer walls thereof be of brick, stone or concrete, and covered with metal, stone, or other noninflammable roofing, within the fire limits as designated by section 33, on page 8 of the printed Ordinances of said town; nor shall any person remove any building, not so constructed, from without into said prescribed fire limits, nor from one place to another within said fire limits: *Provided,* the above ordinance shall not apply to the construction or repair of hitching stalls within said fire limits." The prescribed fire limits are very restricted, and are in the center of the town and mostly abutting on the courthouse square.

It appears from the special verdict that within the fire limits of the town the defendant owns a hotel building, consisting of a main building three stories high, constructed of brick, with a two-story ell extending out therefrom, and the ell (constructed prior to the establishment of any fire limits in the town) is of wood, being an ordinary frame building with a shingle roof. The roof of shingles had become decayed and in such a rotten condition that it leaked badly. The defendant, after the passage of the ordinance above quoted, removed the old rotten shingle roof and recovered the same with sheet iron.

It cannot be doubted that the people of the State, acting (494) through their Legislature, have authority to authorize the governing body of any town to establish fire limits for the protection of life and property therein which would be endangered by fire. There is nothing here to show that the town authorities have acted unreasonably in the establishment of fire limits. Whether they have acted with judgment or not is a matter for the people of the town, who can correct their action, if not agreeable, by making their wishes known to the authorities, or by the election of a new board, if necessary. This Court has neither the information or the authority to supervise their conduct, ordinarily at least, though in a case of palpable oppression an injunction might possibly lie until the people of a town can pass upon the matter in the in the election of officers. As was said by *Pearson, C. J.,* in *Brodnax v. Groom,* 64 N. C., p. 244, as to the action of county commissioners in matters within their jurisdiction, "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 principle of our government and usages of all times past. For the exercise of powers conferred by the Constitution the people must rely upon the honesty of the members of the General Assembly and of the persons elected to fill places of trust in the several counties.

This Court has no power, and is not capable, if it had the power, of controlling the exercise of the power conferred by the Constitution upon the legislative department of the Government or upon the county authorities."

The above has been cited and approved in very numerous cases (see citations in Anno. Ed).

It may be noted that since this ordinance was adopted, 13 May, 1912, there has been an election of a new governing board for the said town, and the ordinance must have been approved by the people of the town and the new officials, as it has not been repealed.

The decisions are thus summed up: "The prevention of and (495) protection against conflagration is generally recognized as an appropriate exercise of the *police power* by municipalities and the enactment of ordinances establishing fire limits and forbiding the use of inflammable material in building or in the erection thereof within such limits, has been uniformly sustained as appropriate methods of its exercise. While some courts hold that this power is inherent in a municipality, it nevertheless usually exists only by reason of an express grant or a necessarily implied statutory or constitutional delegation." 28 Cyc., 741.

Even in the absence of statutory authority, it has been held that the town authorities have the power to prohibit the repairing or altering of wooden buildings within prescribed limits. *Ex Parte Fiske,* 92 Cal., 125; *King v. Davenport,* 98 Ill., 305; *S. v. O'Neal,* 49 La. Annual, 1171; *Brady v. Insurance Co.,* 11 Mich., 425. In *Bank v. Sarlls,* 129 Ind., 201, it was held that the power to prohibit the repair of a building did not exist unless granted by the general law or by the charter of a town. This last is the case here.

In our own State, in *S. v. Tenant,* 110 N. C., 609, the ordinance was held invalid solely because it left the matter of such building to the arbitrary discretion of the board of aldermen, and did not, as in this case, prescribe a uniform rule of action governing the exercise of the discretion.

In this instance, the town, under the express provisions of the charter, has power to pass the ordinance prohibiting the erecting or repairing of a wooden building, and in *S. v. Johnson,* 114 N. C., 846, an ordinance such as the one now under consideration was sustained against the defendant, who was prosecuted for making repairs to a house that had been partially destroyed by fire.

In *Durham v. Cotton Mills,* 141 N. C., at p. 635, *Walker, J.,* says in speaking of a somewhat similar act to protect the waters of creeks, etc., from pollution: "The design of the act is not to take property for public

use, nor does it do so within the meaning of the Constitution. It is intended to restrain and regulate the use of private property so as to protect the common right of all the citizens of the State. Such acts are plainly within the *police power* of the Legislature, which power is the mere application to the whole community of the maxim, (496) *'Sic utere tuo, ut alienum non lædas';* nor does such restraint, although it may interfere with the profitable use of the property by its owner, make it an appropriation to a public use so as to entitle him to compensation." After citing various authorities, it is further said: "Many instances of such an exercise of this power can be found. The State regulates the use of property in intoxicating liquors by restraining their sale, not on the ground that each particular sale does injury, for then the sale would be prohibited, but for the reason that their unrestricted sale tends to injure the public morals and comfort. The State is not bound to wait until contagion is communicated from a hospital established in the heart of a city; it may prohibit the establishment of such a hospital there, because it is likely to spread contagion. So the keeping of dangerous explosives and inflammable substances and the erection of buildings of combustible materials within the limits of a dense population may be prohibited because of the probability or possibility of public injury. Such instances might be indefinitely multiplied, but these are sufficient to illustrate this case. The object of this legislation is to protect the public comfort and health. For that purpose the Legislature may restrain any use of private property which tends to the injury of those public interests."

It is urged that the placing of a metal roof upon this wooden ell makes it not more dangerous, but less so. But this loses sight of the object of the ordinance, which is not only to prohibit the building of wooden buildings within the prescribed limits, but while not requiring the pulling down of the wooden buildings now within the limits, prohibits their repair, in order to prevent their indefinite continuance therein, as would be the case if they can be repaired from time to time. As was said in *S. v. Johnson, supra,* this does not prohibit slight repairs, such as putting in broken windows or hanging a shutter, or fixing up the steps. But it does prohibit such repairs as in this case, of putting on a new roof, which makes the building habitable and thereby insures its continuance. This is contrary to the spirit and the letter of the ordinance, and defeats its purposes, which is to permit only (497) concrete, or stone buildings to be erected and contemplates the discontinuance of wooden buildings as fast as they become by decay unfit for further use or habitation. The substantial repair of such buildings is therefore forbidden.

In *S. v. Baskerville,* 141 N. C., 818, *Hoke, J.,* says: "It is well established that an act of the Legislature will never be declared unconstitutional unless it plainly and clearly appears that the General Assembly has exceeded its powers." In *Ogden v. Saunders,* 12 Wheaton, 213; Cooley Const. Lim. (7 Ed.), 253, the Supreme Court of the United States held that "No act should be held unconstitutional unless it is clearly so, *beyond a reasonable doubt.*"

The action of the Legislature authorizing the enactment of this ordinance and of the board of aldermen in passing it is not a taking of private property for public uses, but it is the restriction of the defendant in the unlimited use of his property by virtue of the *police power* (Dillon Mun. Corp., 727), for the purpose of protecting the community from the dangers to which the public would be exposed by the continuance of a wooden building in that locality, by the requirement that when it becomes unusuable by decay it shall be replaced by a safer construction than wood.

Upon the special verdict the court should have directed that the jury returned a verdict of guilty.

Reversed.

Cited: *S. v. Shannonhouse,* 166 N. C., 242.

(498)

STATE v. LURTON R. ENGLISH.

(Filed 26 November, 1913.)

1. Court's Discretion—Motions—Continuances.

The refusal by the trial judge of a continuance upon the ground of the inability of a party to procure certain witnesses is not reviewable on appeal, in the absence of any abuse of discretion by the court in such matters.

2. Jurors—Challenges—Opinion Expressed.

Notwithstanding a juror may have expressed his opinion upon the matter in controversy, the action of the judge in permitting him to serve as a juror is not error, when it appears from the statement of the juror that he could assume the obligations of a juror, hear the evidence from the witnesses and the charge of the court, and render a verdict entirely in accordance with the law and the evidence uninfluenced by any opinion he may have formed.

3. Jurors—Challenges—Impartial Panel.

The right of challenge is given for the purpose of selecting an impartial jury, and not to allow either party to pick one, and where the

jurors objected to have been stood aside, and the jury impaneled before the party appealing has exhausted his peremptory challenges, there is no reversible error on the ground that the jurors selected were not impartial ones.

4. Homicide—Trials—Evidence Corroborative—Harmless Error.

On a trial for murder, testimony is held competent, that the witness for the State saw the defendant in his buggy, looking for some one; that he heard the shots, and immediately "ran down to see what had happened, when he found the prisoner with a pistol in his hand and the deceased wounded and being carried to the house," the evidence being corroborative of other witnesses, relevant, material, and not disputed.

5. Trials—Evidence Corroborative—Objections and Exceptions—Appeal and Error.

Where evidence is admissible for purposes of corroboration only, exception that it was not confined to that purpose should be made upon a refusal by the court to do so at the request of the appellant duly made, or it will not be considered on appeal.

6. Trials—Evidence—Objections and Exceptions—Competent and Incompetent Testimony—Appeal and Error.

Objections to a mass of evidence, some of which is incompetent and some competent, should specify only the incompetent evidence, or the exception will not be considered on appeal.

7. Trials—Objections and Exceptions—Rulings—Practice—Appeal and Error.

An exception must be made and noted to the ruling of the court, if objected to, and where an objection is made to the exclusion of evidence upon the trial of the case and the witness is ordered to stand aside, with permission to the appellant to recall and further question him on the point, and the witness is not recalled under the permission granted, and no final ruling is made, there is nothing upon which an exception can be based, and the matter is not reviewable on appeal.

8. Homicide—Murder—Drunkenness—Intent — Mental Incapacity — Instructions.

The prisoner being tried for murder, was found guilty in the second degree, upon evidence tending to show that the homicide was committed by him when he was under the influence of a drug or of whiskey. Instructions to the jury held correct, that if the prisoner had at the time become incapable by the use of the drug or liquor to form the intent to kill, or to plan, deliberate, or premeditate beforehand, their verdict should not be for more than murder in the second degree; and that if he was then mentally unsound or unbalanced to such an extent that he could not understand the quality of his act or distinguish between right and wrong, they should acquit him. *Semble*, in the case at bar there was insufficient evidence of mental unbalance of the prisoner to be considered by the jury.

APPEAL by defendant from *Long, J.*, at July Term, 1913, of (499) RANDOLPH.

The defendant was indicted in the Superior Court of Randolph County for the murder of John M. Armstrong, the homicide having been committed on 24 March, 1913. The trial took place at July Term, 1913, when defendant was convicted of murder in the second degree, and was sentenced to imprisonment for twenty-five years.

The special nature of the defense is indicated by the following testimony, taken from the record:

"On the trial, evidence was offered by the State showing that the defendant and the deceased were engaged in the business of leasing lands and looking after lodges for hunting purposes, the defendant for the Archdale Shooting Club and the deceased for George Gould, and that the deceased succeeded in leasing some lands which the defendant wanted, and the defendant had gotten mad with the deceased on that account, and had cursed him and had some time before that threatened to kill him; that on 24 March, 1913, about 5 o'clock in the afternoon, the deceased, who lived near High Point, came through Archdale, returning to his home, and stopped near the house of Mr. Horace Ragan in order to see Mr. Ragan about the purchase of some cattle; that the (500) deceased was traveling in an automobile and accompanied by William White; that they found Mr. Ragan, and while looking at the cattle, which were in a lot belonging to Mr. Ragan and immediately in the rear of the defendant's house, the defendant saw deceased and went to his barn, hitched his horse to his buggy and drove up to where he had seen the deceased and Ragan standing. While he was hitching his horse to his buggy, the deceased and Ragan had gone in an opposite direction away from defendant's house, to Mr. J. L. Freeman's, to look at a pony, several hundred yards from where the defendant had seen them and out of his sight; that defendant was seen to drive in his buggy up to the place where the deceased had left his automobile and where defendant had seen deceased and Ragan standing, and peering around the automobile and into a barn near-by, as if he were looking for some one; that the roads fork at the place where the defendant had driven up, and he first went up one fork of the road, and seeing nothing of the deceased, he came back and placed his buggy in the forks of the road between the deceased's automobile and Freeman's, so that whichever way the deceased returned he would have to pass the defendant; that the defendant waited there until the deceased and Ragan and White and Freeman and his son returned from looking at the pony; that defendant allowed Ragan and White to pass him without interference, while deceased had stopped close by to speak to Mr. Moses Hammond and George Miller, who stood at Hammond's gate and within a few yards of the buggy; that deceased, after shaking hands with Hammond

and Miller, approached the buggy in which the defendant sat, spoke to defendant, shook hands with him, and as deceased turned away to go on with Ragan and White, defendant called to him and said, 'I have something for you,' and as he spoke, drew his pistol and fired at deceased; that deceased was unarmed, and dodged and ran to a tree very close by, and as he ran, just before he reached the tree, the defendant shot again, hitting the deceased in the back, the bullet penetrating the intestines in twenty-one places and inflicting a wound of which the deceased died the next day; that after the defendant had shot the deceased and deceased had gone behind the tree, the defendant (501) turned and fired twice at George Miller, who stood on the opposite side of the road, and towards whom it was shown that he had very bitter feelings and whom he had threatened to kill; that after firing five times, the defendant reloaded his pistol, and when Ragan and White picked up the deceased to carry him to Ragan's house, defendant followed them along in his buggy until he heard the deceased say that he was killed and was going to die, when defendant turned and went on to his house, put up his horse and buggy, returned to his house, went out on the porch, drew his pistol and called to his wife to come and see him finish what he was going to do; that some neighbors came in and took the pistol from the defendant, and shortly thereafter he left his home, went into the woods and remained there until about noon the next day, when he was found and arrested.

"The defendant testified that about five years ago his first wife died, and shortly thereafter he began to take morphine and continued to take it, in the form of what is called papine, for about three years; that papine is a liquid preparation sold in 8-ounce bottles and contains 8 grains of morphine and 11 per cent of alcohol; that he contracted the morphine habit, and for seven and one-half months he used as much as 8 ounces of papine a day, thereby taking 8 grains of morphine and a quantity of alcohol daily, in consequence of which he was taken to a sanitarium and treated and cured of that habit; that shortly afterwards he began to use whiskey, drinking as much as a quart a day for two years before the homicide; he took a drink of whiskey in Dr. Tomlinson's office, and from that time until after the killing his mind was utterly blank, and that he did not come to himself until after the shooting, when he heard his wife scream, and that when he heard his wife scream he came to himself. Defendant also offered the evidence of certain witnesses that at different times during a period of four or five years they had seen the defendant when they thought he was in such a mental condition that he did not know what he was about.

"All the witnesses who saw the homicide, six or seven in num-

(502) ber, some of whom had known the defendant all his life, testified that defendant was cool and deliberate in what he did, and that his mind was all right and that he knew what he was doing; and other witnesses for the State testified that they had known him for years; that they had had business transactions with him on the very day of the homicide and but a few hours before, and that the defendant was perfectly sober, and that his mind was all right and just as good as that of any average man. One of these witnesses, Mr. Woodall, who lived at Archdale, in plain view of the defendant's house and premises, and who saw the defendant drive up in his buggy apparently looking for some one at the place where the deceased had driven up in his automobile, testified that he heard the shots fired and heard the defendant's wife scream, and he ran down to see what had happened, and saw the defendant sitting in his buggy with a pistol in his hand and found the deceased wounded and being carried to the house of Horace Ragan; the witness lived about 250 yards from the house of the defendant and about 150 yards from where the shooting occurred."

With reference to the plea of insanity and the effect of intoxication or the liquor and morphine habit upon the defendant's mental state or condition, the court, at defendant's request, gave the following special instructions:

"1. The jury is instructed that although they might find from the evidence that the defendant committed the criminal act, in the manner and form as charged in the indictment, still, if the jury believe from the evidence that at the time he committed the act he was so affected by long and continued use of alcoholic liquors or drugs, or both, that he did not know the nature of the act, whether it was wrongful or not, and did not know his relations to others, and that such mental deficiency was induced by antecedent and long continued use of such intoxicating drinks or drugs, and not the immediate effects of intoxication, then the defendant cannot be held criminally responsible for such act, and the jury should find the defendant not guilty.

"2. In determining the question whether the defendant was (503) insane at the time of the alleged commission of the crime, the jury are to consider all of his acts at the time of, before, and since the commission of the crime, as such acts and conduct have been shown by the evidence; and the jury should consider the defendant's appearance and actions at the time of, before, and after the commission of the offense, and if the jury is satisfied from the evidence that at the time defendant shot the deceased, defendant was so affected in his mind and memory that he was not able to distinguish right and wrong and had no knowledge and understanding of the character and conse-

quences of the act, and power and will to abstain from it, then he was not a legally responsible being, and the jury should find (defendant) not guilty.

"3. The court instructs you that if you are satisfied from this evidence that the prisoner was of insane mind to such an extent that he was not conscious of the nature of the act he was doing, then you ought to acquit him on the ground of insanity.

"4. The court instructs you that if you are satisfied from the evidence in this case that at the time of the commission of the offense the defendant was suffering from mental aberration or sickness of mind produced by any cause, and by reason thereof his judgment, memory, and reason were so perverted or dethroned that he did not realize the nature and quality of the acts he was doing, or that he did not realize that it was wrong, you must find that he was insane, and for that reason not guilty."

The court then, in its general charge, proceeded as follows:

"These prayers requested by the defendant, to which I have called your attention, I give you; and in this connection also, to present the prisoner's defense more fully, and the State's contention with regard to it, I add the following: The prisoner pleads that at the time of the alleged shooting of the deceased that his mind was dethroned and that he had not the mental capacity to distinguish between right and wrong; that he did not have the power to premeditate and deliberate upon the nature and consequence of his act, and that in the eye of the law he is excused. The burden of this plea is upon him, and not upon the State, to satisfy you of its truth, for in law he is presumed to be (504) sane, not insane. This presumption of the law is rebuttable by evidence, and to do so he is not required to establish his plea beyond a reasonable doubt, but it is incumbent upon him to establish it by evidence to your satisfaction. The prisoner, to be responsible for his act, must have had legal capacity at the time to distinguish between good and evil, and to have known what he was doing, to comprehend his relations towards others, the nature of his act, and to have had a consciousness of wrongdoing. In the inquiry as to the prisoner's mental condition he is assumed to have been sane, that is, to have had the degree of mind and reason required to constitute criminal responsibility for his acts, but the want of such legal capacity may appear by evidence of the presence of insanity. The measure of criminal responsibility is this: If the prisoner at the time of the homicidal act was in a state of mind to comprehend his relations to others, the nature and criminal character of the act, was conscious that he was doing wrong, he was responsible for his act. Otherwise, he was not, and your verdict will be

as you find the facts from the evidence. If you find the prisoner was intoxicated at the time of the alleged homicide from the use of some exciting stimulant, and you, notwithstanding, find and are satisfied beyond a reasonable doubt that he had mind sufficient to have a fixed purpose and to plan, and that he deliberately and with premeditation formed the design to kill the deceased, and that he deliberated and premeditated upon the killing, in consequence of such formed design, and that, in consequence of such formed design, he executed it and shot and killed the deceased, then the fact, if found, that the prisoner was intoxicated, would not excuse the act, but the offense would under such findings be murder in the first degree. If, however, you have a reasonable doubt as to the shooting and killing with premeditation and deliberation, but you find that the prisoner had capacity to comprehend his relations to others, was conscious that it was wrong to take the life of a fellowman, and knew the nature of the act he was committing, and under these circumstances you find that he shot and killed the deceased, he would be guilty of murder in the second degree, and you would
(505) so find. If, however, upon a review of all the evidence you find that the prisoner killed the deceased as alleged by the State, but you find that at the time of the killing he was insane, or was in a state of mind not to comprehend his relations to others, nor the nature and criminal character of the act, when he shot the deceased, and was not conscious that he was doing wrong, under these findings, if so made by you, he would not be responsible, and upon such findings you would acquit the prisoner. The burden of establishing the plea of insanity, however, with the specification as I have heretofore explained, is upon the prisoner, and not upon the State. With regard to this plea, which is made by the prisoner, that he was not able to know what he was doing at the time, and which is more fully set out in the instructions which I give you, I will now state the contentions of the parties."

The presiding judge then very carefully reviewed the testimony and stated fully, fairly and impartially the several contentions of the parties, and concluded his statement as follows:

"I cannot give you all the contentions made by the parties on both sides with regard to this matter, gentlemen. If I have left out any meritorious contention, that is to say, a contention as to the facts based upon evidence which addresses itself to your conviction, whether made by one side or the other, I ask you to consider it and give it such weight as you think it deserves." The court then instructed the jury what verdict they could render according as they found the facts to be. From the judgment rendered upon the verdict, the prisoner appealed to this Court.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Brooks, Sapp & Hall, T. J. Gold, C. H. Redding, J. A. Spence, R. C. Kelly, and J. T. Brittain for defendant.

WALKER, J. The prisoner noted several exceptions during the course of the trial, and we will now consider them in the order they are stated in the record.

The first exception was taken to the ruling of the court refusing a motion for a continuance. The motion was heard upon (506) affidavits; and it appears therefrom that it was made on the ground that the defendant was unable to procure the attendance of certain witnesses. A reading of the affidavits, and the circumstances attending the making of the motion and the ruling of the court thereon, show that there was no abuse of discretion. The granting of a motion for a continuance is in the discretion of the trial court. *S. v. Scott,* 80 N. C., 365; *S. v. Pankney,* 104 N. C., 840; *S. v. Sultan,* 142 N. C., 569; *S. v. Hunter,* 143 N. C., 607. The decision thereon is not reviewable, except to see whether there has been a clear abuse of discretion. *S. v. Lindsey,* 78 N. C., 499. It appears that the judge, with the full consent of the solicitor, proposed to postpone the trial of the case, so that the defendant could take the deposition of the absent and infirm witnesses, and further suggested, the solicitor consenting, that defendant might name the time and place for taking the deposition, and select the commissioner whom the court would appoint for the purpose, "the entire matter being left with the defendant and his counsel, provided the testimony was taken so that the trial could proceed during the term. The defendant's counsel declined to suggest to his Honor the name of the commissioner or to take the deposition of the said witness, and had nothing further to say in response to his Honor's suggestion and the agreement of the counsel for the State," and his Honor thereupon ruled that the trial should be proceeded with, and the defendant excepted. The court exercised its discretion fairly, even liberally, and the refusal of defendant to accept the terms offered by it deprives him of any possible ground of objection. Under the circumstances, he was surely not prejudiced. The case of *S. v. Blackley,* 138 N. C., 620, which he cites in support of this exception, does not sustain it, but, on the contrary, supports the action of the court, for there it is said that a ruling upon a motion for a continuance is not reviewable by this Court on appeal, "unless possibly where there has been a gross abuse of the judge's discretion, which was not the case" there, and is not the case here. There was no abuse at all, but a lenient regard for the rights of the defendant. *S. v. Scott,* (507) 80 N. C., 365.

The second exception was taken to the ruling of the court, that certain jurors passed by the State were impartial. The record shows that those jurors stated, in answer to questions by the court, that notwithstanding they had formed an opinion about the case from the newspaper accounts, they were sure that they could assume the obligation of jurors and enter the jury box and hear the evidence from the witnesses and the charge of the court and render a verdict entirely in accordance with the law and the evidence, uninfluenced by anything that they had read or any opinion that they may have formed from what they read about the case or otherwise. This statement of the jurors under oath was sufficient to justify the ruling of the court; but it further appears that none of the jurors thus objected to were accepted by the defendant. All of them were challenged peremptorily, and when the twelve jurymen had been chosen, the defendant had the right to two more peremptory challenges which he had not exercised. The right of challenge is not one to accept, but to reject. It is not given for the purpose of enabling the defendant, or the State, to pick a jury, but to secure an impartial one. The defendant got an acceptable jury, for he had two peremptory challenges left, which he could have used if he had thought otherwise. In *S. v. Bohanan,* 142 N. C., 695, we said: "There is a familiar principle of law which fully meets and answers this objection. The defendant did not exhaust his peremptory challenges, but there were many left to him when the panel was completed. When such is the case, the objection to a juror who could have been rejected peremptorily is not available. *S. v. Hensley,* 94 N. C., 1021; *S. v. Pritchett,* 106 N. C., 667; *S. v. Teachey,* 138 N. C., 587." The judge found that the challenged jurors were indifferent, and his ruling in this respect will not be reviewed here. *S. v. Bohanan, supra,* where the cases to that date are collected. See, also, *S. v. Banner,* 149 N. C., 522.

The prisoner next objected to the testimony of Mr. Woodall,
(508) which was admitted by the court. The exception is not specific enough, and of course should be so. *Wilson v. Lumber Co.,* 131 N. C., 163. But the evidence was competent and relevant. We do not see why it was not competent to allow the witness to state that he saw the defendant in his buggy looking for some one; heard the shots and immediately "ran down to see what had happened, when he found the prisoner with a pistol in his hand and the deceased wounded and being carried to the house of Horace Ragan." He lived near-by, and knew the parties. Besides, the evidence was harmless, as these facts had already been given in evidence and were not disputed. The evidence was also corroborative of other witnesses, and no request was made that it be confined to that particular purpose. Rule of this Court, No. 27, in 140

N. C., at p. 495. Another conclusive answer to this assignment is that the objection was made to a mass of testimony, some of which, at least, was clearly competent. The rule is stated in *S. v. Ledford,* 133 N. C., at p. 722: "The objections are general, and the rule is well settled that such objections will not be entertained if the evidence consists of several distinct parts, some of which are competent and others not. In such a case the objector must specify the ground of the objection, and it must be confined to the incompetent evidence. Unless this is done, he cannot afterwards single out and assign as error the admission of that part of the testimony which was incompetent. *Barnhardt v. Smith,* 86 N. C., 473; *Smiley v. Pearce,* 98 N. C., 185; *Hammond v. Schiff,* 100 N. C., 161; *S. v. Stanton,* 118 N. C., 1182; *McRae v. Malloy,* 93 N. C., 164. The same rule applies to an objection to the judge's charge, when it consists of several propositions. *Bost v. Bost,* 87 N. C., 477; *Insurance Co. v. Sea,* 21 Wall., 158. Some of the evidence objected to by the defendant was clearly admissible." See, also, *Carmichael v. Telephone Co.,* 162 N. C., 333.

The next objection is stated in the record without any ruling having been made upon which it could be based. It appears that a witness for the defendant was asked a question on redirect examination, to which the State objected, and the witness was then directed to stand aside, with permission to the defendant to recall and examine him later if desired, defendant's counsel stating that they would submit to the (509) court further authorities upon the question. The defendant's counsel did not recall the witness nor ask permission to recall or examine him further on this point, and no ruling was made by the court. The jurisdiction of this Court is restricted to the correction of errors in the rulings of the court below; and where no ruling has been made, there can be no review here. This is self-evident. *Tyson v. Tyson,* 100 N. C., 360; *Scroggs v. Stevenson, ibid.,* 354. There was no offer to show what would be the answer of the witness, and the question, on its face, does not sufficiently indicate it. We are not, therefore, informed as to its relevancy. *In re Smith's Will,* 163 N. C., 464.

This brings us to a consideration of the prayers for instruction and the charge of the court. Exceptions were taken to the refusal of certain requests for instruction to the jury and to the charge. We may say, generally, that the charge of the court was very explicit and accurate, and clearly set forth the principles of law arising upon the evidence. It gave the defendant the full benefit of the doctrine that if the prisoner, when he committed the homicide, had become incapable by the constant use of liquor or drugs to form the intent to kill, or to plan, deliberate, or premeditate beforehand, the jury should not convict him of murder

in the first degree. And the charge in respect to the effect of the liquor or drugs upon his mental condition was also correct, as the court told the jury that if, at the time of the killing, he was mentally unsound or unbalanced to such an extent that he did not know or could not understand the quality of his act, and was not able to distinguish between good and evil, he was not responsible in law, and they should acquit him. This was as far as the judge could well go and stay within the law. The instruction is sustained by *S. v. Haywood,* 61 N. C., 376. In that case Judge George Green charged the jury as follows: "If the prisoner, at the time he committed the homicide, was in a state to comprehend his relations to other persons, the nature of the act and its criminal character, or, in other words, if he was conscious of doing wrong at the time he committed the homicide, he is responsible. But if, on the contrary,
(510) the prisoner was under the visitation of God, and could not distinguish between good and evil, and did not know what he did, he is not guilty of any offense against the law; for guilt arises from the mind and wicked will." This instruction was approved by this Court on appeal, *Chief Justice Pearson,* for the Court, saying: "We fully approve of the charge of his Honor upon the subject of insanity. It is clear, concise, and accurate; and, as it is difficult to convey to the minds of jurors an exact legal idea of the subject, we feel at liberty to call the attention of the other judges to this charge." This case was also approved in *S. v. Potts,* 100 N. C., 458, where the Court, by *Chief Justice Smith,* said: "This charge is strictly in accordance with *S. v. Haywood,* 61 N. C., 376. We find no authority in support of the proposition contained in the prisoner's eighth instruction, that the prisoner's drunken condition, while not absolving him from all guilt, might repel the malice and reduce his crime to a lower grade, though earnestly pressed in the argument on his behalf. The test of accountability for crime is the ability of the accused to distinguish right from wrong, and that in doing a criminal act he is doing wrong. This is settled in *S. v. Haywood, supra.*" In *S. v. Banner,* 149 N. C., 519, the present *Chief Justice,* for the Court, also approved it in these words: "The defense had endeavored to show by a witness that the prisoner was insane, and these questions were legitimate to show that the prisoner was attending to business and knew that it was wrong to shoot any one down. In *S. v. Haywood,* 61 N. C., 376, the Court approved this charge, when the defense of insanity was set up: 'If the prisoner was conscious of doing wrong at the time he committed the homicide, he is responsible.'" The charge of the court is also sustained by *S. v. Murphey,* 157 N. C., 614. In that case it was held that when the defendant was in such a state of voluntary drunkenness at the time of the killing that his mind and reason were so completely

overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill, he could not be found guilty of murder in the first degree. Where a specific intent is essential to constitute crime, the fact of intoxication (or, we may add, the use of (511) drugs) may negative its existence, where the mind is so affected or weakened by it as to be incapable of forming the intent, or by premeditating or deliberating. Clark's Cr. Law, p. 75. *Justice Hoke* said in *S. v. Murphy, supra:* "It is very generally understood that voluntary drunkenness is no legal excuse for crime, and the position has been held controlling in many causes in this State, and on indictments for homicide. The principle, however, is not allowed to prevail where, in addition to the overt act, it is required that a definite specific intent be established as an essential feature of the crime." He further says: "It (evidence of drunkenness) has been excluded in well considered decisions where the facts show that the purpose to kill was deliberately formed when sober, though it was executed when drunk, a position presented in *S. v. Kale,* 124 N. C., 816, and approved and recognized in *Arzman v. Indiana,* 123 Ind., 346, and it does not avail from the fact that an offender is, at the time, under the influence of intoxicants, unless, as heretofore stated, his mind is so affected that he is unable to form or entertain the specified purpose referred to. Wharton sums up the matter by saying that 'a person who commits a crime while so drunk as to be incapable of forming a deliberate and premeditated design to kill is not guilty of murder in the first degree.'" Wharton on Homicide, *infra.* The charge of the judge below in *Com. v. Cleary,* 148 Pa., 27, approved by that Court, and also by us in *S. v. Murphy, supra,* was as follows: "If, however, you find that the intoxication of the prisoner was so great as to render it impossible for him to form the willful, deliberate, and premeditated intent to take the life of the deceased, the law reduces the grade of homicide from murder in the first degree to murder in the second degree. The mere intoxication of the prisoner will not excuse or palliate his offense, unless he was in such a state of intoxication as to be incapable of forming this deliberate and premeditated attempt. If he was, the grade of offense is reduced to murder in the second degree." The clear exposition of Dr. Wharton (Wh. Homicide (3 Ed.), p. 811), which is as follows, we have also approved: "Intoxication, though voluntary, is to be considered by the jury in a prosecution for (512) murder in the first degree, in which a premeditated design to cause death is essential, with reference to its effect upon the ability of the accused at the time to form and entertain such a design, not because, *per se,* it either excuses or mitigates the crime, but because, in connection with other facts, an absence of malice or premeditation may appear.

Drunkenness as evidence of want of premeditation or deliberation is not within the rule which excludes it as an excuse for crime. And a person who commits a crime when so drunk as to be incapable of forming a deliberate and premeditated design to kill is not guilty of murder in the first degree. The influence of intoxication upon the question of the existence of premeditation, however, depends upon its degree, and its effect on the mind and passions. No inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law. And intoxication cannot serve as an excuse for the offender; and it should be received with great caution, even for the purpose of reducing the crime to a lower degree." These principles were stated and applied in *S. v. Shelton, post,* 513. If we apply them to the facts of this case, it is perfectly clear that the instructions of the court were as favorable to the prisoner as the law permitted. As we have seen, he had the full benefit of the principle in regard to insanity.

We may well doubt if there was sufficient evidence in this case—that is, such as is fit to be considered by a jury—that the prisoner was insane at the time of the homicide. His every action and his general conduct indicated the full possession of his faculties, unimpaired by any previous habit of intoxication or any other sort. That he had a motive is well established, and that he was influenced by his hatred of the deceased, engendered by a rivalry in the same kind of business, appears with equal certainty. He proceeds towards the execution of his purpose to slay with all the intelligence of a man who knew what he intended to do and how he should do it. He prepared himself beforehand and quietly awaited the opportunity he was seeking to destroy
(513) his rival. There was an absence of all excitement or impulsiveness, and in its place, a steady and studied effort to carry out his design. But if there was evidence of an unbalanced or abnormal mind, it surely had not reached the stage of insanity such as would excuse the offense and not merely reduce it in degree. There was ample evidence to justify a conviction for the higher felony, but the jury took the benevolent view of it all, and gave him the benefit of the doubt, and the defendant has no reason whatever for complaint.

No error.

Cited: S. v. Rogers, 168 N. C., 114; *S. v. Heavener, ib.,* 164; *S. v. Lowry,* 170 N. C., 734.

STATE v. WALTER SHELTON.

(Filed 5 November, 1913.)

1. Homicide—Murder—Premeditation—Drunkenness—Trials — Instructions—Harmless Error.

Where the defense upon a trial for murder is that at the time of and immediately before the homicide the prisoner had been rendered incapable of forming a deliberate and premeditated purpose to kill, by reason of drunkenness, the burden is upon him to show this to the satisfaction of the jury; and, in this case, it appearing that the judge clearly charged the jury upon the degree of proof necessary for the State to convict, it is held harmless error that he charged that the defendant must prove his defense "beyond a reasonable doubt," it appearing that the jury could not have been misled; and further, there is no evidence that at the time of the homicide the defendant was in such condition.

2. Homicide—Murder—Premeditation—Evidence.

For the defense of drunkenness to be available upon a trial for murder in the first degree, it must be shown that, at the time of the homicide, the mind of the prisoner was so affected by drink as to render him incapable of premeditation and of a deliberate purpose to kill; but when the evidence shows that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants, to whatever extent, in order to carry out the design, will not avail as a defense.

APPEAL by defendant from *Lane, J.*, at August Term, 1913, (514) of ROCKINGHAM.

Indictment for murder. The defendant was convicted of murder in the first degree and sentenced to death. From the judgment pronounced, he appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

P. T. Stiers and C. O. McMichael for defendant.

BROWN, J. The defendant offered no evidence and the case was tried upon that introduced by the State. This evidence tends to prove these facts:

The defendant was the husband of Lula Shelton. It is evident that they lived unhappily together. About two weeks prior to Christmas, 1912, the wife refused to live with the defendant any longer on account of his conduct, and she went to the home of her mother.

On Christmas Eve defendant went there and pointed a pistol at his wife and told her he would kill her if she did not live with him. He

then asked for his overcoat, and as he was about to leave, said to his wife's sister that he intended to kill his wife when she put her foot off the lot, and instructed her to tell his wife.

There is no evidence that he was so drunk on this occasion that he was irresponsible and did not know what he did and said.

About ten days before the homicide defendant told one Adkins he was going to kill his wife because she would not live with him, and he told at different times numerous other witnesses that he was going to kill his wife and the whole Trent family, being the family of his wife; that she had sworn to lies on him.

On 24 March, 1913, the wife was at the home of Mrs. Jennie Black in Reidsville. She was sitting in a room with several other people, when the defendant came in, walked up to his wife and started to put his hand in his pocket. His wife threw up both hands and started towards him, when he pulled out his pistol and shot her twice. The wife fell and died in seven or eight minutes.

A sister of the defendant then pushed him towards the door
(515) and he went out into the yard, where he was arrested by two men, and as he was being carried away, he said: "I did what I said I was going to do—what I wanted to do. I put three balls in her, and I will go to the electric chair for it." He repeated this statement afterwards to other witnesses.

The exceptions to the evidence are without merit and are not of sufficient importance to require discussion.

The third exception relates to a remark of the judge. Counsel for the defense in addressing the court as to the incompetency of a conversation between the defendant and his wife, maintained that this kind of evidence was analogous to that prohibited by section 1631 of the Revisal; that if the witness Effie Trent did not state the truth about the conversation, her sister Lula Shelton being dead, there would be no one to deny it.

The judge remarked from the bench and in the hearing of the jury that the defendant could deny it; and to this remark the defendant excepts. The exception ought not to be sustained. Section 1631 has no application whatever to criminal cases. The conversation between the husband and the wife in which he threatened to kill her was entirely competent. The judge was simply replying to an unsound legal proposition that was being argued by the counsel for the defendant, and his remarks were in no way improper.

He subsequently, in his charge, warned the jury that they could not consider to the prejudice of the defendant the fact that he did not go upon the stand and testify as a witness. The exception chiefly relied on by the defendant is to the following extract from the charge of the court:

"If you find from the evidence beyond a reasonable doubt that the defendant, previous to the time he killed his wife, if you find he did kill her, was so intoxicated as not to be able to form a specific intent and to deliberate and premeditate, but was not insane by reason of it, as before explained to you, so as not to know the difference between right and wrong, and with a deadly weapon slew his wife with malice, you will find him guilty of murder in the second degree."

His Honor erred in using the words "beyond a reasonable (516) doubt" in that connection, but we do not think the error was very material and of sufficient important to warrant another trial.

The burden of proof is on the State at all times to prove the willful, deliberate, and premeditated killing, and his Honor so instructed the jury very clearly, but where the defendant claims that at the time of and immediately before the homicide he had been rendered incapable of forming a deliberate and premeditated purpose to kill by reason of drunkenness, the burden is on him to prove it, not beyond a reasonable doubt, but to the satisfaction of the jury.

The charge of the court upon the burden of proof and the doctrine of reasonable doubt is so full and clear that it would scarcely have been misunderstood.

His Honor said: "This defendant not only pleads not guilty to this charge against him, but when he comes into this court and is put upon his trial, is presumed to be innocent of any crime. This is no mere idle presumption to be disregarded at will, but is a fundamental principle of the law of this State, and applies in this case as in all other trials for violation of the criminal laws. And a defendant is covered with this presumption of innocence until the State by competent evidence rebuts such presumption, and before you can return a verdict of guilty against this defendant of any degree of crime, the State must have satisfied you of his guilt, and that to the exclusion of every reasonable doubt. That is the burden that is upon the State in this case, I repeat, to prove the guilt of this defendant beyond a reasonable doubt, before you can convict him of any degree of homicide."

We are further of the opinion that the charge was harmless error, for the reason that there is no sufficient evidence in the record that at the time of the homicide he was in such a mental condition, brought about by excessive drinking, as to render him incapable of committing deliberate and premeditated murder.

S. v. Murphey is a leading case on this subject, and the question is fully discussed by *Mr. Justice Hoke.*

In that case it is stated that there was evidence that at the time of the killing "the mind of the prisoner was so affected, *at* (517)

the time, by voluntary drunkenness that he was incapable of committing murder in the first degree."

In the opinion the learned judge says: "It is very generally understood that voluntary drunkenness is no legal excuse for crime, and the position has been held controlling in many causes in this State and on indictments for homicide. The principle, however, is not allowed to prevail where, in addition to the overt act, it is required that a definite specific intent be established as an essential feature of the crime. In Clark's Criminal Law, p. 72, this limitation on the more general principle is thus succinctly stated: 'Where a specific intent is essential to constitute crime, the fact of intoxication may negative its existence.'

"Accordingly, since the statute dividing the crime of murder into two degrees, and in cases where it becomes necessary, in order to convict an offender of murder in the first degree, to establish that the killing was deliberate and premeditated, these terms contain, as an essential element of the crime of murder, a purpose to kill previously formed after weighing the matter (*S. v. Banks,* 143 N. C., 658; *S. v. Dowden,* 118 N. C., 1148), a mental process embodying a specific definite intent; and if it is shown that an offender, charged with such crime, is *so drunk* that he is *utterly* unable to form or entertain this essential purpose, he should not be convicted of the higher offense.

"It is said in some of the cases, and the statement has our unqualified approval, that the doctrine in question should be applied with great caution. It does not exist in reference to murder in the second degree, nor as to manslaughter. It has been excluded in well considered decisions where the facts show that the purpose to kill was deliberately formed when sober, though it was executed when drunk, a position presented in *S. v. Kale,* 124 N. C., 816, and approved and recognized in *Arzman v. Indiana,* 123 Ind., 346, and it does not avail from the fact that an offender is, at the time, under the influence of intoxicants, unless, as hereinbefore stated, his mind is so affected that he is (518) unable to form or entertain the specified purpose referred to."

Wharton sums up the matter by saying that "a person who commits a crime while so drunk as to be incapable of forming a deliberate and premeditated design to kill is not guilty of murder in the first degree. The influence of intoxicants upon the question of the existence of premeditation, however, depends upon its degree and its effect on the mind and passions." Homicide (3 Ed.), p. 811.

All the authorities agree that to make such defense available the evidence must show that *at the time of the killing* the prisoner's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill.

As the doctrine is one that is dangerous in its application, it is allowed only in very clear cases; and where the evidence shows that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants to whatever extent in order to carry out the design will not avail as a defense.

In the rulings of the court and the charge to the jury the defendant has had the full benefit of his plea of insanity, which was very properly repudiated by the jury, as there is as little evidence to support that as there is the plea that his mind and reason at the time he slew his wife were so completely dethroned by intoxication that he could not be guilty of a willful, deliberate, and premeditated murder.

The evidence that the defendant formed and expressed to several different persons at various times, extending over a period of two months, the settled purpose to kill his wife is overwhelming.

On Christmas Eve, 1912, he sought his wife, pointed a pistol in her face, and told her he would kill her if she did not live with him. There is no evidence that on these occasions he was drunk and did not know what he was doing.

None of the witnesses who were present at the homicide say that (519) defendant was drunk, and one of the witnesses, Moricle, said he had seen defendant under influence of whiskey, but on this occasion "he looked like a sober man."

Witness Adkins testifies to a conversation ten days before the homicide, in which defendant told him he intended to kill his wife because she would not live with him. "At the time of the conversation I could not say whether Shelton was drunk or not. He had had a drink. He drank right much when he was not at work. He was not at work at this time. It had not been long since he quit work. I saw him about once a week, and he was always drinking."

Witness Tally testified that defendant told him that he intended to kill his wife; that he saw him afternoon of the homicide, and "his condition seemed to be all right."

Witness further said: "I have known Shelton eight or ten years. Sometimes he was drinking, sometimes he was not. You could call him drunk, but he was going. Sometimes for two or three days he would drink, sometimes he would not. He seemed to be sober on the day of the homicide."

Witness Walker testified that he had conversation with defendant the morning of the homicide. "I am not able to tell what his condition was." Witness further stated that defendant before that had come to the store drunk; he generally came in drinking, and witness asked his brother to keep him out.

Witness further testified that "the defendant a few hours before the

killing had asked witness, 'If you were going to kill yourself, where would you shoot?' I told him I had never thought of such a foolish thing. A few hours before the killing, I had told my wife that I believed Shelton was crazy."

Witness Michael testifies to hearing defendant say on the evening of the homicide that he had done what he aimed to do; and on the subject of habits, he said:

"I have known Walter Shelton four years. I live in the same neighborhood with him. I have heard of his drinking habits for the last two years. His general reputation in the neighborhood is that of a drinking man. On the evening of the killing he was as sober as I usually saw him."

Witness Myrick testifies: "I have known Walter Shelton (520) about fifteen years and lived in Reidsville practically all the time Walter has. He drank a good deal. Sometimes he would act kinder foolish. I have heard about his knocking a fellow in the face with a beer bottle. The evening of the homicide he looked like he was drunk."

Thomas Lebass testified as follows: "During Christmas week Shelton made a statement to me. He said he had a wife and was going to kill her, and I says, 'Walter, do you know you are going to get in trouble? There will be another Allen case.' He said he was going to kill her. I asked him what for. He said because she would not live with him. I asked him if she was a nice lady. Said yes, she was a nice lady, and give me that to understand right then. I told him to go home, he was drunk. Said he was not drunk, and he was not going home, either. I saw him on the day of the homicide, about 75 or 100 yards, before and after. He was going up the opposite side from where I was standing, with his right hand in his right coat pocket. I just noticed him going along. I did not pay much more attention to him. He was walking right peartly, as usual, and I talked there about three minutes, when Miss Effie Trent came running down the street and said her sister had been shot.

"I ran to the house as soon as I could get there, and found her on the bed, shot and dying. She lived about six or eight minutes after I got in the house. I saw Shelton against the front fence along the street. I took hold of him one time when he was about to get away.

"He was drinking some, not drunk. He stayed a little intoxicated most of the time. I don't say the 10th or 11th notch. That would be pretty good speed."

This is the entire evidence relating to the condition of the defendant. In our opinion it fails to show that at the time of the homicide the defendant was so drunk as, in the language of *Justice Hoke,* "to render

him utterly incapable of forming a deliberate and premeditated purpose to kill."

It tends rather to prove that the defendant had been for two months deliberating and premeditating the murder of his wife, (521) and that if he was drinking at all on the day of the homicide, it was to assist him to put his deadly purpose into execution.

We have given this case a very careful examination, and are constrained to conclude that there is

No error.

Cited: S. v. English, ante, 512.

STATE v. H. F. CLAUDIUS.

(Filed 10 December, 1913.)

1. Indictment—False Pretense—Intent to Defraud—Motions to Quash.

It is only required that an indictment for false pretense allege that the act committed was with the intent to defraud (Revisal, sec. 3432), and a motion to quash and in arrest of judgment in this case was properly refused which was based upon an alleged defect in the indictment, that the word "fraudulently" was not used in connection with the words "designedly, falsely, and felonously."

2. Same—Casual Connection—Form.

While it is necessary that an indictment for false pretense show a casual connection between the false representations and the parting with the property, no particular form of words is necessary, and it is sufficient if it is apparent that the delivery of the property was the natural result of the false pretense.

3. Indictment—False Pretense—Allegations Sufficient.

An indictment for false pretense, charging in substance that the defendant knowingly and designedly made false representations of a subsisting fact, with intent to defraud, as, in this case, the cost of construction of a house upon which he obtained a mortgage loan in an amount greater than otherwise he could have done, is sufficient.

4. Trials—Instructions Refused—Appeal and Error.

A party to an action must obtain leave from the trial judge to submit prayers for special instruction after the argument has commenced, and from his refusal to consider them when so tendered, no appeal will lie.

5. False Pretense—Written Statement—Statute of Frauds—Trials—Evidence, Corroborative.

Upon a trial for false pretense, alleging that it had induced A. to obtain the money from B., a letter from A. to B. is competent when

in corroboration of the testimony of A., who was a witness; and the fact that the representation was in writing does not preclude evidence of a parol representation.

6. Trials—False Pretense—Evidence—Instructions—Appeal and Error.

Upon a trial for false pretense, where the pretense relates to the misrepresentation of the cost of erecting a certain house upon which the defendant is charged with inducing a loan in a sum he could not otherwise have obtained, evidence of the value of the house, if erroneously admitted in this case, was rendered harmless by an instruction from the court that the jury should not consider it.

(522) APPEAL by defendant from *Adams, J.*, at May Term, 1913, of BUNCOMBE.

The defendant was convicted of the crime of false pretense, upon the following bill of indictment:

"The jurors for the State, upon their oath, present, that H. F. Claudius, late of the county of Buncombe, on the first day of October, in the year of our Lord 1912, with force and arms, at and in the county aforesaid, unlawfully and knowingly devising and intending to cheat and defraud, did then and there unlawfully, knowingly and designedly, falsely and feloniously state, pretend, and represent to one Frederick Rutledge that he had sold in good faith a certain house and lot on Merrimon Avenue in the city of Asheville, North Carolina, for the sum of seven thousand five hundred dollars ($7,500); that fifteen hundred dollars ($1,500) of the purchase money had been paid in cash; that six thousand dollars ($6,000) of the purchase money had been secured by six promissory notes of one thousand dollars ($1,000) each, which said notes were secured by deed in trust on the said house and lot, and that said house and lot were worth the sum of eight thousand dollars ($8,000), and that the cost of the construction of the said house upon said lot was six thousand five hundred dollars ($6,500); and by the means of said false, fraudulent, and felonious statement and representations the said defendant H. F. Claudius obtained the sum of

(523) five thousand five hundred dollars ($5,500) in money from the said Frederick Rutledge; whereas in truth and in fact the said house and lot were not worth the said sum of eight thousand dollars ($8,000), nor had the construction of said house cost six thousand five hundred dollars ($6,500), nor had H. F. Claudius sold said house and lot at the time of the false, fraudulent, and felonious representations and statements, nor had he sold said house and lot in good faith for the sum of seven thousand five hundred dollars ($7,500), nor had fifteen hundred dollars ($1,500) been paid in cash on the purchase money of said house and lot; but whereas in truth and in fact said house and lot were not worth over three thousand or three thousand five hundred dol-

lars, and that the cost of construction of the said house upon said lot was not over two thousand five hundred dollars, and further that the pretended sale which said H. F. Claudius represented he had made of said house and lot to one Anna Kunse was not *bona fide;* all of which statements, so made by the said H. F. Claudius to the said Frederick Rutledge, were falsely, fraudulently, and feloniously made, and by means of the said statements and representations the said H. F. Claudius obtained from the said Frederick Rutledge and B. H. Rutledge the sum of five thousand five hundred dollars ($5,500) in money; said false and fraudulent and felonious statements made by the said H. F. Claudius to the said Frederick Rutledge were made with the purpose and intent to cheat and defraud the said Frederick Rutledge and the said B. H. Rutledge out of the said sum of five thousand five hundred dollars ($5,500), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The defendant moved to quash the indictment for that—

(1) It failed to allege that the act was "fraudulently done."

(2) It failed to state a cause of action.

(3) That there is no sufficient causal connection between the representation alleged and the deceit and false pretense in the bill of indictment, and for the main reason that it is indefinite in first stating in the bill of indictment that the "statements made by the said H. F. Claudius to the said Fred Rutledge" were false pretenses; not showing the relation between Fred Rutledge and B. H. Rutledge, who is alleged in the bill of indictment as being defrauded by the rep- (524) resentations.

The motion was overruled, and the defendant excepted.

The evidence for the State tended to show that the defendant offered to sell to one Frederick Rutledge six notes, each in the sum of $1,000, for $5,500. Rutledge stated that he had not the money himself, but that another person whom he knew, one B. H. Rutledge, would probably purchase them. Frederick Rutledge, a witness for the State, testified that when the defendant offered him the notes, he told the witness that the notes had been taken in part payment of a recent sale of a house and lot; that the property was worth $8,000 or $9,000; that the house cost $6,500; that he had sold it for $7,500; that the purchaser had paid $1,500 in cash and that she had given the six notes of $1,000 each for the balance. The witness wrote to B. H. Rutledge, stating these facts as upon the representations made by the defendant, and the notes were purchased by B. H. Rutledge. The witness testified that in the transaction, and representing B. H. Rutledge, he relied upon the statements of defendant as true. The witness Rutledge further testified that some months after the purchase of the notes he went to the house on which

the notes and mortgage were held as security, and that when he next saw the defendant and asked him about his representations as to the value of the property, the defendant said that the purchaser lived in New York and was amply able to take care of the notes. The witness learned that the purchaser was the mother of the defendant's wife. The defendant did not tell the witness who the purchaser was before he got the money. The witness further testified that the property was not worth more than $3,200, and another witness for the State, T. K. Davis, testified that the house could not have cost $6,500. And testifying on his own behalf, the defendant said: "I never made the statement to Frederick Rutledge or any person as to what this house cost. The fact is, I do not know."

The defendant excepted to the refusal to give certain prayers for instructions, as to which the court finds the following facts:

"On the second day of the trial the defendant's attorney tendered certain prayers for instructions, after two of the counsel had (525) addressed the jury on the day preceding. The prayers were not signed by counsel. They were handed up while the court was preparing the charge, and it had no opportunity to consider them. Under these circumstances the court did not give them, unless as they may happen to appear in the charge, and did not undertake to give them."

Judgment was pronounced upon the verdict, and the defendant appealed.

Attorney-General Bickett and J. D. Murphy for the State.
J. Frazier Glenn for defendant.

ALLEN, J. We have given due consideration to the zealous and learned argument of counsel for defendant in behalf of his client, but we find no error in the record.

The first objection to the indictment, that the word "fraudulently" is not used in connection with the words "designedly, falsely, and feloniously," is met by the statute (Revisal, sec. 3432), which says: "That it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security; and on the trial of any such indictment it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud."

The intent to defraud is alleged, and with more particularity than is required.

It is true, as contended by the defendant, that the indictment must show a causal connection between the false representation and the parting with the property (*S. v. Whedbee,* 152 N. C., 774), but "no particular form of words is necessary; an allegation that 'by means of the false pretense' or 'relying on the false pretense,' or the like, is sufficient, where it is apparent that the delivery of the property was the natural result of the pretense alleged." 19 Cyc., 430.

The indictment alleges that the defendant falsely represented (526) to Frederick Rutledge that the construction of a certain house cost $6,500, and, in one place, that by means of the representation he obtained from the said Rutledge, and in another from said Rutledge and B. H. Rutledge, $5,500 in money, which, in our opinion, satisfies the law.

The indictment also contains all of the elements of a false pretense. It charges that a representation was made as to a subsisting fact (the cost of the construction of the house); that the representation was false; that it was made knowingly and designedly and with intent to defraud; and that by means of the representation he obtained $5,500 in money.

We are, therefore, of opinion that the motions to quash and in arrest of judgment were properly overruled.

The defendant was not entitled to have his prayers for special instructions considered under the findings of his Honor that they were handed up on the second day of the trial, after two speeches had been made on the preceding day, and when the judge was preparing his charge and had no time to consider them.

We said at the last term, in *Holder v. Lumber Co.,* 161 N. C., 178: "After the argument commences it is well settled that counsel will not be permitted to file requests for special instructions without leave of the court, and no such leave appears to have been given in this case, for the court declined to consider the prayers after they were handed up."

The fact that there is a representation in writing does not prevent the introduction of evidence of a parol representation, and the letter of Frederick Rutledge to B. H. Rutledge was competent for the purpose for which it was admitted, to corroborate Frederick Rutledge, who was a witness.

The admission of evidence as to what the house was worth, if erroneous, was cured in the charge, in which the jury were carefully instructed that they could not consider any representation except the one as to the cost of construction.

Nor do we find any valid objection to the charge, which is remarkably clear, full, and accurate. If it is the subject of criticism at all, it is because it is too favorable to the defendant.

No error.

(527)

STATE v. C. L. JENKINS.

(Filed 10 December, 1913.)

1. Criminal Law—Landmarks—Indictment—Variance—Evidence.

The question of variance between the proof and the indictment should be raised upon the trial, and is not the subject of a motion in arrest of judgment.

2. Criminal Law—Boundaries—Stakes—Landmarks—Interpretation of Statutes.

Stakes placed by the agreement of the parties to mark the boundaries between their lands have evidential value in connection with other evidence in locating the lands, and are landmarks as contemplated by Revisal, sec. 3674, prohibiting their removal.

APPEAL by defendant from *Carter, J.*, at September Term, 1913, of BUNCOMBE.

Indictment under section 3674, Revisal. The defendant appealed from verdict and judgment.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Britt & Toms for defendant.

BROWN, J. The evidence for the State tended to show that the defendant owned a tract of land adjoining a tract owned by one T. L. Justice, and that, pending a sale of the land by Justice to A. B. Nix or his wife, the defendant and A. B. Nix entered into an agreement to employ a surveyor to survey and establish the dividing line.

Pursuant to this agreement, the line was surveyed and the stake in question was placed, and the agreement, return of the survey, plat, and order of registration are set up in the record.

The purpose of the agreement is shown by the testimony of A. A. Hamlet, the surveyor, who testified that the line was run and the stake placed on 30 September, 1911; that some time between that date and 13 July, 1913, the stake had been moved about 2 feet from where he placed it, and that the effect of the removal of the stake, if the line were changed accordingly, would be to add approximately an acre to
(528) the land of Jenkins, and to lessen that of Nix in the same amount.

Other witnesses also testified to the removal of the stake.

On the question as to how the stake was moved, and by whom, S. D. Williams testified: "That he knows defendant C. L. Jenkins; has known him all his (witness's) life; saw defendant Jenkins stobbing a stake

down at the point described by the witness Hamlet; thinks this was in the year 1911; it was the same time that witness Hamlet made the survey; thinks the time was in November, 1911, when he saw Jenkins setting the stake . . . Saw the stake driven by witness Hamlet; saw defendant gouging it down or gouging it in the ground, and the other hole was a few inches from it."

The prosecuting witness, A. B. Nix, testified on cross-examination: "That there was feeling between him and the defendant Jenkins; that he did not intend for a man to run over him; that they are bitter enemies; he never saw the defendant remove the stake, but it had been removed; that Jenkins had come to his house with a double-barrel shotgun and nailed a notice about 8 feet from one corner of his house, and swore that he would kill the witness if he crossed the path onto his own land; did not see the defendant making the line. Jenkins gave him the lie."

1. The defendant moved in arrest of judgment. The motion was properly denied.

This motion was made on two grounds: "First, that a wooden stake is not such a landmark as is contemplated by the statute; and, second, for alleged variance between the proof and indictment in that the agreement as to the location of the land offered in evidence by the State was entered into between the defendant and A. B. Nix, and not between the defendant and Nannie Nix, the person named in the indictment.

These grounds of motion present questions which should have been raised during the trial by exceptions. A motion in arrest of judgment must be based upon some matter which appears, or for the omission of some matter which ought to appear, on the face of the record. *S. v. Davis,* 126 N. C., 1007; *S. v. McLain,* 104 N. C., 895; *S. v.* (529) *Douglas,* 63 N. C., 500.

Variance between indictment and proof cannot be taken advantage of by motion in arrest. *S. v. Jarvis,* 129 N. C., 698; *S. v. McLain,* 104 N. C., 895; *S. v. Craige,* 89 N. C., 475.

2. At close of the evidence defendant moved to nonsuit upon the ground that a stake is not a landmark within the meaning of the statute. This motion was properly denied. As the learned Attorney-General well says in his brief: "The statute, section 3674, in denouncing the removal of any landmark, evidently contemplates the preservation of any mark or monument, natural or artificial, which might in any event be of evidential value in determining a question of boundary. Questions of boundary are to be determined by a consideration of natural or permanent objects, by artificial monuments and marks, and by courses and distances, and as to which of these controls depends upon the facts and circumstances in the particular case."

It is true that this Court has held that stakes are not such permanent or natural objects and monuments of boundary as will control course and distance, but they are recognized as between the parties as being evidence of a definite location of land, as also is the planting of a stone. *Allison v. Kenion,* 163 N. C., 582; *Lance v. Rumbough,* 150 N. C., 19; *Higdon v. Rice,* 119 N. C., 623; *Deaver v. Jones,* 119 N. C., 598; *Cox v. McGowan,* 116 N. C., 131.

An examination of these cases will show that the line actually surveyed and marked was in many instances marked by stakes.

The case of *Barker v. R. R.,* 125 N. C., 596, referred to in the brief filed for the defendant, properly read, really supports the construction of the word "landmark" in the statute as including stakes, if the word landmark is to be understood as including all marks and monuments, artificial as well as natural, the existence of which would be of evidential value in determining a question of boundary.

In that case the plaintiff sued in ejectment for the possession of land on the ground that a deed he had previously given and under
(530) which defendant claimed was too indefinite to convey any title, and too vague to be aided by parol evidence.

It appears from the description set out in the opinion that the beginning point was described as a stake without any definite location, the description continuing with courses and distances to stakes, and the Court held that such a description could not be aided by parol, as there was not a single corner fixed by anything more definite than a stake.

It was not held that a stake has no evidential value in connection with other evidence. On the contrary, it was held in the same case that as the land was in fact located and had been surveyed at the time of sale, and as the defendant had been put in actual possession under designated lines and marked corners, the defendant was entitled to hold; in that case the marked corners must have been the stakes referred to in the deed placed at the time of the actual survey, and which would have evidential value in determining the *locus in quo.*

The removal of such artificial evidence of location would seem to be within the protection of the statute as to landmarks.

No error.

STATE v. R. H. DENTON.

(Filed 13 December, 1913.)

1. Intoxicating Liquors—Criminal Law—"Search and Seizure Act"—Recorder's Court—Jurisdiction.

The recorder's court of Edgecombe County has jurisdiction over offenses committed under the act of 1913, ch. 44, known as the "search and seizure act," relating to intoxicating liquors, etc., making the possession of certain specified quantities of the various kind *prima facie* evidence of guilt.

2. Intoxicating Liquors—Criminal Law—"Search and Seizure Act"—Prima Facie Case—Ex Post Facto Law.

Where the defendant, under a proper warrant, has been found with sufficient quantity of intoxicating liquor in his possession to make out a *prima facie* case of the violation of chapter 44, Laws 1913, known as the "search and seizure act," fourteen days after the statute had become effective, he may not successfully resist conviction on the ground that the law was *ex post facto*, as to his case, having had ample time to rid himself of the possession of the liquor after the operative effect of the statute.

WALKER and ALLEN, JJ., dissent as to the jurisdiction of the recorder's court, and concur as to second proposition.

APPEAL by defendant from *Lyon, J.*, at June Term, 1913, of (531) EDGECOMBE.

Criminal proceeding. The defendant was convicted and sentenced to twelve months on the roads, and appeals.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

F. S. Spruill, H. A. Gilliam for defendant.

BROWN, J. Under the Search and Seizure Act of 1913, a warrant was sworn out against the defendant, charging him with having in his possession, for the purpose of sale, 29 barrels of whiskey, 71 half-pints, and 38 quarts of corn whiskey. The action was originally tried in the recorder's court of Edgecombe County, and, upon conviction, the defendant appealed to the Superior Court.

In the Superior Court the evidence disclosed that under a proper search warrant a lawful officer found concealed in different parts of the livery and feed stables of the defendant a large quantity of whiskey in quart, pint, and half-pint bottles, all of which was claimed by the defendant as his own.

There was no evidence of any sale by the defendant, nor by any one in his presence, nor by any one to his knowledge; but there was evidence of sale by another upon the premises of the defendant.

It further appeared that all of this whiskey was shipped into the State of North Carolina and delivered to the defendant prior to 1 April, 1913.

The whiskey was found in defendant's possession 17 April, 1913. The Search and Seizure Act of 1913, ch. 44, contains these provisions:

"SEC. 9. That this act shall not apply to any act committed prior to its ratification.

(532) "SEC. 10. That this act shall be in force from and after the first day of April, 1913.

"Ratified 3 March, 1913."

1. The first point pressed by the learned counsel for the defendant is that the recorder's court had no jurisdiction, and that the defendant should have been indicted in the Superior Court and tried upon such bill.

We are of opinion that this question has been settled at least by a majority of this Court by repeated decisions adverse to such contention. *S. v. Lytle,* 138 N. C., 738; *S. v. Dunlap,* 159 N. C., 491.

2. It is assigned as error that the court instructed the jury: "Upon the foregoing facts the court stated that he would hold that the Search and Seizure Law of 1913 applied to this case, and instructed the jury that the possession of liquor in the quantity as testified to constituted a *prima facie* case, and that if they should find beyond a reasonable doubt the facts to be true, and should further find purpose of sale, then they should return a verdict of guilty, but otherwise they should return a verdict of not guilty."

The form and phraseology of this charge is in complete conformity to what is said in *S. v. Wilkerson, ante,* 431, and *S. v. Russell, ante,* 482. But the learned counsel contends that the court erred in applying the rule of evidence prescribed in the statute to this case, and that under the facts the law as to this defendant is *ex post facto.*

We do not think this position is tenable. A statute is *ex post facto* which by its necessary operation and in its relation to the offense or its consequences alters the situation of the accused to his disadvantage. *Thompson v. Missouri,* 171 U. S., 386; *Thompson v. Utah,* 170 U. S., 343.

At the time this offense occurred, that is, when the liquor was found in defendant's possession, the law had been in force seventeen days. The statute by express language does not apply to acts committed prior

(533) to its ratification, which was on 3 March, 1913. The record does not show that this liquor was acquired prior to that date.

In any event the defendant had full opportunity to get rid of his

liquor, which he could have done by shipping it out of the State between the ratification of the act and the date it was found in his possession.

It was his own folly that he continued to retain it in violation of the statute.

No error.

WALKER and ALLEN, JJ. We do not agree to the proposition that a judgment of imprisonment, with power to work on the public roads, is legal, under our Constitution, without the intervention of a grand jury; but a majority of the Court having heretofore decided otherwise, we concur in the result in this case.

Cited: *S. v. Cathey,* 170 N. C., 796.

STATE v. ARTHUR LEE.

(Filed 13 December, 1913.)

1. Spirituous Liquor—"Search and Seizure Act"—Possession—Principal and Agent—Interpretation of Statutes.

The General Assembly is presumed to have acted advisedly and with a knowledge of the legal meaning of the terms it employs in a statute. Hence, chapter 44, Laws of 1913, known as the "search and seizure act," making the "possession" of certain specified quantities of "spirituous, vinous, or malt liquors" *prima facie* evidence of its violation, intends that the "possession" shall be construed as either actual or constructive; so that the possession of such quantities by the agent will be deemed the possession of the principal for the purposes of the act.

2. Criminal Law—Trials—Warrants—Amendments—Intoxicating Liquors—"Search and Seizure Act."

Upon appeal, the Superior Court judge has authority, after the jury has been impaneled, to permit an amendment to a warrant issued under the "search and seizure law," being chapter 44, Laws 1913, so as to charge that the defendant had spirituous, etc., liquors "for the purpose of sale."

APPEAL by defendants from *Connor, J.,* at July Term, 1913, of (534) WASHINGTON.

The defendant was tried and convicted under the Search and Seizure Law for having spirituous liquors in his possession for the purpose of sale, on a warrant issued by a recorder.

When the case was called for trial in the Superior Court, after the jury had been impaneled, the solicitor for the State moved that the warrant be amended by adding after the words, "spirituous liquors," the words, "for the purpose of sale." The motion was allowed, and the defendant excepted.

The evidence for the State tended to show that on 26 April, 1913, on the arrival at Plymouth of a train from Norfolk, Va., there was received at the Norfolk Southern Railroad station a trunk, afterwards found to contain forty half-pint bottles and four gallon jugs, contaning whiskey. On the morning of its arrival the defendant gave a public drayman a check for the trunk and instructed him to get the trunk and take it to the home of his mother, and paid him for the service to be performed. The drayman went to the station and delivered the check and received the trunk. The trunk was seized by officers while still in possession of the drayman. When the officers went to the store of the defendant, he saw them coming, and walked hurriedly away.

The defendant moved for judgment of nonsuit, and by other exceptions presents the contention that the evidence does not show that the defendant was in possession of the liquor.

His Honor charged the jury, among other things: "That if the jury are satisfied by the evidence beyond a reasonable doubt that the trunk in evidence had been shipped to the defendant, and that a check had been sent to or received by him, which upon surrender to the railroad company entitled him to the possession of the trunk and its contents; that the defendant had delivered the check to Ballard, a drayman, with instructions from defendant to surrender the check and take the trunk to the home of Aggie Lee; that Ballard received the trunk and took it into his possession as agent for the defendant, and that while the trunk was in the actual possession of Ballard it was under the control of and (535) subject to the orders of the defendant, then the trunk was in the possession of the defendant, during the time that Ballard had it on his dray as agent for defendant, if the jury shall find from the evidence beyond a reasonable doubt that Ballard was the agent of the defendant." The defendant excepted.

Judgment was pronounced upon the verdict, and the defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Ward & Grimes and P. H. Bell for defendant.

ALLEN, J. The authority of his Honor to permit an amendment of the warrant is well settled. *S. v. Vaughan,* 91 N. C., 532; *S. v. Telfair,* 130 N. C., 645.

The other exception relied on by the defendant involves a construction of the language in the Search and Seizure Law (ch. 44, Laws 1913), "to have or keep in his, their, or its possession for the purpose of sale any spirituous, vinous, or malt liquors."

The contention of the defendant is that by "possession" is meant an actual possession, and that as the whiskey did not reach the defendant, and was seized in the hands of his agent, he is not guilty, and the statutory presumption from the possession of more than one gallon cannot arise.

The Search and Seizure Law has been upheld as valid and constitutional in *S. v. Wilkerson, ante,* 431, and if we were to sustain the position of the defendant, an act passed to secure the enforcement of the laws against the sale of intoxicating liquors, instead of effecting its purpose, would be a shield and protection to the principal offenders against the law. Intoxicating liquors intended for sale would not hereafter come into the actual possession of the owner, but would be left with an agent, and the moving party and instigator of violations of law would frequently escape punishment.

We are not, therefore, inclined to give to the statute this restricted construction, and the language used does not require us to do so.

The act says "the possession of," which includes actual and constructive possession, and as the General Assembly is presumed to have acted advisedly and with a knowledge of the legal meaning of the term, we are not at liberty to amend the act by inserting before the (536) word "possession" the word "actual."

We find no direct authority upon the question, here or elsewhere; but the decisions upon statutes making it indictable to have counterfeit money or burglar's tools in possession furnish a complete analogy.

It was held in *Reg. v. Williams,* 1 Car. and Marsh, 259 (41 E. C. L., 145), that, "In order to convict a person charged on the stat. 2 Will. IV., ch. 34, sec. 8, with having in his possession more than three pieces of counterfeit coin, with intent to utter them, it is not necessary that the possession should be individual possession, but it is enough if the coin be in the possession of the person charged, or his immediate agent"; in *S. v. Washburn,* 11 Iowa, 245, that coin deposited in a secret place was in possession of the defendant, and that "if the coin was within the power of the prisoner, in such sense that he could and did command its use, the possession was as complete, within the meaning of the statute, as if it had been actual"; and in *S. v. Potter,* 42 Vt., 495, that burglar's tools left by the husband with the wife were in possession of the husband, the opinion being based on the general law, and not on the marital relationship.

Again, in McLean Crim. Law, vol. 2, sec. 785: "The possession may be sufficient, although the counterfeit coin is deposited in a secret place, provided it is within the knowledge and control of the accused; and even though acquired by the accused with the knowledge of the police and immediately afterwards seized so that there could not have been any opportunity for making a fraudulent use thereof. . . . There may be a joint possession where two or more persons are acting in concert in the having and intending to pass, and the possession may be by an agent."

The reasoning in *S. v. Stroud,* 95 N. C., 631, is also pertinent and persuasive. In that case the defendant was charged with receiving stolen goods, and the point was made that the defendant could (537) not be convicted because he was not in actual possession of the goods; but the Court refused to give its assent to this position, and said: "To constitute the criminal offense of *receiving,* it is not necessary that the goods should be traced to the actual possession of the person charged with receiving. It would certainly make him a *receiver* in contemplation of law if the stolen property was received by his servant or agent, acting under his directions, he knowing at the time of giving the orders that it was stolen, for *qui facit per alium facit per se.* It is the same as if he had done it himself."

We are, therefore, of opinion, on reason and authority, that the evidence was sufficient to establish the fact of possession within the meaning of the statute, and that this possession made out a *prima facie* case against the defendant.

His Honor charged the jury as to the effect of the *prima facie* case in accordance with the opinion of this Court in *S. v. Wilkerson, ante,* 431, and *S. v. Russell, ante,* 482.

No error.

Cited: *S. v. Ross,* 168 N. C., 131; *S. v. R. R.,* 169 N. C., 302.

RULES OF PRACTICE IN SUPREME COURT.

APPLICANTS FOR LICENSE TO PRACTICE LAW.

1. *When Examined.*

Applicants for license to practice law will be examined on the first Monday in February and the last Monday in August of each year, and at no other time. All examinations will be in writing.

2. *Requirements and Course of Study.*

Each applicant must have attained the age of 21 years, or will arrive at that age before the time for the next examination, and must have studied:

Ewell's Essentials, 3 volumes.
Clark on Corporations.
Schouler on Executors.
Bispham's Equity.
Clark's Code of Civil Procedure.
Volume 1, Revisal (1905) of North Carolina.
Constitution of North Carolina.
Constitution of the United States.
Creasy's English Constitution.
Sharswood's Legal Ethics.
Sheppard's Constitutional Text-Book.
Cooley's Principles of Constitutional Law.
(Or their equivalents.)

Each applicant must have read law for two years, at least, and shall file with the clerk a certificate of good moral character, signed by two members of the bar who are practicing attorneys of this Court, and also a certificate of the dean of a law school, or a member of the bar of this Court, that the applicant has read law under his instruction, or to his knowledge or satisfaction, for two years, and upon examination by such instructor has been found competent and proficient in said course. Such certificate, while indispensable, will of course not be conclusive evidence of proficiency. An applicant from another State can file a certificate of good moral character signed by any State officer of the State from which he comes.

If the applicant has obtained license to practice law in another State, in lieu of the certificate of two years reading and proficiency, he can file (with leave to withdraw) his law license issued by said State.

3. *Deposit.*

Each applicant shall deposit with the clerk the sum of $23.50 for the license and the clerk's fee before he shall be examined, and if upon examination he shall fail to entitle himself to receive a license, the money (except $1.50 for the clerk) will be returned to him as provided by the statute.

APPEALS—WHEN HEARD.

4. *Docketing.*

Each appeal shall be docketed for the judicial district to which it properly belongs. Appeals in criminal actions shall be placed at the head of the docket of each district. Appeals in both civil and criminal cases shall be docketed, each in its own class, in the order in which they are filed with the clerk.

5. *When Heard.*

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term seven days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee files a proper certificate prior to the docketing of the transcript.

The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed seven days before the Court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless, by consent, it is submitted upon printed argument under Rule 10.

Appeals in criminal actions shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: *Provided, however,* that an appeal in a civil cause from the First, Second, and Third districts, which is tried between 1 January and first Monday in February, or between 1 August and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

6. *Appeals in Criminal Actions.*

Appeals in criminal cases, docketed seven days before the call of the docket for their district, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated shall be called immediately at the close of argument of appeals

from the Twentieth District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

7. *Call of Each Judicial District.*

Appeals from the several districts will be called for hearing on Tuesday of the week to which the district is allotted, as follows:

From the First District, the first week of the term.

From the Second District, the second week of the term.

From the Third District, the third week of the term.

From the Fourth District, the fourth week of the term.

From the Fifth District, the fifth week of the term.

From the Sixth, District, the sixth week of the term.

From the Seventh District, the seventh week of the term.

From the Eighth and Ninth districts, the eighth week of the term.

From the Tenth and Eleventh districts, the ninth week of the term.

From the Twelfth District, the tenth week of the term.

From the Thirteenth District, the eleventh week of the term.

From the Fourteenth District, the twelfth week of the term.

From the Fifteenth and Sixteenth districts, the thirteenth week of the term.

From the Seventeenth and Eighteenth districts, the fourteenth week of the term.

From the Nineteenth District, the fifteenth week of the term.

From the Twentieth District, the sixteenth week of the term.

Where two districts are allotted to one week, the appeals will be heard in the order in which they are docketed.

8. *End of Docket.*

At the Spring Term causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the foot of the docket, shall be called at the close of argument of appeals from the Twentieth District, and each cause, in its order, tried or continued, subject to Rule 6. At the Fall Term, appeals in criminal actions only will be heard at the end of the docket, unless the Court, for special reason, shall set a civil appeal to be heard at the end of the docket at that term. At either term the Court in its discretion may place cases not reached on the call of a district at the end of some other district.

9. *Call of the Docket.*

Each appeal shall be called in its proper order; if any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time;

otherwise, the first call shall be peremptory; or at the first term of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. *Submission on Printed Argument.*

By consent of counsel, any case may be submitted without oral argument, upon printed briefs by both sides, without regard to the number of the case on docket, or date of docketing appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, can direct an oral argument to be made, if it shall deem best.

11. *If Orally Argued.*

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. *If Brief Filed by Either Party.*

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were a personal appearance by such counsel.

13. *Cases Heard Out of Their Order.*

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney-General, assign an earlier place on the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of the party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, or in other cases of sufficient importance in its judgment, may make the like assignment in respect to it.

14. *Cases Heard Together.*

Two or more cases involving the same question may, by order of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagree, the course of argument.

WHEN DISMISSED.

15. *If Appeal Not Prosecuted.*

Cases not prosecuted for two terms shall, when reached in order at the third term, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

16. *Motion to Dismiss.*

A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

17. *Dismissed by Appellee.*

If the appellant in a civil action shall fail to bring up and file a transcript of the record seven days before the Court begins the call of causes from the district from which it comes at the term of this Court at which such transcript is required to be filed, the appellee may file with the clerk of this Court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of appellant, and the date of the settling of the case on appeal, if any had been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at the first session of the Court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause.

18. *When Appeal Dismissed.*

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, the same, or a certificate for that purpose as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing

the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid, or offered to pay, the costs of the appellee in procuring the certificate, and in causing the same to be docketed.

TRANSCRIPTS.

19. *Transcript of Record.*

(1) THE RECORD.—In every record of an action brought to this Court the proceedings shall be set forth in the order of time in which they occurred, and the several processes, or orders, etc., shall be arranged to follow each other in the order the same took place, when practicable. The pages shall be numbered.

It shall not be necessary to send as a part of the transcript, affidavits, orders, process and other proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement which shall be made a part of the record as to the parts to be transcribed, and in the event of disagreement of counsel the judge of the Superior Court shall designate the same by written order: *Provided,* that the pleadings on which the case is tried, the issues and the judgment appealed from, shall be a part of the transcript in all cases: *Provided further,* that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up.

When there are two or more appeals in one action, it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law and shall appear separately in the transcript. The judge of the Superior Court shall determine the part of the costs of making transcript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law.

(2) EXCEPTIONS GROUPED.—All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. If this rule is not complied with, and the appeal is from a judgment of nonsuit, it will be dismissed. In other cases the Court will in its discretion dismiss the appeal or remand to the judge or refer the transcript to the clerk or to some attorney to state the exceptions according to this rule, for which an allowance of not less than $5 will be made, to be paid in advance by the appellant, but the transcript will not be so referred or remanded unless the appellant files with the clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

(3) INDEX.—On the front page of the record there shall be an index in the following or some equivalent form:

Summons—date ..... page 1
Complaint—First cause of action..... page 2
Complaint—Second cause of action..... page 3
Affidavits for attachments, etc..... page 4

20. *Insufficiency of Transcript.*

If any cause shall be brought on for argument, and the regulations in Rule 19, subsection 1, shall not have been complied with, the case shall be dismissed or put to the end of the district, or the end of the docket, or continued, as may be proper. If not dismissed, it shall be referred to the clerk, or some other person, to put the record in the prescribed shape, for which an allowance of $5 will be made to him, to be paid in advance in each case by the appellant, or the appeal will be dismissed.

21. *Summary of Exceptions and Statement of Evidence.*

A case will not be heard until there shall be put in the record, as required in Rule 19 (2), the summary of exceptions, taken on the trial, and those taken in ten days thereafter, to the charge. Those not thus set out will be deemed to be abandoned.

The evidence in case on appeal shall be in narrative form and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception.

When this rule is not complied with, and the case on appeal is settled by the judge, this Court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule.

If the case is settled by agreement of counsel, or the statement of appellant is the case on appeal, and the rule is not complied with, and the appeal is from a judgment of nonsuit, the appeal will be dismissed.

In other cases the Court will in its discretion dismiss the appeal, or remand for a settlement of the case on appeal.

22. *Unnecessary Records.*

The cost of copying and printing unnecessary and irrelevant testimony, or any other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

PLEADINGS.

23. *Memoranda of*

Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

24. *Assigning Two or More Causes of Action.*

Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

25. *When Scandalous.*

Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed, and for this purpose the Court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

26. *Amendments.*

The Court may "amend any process, pleadings, or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe." Revisal (1905), sec. 1545.

EXCEPTIONS.

27. *How Assigned.*

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exception not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment. When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

PRINTING RECORDS.

28. *When to Be Printed.*

Fifteen copies of the transcript sent up in each action shall be printed, except in pauper appeals: *Provided,* it shall not be necessary to print the summons, publication of summons, and other papers showing service of process, if a statement signed by counsel is printed, giving the names of all the parties and stating that summons has been duly served. Nor will it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc. In pauper appeals the counsel for the appellant shall furnish a sufficient number of printed or typewritten briefs for the use of the Court, giving a succinct statement of the facts applicable to the exceptions, and the authorities relied on. Should the appellant gain the appeal, the cost of the same shall be taxed against the appellee.

The printed transcript shall be in the order required by Rule 19 (1), and shall contain the grouped and numbered exceptions and index required by Rule 19 (2) and (3), though for economy the marginal references in the manuscript, required by Rule 11 of the Superior Court, may be printed as subheads in the body of the record, and not on the margin. The transcript shall be printed immediately after docketing the same, unless it is sent up printed.

29. *How printed.*

The transcript on appeal shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size, as the reports of this Court, unless it is printed below in the required style and manner. If it is to be printed here, the party sending up an appeal shall send therewith a deposit in cash for that purpose, to the clerk of this Court, including 10 cents for the clerk for each printed page.

30. *If Not Printed.*

If the transcript on appeal (except in pauper appeals) shall not be printed as required by the rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the rule as to printing is not complied with, other than pauper appeals.

31. *Costs of Printing.*

The actual cost of printing the transcript on appeal shall be allowed to the successful party, not to exceed, however, 70 cents per page of one copy of the printed transcript, and not exceeding 60 pages of the above specified size and type, unless otherwise specially ordered by the Court; and he shall be allowed 10 cents additional for each such page paid to the clerk of this Court for making copy for the printer, unless the appellant shall send up a duplicate manuscript or typewritten copy for that purpose, or shall have the copies printed below.

Judges and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

32. *Printed Briefs.*

Printed briefs of both parties shall be filed in all cases (except in pauper appeals as provided in Rule 28). Such briefs may be sent up by counsel ready printed, or they may be printed under the supervision of the clerk of this Court if a proper deposit for cost of printing is made, as specified in Rule 29. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited if discovered after brief filed.

ARGUMENT.

33. *Oral Arguments.*

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) The counsel for the appellant may be heard for ten minutes for statement of the case and thirty minutes for argument, including the opening argument and reply.

(3) The counsel for the appellee may be heard for thirty minutes.

(4) The time for argument may be extended by the Court in a case

requiring such extension; but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside the time limited.

(5) Any number of counsel may be heard on either side within the limit of the time above specified; but, if several counsel shall be heard, each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

34. *Appellant's Brief.*

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except that as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such briefs shall contain, properly numbered, the several grounds of exceptions and assignments of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment, and, if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket and a copy thereof furnished by him to opposite counsel on application. If not filed by 12 o'clock noon on Tuesday of the week preceding the call of the district to which the cause belongs, the appeal will be dismissed, on motion of appellee, when the call of that district is begun, unless, for good cause shown, the Court shall give further time to print brief.

45. *Copies of Brief to be Furnished.*

Fifteen copies shall be delivered to the clerk of the Court, one of which shall be filed with the transcript of the record, one handed to each of the justices at the time the argument shall begin, one to the reporter, and one to the opposing counsel.

36. *Brief of Appellee.*

The appellee shall file the same number of like briefs, except that he may omit the statement of the case, and it shall be distributed in like manner. Said briefs shall be filed by 12 o'clock noon on Saturday before the week of the call of the district to which the cause belongs, shall be noted by the clerk on his docket, and a copy furnished by him to opposite counsel on application. On failure to file said brief by that time, the cause will be heard and disposed of without argument from

appellee, unless, for good cause shown, the Court shall give further time to present brief.

37. *Cost of Briefs.*

The cost of printing briefs shall be the same as provided in Rule 31 for printing transcript.

38. *Reargument.*

The Court will, of its own motion, direct a reargument before deciding any case, if, in its judgment, it is desirable.

39. *Agreement of Counsel.*

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

40. *Entry of Appearance.*

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

CERTIORARI AND SUPERSEDEAS.

41. *When Applied for.*

Generally, the writ of *certiorari,* as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

42. *How applied for.*

The writs of *certiorari* and *supersedeas* shall be granted only upon petition specifying the grounds of application therefor, except when a diminution of the record shall be suggested, and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

43. *Notice of.*

No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

ADDITIONAL ISSUES.

44. *If Other Issues Necessary.*

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the Court, and certified to the Superior Court for trial, and the case will be retained for that purpose.

MOTIONS.

45. *In Writing.*

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motions, not leading to debate, nor followed by voluminous evidence, may be made at the opening of the session of the Court.

ABATEMENT AND REVIVOR.

46. *Death of Party.*

Whenever, pending an appeal to this Court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the court: *Provided,* such order shall be served upon the opposing party.

47. *When Appeal Abates.*

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

OPINIONS.

48. *When Certified Down.*

The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court which shall have been on file ten days, in cases sent from said court. Revisal 1905, sec. 1549. But the Court in its discretion may order an opinion certified down at an earlier day.

THE JUDGMENT DOCKET.

49. *How Kept.*

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs, or interlocutory, or upon the merits, is entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return on the execution, or from an order for an entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

EXECUTION.

50. *Teste of Executions.*

When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

51. *Issuing and Return of.*

Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will

only be issued from said Superior Court, and, when satisfied, the facts shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the costs of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of term, returnable, on a day named, at the next succeeding term of this Court. The officer to whom said executions are directed shall be amenable to the penalities prescribed by law for failure to make due and proper return thereof.

PETITION TO REHEAR.

52. *When Filed.*

A petitioin to rehear may be filed in the clerk's office at the same term, or during the vacation succeeding the term of the Court at which the judgment was rendered, or not later than the third Monday of the succeeding term.

53. *What to Contain.*

The petition must assign the alleged error of law complained of; or the matter overlooked; or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject-matter, and have never been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion; and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

The petitioner shall indorse upon the petition, of which he shall file two copies, the names of the two justices, neither of whom dissented from the opinion, to whom the petition shall be sent by the clerk, and it shall not be docketed for rehearing unless both of said justices indorse thereon that it is a proper case to be reheard: *Provided, however,* that when there have been two dissenting justices, it shall be sufficient for the petitioner to file only one copy of the petition and designate only one justice, and his approval in such case shall be sufficient to order the petition decketed. The clerk shall indorse on the petition the date on which it was received, and it shall be delivered by him to the justice or justices designated by the petitioner.

There shall be no oral argument before the justices or justice thus designated, before it is acted on by them, and if they order the petition docketed, there shall be no oral argument thereon before the Court

(unless the Court of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing, the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

54. *Stay of Execution.*

When a petition to rehear is filed with the clerk of this Court the justice or justices designated by the petitioner to pass upon it may, upon application and in his or their discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the court below, where the appeal was taken, by giving the required security, he shall at the time of applying to the justice or justices for a stay tender sufficient security for that purpose, which shall be approved by the justice or justices. Notice of the application for a stay must be given to the other party, if deemed proper by the justice or justices, for such time before the hearing of the application and in such manner as may be ordered. If a certificate for a rehearing is denied, or if granted and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once or the judgment or order be otherwise enforced unless, in case the petition is dismissed, the Court shall otherwise direct. When a stay is granted, the order shall run in the name of this Court and be signed and issued by the clerk under its seal, with proper recitals to show the authority under which it was issued.

CLERK AND COMMISSIONERS.

55. *Report of Funds in Hands of.*

The clerk and every commissioner of this Court who, by virtue or under color of any order, judgment, or decree of the Supreme Court,

in any action or matter pending therein, has received, or shall receive, any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the clerk or such commissioner professes to act was made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund and any charge made in the amount or character of the investment, and every payment made to any person entitled thereto.

56. *Report Recorded.*

The reports required by the proceeding paragraph shall be examined by the Court, or some member thereof, and their or his approval indorsed shall be recorded in a well-bound book, kept for the purpose, in the office of the clerk of the Supreme Court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

BOOKS.

57. *Books Taken Out.*

No books belonging to the Supreme Court Library shall be taken therefrom except into the Supreme Court chamber, unless by the justices of the Court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the marshal of the Court, and then only upon the application in writing of a judge of a Superior Court, holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the chairmen of the several committees of the General Assembly. In all cases when a book is taken by other than a member of the Court, the marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

CLERK.

58. *Minute Book.*

The clerk shall keep a Permanent Minute Book, containing a brief summary of the proceedings of this Court in each appeal disposed of.

59. *Clerk to Have Opinions Typewritten and Sent to Judges.*

After the Court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause five

typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the Court, to the end that the same may be carefully examined, and the bearing of the authorities cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

LIBRARIAN.

60. *Reports by Him.*

The Librarian shall keep a correct catalog of all books, periodicals, and pamphlets in the Library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year what books have been added to the Library during the year next preceeding his report, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

61. *Sittings of the Court.*

The Court will sit daily, during the term, Sundays and Mondays excepted from 10 A. M. to 2 P. M., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it. The Court will sit, however, on the first Monday of each term for the examination of applicants for license to practice law.

62. *Citation of Reports.*

Inasmuch as all the volumes of Reports prior to the 63d have been reprinted by the State with the number of the volumes instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin, Taylor & Conf.	as	1	N. C.	1 Dev. & Bat. Eq.	as	21	N. C.
1 Haywood	"	2	"	2 " "	"	22	"
2 "	"	3	"	1 Iredell Law	"	23	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"	2 " "	"	24	"
1 Murphey	"	5	"	3 " "	"	25	"
2 "	"	6	"	4 " "	"	26	"
3 "	"	7	"	5 " "	"	27	"
1 Hawks	"	8	"	6 " "	"	28	"
2 "	"	9	"	7 " "	"	29	"
3 "	"	10	"	8 " "	"	30	"
4 "	"	11	"	9 " "	"	31	"
1 Devereux Law	"	12	"	10 " "	"	32	"
2 " "	"	13	"	11 " "	"	33	"
3 " "	"	14	"	12 " "	"	34	"
4 " "	"	15	"	13 " "	"	35	"
1 " Eq.	"	16	"	1 " Eq.	"	36	"
2 " "	"	17	"	2 " "	"	37	"
1 Dev. & Bat. Law	"	18	"	3 " "	"	38	"
2 " "	"	19		4 " "	"	39	"
3 & 4 " "	"	20	"	5 " "	"	40	"
				6 " "	"	41	"
				7 " "	"	42	"

8 Iredell Eq.	as	43	N. C.	8 Jones Law	as	53	N. C.
Busbee Law	"	44	"	1 " Eq.	"	54	"
" Eq.	"	45	"	2 " "	"	55	"
1 Jones Law	"	46	"	3 " "	"	56	"
2 " "	"	47	"	4 " "	"	57	"
3 " "	"	48	"	5 " "	"	58	"
4 " "	"	49	"	6 " "	"	59	"
5 " "	"	50	"	1 and 2 Winston	"	60	"
6 " "	"	51	"	Phillips Law	"	61	"
7 " "	"	52	"	" Eq.	"	62	"

In quoting from the *reprinted* Reports counsel will cite always the marginal (*i. e.*, the *original*) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

RULES OF PRACTICE IN SUPERIOR COURTS

REVISED AND ADOPTED BY

THE JUSTICES OF THE SUPREME COURT

RULES.

1. *Entries on Records.*

No entry shall be made on the records of the Superior Courts (the summons docket excepted) by any other person than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. *Surety on Prosecution Bond and Bail.*

No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a justice of the peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several Superior Courts to state, on the docket for the court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a justice of the peace.

3. *Opening and Conclusion.*

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. *Examination of Witnesses.*

When several are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel; but the counsel may change with each successive witness, or, with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. *Motion for Continuance.*

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature

of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the court.

6. *Decision of Right to Conclude Not Appealable.*

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument, the court shall decide who is so entitled, and, except in the cases mentioned in Rule 3, its decision shall be final and not reviewable. *S. v. Anderson,* 101 N. C., 758; *S. v. Burton,* 172 N. C. ——

7. *Issues.*

Issues shall be made up as provided and directed in the Revisal, secs. 548 and 549.

8. *Judgments.*

Judgments shall be docketed as provided and directed in the Revisal, secs. 573 and 574.

9. *Transcript of Judgment.*

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket, to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. *Docketing Magistrate's Judgments.*

Judgments rendered by a justice of the peace upon summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. *Transcript to Supreme Court.*

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of *certiorari* as a substitute for an appeal, it shall be the duty of the clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall

be written on the margin of each a brief statement of the subject-matter, opposite to the same. On the first page of the transcript of the record there shall be an index in the following or some equivalent form:

Summons—date .....page 1
Complaint—First cause of action.....page 2
Complaint—Second cause of action.....page 3
Affidavit of Attachment.....page 4

and so on to the end.

12. *Transcript on Appeal—When Sent Up.*

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the Superior Court. Revisal, sec. 592.

13. *Reports of Clerks and Commissioners.*

Every clerk of the Superior Court, and every commissioner appointed by such court, who, by virtue or under color of any order, judgment or decree of the court in any action or proceeding pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act, were made, the amount and character of the investment, and the security for the same, and his opinions as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The report required by the next proceeding paragraph shall be made to the judge of the Superior Court holding the first term of the court in each and every year, who shall examine it, or cause it to be examined, and, if found correct, and so certified, by him, it shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. *Recordari.*

The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision

thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of supersedeas, if prayed for as required by the Revisal, sec. 584. In such case, the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof (unless for good cause shown the hearing shall be continued) upon the petition, answer, affidavits, and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of *certiorari* in like manner, except that in case of the suggestion of a diminution of the record, if it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. *Judgment—When to Require Bonds to Be Filed.*

In no case shall the court make or sign any order, decree, or judgment directing the payment of any money or securities for money belonging to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in the respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. *Next Friend—How Appointed.*

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then, upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. *Guardian Ad Litem—How Appointed.*

All motions for a guardian *ad litem* shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

18. *Cases Put at Foot of Docket.*

All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the court may, in its discretion order that such action be placed at the end of the docket, as if continued by consent.

19. *When Opinion is Certified.*

When the opinion of the Supreme Court in any cause which had been appealed to that Court has been certified to the Superior Court, such cause shall stand on the docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. Revisal, sec. 3284.

20. *Calendar.*

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. *Cases Set for a Day Certain.*

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. *Calendar Under Control of Court.*

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. *Non-Jury Cases.*

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders,

will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. *Appeals from Justice of the Peace.*

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. *On Consent Continuance—Judgment for Costs.*

When civil action shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. *Time to File Pleadings—How Computed.*

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. *Counsel Not Sent for.*

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. *Criminal Dockets.*

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First. All criminal causes at issue.

Second. All warrants upon which parties have been held to answer at that term.

Third. All presentments made at preceeding terms, undisposed of.

Fourth. All cases wherein judgments *nisi* have been tendered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

29. *Civil and Criminal Dockets—What to Contain.*

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First. The names of the parties.

Second. The nature of the action.

Third. A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein.

Fourth. A blank space for the entries of the term.

30. *Books.*

The clerk of the Superior Courts shall be chargeable with the care and preservation of the volumes of the Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

INDEX

ABANDONMENT.

1. *Abandonment—Burden of Proof.*—To convict the husband of abandonment (Revisal, sec. 3355), it is necessary for the State to allege and prove the act of abandonment and the failure of the husband to provide adequate support for the wife and their child or children of the marriage; and that the act of abandonment was willful and without just cause. *S. v. Smith*, 475.

2. *Abandonment—Consent of Wife.*—Where the wife has consented to a separation from her husband, his leaving her is not an abandonment within the meaning of the statute, Revisal, sec. 3355. *Ibid.*

3. *Abandonment—Evidence—Harmless Error.*—Where it is not contested that the husband had actually abandoned his wife, on a trial under an indictment for abandonment (Revisal, sec. 3355), the admission of testimony of the sheriff that he could not find the husband to serve his process is immaterial and harmless. *Ibid.*

4. *Abandonment—Evidence—Willful Act.*—Upon a trial under an indictment for abandonment (Revisal, sec. 3355), there was evidence that the husband had offered to make a home for his wife and child in another town, and that she refused to go there with him. There was evidence that this offer was not made in good faith, and that it was the husband's purpose to make the surroundings of his wife such as to entrap her and lead her into conduct that would give him ground for divorce, and to separate her from her near relations and friends for the purpose. The jury having accepted the version of the prosecutrix, the verdict against the prisoner is not affected, the abandonment being nevertheless willful on the part of the husband. *Ibid.*

ACTIONS. See Trials; Principal and Surety.

ADMISSIONS. See Divorce.

ADVERSE POSSESSION. See Limitation of Actions.

AMENDMENT. See Courts; Appeal and Error.

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1. *Reference—Conclusion of Law—Appeal and Error.*—While the finding of a fact in a matter of reference by the court below is conclusive on appeal, the reason does not apply to a conclusion of law upon the facts found: as in this case, a conclusion of law that the tenant had only become a tenant at will. *Murrill v. Palmer*, 50.

2. *Trial by Jury—Waiver—Consent—Findings by Judge—Trials—Evidence—Exceptions—Appeal and Error.*—The parties to an action may waive their right to a jury by agreeing that the trial judge may find the facts upon the issues involved and declare his conclusions of law arising thereon (Revisal, sec. 540), and where the judge

APPEAL AND ERROR—*Continued.*

has acted accordingly, the relevant and pertinent facts so found by him are conclusive on appeal when there is any sufficient legal evidence to support them. An exception to a finding of fact, on the ground that there was no evidence thereof, must be made in apt time before the judge. *Buchanan v. Clark*, 56.

3. *Appeal and Error—Notice of Appeal—Judgment Rendered Out of Term—Receipt by Clerk—Computation of Time—Certiorari.*—Where by consent of the parties a judgment in the Superior Court is rendered after the expiration of the term in which the action has been tried, and sent by mail to the clerk of the court, with mailed notice to the appellant from the judge that this has been done, the time within which notice of appeal to the Supreme Court may be given is computed from the time the judgment has been received by the clerk, and not from the time the appellant has received the judge's notification that he had signed the judgment; and where the judge improperly refuses to settle the case on appeal for want of statutory notice given to the appellee, a *certiorari* from the Supreme Court will lie. *Fisher v. Fisher*, 105.

4. *Trials—Continuance—Prejudice of Rights—Appeal and Error.*—There is no change of parties to an action, in a legal sense, where a guardian *ad litem* is appointed on the ground of mental incompetency of one of them; and where such guardian is appointed and made a party at the trial term of the action, without change of pleading, it does not give the opposing party a legal right to continue the cause, and the refusal of the trial judge to grant his motion is not reviewable on appeal. *Watson v. R. R.*, 176.

5. *Appeal and Error—Brief—Exceptions Abandoned—Trials—Evidence—Negligence.*—Exceptions not noted in the brief are taken as abandoned; but held, in this case, the refusal to give an instruction excepted to was not error, as it barred the right of recovery for an injury inflicted by the unexpected movement of a log resulting from a negligent act of the defendant. *Buckner v. R. R.*, 201.

6. *Contracts—Breach—Instructions—Appeal and Error.*—When the evidence is conflicting and the defendant contends that the contract sued on was that the plaintiff was to have obtained options on certain lands and his services therefor paid only if the defendant sold the lands to a certain contemplated purchaser; that such sale had not been made and no benefit had consequently been received by him, it is error for the judge to charge the jury, if they found that the minds of the parties had not come together in making the alleged contract, the plaintiff was entitled to recover upon a *quantum valebat*, and reversible error when it appears from the verdict that the instruction influenced the finding upon the issue. *Raby v. Cozad*, 287.

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8. *Appeal and Error—Failure to Print Record—Briefs.*—This appeal is dismissed, under the rule, for failure of appellant to print record and brief, and the importance of observing this rule impressed upon the profession. *Bradshaw v. Stansberry*, 356.

9. *Appeal and Error—Facts Found by Consent—Pleadings—Amendments.*—Where it appears that by consent of the parties the trial judge has found the facts in dispute, and awarded damages in a greater sum than claimed by a party, no reversible error will be found on appeal; and when necessary a pleading may be allowed to be amended in the Supreme Court so as to demand such larger amount. *Corporation Commission v. Bank*, 357.

10. *Appeal and Error—Case Agreed—Omissions—Procedure—Case Remanded.*—A necessary finding in an action to recover money from an express company, alleged to have been lost from a valise which had been intrusted to the defendant for shipment, is that the money was taken while the valise was in the defendant's care or control, and such finding being omitted from an agreed case submitted to the Superior Court, it is remanded so that the omission may be supplied. *Sedbury v. Express Co.*, 363.

11. *Moot Questions—Spirituous Liquors.*—Upon the question presented in this case as to whether the defendant railroad company can legally transport spirituous liquor into the State and deliver it to the plaintiff here, it appears from the briefs filed that only a moot question is raised, which the Court for that reason refuses to consider on appeal. *Kistler v. R. R.*, 365.

12. *Pleadings—Amendments—Court's Discretion—Appeal and Error.*—The refusal of the trial judge, in his discretion, to allow an amendment to a pleading is not reviewable on appeal. *Cavenaugh v. Jarman*, 372.

13. *Appeal and Error—Assignment of Error—Motion to Affirm—Alternative Motion.*—A motion to affirm the judgment of the Superior Court is the proper one for the appellee to make when the appellant has not properly assigned the alleged errors in the case on appeal according to the rule of the Supreme Court; and a motion of this character made in the alternative is sufficient in form. *Wheeler v. Cole*, 378.

14. *Appeal and Error—Assignment of Error—Judgment Affirmed—Record Proper.*—The Supreme Court will affirm the judgment of the lower court where the appellant has not assigned his errors in the case appealed, according to the rule, when no error, upon examination, is found in the record proper. *Ibid.*

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16. *Appeal and Error—Verdict—Judgment—Variance—Penalty Statutes.*—A judgment recovered against a carrier for damages and statutory penalty for failure to deliver a shipment or make payment of loss within ninety days was obtained in a magistrate's court in the sum of $14.82. Upon appeal, the plaintiff was permitted to amend so as

APPEAL AND ERROR—*Continued.*

to claim 2 cents less than the amount of the judgment, and upon verdict for $14.80 judgment was entered for $14.82. *Held,* the judgment in the Superior Court should be modified in accordance with the verdict, and no reversible error is found. *Jones v. R. R.,* 392.

17. *Appeal and Error—Pass Briefs—Rules of Court.*—Briefs which merely state with reference to the exceptions taken of record, "Exception No. 1. This question and answer are incompetent," etc., afford no assistance to the Court. They are merely pass briefs, and do not conform to the rules. *Ibid.*

18. *Trials—Appeal and Error.*—This action was tried in accordance with the decision in the former appeal, and no reversible error is found. *R. R. v. R. R.,* 395.

19. *Appeal and Error—Assignments of Error—Purport of Exception—Appeal Dismissed.*—Supreme Court Rule of Practice 19, sec. 2, requiring the exceptions of record to be grouped and numbered, must be complied with to have the appeal considered by the Court; and where the assignments of error each simply refers to the exception of record by number, without giving the purport or text thereof, it is insufficient, and the judgment of the trial court will be affirmed. *Porter v. Lumber Co.,* 396.

20. *Appeal and Error—Briefs—Exceptions Abandoned.*—An exception not appearing in appellant's brief is considered as abandoned in the Supreme Court (Rule 34, 140 N. C., 498); nor will it be sustained when it is not made to appear by the record that the alleged error was prejudicial to the appellant's rights. *S. v. Smith,* 476.

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2. *Same—Ownership of Car.*—Where under through traffic arrangements a railroad company furnishes its shipper a car belonging to another railroad company, to be loaded by the shipper, the relation between the two companies is that of bailor and bailee; and where the shipper, through the negligence of his employees, injures the car, the bailee railroad company may recover the damages from the shipper, though it was not the owner of the car furnished him. *Ibid.*

3. *Railroads—Car-load Shipper—Bailment—Trials—Damages—Evidence—Burden of Proof.*—In such cases, where it is shown that the car was delivered to the shipper in good condition and returned by him damaged, the burden is upon him to show that he had used ordinary care in caring for the property while under his control. *Ibid.*

BANKRUPTCY.

1. *Contracts, Written—Bills and Notes—Corporations—Insolvency—Consideration.*—Upon evidence tending to show that the payee of a promissory note expressed as payable in money, and given for stock in a corporation, subsequently received and held the note of the corporation for the payment of the same debt, and upon the insolvency of the corporation, proved his claim in bankruptcy proceedings and obtained his dividend thereon; in an action brought by him upon the original note it is *Held*, that it was competent for the defendant to show a parol agreement, made contemporaneously with the making of his note, that the payee should accept the corporation note in payment and discharge of his obligation, though this note accepted ultimately proved to have been valueless. *Richard v. Hodges*, 183.

2. *Bankruptcy—Partnership Exemption—Consent of Partner—Jurisdiction.*—Where one has been adjudicated a bankrupt under the laws of the United States, his right to homestead and personal property exemption under State laws is to be adjudicated in the bankruptcy court. *Pennell v. Robinson*, 257.

BANKS AND BANKING. See Usury; Bills and Notes.

1. *Principal and Agent—Adverse Interest—Imputed Knowledge.*—The knowledge of a cashier of a bank of his own transaction made in his defalcation of the bank's funds, not known to the other officers or to the directors of the bank, will not be imputed to the bank, his principal; for the cashier has therein acted exclusively in his own interest or behalf. *Corporation Commission v. Bank*, 357.

2. *Banks and Banking — Defalcation — Insolvency — Correspondent of Bank—Balance Due—Valid Debt.*—One H. was cashier of bank J., and president of bank S., the former of which became insolvent and went into receivers' hands through his defalcation. It was found that H., as the president of bank S., had customarily remitted for collections sent to bank J., by out-of-town banks, using the form of check of bank S., and the amount claimed by bank S. was for money consequently taken from its own funds: *Held*, this amount constituted a valid indebtedness of the insolvent bank in the receiver's hands. *Ibid.*

BILLS AND NOTES.

1. *Banks and Banking—Correspondent Bank—Bills and Notes—Trials—Payment—Mail—Evidence.*—Evidence that a letter has been mailed

BILLS AND NOTES—*Continued.*

is some evidence that it was properly addressed, stamped, and received by the addressee; and where there is evidence that the drawer of a draft deposited it in his bank, which mailed it to its correspondent bank at a different town; that it was paid to some one by the drawee; it is sufficient to sustain a verdict of the jury in favor of the drawer in an action brought by him against the correspondent bank for collecting the money and failing to remit. *Mill Co. v. Webb*, 87.

2. *Banks and Banking—Collateral Notes—Provisions as to Future Loans —Creditors.*—Where a bank takes a note with collateral security whereon it is stated that the collateral hypothecated should not only be held to secure the amount of the note, but any amount that may at any time become due which the pledgor may have borrowed from the bank, with reference to these further loans contemplated the collateral used in their payment is not for a preëxistent debt, but for a present consideration existing at the time of making the loans. Hence, when a bank is the pledgor and has become insolvent and in a receiver's hands, its creditors can acquire no right to the collateral superior to that of the pledgor thereof. *Corporation Commission v. Bank*, 205.

3. *Bills and Notes—Sale of Collaterals—Credits—Payments—Limitation of Actions.*—K. executed his note to plaintiff bank and assigned certain collateral to H., cashier, to secure the same, with power to H. to sell, and as K.'s agent to apply the proceeds to payment of note, with specific agreement by K. to pay any deficiency. H. sold the collateral and so applied proceeds: *Held*, that the statute of limitations was repelled and that K. was liable for the deficiency. *Bank v. King*, 303.

BOND ISSUES. See Taxation.

BRIEF. See Appeal and Error.

BURDEN OF PROOF. See Evidence; Intoxicating Liquors; Abandonment.

BURGLARY.

1. *Burglary—Felonious Intent—Punctuation—Interpretation of Statutes.* In order to convict, under Revisal, sec. 3333, of any of the offenses therein enumerated, it is necessary to show that the breaking into the dwelling, etc., of another was done "with the intent to commit a felony or other infamous crime therein." *S. v. Spear*, 452.

2. *Verdicts—Burglary—Felonious Intent—Judgments—Acquittal.*—Upon a trial under an indictment for burglary, the jury was instructed by the court that, under the evidence, their verdict should be guilty thereof in the first degree; or of breaking into the dwelling-house of another otherwise than by a burglarious breaking; or not guilty. The verdict rendered was that "the defendant (was) guilty of housebreaking, with no intent to commit a felony": *Held*, the verdict was equivalent to an acquittal under section 3333, Revisal, upon which judgment of not guilty should have been entered by the court, and the defendant discharged. *Ibid.*

CARRIERS OF GOODS.

1. *Carriers of Goods—Refusal to Deliver—Valid Excuse—Burden of Proof.*—Where a consignee brings his action to recover the value of a shipment of goods from the carrier, shows that the shipment was addressed to him, was prepaid, in the carrier's possession at destination, and a demand for delivery, the burden is on the carrier to show a valid reason for its refusal to deliver the shipment. *Jeans v. R. R.*, 224.

2. *Carriers of Goods—Contracts of Shipment—Parol Contracts.*—A parol contract of shipment made with a common carrier is valid in law. *Ibid.*

3. *Carriers of Goods—Refusal to Deliver—Demand of Bill of Lading—Valid Excuse—Burden of Proof.*—The failure or refusal of a consignee to produce, upon the carrier's demand, a bill of lading for a prepaid shipment of goods in the carrier's possession is ordinarily a valid defense to an action to recover of the carrier the value of a shipment, which has never been delivered; but the burden is upon the carrier to prove that such demand has been made and not complied with. *Ibid.*

4. *Same—Fraudulent Transfer—Presumptions.*—Where a prepaid shipment of goods is in the carrier's possession at its destination, addressed to the consignee, and he demands delivery thereof to him, he is entitled to the goods, nothing else appearing; for while the bill of lading is assignable, it will not be presumed that in a given instance it has been assigned, without evidence thereof, and the burden is upon the carrier to prove the consignee's fraudulent intent in making his demand without producing his bill of lading when such is relied on by it as a reason for refusing delivery. *Ibid.*

5. *Railroads—Car-load Shippers —Bailment —Negligence —Trials —Evidence—Damages.*—Where a railroad company has placed a car on its track and turned it over to the shipper to be loaded by the shipper, the relation of bailor and bailee is established between them; and where the car is damaged through the negligence of the shipper's employees, the shipper is responsible to the company for the amount of such damages. *R. R. v. Baird*, 253.

6. *Same—Ownership of Car.*—Where under through traffic arrangements a railroad company furnishes its shipper a car belonging to another railroad company, to be loaded by the shipper, the relation between the two companies is that of bailor and bailee; and where the shipper, through the negligence of his employees, injures the car, the bailee railroad company may recover the damages from the shipper, though it was not the owner of the car furnished him. *Ibid.*

7. *Railroads—Car-load Shipper—Bailment—Trials—Damages—Evidence—Burden of Proof.*—In such cases, where it is shown that the car was delivered to the shipper in good condition and returned by him damaged, the burden is upon him to show that he had used ordinary care in caring for the property while under his control. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers—Negligence—Accident—Damnum Absque Injuria—Trials—Evidence—Nonsuit.*—A railroad company is not respon-

CARRIERS OF PASSENGERS—*Continued.*

sible for an injury caused to one of its passengers by another which it could not reasonably have anticipated or prevented; and it appearing in this case that the plaintiff was riding with three passengers on seats turned so that they face each other, and that after drinking whiskey from a bottle, one of the passengers attempted to throw the bottle from the window in a curved tunnel, and the bottle was shattered against the rugged side of the tunnel, causing some of the fragments of glass to fly back and injure the plaintiff's eye, it is *Held,* that the injury thus sustained was accidental, an unusual and unexpected event, from which no damages are recoverable of the railroad. *Pruett v. R. R.*, 3.

2. *Carriers of Passengers—Wrongful Ejection—Negligence.*—In this action against a railroad company for wrongfully ejecting the plaintiff from the train, there was conflicting evidence, and in behalf of the plaintiff that while asleep on the train he was carried by his destination to which he had purchased a ticket, and at his insistence, the conductor carried him to the next station, where, changing his destination for his home beyond, he procured a ticket to that place from the railroad agent, again boarded the train and the conductor took up his ticket. Thereafter the conductor insisted that he would retain the ticket as a part payment for his fare from his original destination to the place he had bought his second ticket, and demanded a cash fare from the latter place to his then destination. Upon his refusal to pay the cash fare, he was put off the train at a place where there was no station or people living: *Held,* (1) A motion as of nonsuit upon the evidence was properly refused; (2) Under a correct instruction, upon the evidence, the verdict in this case established as a fact that the plaintiff was wrongfully ejected from the train, after the conductor had accepted and retained his ticket, at a place forbidden by statute, and actionable negligence has been found. *Mott v. R. R.*, 367.

CASE ON APPEAL. See Appeal and Error.

CERTIORARI.

Appeal and Error—Notice of Appeal—Judgment Rendered Out of Term—Receipt by Clerk—Computation of Time—Certiorari.—Where by consent of the parties a judgment in the Superior Court is rendered after the expiration of the term in which the action has been tried, and sent by mail to the clerk of the court, with mailed notice to the appellant from the judge that this has been done, the time within which notice of appeal to the Supreme Court may be given is computed from the time the judgment has been received by the clerk, and not from the time the appellant has received the judge's notification that he had signed the judgment; and where the judge improperly refuses to settle the case on appeal for want of statutory notice given to the appellee, a *certiorari* from the Supreme Court will lie. *Fisher v. Fisher*, 105.

CHALLENGES. See Jurors.

CITIES AND TOWNS. See Taxation; Health, 1, 3, 4.

1. *Cities and Towns—Street Grading—Embankments—Adjoining Owners—Courts—Negligence.*—Where a town has caused damage to the

CITIES AND TOWNS—*Continued.*

lands of adjoining owners on a street by filling in the street in the course of grading it, so as to cause an embankment 5 or 6 feet high to be made in front thereof, and it appears that the work was not negligently done and was in accordance with the plans of the town engineer, adopted by the city council, all acting in good faith, under powers conferred by the charter, such damages are not recoverable in an action therefor against the city, for the judgment of the town authorities in such matters is not reviewable by the courts. *Hoyle v. Hickory*, 79.

2. *Cities and Towns—Street Grading—Embankment—Trials—Negligence—Evidence.*—The height of an embankment placed by a town in grading its streets in front of adjoining lots on one of them is not of itself evidence of negligent construction for which damages are recoverable by the owners; and in the absence of further negligence therein, an instruction which leaves the question of actionable negligence to the determination of the jury is erroneous. *Ibid.*

3. *Cities and Towns—Street Grading—Embankments—Retaining Walls—Trials—Evidence—Negligence.*—Where the owner of lands adjoining a street sues for damages arising from the dirt of an embankment constructed by the city in the grading of the street rolling down upon and damaging his land, and it appears that a retaining wall would have prevented the injury, evidence in behalf of the city is competent that at the request or instance of the plaintiff, ratified by the proper authorities of the defendant, the latter did not construct the retaining wall, which it otherwise would have done. *Ibid.*

4. *Cities and Towns—Street Grading—Different Locations—Trials—Evidence—Negligence.*—In an action by the owner of lands on a city street, brought against the city for the alleged negligent construction on that street of an embankment to the plaintiff's damage, erected in the grading thereof, evidence of construction at an entirely different place is not evidence of negligent construction at the place complained of. *Ibid.*

5. *Cities and Towns—Ordinances—Streets and Sidewalks—Adjoining Owner—Negligence—Trials.*—Where a city ordinance requires the owners of lots adjoining the streets to keep the sidewalks in front of their premises, under penalty, free from ice, snow, etc., it is for the city to enforce its ordinance, and a property owner is not liable in damages to a pedestrian injured by falling on a sidewalk in front of his premises, alleged to have been caused by his negligence in failing to observe the ordinance. Instances distinguished in which the city has made a contract for the benefit of its citizens, as in *Gorrell v. Water Co.*, 124 N. C., 328. *Hartsell v. Asheville*, 193.

6. *Cities and Towns—Negligence—Presenting Claims—Interpretation of Statutes—Notice—Exceptions.*—No actual notice is required to be given of a provision of a city charter that no action for damages for a personal injury shall be instituted against it unless notice be given in writing, in a certain manner, within ninety days after the happening or infliction of the injury complained of, and a provision of this character, being to protect the city from unjust claims or demands, is held valid; and no exception thereto is shown when it appears that a plaintiff was not mentally incapacitated from giving

the notice, and had ample opportunity to have done so, though physically unable during the period specified. *Ibid.*

7. *Cities and Towns—Nuisance—Sewerage—Permanent Damages—Taking of Property—Constitutional Law.*—An act which directs or authorizes the taking of private property, in whole or in part, without compensation, is unconstitutional; and the creation of a nuisance by a city which permanently damages the riparian owner of lands on a stream below the place where the city sewage is emptied, by reason of offensive matter cast upon the lands, and odors affecting the convenience and health of the owner's home, is actionable, permitting a recovery against the city for such damages as are thereby permanently caused and which are evidenced by the depreciation in value of the lands. *Donnell v. Greensboro*, 330.

8. *Same—State Board of Health.*—Where a city has created a nuisance to the permanent damage of the lands of a riparian owner on a stream into which the city sewage is emptied, the owner may recover such damages, though the city has therein complied with all the regulations of the State Board of Health, under authority conferred upon the latter by statute. Laws 1909, ch. 793. Distinction is made by HOKE, J., between the application of this principle to our own statutes and Constitution and those of England. *Ibid.*

9. *Cities and Towns—Nuisance—Trials—Damages—Evidence — Instructions—Harmless Error—Appeal and Error.*—In this action to recover damages against a city for permanent injury to lands of a riparian owner upon a stream into which the city sewage is emptied, there was evidence that the plaintiff's land was also injured by objectionable matter being emptied into the stream from mill settlements located beyond the city limits: *Held*, the court properly instructed the jury to confine their inquiry as to damages to those arising by reason of the operation of defendant's sewerage system, and exclude damages which may otherwise have been caused, and no reversible error is found. *Ibid.*

10. *Railroads—Charter—Roadbed—Conditions Implied—Cities and Towns—Police Powers—Ordinance—Street Grading.*—A railroad company in accepting its charter does so upon condition, necessarily implied, that it will conform, at its own expense, to all reasonable and authorized regulations of towns existing along its route or those which thereafter may grow up thereon, relative to the safe and proper use of the streets and thoroughfares; and where a roadbed of such company lies along the streets of a town, an ordinance is enforcible as within the exercise of the police powers of the town, requiring the railroad, at a reasonable expenditure under the conditions existing, to make the roadbed conform to the grade of the streets and so maintain it with reference to its drain ditches that it may be crossed at all points with ease and safety. *S. v. R. R.*, 422.

11. *Cities and Towns—Fire Districts—Police Powers—Legislative Power—Constitutional Law.*—It is within the valid exercise of the police power of the State for the Legislature to confer authority upon an incorporated town to establish fire limits for the protection of the property of its citizens, wherein houses of wood may not be erected, or repaired; and where the town has accordingly passed an ordinance

CITIES AND TOWNS—*Continued.*

establishing a fire district within its business section, it is an unlawful violation thereof to replace with iron or metal roofing the old and worn-out shingles on an old frame structure; for a repair of this character looks to the continued use of the kind of buildings prohibited, and is not such slight repairs as are necessary to make it habitable, such as putting in broken windows or hanging a shutter, etc., *S. v. Lawing*, 492.

12. *Cities and Towns—Fire Districts—Discretionary Powers—Courts.*—The courts will not pass upon the reasonableness of fire limits established by an incorporated town under authority conferred by the Legislature, at least where the limits established appear to be reasonable, and without palpable oppression or injustice. *Ibid.*

COLOR OF TITLE. See Limitations of Actions; Deeds and Conveyances.

COMMERCE.

1. *Commerce — Shipments in Bulk — Separate Packages — Taxation — Peddlers—Constitutional Law.*—Where separate articles are shipped into this State in larger packages, they are not the subject of interstate commerce after the bulk has been broken here for distribution; and a peddler's tax imposed upon a person thus selling these separate articles which have in this manner been shipped to him from beyond the State is not an interference with the commerce clause of the Federal Constitution. *Smith v. Wilkins*, 135.

2. *Carriers of Goods—Interstate Commerce—Federal Questions—Practice—Penalties.*—In an action to recover the penalty for the refusal of the carrier to deliver an interstate shipment of goods, the exception that such recovery would impose a burden upon the interstate commerce must be taken upon the trial and in the appellant's brief in order for the Federal question to be made available; but it is *Held*, that a penalty recoverable for the refusal of delivery and the failure to settle a claim based thereon after the arrival here of the shipment and while in the carrier's possession, does not raise a Federal question. Revisal, secs. 2633, 2634. *Jeans v. R. R.*, 224.

COMPROMISE AND SETTLEMENT.

Debtor and Creditor—Compromise and Settlement—Acceptance.—The debtor transmitted to his creditor his check or letter, which stated that according to his books it covered a statement said to have been inclosed, and which was omitted, with the request that the creditor should "go over the statement, and if it did not agree with his books, he would take the matter upon with him later": *Held*, the acceptance of the check did not preclude as a compromise the creditor from recovering a larger amount found to be due him, this by the terms of letter being left open to future adjustment. *Aydlett v. Brown*, 153 N. C., 334, cited and distinguished. *Lumber Co. v. Lumber Co.*, 359.

CONDEMNATION. See Easements.

CONSTITUTION.

ART.

I, sec. 3. Where appeal is provided from recorder's court, the right of trial by jury is not denied. *S. v. Hyman*, 411.

CONSTITUTION—*Continued.*

ART.

I, secs. 12 and 13. Where two sections of a statute conflict, and one is unconstitutional, the other will control; and under definition of misdemeanor, with punishment for felony, indictment by grand jury is necessary, and recorder's court cannot acquire jurisdiction. *S. v. Hyman*, 411.

II, sec. 10. Statutes allowing divorces in individual cases are unconstitutional. *Cooke v. Cooke*, 272.

VIII, sec. 1. Charter powers conferred on corporations subject to legislative right of repeal. *R. R. v. Oates*, 167.

CONSTITUTIONAL LAW. See Taxation; Divorce, 3; Intoxicating Liquors, 5, 7.

1. *Trial by Jury—Waiver—Consent—Findings by Judge—Trials—Evidence—Exceptions—Appeal and Error.*—The parties to an action may waive their right to a jury by agreeing that the trial judge may find the facts upon the issues involved and declare his conclusions of law arising thereon (Revisal, sec. 540), and where the judge has acted accordingly, the relevant and pertinent facts so found by him are conclusive on appeal when there is any sufficient legal evidence to support them. An exception to a finding of fact, on the ground that there was no evidence thereof, must be made in apt time before the judge. *Buchanan v. Clark*, 56.

2. *Constitutional Law—Legislative Acts—Void in Part—Intent—Interpretation of Statutes.*—An act of the Legislature taxing trades will not be declared invalid by the Court because it exceeded its power in excluding trades of a certain class, unless it is evident from its subject-matter that the Legislature intended it to be construed only as a whole. Hence, section 44 is not construed as unconstitutional because it exempts from the peddler's tax, in the discretion of the board of county commissioners, "any poor and infirm person," and expressly exempts Confederate soldiers and blind residents of the State, if it be conceded that such exemptions would, as far as beneficial to the class of persons named, be unconstitutional. *Smith v. Wilkins*, 135.

3. *County Commissioners — Roads and Highways — Condemnation — —Notice—Due Process—Interpretation of Statutes.*—The presumption is in favor of the validity of a statute, and it is held that section 16, ch. 80, Laws 1909, authorizing the county commissioners of Buncombe County to lay out and establish a public road, is not unconstitutional in failing to provide that notice be given the landowner sufficient to protect him in asserting his right to receive compensation for his land thus taken, as he is expressly given thirty days after the order of the commissioners to make the road, in which to assert his rights, which clearly implies that notice should be given him thereof. *Luther v. Commissioners*, 241.

4. *Same—Actual Notice—Misapprehension of Rights.*—One who has had actual and ample notice of an order of the board of county commissioners to lay off a public road in accordance with the provisions of a statute cannot successfully set up the invalidity of the statute in failing to provide for giving the notice, upon the ground that the road as laid out ran upon his land and did not afford him oppor-

CONSTITUTIONAL LAW—*Continued.*

tunity to appeal from the assessment of his damages for his property thus taken; or that it deprived him of reasonable time in which to appeal under its provisions, when it appears that he had ample and sufficient time, except for a misapprehension of his remedy. *Ibid.*

5. *Constitutional Law—Trial by Jury—Appeal.*—Where an appeal from a recorder's court is provided by statute, a jury trial is afforded the accused in the Superior Court, and hence he is not deprived of this, his constitutional right. Art. I, sec. 13. *S. v. Hyman*, 411.

6. *Constitutional Law — Indictment — Grand Jury—Recorder's Court—Jurisdiction.*—The offense of perjury is a felony, and where a conviction thereof is had in the Superior Court, upon appeal from a recorder's court, without indictment found by the grand jury, it is unconstitutional. Const., Art. I, sec. 12. *S. v. Cline*, 146 N. C., 640, and other like cases, cited and distinguished. *Ibid.*

7. *Criminal Law—Promise to Work—Intent—Presumptions—Statutes—Constitutional Law.*—The defendant was indicted (Revisal, sec. 3431) for promising to work, etc., and obtaining money, goods, etc., upon the strength of that promise, and for failing to do the work, etc., and there was evidence in support of the charges in the indictment: *Held*, this case is controlled by *S. v. Griffin*, 154 N. C., 611, and the motion to dismiss the action is sustained under chapter 73, Laws 1913. *S. v. Isley*, 491.

CONTINGENT REMAINDER. See Estates.

CONTINUANCES. See Trials; Courts.

CONTRACTS. See Bills and Notes, 3; Carriers of Goods.

1. *Deeds and Conveyances—Contracts to Convey—Husband and Wife—Dower—Valuation—Abatement—Judgments.*—The contingent dower interest of the wife in the lands of her living husband is capable of being valued, and where she refuses to join her husband in a deed to his lands, which he has contracted to convey, and resistance to making the conveyance is based thereon, a decree in an action by the vendee for specific performance, that the vendor convey the land at the agreed price, to be reduced by the value of the wife's dower, is a proper one. *Bethell v. McKinney*, 71.

2. *Parol Agreement—Bills and Notes—Corporations—Insolvency.*—Upon evidence tending to show that the payee of a promissory note, expressed as payable in money and given for stock in a corporation, subsequently received and held the note of the corporation for the payment of the same debt, and upon the insolvency of the corporation, proved his claim in bankruptcy proceedings and obtained his dividend thereon; in an action brought by him upon the original note, it is *Held*, that it was competent for the defendant to show a parol agreement, made contemporaneously with the making of his note, that the payee should accept the corporation note in payment and discharge of his obligation, though this note accepted ultimately proved to have been valueless. *Richards v. Hodges*, 183.

3. *Contracts—Offer—Acceptance.*—For the acceptance of an offer to become a binding contract, it must be absolute and unconditional, and

CONTRACTS—*Continued.*

identical with its terms in all respects; and where an offer to sell lumber is made, and the acceptance is for a lower price, with further specifications as to kinds, etc., the acceptance is a conditional one, and does not make a contract of sale. *Morrison v. Parks*, 197.

4. *Contracts—Offer to Sell—Acceptance—Place of Payment.*—An acceptance of an offer to sell must unconditionally be in accordance with the full terms of the offer, to make a binding contract; and where the proposed vendor and purchaser reside in different towns or places, an offer to sell lands at a certain price implies that payment should be made in cash at the residence of the former, and an acceptance by the latter specifying payment at his own place of residence is a variation from the terms of the offer, and no contract is thereby effectuated. *Hall v. Jones*, 199.

5. *Contracts, Written—Vendor and Vendee—Trials—Evidence—Copies—Harmless Error.*—Where the controversy rests upon a written order or contract for the sale of goods, and a carbon copy of this order offered by the vendee has been admitted in evidence, the original being in the hands of the vendor, the error, if any, is cured by the introduction of the original order by the vendor, identical with the copy. *Arundell v. Mill Co.*, 238.

6. *Contracts, Written—Vendor and Vendee—Warranties—Parol Evidence—Trials—Evidence.*—Where a written order for the purchase of oil, accepted by the vendor, provides that if the "goods prove unsatisfactory after a thorough trial by the purchaser within thirty days after delivery, the remaining quantity may be returned, without any charge for what has been used in the test," evidence is competent on behalf of the vendee, tending to show that the sales agent, at the time of the sale, informed him that the vendor would send a demonstrator and that the vendee should not use the oil until he arrived; for such evidence is not a variance with or contradiction of the written order, and in this case is competent to explain the vendee's delay in returning the unsatisfactory goods under the provision of the contract. *Ibid.*

7. *Contracts—Breach—Quantum Valebat—Benefits.*—The recovery on a *quantum meruit* or *quantum valebat* is allowed upon breach of a special contract between the parties where the defendant has been properly apprised that it would, in the event of the breach, be insisted upon, and where substantial or appreciable benefit has been received and enjoyed by the party charged under the circumstances, which renders it inequitable that any and all recovery should be denied. *Raby v. Cozad*, 287.

8. *Same—Instructions—Appeal and Error.*—When the evidence is conflicting and the defendant contends that the contract sued on was that the plaintiff was to have obtained options on certain lands and his services therefor paid only if the defendant sold the lands to a certain contemplated purchaser; that such sale had not been made and no benefit had consequently been received by him, it is error for the judge to charge the jury, if they found that the minds of the parties had not come together in making the alleged contract, the plaintiff was entitled to recover upon a *quantum valebat*, and

CONTRACTS—*Continued.*

reversible error when it appears from the verdict that the instruction influenced the finding upon the issue. *Ibid.*

9. *Contracts, Written—Deeds and Conveyances—Consideration—Guaranty—Parol Contracts—Trials—Evidence.*—The plaintiff and defendant having agreed to form a copartnership for producing turpentine on the lands of the latter, an undivided one-half interest in the lands was conveyed to the former for a monetary "and a further consideration." It was found as a fact that the entire contract was not reduced to writing, but that it was stipulated by parol that the defendant would pay the amount of shortage in the "crop boxes" should the actual number thereof be less than that specified in the conveyance: *Held*, the parol part of the contract did not vary or contradict the writing (the deeds) in this case, and is admissible as evidence; and that this agreement to refund was a part of the consideration of the deed. *Buie v. Kennedy*, 290.

CONTRIBUTION. See Principal and Surety.

CONTRIBUTORY NEGLIGENCE. See Issues; Negligence.

CORPORATIONS. See Bankruptcy, 1; Removal of Causes.

1. *Corporations—Repeal of Charter—Legislative Powers—Constitutional Law.*—By express provision of Article VIII, sec. 1, of our Constitution all legislative powers conferred upon corporations are taken by them subject to the legislative power of repeal. *R. R. v. Oates*, 167.

2. *Corporations — Officers — Principal and Agent—Purchase of Land—Equity—Consideration Advanced by Third Person—Trials—Pleadings—Issues.*—Where a corporation sues for the title to lands upon the ground that the grantor and the grantee in the deed were officers and acted for the company in the transaction, it cannot invoke the equitable jurisdiction of the court without repaying money advanced for the purchase by a third and innocent person, a party to the action, and used in procuring the title and for the organization of the corporation; and an issue thereon may be submitted, though not raised by the pleadings. *Franks v. Nolop*, 390.

COUNTIES. See Highways.

COUNTY COMMISSIONERS. See Taxation; Highways.

COURTS. See Trials; Removal of Causes; Judgments.

1. *Trials—Pleadings—Extension of Time—Further Orders—Court's Discretion—Limitation of Actions.*—It is not within the discretion of the trial judge to order stricken out a part of an amended pleading simply because the statute of limitations was pleaded in it when the judge holding a former term of the court has unconditionally allowed the pleader further time in which to file the amended answer. *Hardin v. Greene*, 99.

2. *Justices' Courts—Appeal Docketed in Superior Court—Notice of Appeal—Discretion of Court.*—After an appeal from a judgment rendered by a justice of the peace has been duly docketed in the Superior Court, without notice thereof to the appellee, it is within the discretion of the Superior Court judge then to allow such notice to be given. *Arundell v. Mill Co.*, 238.

COURTS—*Continued.*

3. *County Commissioners—Roads and Highways—Discretionary Powers —Power of Courts.*—Where the county commissioners under authority of statute, and in exact accord with its provisions, lay out and establish a public road, the courts will not interfere with the exercise of the discretion conferred, except to the extent of preserving to the land owner, when necessary, his constitutional right of compensation for thus taking his land for a public use. *Luther v. Commissioners,* 241.

4. *Trials—Expression of Opinion by Court—Deeds and Conveyances— Acreage—Evidence.*—In an action of trespass, involving title to lands, it appeared that to locate the land in accordance with plaintiff's contention the boundaries would include 60 acres, whereas the successive deeds he relies on to show paper title purport to convey 50 acres only; and under the boundaries contended for by the defendant, 50 acres would be included, according to the acreage expressed to be conveyed in plaintiff's deeds; on the facts presented: *Held,* this discrepancy between the number of acres embraced under the boundaries contended for by plaintiff and the number of acres stated in his deeds, under the circumstances, was a relevant circumstance to be passed upon by the jury; and the charge of the court that it would be of no great value as an aid to the jury, was an expression of opinion forbidden by the statute. *May v. Manufacturing Co.,* 262.

5. *Recorder's Courts — Jurisdiction — Misdemeanors—Definition—Interpretation of Statutes.*—Where a statute confers original and exclusive jurisdiction on a recorder's court over petty misdemeanors, the question as to the extent of the jurisdiction conferred is resolved under Revisal, sec, 3291, which defines the line between felonies and misdemeanors to be that a felony is one punishable by death or imprisonment in the State's prison, and that all other crimes are misdemeanors. *S. v. Hyman,* 411.

6. *Interpretation of Statutes—Conflicting Terms—Perjury—Constitutional Law.*—Revisal, 3615, calls perjury a misdemeanor, but makes it a felony by the punishment imposed thereon. Jurisdiction thereof cannot be given to a recorder's court, where the statute specifies that it shall have jurisdiction of misdemeanors; while the two sections of the Revisal should ordinarily be construed together, yet if one provision is unconstitutional and the other is not, the latter will be held as controlling. Const. Art. I, secs. 12 and 13. *Ibid.*

7. *Constitutional Law — Indictment — Grand Jury—Recorder's Court— Jurisdiction.*—The offense of perjury is a felony, and where a conviction thereof is had in the Superior Court, upon appeal from a recorder's court, without indictment found by the grand jury, it is unconstitutional. Const., Art. I, sec. 12. *S. v. Cline,* 146 N. C., 640, and other like cases, cited and distinguished. *Ibid.*

8. *Statutes — Criminal Law — Jurisdiction—Misdemeanors—Legislative Powers—Courts—Jurisdiction.*—The Legislature may prescribe different punishments for the same offenses, in different counties, and it may reduce the punishment for all offenses so as to make them misdemeanors; but when the punishment has fixed the grade of the offense, it may not be altered by the name given it in the statute. *Ibid.*

COURTS—*Continued.*

9. *Court's Discretion—Witnesses Recalled—Appeal and Error.*—Where a witness in an action has been examined and cross-examined, it is within the discretion of the trial judge to permit his recall at the request of one of the parties, and his refusal to do so is not reviewable on appeal. *S. v. Fogleman*, 458.

10. *Court's Discretion—Motions—Continuances.*—The refusal by the trial judge of a continuance upon the ground of the inability of a party to procure certain witnesses is not reviewable on appeal, in the absence of any abuse of discretion by the court in such matters. *S. v. English*, 497.

CREDITOR'S BILL. See Equity, 2.

CRIMINAL LAW. See Judgments; Courts, 14; Homicide; Intoxicating Liquors; Burglary.

1. *Criminal Law—Bailee—Larceny—Trespass.*—One who is intrusted by a person to mail a letter given by another for that purpose, and breaks open the letter before mailing and extracts and appropriates money therefrom, is guilty of larceny, upon the principle, if considered as a bailee, that he has "broken bulk and appropriated the goods or a part of them to his own use." *Semble*, a conviction of larceny could be sustained upon the ground that the defendant had only the care or custody of the property, and not the legal possession. Hence, the position cannot be sustained that a conviction of larceny could not be had because the defendant had acquired possession with the consent of the owner. *S. v. Ruffin*, 416.

2. *Criminal Law—Promise to Work—Intent—Presumptions—Statutes—Constitutional Law.*—The defendant was indicted (Revisal, sec. 3431) for promising to work, etc., and obtaining money, goods, etc., upon the strength of that promise, and for failing to do the work, etc., and there was evidence in support of the charges in the indictment: *Held*, this case is controlled by *S. v. Griffin*, 154 N. C., 611, and the motion to dismiss the action is sustained under chapter 73, Laws 1913. *S. v. Isley*, 491.

3. *Criminal Law—Landmarks—Indictment—Variance—Evidence.*—The question of variance between the proof and the indictment should be raised upon the trial, and is not the subject of a motion in arrest of judgment. *S. v. Jenkins*, 527.

4. *Criminal Law—Boundaries—Stakes—Landmarks—Interpretation of Statutes.*—Stakes placed by the agreement of the parties to mark the boundaries between their lands have evidential value in connection with other evidence in locating the lands, and are landmarks as contemplated by Revisal, sec. 3674, prohibiting their removal. *Ibid.*

DEBTOR AND CREDITOR. See Compromise and Settlement.

DEEDS AND CONVEYANCES. See Trusts and Trustees; Mortgages; Escrow; Contracts; Limitation of Actions.

1. *Deeds and Conveyances—Delivery to Another—Acceptance—Trials—Presumptions—Evidence.*—Where one purchases land and has the deed made to his illegitimate son, and himself receives and holds the conveyances for the son, it is in fact a delivery of the deed in such

DEEDS AND CONVEYANCES—*Continued.*

manner as to vest the title of the lands in his son; and where this is done without the knowledge of the son, the presumption is that he will accept the deed made for his benefit, and this presumption will prevail in the absence of evidence to the contrary. *Buchanan v. Clark*, 56.

2. *Deeds and Conveyances—Test of Delivery—Trials—Evidence.*—Where the fact of the delivery of a deed to lands is in question, the test is, whether the grantor in parting with its possession thereby lost control of it, and the power of recalling it. *Ibid.*

3. *Same — Undisclosed Intent — Reconveyance.* — Where a father purchases lands and has a conveyance thereof made to his illegitimate son, saying at the time it was to make provision for him, but without the knowledge of the son, who dies before his majority, a second conveyance from the same grantor obtained afterwards by the father and made to him as grantee cannot divest the title conveyed to the son in the first deed, whatever his undisclosed intent may have been at that time. *Ibid.*

4. *Deeds and Conveyances—Registration—Purchaser Not for Value—Actual Notice.*—The provision of Revisal, sec. 980, was intended to protect a purchaser of land for value from the claim of a grantee under an unrecorded deed, and has no application where a deed has been delivered which conveys the title to a son of the purchaser, and subsequently the purchaser obtains a conveyance thereof to himself from the same grantor without any consideration, for then, the grantor having parted with his title, the second deed is made without value, which is sufficient to avoid it. *Ibid.*

5. *Deeds and Conveyances—Husband and Wife—Dower—Warranties—Encumbrances.*—The inchoate right of dower of the widow in the lands of her living husband, while not an estate in his lands, is such an encumbrance on the title as is contemplated in the usual covenants and warranties against encumbrances contained in a deed to the fee. *Bethell v. McKinney*, 71.

6. *Deeds and Conveyances—Definite Tract of Land—Acreage—Purchase Price—Abatement.*—Where a definite tract of land has been contracted to be sold, in the absence of fraud and false representations, the purchaser is not entitled to an abatement in the price because of a shortage in the acreage as represented, where the quantity of the land has not been guaranteed or warranted. *Ibid.*

7. *Trials—Expression of Opinion by Court—Deeds and Conveyances—Acreage—Evidence.*—In an action of trespass, involving title to lands, it appeared that to locate the land in accordance with plaintiff's contention the boundaries would include 60 acres, whereas the successive deeds he relies on to show paper title purport to convey 50 acres only; and under the boundaries contended for by the defendant, 50 acres would be included, according to the acreage expressed to be conveyed in plaintiff's deeds; on the facts presented: *Held*, this discrepancy between the number of acres embraced under the boundaries contended for by plaintiff and the number of acres stated in his deeds, under the circumstances, was a relevant circumstance to be passed upon by the jury; and the charge of the

DEEDS AND CONVEYANCES—*Continued.*

court that it would be of no great value as an aid to the jury, was an expression of opinion forbidden by the statute. *May v. Manufacturing Co.*, 262.

8. *Deeds and Conveyances—Minerals—Surface of Lands—Adverse Possession—Limitation of Actions.*—Where the mineral interest in lands and the surface thereof are conveyed to different grantees, each constitutes a different and distinct estate in the lands from the other, and adverse user or possession of the one sufficient to ripen title will not alone apply to the other. *Hoilman v. Johnson*, 268.

9. *Same—Trials—Evidence—Questions for Jury.*—The acts of the owner of the surface of the lands in mining for mica and other mineral interests therein, which had separately been conveyed, are held sufficient in this case upon the question of adverse possession, under conflicting evidence, to be submitted to the jury upon the issue of title thereto. *Ibid.*

10. *Deeds and Conveyances—Minerals—Adverse Possession of Part—Limitation of Actions—Trials—Evidence.*—Where the mineral interests in lands have been separately conveyed, and there is sufficient evidence of adverse possession to ripen title in the occupant and defeat the grantee's paper title, it applies to all of the mineral interests conveyed by the deed, and is not confined to the particular mineral or minerals which had been mined. *Ibid.*

DELIVERY. See Escrow.

DEMURRER. See Pleadings.

DISCRETION. See Courts; Trials.

DIVORCE.

1. *Husband and Wife—Action for Support—Issues—Divorce—Motions—Judgment.*—In an action for support brought by the wife under the provisions of Revisal, sec. 1567, the inquiry is confined to only two material issues, the marriage and the separation. Hence, reasons or excuses of the husband for the separation are irrelevant to the inquiry, as the judgment is not final, and should he establish his right to an absolute divorce in his separate action, he may then move in proceedings of this character to have the judgment therein modified or set aside. *Hooper v. Hooper*, 1.

2. *Husband and Wife—Action for Support—Pleadings—Admissions—Formal Denials.*—In proceedings brought for support by the wife under the provisions of the Revisal, sec. 1567, an admission in the answer of the husband that he had ceased to occupy a room with his wife or be with her at any place in privacy, and that he had notified his landlady that he would not be responsible for her board, is an admission of separation from his wife, though the allegation of separation in the complaint was formally denied in the answer. *Ibid.*

3. *Marriage and Divorce—Statutes—Constitutional Law.*—The only limitation on powers of the Legislature in enacting statutes relating to divorce is found in Article II, sec. 10, of the Constitution, which prohibits legislation of this character which is passed for any individual case. *Cooke v. Cooke*, 272.

DIVORCE—*Continued.*

4. *Same—Interpretation of Statutes—Party at Fault—Power of Courts—Living Separate and Apart—Divorce a Mensa—Computation of Time.*—It being in the exclusive power of the Legislature to regulate the questions of divorce, the courts may not by interpretation interpolate a provision which does not appear in a clearly expressed legislative act; and the Legislature having added a new cause for absolute divorce by chapter 89, Laws 1907, as amended by chapter 165, Laws 1913, as follows: "If there shall have been a separation of husband and wife, and they shall have lived separate and apart for ten successive years; and the plaintiff in the suit for divorce shall have resided in this State for that period, and no children be born of the marriage and living," the plaintiff in an action for divorce under the conditions named is entitled to a decree in his or her favor, without reference to the question whether the one or the other party was in fault in bringing about the separation; and should a part of the statutory period have been covered by a decree *a mensa et thoro*, this will not be excluded from the computation of the period of time required. *Ibid.*

5. *Marriage and Divorce—Interpretation of Statutes—Separation by Consent.*—It is not necessary to a divorce under the provisions of chapter 89, Laws 1907, amended by chapter 165, Laws 1913, that the separation between husband and wife should have been by mutual consent. *Ibid.*

6. *Marriage and Divorce—Interpretation of Statutes—Judgments for Divorce a Mensa—Absolute Divorce—Estoppel.*—The cancellation of the marriage tie is not included within the scope of the inquiry, issues, verdict, or judgment in an action for divorce *a mensa et thoro*, and such may not be successfully pleaded as an estoppel in a suit for absolute divorce brought under the provisions of chapter 89, Laws 1907, amended by chapter 165, Laws 1913. *Ibid.*

DOWER. See Deeds and Conveyances.

EASEMENTS. See Constitutional Law, 6, 7.

1. *Statutes, Interpretation—Vested Rights—Condemnation—Summons—Prosecution Bond.*—In order to acquire a vested right under a statute to condemn lands, which has subsequently been repealed, it is necessary to show a finality by judgment in the proceedings before the later act had become effective; and where it appears that the summons was served in time, but that the prosecution bond, made a prerequisite by Revisal, 450, was not, no vested right in the former statute can be acquired by the further prosecution of the condemnation proceedings. *R. R. v. Oates*, 167.

2. *Same—Railroads—Water Rights.*—Chapter 94, Laws 1913, ratified 8 March, 1913, amending chapter 302, Laws 1907, excepts from the provisions of the prior act the condemnation of "any water-power, right, or property of any person, firm, or corporation engaged in the actual service of the general public, where such power, right, or property is being used or held to be used or developed for use in connection with or in addition to any power actually used by such person, etc., serving the general public." *Held*, no vested right was acquired under the acts of 1907 by an "interurban railroad company" so as to except it from the provisions of the act of 1913, which had only issued the

EASEMENTS—*Continued.*

summons in condemnation proceedings before the later act had become effective. A vested right could have been acquired only by final judgment prior to the repealing act. *Ibid.*

3. *Condemnation—Trial by Jury—Procedure.*—While ordinarily a jury trial is not required in condemnation proceedings, except as to the assessment of damages, the general rule does not apply where the pleadings put at issue the question as to whether the character of the lands is such as to be embraced within the right conferred or within an exception to that right under the terms of a statute. *Ibid.*

4. *Condemnation—Verdict, Directing—Issues of Fact—Appeal and Error —Procedure.*—Where the judge erroneously holds that an issue answered by the jury was a "question of fact" and not an issue of fact, in condemnation proceedings, and strikes out the answer found and enters one directly opposite, not as against the weight of the evidence or in his discretion, it will be held for reversible error, and in proper instances the Supreme Court will order that the answer of the jury be reinstated. *Ibid.*

ELECTIONS.

Elections—Quo Warranto—Electors—Qualifications—Registration—Poll Tax—Interpretation of Statutes.—In an action of *quo warranto* in which the title to a municipal office depends upon the result of an election held therein, it is competent to show that certain votes for the relator were cast by persons disqualified by nonresidence, and that others cast against him were by persons who were ineligible for nonpayment of poll tax, required for valid registration by Revisal, sec. 2949, though these voters had been admitted to registration after challenge. *Echerd v. Viele*, 122.

EQUITY. See Principal and Surety, 2.

Deeds and Conveyances—Parol Trusts—Statute of Frauds—Equity.—Engrafting a parol trust upon lands conveyed is not a contradiction or variance of the terms of the writing as expressed in the deed in contemplation of the statute of frauds, for such is an incident attached to the title conveyed affecting the conscience of the grantee thereof. *Jones v. Jones*, 320.

ESCROW.

1. *Deeds and Conveyances — Escrow — Delivery — Evidence.*—Where a deed is executed and given to a third person to be held in escrow and to be given by him to the grantee after the death of the grantor, the latter retaining no control over it and no right to recall it, it is a valid delivery; and when the deed is once delivered without reservation, the grantor cannot, by any subsequent act of his, defeat the rights of the grantee. *Huddleston v. Hardy*, 210.

2. *Same—Subsequent Writing in Escrow.*—In an action involving the question of delivery of a deed, a witness testified that the deceased grantor had told him he wished the grantee to have the lands, and on the following day the grantor came to his office, executed the deed, saying he wanted it to be held in escrow, and passed it across a desk at which they were sitting, saying, "There is the deed," and the witness placed the deed under an inkstand on his

ESCROW—*Continued.*

desk; that about an hour and a half later the grantor signed written instructions as to the conditions of the escrow, reciting therein that he "did execute and deliver the deed," before which time there was no suggestion of the right of the grantor to retain or lose control of the deed: *Held*, upon this evidence it was for the jury to determine whether or not the grantor parted with the possession of the deed, intending at the time to surrender all power or control over it. *Ibid.*

ESTATES.

1. *Wills — Interpretation — Intent — Contingent Limitations — Vesting of Estates.*—The law favors the early vesting of estates, to the end that property may be kept in the channels of commerce. Hence a future or executory limitation under a devise in a will will not be construed as contingent, when, construing the will as a whole, it appears that the intent of the testator was that it should be deemed as vested. *Dunn v. Hines*, 113.

2. *Estates — Contingent — Limitations — Deeds and Conveyances.* — A devise of land to L. with limitation that if she "shall die leaving issue surviving her, then to such issue and their heirs forever," but if she "shall die without issue surviving her, then the property to return to my eldest daughter": *Held*, the vesting of the estate in remainder depended upon the contingency of the death of L. without leaving "issue" surviving her, and not upon the death of the testatrix (Revisal, sec. 1581); hence, during the lifetime of L. indefeasible title could not be conveyed, for should L. die leaving issue, the title would vest in them. *Rees v. Williams*, 128.

ESTOPPEL. See Judgments.

EVIDENCE. See Escrow; Slander; Deeds and Conveyances; Trials; New Trial; Homicide; Intoxicating Liquors; Abandonment.

Condemnation—Verdict, Directing—Issues of Fact—Appeal and Error —Procedure.—Where the judge erroneously holds that an issue answered by the jury was a "question of fact" and not an issue of fact, in condemnation proceedings, and strikes out the answer found and enters one directly opposite, not as against the weight of the evidence or in his discretion, it will be held for reversible error, and in proper instances the Supreme Court will order that the answer of the jury be reinstated. *R. R. v. Oates*, 167.

EX POST FACTO LAWS. See Intoxicating Liquors.

EXECUTORS AND ADMINISTRATORS. See Limitations.

FALSE PRETENSE.

1. *Indictment—False Pretense—Intent to Defraud—Motions to Quash.*— It is only required that an indictment for false pretense allege that the act committed was with the intent to defraud (Revisal, sec. 3432), and a motion to quash and in arrest of judgment in this case was properly refused which was based upon an alleged defect in the indictment, that the word "fraudulently" was not used in connection with the words "designedly, falsely, and feloniously." *S. v. Claudius*, 521.

FALSE PRETENSE—*Continued.*

2. *Same—Causal Connection—Form.*—While it is necessary that an indictment for false pretense show a causal connection between the false representations and the parting with the property, no particular form of words is necessary, and it is sufficient if it is apparent that the delivery of the property was the natural result of the false pretense. *Ibid.*

3. *Indictment—False Pretense—Allegation Sufficient.*—An indictment for false pretense, charging in substance that the defendant knowingly and designedly made false representations of a subsisting fact, with intent to defraud, as, in this case, the cost of construction of a house upon which he obtained a mortgage loan in an amount much greater than otherwise he could have done, is sufficient. *Ibid.*

4. *False Pretense—Written Statement—Statute of Frauds—Trials—Evidence, Corroborative.*—Upon a trial for false pretense alleging that it had induced A. to obtain the money from B., a letter from A. to B. is competent when in corroboration of the testimony of A., who was a witness; and the fact that the representation was in writing does not preclude evidence of a parol representation.—*Ibid.*

5. *Trials—False Pretense—Evidence—Instructions—Appeal and Error.*—Upon a trial for false pretense where the pretense relates to the misrepresentation of the cost of erecting a certain house upon which the defendant is charged with inducing a loan in a sum he could not otherwise have obtained, evidence of the value of the house, if erroneously admitted in this case, was rendered harmless by an instruction from the court that the jury should not consider it. *Ibid.*

FEDERAL EMPLOYER'S LIABILITY ACT. See Statutes.

FIRE DISTRICTS. See Cities and Towns.

GRAND JURY. See Constitutional Law.

HARMLESS ERROR. See Appeal and Error.

HEALTH.

1. *Health Laws—Taxation—Cities and Towns—Boards of Health—Dairy Products—Trials—Reasonable Taxation.*—A tax authorized to be levied by the health board of a city upon those selling milk products therein of $1 upon each cow kept for the purpose is a license tax and not one upon the property; and when the statute requires that the tax shall be reasonable and applied to the expense of this department, and that the amount received is insufficient for that purpose, the tax will not be held an unreasonable one, without further proof thereof. *Asheville v. Nettles*, 315.

2. *Same—Business Unprofitable.*—The fact that a vendor of milk in a city is a good business man and has lost money in his dairy business for a certain year does not establish as a further fact that his losses occurred by reason of an authorized tax of $1 on each cow for that year ordered by the board of health of the city to be collected, or furnish evidence that the tax was unreasonable when the statute required that it should be reasonable. *Ibid.*

3. *Health Laws—Taxation—Cities and Towns—Boards of Health—Dairy Products—Reasonable Taxation—Trials—Evidence*—Where the un-

HEALTH—*Continued.*

reasonableness of the tax ordered levied by the board of health of a city on each cow used for producing milk to be sold within its limits is brought in question, and it appears that the taxes thus received are inadequate, and the statute directs they shall be applied to the payment of such expenditures, extravagance of the board of health will not be considered in an action brought by the city for the penalty for the violation of its ordinance, the proper remedy being first on application to the authorities to remedy the matter, and then, upon their refusal, and upon proper proceedings, to have the matter determined in the courts. *Ibid.*

4. *Health Laws—Taxation—Cities and Towns—Dairy Products—Sale Within the City—Outside Dairies—Sale to One Person.*—Where authority is conferred upon a city board of health to levy and collect a tax upon each milk cow used for the purpose of selling milk within its corporate limits, the fact that the cows are kept on a dairy farm near to the city and their milk sold to one person within the city, who distributed or sold it therein, will not avoid the collection of the tax on the cows thus used. *Ibid.*

HIGHWAYS.

1. *County Commissioners—Roads and Highways—Discretionary Powers—Power of Courts.*—Where the county commissioners under authority of statute, and in exact accord with its provisions, lay out and establish a public road, the courts will not interfere with the exercise of the discretion conferred, except to the extent of preserving to the landowner, when necessary, his constitutional right of compensation for thus taking his land for a public use. *Luther v. Commissioners,* 241.

2. *County Commissioners—Roads and Highways—Condemnation—Notice—Due Process—Interpretation of Statutes.*—The presumption is in favor of the validity of a statute, and it is held that section 16, ch. 80, Laws 1909, authorizing the county commissioners of Buncombe County to lay out and establish a public road, is not unconstitutional in failing to provide that notice be given the landowner sufficient to protect him in asserting his right to receive compensation for his land thus taken, as he is expressly given thirty days after the order of the commissioners to make the road, in which to assert his rights, which clearly implies that notice should be given him thereof. *Ibid.*

3. *Same—Actual Notice—Misapprehension of Rights.*—One who has had actual and ample notice of an order of the board of county commissioners to lay off a public road in accordance with the provisions of a statute cannot successfully set up the invalidity of the statute in failing to provide for giving the notice, upon the ground that the road as laid out ran upon his land, and did not afford him opportunity to appeal from the assessment of his damages for his property thus taken; or that it deprived him of reasonable time in which to appeal under its provisions, when it appears that he had ample and sufficient time, except for a misapprehension of his remedy. *Ibid.*

INDEX.

HOMICIDE.

1. *Homicide—Murder—Evidence Sufficient.*—Evidence in this case is held sufficient for conviction of murder in the first degree for waylaying and killing the deceased with a pistol shot, at night, when he was going from his store to his home with a sum of money, accompanied by his son, which tends to show that the prisoner knew of the custom of the deceased, conspired with another to do the act, agreeing to use bicycles to keep from being trailed by bloodhounds; that they borrowed bicycles and that the bicycle tracks leading from the place of the crime corresponded with the tires of the one borrowed by the prisoner; that the foot tracks at this place corresponded with the size and shape of the prisoner's shoes, and were successfully trailed by bloodhounds; that it was too dark for the son of the deceased to identify the prisoner at the time of the crime, but that the size of the prisoner was that of the murderer, and that the latter wore a cap such as the prisoner usually wore. *S. v. Cobb*, 418.

2. *Homicide—Murder—Admissions—Instructions—Appeal and Error.*—Where one of two prisoners on trial for murder is released, his admissions cannot be held for error, on the ground of duress, on an appeal from the conviction of the other, as the objection was only competent against the one making it, and became irrelevant, upon the instruction of the trial judge that the admissions should not be considered by the jury against the other defendant. *Ibid.*

3. *Homicide—Murder—State's Witness—Custody—Accessory—Evidence—Instructions.*—The mode of examination of witnesses is a matter within the sound discretion of the trial judge, and not reviewable on appeal, in the absence of a gross abuse thereof; and where one of two defendants being tried for murder has been used as a State's witness, and as to him a verdict of not guilty has been entered, it will not be held for error on appeal from conviction of the other that the trial judge, in the presence of the jury, and at the solicitor's request, ordered him taken into custody to be held for an indictment of accessory before and after the fact. *Ibid.*

4. *Homicide—Outside Influence—Appeals to Feelings—Trials—Instructions.*—Where upon the trial for murder the circumstances warrant it, it is not error for the judge to instruct the jury that the father and mother of the prisoner had a right to be in court, but that the jury should not consider them, it appearing from his further charge that this instruction was to eliminate any appeals to the feelings of the jury in their behalf, in making up their verdict. *S. v. Fogleman*, 458.

5. *Homicide—Facts at Issue—Evidence—Killing by Another.*—The question at issue upon a trial for murder, where the killing is denied by the prisoner, is whether the prisoner killed the deceased as alleged, and it is not allowable to show by circumstances or insinuations that some one else had done so. *Ibid.*

6. *Homicide—Witnesses—Father and Mother—Weight of Evidence—Trial—Instructions.*—Where upon a trial for murder the father and mother of the prisoner have testified in his behalf, an instruction to the jury is proper that they may consider the relationship, partiality, and the effect of the prisoner's conviction on the witnesses,

HOMICIDE—*Continued.*

and then to ascertain what influence that would have on the truthfulness of their evidence, and to ascertain, under all the circumstances, the weight this testimony should be given. *Ibid.*

7. *Homicide —Murder —Defendant a Witness —Trials —Instructions — Weight of Evidence.*—Where upon a trial for murder the prisoner has testified in his own behalf, it is not error for the judge to comment upon the history of such evidence before 1881, when it was inadmissible, and afterwards, it appearing that he immediately thereafter correctly charged as to the scrutiny testimony of this character should be subjected to by them, and that after considering it the jury should determine, as best they could, his interest in the result, and then to give his testimony that weight and effect which, under all the circumstances, they thought it entitled to; and should they believe the prisoner told the truth, it was their duty to give "his testimony the same weight and effect you would give to the testimony of any disinterested witness." *Ibid.*

8. *Homicide—Murder—Premeditation—Evidence—Questions for Jury.*— Where there was evidence that the prisoner immediately before the homicide went up to a group of negroes, among whom was the deceased, and said, "What did you say, old nigger!" repeated the remark, after a silence, whereupon the deceased asked him to whom he was speaking, and the prisoner replied with an oath that he was speaking to him, the deceased, saying further, "I don't like you, nohow, and what it takes to kill you I got it," and then took a pistol from his pocket, fired twice at the deceased, snapping empty cartridges several times, the firing causing the death; that the prisoner after the homicide expressed a regret that he had not had another shot at the deceased; and there was no evidence that the prisoner at the time was drunk or under the influence of a drug, it is held sufficient upon the question of deliberation and premeditation for conviction of murder in the first degree. *S. v. McCormac*, 116 N. C., 1036, cited, approved, and applied. *S. v. Daniels*, 464.

9. *Homicide—Murder—Self-defense.*—Self-defense may not be successfully maintained where the prisoner has wrongfully assaulted the deceased or provoked a fight resulting in the latter's death. *S. v. Lucas*, 471.

10. *Same—Unprovoked Assault—Necessity to Kill—Trials—Questions for Jury.*—Where an assault is unprovoked and made with the intent and present ability to kill, the person assaulted is not required to show that he endeavored to withdraw from the conflict before making the necessary resistance to protect his life or save himself from great bodily harm, before taking the life of his assailant, though it is otherwise if the assault is not felonious, for then he is required to retreat to the wall, as far as consistent with his own safety; and in order to establish self-defense in either case, the necessity to kill is required to be shown; but in the first instance it is to be determined by the jury in view of the fact that the assailed may stand his ground, and in the other, in view of the fact that it is required that he show that he had retreated as far as consistent with his own safety. *Ibid.*

HOMICIDE—*Continued.*

11. *Instructions—Murder—Self-defense.*—In this case it is held that the judge's erroneous instruction upon the doctrine of self-defense on a trial for murder was not cured by construing it with a former portion of his charge, such former portion referring in general terms to the doctrine of self-defense as being a killing from necessity, and it is in the part objected to that he lays down the rule on the subject for the jury's guidance, and it is the only place he intends or professes to do it. *Ibid.*

12. *Homicide—Trials—Evidence Corroborative—Harmless Error.*—On a trial for murder, testimony is held competent, that the witness for the State saw the defendant in his buggy, looking for some one; that he heard the shots, and immediately "ran down to see what had happened, when he found the prisoner with a pistol in his hand and the deceased wounded and being carried to the house," the evidence being corroborative of other witnesses, revelant, material, and not disputed. *S. v. English*, 497.

13. *Homicide —Murder —Drunkenness —Intent —Mental Incapacity —Instructions.*—The prisoner being tried for murder, was found guilty in the second degree, upon evidence tending to show that the homicide was committed by him when he was under the influence of a drug or of whiskey. Instructions to the jury held correct, that if the prisoner had at the time become incapable by the use of the drug or liquor to form the intent to kill, or to plan, deliberate, or premeditate beforehand, their verdict should not be for more than murder in the second degree; and that if he was then mentally unsound or unbalanced to such an extent that he could not understand the quality of his act or distinguish between right and wrong, they should acquit him. *Semble*, in the case at bar there was insufficient evidence of mental unbalance of the prisoner to be considered by the jury. *Ibid.*

14. *Homicide — Murder — Premeditation — Drunkenness—Trials—Instructions—Harmless Error.*—Where the defense upon a trial for murder is that at the time of and immediately before the homicide the prisoner had been rendered incapable of forming a deliberate and premeditated purpose to kill, by reason of drunkenness, the burden is upon him to show this to the satisfaction of the jury; and, in this case, it appearing that the judge clearly charged the jury upon the degree of proof necessary for the State to convict, it is held harmless error that he charged that the defendant must prove his defense "beyond a reasonable doubt," it appearing that the jury could not have been misled; and further, there is no evidence that at the time of the homicide the defendant was in such condition. *S. v. Shelton*, 513.

15. *Homicide—Murder—Premeditation—Evidence.*—For the defense of drunkenness to be available upon a trial for murder in the first degree, it must be shown that, at the time of the homicide, the mind of the prisoner was so affected by drink as to render him incapable of premeditation and of a deliberate purpose to kill; but when the evidence shows that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants, to whatever extent, in order to carry out the design, will not avail as a defense. *Ibid.*

HUSBAND AND WIFE. See Divorce; Deeds and Conveyances; Abandonment.

INDEPENDENT CONTRACTOR. See Master and Servant.

INDICTMENT. See Constitutional Law; False Pretense.

1. *Indictment—Spirituous Liquors—Persons to Jurors Unknown—Actual Sale—Trial—Evidence.*—To convict under an indictment of sale of intoxicating liquors "to some person to the jurors unknown," it is as necessary to offer evidence of an actual sale to the unknown person as if his name had been inserted in the indictment. *S. v. Watkins*, 425.

2. *Same—Identification of Defendant—Verdict, Directing.*—On a trial upon indictment for the unlawful sale of spirituous liquor alleged to have been made prior to the operative effect of chapter 44, Laws 1913, there was evidence only that a barrel, marked to defendant's address, was found at his railroad shipping point, containing 30 gallons of whiskey; that the barrel was receipted for and was delivered to some person by the railroad agent, but the signature to the receipt was not identified as the handwriting of the defendant, and the defendant was not identified as the one who received the barrel. The rule of evidence that the possession of more than one quart of whiskey shall be *prima facie* evidence of sale not applying to the county wherein the sale is alleged to have been made, it is *Held*, the court should have instructed the jury, upon the evidence, to return a verdict of not guilty. *Ibid.*

INJUNCTION.

1. *Injunctions—Distinctions Abolished—Code Practice—Interpretation of Statutes.*—Under our Code practice the difference between special and common injunctions has been abolished, and they are ancillary to the relief sought in the action, and dependent upon service of process upon the defendant therein in accordance with the modes recognized by statute. *Armstrong v. Kinsell*, 125.

2. *Injunctions—Bills and Notes—Banks and Banking—Nonresident Defendant—Process—Attachment.*—Where the maker of a note brings his action against a nonresident payee to impeach his note upon the ground of fraud or false representations in its procurement, and seeks an injunction restraining the payee from further negotiating it, and a resident bank, where it had been deposited, from parting with its possession, it is necessary to show personal service of the summons on the nonresident defendant or his duly authorized agent, or some act of his amounting to a waiver thereof; and the issuance of the restraining order on the bank, depending upon proper service of process on the payee, will likewise be dismissed where a special appearance has been entered for that purpose, and there has been no service or waiver of process by the nonresident defendant. The remedy is by attachment of the note in the hands of the bank, under the provisions of Revisal, sec. 777, and publication of notice to the nonresident defendant based thereon. *Bernhardt v. Brown*, 118 N. C., 701, cited and applied. *Ibid.*

INSOLVENCY. See Banks and Banking, 2.

INSTRUCTIONS. See Trials.

INTERSTATE COMMERCE. See Commerce.

INTOXICATING LIQUORS. See Indictment.

1. *Spirituous Liquor—Unlawful Sale—Possession—Prima Facie Case—Burden of Proof—Interpretation of Statutes.*—Chapter 44, Laws 1913, making it unlawful, with certain exceptions, for any person, etc., to keep in his possession for the purpose of sale, spirituous liquors, etc., enacting that the possession of more than one gallon thereof shall constitute *prima facie* evidence of the violation of the statute, does not relieve the State from the burden of the issue and of proving that the one in whose possession more than one gallon of whiskey was found, under its "search and seizure" provision, and who was indicted and tried under this statute, was guilty of the violation of the law, beyond a reasonable doubt, and while the *prima facie* case, unexplained, is sufficient to sustain a verdict of guilty, yet the defendant is not required to show, by the greater weight of the evidence, that the whiskey was in his possession for lawful purposes, for such, in effect, would require him to establish his own innocence, and relieve the State of the burden of the issue, which is placed upon it. *S. v. Wilkerson*, 431.

2. *Spirituous Liquor—Burden of Proof—Prima Facie Case—Instructions, Conflicting—Trials.*—Where a defendant is tried for the violation of the prohibition laws of this State, under chapter 44, Laws 1913, making the possession of more than one gallon of spirituous liquor *prima facie* evidence of its violation, an erroneous instruction which placed upon him the burden of showing that he did not have the spirituous liquor for an unlawful purpose, is not cured by also placing the burden upon the State to show that he was guilty of the offense charged beyond a reasonable doubt. *Ibid.*

3. *Spirituous Liquor—Unlawful Sale—Principal and Agent—Trials—Questions for Jury—Interpretation of Statutes.*—It is not in violation of our prohibition law for one to receive here money from another as his agent and go to another State by private conveyance or otherwise, and purchase spirituous liquor there, and deliver it here, when his act as agent is *bona fide* (Revisal, sec. 3534); and he is entitled to receive a reasonable compensation, at least, for the services thus rendered, but not as any part of the purchase price, the intent and the true nature of the transaction, in proper instances, being questions for the jury under instructions from the court on the law applicable. *Ibid.*

4. *Same—Instructions.*—Upon a trial for a violation of our prohibition law, there was evidence tending to show that the defendant was found in possession of eleven gallons of whiskey, which possession, under chapter 44, Laws 1913, was made *prima facie* evidence of an intent to unlawfully sell the same or of keeping it for sale, contrary to the statute. There was evidence in behalf of the defendant that he had received from each of ten customers at his store the price for one gallon of whiskey, for which he agreed to go to Virginia and make the purchase as their agent, charging 25 cents a gallon for his services as such. He was returning from his trip with eleven gallons of whiskey, having purchased one gallon for his own use, when he was seized and searched and the whiskey was found in his possession: *Held*, it was reversible error for the court to instruct the jury that

INTOXICATING LIQUORS—*Continued.*

the defendant must show *by the preponderance of the evidence* that he was acting *bona fide* as the agent for others, as testified, in order to acquit him. *Ibid.*

5. *Spirituous Liquor—Offense Charged—Conviction—Constitutional Law.* Where one is indicted for the sale of spirituous liquor, and tried under chapter 44, Laws 1913, making possession of a certain quantity *prima facie* evidence of a guilty purpose in having it, he may not be convicted under the provisions of chapter 133, Laws 1911, known as the "Club Act," for it would be in violation of his constitutional rights to charge him with the commission of one crime and convict him of a different one. *Ibid.*

6. *Spirituous Liquor—Prospective Laws—Conflict—Interpretation of Statutes.*—Public Laws of 1913, ch. 44, called the "Search and Seizure" law, ratified 3 March, is by its provisions effective April 1 of the same year, and having a prospective effect, is not in conflict, as to acts committed before then, with chapters 819 and 992, Laws 1907, making the possession by one person in Mecklenburg County of more than 2½ gallons of spirituous liquor *prima facie* evidence of the unlawful intent to sell. *S. v. Perkins*, 141 N. C., 797. *S. v. Russell*, 482.

7. *Spirituous Liquors—Coördinate Branches of Government—Presumptions of Innocence—Constitutional Law—Statutes.*—The provision of chapters 819 and 992, Laws 1907, making the possession by one person of more than 2½ gallons of spirituous liquor in Mecklenburg County *prima facie* evidence of an unlawful intent to sell, is not an unconstitutional assumption by the Legislature of the judicial power, nor does it deprive the citizen of the common-law presumption of innocence, or of the benefit of the doctrine of reasonable doubt. *S. v. Barrett*, 138 N. C., 630; *S. v. Wilkerson, ante*, 431. *Ibid.*

8. *Spirituous Liquors—Burden of Proof—Reasonable Doubt—Prima Facie Case—Instructions.*—Where the statute makes the possession by one person of a certain quantity of spirituous liquor *prima facie* evidence of an unlawful intent to sell, the burden of the issue remains on the State to show the guilt, as charged in the indictment, beyond a reasonable doubt; and when the *prima facie* case has been established, under the provision of the statute, it does not forestall the verdict, for it only means that as evidence it is sufficient to establish the ultimate fact of guilt, and the jury may convict if they find that it is not explained or rebutted. The presumption of innocence is still with the prisoner, and the burden continues to rest upon the State to show guilt beyond a reasonable doubt. The charge of the court in this case is approved. *S. v. Wilkerson, ante*, 431. *Ibid.*

9. *Intoxicating Liquors—Criminal Law—Search and Seizure Act—Recorder's Court—Jurisdiction.*—The recorder's court of Edgecombe County has jurisdiction over offenses committed under the act of 1913, ch. 44, known as the "search and seizure act," relating to intoxicating liquors, etc., making the possession of certain specified quantities of the various kinds *prima facie* evidence of guilt. *S. v. Denton*, 530.

10. *Intoxicating Liquors—Criminal Law—"Search and Seizure Act"—Prima Facie Case—Ex Post Facto Laws.*—Where the defendant, under a proper warrant, has been found with sufficient quantity of in-

INTOXICATING LIQUORS—*Continued.*

toxicating liquor in his possession to make out a *prima facie* case of the violation of chapter 44, Laws 1913, known as the "search and seizure act," fourteen days after the statute had become effective, he may not successfully resist conviction on the ground that the law was *ex post facto*, as to his case, having had ample time to rid himself of the possession of the liquor after the operative effect of the statute. *Ibid.*

11. *Spirituous Liquors—"Search and Seizure Act"—Possession—Principal and Agent—Interpretation of Statutes.*—The General Assembly is presumed to have acted advisedly and with a knowledge of the legal meaning of the terms it employs in a statute. Hence, chapter 44, Laws of 1913, known as the "search and seizure act," making the "possession" of certain specified quantities of "spirituous, vinous, or malt liquors" *prima facie* evidence of its violation, intends that the "possession" shall be construed as either actual or constructive; so that the possession of such quantities by the agent will be deemed the possession of the principal for the purposes of the act. *S. v. Lee*, 533.

12. *Criminal Law—Trials—Warrants—Amendments—Intoxicating Liquors —"Search and Seizure Act."*—Upon appeal, the Superior Court judge has authority, after the jury has been impaneled, to permit an amendment to a warrant issued under the "search and seizure law," being chapter 44, Laws 1913, so as to charge that the defendant had spirituous, etc., liquors "for the purpose of sale." *Ibid.*

ISSUES. See Evidence, 3; Trials; Divorce.

1. *Issues—Assumption of Risks—Trials—Instructions.*—In this action to recover damages from a railroad company for the negligent killing of plaintiff's intestate, an additional issue to those of negligence and contributory negligence is suggested as to the assumption of risks, the jury to be instructed in their answer thereto upon their finding as to a certain phase of the controversy with respect to the conduct of the defendant's engineer in signaling the engine forward at the time of the injury. *Horton v. R. R.*, 162 N. C., 424. *Irvin v. R. R.*, 5.

2. *Trials—Contributory Negligence—Issues Submitted.*—It is not error for the trial judge to refuse to submit an issue upon the question of contributory negligence when such has not been tendered by the defendant. *R. R. v. Baird*, 253.

JUDGE'S NOTES. See Trials.

JUDGMENTS. See Divorce; Deeds and Conveyances; Pleadings, 3.

1. *Judgments—Estoppel—Pleadings—Issues—Trials—Forms—Interpretation of Statutes.*—Under our Code system of pleading, forms which do not make for the speedy trial of a cause of action upon its merits are abolished, and our statute, Revisal, sec. 479, does not require that new matter constituting a defense must exist at the time of the commencement of the action, and inconsistent defenses may be pleaded. Hence, a judgment rendered in another jurisdiction after the present cause has been commenced and is at issue may be taken advantage of by amendment, and pleaded as an estoppel, to be determined at the trial by the court alone if presenting only a matter of law, and

JUDGMENTS—*Continued.*

by the jury if issues of fact are raised by the pleadings. *Williams v. Hutton*, 216.

2. *Same—Pleas—"Puis Darrein Continuance."*—After pleadings were filed in an action involving the disputed title to lands, the defendant filed a plea *puis darrein continuance*, alleging an estoppel by judgment rendered in the Federal Court, to which the plaintiff replied, denying the jurisdiction of the Federal Court and alleging that there was no identity of or privity among the parties to that action with those of the present one: *Held*, the defendant's plea should be considered as an amendment to the answer, which, not being in the nature of a counterclaim, required no further pleading by the plaintiff to be considered as denied. The practice of the common-law plea of *puis darrein continuance*, and its effect, discussed by ALLEN, J. *Ibid.*

3. *Marriage and Divorce—Interpretation of Statutes—Judgments for Divorce a Mensa—Absolute Divorce—Estoppel.*—The cancellation of the marriage tie is not included within the scope of the inquiry, issues, verdict, or judgment in an action for divorce *a mensa et thoro*, and such may not be successfully pleaded as an estoppel in a suit for absolute divorce brought under the provisions of chapter 89, Laws 1907, amended by chapter 165, Laws 1913. *Cooke v. Cooke*, 272.

4. *Judgments—Nonsuit—Adjudication.*—Where a judgment of nonsuit is entered upon demurrer, the judgment should only adjudicate that the complaint does not state a cause of action and deny the right of recovery. *Cavenaugh v. Jarman*, 372.

5. *Judgments —Mortgages —Foreclosure Suits—Estoppel.*—The plaintiff alleged that a degree of foreclosure was entered against him, and the mortgaged premises sold at a price insufficient to pay off the amount of the mortgage; that an action was then instituted, which adjudged the amount due, condemning the land to its payment, and, after it was docketed, the plaintiff, an ignorant man, conveyed a certain other tract of his land to another, who then conveyed it to plaintiff's wife, under advice and belief that this was the only way to secure a homestead to himself; that a homestead in this land was allotted, to which exceptions were filed, eventuating in a judgment denying the homestead right. The defendant demurred: *Held*, the plaintiff is estopped by the former judgment from claiming his homestead in this action. *Ibid.*

6. *Judgment Suspended—Terms Imposed—Power of Courts.*—The Superior Court judge may, in his reasonable discretion, suspend judgment in a criminal action upon submission or conviction of the defendant, and require the defendant to appear from term to term, for the next ensuing two years, and show that he has demeaned himself as a good and law-abiding citizen. *S. v. Everitt*, 399.

7. *Same—Indefinite Suspension.*—A suspension of judgment against a defendant in a criminal action in the Superior Court requiring him to appear from term to term for the next ensuing two years, etc., is not objectionable as an indefinite suspension of judgment. *Ibid.*

8. *Judgment Suspended—Power of Court—Implied Consent.*—Where a defendant submits or is convicted of a criminal offense and is present when the judge, in the exercise of his reasonable discretion, suspends

JUDGMENTS—*Continued.*

judgment upon certain terms, and does not object thereto, he is deemed to have acquiesced therein, and may not subsequently be heard to complain thereof; and in proper instances it will be presumed that the court exercised such discretion. *Ibid.*

9. *Judgment Suspended—Terms—Costs—Part Compliance —Sentence — Power of Courts.*—Where judgment against a defendant in a criminal action has been suspended upon payment by him of the costs, and other conditions, such payment is not a full compliance by him with the terms of the suspension and does not take from the court the power to subsequently proceed to judgment should the defendant violate the further conditions upon which the judgment was suspended. *Ibid.*

10. *Judgment Suspended—Terms—Costs—Alternate Judgments.*—A suspension of judgment in a criminal action upon payment of costs, requiring the appearance of the defendant at subsequent terms of the criminal court and show that he has demeaned himself as a good, law-abiding citizen, is certain in its terms and not objectionable as imposing alternate duties or obligations. *Ibid.*

11. *Judgment Suspended—Subsequent Sentence—Original Offense—Trial by Jury—Court's Discretion—Appeal and Error.*—Where judgment in a criminal action has been suspended upon payment of costs, imposing further terms as to the conduct of the defendant, and at a subsequent term of the criminal court the judge finds upon affidavits or otherwise that the defendant has violated the terms upon which the judgment had been suspended, and passes sentence, the sentence is imposed as a punishment for the original offense of which the defendant stands convicted, and not for the subsequent misconduct, and the proceedings to ascertain whether the defendant has complied with the terms imposed being directed to the reasonable discretion of the judge, are not within the province of the jury, and not appealable unless the judge's discretion has been grossly abused. *Ibid.*

12. *Judgment Suspended—Subsequent Sentence—Court in Term.*—Where a judgment has been suspended against a defendant in a criminal action upon certain terms imposed, any further proceedings to ascertain whether those terms have been complied with must be in term and not in vacation. *Ibid.*

13. *Same—Appeal and Error.*—This power of the court to suspend judgment upon terms should not be exercised so as to prejudice or embarrass the defendant's right to review the judgment and proceedings of the court upon which it is based, by appeal, if he elects to do so. *Ibid.*

14. *Verdicts—Burglary—Felonious Intent—Judgments—Acquittal.*—Upon a trial under an indictment for burglary, the jury was instructed by the court that, under the evidence, their verdict should be guilty thereof in the first degree; or of breaking into the dwelling-house of another otherwise than by a burglarious breaking; or not guilty. The verdict rendered was that "the defendant (was) guilty of housebreaking, with no intent to commit a felony": *Held*, the verdict was equivalent to an acquittal, under section 3333, Revisal, upon which judgment of not guilty should have been entered by the court, and the defendant discharged. *S. v. Spear*, 452.

JURISDICTION. See Courts, 8, 11, 13, 14, 19; Removal of Causes.

JURORS.

1. *Jurors —Challenges —Opinion Expressed.*—Notwithstanding a juror may have expressed his opinion upon the matter in controversy, the action of the judge in permitting him to serve as a juror is not error, when it appears from the statement of the juror that he could assume the obligations of a juror, hear the evidence from the witnesses and the charge of the court, and render a verdict entirely in accordance with the law and the evidence, uninfluenced by any opinion he may have formed. *S. v. English*, 498.

2. *Jurors—Challenges—Impartial Panel.*—The right of challenge is given for the purpose of selecting an impartial jury, and not to allow either party to pick one, and where the jurors objected to have been stood aside, and the jury impaneled before the party appealing has exhausted his peremptory challenges, there is no reversible error on the ground that the jurors selected were not impartial ones. *Ibid.*

LANDLORD AND TENANT.

1. *Landlord and Tenant—Leases—Tenant Holding Over.*—When a tenant for a year or longer time holds over and is recognized by the landlord without further agreement or other qualifying facts or circumstances, he becomes tenant from year to year, and is subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existing conditions. *Murrill v. Palmer*, 50.

2. *Same—Renewal of Lease—Presumptions—Breach by Tenant—Damages.*—Where a tenant for a term of years continues to occupy the leased premises after the expiration of the lease, and pays the stipulated monthly rental, which the landlord accepts, and thereafter the landlord asks whether he would desire to renew the lease at an advanced rental, which resulted without further agreement in the continued occupancy by the tenant of the premises, and his continuing to pay the monthly rental in the same amount, the intent of renewing the lease as tenant from year to year is presumed from the circumstances, notwithstanding the tenant declares a different one; and where he leaves the premises before the expiration of the renewed term, he is liable to the landlord for the payment of the rent for the unexpired term, when the latter has used reasonable but unavailing diligence to secure another tenant within that time. Instances in which it is permissible to show a contrary intent to that of a renewal of the lease, where the tenant holds after the expiration of the term, discussed by HOKE, J. *Ibid.*

LANDMARKS. See Criminal Law.

LARCENY. See Criminal Law.

LEASES. See Landlord and Tenant; Railroads.

LIMITATION OF ACTIONS. See Deeds and Conveyances.

1. *Limitation of Actions—Judgments—Pleadings.*—Where judgment is rendered in the Superior Court upon judgments theretofore rendered, the statute of limitations as to the prior judgments should have been pleaded in the later action, if available, and it will begin to run only from the date of the last judgment. *Hardin v. Greene*, 99.

LIMITATIONS OF ACTIONS—*Continued.*

2. *Limitation of Actions—Adverse Possession—State's Title—Evidence—Marked Lines.*—One relying solely upon adverse possession and without color of title to establish his title to lands in controversy must show title out of the State by actual possession for thirty years, not necessarily continuous occupancy of the property, but of a hostile character sufficiently definite and observable to apprise the true owner that his property rights have been invaded and to the extent of the adverse claim. And where there is a physical occupation with claim extending to certain marked boundaries, there must be some evidence tending to connect such occupation with the boundaries claimed or some exclusive control or dominion over the unoccupied portions of the land. *May v. Manufacturing Co.*, 262.

3. *Deeds and Conveyances—Color of Title—Boundaries—Adverse Possession—Limitation of Actions—Trials—Nonsuit.*—Where one enters on a tract of land under a deed having known and visible lines and boundaries, and occupies any portion of the tract, asserting ownership of the whole, there being no adverse occupation of any part, the force and effect of such occupation will be extended to the outer boundaries of his deed, and if exclusive and continuous for seven consecutive years, the title being out of the State, such possession will ripen into an unimpeachable title to the entire tract. *Ray v. Anders*, 311.

4. *Same—Intermittent Possession—Trespasser—Trials—Nonsuit.*—A casual or intermittent interruption of the possession of one who occupies land under a deed conveying it under known and visible boundaries is insufficient to defeat his title when otherwise his possession for seven years has ripened it to the whole of the lands thus conveyed; nor can this right be defeated by one occupying adjacent lands without evidence of claim of color, whose actual possession extends only to a clearing not included in the *locus in quo (Haddock v. Leary*, 148 N. C., 378, cited and distinguished); and upon the evidence in this case a judgment of nonsuit should not have been granted. *Ibid.*

5. *Executors and Administrators — Interrupted Administration — Judgments—Proceedings to Make Assets—Limitations of Actions—Interpretation of Statutes.*—Where a judgment has been obtained in 1893 against an administrator upon a debt due by deceased, the administrator dies in 1898 without further administration until 1911, when proceedings are commenced against the heirs at law to sell lands to make assets to pay the judgment debt, there being no personal assets, a plea of the statute of limitations as a defense should be sustained under the express requirements of the Revisal 1905, sec. 367, that letters of administration shall issue "within ten years of the death of such person," and the period of interrupted administration will not be counted. *Smith v. Brown*, 99 N. C., 386, cited and approved. *Fisher v. Ballard*, 326.

MALICIOUS PROSECUTION.

1. *Malicious Prosecution—Probable Cause—Malice.*—In an action to recover damages for malicious prosecution the plaintiff must show a want of probable cause in the criminal action, and malice in its prosecution. *Humphries v. Edwards*, 154.

MALICIOUS PROSECUTION.

2. *Same—Malice Inferred.*—In an action to recover damages for malicious prosecution, malice may be inferred from the absence of probable cause, or it may be otherwise established, though malice alone, without the want of probable cause, is not sufficient; and where it appears that the criminal prosecution was with probable cause, the civil action will not lie. *Ibid.*

3. *Malicious Prosecution—Probable Cause—Trials—Questions for Court.* When the facts are admitted or established in an action to recover damages for malicious prosecution, the question of probable cause for the prosecution of the criminal action is one of law. *Ibid.*

4. *Malicious Prosecution—Participation—Evidence—Questions for Court.* It is necessary, in an action to recover damages for malicious prosecution, that the plaintiff show that the defendant authorized the prosecution of the criminal action; and the evidence in this case is held insufficient for that purpose, it appearing that on appeal from the justice's court the judgment there taxing the defendant with costs was reversed in the Superior Court, whereupon the solicitor voluntarily sent a bill to the grand jury, marking the defendant a State's witness, for the same assault, resulting in a trial and acquittal, and that the court declined the request of the solicitor to adjudge the defendant to be the prosecutor. *Ibid.*

MASTER AND SERVANT.

1. *Corporations—Negligence—Independent Contractor—Master and Servant—Production of Books—Evidence—Trials.*—Where a defendant corporation relies upon the defense of an independent contractor in an action to recover damages for a personal injury alleged to have been negligently inflicted, and upon notice produces at the trial the minutes of the stockholders and directors bearing upon the employment of the alleged independent contractor, the production of the books is at least sufficient evidence of genuineness to justify their admission on the part of the plaintiff, and are properly received in evidence when tendered by him; and it is held in this case that evidence which tended to show that one who substantially owned the defendant company and was in a position to change the contract made by it with him, was not such an independent contractor as would relieve the company from liability for his negligent acts. *Watson v. R. R.*, 176.

2. *Master and Servant—Negligence—Dangerous Work—Independent Contractor —Vice-Principal —Instructions to Employees —Trials —Evidence—Nonsuit.*—The plaintiff was engaged at the time of his injury for which this action to recover damages was brought, in drilling holes for blasting a right of way for defendant's road, using dynamite and powder, and there was evidence tending to show that the injury was caused by his having been directed, by the vice-principal, to drill into a hole in a rock which had failed to explode, to clear it out, while the safe method, followed up to that time, was to use a sharpened stick or the hands for the purpose; that in using the drill the plaintiff relied upon the knowledge or judgment of the vice-principal, though he was an experienced man in such work: *Held*, (1) the evidence was sufficient upon the question of defendant's negligence to take the case to the jury; (2) the character of this

MASTER AND SERVANTS—*Continued.*

class of work is so intrinsically dangerous that the defense of independent contractor will not avail. *Arthur v. Henry,* 157 N. C., 402, cited and applied. *Ibid.*

3. *Negligence —Inexperienced Employees —Trials —Evidence.* —Where damage for a personal injury is alleged to have been negligently inflicted by a railroad company, the negligence alleged being that of a fellow-servant, it is competent for the plaintiff to testify to a conversation had by him and the defendant's foreman, tending to show that the fellow-servant was inexperienced in the work; and while this testimony was held unnecessary in this case, its admission is held as immaterial. *Buckner v. R. R.*, 201.

4. *Trials—Negligence—Evidence—Nonsuit—Questions for Jury.*—In an action to recover damages for a personal injury alleged to have been negligently inflicted, there was evidence that while the plaintiff was engaged in loading logs for the defendant company, operating a logging road, the defendant's log-loader, without any signal or warning, suddenly and unexpectedly jerked the log at which plaintiff was at work, and thus caused the injury complained of, by throwing it upon him: *Held,* evidence sufficient to take the case to the jury, and a motion as of nonsuit was properly denied. *Ibid.*

5. *Master and Servant—Contracts—Independent Contractor—Trials—Evidence—Control by Employer.*—In determining the liability for a tort alleged by the defendant to have been committed by an independent contractor, the question is determinative as to whether the employer has the right to control the employee in respect to the work from which the injury arose, whether he exercised the right or not; and where there is evidence of this character of employment and *per contra*, the question of independent contractor should be submitted to the jury under proper instructions, and a motion for judgment as of nonsuit denied. *Patrick v. Lumber Co.*, 208.

6. *Master and Servant—Dangerous Work—Assumption of Risk—Safe Appliances—Duty of Master—Negligence.*—It is the duty of the employer to furnish his employee such tools and appliances to do the work required of him as are reasonably safe, under the rule of the prudent man; and where the character of the work is dangerous, the employee only assumes the risk incident to its dangerous character, and not that caused by the omission or neglect of the employer in the performance of the duties required of him for the employee's greatest security. *Lynch v. R. R.*, 249.

7. *Negligence—Fellow-servant—Master and Servant.—Held,* in this action to recover damages for personal injury, if there was evidence of negligence it was that of a fellow-servant, for which no recovery could be had. *Page v. Sprunt*, 364.

MINERAL. See Limitation of Actions.

MISDEMEANORS. See Statutes.

MOOT QUESTIONS. See Appeal and Error.

MORTGAGES. See Judgments, 5.

1. *Mortgages—Incorrect Registration—Notice—Subsequent Mortgage — Action.*—A chattel mortgage of a bay horse, incorrectly recorded as

MORTGAGES—*Continued.*

a bay steer, does not give notice to a subsequent mortgagee of the horse of the prior encumbrance, and the lien of the second mortgage is prior to that of the first, though subsequently registered; and where the first mortgagee has obtained possession of the horse under a judgment rendered in claim and delivery before a justice of the peace, has sold the horse, satisfied his debt and turned the balance of the proceeds over to the second mortgagee, and the justice's judgment has been reversed on appeal, the latter may recover so much of the proceeds of sale of the horse from the former as will satisfy the balance due on his lien. *Abernethy v. Starnes*, 162.

2. *Mortgages—Foreclosure—Equity—Creditor's Bill—Writ of Supersedeas.* On appeal from the refusal of the Superior Court judge to presently render a decree of foreclosure of a mortgage on which he had entered judgment for the amount of the debt, the plaintiff moved in the Supreme Court for a writ in the nature of a *supersedeas*, restraining the enforcement of a decree in another pending action, in the nature of a creditor's bill, involving the property subject to the mortgage, in which a receiver had been appointed to take charge of the lands. *Held*, the rights of the petitioning plaintiff are fully protected in the proceedings sought to be restrained by him, and the motion is denied. *McArthur v. Timber Co.*, 387.

MOTIONS. See Divorce; Pleadings; Appeal and Error.

MOTION TO QUASH. See False Pretense, 1.

MUNICIPAL CORPORATIONS. See Cities and Towns; Health, 1, 3, 4.

MURDER. See Homicide.

NEGLIGENCE. See Trials; Cities and Towns; Master and Servant; Railroads.

1. *Railroads—Pedestrians—"Look and Listen"—Reasonable Precautions—Negligence—Proximate Cause.*—One walking on a railroad track is required to look and listen for approaching trains and to be reasonably alert for his own safety, which the employees on the train may assume that he has done, and that he will leave the track in time to avoid an injury, where it does not appear that he is incapacitated from appreciating the danger or avoiding it; and this without reference to the speed of the train at the time; therefore, when under such circumstances a pedestrian is killed or injured by being run upon or over by a railroad train, negligence is imputed to him as the proximate cause of the injury, whether the approaching train gave alarm signals or not, and he may not recover damages therefor. *Abernathy v. R. R.*, 91.

2. *Same—Trials—Negligence—Evidence—Nonsuit.*—In an action to recover damages from an employer for a personal injury alleged to have been negligently inflicted upon its employee, there was a motion as of nonsuit upon evidence tending to show that the plaintiff was employed at the time of the injury in unloading coal from a gondola car, opening at the bottom and dumping the coal into the tender of a locomotive beneath; and while he was using a pick for the purpose, as was customary with him, he was peremptorily in-

NEGLIGENCE—*Continued.*

structed to use a shovel instead, the latter being a more dangerous method, and in consequence thereof he received the injury: *Held*, under this evidence, viewed in the light most favorable to the plaintiff, as required, a judgment of nonsuit was properly disallowed, there being sufficient evidence of defendant's actionable negligence to take the case to the jury; and, further, there was no evidence of contributory negligence. *Orr v. Telephone Co.*, 132 N. C., 691. *Lynch v. R. R.*, 249.

NEW TRIAL.

New Trial—Newly Discovered Evidence.—A motion for a new trial based upon allegations of newly discovered evidence is denied under the authority of *Johnson v. R. R.*, 163 N. C., 431. *Wheeler v. Cole*, 378.

NONSUIT. See Trials; Judgments.

NUISANCE. See Cities and Towns.

PARTNERSHIPS. See Bankruptcy, 2.

1. *Partnership—Dissolution—Profits—Diminution of Assets—Liability for Losses.*—Where a partnership was formed for the purpose of engaging in the business of making turpentine, the partners agreeing to divide the profits in the proportion of three-fourths and one-fourth, and one-half of the capital was lost in the business in depreciation of the property contributed by the partners, which was caused by its use in the business: *Held*, that as the firm was indebted to each partner for the share of capital furnished by him, the amount of capital so lost should be deducted from the gross returns, along with the costs and expenses of operation, in order to ascertain if any profits had been realized, and if any, to what amount. And this would be so whether the firm is to be considered as indebted to the partners in their contribution to the capital or whether there was merely a loss of capital by user of the property so contributed, and which is to be regarded as making a part of the gross returns in its converted form and to be taken therefrom, in like manner as debts of the firm, and to be deducted, in ascertaining whether there are any profits. *Buie v. Kennedy*, 290.

2. *Contracts, Writing—Deeds and Conveyances—Consideration—Guaranty—Parol Contracts—Trials—Evidence.*—The plaintiff and defendant having agreed to form a copartnership for producing turpentine on the lands of the latter, an undivided one-half interest in the lands was conveyed to the former for a monetary "and a further consideration." It was found as a fact that the entire contract was not reduced to writing, but that it was stipulated by parol that the defendant would pay the amount of shortage in the "crop boxes" should the actual number thereof be less than that specified in the conveyance: *Held*, the parol part of the contract did not vary or contradict the writing (the deeds) in this case, and is admissible as evidence; and that this agreement to refund was a part of the consideration of the deed. *Ibid.*

PAYMENT. See Contracts; Bills and Notes.

PEDDLERS. See Taxation.

PENALTY STATUTES.

1. *Carriers of Goods—Interstate Commerce—Federal Questions—Practice —Penalties.*—In an action to recover the penalty for the refusal of the carrier to deliver an interstate shipment of goods, the exception that such recovery would impose a burden upon interstate commerce must be taken upon the trial and in the appellant's brief in order for the Federal question to be made available; but it is *Held*, that a penalty recoverable for the refusal of delivery and the failure to settle a claim based thereon after the arrival here of the shipment and while in the carrier's possession, does not raise a Federal question. Revisal, secs. 2633, 2634. *Jeans v. R. R.*, 224.

2. *Carriers of Goods — Penalty Statutes—Actions.*—A recovery of the value of a shipment of goods and the penalties for the refusal of the carrier to deliver (Revisal, sec. 2634) and for the failure to settle the claim within the statutory period, may be united in the same action. *Ibid.*

3. *Appeal and Error—Verdicts—Judgment—Variance—Penalty Statutes.* A judgment recovered against a carrier for damages and statutory penalty for failure to deliver a shipment or make payment of loss within ninety days was obtained in a magistrate's court in the sum of $14.82. Upon appeal, the plaintiff was permitted to amend so as to claim 2 cents less than the amount of the judgment, and upon verdict for $14.80 judgment was entered for $14.82: *Held*, the judgment in the Superior Court should be modified in accordance with the verdict, and no reversible error is found. *Jones v. R. R.*, 392.

PERJURY. See Courts.

PLEADINGS. See Easements; Removal of Causes; Appeal and Error; Courts; Trials.

1. *Pleadings—Answer—Admissions—Prior Demand—Waiver—Principal and Surety.*—Where the plaintiff brings suit for contribution against a cosurety on a note, alleging his liability as such, and that he had failed or refused reimbursement to the extent of his liability to the plaintiff, who had paid the same, and the defendant answers, denying liability, and there is no averment that demand had been previously made on the defendant, the right to a demand is waived by the answer, and the statement of the cause of action being only defective, is cured. *Shuford v. Cook*, 46.

2. *Appeal and Error—Pleas in Bar.*—Where specific performance of a contract to convey land is resisted upon the ground that the proposed grantor is a married man whose wife will not join in the conveyance, an appeal from a decree of performance and the payment into court of the agreed purchase price abated to the extent of the value of the wife's dower, to be subsequently ascertained, is in the nature of an appeal from a plea in bar, and presents an exception to the general rule which requires the entire case to be passed upon before the appeal will be entertained. *Bethell v. McKinney*, 71.

3. *Trials—Pleadings—Extension of Time—Further Orders—Court's Discretion—Limitation of Actions.*—It is not within the discretion of the trial judge to order stricken out a part of an amended pleading simply because the statute of limitations was pleaded in it when the judge holding a former term of the court has unconditionally

PLEADINGS—*Continued.*

allowed the pleader further time in which to file the amended answer. *Hardin v. Greene*, 99.

4. *Pleadings — Orders—Definiteness—Court's Discretion—Interpretation of Statutes.*—While the trial judge is authorized in the exercise of his discretion to order that a pleading be made more definite under the provisions of the Revisal, sec. 496, he may not direct the manner in which this may be done. *Hensley v. Furniture Co.*, 148.

5. *Same — Indemnity Companies — Copies of Policies—Findings—Direction for Pleadings.*—In an action to recover damages for an injury alleged to have been negligently inflicted on the defendant's employee, an indemnity company was made a codefendant and moved that the complaint be made more definite, under the provisions of the Revisal, sec. 496, and to an affidavit of its president attached a copy of a policy it alleged to have been in force at the time, and under which no recovery could be had (*Jarrett v. Trunk Co.*, 142 N. C., 466.) The trial judge stated in his order that no denial was made of the truth of the affidavit, and found as a fact the copy set out was a true copy of the policy in force at the time of the injury. *Held*, an order of the judge that a copy of the policy as thus ascertained be attached to the complaint as a part thereof, exceeded his authority and was reversible error on appeal therefrom, as plaintiff had the right to show what was the contract. The extent of the discretion vested in the trial judge and the manner of its exercise discussed by WALKER, J. *Ibid.*

6. *Same — Pleas—"Puis Darrein Continuance."*—After pleadings were filed in an action involving the disputed title to lands, the defendant filed a plea *puis darrein continuance*, alleging an estoppel by judgment rendered in the Federal Court, to which the plaintiff replied, denying the jurisdiction of the Federal Court and alleging that there was no identity of or privity among the parties to that action with those of the present one: *Held*, the defendant's plea should be considered as an amendment to the answer, which, not being in the nature of a counterclaim, required no further pleading by the plaintiff to be considered as denied. The practice of the common-law plea of *puis darrein continuance*, and its effects, discussed by ALLEN, J. *Williams v. Hutton*, 216.

7. *Pleadings—Demurrer—Judgment, Objectionable—Costs.*—The demurrer to the complaint in this action is sustained and the form of the judgment held objectionable, and the judgment is modified and the plaintiff and his surety on his prosecution bond taxed with costs. *Cavenaugh v. Jarman*, 372.

POLICE POWERS. See Cities and Towns.

POLL TAX. See Elections.

PRACTICE. See Statutes.

PRIMA FACIE CASE. See Intoxicating Liquors.

PRINCIPAL AND AGENT. See Usury; Removal of Causes; Banks and Banking, 1; Corporations, 2; Intoxicating Liquors, 3, 11.

1. *Principal and Agent—Realty Broker—Sale by Owner—Commissions—Trials—Evidence—Nonsuit.*—While real property remains in the

PRINCIPAL AND AGENT—*Continued.*

hands of a broker for the purpose of sale, the owner may not consummate the sale with one who had become interested as a proposed purchaser through the efforts of the broker, and escape liability to the latter for the payment of the commissions agreed upon; and where in an action by the broker to recover his commissions, there is conflicting evidence, but the evidence viewed in the light most favorable to the plaintiff's contentions tends to establish a transaction of this character, a judgment as of nonsuit upon the evidence should not be granted. *Trust Co. v. Goode*, 19.

2. *Principal and Agent — Declarations of Agent — Trials — Evidence.*— Declarations of an agent made within the scope of the agency and concerning the very business about which the declaration is made, whether the principal be a person or corporation, is competent in evidence to the same extent as the declaration of the principal would be; and in this case is held applicable to the declarations of an agent as to the amount of hauling and delivering logs done by the plaintiff upon which he was to receive compensation in commission of a certain per cent. *Styles v. Manufacturing Co.*, 376.

PRINCIPAL AND SURETY. See Pleadings, 6.

1. *Principal and Surety—Cosureties—Equity—Contribution—Insolvency of Principal—Actions—Interpretation of Statutes.*—Where it appears that the principal on a note has secured his discharge in bankruptcy from his obligations, including a note paid at maturity by one of two sureties thereon, and that a few months thereafter the surety who paid the note brought his action for contribution against his cosurety, who has paid nothing, the right of action given by Revisal, sec. 2844, will not, without more, be denied upon the ground that it requires the insolvency of the principal, in such cases, to be shown at the institution of the action. *Shuford v. Cook*, 46.

2. *Principal and Surety — Cosureties — Primary Liability — Trials—Evidence.*—Evidence that one signing a note with another did so only as "supplemental surety," with primary liability resting upon his cosurety, is not sufficient, which tends only to show that the cosurety represented that the principal was thoroughly solvent, and there was no danger, and thereupon he indorsed the note as surety with the other one. *Ibid.*

3. *Recognizance—Principal and Surety — Special Appearance—Merits—Process.*—Where a defendant has defaulted under his recognizance to abide by the sentence of the court in a criminal action, etc., and the surety has appeared and resisted the judgment of the court fixing his with liability under the recognizance, the appearance is general, affecting the merits of the controversy, though he may have called it a special appearance, and it is not required that he should have been served with process. *S. v. White*, 408.

PROFITS. See Partnerships.

QUO WARRANTO.

1. *Quo Warranto—Attorney-General—Consent—Trials—Correspondence—Evidence—Questions for Court.*—A letter received, in due course of mail, from the addressee in reply to a letter mailed to him, is *prima facie* evidence, without further proof, of the genuineness of the

QUO WARRANTO—*Continued.*

letter so received; and where a relator, through his attorney, in *quo warranto*, has mailed a letter to the Attorney-General for authority to bring the action, a letter received by mail in reply, apparently from the Attorney-General, granting the request, is evidence sufficient that such consent had been duly obtained, and presents a question of fact for the court. *Echerd v. Viele*, 122.

2. *Quo Warranto — Election—Returns—Trials—Evidence — Prima Facie Case.*—In an action of *quo warranto*, impeaching the result of an election to the office contested, the return of the poll-holders of the result is *prima facie* evidence of its correctness. *Ibid.*

3. *Elections — Quo Warranto — Electors—Qualifications—Registration—Poll Tax—Interpretation of Statutes.*—In an action of *quo warranto* in which the title to a municipal office depends upon the result of an election held therein, it is competent to show that certain votes for the relator were cast by persons disqualified by nonresidence, and that others cast against him were by persons who were ineligible for nonpayment of poll tax, required for valid registration by Revisal, sec. 2949, though these voters had been admitted to registration after challenge. *Ibid.*

RAILROADS. See Easements; Carriers of Goods.

1. *Railroads—Federal Employer's Liability Act—Transactions with Deceased—Interest—Evidence—Interpretation of Statutes.*—In an action brought by the administrator of the deceased, for the benefit of the mother, under the Federal Employer's Liability Act, to recover for the pecuniary loss she has sustained in the negligent killing by the defendant railroad company of her son, it is competent for her to testify as to what pecuniary benefits she had received from her son, such testimony, though she is interested in the event of the action, not being against the representative of a deceased person and prohibited by Revisal, sec. 1631. *Bunn v. Todd*, 107 N. C., 266, cited and applied. *Irvin v. R. R.*, 5.

2. *Railroads—Federal Employer's Liability Act—Prospective Benefits—Support of Parent—Evidence, Material—Argument to Jury—Instructions—Trials.*—An action may be sustained under the Federal Employer's Liability Act brought by the administrator of the deceased employee for the benefit of his parent, for the reasonable expectation of pecuniary benefit from the continuance of the life of the child, although the child has not contributed to the support of the parent, but evidence of contributions when made by the child to the support of the parent is material and important in determining whether such reasonable expectation exists, and also as to the amount of the recovery. Therefore, where the parent has not testified as to the pecuniary benefits he had received during the life of the child, it is competent for the defendant's attorney, in his argument to the jury, to comment on this fact; and while matters of this character are largely left within the discretion of the trial judge, he may not deprive a party litigant of the benefit of his counsel's argument when made within proper bounds and addressed to the material facts of the case; and his doing so, in this case, is held for reversible error, especially as it appears that the error was accentuated by a refusal of a special prayer for instructions tendered by the defendant, that

RAILROADS—*Continued.*

there was no evidence of contribution by the son to the support of the parent, and a charge that the jury may consider what support he had given, when there was no evidence thereof. *Ibid.*

3. *Railroads — Engineer — Joint Actions—Negligence—Trials—Instructions.*—The railroad company and its engineer were jointly sued for the negligent killing of plaintiff's intestate while endeavoring to hold, with another employee, a long pole between the engine and caboose car, so that the latter could be pushed clear of the track at a crossing it was necessary for the former to pass over. There was evidence tending to show that the engineer was not negligent, which was found to be true by the jury and included in their verdict, but as to the defendant railroad company they found affirmatively upon the issue of negligence upon evidence tending to establish it as to other employees: *Held*, a prayer for special instruction should have been given as requested by the defendant railroad company, that if they found the engineer not negligent, his acts or conduct would not support an affirmative answer to the issue as to the company's negligence and should not be considered in determining its negligence; and a charge held for reversible error, that the defendant, acting necessarily through its employees, was responsible for any acts of negligence on the part of the train crew which proximately caused the injury complained of. *Ibid.*

4. *Railroads — Negligence — Trials—Evidence—Nonsuit.*—In this action against a railroad company for damages for the negligent killing of plaintiff's intestate by defendant's train, the evidence tending to show that at sundown the intestate was seen sitting on a cross-tie of the track over which the train passed, with his elbows on his knees and his head bent down, and that alarm signals of the approaching train were several times given at a distance of about 150 to 200 feet: *Held*, the decision is controlled by *Holder v. R. R.*, 160 N. C., 6. *Stout v. R. R.*, 384.

5. *Railroads—Lessor and Lessee.*—A lessee railroad is bound to the observance of any municipal regulation binding upon its lessor. *S. v. R. R.*, 422.

6. *Railroads—Charter—Roadbed—Conditions Implied—Cities and Towns—Police Powers—Ordinance—Street Grading.*—A railroad company in accepting its charter does so upon condition necessarily implied, that it will conform at its own expense to all reasonable and authorized regulations of towns existing along its route or those which thereafter may grow up thereon, relative to the safe and proper use of the streets and thoroughfares; and where a roadbed of such company lies along the streets of a town, an ordinance is enforcible as within the exercise of the police powers of the town, requiring the railroad, at a reasonable expenditure under the conditions existing, to make the roadbed conform to the grade of the streets and so maintain it with reference to its drain ditches that it may be crossed at all points with ease and safety. *Ibid.*

7. *Fellow-servant—Logging Roads—Interpretation of Statutes.*—Logging roads are railroads within the meaning of the fellow-servant act, Revisal, sec. 2646, and the provisions of the act apply to an injury negligently inflicted by a fellow-servant in any department of a railroad being operated. *Buckner v. R. R.*, 201.

RECOGNIZANCE.

1. *Criminal Law—Recognizance — Acknowlegment—Court's Minutes.*—A recognizance is a debt of record acknowledged before a court of competent jurisdiction, with condition to do some particular act, and need not be formally executed by the principal and his surety, but it is sufficient if acknowledged by them and is entered by the court upon its minute docket. *S. v. White*, 408.

2. *Criminal Law—Recognizance—Scope of Obligation.*—A recognizance binds the defendant in a criminal action to appear and answer, and also to stand and abide the judgment of the court; hence, the surety on a recognizance is not relieved of liability because the principal appeared at the trial and entered a submission, and while the sentence of the court was being considered for several days, departed from the State; for the appearance of the defendant at the trial is not a full compliance with the obligation of the surety in respect to the recognizance. *Ibid.*

RECORDER'S COURT. See Courts.

REFERENCE. See Appeal and Error.

REGISTRATION. Se Deeds and Conveyances; Mortgages.

REMAINDER. See Estates.

REMOVAL OF CAUSES.

1. *Removal of Causes—Federal Courts—Diversity of Citizenship—Fraudulent Joinder—Complaint—Allegations.*—Where a complaint in an action to recover damages for a personal injury against a nonresident defendant sufficiently alleges a joint wrong against them as the cause of the injury, in good faith, the allegations must be passed upon as the complaint presents them; and no severable controversy being presented, the petition for removal to the Federal court filed by the nonresident defendant in the State court, upon the ground of diversity of citizenship, will be denied. *Smith v. Quarries Co.*, 338.

2. *Same—Jurisdictional Facts.*—Where a nonresident defendant seeks to have the cause removed to the Federal court from the State court, wherein a resident defendant has been made a party, for a fraudulent joinder of the resident defendant, and in his petition or affidavits filed therewith matters relating to the fraudulent joinder are sufficiently alleged, which matters are traversed by the plaintiff, the latter must proceed in the Federal court to have the jurisdictional fact determined. *Ibid.*

3. *Same—Specific Averments.*—Where a nonresident defendant and resident defendant, in this case being employer and employee, are sued in the State court for an alleged joint wrong as causing the damages complained of, and the former seeks to remove the cause to the Federal court on the ground of diversity of citizenship, with allegation of a fraudulent joinder for the purpose of ousting the original jurisdiction of the Federal court, it is necessary for the movant to allege the facts and circumstances constituting the alleged fraud with such definiteness as may be sufficient for the court to base its own conclusion that a fraudulent joinder has been made, and no

REMOVAL OF CAUSES—*Continued.*

averments, however positive, that merely alleged the fraudulent joinder will be sufficient to transfer the cause to the Federal court for the determination of the jurisdictional facts there. *Ibid.*

4. *Same — Corporations — Principal and Agent.*—The plaintiff's intestate a boy of 14 or 15 years of age, was killed while employed by the defendant nonresident corporation, operating a granite quarry in this State, in drilling holes for blasting the rock, and the negligence alleged was the employment of a young and inexperienced boy to do dangerous work of this character, without instruction and with inefficient assistants. The resident managers or superintendents of the corporation were made parties defendant. The nonresident defendant filed petition and bond for removal of the cause to the Federal court upon the ground of diversity of citizenship, alleging generally a fraudulent joinder of parties, with further averment that the resident defendants were not charged with any duties respecting the intestate, but it appeared that one of them had, a short time prior to the death of the intestate, given him instructions with reference to the use of the drill he was required to use, and generally with regard to the safe methods of doing this work: *Held*, the traversable facts were not sufficiently full and definite to raise the issue of fraudulent joinder within the meaning of the removal act. *Ibid.*

REVISAL.

SEC.

367. This section applies to interrupted administration upon decedent's estate. *Fisher v. Ballard*, 326.

450. The prosecution bond is a prerequisite to the condemnation of lands, and no vested right under a repealed statute can be acquired without this having been done. *R. R. v. Oates*, 167.

479. It is not required that new matter of defense exists when action is begun; and inconsistent defenses may be pleaded. *Williams v. Hutton*, 216.

496. The court may not direct the manner in which a pleading should be made more definite. *Hansley v. Furniture Co.*, 148.

536. Refusal to give special prayers for instruction submitted after close of evidence is not reviewable. *Barringer v. Deal*, 246.

538. Refusal to give special prayers for instruction after close of evidence is not reviewable. *Barringer v. Deal*, 246.

540. Party agreeing that judge may find facts waives right to trial by jury. *Buchanan v. Clark*, 56.

554 (2). The trial judge is not required to take notes of evidence personally; and where appellants' attorney has been instructed to do so, and given ample time, he will not be heard to complain on appeal. *Buckner v. R. R.*, 201.

777. Action to impeach for fraud note of nonresident at bank cannot be maintained without personal service of process on nonresident or by attachment. *Armstrong v. Kinsell*, 125.

979. A parol trust may be created in lands in favor of grantor's children. *Jones v. Jones*, 320.

980. This section does not apply to conveyance made to son of purchaser and the purchaser thereafter retains deed to himself. *Buchanan v. Clark*, 56.

REVISAL—*Continued.*

SEC.

1567. The material issues in abandonment by the wife are marriage and separation, and the admission of separation in this case held controlling on that point. *Hooper v. Hooper*, 1.

1581. A devise upon the contingency of issue of devisee, and should she die without such issue then with limitation over, creates a contingent remainder upon the death of first taker without issue. *Rees v. Williams*, 128.

1591. One charging more than 6 per cent interest subject to the penalty for usury, applies to loan by bank to director; and knowledge of cashier is sufficient. *MacRackan v. Bank*, 24.

2633. Contention that penalty is burden upon interstate commerce must be pleaded and noticed in brief; and when accruing after arrival it is not in contravention. May be united in actions for damages. *Jeans v. R. R.*, 224.

2634. See *Jeans v. R. R.*, 224.

2646. Logging roads come within the meaning of the statute, and applies to any department of railroad being operated. *Buckner v. R. R.*, 201.

2844. Bankruptcy of principal on note sufficient evidence of insolvency to sustain surety's action for contribution. *Shuford v. Cook*, 46.

3291. Where jurisdiction of recorder's court is over petty misdemeanors, the extent of jurisdiction is resolved under this section. *S. v. Hyman*, 411.

3333. The intent to commit a criminal offense is necessary, and a verdict finding no intent is equivalent to an acquittal. *S. v. Spear*, 452.

3335. The acts of abandonment and nonsupport must be shown; consent of wife to separate not evidence of abandonment by husband; offer of husband to make home for wife, not in good faith; testimony of sheriff, that he could not find husband to serve process, immaterial in this case; admission of parts of answer held harmless. *S. v. Smith*, 475.

3431. Obtaining money upon promising to work, see *S. v. Griffin*, 154, N. C., 611. *S. v. Isley*, 491.

3432. Indictment failing to allege "fraudulently" in connection with "designedly, falsely, and feloniously," held not defective. *S. v. Claudius*, 521.

3534. Where one acting as *bona fide* agent purchases intoxicants in another State and delivers here, he is not indictable. *S. v. Wilkerson*, 431.

3615. Where an offense is defined as a misdemeanor and the punishment is for a felony, jurisdiction is not acquired by recorder's court. *S. v. Hyman*, 411.

3674. Boundary stakes placed by agreement of parties are landmarks. *S. v. Jenkins*, 527.

4305. Where the voting places of a county are established and well known, notice specifying the "various voting precincts" is sufficient. *Commissioners v. Trust Co.*, 301.

SAFE APPLIANCES. See Negligence.

SALE, POWER OF. See Trusts and Trustees; Vendor and Vendee.

SEARCH AND SEIZURE LAW. See Intoxicating Liquors.

SELF-DEFENSE. See Homicide.

SENTENCE. See Judgments.

SLANDER.

1. *Slander—Ulterior Purpose—Trial—Evidence.*—While in an action for slander it is competent for the defendant to testify that the slanderous words were uttered by him without malice, it is incompetent for him to testify as to the purpose with which he did so, uncommunicated at the time. *Barringer v. Deal*, 246.

2. *Slander — Compensatory Damages — Evidence.*—Compensatory damages may be recovered in an action for slander without specific proof that they have been suffered, when the words are libelous *per se*, their falsity is admitted, justification not pleaded, and privilege not claimed. *Ibid.*

SPIRITUOUS LIQUORS. See Indictment; Intoxicating Liquors.

STATUTES. See Usury; Constitutional Law; Corporations; Easements; Penalty Statutes; Divorce; Intoxicating Liquors.

STATUTE OF FRAUDS.

1. *Contracts, Written—Parol Agreement—Promissory Notes—Statute of Frauds.*—Where a promissory note expresses payment to be made in money, a parol contemporaneous agreement that it was otherwise to have been paid, as in this case, by the acceptance of a note of a third person, would vary or contradict the writing, and is inadmissible under the statute of frauds; but where the evidence tends to show that this note was accepted by the payee in discharge of the original note, it would establish an executed agreement if found to be true, and in that event evidence of the parol agreement would be competent as tending to show that the note of the third person when accepted was in payment or discharge of the original one. *Richards v. Hodges*, 183.

2. *Deeds and Conveyances—Parol Trusts—Statute of Frauds—Equity.*—Engrafting a parol trust upon lands conveyed is not a contradiction or variance of the terms of the writing as expressed in the deed in contemplation of the statute of frauds, for such is an incident attached to the title conveyed affecting the conscience of the grantee thereof. *Jones v. Jones*, 320.

SUPERSEDEAS. See Mortgages.

TAXATION. See Elections; Health, 1, 3, 4.

1. *Taxation—Cities and Towns—Bond Issues—Waterworks—Vote of the People—Constitutional Law—Necessaries—Interpretation of Statutes.*—Bonds issued for purpose of enlarging and improving the waterworks system of a town and authorized by legislative enactment, are for a necessary expense and valid without the question of their issue having been submitted to the qualified voters of the municipality, when the statutes do not so require; and chapter 86, Laws 1911, and chapter 201, sec. 3, Public Laws 1913, have no application. *Bain v. Goldsboro*, 102.

2. *Taxation—Cities and Towns—Waterworks—Bond Issues—Injunction—Excessive Tax—Burden of Proof.*—Where the issuance of municipal bonds for enlarging and improving the waterworks system of the town are sought to be enjoined by a taxpayer on the ground that the present tax rate is burdensome, and the issuance would increase this rate beyond the limitation placed by the statutes, the burden is

TAXATION—*Continued.*

upon the plaintiff to show that the tax rate would be unlawfully increased, which in the present case would involve the question of the increase in revenue of the town by the receipts from the water-works plant. *Ibid.*

3. *Taxation—Trade Tax—Peddlers.*—The Legislature has the power to tax trades, which are defined to be a tax upon "any employment or business embarked in for gain or profit," and includes within the definition the tax upon peddlers imposed by section 44, ch. 201, Public Laws 1913. *Smith v. Wilkins*, 135.

4. *Same — Classification — Legislative Powers—Constitutional Law.*—In taxing trades the Legislature may divide them into several classes, with different rates of taxation, subject to the limitation that the difference in the various rates shall be reasonable and each rate uniformly applicable to its respective class, the reasonableness of the classification, with their respective rates, being largely left to legislative discretion; and in the exercise of this discretion it is not required that all trades be taxed, but the Legislature may tax some of them and refuse to tax others. *Ibid.*

5. *Same—Courts.*—The power of the Legislature to provide regulations determining the different classes of trades and imposing a different tax on each class will not be interfered with unless utterly unreasonably exercised, and while the courts will interfere when this power has been exceeded, every presumption is in favor of its proper exercise, and the courts will not otherwise declare except in extreme cases and from necessity. *Ibid.*

6. *Taxation—Peddlers—Reasonable Classification.*—It is held that the difference in classification of peddlers by section 44, chapter 201. Public Laws 1913, between those on foot and with vehicles, those selling proprietary medicines with free attractions and those without, etc., furnish reasonable grounds for the classification made and the several rates of taxation prescribed by the statute. *Ibid.*

7. *Taxation — Classification — Uniformity — Exemptions—Constitutional Law.*—The Legislature having the power to tax trades, preserving the uniformity of classification, and to omit some of them, it is held that section 44, chapter 201, Public Laws 1913, exempting or excepting those engaged in the sale of books, etc., or those exchanging woolen goods for wool, is a valid exercise of the legislative discretion. *Ibid.*

8. *Same—Drummers.*—Drummers selling by wholesale do not come within the definition of the word "peddler," and hence would not be required to pay the peddler's tax prescribed by section 44, chapter 201, Public Laws 1913, should they not have been expressly excepted from its provisions. *Ibid.*

9. *Taxation—Exemptions—County Commissioners—Discretion—Constitutional Law.*—It is held in this case that the discretion vested in the county commissioners to exempt from the peddler's tax the "poor and infirm" is necessary to the administration of statutes like section 44, chapter 201, Public Laws 1913; and will not be interfered with unless arbitrarily exercised; and that the plaintiff having received his license, could not complain if it were otherwise. *Ibid.*

TAXATION—*Continued.*

10. *Taxation—Bond Issues—Polling Places—Notice.*—While it is required, for the purpose of submitting to the vote of the people the question of issuing bonds, that a correct notice of the polling places be given, this requirement is fully met when the voting places have been established and are well known to the entire electorate of the county, and the voters were fully and formally notified that the election would be held on the specified date "at the various voting precincts of the county as they are now established." Revisal, sec. 4305. *Commissioners v. Trust Co.*, 301.

TELEGRAPHS.

Telegraphs—Telegrams—Stipulations Limiting Liability.—A stipulation on the back of a telegram limiting the liability of telegraph company, which received it for transmission and delivery, to a sum not exceeding $50, whether it may be negligent or not in its duties, unless a greater value is stated in writing thereon, and an additional sum paid or agreed to be paid in proportion to its greater value, is void. *Rhyne v. Telegraph Co.*, 394.

TRESPASS. See Limitation of Actions; Criminal Law.

TRIAL BY JURY. See Constitutional Law; Easements.

TRIALS.

1. *Malicious Prosecution—Assaults—Threats—Evidence.*—Where one is engaged in doing a lawful act, and is compelled to desist therefrom and retreat by the threats of violence and display of force by another having the reasonably apparent present capacity and means of carrying his threats into execution or inflict injury, the acts of such person will be held to be the commission of an assault, as a matter of law, in the absence of further evidence as to a pacific intent on the part of the aggressor. *Humphries v. Edwards*, 154.

2. *Same—Evidence—Questions for Court.*—In an action to recover damages for malicious prosecution the only evidence upon the question of probable cause for the prosecution of the criminal action for an assault was that the defendant was marking the line between his land and that of an adjoining owner, which had been plowed over by the tenant of the latter, when the plaintiff appeared, and without provocation and with rocks in each hand, and in a threatening attitude, using aggressive language, demanded that he desist from his occupation, which, being influenced by the plaintiff's attitude, he did and left the place: *Held*, as a matter of law the evidence established a probable cause for the prosecution of the criminal action of assault, and a judgment as of nonsuit in the civil action was properly granted. *Ibid.*

3. *Malicious Prosecution—Participation—Evidence—Questions for Court.* It is necessary, in an action to recover damages for malicious prosecution, that the plaintiff show that the defendant authorized the prosecution of the criminal action; and the evidence in this case is held insufficient for that purpose, it appearing that on appeal from the justice's court the judgment there taxing the defendant with costs was reversed in the Superior Court, whereupon the solicitor voluntarily sent a bill to the grand jury, marking the defendant a State's witness, for the same assault, resulting in a trial and acquittal,

TRIALS—*Continued.*

and that the court declined the request of the solictor to adjudge the defendant to be the prosecutor. *Ibid.*

4. *Trials—Continuances—Court's Discretion—New Parties.*—The question of continuance is ordinarily a matter appealing to the discretion of the trial judge, and his action in refusing a motion for a continuance as a matter of right, for making a new party to the action at the instance of the appellant, where no change has thereby been made in the pleadings and the issues, and no suggestion that it would be prejudicial to him to immediately proceed with the trial, is not held erroneous. *Watson v. R. R.* 176,

5. *Trials—Compromise—Evidence—Witness—Bias.*—The defendant corporation was sued to recover damages for personal injury to an employee, and under cross-examination its president was required to testify, under its objection, as to conversations with the plaintiff and his attorneys, in an attempt to compromise the suit before trial, and especially as to his statements that plaintiff's attorneys were holding up the compromise because of their contingent fee; that under the plaintiff's arrangement with his attorneys he had agreed to pay too much; that he had approached the plaintiff, when he agreed at a prior term of the court not to do so, etc.: *Held*, the evidence was competent as bearing upon the bias of the witness in being unduly zealous in the defendant's behalf, and having been properly restricted by the trial judge to this purpose, its admission was not error. *Ibid.*

6. *Trials—Notes of Evidence—Judge's Notes.*—It is not required that the presiding judge shall take down the evidence upon the trial of an action, and though Revisal, 554 (2), does require that so much of the evidence as may be material to an exception taken shall be reduced to writing and entered by the judge upon the minutes of the court and filed with the clerk, the judge may require a stenographer or some one else to do so; and where the attorney for the appellant has been previously informed and given ample time on the trial to do this, and his notes with exceptions have been fully adopted in the case on appeal, he cannot be heard to complain either of its insufficiency or the failure of the judge to take the notes himself. *Buckner v. R. R.*, 201.

7. *Negligence—Trials—Evidence—Measure of Damages.*—In an action to recover damages for a personal injury, it is competent for the plaintiff to testify the regular price for the work he was engaged in which the defendant promised to pay him, an as element of damages involving the loss of compensation. *Ibid.*

8. *Escrow—Delivery—Intent—Trials—Questions for Jury.*—Where a deed is executed and given to a third party to be held in escrow, to be then given to the grantee after the death of the grantor, and the evidence is conflicting as to whether, at the time of the delivery in escrow, the grantor did so without reservation or without retaining control over it, the controlling test is the intent of the grantor, at the time, to part with the deed and put it beyond his control, which raises an issue of fact to be determined by the jury. *Huddleston v. Hardy*, 210.

TRIALS—*Continued.*

9. *Trial—Instructions, When Submitted—Appeal and Error.*—The refusal of the trial judge to give special instructions requested is not reviewable on appeal when it appears that they were submitted to the judge after the close of the evidence. Rev., secs. 536, 538. *Barringer v. Deal,* 247.

10. *Master and Servant—Safe Appliances—Trials—Negligence—Evidence—Nonsuit.*—In an action to recover damages from an employer for a personal injury alleged to have been negligently inflicted upon its employee, there was a motion as of nonsuit upon evidence tending to show that the plaintiff was employed at the time of the injury in unloading coal from a gondola car, opening at the bottom and dumping the coal into the tender of a locomotive beneath; and while he was using a pick for the purpose, as was customary with him, he was peremptorily instructed to use a shovel instead, the latter being a more dangerous method, and in consequence thereof he received the injury: *Held:* under this evidence, viewed in the light most favorable to the plaintiff, as required, a judgment of nonsuit was properly disallowed, there being sufficient evidence of defendant's actionable negligence to take the case to the jury; and, further, there was no evidence of contributory negligence. *Orr v. Telephone Co.,* 132 N. C., 691. *Lynch v. R. R.,* 249.

11. *Railroads—Car-load Shipper—Bailment—Trials—Damages—Evidence—Burden of Proof.*—In such cases, where it is shown that the car was delivered to the shipper in good condition and returned by him damaged, the burden is upon him to show that he had used ordinary care in caring for the property while under his control. *R. R. v. Baird,* 253.

12. *Verdicts, Inconsistent—Interpretation.*—While a conflict in a verdict on essential and determinative matters will vitiate it, yet the verdict should be liberally and favorably construed with a view to sustaining it; and to obtain a proper apprehension of its meaning, resort may be had to the pleadings, evidence, and the charge of the court, and it thus appearing that the verdict and judgment in this case could be properly sustained upon two of the issues answered, and that injunctive relief had been refused upon other issues apparently in conflict, the judgment rendered below is sustained. *Donnell v. Greensboro,* 330.

13. *Trials—Continuance—Court's Discretion.*—The refusal of the trial judge to grant a continuance of a case because of the absence of a witness is a matter within his discretion, and not reviewable on appeal unless this discretion has been abused, and where the trial is for murder in the first degree, and defended upon the theory that the prisoner was under the influence of a drug, at the time, which rendered him incapable of premeditation, and no evidence thereof has been offered, though it appears that opportunity under the circumstances was afforded, the refusal of a motion to continue for the absence of a witness to testify as to this fact is not reviewable. *S. v. Daniels,* 464.

14. *Prejudicial Error — New Trial — Evidence—Pleadings—Husband and Wife.*—Evidence erroneously admitted upon a trial must be prejudicial and not merely theoretical error in order to entitle the com-

TRIALS—*Continued.*

plaining party to a new trial; and where the act of abandonment (Revisal, sec. 3355) and the failure to support are not contested, it is not prejudicial error for the court to admit a part of the defendant's answer forbidden by Revisal, sec. 493, in an action for divorce brought by his wife, to the effect that the husband had sold his property, etc., and had gone to certain places beyond the State. *S. v. Smith*, 475.

15. *Spirituous Liquors—Burder of Proof—Reasonable Doubt—Prima Facie Case—Instructions.*—Where the statute makes the possession by one person of a certain quantity of spirituous liquor *prima facie* evidence of an unlawful intent to sell, the burden of the issue remains on the State to show the guilt, as charged in the indictment, beyond a reasonable doubt; and when the *prima facie* case has been established, under the provision of the statute, it does not forestall the verdict, for it only means that as evidence it is sufficient to establish the ultimate fact of guilt, and the jury may convict if they find that it is not explained or rebutted. The presumption of innocence is still with the prisoner, and the burden continues to rest upon the State to show guilt beyond a reasonable doubt. The charge of the court in this case is approved. *S. v. Wilkerson, ante*, 431. *S. v. Russell*, 482.

16. *Trials—Evidence Corroborative—Objections and Exceptions—Appeal and Error.*—Where evidence is admissible for purposes of corroboration only, exception that it was not confined to that purpose should be made upon a refusal by the court to do so at the request of the appellant duly made, or it will not be considered on appeal. *S. v. English*, 497.

17. *Trials—Evidence—Objections and Exceptions—Competent and Incompetent Testimony—Appeal and Error.*—Objections to a mass of evidence, some of which is incompetent and some competent, should specify only the incompetent evidence, or the exception will not be considered on appeal. *Ibid.*

18. *Trials—Objections and Exceptions—Rulings—Practice—Appeal and Error.*—An exception must be made and noted to the ruling of the court, if objected to, and where an objection is made to the exclusion of evidence upon the trial of the case and the witness is ordered to stand aside, with permission to the appellant to recall and further question him on the point, and the witness is not recalled under the permission granted, and no final ruling is made, there is nothing upon which an exception can be based, and the matter is not reviewable on appeal. *Ibid.*

19. *Trials—Instructions Refused—Appeal and Error.*—A party to an action must obtain leave from the trial judge to submit prayers for special instruction after the argument has commenced, and from his refusal to consider them when so tendered, no appeal will lie. *S. v. Claudius*, 521.

TRUSTS AND TRUSTEES.

1. *Trusts—Power of Sale—Cestui Que Trust—Written Request—Deeds and Conveyances—Purchaser—Application of Funds.*—A deed in trust to lands to be held to the sole and separate use of another, with

TRUSTS AND TRUSTEES—*Continued.*

certain expressed limitations over, containing a power of sale in the trustee upon the written request of the *cestui que trust*, the proceeds to be invested and held by the trustee to the same uses and purposes, confers upon the trustee with such written consent full power to convey to a *bona fide* purchaser, and the latter is not held to see to the proper application of the funds derived from the sale; and it is further held that the *cestui que trust* joining in the trustee's deed is a sufficient authorization. *Kadis v. Weil*, 84.

2. *Deeds and Conveyances—Trusts—Exceptions*—A parol trust, excepting one in favor of the grantor, may be established by parol declarations contemporarily made with the making of a deed to lands, or prior thereto and existent at the time it was executed and title passed, where, as in North Carolina, there is no controlling statute to the contrary; but the exception as to the grantor in engrafting on his deed a parol trust in his own favor does not extend to his children when it is properly shown and established that the title to the land passed to grantee, to be held in trust for them. Revisal, sec. 979 (Laws 1715, ch. 7, sec. 21). *Jones v. Jones*, 320.

3. *Same—Consideration Recited.*—The consideration recited in a conveyance of lands is open to explanation by parol, and does not conclude the parties from showing the actual consideration passed, except in so far as to prevent a resulting trust in favor of the grantor in the deed; and hence such deed reciting a valuable consideration does not prevent engrafting a parol trust on the lands conveyed when not in favor of the grantor, and sufficiently and properly proved and established. *Ibid.*

4. *Deeds and Conveyances—Parol Trusts—Statute of Frauds—Equity.*—Engrafting a parol trust upon lands conveyed is not a contradiction or variance of the terms of the writing as expressed in the deed in contemplation of the statute of frauds, for such is an incident attached to the title conveyed affecting the conscience of the grantee thereof. *Ibid.*

5. *Deeds and Conveyances — Parol Trusts — Grantor — Beneficiaries—Parties.*—A grantor in a deed may not establish, contrary to the terms of his deed, a parol trust in himself to the land conveyed, nor can other beneficiaries of the alleged trust have the trust established in their behalf, when they are not parties to the suit. *Cavanaugh v. Jarman*, 372.

USES AND TRUSTS. See Trusts and Trustees.

USURY.

1. *Usury—Definition—Interpretation of Statutes—Forfeitures.*—Usury is the taking of a greater premium for the use of money loaned than the law allows; and if the lender knowingly takes, receives, reserves, or charges a greater rate than 6 per cent per annum, he forfeits the interest if it has not been paid, and is subject to a penalty of twice this amount if the interest has been paid (Revisal, sec. 1951), and whatever the form of the transaction may be, it is usury if the rate of interest charged or received is unlawful. *MacRackan v. Bank*, 24.

2. *Uusury—Intent Inferred.*—Whenever the usurious character of the transaction is revealed on the face of the instrument, the unlawful

USURY—*Continued.*

intent to charge or receive an illegal rate of interest for the money loaned will be inferred from the instrument itself. *Ibid.*

3. *Usury—Banks and Banking—Loans to Officers—Interpretation of Statutes—In Pari Delicto.*—It is the receiving of a usurious rate of interest by the lender of money for which the statute, Revisal, sec. 1951, imposes the penalty, and the question is not affected by the fact that the loan is from a bank and made to a stockholder who is also a director of the bank and a member of its loan or discount committee; nor is the doctrine of *in pari delicto* applicable. *Ibid.*

4. *Usury—Banks and Banking—Principal and Agent—Cashier—Imputed Knowledge.*—Notice to a cashier of a bank of an illegal charge of interest for money loaned by it, contrary to Revisal, sec. 1951, is notice to the bank, and the latter is fixed with notice of a transaction of this character when upon paying the usurious interest the borrower protests to its cashier against the excessive interest he is obliged to pay for the loan. *Ibid.*

VENDOR AND VENDEE. See Contracts.

Vendor and Vendee—Sales—Merchandise in Bulk—Void Transactions—Interpretation of Statutes.—Where the provisions of chapter 623, Laws 1907, regulating the sale of the whole or a large part of a stock of merchandise other than in the usual course of the seller's business, have not been complied with, in making a sale of this character, as to giving notice to creditors, making inventory or giving bond, etc., the sale is absolutely void, the question of *bona fides* in the transaction arising only when the conditions of the statute are met. *Pennell v. Robinson*, 257.

VERDICT. See Evidence; Trials; Judgments.

VESTED RIGHTS. See Easements.

WAIVER. See Pleadings; Appeal and Errors.

Trial by Jury—Waiver—Consent—Findings by Judge—Trials—Evidence—Exceptions—Appeal and Error.—The parties to an action may waive their right to a jury by agreeing that the trial judge may find the facts upon the issues involved and declare his conclusions of law arising thereon. (Revisal, sec. 540), and where the judge has acted accordingly, the relevant and pertinent facts so found by him are conclusive on appeal when there is any sufficient legal evidence to support them. An exception to a finding of fact, on the ground that there was no evidence thereof, must be made in apt time before the judge. *Buchanan v. Clark*, 56.

WILLS.

1. *Wills—Interpretation—Intent—Rules of Construction.*—In construing a will, where there is doubt or ambiguity, the true intent and meaning of the testator should be gathered from the entire instrument, in accordance with the rules of law established for the purpose. *Dunn v. Hines*, 113.

2. *Same—Heir at Law.*—A will should not be so construed as to disinherit the heir unless this has been done by express devise, or from necessary implication from the terms of the will. *Ibid.*

WILLS—*Continued.*

3. *Wills—Interpretation — Intent—"Unmarried"—Words and Phrases.*—Where a devise is made contingent upon the devisee being "unmarried," etc., the word used must be construed with the context and as a part of it; for expressions of this character are not inflexible in their meaning and by proper interpretation should carry out the intent of the testator as gathered from the will. *Ibid.*

4. *Wills—Interpretation—Intent—Devisee First Named.*—The first taker in a will is presumably the favorite of the testator, and in doubtful cases the gift is to be construed so as to make it as effectual as to him as the language of the will, by reasonable construction, will warrant. *Ibid.*

5. *Wills—Interpretation—Intent—Contingent Limitations — "Unmarried" —Children of Age—Vesting of Estates.*—A testator devised his lands to his several children, and first, a certain tract of land to his wife for life, then to his daughter C. "during her natural life; and should she marry and have children to arrive at the age of 21 years, then to my said daughter and her children then living," etc., in fee simple; "and if my said daughter should die without marriage and children of the age of 21," etc., then with limitation over to a son who was later provided for in the will. The widow of the testator being dead, and the daughter C. being alive and having several children, one of whom had arrived at the age of 21 years, it is *Held*, that in accordance with the intent of the testator as gathered from the terms of the will, the fee simple had vested in C. and her children as tenants in common, and that they may convey an absolute fee-simple title to the land; and, further, that the arrival at full age of any one of the children was sufficient to vest the estate. *Ibid.*

6. *Wills — Widow's Dissent — Qualifications as Executrix — Right Not Barred, When.*—A widow named in her husband's will as executrix with other executors, who has qualified, but received no benefits made under the provisions of the will, and who has acted under the advice of her son-in-law, an attorney, and with the assurance of the beneficiaries competent to make them, that she would be further provided for than the will directs, and by her coexecutors that they would use their best endeavors to procure a more adequate provision for her, is not barred of her right to dissent from the will within six months from the time it had been ascertained that this further provision could not be made; and the position of the executors, that they would not be protected from the claims of minor beneficiaries, under the circumstances in this case, is held a correct one. *In re Shuford's Will*, 133.

7. *Wills—Bequests—Vested Interest—Husband and Wife.*—A bequest for the annual payment of a sum of money to a daughter of a testator, the benficiary dying after the testator's death, leaving a husband and children, but no will, is held to vest the interest in the child named, and at her death the payment should be made to her husband. *Ibid.*

8. *Wills—Construction—Intent Clearly Expressed.*—In this controversy to construe the will of the deceased, it is held that the intention of the testator is clearly and unambiguously expressed, leaving nothing to interpretation. *Potts v. Potts*, 385.