NORTH CAROLINA REPORTS

VOL. 165

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1914

(IN PART)

BY

ROBERT C. STRONG

STATE REPORTER

ANNOTATED THROUGH VOL. 230.

The numbers in parenthesis following the annotation indicate the number of the digest in the annotated case which is discussed in the case cited. The letters following the numbers indicate the treatment in the cited case: S.c., same case; c, cited; b, converse of principle applied; d, distinguished; f, cited as controlling; g, cited with approval; j, cited in concurring or dissenting opinion; l, limited; o, overruled; p, parallel; q, questioned.

RALEIGH
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1950

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2 Iredell Equity	"	37	"
3 Iredell Equity	"	38	"
4 Iredell Equity	"	39	"
5 Iredell Equity	"	40	"
6 Iredell Equity	"	41	"
7 Iredell Equity	"	42	"
8 Iredell Equity	"	43	"
Busbee Law	"	44	"
Busbee Equity	"	45	"
1 Jones Law	"	46	"
2 Jones Law	"	47	"
3 Jones Law	"	48	"
4 Jones Law	"	49	"
5 Jones Law	"	50	"
6 Jones Law	"	51	"
7 Jones Law	"	52	"
8 Jones Law	"	53	"
1 Jones Equity	"	54	"
2 Jones Equity	"	55	"
3 Jones Equity	"	56	"
4 Jones Equity	"	57	"
5 Jones Equity	"	58	"
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OF THE

SUPREME COURT OF NORTH CAROLINA

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

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GEORGE H. BROWN,
WILLIAM A. HOKE,
WILLIAM R. ALLEN.

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ASSISTANT ATTORNEY-GENERAL:

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SUPREME COURT REPORTER:

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

FOR 1913

Name.	*District.*	*County.*
W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
R. B. Peebles	Third	Northhampton.
F. A. Daniels	Fourth	Wayne.
H. W. Whedbee	Fifth	Pitt.
O. H. Allen	Sixth	Lenoir.
C. M. Cooke	Seventh	Franklin.
George Rountree	Eighth	New Hanover.
C. C. Lyon	Ninth	Bladen.
W. A. Devin	Tenth	Granville.
H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
W. J. Adams	Thirteenth	Moore.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
E. B. Cline	Seventeenth	Catawba.
M. H. Justice	Eighteenth	Rutherford.
Frank Carter	Ninteenth	Buncombe.
G. S. Ferguson	Twentieth	Haywood.

SOLICITORS

Name.	*District.*	*County.*
J. C. B. Ehringhaus	First	Pasquotank.
Richard G. Allsbrook	Second	Edgecombe.
John H. Kerr	Third	Warren.
Walter D. Siler	Fourth	Chatham.
Charles L. Abernethy	Fifth	Carteret.
H. E. Shaw	Sixth	Lenoir.
H. E. Norris	Seventh	Wake.
H. H. Lyon	Eighth	Columbus.
N. A. Sinclair	Ninth	Cumberland.
S. M. Gattis	Tenth	Orange.
S. P. Graves	Eleventh	Surry.
John C. Bower	Twelfth	Davidson.
A. M. Stack	Thirteenth	Union.
G. W. Wilson	Fourteenth	Gaston.
W. C. Hammer	Fifteenth	Randolph.
Thomas M. Newland	Sixteenth	Caldwell.
F. A. Linney	Seventeenth	Watauga.
A. Hall Johnston	Eighteenth	McDowell.
R. R. Reynolds	Nineteenth	Buncombe.
Felix E. Alley	Twentieth	Jackson.

LICENSED ATTORNEYS, SPRING TERM, 1914

Name.	*County.*
Edgar Oakes Achorn	Moore.
James McDuffy Alexander	Buncombe.
Lowry Axley	Cherokee.
Charles Boon Bolick	Macon.
Edwin Thomas Burton	Pender.
William Baugham Campbell	Beaufort.
Claude Carl Canaday	Johnston.
Walter Watson Cook	Cumberland.
William Summey Coulter	Catawba.
William Henry Harrison Cowles	Iredell.
Orville Thomas Davis	Haywood.
William Cleveland Davis	Mecklenburg.
Gudger Wayne Edwards	Madison.
William Alexander Efird	Buncombe.
Robert Emmett Hamlett	Montgomery.
Harry Burgwyn Hannah	Chatham.
David Anderson Houston	Union.
Josiah Purnell Johnson	Mecklenburg.
John Rockwell Kenyon	Catawba.
Ralph Vincent Kidd	Mecklenburg.
Dan Bryant King	Lee.
Luther Mills Kitchin	Halifax.
Loomis Franklin Kluttz	Catawba.
Joseph Gilmer Leatherwood	Haywood.
Joseph Raymond Lee	Duplin.
Joseph Alden Lyon	Bladen.
William Lenoir Morris	Forsyth.
William Holt Oates	Henderson.
Alexander Bate Outlaw	Pasquotank.
Ezra Parker	Johnston.
Marvin Lee Ritch	Mecklenburg.
Julius Addison Rousseau	Wilkes.
Gordon Bennett Rowland	Wake.
Ernest Cofield Ruffin	Edgecombe.
Paris Cecil Smith	Buncombe.
Hoyt Patrick Taylor	Hertford.
Walter Frank Taylor	Duplin.
Samuel Farris Teague	Wayne.
Edward Lloyd Tilley	Durham.
Ernest Rudolph Tyler	Bertie.
Fitzhugh Ernest Wallace	Duplin.
Roy Webster	South Carolina.
William Claude West	Macon.
Warren Rand Williams	Lee.
Jesse Franklin Wilson	Harnett.
John Lisbon Woodward	Haywood.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1914.

SUPREME COURT

The Supreme Court of North Carolina meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place on the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

First District	September	1
Second District	September	8
Third District	September	15
Fourth District	September	22
Fifth District	September	29
Sixth District	October	5
Seventh District	October	12
Eighth and Ninth Districts	October	19
Tenth and Eleventh Districts	October	26
Twelfth District	November	2
Thirteenth District	November	9
Fourteenth District	November	16
Fifteenth and Sixteenth Districts	November	23
Seventeenth and Eighteenth Districts	November	30
Nineteenth District	December	7
Twentieth District	December	14

SUPERIOR COURTS, FALL TERM, 1914

The parenthesis numeral following the date of a term indicates the number of weeks during which the court may hold.

THIS CALENDAR IS UNOFFICIAL.

FIRST JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Carter.*

Pasquotank—July 6 (1); †Sept. 21 (2); Nov. 16 (1).
Camden—†July 20 (1); Nov. 9 (1).
Gates—Aug. 3 (1); Dec. 14 (1).
Washington—Aug. 10 (1).
Perquimans—†Aug. 17 (1); Nov. 2 (1).
Currituck—Sept. 7 (1).
Chowan—Sept. 14 (1); Dec. 7 (1).
Beaufort—†Oct. 5 (2); Nov. 23 (1); †Dec. 21 (1).
Hyde—Oct. 19 (1).
Dare—Oct. 26 (1).
Tyrrell—Nov. 30 (1).

SECOND JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Ferguson.*

Nash—Aug. 31 (1); Oct. 12 (1); Nov. 30 (2).
Wilson—Sept. 7 (1); Oct. 5 (1); †Nov. 16 (2); Dec.* 21 (1).
Edgecombe—*Sept. 14 (1); †Nov. 2 (2).
Martin—Sept. 21 (2); Dec. 14 (1).

THIRD JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Bond.*

Northampton—‡Aug. 3 (1); Nov. 2 (2).
Halifax—Aug. 24 (2); Nov. 30 (2).
Bertie—Sept. 7 (1); Nov. 16 (2).
Warren—Sept. 21 (2).
Vance—Oct. 5 (2).
Hertford—Oct. 19 (2).

FOURTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Connor.*

Lee—July 20 (2); †Oct. 26 (1); Nov. 9 (1).
Chatham—†Aug. 10 (1); Nov. 2 (1).
Johnston—*Aug. 17 (1); †Sept. 28 (2); Dec. 14 (2).
Wayne—Aug. 24 (2); †Oct. 12 (2); Nov. 30 (2).
Harnett—Sept. 7 (2); †Nov. 16 (2).

FIFTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Peebles.*

Jones—Aug. 17 (1); Dec. 7 (1).
Pitt—†Aug. 24 (1); *Aug. 31 (1); †Sept. 21 (1); †Oct. 5 (1); †Nov. 9 (1); *Nov. 16 (1); †Dec. 14 (1).
Craven—‡Sept. 7 (2); *Oct. 12 (1); †Nov. 23 (2).
Carteret—Oct. 19 (1).
Pamlico—Oct. 26 (2).
Greene—Dec. 21 (1).

SIXTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Daniels.*

Onslow—†July 20 (1); Oct. 12 (1); †Dec. 7 (1).
Duplin—July 27 (1); †Aug. 31 (2); Sept. 14 (1); Nov. 23 (2); †Dec. 21 (1).
Sampson—Aug. 10 (2); †Sept. 21 (2); Oct. 26 (2).
Lenoir—*Aug. 24 (1); ‡Oct. 19 (1); †Nov. 9 (2); *Dec. 14 (1).

SEVENTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Whedbee.*

Wake—*July 13 (1); *Sept. 14 (1); †Sept. 21 (3); *Oct. 12 (1); †Oct. 26 (2); *Nov. 9 (1); †Nov. 30 (1); *Dec. 7 (1); †Dec. 14 (1).
Franklin—†Aug. 31 (2); *Oct. 19 (1); †Nov. 16 (2).

EIGHTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Allen.*

Brunswick—†Aug. 24 (1); Oct. 12 (1).
Columbus—Aug. 31 (2); †Nov. 23 (2); *Dec. 21 (1).
New Hanover—Sept. 14 (2); †Oct. 26 (2); Nov. 16 (1); †Dec. 7 (2).
Pender—†Sept. 28 (2); Nov. 9 (1).

NINTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Cooke.*

Robeson—*July 6 (2); *Sept. 7 (1); †Sept. 14 (1); †Oct. 5 (2); *Nov. 9 (2); Dec. 14 (1).
Bladen—†Aug. 10 (1); Oct. 19 (1).
Hoke—Aug. 17 (1); Nov. 30 (1).
Cumberland—*Aug. 31 (1); †Sept. 21 (2); †Oct. 26 (2); *Nov. 23 (1).

TENTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Rountree.*

Granville—Aug. 10 (1); Nov. 16 (2).
Person—Aug. 17 (1); Oct. 26 (1).
Alamance—*Aug. 24 (1); †Sept. 14 (2); †Oct. 12 (2); *Nov. 30 (1).
Durham—*Aug. 31 (1); †Sept. 28 (2); †Nov. 9 (1); *Dec. 14 (1).
Orange—Sept. 7 (1); Dec. 7 (1).

ELEVENTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Lyon.*

Ashe—July 13 (2); Oct. 19 (1).
Forsyth—*July 27 (2); †Sept. 14 (2); Oct. 5 (2); †Nov. 9 (2); *Dec. 14 (1).

Rockingham—*Aug. 10 (2); †Nov. 23 (2); *Dec. 21 (1).
Caswell—Aug. 24 (1); Dec. 7 (1).
Surry—Aug. 31 (2); Oct. 26 (2).
Alleghany—Sept. 28 (1).

TWELFTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Devin.*

Davidson—Aug. 3 (2); †Nov. 23 (2).
Guilford—†Aug. 17 (2); †Sept. 7 (2); *Sept. 21 (1); †Sept. 28 (1); †Oct. 12 (2); †Nov. 9 (2); †Dec. 7 (1); *Dec. 14 (1); †Dec. 21 (1).
Stokes—*Oct. 26 (1); †Nov. 2 (1).

THIRTEENTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Lane.*

Moore—July 6 (1); Aug. 17 (1); †Sept. 21 (1); Dec. 14 (1).
Stanly—July 13 (1); †Oct. 12 (1); Nov. 23 (1).
Richmond—*July 20 (1); †Sept. 7 (1); *Sept. 28 (1); †Dec. 7 (1).
Union—*Aug. 3 (1); †Aug. 24 (2); Oct. 19 (2); †Dec. 21 (1).
Anson—*Sept. 14 (1); †Oct. 5 (1); †Nov. 16 (1).
Scotland—Nov. 2 (1); Nov. 30 (1).

FOURTEENTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Shaw.*

Mecklenburg—*July 13 (2); *Aug. 31 (1); †Sept. 7 (2); *Oct. 5 (1); †Oct. 12 (2); †Nov. 2 (2); *Nov. 16 (1); †Nov. 23 (2).
Gaston—*Aug. 24 (1); †Sept. 21 (2); *Oct. 26 (1); Dec. 7 (1).

FIFTEENTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Adams.*

Montgomery—*July 13 (1); †Sept. 28 (2).
Randolph—†July 20 (2); *Sept. 7 (1); Dec. 7 (2).
Iredell—Aug. 3 (2); Oct. 19 (2).
Cabarrus—Aug. 17 (2); Nov. 2 (2).
Davie—Aug. 31 (1); Nov. 16. (1).
Rowan—Sept. 14 (2); †Oct. 12 (1); Nov. 23 (2).

SIXTEENTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Harding.*§

Lincoln—July 20 (1); Sept. 7 (1); Dec. 21 (1).
Cleveland—July 27 (2); Nov. 2 (2).
Burke—Aug. 10 (2); †Oct. 5 (2); †Dec. 7 (2).
Caldwell—Aug. 24 (2); †Nov. 16 (2).
Polk—Sept. 21 (2).

SEVENTEENTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Long.*

Catawba—July 13 (2); Nov. 2 (2).
Mitchell—†July 27 (2); Nov. 16 (2).
Wilkes—Aug. 10 (2); †Oct. 5 (2).
Yadkin—Aug. 24 (1); Nov. 30 (1).
Watauga—Sept. 7 (2).
Alexander—Sept. 21 (2).
Avery—Oct. 19 (2).

EIGHTEENTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Webb.*

McDowell—July 13 (2); Sept. 21 (2).
Rutherford—†Aug. 24 (2); Oct. 19 (2); †Dec. 14 (1).
Transylvania—Sept. 7 (2).
Henderson—*Oct. 5 (2); †Nov. 16 (2).
Yancey—Nov. 2 (2).

NINETEENTH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Cline.*

Buncombe—*July 13 (2); †Aug. 17 (2); *Sept. 21 (2); †Oct. 5 (3); †Oct. 26 (2); *Nov. 9 (1); †Nov. 30 (3).
Madison—Sept. 7 (2); †Nov. 16 (2).

TWENTIETH JUDICIAL DISTRICT.

FALL TERM, 1914—*Judge Justice.*

Haywood—July 13 (2); Sept. 21 (2).
Swain—July 27 (2); Oct. 26 (2).
Cherokee—Aug. 10 (2); Nov. 9 (2).
Macon—Aug. 24 (2); Nov. 23 (2).
Graham—Sept. 7 (2); Dec. 7 (2).
Clay—Oct. 5 (1).
Jackson—Oct. 12 (2).

*Criminal cases. †Civil cases. ‡Jail and civil cases. §Succeeded by Judge Duls.
Compiled by permission from calendar of Mr. A. B. Andrews, Jr., of the Raleigh Bar.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—HENRY G. CONNOR, Judge, Wilson.
Western District—JAMES E. BOYD, Judge, Greensboro.

EASTERN DISTRICT.

Terms.—District terms are held at the time and place, as follows:

Raleigh, fourth Monday after the fourth Monday in April and October. ALEX. L. BLOW, Clerk; LEO. D. HEARTT, Deputy Clerk.

Elizabeth City, second Monday in April and October. HARRY T. GREENLEAF, JR., Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. ARTHUR MAYO, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. WALTER DUFFY, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. SAMUEL P. COLLIER, Deputy Clerk, Wilmington.

OFFICERS.

F. D. WINSTON, United States District Attorney, Windsor.

E. M. GREENE, Assistant United States District Attorney, New Bern.

W. T. DORTCH, United States Marshal, Goldsboro.

ALEX. L. BLOW, Clerk United States District Court at Raleigh for the Eastern District of North Carolina, Raleigh.

LEO. D. HEARTT, Deputy Clerk, Raleigh,

WESTERN DISTRICT.

Terms.—District terms are held at the time and place, as follows:

Greensboro, first Monday in April and October. J. M. MILLIKEN, Clerk, Greensboro.

Statesville, third Monday in April and October.

Asheville, first Monday in May and November. W. S. HYAMS, Deputy Clerk, Asheville.

Charlotte, second Monday in June and December.

(Terms of Court for Wilkesboro and Salisbury not given.)

OFFICERS.

A. E. HOLTON, United States District Attorney, Winston.

A. L. COBLE, Assistant United States District Attorney, Statesville.

WILLIAM E. LOGAN, United States Marshal, Greensboro.

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OPENING OF THE NEW SUPREME COURT BUILDING, 2 FEBRUARY, 1914

ADDRESS OF CHIEF JUSTICE CLARK

Ladies and Gentlemen: I am commissioned by the Court to express our appreciation to the Legislative Department of the State for these more commodious quarters, and to Governor Craig of the Executive Department, who has made the presentation so handsomely. A fireproof building was especially demanded for the safety of the valuable records and books, whose loss could not be repaired.

When the English courts which had so long occupied the great hall of William Rufus were removed a short distance there were lawyers who insisted that it was contrary to Magna Carta, because that instrument required the Court to be located "in some certain place." That famous instrument was a contract between King John on the one side and a few barons and bishops on the other, restricting the King by certain obligations. It was a singular perversion that what had been created as a restriction upon the King should be twisted into a limitation upon the power of the people centuries later. We have had in this country similar illogical applications attempted of Magna Carta, but not in this particular form.

Twenty-six years ago, when the Court removed from the Capitol to our late quarters, similar ceremonies to these were had, on 3 March, 1888, when Governor Scales presented the new building, which was accepted by Chief Justice Smith. On that occasion the full-length portrait of Chief Justice Ruffin, which now hangs over the door, was presented in a speech by Governor Scales, and the portrait of Judge Ashe by Col. Thomas S. Kenan. This was the beginning of the splendid collection on these walls, which now embraces the portraits of all the ex-judges, except those that are promised; and we have also begun a collection of portraits of the Leaders of the Bar which are being placed on the walls of our new Library.

It may well be said that when the Court decides it is composed not merely of the sitting members, but we have the recorded opinions and, so to speak, the potential presence of the illustrious dead, who have sat on this Court with so great honor to themselves and to the State. They still share in and largely shape the course of judicial decisions.

> "In Israel's court there sat no Abethden
> With hands more clean or more discerning eyes"

than theirs.

We are deeply impressed with the great responsibility which rests upon us to keep the course of justice ever smooth and true. We know

that through these doors there will come many generations of lawyers to the debate of high questions, and that through that other door judge after judge will come, one after another, at the bidding of the sovereign people, to take their seats upon this Bench to administer justice, and, as in Macbeth, "another holds a glass that shows us many more." In their turn they will do what in them lies to accord the right—as it is given them to see the right—in the due administration of the laws which shall be enacted by the representatives of a free people. With yet unmolded tongues, and it may be in accents yet unknown, they will pronounce their decisions from this Bench.

Welcome within these walls, in this calm atmosphere, shall ever be the debate of minds intent on the search for truth and justice. But the people of this State shall demand that in the discussion and decision of matters in this their highest court, and their ultimate tribunal to pass upon matters touching their lives, their liberties, and their property, passion shall have no power, party rage no place, and that prejudice shall die at the door. Here,

> "Far off the noises of the world retreat;
> The loud vociferations of the street
> Become an undistinguishable roar.
> The tumult of the time disconsolate
> To inarticulate murmurs dies away
> While the eternal ages watch and wait."

We have faith to believe that as long as this building stands and the memories of our predecessors and of ourselves shall abide, the decisions rendered here will ever be for even and exact justice to all men, without fear and without favor.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1914

JOHN W. TOWE, SR., ADMINISTRATOR, v. ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 18 February, 1914.)

1. Railroads—Duty of Trespasser—Frightened Child—Contributory Negligence—Evidence.

The doctrine that an engineer of a moving train has the right to expect a trespasser on the track ahead to step from the track to a place of safety when he is apparently in possession of his faculties, and the conditions will allow, has no application to a child 10 years of age upon the track, apparently so frightened as to be incapable of exercising this degree of care for its own safety.

2. Same—Negligence—Trials—Nonsuit—Instructions.

Where there is evidence tending to show that an engineer on a train consisting of an engine and two cars, running 7 or 8 miles an hour, has failed to keep a lookout ahead, and through this neglect he has failed to see a 10-year-old child on the track ahead, in time to have stopped the train to avoid killing it, the child apparently so frightened as to have lost the degree of care which should have caused him to leave the track; and also failed to see the signals for him to stop the train, given by another person ahead, near the track; the contributory negligence of the child will not bar the right of his intestate to recover for his negligent killing thus caused; and the question of defendant's negligence is one for the jury under proper instructions from the court. The charge in this case is approved.

APPEAL by defendant from *Connor, J.*, at October Term, 1913, of WASHINGTON.

(2) Civil action, tried upon these issues:

1. Was the death of plaintiff's intestate caused by the negligence of defendant, as alleged? Answer: Yes.

2. Did plaintiff's intestate by his own negligence contribute to his death, as alleged? Answer: No.

3. What damages, if any, is the plaintiff entitled to recover? Answer: $1,000.

From the judgment rendered, defendant appealed.

Ward & Grimes, P. H. Bell, for plaintiff.

Gaylord & Gaylord for defendant.

BROWN, J. The intestate of the plaintiff, his son, about 10 years of age, was killed by defendant's engine while attempting to cross the railroad track.

The evidence tends to prove that the boy came down the defendant's switch track from a lumber mill onto the Y while the train composed of an engine and two flat cars was approaching at the rate of 7 or 8 miles an hour.

There was a switchman just ahead or a little to his right, who saw him, and, facing the boy and the approaching engine, and appreciating his danger, threw up his hands to the engineer to stop, and hollered to the boy to go down the bank. The track where the boy stood was on an embankment, and the embankment was steep, with bushes and briers, and the boy was barefooted.

The boy saw his peril and began to run, evidently frightened. He started to go down the bank, and turned back and continued his running; all the time the engine gaining on him. As the engine approached, the boy in his alarm sprang up the track, and the engine ran on him and he was killed. The path he was running on is just at the edge of the ties, and the engine beam came out to the end of the ties. The boy was hit by the beam and killed.

The defendant contends that in any view of the evidence the boy was guilty of such contributory negligence as bars recovery, and that, therefore, the motion to nonsuit should have been granted.

(3) This position is hardly tenable. Assuming that the boy was guilty of negligence, himself, there is abundant evidence that neither the engineer nor the fireman was keeping a lookout in the direction in which they were going.

If a proper lookout had been kept, the engineer could probably have seen the dangerous predicament of the boy in the time he had to have stopped the engine. There were only two cars attached to the engine,

and it was running only 7 or 8 miles an hour, and could have been very readily stopped. We recognize the rule as laid down in *Beach's case,* 148 N. C., 153, and *Abernathy's case,* 164 N. C., 91, that an engineer on a moving train has the right to expect that a trespasser on the track will exercise due care, and will step off the track; but in this case it is a fair inference which the jury may well have drawn from the evidence, that if a proper lookout had been kept, the engineer would have discovered the dangerous situation of the boy in time to have stopped the train. He would have seen the frightened child running along the narrow path of the embankment, and would have seen the signals made to stop. Under such circumstances, it would have been his duty to resolve all doubts in favor of human life, and to at once apply his emergency brake and stop his train. His Honor presented this view of the case very clearly in these words:

"If the jury shall find from the evidence that plaintiff's intestate was a boy of 10 years of age, and on account of his tender years was of immature judgment and discretion, and not capable of exercising that degree of care for his safety which a grown person would have exercised under the same circumstances, and shall further find that from the time that he was seen, if he was seen by the engineer or other employees of defendant on the train, until he was killed, was in an unsafe and dangerous place, and shall further find that on account of his size, his manner, and such other circumstances as the jury shall find existed during the time, the engineer or other employees of defendant on the train could, or should by the exercise of reasonable care and caution, have discovered that he was a child of immature judgment, lacking in discretion, and that he was in an unsafe place, and was frightened or panic-stricken, then (4) they owed intestate the duty to do all in their power, at all times after they discovered or should have discovered these facts, to avoid any injury to him, and, if necessary, should have given him warning of his danger, slackened the speed of the train, or stopped it if in their power to do so."

The assignments of error, except the motion to nonsuit, all relate to the charge, and we think they are without merit.

No error.

Cited: Smith v. Miller, 209 N.C. 172 (1p) (2p).

E. E. ROBERTSON v. PLYMOUTH LUMBER COMPANY.

(Filed 18 February, 1914.)

1. Principal and Agent—Evidence—Declarations of Agent.

Where an agent of the defendant has been negotiating as such agent, for the rental of plaintiff's boat, evidence in plaintiff's behalf that the agent told the witness to tell plaintiff the defendant had decided to take the boat at a certain rental, keep it in good repair, and return it in good condition, constitutes the contract itself which the agent had general authority to make in behalf of the principal, and is not the narration of a past transaction; and is competent in the plaintiff's action to recover damages under the contract.

2. Principal and Agent—Ratification—Evidence.

Where the defendant has used a boat in the conduct of its business rented by its general agent for the purpose of transporting its laborers to and from their work and for other purposes, furnished the gasoline and oil, and there is evidence that the laborers were required to pay certain transportation charges which the defendant deducted from their wages, the evidence is sufficient upon the question of the defendant's ratification of the acts of its agent; and evidence in defendant's behalf that the transaction was a personal one to the agent, that he was paid the transportation fares and charges, raises a question for the jury.

3. Contracts—Breach—Damages—Negligence.

Where A. enters into a contract with B. for the renting of a boat, wherein it is agreed that A. will keep it in good repair and return it in good condition, and the boat is returned in a damaged condition, A. is liable to B. for the damages arising from the breach of contract, irrespective of the question of negligence.

(5) APPEAL by defendant from *Connor, J.*, at September Term, 1913, of MARTIN.

Civil action, tried upon these issues:

1. Was the plaintiff's boat injured by the negligence of defendant, as alleged? Answer: Yes.

2. If so, what damage did plaintiff sustain? Answer: $250.

From the judgment rendered, defendant appealed.

H. W. Stubbs for plaintiff.

Gaylord & Gaylord for defendant.

BROWN, J. The action is to recover damages for failure to return plaintiff's gas boat in good condition. The defendant denies that it hired the boat or that it was injured by its negligence.

The defendant excepts to the ruling of the court permitting Thomas Hopkins, a witness for plaintiff, to testify: "Later, Horton told me to

tell Robertson that Plymouth Lumber Company had decided to take the boat, and would pay every two weeks, and would keep her in good repair and return her in good condition."

It is contended that the declaration of Horton is that of an agent relating to a past transaction, and is incompetent as against the principal under the rule laid down in *Styles v. Manufacturing Co.*, 164 N. C., 376; *Rumbough v. Impr. Co.*, 112 N. C., 752; *Southerland v. R. R.*, 106 N. C., 105; and other similar cases.

The declaration of Horton is not the recital of a past occurrence. It was the contract itself, made with plaintiff Robertson through the mediation of Hopkins, and no other contract than that was made. Robertson testifies:

"Boat was rented in February, 1911. I had been logging up river. Horton bought my timber and O. K.'d statement. I would take statement to defendant company, who would pay me. I accepted contract of rental at $2 per week as conveyed to me by Hopkins, and (6) never received any rent. My boat was damaged about $350."

Horton was the general manager of the defendant's logging business, and had power to hire and discharge laborers, and to fix their wages. The boat was hired for the purpose of carrying the laborers to and from their work.

There is abundant evidence to sustain the position that when Horton delivered the message to Hopkins to be given to the plaintiff, he was acting for the defendant, and within the scope of his agency. The contract as thus made through Hopkins was accepted by the plaintiff and the boat delivered to the defendant.

There is evidence sufficient to go to the jury that the defendant ratified Horton's contract. The laborers were required to pay 25 cents per week passage money, and that sum was deducted by the defendant from their pay. Although Horton testifies that he hired the boat as a personal transaction, and that this deduction was made for his benefit, the real truth of the matter was eminently a question for the jury.

The defendant company used the boat in transporting logging gear from its mill in Plymouth to the woods, and also furnished the gasoline and oil to run the boat with.

We think the declaration objected to was competent as made in the scope of Horton's agency, and while acting for the defendant in the furtherance of its business, and comes within the rule enunciated in *Gazzam v. Insurance Co.*, 155 N. C., 340:

"Competency of the declarations of an agent of a corporation rests upon the same principle as the declaration of an agent of an individual. If they are a 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 same business about which the declaration is made, they are competent."

The defendant further excepts because motion to nonsuit was denied.

(7) There is abundant evidence that the only contract made was the one testified to by Hopkins and accepted by the plaintiff. It is in evidence that the engineer, Twiddy, in the employ of the defendant, was in charge of the boat, and being drunk at the time, carelessly ran the boat over an obstruction in the river and damaged it.

This is sufficient evidence of negligence, even if it is necessary to prove negligence. But under the contract as testified to by Hopkins, it is only necessary to prove a breach of the contract, viz., that the boat was not kept in good repair nor returned in good condition, and there is abundant evidence of that.

No error.

Cited: Sawyer v. Wilkinson, 166 N. C. 497 (3d); *Fleming v. R. R.,* 168 N. C. 250 (1d); *Cooke v. Veneer Co.,* 169 N. C. 493 (3f); *Sams v. Cochran,* 188 N. C. 735 (3f); *Lacy v. Indemnity Co.,* 193 N. C. 182 (3f).

MRS. LAURA SULLIVAN v. GEORGE W. BLOUNT ET AL.

(Filed 18 February, 1914.)

1. Deeds and Conveyances—Boundaries—Evidence—Declarations.

Declarations are competent as tending to show the lines and corners stated in a deed, when the declarant is dead at the time they were offered in evidence, when made by him before a controversy had arisen as to the boundary, and when he was disinterested at the time he made them.

2. Same—Adjoining Owner—Interest.

Declarations made by an adjoining owner of lands to the *locus in quo* of corners and boundaries are not incompetent when not made in his own interest, and otherwise competent.

3. Deeds and Conveyances—Boundaries—General Reputation — Remoteness—Evidence.

Evidence of general reputation is competent in the location of private boundaries if the reputation had its origin at a time comparatively remote, had existed before the controversy, and attached to some monument of boundary or natural object, in this case a holly tree; and a period of forty years is held to be remote within the meaning of the law.

4. Same—Corroborative Evidence.

Where declarations of the location of a corner or boundary stated in a deed is sufficiently remote and otherwise competent, evidence of a declaration subsequently made is competent in corroboration.

5. Deeds and Conveyances—Boundaries—General Reputation—Ownership of Lands—Evidence.

While evidence of reputation may be competent to locate a corner or boundary given in a deed, it cannot be admissible to prove ownership of the land.

APPEAL by defendants from *Connor, J.*, at September Term, (8) 1913, of MARTIN.

This is an action to recover the value of certain timber trees, cut by the Plymouth Lumber Company on certain land claimed by the plaintiff Sullivan and the defendant Blount, who own adjoining tracts of land.

The real dispute, and upon which the whole case depends, is as to the location of the beginning corner of the land of the plaintiff, known as the Sandy Bottom tract, which is described in the deed as a holly, the defendant claiming that the holly is at the figure 1 on the plat, and the plaintiff that it is at the letter A, which is east of the figure 1.

The plaintiff, among other things, testified: "About forty years ago, when I was a girl, I was riding with Rev. Clayton Moore, who owned a tract of land adjoining 'Sandy Bottom,' the land defendant now owns. Rev. Moore is now dead. There was then no controversy about this beginning corner, nor the other boundaries of 'Sandy Bottom' tract, and he had no interest in the 'Sandy Bottom' tract of land. On this occasion he pointed out this holly, now claimed by me, and told me it was the corner of his land and the corner of 'Sandy Bottom' tract of land."

Defendant Blount objected, because it appeared that he owned at the time an adjoining tract of land, and that he was interested in locating the holly as the corner of his own land.

Objection overruled, and defendant Blount excepted.

She further testified: "That she knew Mr. Goodman Darden, an old man who lived in the neighborhood and owned land adjoining the 'Sandy Bottom' tract on the east. He has been dead many years; had no interest in the 'Sandy Bottom' tract; and many years ago, when there was no controversy about the beginning corner or other boundaries of 'Sandy Bottom' tract he pointed out to me the holly now claimed by me as the beginning corner of the Sandy Bottom tract of land (9) and as one of the corners of his land."

The defendant Blount objected on the ground that it appeared he owned an adjoining tract of land, and was interested in locating his own corner. Objection overruled, and defendant Blount excepted.

D. Allen, a witness for plaintiff, testified: "Am 56 years old. My father, who has been dead many years and had no interest in 'Sandy Bottom' tract of land or its boundaries, and when there was no controversy about the beginning or other boundaries of 'Sandy Bottom' tract, pointed out to me the holly as now claimed by Mrs. Sullivan as the beginning corner of Sandy Bottom tract of land. That when I can first recollect, more than forty years ago, this holly was, by common reputation in the neighborhood, known as the beginning corner of the 'Sandy Bottom' tract of land. It is an old holly, and looked forty-five years ago about as it does now. Was, when I can first recollect, marked as a corner. The marks on it were then old. My father owned land adjoining 'Sandy Bottom' tract on the east."

The defendant Blount objected because it appeared that Mr. Allen's father owned an adjoining tract of land. Objection overruled, and defendant Blount excepted.

Samuel Darden, a witness for the plaintiff, testified to declarations of his father, Goodman Darden, substantially like those testified to by the plaintiff, and further, that "over forty years ago this holly, claimed by Mrs. Sullivan, was by common reputation in the neighborhood known as the beginning corner of the Sandy Bottom tract of land."

To this testimony defendant Blount objected. Objection overruled, and defendant excepted.

W. W. Ange, a witness for plaintiff, testified: "Am 45 years of age and am a surveyor. Many years ago my father, who was a surveyor, and who is now dead, and had no interest, and when there was no controversy about the beginning or other boundaries of the Sandy Bottom tract of land, pointed out to me the holly, now claimed by Mrs. Sullivan as the beginning corner of the Sandy Bottom tract of land. (It was the
(10) common neighborhood reputation that the corner at 'A' was the corner of Sandy Bottom and the old Duckinfield corner.)"

To the foregoing testimony in parentheses the defendants objected; objection overruled, and defendants excepted.

The defendants requested the court to charge the jury: "If the jury believe all the evidence, they shall answer the first issue in favor of the defendants." This was refused, and defendant Blount excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

Gaylord & Gaylord for plaintiff.

S. A. Newell and H. W. Stubbs for defendant.

ALLEN, J. It is well settled in this state that declarations are competent as to the location of lines and corners when it appears (1) that the declarant is dead at the time the declaration is offered as evidence; (2) that the declaration was made before a controversy had arisen as to the boundary; (3) that the declarant was disinterested at the time the declaration was made. *Sasser v. Herring,* 14 N. C., 340; *Bethea v. Byrd,* 95 N. C., 311; *Hemphill v. Hemphill,* 138 N. C., 504.

The declarations offered in evidence by the plaintiff meet every requirement of the law, as they are declarations of deceased persons, made *ante litem motam,* and the declarants not only had no interest in the Sandy Bottom tract of land, the boundaries of which are in controversy, but their declarations were against interest, as it would have been advantageous to them to establish the corner at the figure 1, instead of at the letter A, as their lands were east of the land of the plaintiff, and the letter A is east of the figure 1.

The fact that the declarant owns an adjoining tract of lands does not render the declarations incompetent (*Bethea v. Byrd,* 95 N. C., 309; *Lewis v. Lumber Co.,* 113 N. C., 55), unless made in his own interest. *Chrisco v. Yow,* 153 N. C., 435. There is no conflict between these authorities and *Hagaman v. Bernhardt,* 162 N. C., 381, relied on by the defendant, as in the latter case the declaration was excluded upon the ground that the declarant was pointing out his own bound- (11) aries, and that the declaration was in his own interest.

It is equally well settled that evidence of common or general reputation is competent in the location of private boundary if (1) the reputation had its origin at a time comparatively remote, and (2) existed before the controversy, and (3) attached itself to some monument of boundary, or natural object, or is supported by evidence of occupation and acquiescence tending to give the land some fixed or definite location. *Tate v. Southard,* 8 N. C., 45; *Dobson v. Finley,* 53 N. C., 496; *Yow v. Hamilton,* 136 N. C., 357; *Hemphill v. Hemphill,* 138 N. C., 504; *Lamb v. Copeland,* 158 N. C., 138.

It is true, the expressions "remote" and "comparatively remote" are indefinite; but as said in *Lamb v. Copeland, supra,* as the principle admitting evidence of common reputation "was established of necessity, when from changing conditions and the absence of permanent monuments better evidence of boundary could not be procured, so the time may vary to some extent, as the facts and circumstances may show that the necessity does or does not exist."

In *Bland v. Beasley,* 140 N. C., 633, it was held that a reputation having its origin seventeen years before action commenced was not sufficiently remote, and in *Ricks v. Woodard,* 159 N. C., 648, the same rul-

ing was made as to a reputation of twenty years; but it was also held in the latter case that a reputation existing for forty or fifty years was remote within the meaning of the law, and that when evidence of such reputation is introduced, it is competent to introduce evidence of a common reputation for a shorter period in corroboration.

Applying these principles, the evidence as to common reputation was competent. It had existed for forty years or more, according to one witness, and before any controversy as to boundaries, and it attached itself to a natural object—the holly. The evidence of the other witness Ange, as to reputation, does not fix the time, but he was evidently speaking of a remote period, and in any event it was competent as corroborative evidence.

(12) It may be well to note that evidence of reputation only applies to questions of boundary, and that it is not admissible to prove the ownership of the land. *Locklear v. Paul,* 163 N. C., 338.

In other words, it is permissible, under the conditions stated, to prove the common reputation as to a corner or a line, but not as to who is the owner of the land.

The instruction prayed for was properly refused, as there was ample evidence to support the verdict in favor of the plaintiff.

No error.

Cited: Corpening v. Westall, 167 N.C. 686 (3f) (4f); *Byrd v. Spruce Co.,* 170 N.C. 434 (3f) (4f); *Stallings v. Hurdle,* 171 N.C. 5 (1b); *Stewart v. Stephenson,* 172 N.C. 83 (1p); *Bank v. Whilden,* 175 N.C. 54 (1f); *Barnhill v. Hardee,* 182 N. C. 86 (3f); *Tripp v. Little,* 186 N.C. 218 (1b); *Pace v. McAden,* 191 N.C. 140 (1b); *Brown v. Buchanan,* 194 N.C. 678 (1b); *Thompson v. Buchanan,* 198 N.C. 282 (2f).

BOARD OF SCHOOL TRUSTEES OF ELIZABETH CITY v. R. L. HINTON ET ALS.

(Filed 18 February, 1914.)

Constitutional Law—Cities and Towns—Condemnation—School Purposes.

The taking of lands for the purposes of public schools is for a public use, in contemplation of our Constitution; and an act of the Legislature empowering a town to condemn land for such purposes is constitutional.

APPEAL by defendant from *Bragaw, J.,* at November Term, 1913, of PASQUOTANK.

This is a proceeding under chapter 140, Private Laws 1907, as amended by chapter 163, Private Laws 1909, to condemn land for school purposes.

All the issues and questions of fact were found in favor of the petitioner, and judgment was rendered condemning the land, and awarding the defendant $3,000, to which he excepted and appealed.

W. L. Cahoon and J. K. Wilson for plaintiff.

Ward and Thompson for defendant.

ALLEN, J. The only question presented by the appeal is the constitutionality of the act of the General Assembly authorizing the condemnation of land for the purposes of a graded school.

As was said in *R. R. v. Davis,* 19 N. C., 456: "The right of the (13) public to private property, to the extent that the use of it is needful and advantageous to the public, must, we think, be universally acknowledged. Writers upon the laws of nature and nations treat it as a right inherent in society. There may, indeed, be abuses of the power, either in taking property without a just equivalent, or in taking it for a purpose really not needful or beneficial to the community; but when the use is in truth a public one, when it is of a nature calculated to promote the general welfare, or is necessary to the common convenience, and the public is, in fact, to have the enjoyment of the property or of an easement in it, it cannot be denied that the power to have things before appropriated to individuals again dedicated to the service of the State is a power useful and necessary to every body politic."

This case has been approved on this point more than thirty times, and it would seem to follow from the principle declared that if a user for schools is a public use, that the General Assembly was acting within its powers.

In Lewis on Eminent Domain, vol. 1, sec. 270, the author says: "Property taken for public buildings of all kinds, such as city halls, courthouses, jails, public schools, markets, almshouses, and the like, is taken for a public use," and statutes permitting the condemnation of land for school purposes were held to be constitutional in *Long v. Fuller,* 68 Pa. St., 170; *Township Board v. Hockmann,* 48 Me., 243; *Williams v. School District,* 33 Vt., 271.

This accords with the spirit of our Constitution, which says that "schools and the means of education shall forever be encouraged," because knowledge is "necessary to good government and the happiness of mankind," and which requires the General Assembly to "provide by taxa-

tion and otherwise for a general and uniform system of public schools" for all the children of the State.

We find no error.

Affirmed.

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(14)

JOHN FORBES v. CITY OF ROCKY MOUNT.

(Filed 18 February, 1914.)

1. Electricity—Trials—Negligence—Evidence.

In an action to recover damages for an injury caused the plaintiff by a shock from a live electric wire alleged negligently to have been left hanging upon the street of a town, evidence of negligence in regard to another wire about a block away whereby another person was injured is irrelevant and incompetent, and its admission is reversible error.

2. Same—Subsequent Conditions.

Evidence of negligence in regard to electric wires of a defendant company, operating a light and power plant, existing a long time subsequent to the date of the injury complained of, in this case for more than two years, is irrelevant and incompetent, and its admission constitutes reversible error.

APPEAL by defendant from *Connor, J.*, at October Term, 1913, of EDGECOMBE.

Civil action, tried upon these issues:

1. Was the plaintiff Norman Forbes injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff Norman Forbes contribute to his injury by his own negligence? Answer: No.

3. What sum, if any, is plaintiff Norman Forbes entitled to recover as damages? Answer: $2,500.

4. What sum, if any, is plaintiff John Forbes entitled to recover as damages? Answer: $250.

From the judgment rendered, the defendant appealed.

E. B. Grantham, H. A. Gilliam, James M. Norfleet for plaintiff.

L. V. Bassett, T. T. Thorne, and W. O. Howard for defendant.

BROWN, J. The plaintiff sues the defendant for damage for a personal injury received by coming in contact with an electric light wire of the defendant's municipal plant, hanging down over the street. The plaintiff was riding a bicycle and attempted to push the wire out of his

way, and was thrown to the ground and burned. The defendant assigns error:

1. For that the court erred in permitting the defendant's wit- (15) ness Martin to testify, on cross-examination, over defendant's objection, as follows, towit:

Q. What was the cause of that wire falling about 30 yards below there at the time Mr. Warren was hurt, if he was hurt? A. That was a guy stub that was setting on the side of the street, and a wagon ran against it and broke it off, and that dropped the guy on the high tension wire. I don't know how long the wire stayed in the streets; I don't know whether it was in the street six weeks or not. I have not a record of what happened then. I don't know whether that wire stayed down nearly six weeks or not. I don't know anything about any children playing with that wire before Mr. Warren was hurt. I do not know anything about the town of Rocky Mount paying Mr. Warren $6,000. I did not know Mr. Thorne represented him. I know a gentleman was hurt there, but that is all. I don't know about anybody else being hurt except this little boy here. The two places where the two accidents happened are not far apart. I think Mr. Warren was hurt on the next corner. It was not the same wire that hurt him.

The basis of this assignment of error is that the foregoing evidence was not relevant to the matter in issue, and, not being competent, should have been excluded.

We think the evidence both irrelevant and incompetent. The admission of it introduces another controversy wholly unrelated to that before the jury, and was highly prejudicial to the defendant. 1 Wigmore, 556; *Cheek v. Lumber Co.*, 134 N. C., 225; *Grant v. R. R.*, 108 N. C., 470; *Bottoms v. Kent*, 48 N. C., 154.

The defendant again assigns error, for that the court erred in permitting the plaintiff's witness Hoffer to testify, over the defendant's objection, as follows, towit:

Q. Please tell the jury briefly about the last Sunday a week ago when you, Mr. Grantham, Mr. Gilliam, Mr. Dickson, and Mr. Forbes went there to look at that situation. Describe to the jury whether that 2,300-volt wire was hanging against any others. A. This circuit is underneath the wire that was broken down, and the loop comes down by the side of the pole and lays up against two pairs of telephone wires, and the other side comes up and continues on. The wind, or the jar of (16) the pole, could naturally wear the insulation off, and in that way in wet weather there is bound to be a leak and burn the wires down. Anybody coming in contact with those wires would receive a severe shock.

This evidence is also irrelevant and incompetent. It relates to conditions existing evidently only a week before the trial of this case and more than two years subsequent to the date when the plaintiff was injured.

Such evidence was prejudicial to defendant, and should not have been admitted. *Cheek v. Lumber Co., supra.*

New trial.

E. V. BROGDEN v. T. E. GIBSON.

(Filed 18 February, 1914.)

1. Trusts and Trustees—Partnership—Parol Trusts—Purchase of Lands—Consideration—Division of Profits.

A parol trust is enforcible in this State; and where in pursuance of a verbal agreement A. has secured certain lands for the purpose of a resale by him and a division of the clear profits, and B., who advanced the purchase money and by reason of the agreement has procured the title to be made to himself, and refuses to comply with the agreement, the services of A. are a sufficient consideration to support the contract, and B. will be declared to hold the title as trustee, subject to the uses declared in the agreement.

2. Same—Money Advanced—Equity—Procedure.

Where A. and B. have entered into a parol agreement for the purchase and sale of certain lands for joint profit, A. to transact the business in that behalf and attend to the selling, and B. to furnish the purchase money, and this is accordingly done, but B. has wrongfully taken the title in his own name and refused to sell the lands and divide the clear profits in accordance with his agreement, the statute of frauds has no application, and the courts will decree a sale of the lands, payment of the purchase price into court, and a division of the clear profits after repaying B. the purchase money he has advanced.

3. Appeal and Error—Prejudicial Error.

A judgment of the Superior Court will not be reversed on appeal for error committed on the trial when it is not prejudicial to the appellant.

(17) APPEAL by defendant from *Connor, J.*, at October Term, 1913, of EDGECOMBE.

This is an action to compel the execution of a parol trust. The verdict of the jury shows that the plaintiff and defendant entered into an oral agreement, on joint account, that they should buy and sell for gain certain lots situated in the city of Rocky Mount, the specific stipulation being that plaintiff should purchase and sell the lots, doing all of

the active business in that behalf, and the defendant should furnish the money with which to make the purchases; that the lands should be sold, defendant repaid the amount of his advances in money, and the clear profits should be divided equally between them. That plaintiff was ready, able, and willing to perform his part of the contract, and actually did do all the things required of him, and defendant refused to comply therewith on his part. By plaintiff's efforts, actually bestowed by him, they succeeded in purchasing from one J. H. Flood five lots, upon terms satisfactory to all the parties; but instead of having Flood make the title to plaintiff, or to plaintiff and defendant, so that plaintiff might resell them and realize the proceeds of the sale, and that the agreement could be executed to that extent, the defendant secretly and without plaintiff's knowledge, and with the intent to defeat his rights in the contract, caused J. H. Flood to convey the lots to him individually and thereby got control of the title. Defendant afterwards agreed orally to perform the contract, which he admitted, by a sale of the lots at plaintiff's request, but, later, refused to do so. Plaintiff had procured bidders at advantageous prices, but defendant still refused to sell to any one of them, and plaintiff, thereupon, offered to pay his fair proportion of the amount advanced by defendant, and take a conveyance for one moiety to the four remaining lots, one of the five lots having theretofore been sold to C. R. L. Matthews for $175. This proposal was rejected by defendant. That the price paid Flood for the lots was $625, a large part of which defendant (18) borrowed for the purpose, securing the repayment of it by a mortgage on said premises. That afterwards plaintiff proposed to pay defendant his part of the purchase price and take a deed for two of the lots, but this defendant declined to do, stating that he intended to hold the lots absolutely for himself and for his sole use and benefit, claiming sole and absolute ownership in spite of the plain terms of the contract, by which he agreed that the lands should be held in trust for the plaintiff and himself, as aforesaid, and not by him individually in his own right.

Plaintiff avers that defendant is a trustee for the benefit of the parties to the said agreement, holding the legal title to the land for the uses and purposes above set forth. He asks for an adjustment of the amounts due and to be paid by each of the parties, and upon payment of the sum due by him that the four lots be equally divided between them, and that deeds be executed accordingly, and for general relief.

Defendant denied the essential facts alleged by plaintiff in regard to the purchase of the lots for the joint benefit of plaintiff and himself, and averred that he bought the property for himself—by borrowing the money, it is true, and mortgaging the land to pay the purchase price, but that he made no agreement that plaintiff should have any share or inter-

est therein, nor did he conceal any part of the transaction from the plaintiff. After the property was bought by him, he agreed to pay plaintiff commissions if he sold the same for him, but before there was any sale by plaintiff, he concluded to withdraw the land from the market and build houses upon it, and this was all of their agreement. Upon an issue submitted, the jury found the facts to be as stated by plaintiff in his complaint, thereby adopting his version as above set out. The court, upon the verdict, declared that defendant held the land in trust, according to the terms of the agreement between the parties, and adjudged that it be sold and the cause retained for further orders and directions, defendant to pay the costs of the action; whereupon he appealed.

(19) *E. B. Grantham for plaintiff.*
Bunn & Spruill and G. M. T. Fountain & Son for defendant.

WALKER, J., after stating the case: The main contention of the defendant is that the agreement between the parties, alleged by the plaintiff and found by the jury to be the true one, is within the terms of the statute of frauds, and not having been reduced to writing, is voidable by him. But the fallacy of the position is apparent when we consider that this is an action to enforce a trust, which is not within the statute, and not one for specific performance of a contract relating to land. The English statute includes parol trusts within its prohibition, but ours does not, and they remain here as at common law.

The transaction between these parties falls clearly within the definition of a parol trust, as settled by several decisions of this Court. If the land had been sold by the defendant, and that part of the contract performed, the plaintiff would be entitled to recover his share of the proceeds of the sale, in assumpsit, upon the theory of money received to his use, from which the law implies a promise by defendant to pay it over to him, and this without regard to the statute of frauds, as the case would not be covered by its provisions, which refer to a sale or conveyance of land and not to a division of money merely or the proceeds of the sale. *Massey v. Holland,* 25 N. C., 197; *Michael v. Fort,* 100 N. C., 178; *Sprague v. Bond,* 108 N. C., 382; *Bourne v. Sherrill,* 143 N. C., 381.

The Court held in *Hess v. Fox,* 10 Wendell (N. Y.), 436, that the statute did not apply to such an agreement, because, "No question can arise on the validity of the agreement to sell. That was performed, and the remaining part was to pay over money, supported by the consideration of land conveyed to the promisor." This case is cited with approval in *Bourne v. Sherrill, supra,* and it may now be taken as settled law in this State, if not in all jurisdictions.

While defendant has not sold the land, so as to bring this case within the operation of the principle just stated, he has, by his agreement, charged it with a trust which equity will enforce, and the statute, fortunately for fair and honest dealing is no protection to him. (20) That he is morally bound to its performance will not be questioned, and he is also legally required to fulfill his promise. The law, upon this phase of the matter, is equally well established. We cannot doubt for a moment that the agreement was that the title to the land should be taken in the name of the plaintiff, or, at least, in the joint names of the parties, as the plaintiff was authorized to sell as well as to buy the lots, and everything necessary to carry out this purpose is implied. It surely was not intended that defendant should be able to block the execution of the agreement by taking the title to himself and refusing to convey. But even if it was the purpose that he should have it, the agreement was that he should hold it for the joint benefit of himself and the plaintiff, and upon the faith of this promise he acquired the title, and will not be permitted to hold it discharged of this obligation, but only in trust for the uses declared in the agreement. The further consideration for the promise was that the plaintiff should contribute his skill and labor in securing the property for the purposes of the joint enterprise. This he has done fully and faithfully, and equity will not disappoint his reasonable expectation that defendant would not take the benefit of this skill and labor and refuse to execute the trust and confidence reposed in him.

Plaintiff's equity is clear. The case is fully covered by *Avery v. Stewart*, 136 N. C., 426. Without quoting literally, the Court then held: A breach of a mere moral obligation is not, by itself, sufficient ground for the interference of the court. The evidence, if taken as true, shows that there was more than that in this instance, and that the defendant has acquired property which he could not have obtained but for the plaintiff's request that he furnish the money and take the title, and his promise to do so. The plaintiff's equity seems to us to be plain.

That case was approved in *Russell v. Wade*, 146 N .C., 116, and the two cases distinguished in their facts by the following reasoning, though it was held there was no material difference, but both were governed by the same general and equitable rule: "The difference in the two cases consists in the fact that, in one, the defendant agreed to take the title to himself for the benefit of the plaintiff, whereas in the other (21) he was to take the option in the name and for the benefit of both, and in violation of his promise and his duty, he took it to himself. In one the wrong was in refusing to execute an express promise, upon the faith of which defendant got the property, whereas in the other defendant

took title in violation of his agreement. In the first case the court enforces the execution of an express parol trust. In this case the court declares defendant a trustee to prevent fraud *ex maleficio.*" It had before been said in *Avery v. Stewart, supra:* "Trusts of the second class exist purely by construction of law, without reference to any actual or supposed intention to create a trust, for the purpose of asserting rights of parties or of frustrating fraud, and are therefore termed constructive trusts. The party guilty of the fraud is said in such cases to be a trustee *ex maleficio* and will be decreed to hold the legal title for the use and benefit of the injured party and to convey the same when necessary for his protection, as when one has acquired the legal title to property by unfair means. The jurisdiction is exercised distinctly upon the ground of the fraud practiced by the party against whom relief is prayed," citing Bispham on Equity (6 Ed.), sec. 79 and pp. 125, 216, 143; *Wood v. Cherry,* 73 N. C., 116; *Gorrell v. Alspaugh,* 120 N. C., 362.

In *Glass v. Hulbert,* 102 Mass., 39 (2 Am. Rep., 418), the Court so states the principle as to make its application to our facts very transparent: "Where a party acquires property by conveyance or devise secured to himself under assurances that he will transfer the property to, or hold and appropriate it for, the use and benefit of another, a trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of said promise he had induced the transfer of the property to himself."

When one has, by his promise to buy, hold, or dispose of real property for the benefit of another, induced action or forbearance of another relying upon said promise, it would consummate a fraud if the promise, so solemnly but deceptively made, should not be enforced. If
(22) the plaintiff had suspected that the defendant intended to betray him by a false promise, and thus to mislead him into the adoption of a course of action which otherwise he would not have taken, or to cease efforts in the same direction and with the same end in view, which otherwise he would have continued, he would have withdrawn his misplaced confidence in defendant and have arranged with some other and more reliable person, equally able to assist him, in order to secure the same kind of benefit. *Vestal v. Sloan,* 76 N. C., 127; *Johnson v. Hauser,* 88 N. C., 388; *Shields v. Whitaker,* 82 N. C., 516; *Thompson v. Newlin,* 38 N. C., 338.

If we should permit defendant to profit by any such betrayal of the trust so implicitly and innocently reposed in him, it would be not only inequitable, but a reproach to the administration of justice. This view is further sustained by the language of *Chief Justice Smith* in *Cheek v. Watson,* 85 N. C., at p. 198: "Our conclusion upon the whole testimony

is that the defendant has deceived an embarrassed man into assent to the sale of his land to the defendant, through the trustee, by taking advantage of his distress and exciting false hopes, that the sale should not be pleaded as absolute, but that the land might be redeemed within a reasonable time. The trust would equally arise where the party relying upon the assurance is prevented from making arrangements with others by which he could have secured the same benefits promised by the purchaser." It will not do to say that the defendant was moved merely by friendly or benevolent considerations, and his promise was, therefore, voluntary, and, therefore, he may, at his option, refuse a compliance with it. Equitable considerations, we have described, constitute the foundation of almost every trust, and the fiduciary should be held to account as nearly as possible in the same spirit in which he originally contracted and to the same extent. *Sandfoss v. Jones,* 35 Cal., 481; *Owens v. Williams,* 130 N. C., at p. 168; *Soggins v. Heard,* 31 Miss., 428.

In *Cousins v. Wall,* 56 N. C., 43, *Judge Battle* states our case substantially, and says: "By paying his money and taking the legal title to himself, the defendant held the legal estate in trust to secure the repayment of the purchase money, and then in trust for the (23) plaintiff. The defendant never contracted to sell or convey the land or any interest therein to the plaintiff, for at the time of the agreement he had no title or interest in the land, and it was only by force of the agreement that he was permitted to take the legal title, and by the same act he took it in trust for the plaintiff. It is manifest that the statute of frauds does not apply."

The doctrine has been thus most aptly stated: Although no one can be compelled to part with his own title by force of a mere verbal bargain, yet when he procures a title from another which he could not have obtained except by a confidence reposed in him, the case is different. There, if he abuse the confidence so reposed, he is converted into a trustee *ex maleficio.* The statute which was intended to prevent frauds turns against him as the perpetrator of the fraud. It is not, therefore, the fact that the bargain by which he was enabled to obtain the title is verbal which governs the case, but the fact that he procured the title to be made to him in confidence, the breach of which is fraudulent and in bad faith. *Sechrist's Appeal,* 66 Pa. St., 237. Substantially to the same effect is the following statement of the Court in *Carr v. Carr,* 52 N. Y., at p. 260, after discussing the meaning and application of the statute of frauds: "It bars no other equity and precludes no one from asserting title against one who has thus taken a conveyance for a lawful and specific purpose and attempts to retain the property in violation of the arrangement and agreement under which he has acquired the formal title in fraud of the

real owner and against equity and good conscience. Manifestly such is the case now before us for adjudication, upon the judgment nonsuiting the plaintiff." Numerous cases in this Court have stated and applied the principle in the same way. *Sykes v. Boone,* 132 N. C., 199; *Hargrave v. King,* 40 N. C., 436; *Turner v. King,* 37 N. C., 132; *Cloninger v. Summit,* 55 N. C., 513; *Barnard v. Hawks,* 111 N. C., 338, and other cases cited in *Avery v. Stewart, supra,* and *Russell v. Wade, supra.* "When one by parol agrees to procure a lease for himself and others, and does procure the lease in his own name, he is a trustee for those for
(24) whom he agreed to act, and the statutes referred to have no application." *Hargrave v. King, supra.*

"The plaintiff's equity does not rest upon the idea of the *specific performance of a contract.* The parties did not occupy the relation of vendor and vendee. The defendant did not agree to *sell* the land to the plaintiff, for at the time of this arrangement he did not have the land, or any interest therein, to sell; nor was the plaintiff to *pay a price for it.* But the plaintiff's equity rests upon the idea of *enforcing the execution of a trust;* and the facts show that the relation of the parties was that of trustee and *cestui que trust.*"

The case of *Falkner v. Hunt,* 76 N. C., 202, would appear to be directly and expressly in point, leaving nothing to inference or speculation, as the facts of the two cases are so closely and intimately analogous. It was held that the statute of frauds did not apply, and that plaintiff's agreeing to charge the "mill site" with a trust in his behalf and for his benefit, *jointly* with defendant, was too plain for discussion, and, therefore, the Court merely states the facts and its conclusion without the citation of authority. See, also, *Hanff v. Howard,* 56 N. C., 440; 20 Cyc., 237 and 232.

The Court, in *Neely v. Torian,* 21 N. C. (Battle's Ed.), 410, after finding that defendant acquired title to land by a false promise, which deceived the plaintiff into assenting to his purchase of it, adjudged that he should hold as trustee, first, to reimburse himself the amount he had advanced, and then for the benefit of the plaintiff, who should pay the purchase money and receive the title by conveyance from the defendant, the Court saying that defendant had obtained the title by exciting false hopes in the plaintiff that the sale should not be treated as absolute, and taking advantage of him, and that, in conscience, he should not retain the unfair gains thus acquired by the deception, but could avail himself of the legal title only as a security for what he had advanced on the faith of it.

This Court, at the last term, decided a case in all essential respects like the one at bar. There a sale of the land was ordered, with direc-

tion to pay the purchase money advanced by the defendant, and (25) then to divide the balance of the proceeds between the parties, according to their agreement. This Court affirmed the judgment (*Anderson v. Harrington,* 163 N. C., 140), holding that a trust had been created by contract, based upon a valuable consideration, to stand seized to the use of or in trust for another, as decided in *Wood v. Cherry, supra,* and that the statute of frauds did not apply, citing *Riggs v. Swann,* 59 N. C., 118. That is decisive of this case.

The other exceptions become immaterial, in view of what we have said. Even if there was any error in the rulings upon testimony, which we do not admit, it was so very slight as not to have affected the result. A reversal will not be granted unless the error is prejudicial. *S. v. Smith,* 164 N. C., 475; *McKeel v. Holleman,* 163 N. C., 132; *Steeley v. Lumber Co., post,* 27.

When the fund is paid into the court after the sale has been made, it will be distributed according to the agreement, the purchase money of the land paid to defendant, and then the balance divided equally between the parties.

No error.

Cited: Smith v. Hancock, 172 N.C. 153 (3f); *Newby v. Realty Co.,* 182 N.C. 38, 39 (1f) (2f); *Lefkowitz v. Silver,* 182 N.C. 349 (1g) (2g); *McNinch v. Trust Co.,* 183 N.C. 38 (1g) (2g); *Bank v. Scott,* 184 N.C. 315 (1f) (2f); *S. v. Beam,* 184 N.C. 742 (3f); *Pridgen v. Pridgen,* 190 N.C. 106 (1g) (2g); *Leftwich v. Franks,* 198 N.C. 292 (1p) (2p); *Peele v. LeRoy,* 222 N.C. 126, 127 (1f) (2f); *Creech v. Creech,* 222 N.C. 663 (1g) (2g); *Thompson v. Davis,* 223 N.C. 794 (1f) (2f); *Embler v. Embler,* 224 N.C. 815 (1f) (2f); *Atkinson v. Atkinson,* 225 N.C. 128 (1d) (2d); *Atkinson v. Atkinson,* 225 N.C. 133, 134 (1j) (2j).

SELIM SUTTON **BLOUNT** ET ALS. v. CHARLES JOHNSON ET ALS.

(Filed 18 February, 1914.)

1. Estates—Remaindermen—Right of Action—Life Estate—Real Party in Interest—Interpretation of Statutes.

The remaindermen have no right of possession in lands during the lifetime of the first taker, and during that time their action to recover the land will not lie, the statute requiring it to be brought by "the real party in interest." Revisal, sec. 400.

2. Same—Tax Title.

The plaintiffs, being remaindermen, may not recover the lands during the continuance of the life estate, and the court will not consider whether the defendants' tax deed for the lands sold would bar the plaintiffs' right to recover, should they have had a cause of action.

(26) APPEAL by plaintiff from *Bragaw, J.*, at November Term, 1913, of PASQUOTANK.

Ward & Thompson for plaintiffs.

Ehringhaus & Small and E. F. Aydlett for defendants.

CLARK, C. J. This is an action to recover land. The plaintiffs introduced a deed showing title in Selim Sutton, their grand-uncle, and also his will, under the terms of which the land in controversy would descend to them after a life estate in his daughter, Lizzie. There was no evidence of the death of Lizzie, so no right of possession has ever vested in the plaintiffs, and indeed it was admitted on the argument here that she is still living. The contention of the plaintiffs that they have a vested remainder, and therefore can recover possession, cannot be sustained. "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided." Rev., 400. The plaintiffs here do not come within any exception "otherwise provided."

The defendants introduced evidence that while the title to the land was in Lizzie, it was sold for taxes, and the ancestor in title of the defendants purchased it. We need not go into the phases of the controversy dependent upon such evidence and consider whether the plaintiffs, if they had a cause of action, are barred, because the life tenancy not having expired, they have no present right of possession, and cannot recover it.

This is not a proceeding for the redemption of lands from taxes under Rev., 2913. The judgment of nonsuit must be

Affirmed.

Cited: Loven v. Roper, 178 N.C. 582 (f); *Caskey v. West,* 210 N.C. 243 (g).

(27)

O. H. STEELEY v. DARE LUMBER COMPANY.

(Filed 18 February, 1914.)

1. Pleadings—Amendments—Courts.

An amendment to a complaint allowed by the court before proceeding with the trial, which merely perfects the allegations therein made, is not objectionable as stating a new cause of action. *Simpson v. Lumber Co.*, 133 N. C., 95, cited and applied.

2. Evidence—Questions and Answers—Objections and Exceptions—Appeal and Error.

When exception is taken to the exclusion of a question asked a witness, it must in some way be made to appear what the answer to the question would have been, so that the Court may determine whether its exclusion was prejudicial to the appellant.

3. Evidence—Questions at Issue.

When the issue in an action to recover damages for a personal injury alleged to have been negligently inflicted involves the safety of working at an alleged defective machine, which the plaintiff was operating, a question asked a witness as to the safety of working at the machine is directed to the very question submitted to the determination of the jury, and was properly excluded.

4. Evidence—Compromise—Prejudicial Error—Harmless Error — Appeal and Error.

The admission of testimony in this case that the action was brought after the witness, an attorney in the case, had endeavored to compromise it, is not held to be reversible error, as the facts show that it could not have materially affected the result of the trial, and therefore was not prejudicial to the appellant.

5. Appeal and Error—Assignments of Error.

Assignments of error not stated according to the rules of the Supreme Court will be disregarded.

6. Master and Servant—Negligence—Duty of Master—Safe Appliances—Inspection—Instruction to Servant.

The plaintiff was injured while operating, as an employee of the defendant, a machine for making shingles, and there was evidence tending to show that the machine was defective, that the plaintiff was inexperienced and had not been properly instructed in its operation or warned of its dangerous character, and evidence *per contra*. While the assignments of error were not made in accordance with the rules of this Court, the principles relative to the duty of the master to provide a safe place to work and approved appliances for the employee, and to inspect them at reasonable intervals, and to warn and instruct the employee, are discussed by WALKER, J.

7. New Trials—Motions—Newly Discovered Evidence.

Motions made in this Court for a new trial, based upon the ground of newly discovered evidence, are not debatable. The motion in this case is denied, the evidence being largely cumulative, and it being improbable that a new trial will result differently; it also appearing that the movant had not exercised due diligence to secure the evidence at the proper time. *Warwick v. Taylor*, 163 N. C., 68, cited and applied.

(28) APPEAL by defendant from *Bragaw, J.*, at November Term, 1913, of PASQUOTANK.

This action was brought to recover damages for injuries alleged to have been sustained by the plaintiff and caused by negligence of defendant. Plaintiff was employed in operating a machine for making shingles. It was made up of a bench or frame, about waist high, upon which was set horizontally upon a plane a saw about 3 feet in diameter, and it was provided with a carriage upon which the blocks were fed to the revolving saw. There was a lever and a clutch to start and stop the machine.

Plaintiff testified: "I was put to work at a shingle machine; there were two in the mill; saw was about 3 feet in diameter, horizontal carriage to carry blocks to the saw. Juniper blocks were sawed into shingles. The blocks were 20 inches in length and slabbed on two sides; the saw flew around. The carriage would carry blocks up to the saw; there was no machinery around the carriage. Had to catch the blocks and throw them into the carriage without stopping it. Mr. Holloman, the foreman, employed me, and told me to go and take the machine; Sawyer had been driving it. He gave me no caution or warning, nor any instructions how to work it. I had never had any experience with machines of this or any other kind. Had been working only four or five days when I got hurt; had been employed three or four weeks. I had the block in the machine; it was the right length when I put it in—one end cut out sloping.
(29) As the shingles were cut off the lower side of the block, it became too short for the dogs to hold. I tried to stop the carriage by using my right hand and holding the block with the left, steadying the block; the carriage would not stop—the clutch was out of order. By using the lever, I could not stop the carriage. I snatched on it two or three times; the saw snatched the block, and my hand fell on the saw, and the saw cut my fingers at the joint on the first and third fingers and stiffened the middle finger. Holloman came in and carried me to Dr. McMullan's; he cut the bone of my hand and stitched the flesh; it hurt. I did not get well till nearly spring; hurt clear till it got well. Thoughts of never using my finger hurt me. Lost three months from work; could not do anything; went hungry; had no wood. If the clutch had worked, it would have stopped the carriage instantly. I cannot say what was the

matter with the clutch; it would not stop the carriage. It was so it would not stop the carriage when I first went to work there. It was worn and out of order. It would not work. I cannot tell what was the matter with it. The defendant told me to push forward with the work; it was behind with the work. Mr. Holloman was about in 10 feet of me when hurt."

Under the evidence and instructions of the court, the jury returned a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

W. L. Cahoon, I. M. Meekins, and Ward & Thompson for plaintiff.
E. F. Aydlett for defendant.

WALKER, J., after stating the case: There was evidence of contributory negligence in this case, but it was fairly and properly submitted to the jury, in connection with evidence which tended to exonerate the plaintiff from blame, and we find no error in respect to the second issue, nor do we understand that appellant claims that there was any.

First exception: Plaintiff was permitted to amend his complaint over defendant's objection, upon the ground that it was adding a new cause of action; but we do not think so. It was merely perfecting the allegations of the cause already stated in the complaint, which is per- (30) missible. The very question was so decided in *Simpson v. Lumber Co.*, 133 N. C., 95, where we held that a complaint stating that damage by fire was caused by the careless and negligent failure to provide an engine with spark arresters may be amended by alleging further that defendant was also negligent in allowing inflammable material to accumulate unnecessarily upon its right of way, thereby increasing the danger to adjacent property from fire set out by its engines. The judge was liberal with the defendant, for the allowance of the amendment to be made was coupled with the option given, at the same time, to the defendant to proceed with the trial or to continue it, as it might elect. Besides, in our opinion, the amendment was not an essential one, and plaintiff could just as well have recovered upon the original complaint, the allegations being fully sufficient for that purpose.

Second exception: A witness for the plaintiff, A. B. Holloman, was asked, on cross-examination by defendant's counsel, the following question, which was excluded: "How is that machine as to safety of one working it?" It does not appear what the response would have been, if the witness had been permitted to answer it, and, therefore, we cannot see or know that there was any error. "The general rule is that the party asking the question which is excluded must disclose to the court what he expects to prove by the witness," for the reason that the court must be

able to judge of the competency or materiality of the evidence proposed to be elicited—not the counsel. The rule and the procedure under it are fully stated in the case of *In re Smith's Will,* 163 N. C., 464, citing *Boney v. R. R.,* 155 N. C., 95; *Whitmire v. Heath,* 155 N. C., 304, and other precedents. But if the witness was expected to state that the machine was safe—and we infer from his previous statement that he would have so answered—the question was not competent, and similar questions have been so held by this Court. *Marks v. Cotton Mill,* 135 N. C., 287; *Seawell v. R. R.,* 133 N. C., 515; *Rayner v. R. R.,* 129 N. C., 195; *Phifer v. R. R.,* 122 N. C., 940.

(31) In *Marks v. Cotton Mill, supra,* it was said: "As to whether the speeder is so constructed as that its operation was safe to the defendant's employees was the very question upon which the parties were at issue, and which the jury were impaneled to decide. The witness's opinion upon that question was incompetent, and the plaintiff's objection to it should have been sustained."

Third and fourth exceptions: The defendant proved by its witness C. P. Brown, one of its employees, that plaintiff had told him he wished to withdraw the suit, but his attorney would not let him do so. Plaintiff, in reply to this question, introduced as a witness plaintiff's attorney, who testified that he had not brought the suit against the plaintiff's wishes. He was then asked by defendant's counsel if Steeley had ever requested him to withdraw the suit, but there was no answer given by the witness, and the defendant's objection, therefore, falls within the rule just stated in considering the second exception. The witness did state, later on, that the suit was brought after he had tried to compromise it. If the admission of this evidence was erroneous, it is not sufficient to invalidate the verdict, as it could not materially have affected the result. Plaintiff's attorney doubtless reasoned, if he gave the advice to his client, that the suggested course was directed by wisdom and prudence, or, perhaps, he thought the defendant was not liberal enough in its offer to receive for it favorable consideration, and he acted strictly in favor of his client's interests and fully within his right as an attorney. It appears, too, that the parties were negotiating for a settlement or compromise of their differences, and what was said under the circumstances, if competent, would be entitled to little or no consideration as controlling or even influential testimony.

If there was error, and we do not concede it, the damage was too remote and infinitesimal to warrant a reversal. "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 sub- (32) serve the real ends of substantial justice." *S. v. Smith,* 164 N. C., 476.

The motion for another trial should be meritorious and the grounds not so slight as to be trivial, for the foundation of the motion is the allegation of injustice and the prayer is for relief. If no real wrong has been suffered, there is nothing to be relieved against. "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." *S. v. Smith, supra; McKeel v. Holloman,* 163 N.C., 132. There are other reasons for sustaining the ruling, but they need not be stated, as those we have given are sufficient.

The other assignments of error are not stated according to the rule of this Court, and might be disregarded. *Wheeler v. Cole,* 164 N. C., 378. But notwithstanding this departure from the settled procedure, we will refer to them briefly.

Fifth, sixth, and seventh exceptions: They are too broadly stated, having been taken to the entire charge, without specifying any error therein.

Eighth, ninth, tenth, and eleventh exceptions: These were taken to the refusal of the court to give the first, second, third, and fourth prayers for instructions to the jury. The first prayer appears to have been given, and if not, there was no exception noted to any refusal to give it, upon which an assignment of error could be based. The other prayers were predicated upon the theory that Steeley, the plaintiff, had sufficient capacity and previous experience in the management of such machines to know how to operate this one without any instructions from the defendant, and that he had admitted having such capacity and experience to defendant's manager. We have read the charge carefully, and find that the judge fully and sufficiently responded to these prayers for instruction, and almost in their very language. The court gave the fifth, sixth, seventh, and eighth prayers, as the record states. The refusal to give the ninth prayer, as to the diminution of the plaintiff's (33) earning capacity by the injury, does not appear to have been assigned as error; but if it had been, we think there was some evidence, even though slight it may be, that his earning capacity is not as good now as it was before he was hurt in the operation of the machine. The prayer was, therefore, properly disregarded. The errors last assigned are the refusal of the court to grant a new trial, and the signing of the judgment for plaintiff. These are merely formal, and require no comment.

Defendant contends that there was no sufficient time for it to ascertain the defect in the clutch of the machine or its dangerous condition; but this was for the jury upon the facts. There was, at least, some evidence of negligence in this respect.

These principles appear to be settled:

First. Where there is evidence tending to show that an injured employee did not have a reasonably safe place to work, or was not instructed as to the danger attending the act he was told to do, the question whether it was a reasonably safe place to work or whether the failure to warn him of the danger was the proximate cause of the injury should be submitted to a jury. The evidence that there was a safe way to do the particular work required of the plaintiff, as appears in this case, did not authorize a withdrawal of the case from the jury, in view of the evidence we find in the record. When more than one inference can be drawn as to defendant's negligence or the proximate cause of the injury, the question of liability is for the jury.

Second. It is the negligence of the employer in not providing for his employees reasonably safe machinery and a reasonably safe place in which to work that renders him liable for any resulting injury to them; and this negligence may consist in his failure to adopt and use the approved appliances which are in general use and necessary to the safety of the employees in the performance of their duties.

Third. A master owes to a servant the duty to carefully inspect, at reasonable intervals, the machinery, ways and appliances provided for the use of the servant in the performance of his work, and it is not
(34) essential to his liability for an injury to the servant that he should actually know of the defect causing the injury.

Fourth. Generally speaking, an employer is bound to warn and instruct his employees concerning dangers known to him, or which he should know in the exercise of reasonable care for their safety, and which are unknown to them, or are undiscoverable by them in the exercise of such ordinary and reasonable care as in their situation they may be expected and required to take for their own safety, or concerning such dangers as are probably not appreciated by them, by reason of their lack of experience, their youth, or through general incompetency or ignorance; and unless the servant is so warned or instructed, he does not assume the risk of such dangers; but if he receives an injury without fault on his part, in consequence of not having received a suitable warning or instruction, the master is bound to indemnify him therefor.

The above rules are supported by numerous authorities. *Norris v. Mills,* 154 N. C., 474; *Marks v. Cotton Mills,* 135 N. C., 290; *West v. Tanning Co.,* 154 N. C., 44; *Womble v. Grocery Co.,* 135 N. C., 486;

Dorsett v. Manufacturing Co., 131 N. C., 254; *Holton v. Lumber Co.*, 152 N. C., 69; *Cotton v. R. R.*, 149 N. C., 227, and other cases cited in *West v. Tanning Co., supra.* The master is not an insurer of the servant's safety, but he does guarantee that he will exercise reasonable care to see that he is not injured by dangerous machinery or unsafe surroundings; and when the legal fault is his, and not that of the servant, he becomes liable to the latter for any resultant injury. It is culpable negligence on his part that is the test. Under these rules, the case was properly submitted to the jury, upon the evidence, to determine the issues raised between the parties.

The charge of the court was full and accurate and presented every possible phase of the case to the jury. Upon a careful review of the entire case, we can find no legal ground for disturbing the verdict.

No error.

WALKER, J. There was a motion in this case for a new trial, (35) based upon the ground of newly discovered evidence. This kind of motion is not debatable before us. It is submitted without argument. We have examined the affidavits filed in support of it, and find that the new evidence is largely cumulative, nor are we satisfied that the defendant exercised due diligence to secure it at the proper time. It has not, therefore, brought its application within the well settled rules governing such cases. *Johnson v. R. R.*, 163 N. C., 431, at p. 453, and cases cited therein. We cannot find in the affidavits offered any sufficient proof of due diligence or of new and substantive evidence, nor are we convinced by the proof offered that any real or material injustice has been done by reason of the unavoidable failure to produce the alleged new evidence at the trial, nor does it appear to us probable that on a new trial a different result will be reached and the right prevail. In such a case, we must deny the request. *Warwick v. Taylor*, 163 N. C., 68.

Motion denied.

Cited: Haddock v. Stocks, 167 N.C. 71 (5f); *Carter v. Reaves*, 167 N.C. 133 (5f); *Lynch v. Veneer Co.*, 169 N.C. 172 (6g); *Deligny v. Furniture Co.*, 170 N.C. 196 (1f); *Deligny v. Furniture Co.*, 170 N.C. 204 (6g); *Smith v. Hancock*, 172 N.C. 153 (4g); *Hux v. Reflector Co.*, 173 N.C. 99 (6g); *Lynch v. Dewey*, 175 N.C. 159 (6g); *Gadsden v. Crafts*, 175 N.C. 361 (1f); *Alexander v. Cedar Works*, 177 N.C. 537 (7f); *McMahan v. Spruce Co.*, 180 N.C. 641 (6g); *Green v. Lumber Co.*, 182 N.C. 682 (6g); *Modlin v. Garrett*, 183 N.C. 123 (1f); *S. v. Beam*, 184 N.C. 742 (4j); *Street v. Coal Co.*, 196 N.C. 181 (6g); *Grubbs v. Lewis*, 196 N.C. 393 (6g); *Watson v. Construction Co.*, 197 N.C. 590 (6g).

A. G. WALKER v. WILL REEVES ET ALS.

(Filed 18 February, 1914.)

Drainage Districts—Appeal and Error—Fragmentary Appeal—Exceptions to Reports—Clerk's Jurisdiction.

Where on appeal to the Superior Court a cause in drainage proceedings has been remanded to the clerk to resume jurisdiction and determine the question of hearing exceptions to the preliminary and final reports, and fix a time therefor, should he determine to hear them, the parties should except and appeal to the Supreme Court, should they so desire, or the order will be final; and an appeal from the order of the clerk made accordingly, fixing a time for the hearing of the exceptions, is fragmentary and will be dismissed. It is further held that the clerk had the jurisdiction to hear the exceptions and grant the parties time within which to file them.

APPEAL by plaintiff from *Connor, J.*, at July Term, 1913, of WASHINGTON.

(36) "This cause coming on to be heard on appeal by the drainage commissioners from the order of the clerk of the Superior Court allowing the parties, represented by W. M. Bond, Jr., and W. M. Bond, Sr., to file objections and exceptions to the final report and preliminary reports in this cause, and said appeal being heard: It is considered and adjudged by the court that the clerk in allowing objections, exceptions, and answers to the preliminary and final reports was acting under authority of a prior judgment in this cause rendered by Judge H. W. Whedbee on 23 April, 1913, and this court has no power to reverse the findings of said clerk acting under authority of said judgment. It is ordered that said proceeding be remanded to said clerk, that he may proceed as directed by the order made herein by his Honor, H. W. Whedbee. 11 July, 1913."

Defendants appealed.

E. F. Aydlett, Van B. Martin for plaintiff.

W. M. Bond, Jr., for defendant.

BROWN, J. The order of Judge Whedbee, referred to in the order of Judge Connor, is as follows:

"This cause coming on to be heard on appeal from order signed by C. V. W. Ausbon, clerk Superior Court, dated 20 February, 1913, it is considered and adjudged by the court that said clerk of court pass upon the affidavits filed in said cause, and that he has jurisdiction to either allow said petitioners, represented by W. M. Bond, Sr., and W. M. Bond, Jr., to file objections and exceptions to preliminary report and final re-

ports in said action, and other orders therein, or to refuse to allow them to file exceptions. In the event he shall order that objections and exceptions be filed, he shall fix a date and pass on said objections and exceptions which are then filed. It is ordered that said clerk hear said matter on 13 May, 1913, at 4 o'clock, at his office in Plymouth, N. C.; and this appeal is remanded to him to hear and pass upon said matter. This 23 April, 1913."

No appeal was taken from this order. When the cause came again before the clerk, he made an order "that said parties be allowed thirty days from 1 July, 1913, within which to file said excep- (37) tions and answers, and that the defendants have thirty days thereafter to file answers thereto, if they be so advised."

We are of opinion that this appeal is premature, and must be dismissed.

It is plain that under the order of Judge Whedbee, which was not appealed from or even excepted to, and was therefore final, the clerk had the power to entertain and pass upon exceptions and to grant the parties time within which to file them.

It was the appellants' duty, if dissatisfied, to except to the order of Judge Connor, and wait until after the exceptions were finally passed upon before appealing to this Court.

It is possible the exceptions may be decided in defendants' favor, and then they would not care to appeal.

Fragmentary appeals are not encouraged.

Appeal dismissed.

Cited: Cement Co. v. Phillips, 182 N.C. 440 (f).

THE BOARD OF DRAINAGE COMMISSIONERS OF PARKVILLE DRAINAGE DISTRICT, No. 1, v. BRETT ENGINEERING COMPANY.

(Filed 18 February, 1914.)

1. Drainage District—Bond Issues—Time of Objections—Actual Notice—Publication in Newspaper—Interpretation of Statutes.

It is not necessary to the validity of bonds issued by a drainage district under the provisions of chapter 442, Public Laws 1909, amended by chapter 67, Public Laws 1911, that the notice of the time of hearing objections to the final report of the engineer and viewers was not published in some newspaper of general circulation in the county, when it appears that no newspaper was published therein, or elsewhere, which has a general circu-

lation in the county, and that the landowners affected had actual and ample notice of such time and raised no objection.

2. Drainage District—Liberal Construction—Interpretation of Statutes.

The drainage laws apply to the whole State, and by the express provision of section 37, chapter 442, Public Laws 1909, they should be liberally construed to promote the leveeing, ditching, draining, and reclamation of wet and overflowed lands.

3. Drainage Districts—Objection—Publication in Newspaper—Waiver—Consent—Interpretation of Statutes.

Where the purchaser of bonds issued under Public Laws 1909, ch. 442, amended by the Public Laws 1911, ch. 67, protest their validity on the ground that no notice of the time of hearing of objections had been published in a newspaper, and it appearing that the landowners affected had full and ample actual notice thereof, and publication could not be made because no newspaper was published in the county or had a general circulation therein, the failure of such owners to pay to the county treasurer the full amount for which their lands are liable, publication being made in accordance with the amendatory act, sections 9 and 10, will operate as a waiver of their rights to contest the validity of the bonds, and the purchaser of the bonds is in no better condition to resist their validity, and all parties to the proceedings are held to have consented to the issuance.

(38) APPEAL by defendant from *Ferguson, J.*, at Spring Term, 1914, of PERQUIMANS.

This is a controversy submitted without action to test the validity of certain drainage bonds, issued under the provisions of chapter 442, Public Laws 1909, as amended by chapter 67, Public Laws 1911, which the Engineering Company agreed to accept in payment for construction.

It is admitted by the parties: "That all of the provisions of the said chapter 442, Public Laws 1909, and of chapter 67, Public Laws 1911, pertaining to the creation and establishment of drainage districts and the issuance of bonds, have been complied with, saving only in this single respect, to wit: That after the completion of the final report, and after the same had been filed and examined by the court, found in due form and in accordance with the law and accepted, and the date fixed by the court for the final hearing upon the report in accordance with the provisions in section 15 of chapter 442, Public Laws 1909, the notice by publication in a newspaper as required by section 15 was not given, there being no newspaper published in the said county of Perquimans. Notice of the said final hearing was given by posting a written or printed notice at the door of the courthouse and at five conspicuous places throughout the district for more than two weeks before the said final hearing,
(39) and during this time a copy of the said final report was constantly on file in the office of the clerk of the Superior Court of Perqui-

mans County and open to the inspection of any landowner or other person interested within the district; that notwithstanding the failure to publish the said notice in a newspaper as required by said section 15 of chapter 442, Laws 1909, each and every of the landowners and persons interested within the said drainage district had actual notice of the date set by the court for the final hearing of the said report, as attested by the admissions of such landowners in writing hereto attached."

All the landowners and other persons interested file a paper in this proceeding, stating:

"That we and each of us had actual notice of the hearing of the final report of the viewers and engineer appointed in the above entitled matter, on 17 March, 1913, and had actual notice of the time and place that said hearing was to take place, and that our lands were assessed in said final report. This 15 December, 1913."

His Honor held that the bonds were valid, and the Engineering and Construction Company excepted and appealed.

J. S. McNider and Charles Whedbee for Drainage Commissioners.

Small, McLean, Bragaw and Rodman for Construction and Engineering Company.

ALLEN, J. The proceedings leading up to the issuing of the bonds conform to all the requirements of chapter 442 of the Public Laws 1909 as amended by chapter 67 of the Public Laws 1911, except in the one particular, that after the final report of the engineer and viewers was filed and accepted by the court, notice of the time of hearing objections to the report was not published in some newspaper of general circulation in the county, in addition to posting a notice at the courthouse door and at five conspicuous places in the drainage district, both publications being required by section 15 of the first act.

Is this fatal to the validity of the bonds? We think not, as it (40) appears that no newspaper is published in the county, and there is no evidence or finding that one published elsewhere has a general circulation there.

The act applies to the whole State, and it provides (sec. 37, ch. 442, Laws 1909) that it "shall be liberally construed to promote the leveeing, ditching, draining, and reclamation of wet and overflowed lands"; and if we should adopt the construction contended for by the Engineering Company, instead of promoting drainage wherever needed, counties in which no paper has a general circulation would be deprived of all benefit of the act, which manifestly was not the intention of the General Assembly.

If, however, there is a defect in the service of the notice, we are further of the opinion it has been waived.

All persons interested are parties to the drainage proceeding and have legal notice of every step taken up to the hearing of objections to the final report. They had notice that the time within which the report would be filed was fixed by statute, and that within a short time thereafter objections would be heard, and instead of filing objections, or questioning the power to issue the bonds, they file a paper in this proceeding on 15 December, 1913, after full knowledge of all the facts, acknowledging that they had actual notice of the time and place of hearing the final report on 17 March, 1913, and that their lands were assessed in the report.

Only one construction can be placed on this act of the parties, and that is that they are endeavoring to aid the drainage commissioners to establish the validity of the bonds, and to compel the Engineering Company to accept them. If so, they could not hereafter attack the bonds after their acceptance because of failure to publish the notice.

Again, the amendatory act of 1911, secs. 9 and 10, provide that—

"In case the total cost exceeds an average of 25 cents per acre on all lands in the district, the board of drainage commissioners shall give notice for three weeks by publication in some newspaper published
(41) in the county in which the district or some part thereof is situated, if there be any such newspaper, and also by posting a written or printed notice at the door of the courthouse and at five conspicuous places in the district, reciting that they propose to issue bonds for the payment of the total cost of the improvement, giving the amount of bonds to be issued, the rate of interest that they are to bear, and the time when payable. Any landowner in the district not wanting to pay interest on the bonds may, within fifteen days after the publication of said notice, pay to the county treasurer the full amount for which his land is liable, to be ascertained from the classification sheet and the certificate of the board showing the total cost of the improvement, and have his lands released from liability to be assessed for the said improvement; but such land shall continue liable for any future assessment for maintenance or for any increased assessment authorized under the law."

And that—

"Each and every person owning land in the district who shall fail to pay to the county treasurer the full amount for which his land is liable, as aforesaid, within the time above specified, shall be deemed as consenting to the issuance of drainage bonds, and in consideration of the right to pay his proportion in installments, he hereby waives his right of defense to the payment of any assessments which may be levied

for the payment of bonds, because of any irregularity, illegality, or defect in the proceedings prior to this time."

This provision was complied with by the drainage commissioners, and by its terms all parties to the proceedings are held to have consented to the issuing of the bonds.

We find no error.

Affirmed.

Cited: Griffin v. Comrs., 169 N.C. 644 (g); *Banks v. Lane*, 170 N.C. 16 (2g).

(42)

MARY F. COLTRAIN ET AL. v. DENNIS SIMMONS LUMBER COMPANY ET ALS.

(Filed 18 February, 1914.)

1. Deeds and Conveyances—Location of Lands—Evidence—Appeal and Error—Harmless Error.

Where the controversy concerning lands depends upon whether the *locus in quo* was contained within the description of plaintiff's deed, a question asked a witness, by the defendant, whether the lands were not contained in a deed made to him, is incompetent, as the deed will speak for itself, and was otherwise immaterial; and in this case the error, if any, in excluding the question was cured by the introduction of the witness's deed.

2. Evidence—Communications—Insane Persons—Interpretation of Statutes.

When the wife of an insane person sues under his deed and title to lands in dispute, testimony of a witness of conversation he had with the husband as to his claim to the lands is incompetent. Revisal, sec. 1631.

3. Same—Hearsay.

In an action by the wife to recover lands under a conveyance made to her by her husband, since insane, testimony of a son as to the claim of his father to the lands, prior to his deed, in a conversation between them, is incompetent as hearsay, and forbidden by statute. Revisal, sec. 1631.

4. Deeds and Conveyances—Location of Lands—Adverse Possession—Instructions.

Where the plaintiff claims the land in dispute upon the sole ground that it was contained in the description of her deed which was the only controverted matter, it is not error for the court to refuse defendant's prayer for special instruction upon the sufficiency of the plaintiff's evidence of adverse possession to ripen title.

5. Deeds and Conveyances—Descriptions—Boundaries.

In this action to recover lands and for trespass the failure of the *locus in quo* to bound on the other lands described in the deed is not held to be a fatal defect, under *Austin v. Austin*, 160 N. C., 369.

APPEAL by defendants from *Connor, J.*, at September Term, 1913, of MARTIN.

(43) *Winston & Matthews and S. J. Everett for plaintiffs.*
H. W. Stubbs and Martin & Critcher for defendants.

CLARK, C. J. This is an action of trespass, and to recover possession of land. Both parties claim under a common source of title. It is admitted that the plaintiffs are owners of the first two tracts of land described in the deed from Biggs and Jones, trustees, to W. H. and Exum Carstarphen, by virtue of the deed to them from the heirs of the said Carstarphens.

The sole question at issue is whether the deed from the Carstarphen heirs to H. A. Coltrain embraced the third or 50-acre tract of land described in the deed from said trustees. All the evidence is to the fact that the 50-acre tract of land was timber land. The original answer practically admitted that the deed under which the plaintiffs claim embraces the 50-acre tract, and the answer sets up a demand for reformation on the ground of mutual mistake or mistake of the draftsman in drawing the deed. No evidence was introduced to that effect, and the sole question remains whether the deed under which the plaintiffs claim embraces said 50-acre tract.

Mary F. Coltrain, the plaintiff, claims under the deed from her husband, H. A. Coltrain, who is now confined as a lunatic in the asylum at Raleigh, and who is represented by his wife, Mary F. Coltrain, who sues as next friend and also in her own behalf.

Exception 1 is that J. L. Coltrain, witness for the plaintiff, was asked on cross-examination: "Did your father make a deed to you? Yes. Did the deed to you cover part of the land described in the deed to your father?" On objection, the last question was properly ruled out. The deed will speak for itself. The defendants do not contend that any part of the 50-acre tract was in that deed. And, indeed, they deny that the father ever owned that tract. It is immaterial whether any of the other lands were included in the deed to the witness. Besides, the error, if any, was cured by the subsequent admission of the deed itself, which was put in evidence by the defendants.

(44) Exception 3. S. C. Carstarphen, one of the defendants, was asked: "What conversation, if any, did you have with H. A.

Coltrain some time after execution of your deed to him, relative to his ownership of the 50-acre tract of land or any act of possession exercised by him?" This question was properly excluded by the court, on the objection of the defendant. H. A. Coltrain was insane, and the plaintiff Mary F. Coltrain claims under her husband and also sues as his next friend. Revisal, 1631, excludes this testimony. *Bunn v. Todd,* 107 N.C., 267.

Exception 4. The defendant C. D. Carstarphen was asked: "What conversation, if any, just prior to the institution of this action, did you have with J. L. Coltrain, son of H. A. Coltrain, in which you informed him of a prior conversation with his father in which his father said that he did not claim the 50-acre tract, had never bought it, and had never listed it for taxation or paid taxes thereon." This question was properly excluded, upon objection of the plaintiff. The conversation is hearsay, and, besides, is barred by Revisal, 1631.

Exception 6. The court declined to charge as follows: "There are not sufficient acts of ownership upon part of plaintiff to show title by possession," without adding, "provided you find that the 50-acre tract is not covered by the deed from Carstarphen to Coltrain." The addition was proper. There is no claim that possession had ripened into title, but the foundation of the action is the deed.

Title being out of the State, and both parties claiming under a common source of title, a deed covering the 50-acre tract, then possession followed the true title. There was, however, evidence of possession, if the plaintiff had been put to show seven years possession under a deed as against strangers. J. L. Coltrain testified that his father went into possession of all these tracts in January, 1899, after the deed was made to him. But whether he went into possession or not makes no difference if the deed covered this land, for the deed under which the plaintiff claims was executed by the defendants or those under whom they claim.

Exceptions 2 and 5 are to the refusal of the court to nonsuit, in (45) which there was no error. There was evidence that the 50-acre tract was within the deed to Coltrain.

The contention that the failure of the 50-acre tract to bound on the other lands, as described in the deed, is a fatal defect, cannot be sustained. *Bradshaw v. Ellis,* 22 N. C., 20, cited *Austin v. Austin,* 160 N. C., 369.

No error.

Cited: Bachelor v. Norris, 166 N.C. 509 (5f); *S. v. Reid,* 178 N.C. 748 (2g).

S. W. ALEXANDER v. R. W. ALEXANDER.

(Filed 18 February, 1914.)

Divorce a Mensa—Trials—Evidence—Nonsuit.

The evidence in this action for divorce *a mensa* is held insufficient, and a motion of nonsuit was properly allowed. *Martin v. Martin*, 130 N. C., 28, and other cases cited by the Court.

APPEAL by plaintiff from *Connor, J.*, at October Term, 1913, of EDGECOMBE.

Civil action for divorce *a mensa et thoro*. At the close of the evidence, the defendant moved for judgment of nonsuit upon the ground that the evidence was insufficient to be submitted to the jury. The motion was allowed, and the plaintiff appealed.

James M. Norfleet and H. A. Gilliam for plaintiff.

James R. Gaskill and T. T. Thorne for defendant.

BROWN, J. The plaintiff asks a decree of divorce from bed and board upon the ground of abandonment, coupled with failure to support her, and also that the defendant has inflicted such indignities upon her as makes her life intolerable. No alimony is asked.

The court sustained the motion to nonsuit and dismissed the action, but awarded the custody of the children, under certain conditions, to the plaintiff.

We have examined the evidence in this record with great care, and find that it discloses a most unfortunate and lamentable condition of
(46) affairs, but it falls far short of that character which entitles the plaintiff to a divorce *a mensa*, assuming that her version of the facts is correct.

The law will not sanction and authorize by its decrees the separation of husband and wife except for legal cause as prescribed in the statute and settled by numerous decisions of this Court. *Martin v. Martin*, 130 N. C., 28; *Oconnor v. Oconnor*, 109 N. C., 139; *Jackson v. Jackson*, 105 N. C., 433; *White v. White*, 84 N. C., 340; *Joyner v. Joyner*, 59 N. C., 322; *McQueen v. McQueen*, 82 N. C., 472.

The evidence in this case does not at all meet the requirements of the law as laid down in those cases.

We deem it unnecessary to discuss it. It would be painful to the parties chiefly interested, and their children, and of but little value as a precedent.

Affirmed.

E. H. JEFFERSON ET AL. v. ROANOKE RAILROAD AND LUMBER COMPANY.

(Filed 18 February, 1914.)

1. Deeds and Conveyances—Reformation—Limitation of Actions—Interpretation of Statutes.

To reform a deed for mutual mistake, the cause of action accrues when the mistake is discovered or should have been in the exercise of ordinary care, and is barred three years thereafter. Hence, in an action to reform a timber deed for an alleged mutual mistake of the parties, so as to incorporate therein an agreement of the grantee that the land was only to be once cut over, and that the right to cut should cease when he moved away from the land, the statute of limitations will run three years after the plaintiff had knowledge of the mistake alleged. Revisal, sec. 395, subsec. 9.

2. Deeds and Conveyances—Timber—Adverse Possession—Consistent Occupancy.

The statute of limitations will only run against a title to or an interest in lands when the occupation of the property or the enjoyment of the right is hostile to the right of the adverse claimant or in some way antagonistic to it; and such adverse use or occupation is not shown when the owner of lands reserves the timber of a certain dimension standing thereon and conveys the land itself, and the grantee enters upon the lands and uses the same for farming or other like purposes consistent with the right of the grantor to the timber reserved. As to whether the plaintiff's evidence in this case is sufficient to show mutual mistake, or to aid him were it established, *Quære.*

3. Limitation of Actions — Adverse Possession — Evidence — Occasional Trespass.

In this case the grantor of a large tract of more than 200 acres reserved the right to the timber of a certain dimension growing thereon, and the grantee entered thereon and used the same for farming or like purposes. There was evidence tending to show that the grantee at one time entered upon the lands and cleared some 15 or 20 acres, and that he or his assignee cut down several trees that were merchantable timber; also, that upon another occasion he cleared about 4 or 5 acres more of the land. Upon the plea of the statute of limitations by the grantor, it is *Held*, that the grantee has not established such an invasion of the grantor's rights, or such possession or enjoyment opposing his interest, as would stay the effect and operation of the statute.

APPEAL by plaintiff from *Bragaw, J.*, at October Term, 1913, (47) of BEAUFORT.

Civil action to correct mistake in deeds and to recover damages for the alleged wrongful cutting of timber.

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

Ward & Grimes for plaintiff.

A. O. Gaylord, A. D. MacLean, and W. B. Rodman, Jr., for defendant.

HOKE, J. On 27 July, 1912, plaintiffs, claiming a portion of the land involved in this controversy as heirs at law of D. A. Jefferson, deceased, and the residue as grantees of said D. A. Jefferson, instituted the present action to correct two deeds, one from D. A. Jefferson to defendant company, extending the time to cut certain timber, purchased and owned by the company, on the home place of said Jefferson, five years from 11 May, 1903, and the second a deed from defendant company to
(48) Jefferson, dated 25 February, 1903, for certain other tracts of land, known chiefly as the Gurganus lands, in which last mentioned deed plaintiff excepted all the timber on said land down to 4 inches in diameter at the base when cut and all such timber as would attain such size during the ten years from date, the time allowed for cutting and removing the timber excepted. This deed contained minute and extended stipulations conferring on the company the right of entering on said land, building all necessary roads, etc., cutting and removing said excepted timber, as stated, at any time within ten years from the making of the deed. In said action plaintiffs also sought to recover damages from defendant by reason of the alleged wrongful cutting of timber on said lands.

From the facts in evidence, it appeared that defendant had purchased and owned the timber on the home place of D. A. Jefferson and the time for cutting the same was about to expire when defendant company, having bought certain other lands, amounting to 200 acres and over, being the Gurganus lands and others, and, on 25 February, 1903, for recited consideration of $400, sold and conveyed these lands to D. A. Jefferson, excepting the timber down to 4 inches when cut, and stipulating for the right to cut and remove timber at any time within ten years, and also all timber that should attain such size at any time during the period of ten years. As a part of the consideration for this conveyance, D. A. Jefferson made a deed extending for five years the right to cut the timber on the D. A. Jefferson home place, etc. That soon after the execution of these deeds defendant company cut over a portion of the lands conveyed, lying on the south side of the road that divided the property, but did not cut any on the portion lying north of the road and amounting to 100 or 125 acres; it appearing that another lumber company held timber rights on that portion which had not then expired. These rights having expired, defendant company, in 1912, went back on the land and cut over this 100 acres north of the road, and also a small portion on the south side, about 5 per cent of the whole and within the dimensions specified in

the contract. Plaintiffs then instituted the present suit, claiming, in effect, that it was a part of the contract and agreement beween (49) the company and D. A. Jefferson that the land was only to be cut over one time, and that when the company ceased cutting and moved away from the land, any and all rights in the timber should cease, and that the stipulation of the contract was left out of the deeds by mutual mistake of the parties, and was not discovered by them till several months after the deeds were executed. There was also evidence on the part of plaintiffs that, shortly after defendant company cut over the land south of the road, one of plaintiffs cleared some 15 or 20 acres of that land, and he or his assignee cut down several trees that were merchantable timber, and, in 1904 or 1905, another of the plaintiffs cleared 4 or 5 acres north of the road. It does not distinctly appear whether this clearing was during the life of the other lumber company's claim or not.

There is doubt if the plaintiffs have offered evidence to show that the stipulations under which plaintiffs make their claim was omitted from the deed by the mutual mistake of the parties, or that it would aid plaintiffs if such mistake were established. According to the testimony, the defendant company had never cut over, even one time, the portion of land lying north of the road, within the meaning of these contracts as ordinarily expressed (*Davis v. Frazier,* 150 N. C., 448); but if both positions be conceded to plaintiffs, we are of opinion that they have been properly nonsuited. If the deeds stand as they are now clearly written, the defendant company was well within its rights in cutting over the land in 1912, and in order to a recovery it is essential that the deeds in question should be corrected by reason of the alleged mistake, a cause of action which arises when the mistake is discovered or should have been in the exercise of ordinary care, and is barred within three years from the time the same accrues. Revisal, 395, subsec. 9; *Modlin v. R. R.,* 145 N. C., 218; *Peacock v. Barnes,* 142 N. C., 215; *Bonner v. Stotesbury,* 139 N. C., 3.

According to the allegations of the complaint and the admitted facts, the mistake, if any, occurred in July, 1903, and was fully known to the parties within a few months thereafter. The present action (50) was not commenced till 27 July, 1912, and, the statute having been properly pleaded, plaintiff's claim is thereby barred.

It is urged for plaintiffs that the statute should not prevail against them in this instance by reason of their continuous occupation of the property and the assertion of a claim thereon in contravention of defendant's estate. There are several decisions with us, and they are in accord with doctrine prevailing elsewhere, that the statute of limitations will not run against one in possession of the property, as in *Porter v.*

White, 128 N. C., 42; *Mask v. Tiller,* 89 N. C., 423; *Stith v. McKee,* 87 N. C., 389, etc.; but the principle in question obtains, as a rule, when the occupation of the property or the enjoyment of the right is hostile to the adverse claim or in some way antagonizes it. It is in the nature of a corollary of the more general doctrine of acquiescence or abandonment on the part of the adverse claimant, and should not prevail when the occupation or possession is uniformly consistent with the other's interest, or the invasion at most only amounts to occasional and wrongful interferences with it. This is well illustrated in the case of mines and mineral interests after severance from the general ownership of the property and in which the occupation of the surface by such owner after severance is held not necessarily or usually to antagonize the special interest; a position recently applied by this Court in a well considered opinion by *Associate Justice Brown,* in *Hoilman v. Johnson,* 164 N. C., 268, and citing, among other authorities, *Wallace v. Elm Grove Coal Co.,* 58 W. Va., 449, and *Plant v. Humphries,* 66 W. Va., 88. From a perusal of the facts in evidence, it will appear that defendant company, in conveying this property, excepted the timber interest thereon, reserving the right to cut and remove the same at any time within ten years. Defendants entered and cut over a distinct portion of the property, that on the south side of the road, in 1903, not entering on the north side at that time by reason of a timber interest then existent in another company.

When this interest expired, in 1912, it entered and cut the timber
(51) on the northern part of the tract, cutting also a small amount of merchantable timber on the south side which had been left in 1903. The right reserved and clearly expressed on the face of the instrument was fully known to plaintiffs and those under whom they claim within a few months after the execution of the deed, in February, 1903, and plaintiffs have made no allegations of any mistake nor taken any steps towards having same corrected from that time till 1912, nine years or over. Plaintiffs bought the property and held it with a view to farming purposes, and it was not shown that the clearings made by them were inconsistent with the purposes for which they held possession or that the cutting of a few timber trees was such an interference as would destroy or tend to destroy the estate or interest of defendant in the residue of the timber. On the facts in evidence, the plaintiffs, in our opinion, have established no such invasion of defendant's rights or no such possession or enjoyment of an opposing interest as would stay the effect and operation of the statute, and the order of nonsuit is

Affirmed.

Cited: Williams v. Parsons, 167 N.C. 532 (3g); *Cooley v. Lee,* 170 N.C. 23 (2g); *Ewbank v. Lyman,* 170 N.C. 508 (1f); *Garland v. Arro-*

wood, 172 N.C. 593 (1f); *Latham v. Latham,* 184 N.C. 64 (1f); *Stancill v. Norville,* 203 N.C. 461 (1f).

W. E. CAMPBELL v. A. MILLER.

(Filed 18 February, 1914.)

1. Limitations of Actions—Adverse Possession—Color of Title.

One who cuts wood upon the lands in dispute at several separate times, without title, is a trespasser upon the lands, and evidence of this character is insufficient to ripen title as adverse possession without "color."

2. Same—Instructions—Appeal and Error—Harmless Error.

In an action to recover lands contained in the lappage of disputed division lines between adjoining owners which one of them claims under seven years adverse possession under "color of title," his prayer is properly refused which leaves out the words "color of title," seven years without "color" being insufficient; but had the prayer been correct, its refusal by the court is rendered harmless in this case, by the location of the line by the jury in accordance with the contention of his adverse claimant.

3. Deeds and Conveyances—Lines and Boundaries—Estoppel.

For an adjoining owner to be estopped from claiming the true divisional line of his lands, it is necessary for the party setting up the estoppel to show that he purchased the lands from him, and that there was a contemporaneous running and marking of the line; and it is insufficient that he only pointed out the wrong line at the time of purchase from another.

APPEAL by defendant from *Bragaw, J.,* at September Term, (52) 1913, of BEAUFORT.

Small, McLean & Bryan for plaintiff.

M. G. Tooley, W. B. Rodman, Jr., Rodman & Bonner for defendant.

CLARK, C. J. The principal controversy is as to the location of the line between the plaintiff and the defendant, known as the Chester-Winfield line, there being no serious dispute about the title. Plaintiff owns part of the Satterthwaite land, the deed for which calls for the Winfield line, and the defendant owns part of the Winfield land. Both parties claim under W. J. Bullock, who formerly owned both tracts or parts of them. In 1892 Dr. Bullock conveyed to Mrs. Addie Wentz, under whom defendant claims, an interest in the tract of land known as the Chester-Winfield land adjoining the Edward Satterthwaite land and

others, and in 1902 Bullock conveyed to plaintiff certain parts of the Edward Satterthwaite land, calling for the Chester-Winfield line as its boundary. On 8 December, 1904, Mrs. Wentz conveyed to defendant, and this suit was begun 3 May, 1911, being less than seven years after defendant purchased.

The court told the jury in effect that the Chester-Winfield line was the only one necessary to be located. There was no other line common to, or in dispute between, plaintiff and defendant, and by referring to the deed from Davis to Winfield it will be seen that no other call serves to aid, much less to control, the location of that line.

The chief controversy on the part of the defendant, who is appellant, is that even if the line was correctly located, he and Mrs. Wentz,
(53) under whom he claims, have held seven years possession of the lappage or *locus in quo*. He bought in 1904 when the land was in woods. He testified that when he bought the land McGowan had been cutting timber off of it, and it had no timber when he bought it. He said that he had been working it continuously ever since. McGowan testified as a witness that he was Mrs. Lentz's agent and looked after the land for her; that she first took possession in 1901; that in January, 1903, he cut some wood on the land for her and hauled it in 1904 up to the time that defendant Miller bought; that there was no merchantable timber on the land; that he cut some wood off the land in 1903 and hauled it to Belhaven to the hotel, and in 1904 he got some for his personal use. He said on cross-examination: "When I said I had possession of the land for Mrs. Wentz, I meant that I went on it and cut some wood which I hauled off." This cannot be said to be possession, but amounts simply to a trespass, unless Mrs. Wentz had title to the land. *Cox v. Ward,* 107 N. C., 512; *Vanderbilt v. Johnson,* 141 N. C., 370. The court properly refused to charge: "If the defendant and those under whom he claims have had possession of the land in dispute for a period of seven years under known and visible boundaries, and said possession was continuous, and the land was used in such manner as it was then capable of," to answer the first issue, as to the location of the line, as claimed by the defendant, for the prayer omits the words "under color of title." Besides, the defendant had no color for the *locus in quo* if the Chester-Winfield line is located where plaintiff claims and the jury found it. Seven years possession without color is not sufficient.

The defendant contends that the plaintiff pointed out the line at the time the defendant purchased, and, therefore, the plaintiff having misled the defendant, was estopped to set up the true boundary. The issue as to this was found by the jury in favor of the plaintiff, and the charge of the court was as favorable to the defendant as he could ask, for he did

not purchase from or claim under the plaintiff, and there was no contemporaneous running and marking. *Caraway v. Chancy,* 51 N. C., 361. The court seems to have followed, in the charge, the ruling (54) in *Boddie v. Bond,* 154 N. C., 359, and the jury found that there was no misrepresentation on the part of the plaintiff.

The other exceptions do not require discussion.

No error.

Cited: Katz v. Daughtrey, 198 N.C. 934 (g).

WILTZ VENEER COMPANY v. A. T. ANGE ET ALS.

(Filed 18 February, 1914.)

1. Deeds and Conveyances—Standing Timber—Future Growth—Vested Interests.

A conveyance of standing timber of a certain diameter and such as may attain that size during the period allowed for cutting, vests in the grantee a present estate in the timber, both that which at the date of the deed is of the specified size and that which within the period will attain it, postponing the grantee's right to cut, as to the latter, to the time when it reaches the size called for in the conveyance.

2. Same—Undergrowth—Equity—Injunction.

Where standing timber of a certain size is conveyed and that which may attain that size during the period of cutting, and the right is also given to cut smaller growth for car standards, railroad ties for the logging road of the grantee, etc., the grantor may be enjoined, within the stated period, from cutting or removing the undersized timber, where it appears from the evidence that some of the trees will reach by natural growth, within the stated period, the size stated in the deed.

3. Deeds and Conveyances—Standing Timber—Future Growth—"May"—Words and Phrases.

Where timber of a certain size is conveyed, together with that which "may" attain that size within the period of time allowed for cutting, the word "may" will be interpreted as meaning such timber as *can* by natural growth reach that size within the period stated.

4. Expert Evidence—Deeds and Conveyances—Timber—Future Growth.

When it is relevant to the inquiry as to what timber of a certain size, or that may attain that size during the period of cutting, has passed by a deed, testimony of experts is competent to show the probable increase in the diameter of the smaller trees to the specified size within the time and according to the law of nature.

(55) APPEAL by defendant from order made by *Connor, J.*, at chambers, 16 September, 1913; from WASHINGTON.

This action was brought by the plaintiff for the recovery of damages and to enjoin the defendants from cutting on and removing from two certain tracts of land the timber and undergrowth standing thereon. The defendants, by deeds dated respectively 29 November, 1909, and 14 January, 1913, conveyed to the plaintiff the timber and undergrowth on the tracts of land described in the said deeds, with the right to cut and remove the timber, and to cut and use the undergrowth for the purposes specified in the deeds, which contain stipulations substantially similar as to the time of cutting and removing the timber, except, perhaps, as to the timber to be cut during the extension period, but no reference was made to any such difference in the argument now before us, nor is there any in the briefs; so it is pretermitted. We take the following clauses from the deed of 14 January, 1913: "The growth and timber herein mentioned and hereby sold and conveyed is all that growth on the said tracts which is now or which may at any time within the period of ten years from this date or any extension thereof be or reach in said time the size of 12 inches on the stump or upwards when cut, to be cut 18 inches above the ground at any time during the said term of ten years from this date or any extension of said term as hereinafter set out. . . Also the right to cut smaller growth and undergrowth under the size mentioned above without liability, for car standards, railroad ties for the logging roads of the party of the second part."

The defendant has cut trees from the land which will grow to the size specified for cutting during the period fixed in the deeds, as found by the court.

The contentions of the respective parties are thus stated by the court in its findings and judgment:

(56) "The plaintiff contends that it is the owner under the two deeds of all timber standing on the land which was at the dates of the deeds or which would reach at any time during a period of ten years from the said respective dates, or during any extension of such period as therein provided, the size of 12 inches or upwards in diameter at the stump; and also that the plaintiff is the owner, with right to cut, use and remove for making tramways, car standards, etc., all undergrowth and smaller sized timber on the land, as described in the deeds. The defendants admit that plaintiff is the owner of all the timber which was, at the dates of the deeds, 12 inches and upwards in diameter at the stump; that during the period aforesaid the plaintiff has the right to cut and remove so much of the timber as may, during said period, have attained to such size when cut; but the defendants deny that plaintiff is now the

owner of or has any title to or estate in the timber which is now under the size aforesaid; and defendants further deny that plaintiff is now the owner of any undergrowth or of any timber under the size of 12 inches in diameter at the stump, which may be necessary for tramways, car standards, etc.; but contend that the plaintiff has the right by virtue of the deeds to cut, use, and remove only so much of the undergrowth and timber under the size aforesaid as may be necessary for the purposes specified, *from time to time* during the stipulated period."

The court found as facts that a pine tree not now less than 7 inches in diameter, and hardwood trees not less than 10 inches at the stump, will grow to the size of 12 inches in diameter at the stump 18 inches from the ground within the period of time named in the deeds, and enjoined defendants from cutting any such timber, and also from cutting and removing any undergrowth which will not reach the size of 12 inches in diameter within said time, except for firewood and "general plantation purposes," and then only in such a way as not unnecessarily to interfere with plaintiff's rights under the deeds, and continued the injunction to the hearing, with leave to apply for an increase in the amount of plaintiff's undertaking.

Defendant appealed.

W. M. Bond, Jr., for plaintiff. (57)
Gaylord & Gaylord for defendant.

WALKER, J., after stating the case: We do not see why the judgment of the court below was not correct. The contract of the parties, as it appears in the deeds, is not very clearly expressed, but sufficiently so to make its construction a question for the court. The defendants conveyed to the plaintiff, not only the trees which, at the date of the deeds, had reached a certain diametric size, but also those which could, at any time during the fixed period, grow to that size. Discarding irrelevant words, the language is, "all that growth which is *now* (of the prescribed diameter) or which, *at any time* within the period of ten years from this date, may reach the size of 12 inches on the stump or upwards, when cut, the cutting to be 18 inches above the ground." They not merely conveyed trees found to be of a certain size at the time of cutting them, but presently passed all that would attain to that size during the time allowed for cutting and removing the same. It was said by *Justice Avery,* for the Court, in *Warren v. Short,* 119 N. C., 39, that "a deed might be so drawn as to pass all trees that would attain to the size mentioned within a reasonable time fixed by the deed," and these deeds were presumably framed in accordance with that suggestion.

It may not be necessary to decide, for the purpose of this appeal and at this time, whether the estate in those trees which would, in the course of natural growth, reach the required diameter, vested absolutely at the date of the deeds, as much so as it did in those which were then of that dimension, it being susceptible of proof that trees of a certain age now will be of the required size before the expiration of the period allowed for cutting and removing the timber; for if the plaintiff has merely a contingent right or interest in the trees, which, by the natural growth of the trees, will ripen into a vested one, we should still protect it by restraining any act of defendant committed or threatened in derogation of that right or interest. But this is not even a contingent right, as we gather from the findings. It can be determined with reasonable certainty, as we have said, that a tree will, within a given period,
(58) grow to a certain size, measured diametrically, and therefore it cannot well be doubted that the parties intended, at the date of the deeds, that plaintiff should have a present estate, not only in the trees which were then 12 inches in diameter, but in those which should thereafter grow to that size within the stated period. The estate vested in both kinds of trees at the date of the deed, but the enjoyment of it, as to the latter class, or the right to cut the trees of that class, was postponed until they had attained to the regular size. Otherwise, the vendor could destroy the subject of the grant to the vendee. What the parties meant, if we state it more exactly, was that the vendee should acquire by the deeds a present interest in the trees which, in the unimpeded course of nature, would grow to the dimension of 12 inches in diameter within the fixed time, and not in those only which the vendor may not have cut down before that stage of their maturity was reached. Where a deed conveys trees of a certain diameter, nothing else being said, it passes only those coming within the description at the date of the deed. *Whitted v. Smith,* 47 N. C., 36; *Warren v. Short, supra; Hardison v. Lumber Co.,* 136 N. C., 173; *Whitfield v. Lumber Co.,* 152 N. C., 212; *Kelly v. Lumber Co.,* 157 N. C., 175. When it conveys trees of a certain diameter when cut, it means those which are actually of that diameter when reached in the process of cutting. *Lumber Co. v. Corey,* 140 N. C., 462. But these deeds mean more than that, and embrace trees which are, at the time of the deed, capable of increasing in size to the stipulated diameter, if left to grow according to the law of nature. How could the vendee know whether there would be any trees to cut, other than those of 10 inches in diameter then standing on the land, if the vendor is permitted to destroy all the trees on the land other than those just mentioned?

The stipulation as to future growth of the trees was a substantial part of the contract, and the consideration paid for the trees and the privilege of cutting and removing them may have been measurably based upon it; but if the defendant's contention be the true one, the benefit from the contract to the vendee would be largely illusory—a figurative but veritable jack in the box. It is easy to say that (59) the vendor reserved what he did not grant; but here there is a clearly implied stipulation that he will do nothing to make his grant ineffective, nor will he set up something for the money he received and then knock it down at his will and pleasure. Such a construction, it seems to us, would be unreasonable and lead to great injustice. It would be inequitable to permit him to thus destroy the substance and effect of his covenant. In *Kelly v. Lumber Co., supra,* the *Chief Justice* intimates that, if words of prospective meaning, as to growth of trees, are used in the contract, the deed is not confined, in its operation, to trees of the required size at the time of the deed, but will include those which can reach that size in their natural development during the contract period of cutting. There may be expressions in one or two cases which are apparently in conflict with these views, but the inconsistency is more apparent than real. The language in the deeds in those cases was different, and it was not contemplated by the parties that the vendee should have a present interest in the undeveloped trees, with merely the right to cut postponed, as is the case here.

In some deeds the expression "when cut" is used with the purpose of fixing the time when the measurement is to be made and of forbidding a cutting before that time, although the tree will reach the requisite size during the period allowed for cutting, and, further, for the purpose of providing that, if the tree is not cut during the period, although it may come to the proper size, it will not pass to the vendee, but revert to the vendor. These decisions and their reasoning are, of course, not applicable here.

The case of *Robinson v. Gee,* 26 N. C., 186, can be distinguished from this one. It was an action of trespass *quare clausum,* and not a bill for an injunction to prevent an illegal and inequitable act, which is threatened, in violation of plaintiff's rights. Besides, the period fixed for the cutting was unlimited, and there are, perhaps, other differences, growing out of dissimilarity in the language of the deeds in the two cases; but if it is not in entire harmony with this opinion, we would not be disposed to follow it, so far as it may essentially differ there- (60) from, as we are convinced that the true rule of construction has been applied to the deeds in this case, and that we have reached a just and equitable conclusion, when we hold that there was no error in con-

tinuing the injunction as to the timber, both pine and hardwood, nor as to the undergrowth, to the final hearing. It is so perfectly clear as to require no argument to show that the continuance of the injunction, as to the undergrowth, was entirely proper.

We may add that the auxiliary verb "may" implies ability or possibility, and Webster says is now oftener expressed by the verb "can," and as thus used it means potentiality, and, in these deeds, the possibility of the trees growing to a size which will measure 12 inches in diameter. The two verbs "may" and "can" we know are often used indifferently in common parlance to express the same idea, and we are satisfied the parties intended, when they referred to trees that may grow to such a size, that all trees which had the natural capacity, so to speak, of reaching that state of maturity during the contract period, should presently pass to the vendees.

It was competent to hear evidence of experts as to the probable increase in the diameter of the trees within a given time, according to the law of nature. *Whitfield v. Lumber Co., supra; Kelly v. Lumber Co.*, 157 N. C., 175.

No error.

Cited: Mfg. Co. v. Thomas, 167 N.C. 111 (1f).

J. W. DAILEY v. SOUTHERN LIME AND FERTILIZER WORKS AND DR. JOHN L. PRITCHARD.

(Filed 18 February, 1914.)

Corporations—Insolvency—Parties Defendant—Demurrer—Interpretation of Statutes.

For one to be made a proper party defendant under Revisal, sec. 410, in an action to appoint a receiver for an insolvent corporation and administer its assets, he must claim an adverse interest to the plaintiff in the action and necessary to the complete determination or settlement of the questions therein involved; and his demurrer is good to a complaint which alleges that he wrongfully claims that the plaintiff is liable to him for some shares of stock he had sold him upon authority of the corporation, under an agreement to take back the stock and repay the purchase price in the event of dissatisfaction on the defendant's part; for such allegations negative the idea that the defendant has a cause of action either against the plaintiff or the corporation, and states no cause of action against the defendant.

APPEAL by plaintiff from *Bragaw, J.*, at December Term, 1913, (61) of BEAUFORT.

This is an action by the plaintiff, as stockholder and creditor of the defendant fertilizer company, a corporation, for the appointment of a receiver and the collection and distribution of its assets.

The defendant Pritchard was made a party, and the plaintiff alleges as against him:

"(4) That heretofore, on the . . . . day of January, 1911, the plaintiff having authority from said corporation to sell stock, negotiated the sale of ten shares of stock of par value of $100 to the defendant Pritchard at Windsor, N. C., and at the time of said sale entered into agreement, together with one George T. Hardy, who is now a nonresident of this State and without property in the State, with him, the said Pritchard, that if he, said Pritchard, was dissatisfied with his stock within one year from date thereof they, the plaintiff and Hardy, would take back said stock and reimburse him, said Pritchard, the amount paid therefor, towit, $1,000.

"(5) That said Pritchard made no expression either to the plaintiff, said Hardy, or the defendant corporation of any dissatisfaction with said purchase during the period of one year from said sale, and never made any claim or demand thereon until 26 November, 1913, at which time said defendant Pritchard made demand on this plaintiff for $1,000 and interest thereon, basing his claim upon the agreement aforesaid, and claiming and asserting that this plaintiff at the time of said sale had represented that said stock was to be issued by a certain corporation known as the Southern Lime Company, and not by the (62) Southern Lime and Fertilizer Works, Inc., which plaintiff denies and hereby alleges to be untrue, and that the sale of said stock in said last named corporation was a fraud on him, the said Pritchard, which he also denies and alleges to be untrue, and said defendant Pritchard is now claiming and demanding against plaintiff payment as aforesaid: which said demand, for the reasons above set out, is wrongful and unlawful, and he is advised and believes, and so alleges, that said Pritchard proposes and intends to attempt to enforce his demand against plaintiff through the courts.

"(6) That the plaintiff was expressly authorized and empowered by the defendant corporation to make the agreement with defendant Pritchard, and made same on behalf of said corporation, and if there be any liability in favor of defendant Pritchard in said agreement, which is denied, the defendant corporation is primarily and solely liable, and not this plaintiff; and if said Pritchard is allowed to attempt to enforce his

claim and demand against this plaintiff and not against said corporation, this plaintiff will be irreparably damaged.

"(7) That for the reasons and upon the facts above set out the plaintiff is not indebted to defendant Pritchard, and owes him nothing, and any liability on said stock and the condition of sale thereof exists between said Pritchard and said Southern Lime and Fertilizer Works, Inc."

His Honor dismissed the action as against Pritchard, and the plaintiff excepted and appealed.

Ward & Grimes for plaintiff.

Winston & Matthews for defendant Pritchard.

ALLEN, J. This action is for the appointment of a receiver of the defendant corporation, to the end that its assets may be collected and administered, and the statute (Revisal, sec. 410) provides that any person may be made a defendant "who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the questions involved
(63) therein."

Accepting the allegations of the complaint to be true, and applying the test prescribed by the statute, it not only appears that the defendant Pritchard has no interest in the assets of the corporation, but that he claims none, and that the corporation has incurred no liability to him; and it is expressly alleged that his demand against the plaintiff is spurious, and that the plaintiff owes him nothing.

There is therefore no cause of action stated against him, and the complaint negatives the idea that he has a cause of action against the plaintiff.

The principle involved in *Spruill v. Bank,* 163 N. C., 43, is closely related to the one under consideration. In that case the plaintiff brought his action against the bank and its cashier for wrongfully paying a check to one Jackson, who was also made a party defendant, upon the theory that if there was a recovery against the bank it could recover against Jackson.

The plaintiff alleged no cause of action against Jackson, and the bank and Latham denied that they had wrongfully paid the check to him, and it was held that the action was properly dismissed as to Jackson.

We therefore conclude there is no error.

Affirmed.

J. K. BULLOCK ET ALS. v. PLANTERS COTTON-SEED OIL COMPANY.

(Filed 25 February, 1914.)

1. Judicial Sales—Estates — Contingent Remainders — Interpretation of Statutes—Constitutional Law.

Revisal, sec. 1591, rendering valid judgments authorizing the sale of lands wherein there are contingent remainders, is constitutional and valid.

2. Judicial Sales—Estates—Contingent Interests—Interpretation of Statutes—Parties—Representation—Application of Funds.

A testator devised certain lands to his wife during her widowhood or life, which, at her death, were to be equally divided between the children or "their heirs." The lands were sold in partition in 1904, during the lifetime of the widow, and the children were made parties. One of these children died in 1906, before the death of her mother (in 1909) and her children, the grandchildren of the testator, brought suit to recover their interests in the land devised, claiming they had a vested interest therein in 1904, and not being parties to the proceedings, were not estopped by the judgment in partition: *Held*, the plaintiffs had a contingent interest in the lands at the time of the sale, and were concluded from claiming the lands under the validating act of 1905 (Revisal, sec. 1591). *Semble*, even under the common law the representation of the mother was sufficient to bind the plaintiffs, and the purchaser was not required to see to the application of the proceeds of sale. *Springs v. Scott*, 132 N. C., 564, cited and applied.

APPEAL by defendants from *Connor, J.*, at August Term, 1913, (64) of NASH.

J. M. Norfleet and H. A. Gilliam for plaintiffs.

Bunn & Spruill and Winston & Biggs for defendants.

CLARK, C. J. Samuel H. Hargrove, under whom both parties claim, died in 1874, and by his will devised all his property, land, crops, stocks, etc., to his wife "during her widowhood or life," and after her death "it shall be equally divided between all my children or their heirs at her death."

The widow never remarried, and died in 1909. At the death of the testator in 1874 there were four children, *i. e.*, (1) Robert Hargrove; (2) a daughter, Lucy, who married Ruffin and died before her mother, leaving two children, Frank and Samuel; (3) a daughter, Martha, who married Spicer, and also died before her mother, leaving a number of children, for whom T. M. Arrington was duly appointed guardian; (4) a daughter, Prudence, who married R. D. Bullock, and who also died before the widow, leaving several children, who are the plaintiffs herein.

In 1904, Mrs. Lucy Hargrove, the widow; R. D. Bullock and his wife, Prudence, the mother of the plaintiffs in this case, who was then living; Frank and Samuel Ruffin, children of the deceased daughter,
(65) Lucy, both of whom were of age; the children of Martha Spicer, who were minors represented by T. M. Arrington as their guardian, and Robert Hargrove, all joined in a special proceeding before the clerk of the Superior Court asking to be allowed to sell 7 acres of land, which is the *locus in quo* for division. The proceeding was regular in all respects, the sale made, deed executed, money paid and distributed, and the purchaser, Planters Cotton-seed Oil Company, went into possession and erected its factory. Various parcels of this land have been sold since by the purchaser, the oil company, to the other defendants herein named.

This action is brought on the ground that after the sale and before the widow's death, Prudence Bullock died, and hence that at her death the children of Prudence Bullock became entitled to one-fourth of the land, upon the theory that the words "at her death" made the "heirs" among whom the partition should be made those heirs who were living at the death of the widow, and that the children of Prudence Hargrove not having been made parties to the proceedings in 1904, are not estopped by the judgment therein, and are entitled to recover one-fourth interest in the realty.

The defendants contend that under the will: (1) There was a life estate in the widow, with vested remainder in her children, with provision that in the case of the death of such child before the death of the widow the children or heirs of the deceased child should stand in the place of the parent when the division is made. (2) That all the parties in remainder at the date of the sale in 1904 being before the court, the decree passed the title to the purchaser.

The law favors the early vesting of a remainder. *Whitesides v. Cooper,* 115 N. C., 573; *In re Yancey's will,* 124 N. C., 153; 2 Underhill Wills, sec. 610, note 3. *Chancellor Kent* says that a vested remainder is where there is a present fixed right of future enjoyment. 4 Comm., 194. The defendants contend that under the will the children of the testator took a vested interest and that the provision as to the division at the death of the widow referred only to the partition which should
(66) take place at that time, and did not confer on the grandchildren any vested interest during the lifetime of the parent.

In *Irvin v. Clark,* 98 N. C., 437, the limitation was "To Margaret Irvin and her husband during their natural lives, and to descend to the children of the said Margaret equally." The Court said: "If the devise had been to those children *living at the death* of the mother, there would

have been a contingent and not a vested remainder in either, for, until that event occurred, it could not be known who would take, and in such case the contingent interest could not be sold by a court of equity. But when the gift is general, not being confined to survivors when to take effect, it is otherwise, and by representation those who may afterwards come into being are concluded by the action of the court upon those whose interests are vested, but whose possession is in the future."

In *Springs v. Scott,* 132 N. C., 548, it was held: "By Laws 1903, ch. 99, the Court has the power, where there is a vested interest in real estate and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, to order the sale by conforming to the procedure prescribed by the act. The act is constitutional, and applies to estates created prior to its enactment." See, also, *Yancey's Will,* 124 N. C., 151; *Hutchinson v. Hutchinson,* 126 N. C., 671; *Hodges v. Lipscomb,* 128 N. C., 57, all of which show the disposition and tendency of our courts to favor all sales of land for division, whether vested or contingent. *Bowen v. Hackney,* 136 N. C., 187, is distinguished from the present case because in *Bowen's case* the division was to be "at the expiration of the life estate of my wife," referring to the termination of a property right, while in the present case it is "after the death of my beloved wife," when the property right has already been fixed.

Hodges v. Lipscomb, supra, is direct authority for the validity of said sale. In *Springs v. Scott,* 132 N. C., at p. 564, the Court said: *"Without regard to the act of 1903,* the court has the power to order the sale of real estate limited to a tenant for life, with a remainder to children or issue upon failure thereof over to persons some or all of (67) whom are not *in esse* when one of the class *being first in remainder after the expiration of the life estate* is *in esse* and a party to the proceeding to represent the class, and upon decree passed and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons *in esse* or *in posse.*"

Here the person next in remainder to the life estate, to wit, the mother of plaintiffs, was *in esse* and a party to the proceeding. True, it is said in *Springs v. Scott,* at foot of p. 564, that "The decree must provide for the investment of the fund in such way as the court may deem best for the protection of all persons who have, or may have, a remote or contingent interest." But this would not require the purchaser to see that the proceeds of the sale were ordered to be thus invested. *Springs v. Scott* has been affirmed in *Hughes v. Pritchard,* 153 N. C., 145; *McAfee v. Green,* 143 N. C., 417, 418.

But whatever doubt there might have been as to this proposition, the matter was settled by the act of 1905, ch. 93, now Revisal, 1591, which provides: "In all cases wherein property has been . . . devised by will upon contingent remainder . . . wherein a judgment of the Superior Court has been rendered authorizing the sale of such property discharged of such contingent remainder . . . *in actions or special proceedings wherein all persons in being who would have taken such property if the contingency had then happened, were parties,* such judgment shall be valid and binding upon the parties thereto and upon all other persons not then in being: *Provided,* no vested right or estate shall be impaired."

The persons "who would have taken such property if the contingency (the death of the life tenant) had *then* happened" (in April, 1904) would have been the identical parties at that time before the court.

This section was held constitutitontal in *Anderson v. Wilkins,* 142 N. C., 154, in which it was applied to proceedings already brought (see p. 158 as to legislative power over contingent interests). *Anderson v. Wilkins* has been cited and approved in *McAfee v. Green,* 143
(68) N. C., 418, where it was held that the statute was enacted for just such occasions as the present. It has been since cited in approval in *Penland v. Barnard,* 146 N. C., 381; *Richardson v. Richardson,* 150 N. C., 551; *Smith v. Miller,* 151 N. C., 627; *Elkins v. Seigler,* 154 N. C., 375; *Swindell v. Smaw,* 156 N. C., 3; *Stephens v. Hicks,* 156 N. C., 244; *Fellowes v. Durfey,* 163 N. C., 313, and in *Dunn v. Hines,* 164 N. C., 121.

Whatever doubt might have been raised by expressions in sundry prior cases, this statute (Revisal, 1591) has settled the law. In *Hodges v. Lipscomb,* 128 N. C., 57, the Court pointed out the public inconvenience and the great hardships arising in many instances because of lack of power in the courts to decree a sale of land where it was limited in remainder to parties not *in esse,* and called attention to the fact that Laws 1794, ch. 204, now Revisal, 1578, had converted, by one stroke of the legislative pen estates tail into fee simple. In consequence of this intimation the act of 1903, ch. 99, now Revisal, 1590, was enacted. *Hodges v. Lipscomb,* 133 N. C., 203. But that statute not proving sufficiently efficacious, the General Assembly enacted Laws 1905, ch. 93, now Revisal, 1591, which is above set out and which was sustained in *Anderson v. Wilkins,* 142 N. C., 154, which has been cited and approved as above stated.

Our conclusion is that if there had been any doubt as to the validity of the sale under the decree of the court in 1904, it was validated by the act of 1905, Revisal, 1591, which statute was passed prior to the death of

Prudence Bullock, who died in November, 1906, subsequent to the passage of said act of 1905. At the time, therefore, of the sale in 1904, and the validating act of 1905, the children of Prudence, the present plaintiffs, had acquired no vested interest in said premises. As was held in *Hodges v. Lipscomb,* 128 N. C., 63, and in same case, 133 N. C., 199, the General Assembly had power over the procedure as to the sale of property in which there were contingent interests as fully as the Legislature had the power to convert estates tail into estates in fee simple. Upon the facts agreed judgment should have been entered in favor of the defendant. (69)

We are not inadvertent to the earnest contention of the learned counsel of the defendants that in *Rives v. Frizelle,* 43 N. C., 239, towards the end of the page, the word "not" has been left out in the printed report, and that by reason of such omission several subsequent cases had been erroneously construed by the Court. But by reference to the manuscript opinion of *Chief Justice Ruffin,* in our files, we find that the opinion has been printed as he wrote it, and indeed the context shows that there has been no omission of any word.

Reversed.

Cited: Smith v. Witter, 174 N.C. 620 (2l); *Lumber Co. v. Herrington,* 183 N.C. 89 (2f); *Construction Co. v. Brockenbrough,* 187 N.C. 75 (2g); *Perry v. Bassenger,* 219 N.C. 848 (2f); *Beam v. Gilkey,* 225 N.C. 525 (2f).

ELIZABETH CARTER v. JOHN T. STRICKLAND AND WIFE, MYRTLE STRICKLAND.

(Filed 25 February, 1914.)

1. Wills—Intent—Precatory Words—Trusts and Trustees.

A will should be construed to effectuate the intent of the testator as gathered from the terms used by him therein; and precatory words will be given their ordinary and usual significance, unless from the terms and disposition of the will and the circumstances relevant to its proper construction it clearly appears that they are to be considered as imperative, and that the testator intended to create a trust.

2. Same.

A devise of certain lands to the testator's niece, by name, with "request" that she shall devise it to her daughter M. at her death, and it appears from other parts of the will that the testator knew apt words to create a trust, and in a subsequent clause of the will referred to the lands devised to the niece: *Held,* the niece, being nearer to the testator in blood, is

evidently the primary object of his bounty, and under the terms of the will it was the testator's intent and purpose to devise the lands in fee to his niece, not raising a trust in favor of M., but referring the matter to the affectionate discretion of the mother. The position is not affected by an admission on the part of the devisee, the niece, that the testator was very fond of M., her daughter, had her to visit him frequently, and had contributed largely to her education.

(70) APPEAL by defendants from *Connor, J.*, at August Term, 1913, of NASH.

Civil action to remove a cloud from title, tried on pleadings and facts admitted.

From these facts it appeared that some years prior to institution of this suit one John A. Williams died testate in Warren County, having made his last will and testament, duly admitted to probate, and said will containing, among others, the following items, being those more relevant to the inquiry:

"(2) Item. I devise and bequeath to my niece, Elizabeth W. Carter, my plantation near Shady Grove on which I now reside, it being the farm willed to me by my brother, Thomas A. Williams, and not including any of my other land; and it is my request that my said niece, Elizabeth W. Carter, shall, at her death, devise said tract of land to her daughter, Myrtie E. Carter.

"(3) Item. I also give and bequeath to my said niece, Elizabeth W. Carter, the sum of $700, to be paid her by my executors out of my estate, and also all the crop and stock on the land devised her in Item 1, and also all the furniture in my house, except certain articles hereinafter excepted and bequeathed to my grand-niece, Myrtie E. Carter.

"(4) Item. I give and bequeath to my great-niece, Myrtie E. Carter, my walnut bedstead, and the bed and furniture belonging thereto, and also my center-table, walnut bureau, and dining-room press. And whereas my said great-niece, Myrtie E. Carter, holds my note for the sum of $1,500, it is my will that my executors, and they are hereby so directed, pay the amount of said note to my said great-niece out of my estate."

. . . . . .

"(11) Item. I give and bequeath to my brother, Dr. Samuel A. Williams, his heirs and assigns, all the residue of my personal property of whatever kind, to be held by him in trust for the use of his children and to be given them at his death; but it is my will that my said brother, Samuel A. Williams, shall use the interest accruing from said money or property during his life to support his family"; that plaintiff, Elizabeth Carter, is the niece referred to in the will, and *feme* defendant, Myrtie

E. Strickland, is Myrtie E. Carter, and daughter of plaintiff, (71) since intermarried with defendant John T. Strickland; that soon after the death of John A. Williams the plaintiff entered on the tract of land in question, the same being the farm near Shady Grove referred to in the will, and has since continued to occupy and possess the same, claiming the absolute and beneficial ownership under the terms of the will; that defendant Myrtle Strickland contends and claims: "That under the will plaintiff is absolute owner of the land only for life, and that beneficial ownership in remainder is in this defendant; that the word request, in Item 2 of the will, was there used by the testator in the imperative sense, and that plaintiff had no right to accept and hold the property under the will and at the same time refuse to carry out the request made in reference thereto."

In aid of this position, defendants further aver in the answer, and, for the purpose of the action the same is admitted to be true, "That the testator was especially devoted to the *feme* defendant, who stayed a great part of the time with him at his home in Warren County, and the expense of her education was largely borne by him," etc.

Upon these facts the court, being of opinion that plaintiff was absolute owner of the property in fee, entered judgment as prayed by plaintiff, and defendant excepted and appealed.

Bunn & Spruill for plaintiff.
Jacob Battle for defendant.

HOKE, J., after stating the case: Some of the earlier English cases, and they have been followed by decisions in this country, are to the effect that a trust will be engrafted or imposed upon an estate, absolute in terms, or upon its holder, by reason of precatory words in a will whenever "the objects of the precatory language are certain and the subject of the recommendation or wish is also certain"—a position supposed to best effectuate the intent of the testator. A consideration of the later cases, however, will show that, in the decisions referred to, the principle has been too broadly stated, and it is now the prevailing doctrine, certainly so in this jurisdiction, that such words will be given (72) their ordinary significance, and will not have the effect, as stated, unless from the terms and dispositions of the will and the circumstances relevant to its proper construction it clearly appears that they are to be considered as imperative and that the testator intended to create a trust. *Fellowes v. Durfey,* 163 N. C., 305; *Hayes v. Franklin,* 141 N. C., 599; *St. James Church v. Bagley,* 138 N. C., 384; *Batchelor v. Macon,* 69 N. C., 545; *Alston v. Lea,* 59 N. C., 27; *Post v. Moore,* 181 N. Y., 15;

Foose v. Whitmore, 82 N. Y., 405; *Burns v. Burns,* 137 Fed., 781; *Williams v. Worthington,* 49 Md., 572; *Williams v. Baptist Church,* 92 Md., 497; *Aldrich v. Aldrich,* 172 Mass., 10; *Orth v. Orth,* 145 Ind., 184; Pomeroy Eq. Jurisprudence (3d Ed.), secs. 1015-1016; 22 A. and E. Enc., p. 1163.

In the recent case of *Fellowes v. Durfey* the *Chief Justice* quotes with approval from *Burns v. Burns* as follows: "The tendency of the modern decisions, both in England and in this country, is to restrict the practice which deduces a trust from the expression by the testator of a wish, desire, or recommendation regarding the disposition of property absolutely bequeathed"; and in *St. James Church v. Bagley, Connor, J.,* delivering the opinion, said: "Formerly, the rule in England was that whenever property was given, coupled with expressions of request, hope, desire, or recommendation that the person to whom it is given will use or dispose of the same for the benefit of another, the donee will be considered a trustee for the purpose indicated by the donor. Such expressions were regarded as *prima facie* imperative. 'But within the last few years the doctrine has changed, and the English rule is now that precatory words are *not* to be regarded as imperative unless it is plain from the context that the testator so intended them. *Prima facie,* a mere request or an expression of hope, confidence, or expectation does not import a command,' citing Bispham Eq. (6 Ed.), p. 117."

The case of *Colton v. Colton,* 127 U. S., 300, to which we were referred by counsel, is in approval of the same general principle. True, in *Colton's case* the trust was upheld, the Court laying much stress
(73) on facts *dehors,* establishing a moral obligation for support and maintenance on the part of the testator and tending to show that the claimants were an aged mother and sister largely dependent on his bounty, and giving color to certain phraseology of the will permitting construction; but on the question presented here, it was held, among other things, that, "When property is given by will absolutely and without restriction, a trust is not to be lightly imposed upon mere words of recommendation and confidence," etc., and *Associate Justice Matthews,* delivering that opinion, refers to an opinion of *Chief Justice Gray* for a correct statement of the doctrine, in these terms: "The existing state of the law on this question, as received in England, and generally followed in the courts of the several States of the Union, is well stated by *Gray, C. J.,* in *Hess v. Singler,* 114 Mass., 56, 59, as follows: 'It is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty, or recommendation that he will apply it to the benefit of others, may be held to create a trust, if the subject and the objects are sufficiently certain. Some of the earlier

English decisions had a tendency to give to this doctrine the weight of an arbitrary rule of construction. But by the later cases in this and in all other questions of the interpretation of wills the intention of the testator, as gathered from the whole will, controls the court; in order to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence.' "

A correct application of the principle, as stated and sustained by these decisions, is in full support of his Honor's ruling. The testator was evidently a man of intelligence, or he acted in this instance under very intelligent advice. A perusal of Item 11 of his will shows that he knew the use of apt and efficient words to create a trust when he so desired. In Item 2 he first devises to the plaintiff his home plantation in terms of absolute ownership, and again in Item 3 he bequeaths to her the sum of $700 and all crops and stock on the land, again referring to it as the land devised to her. Nearer to him in blood, she is evidently (74) the primary object of his bounty, and we are clearly of opinion that the "request" in favor of defendant, appearing in 2d item of the will, is not sufficient to raise a trust in the property, but the testator only intended to refer the matter to the affectionate discretion of the devisee, the present plaintiff.

The allegations of the answer, "That the testator was especially devoted to the *feme* defendant, who stayed a great part of her time with him at his home place, and that the expenses of her education were largely borne by him," and admitted by plaintiff, for the purposes of this action are not sufficient to alter or affect the result. They show no state of dependence on the part of the *feme* defendant, nor do they establish any moral claim to further support, but are entirely consistent with a disposition of the property in favor of the plaintiff, who was the defendant's own mother.

On perusal of the will and the facts in evidence, we are of opinion, as stated, that plaintiff is entitled to the property in absolute ownership, and that the decree protecting her in the possession and enjoyment of such an estate must be

Affirmed.

Cited: Hardy v. Hardy, 174 N.C. 507 (f); *Laws v. Christmas,* 178 N.C. 361 (b); *Springs v. Springs,* 182 N.C. 487 (f); *Weaver v. Kirby,* 186 N.C. 391 (f); *Greene v. Lyles,* 187 N.C. 424 (f); *Hass v. Hass,* 195 N.C. 741 (f); *Brown v. Lewis,* 197 N.C. 706 (f); *Dixon v. Hooker,* 199 N.C. 678 (f); *Brinn v. Brinn,* 213 N.C. 287 (f).

FIDELITY TRUST COMPANY v. J. D. WHITEHEAD ET ALS.

(Filed 4 March, 1914.)

1. Bills and Notes—Fraud—Burden of Proof.

Where fraud in the procurement of note is pleaded as a defense to the payment of a note, with evidence tending to establish it, the burden of proof is on the plaintiff claiming to be a holder in due course, to show that he purchased in good faith and without notice of any infirmity or defect, for value and before maturity.

2. Same—Infirmity—Default in Interest—Notice—Evidence.

As to whether default in payment, when previously due, of interest on a negotiable note acquired before maturity is alone evidence of notice of the infirmity of the instrument, *Quære.* But in this case it is held sufficient to be submitted to the jury with the further evidence that the note was purchased at a considerable discount, and the maker was sued in another State when the indorser was solvent, lived in the same town with the plaintiff, and had not been sued on his indorsement.

3. Trials—Courts—Remarks—Appeal and Error.

In an action by a bank upon a note, the remarks of the trial judge that the witness may be of good character and a good banker, but that not every such one knows the law, is held not prejudicial or reversible, if erroneous.

(75) APPEAL by plaintiff from *Peebles, J.,* at August Term, 1913, of HALIFAX.

Clark & Clark, George C. Green, and Winston & Biggs for plaintiff.
W. E. Daniel, R. C. Dunn, and E. L. Travis for defendants.

CLARK, C. J. This is another action, of which we have had several, upon a note to McLaughlin Brothers as part of the purchase price of a French coach horse. See *Trust Co. v. Ellen,* 163 N.C., 45. The defendants pleaded fraud in procuring the note, as a defense, and that issue is so found, and there is no exception on the part of the plaintiff. The burden as to the second issue, whether the note was "purchased in good faith and without notice of any infirmity or defect and before maturity and for value," was on the plaintiff, Revisal, 2208; *Bank v. Exum,* 163 N. C., 203.

The note was dated 2 November, 1907, payable 1 July, 1911, "with interest at 6 per cent, payable annually." The plaintiff purchased the note, according to its own evidence, on 1 November, 1909, when at least one installment of interest was past due.

The court charged the jury that the fact that interest was unpaid on the note was a circumstance to be considered in passing upon the second issue, and that they could also consider the further circumstances that the president of the plaintiff company testified that McLaughlin Brothers were indorsees on the note and were solvent, and lived in the same town, and that the plaintiff, instead of bringing suit against them, came to North Carolina to sue the defendants. The jury (76) were also entitled to consider the further fact that upon the plaintiff's evidence it bought the note for $1,490.64 when its face value at that time was $1,624.30, and that there was no indorsement on the note of payment of past-due interest.

These were circumstances which the defendants were entitled to have submitted to the jury upon the second issue which the jury found against the plaintiff. The plaintiff earnestly contended that the nonpayment of interest when it fell due was not notice of dishonor. The court, however, simply left it to the jury, together with the other circumstances above named, for the jury to find whether or not the plaintiff was a purchaser without notice.

As to the abstract proposition, for such it was in this case, "where a note is payable on a future day, with interest payable at stated periods before the maturity of the principal of the note, whether the nonpayment of the installments of interest is notice of dishonor," the authorities are divided. In *Newell v. Gregg,* 51 Barb., 263, it is held: "Where a note is payable at a future day, with interest payable annually, the payment of interest annually is as much a part of the agreement as a promise to pay the principal. It is a portion of the debt, and if when the note is bought by a third party the interest is past due, the note is then dishonored." Tiedeman Com. Paper, sec. 297.

There are cases which hold to the contrary, and in Daniel on Neg. Instr., sec. 787 (Calvert's Ed.), it is said: "The weight of authority is that the *bona fide* purchaser for value is within the protection of the law merchant, although interest is overdue and unpaid at the time of the purchase," the authorities being cited in the notes. The notes, however, cite *Guckian v. Newbold,* 22 R. I., 279, which held that nonpayment of annual interest was notice of dishonor, though this was explained in a subsequent case between the same parties (23 R. I., 553) to apply where a note had run for a long time with no apparent reason for the delay, and there was nonpayment of interest. We think, however, that there is a distinction between nonpayment of interest on an ordinary negotiable instrument and nonpayment of coupons upon municipal (77) and other bonds referred to in many decisions quoted in the notes to 2 Daniel Neg. Instr., sec. 1506.

In *Union Investment Co. v. Wells,* in the Supreme Court of Canada, 11 A. and E. Anno. Cases, it was held that the nonpayment of interest payable at stated periods before the maturity of the principal was not notice of dishonor. But there was a very able dissenting opinion, concurred in by two of the judges. The note to that case is very full, and shows a conflict of authority. To the same effect is *Winter v. Nobs* (Ida.), 24 A. and E. Anno. Cases, 302. The very full notes to that case show that while such is the preponderance of authorities, there are cases to the contrary. Notably, *Bank v. Brisch,* 154 Mo. App., 631, and *Bank v. Couse,* 124 N. Y., 79, which follow the doctrine laid down in *Newell v. Gregg,* 51 Barb., 279, above cited.

We do not need, however, to confine ourselves to either of these two lines of decision, for this case does not depend upon that one circumstance of the nonpayment of interest. Even if it did, there is a line of authorities represented by *Bank v. Kirby,* 108 Mass., 497, which holds that while the nonpayment of interest, falling due at stated periods before the maturity of the principal of the note, is not of itself notice of dishonor, it is a circumstance for the consideration of the jury on the issue whether the plaintiff took it "in good faith and without notice of dishonor."

In the present case, upon the plaintiff's own evidence, there was nonpayment of interest, no indorsement of its payment, the purchase of the note at a considerable discount, and though the indorsee of the note lived in the same town in a distant State, where the bank was located, and was solvent, the plaintiff did not bring its action there, but came to this State to do so; and all these circumstances could be considered by them in passing upon the issue. We think there was no error in leaving these facts to the jury upon the issue as to "notice." It is not neces-
(78) sary, therefore, to discuss the abstract question as to what would have been the effect if the only circumstance had been the nonpayment of interest.

As to the remark of the judge, "Mr. Flower may be a man of very good character and a good banker, but it is not every man of good character and who is a good banker, who knows the law," we do not think that, if erroneous, it could have affected the result or would justify a new trial. It might have been left unsaid without hurt to any one, but we cannot see that making the statement was prejudicial to the extent that it could reasonably have affected the verdict.

No error.

Cited: Bank v. Sherron, 186 N.C. 2911 (1f).

J. A. ELEY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 4 March, 1914.)

1. Trial by Jury—Waiver—Findings by Court—Evidence—Appeal and Error.

When a trial by jury has been waived by the parties for the judge to find the facts, his findings thereof are conclusive on appeal if there is evidence to support them; and where the burden of proof is upon the plaintiff to establish the issue, his finding for the defendant thereon is not reviewable, for the plaintiff is required to satisfy him with the evidence that the issue should be answered in his favor.

2. Trial by Jury—Waiver—Findings in Writing—Conclusions of Law—Interpretation of Statutes.

Where a jury trial has been waived by the parties, and the record discloses that the decision of the judge was given in writing, and his finding of fact and conclusions of law are separately stated, it is sufficient under Revisal, sec. 541.

APPEAL by plaintiff from *Peebles, J.*, at October Term, 1913, of HERTFORD.

This is an action to recover the value of certain goods alleged to have been negligently destroyed by fire while in the warehouse of the defendant. (79)

Both parties introduced evidence, and his Honor rendered the following judgment:

"By consent, a jury trial was expressly waived, and both law and fact submitted to the judge. It was admitted that defendant was not liable as common carrier, but solely as warehouseman, and the sole question of fact submitted, 'Did the defendant by its negligence cause the burning of its warehouse at Tunis?' The court being of the opinion that the evidence fails to show that defendant's negligence caused said fire, so finds, and adjudges that plaintiff take nothing by his action, and that defendant go hence without day."

The plaintiff excepted and appealed, for that:

1. The court failed to set out the facts found and the conclusions of law separately, and contended that upon the evidence submitted in this case, and the law arising thereon, the defendant company was guilty of negligence. The court declined so to find, and plaintiffs excepted.

2. Because the court decided to hold that the defendant company was guilty of negligence in law arising on the facts therein.

3. The court rendered judgment as appears of record.

Roswell C. Bridger for plaintiff.

Pruden & Pruden and S. Brown Shepherd for defendant.

ALLEN, J. A jury trial being waived, the findings of fact by the judge are as conclusive as the verdict of a jury, when there is evidence to support them(*Matthews v. Fry,* 143 N. C., 385); and in this case it cannot be said there was no evidence to support the findings, because the burden of proof was on the plaintiff to establish negligence, and his Honor had the right which a jury could have exercised, to say that the evidence of the plaintiff did not satisfy him that the defendant was negligent.

There was only one fact in controversy, negligence, and upon a finding upon this adverse to the plaintiff, only one conclusion of law could follow, that the plaintiff take nothing by his action; and an inspection of the record discloses that the decision of the judge was "given in writing," and that the finding of fact and the conclusion of law are stated separately.

(80) This is, in our opinion, a full compliance with Revisal, sec. 541.

The fact upon which the right to recover depends has been found against the plaintiff by the tribunal of his own selection, and there is no error.

Affirmed.

Cited: Colvard v. Dicus, 198 N.C. 271 (1f); *Morris v. Y & B Corp.,* 198 N.C. 708 (1f); *Chandler v. Conabeer,* 198 N.C. 759 (1f); *Roebuck v. Surety Co.,* 200 N.C. 199 (1f); *Walker v. Walker,* 204 N.C. 212 (2g); *Trust Co. v. Cooke,* 204 N.C. 567 (1f, 2g); *Dailey v. Ins. Co.,* 208 N.C. 818 (2g); *Fish v. Hanson,* 223 N.C. 145 (1f); *Poole v. Gentry,* 229 N.C. 269 (1f); *Cannon v. Blair,* 229 N.C. 610 (1f).

JOHN P. ROOKER v. T. O. RODWELL, ADMINISTRATOR OF LUCY THOMPSON ET ALS.

(Filed 25 February, 1914.)

Contracts—Agreement for Support of Intestate—Executors and Administrators—Evidence—Paper-writing—Corroboration.

In an action on account against an administrator for the support and maintenance of his intestate, there was evidence tending to show that plaintiff, who had married a daughter of the intestate, moved upon the lands of the latter, cleared and cultivated same, and built a house thereon,

wherein they all then lived, and that plaintiff supported the intestate in accordance with an agreement that it should be in consideration of his having the title to the land at her death. A paper-writing purporting to contain the agreement, signed by the mark of the intestate and witnessed, was found among the valuable papers of the witness, after his death, in an envelope stating it belonged to the plaintiff and was to be given to no other person. The handwriting on the paper and envelope was that of the deceased witness thereto: *Held*, (1) a motion to nonsuit was improperly granted; (2) the paper-writing was competent in corroboration of the parol contract.

APPEAL from *Peebles, J.*, at September Term, 1913, of WARREN.

This was a civil action upon an account for the support and maintenance of the defendant's intestate, Lucy Thompson, deceased. At the conclusion of the evidence the court sustained a motion to nonsuit, and the plaintiff appealed.

(81)

John H. Kerr for plaintiff.

T. T. Hicks, Tasker Polk, W. H. Yarborough, Jr., for defendant.

BROWN, J. The evidence offered by the plaintiff tends to prove that the plaintiff, the husband of the daughter of the defendant's intestate, resided with his mother-in-law upon the tract of land described in the pleadings; that plaintiff cleared the land, built a home on it for his wife, mother-in-law, and himself.

Upon this place these three people lived, the plaintiff and his wife having no children, the plaintiff supporting and maintaining the family until the two ladies died; Mrs. Thompson in the year 1906, and his wife about a year thereafter.

The plaintiff offered evidence to the further effect that he supported his mother-in-law, and that the services rendered were not rendered gratuitously, but it was understood that they were to be paid for by a conveyance to him of this land.

The evidence of Gupton tends to prove in substance that the intestate told him that Mr. Rooker said that he would not stay there unless she would give him title to the land, and that while the defendant's intestate was at his house, Mr. Rooker came there, and that she told Mr. Rooker in witness's presence, if he (Rooker) would have a paper written she would give it to him so he could stay there and take care of her. Witness further testified that he heard no more of the trouble, and that the plaintiff supported, cared for, and maintained the defendant's intestate and put all the improvements upon the tract of land.

Plaintiff offers paper-writing marked "Exhibit A" in evidence, to rebut the presumption that the support of Mrs. Thompson was gratuitous. (Objection; sustained; exception by plaintiff.)

EXHIBIT A.

STATE OF NORTH CAROLINA—Warren County.

March 14, 1881.

This is to certify that I have this day agreed to give James Rooker a right and title to my tract of land, known as a part of the
(82) Tucker tract *Provided,* he will take care of me my lifetime, and treat me with good respect; and *Provided further,* that he is not to quarrel and drift me about; he must treat me as one of the family; and if said Rooker fails to comply with this agreement, then this paper will be null and void.

Her
LUCY × THOMPSON.
mark.

Witness: W. T. WILLIAMS.

There is evidence tending to prove that this paper-writing was found among the papers and in the safe of the late George W. Davis, who conducted a mercantile business near the home of the parties to this action, indorsed on the envelope containing the same in the handwriting of said Davis: "This paper belongs to James P. Rooker, and must not be given to any other person." It was handed to Mr. Rooker some time after the death of Mr. Davis, and after the death of Mrs. Thompson; the envelope which contained Exhibit "A" was marked Exhibit "B."

There is also the evidence of witness tending to prove that the entire paper is in handwriting of the subscribing witness. As the intestate made her mark, her handwriting is incapable of proof.

We are of opinion that his Honor erred in ruling out this paper upon the evidence and for the purpose offered. It is not relied upon by the plaintiff as the basis of the action, a contract to convey land, but is offered only to rebut any presumption or contention that the plaintiff's services were gratuitous. *Dunn v. Currie,* 141 N. C., 125; *Avitt v. Smith,* 120 N. C., 393.

The value and crediblity of the evidence tending to prove the identity and execution of that paper is a matter for the jury.

New trial.

(83)

JOHN L. ROPER LUMBER COMPANY v. RICHMOND CEDAR WORKS AND DISMAL SWAMP RAILROAD COMPANY.

(Filed 25 February, 1914.)

1. Limitations of Actions—Tenants in Common—Partition—Color of Title—Adverse Possession.

An allotment of lands to a tenant in common under a judgment in proceedings to partition them among all of the tenants, purporting to allot to each tenant his share of the entire estate in severalty, is color of title as to the share allotted or purparty, and seven years adverse possession of such tenant thereunder, or those claiming under him by deeds, will ripen the title thereto.

2. Limitations of Actions—Foreign Wills—Defective Probate—Color of Title.

A will purporting to devise certain lands, sufficiently describing them, is color of title, though made in another State and defective as to the probate here.

APPEAL by defendant from *Bragaw, J.*, at July Term, 1913, of CAMDEN.

This is an action to recover damages for trespassing upon land known as the Whitehead tract, and being Lot No. 12 in the New Lebanon Division. The same case was before us at a former term, and is reported in 158 N. C., 161, and involved the claim of the defendant to an easement or right of way over the land, for the purpose of operating a tramroad and hauling lumber thereon over and across said land. We then denied the existence of any such right, defendant admitting that plaintiff owned the land. Defendant has since amended its answer and set up title to Lot No. 12, and plaintiff cannot recover for the alleged trespass unless he has shown a title to the same, giving him constructive possession thereof, which it has attempted to do, and, as we think, has succeeded in doing.

The sole claim of plaintiff, in view of the restrictive charge of the court, is that it has acquired title by color and seven years adverse possession. We are confined to the decision of this one question, as the case was so submitted to the jury, although plaintiff seems to have insisted upon his title to the land as established by an open, (84) adverse, and continuous possession, under a claim of right, for twenty years prior to the bringing of the action. Plaintiff introduced in evidence the record of the New Lebanon Division, which shows that Lot No. 12 was allotted to W. B. Whitehead, and by mesne conveyances the plaintiff has acquired his title. The defendant alleges that the parties to that partition, or some of them, claimed as devisees of Josiah

Riddick, of Soldiers' Hope, in Nansemond County, Virginia, whose will has never been properly probated and recorded in this State, where the land in controversy is situated. We think it would be unprofitable to enter upon an examination of this contention for the purpose of deciding whether it is a valid will or whether it has been properly proved and recorded here or not, as our decision can well be made to turn upon another feature of the cast. If it be granted that the will is not valid and sufficient in this State to pass the land devised in it because of the defective probate, the plaintiff has made out his case in another way, not connected with the will, as a valid instrument, and not, therefore, dependent upon its validity, for, as stated, it has shown in evidence a partition of the lands in 1846, between William B. Whitehead and the devisees of Josiah Riddick, Lot No. 12 having been set apart to William B. Whitehead, and plaintiff having acquired whatever title Whitehead got in this division by mesne conveyances from him. It seems that there had been a previous partition between Mills and Josiah Riddick and others in 1817, known as the New Lebanon Division, by which certain lands, embracing those now in dispute, were allotted to Mills and Josiah Riddick. Mills Riddick conveyed his interest to William B. Whitehead, between whom and the devisees of Josiah Riddick, claiming under the will above described, the division in 1846 was made by the court. Defendant appealed.

W. B. Rodman, A. D. McLean, and J. K. Wilson for plaintiff.

Ward & Thompson, Charles Whedbee, Starke & Tillitt, and Winston & Biggs for defendant

(85) WALKER, J., after stating the case: The question now presented for our decision is, whether the partition of 1846 and the allotment to William B. Whitehead and the deeds of those claiming under him are, in law, good color of title, for the jury have found that plaintiffs have had adverse possession of the land for a sufficient time to ripen their title, provided we settle the other question in their favor. We are aware that this Court has held that a deed by one tenant of the entire estate held in common is not sufficient to sever the unity of possession by which they are bound together, and does not constitute color of title, as the grantee of one tenant takes only his share and "steps into his shoes." In such case, twenty years of adverse possession, under a claim of sole ownership, is required to bar the entry of the other tenants, under the presumption of an ouster from the beginning raised thereby. *Cloud v. Webb,* 14 N. C., 317; *Hicks v. Bullock,* 96 N. C., 164; *Breeden v. Mc-*

Laurin, 98 N. C., 307; *Bullin v. Hancock,* 137 N. C., 189, and *Dobbins v. Dobbins,* 141 N. C., 210, where the other cases are collected

We are not inadvertent to the fact that this State stands alone in the recognition of this principle, the others holding the contrary, that such a deed is good color of title (1 Cyc., 1078 and notes); but it has too long been the settled doctrine of this Court to be disturbed at this late day, as it might seriously impair vested rights to do so. It should not, though, be carried beyond the necessities of the particular class of cases to which it has been applied, but confined strictly within its proper limits; otherwise we may destroy titles by a too close attention to technical considerations growing out of this particular relation of tenants in common, and more so, we think, than is required to preserve their rights. This view has, within recent years, been thoroughly sanctioned by the Court.

It has been held that where less than the whole number of tenants join in a proceeding to sell the common estate for partition, and the same is sold, a deed made under order of the court to the purchaser is color of title, and seven years adverse possession thereafter by him under the deed will bar the cotenants who were not parties. *Amis v.* (86) *Stephens,* 111 N. C., 172 (opinion by the present *Chief Justice*), citing The Code, secs. 141, 148; *McCulloh v. Daniel,* 102 N. C., 529, and *Johnson v. Parker,* 79 N. C., 475.

It will be found in the case first cited that there were tenants who were not made parties to the proceeding at law, and yet they were held to be barred by the adverse possession of seven years; and this was because the court attached importance to the fact that the deed had been made under a decree in a judicial proceeding which closely resembled one made by a stranger to the title held by the cotenants. Only a part of the estate held in common was sold for partition, but the parties to the proceeding claimed the entirety in that part, or purparty, as it is technically called. The case strongly resembles this one, in that the proceeding was brought to divide 70 acres of a larger tract among the heirs of B. D. Paylor, who had purchased the same presumably under an order in a proceeding in equity for the partition of the larger tract. The plaintiffs alleged that they had not been made parties to the last mentioned proceeding, and sued to recover their interest in the tract of 70 acres from the defendants, who had bought the same at the sale thereof in the proceeding for its partition. The Paylor heirs claimed the entire interest in the 70 acres, as did Whitehead and the Riddicks in the land partitioned in 1846, and this Court held that the deed for the 70 acres to the purchaser was color of title, and seven years adverse possession thereunder barred the cotenants not made parties to the first partition or to the second, and the case was approved in *Ferguson v. Wright,* 113 N. C., 537, the distinction

being made that the title derived under the court proceeding purported to be adverse to all of the tenants, the land having been sold as an entirety, in disregard of any community of estate. This being equivalent to a disseisin, it followed that seven years adverse possession barred under the statute.

The only difference between that case and this one is, that here there was an actual partition, and Lot No. 12 was allotted to Whitehead
(87) in the partition, instead of being sold and conveyed to him as a purchaser thereof at a sale for partition. But there is no difference in principle between the two, for in both the Court deals with the entire interest, the rights of the cotenants being ignored by not making them parties. If they are barred in the one case, there is no valid reason why they should not be in the other. In deciding this question, though, the proceeding at law is to be regarded as having the force and effect that a deed of one not connected with the tenancy would have. It purports to sever the relation of all the cotenants, whether it does so in law or not, at the time, as against those tenants not made parties to it.

In this case the court divided the land among the devisees of Josiah Riddick and William B. Whitehead, as the sole owners thereof. All the devisees of Riddick were parties, as appears by the record, as the division is said to have been made among them. The proceeding professes to pass the entire interest in the land, and not merely the purparties of some of the cotenants. It comes manifestly within the definition of color in *McConnell v. McConnell,* 64 N. C., 342, which is stated to be, not a writing which in law passes the title, but one which professes to do so, but fails in that respect, either from want of title in the person making it or from the defective mode of conveyance employed, with this qualification, that the defect must not be so obvious that a man of ordinary capacity could not be misled by it, excluding, though, from our consideration the presumption generally applicable, that every man knows the law.

McConnell's case, in which *Justice Rodman* delivered a most lucid opinion, has often been approved by this Court, notably in *Greenleaf v. Bartlett,* 146 N. C., 495 (opinion by *Justice Connor*), where the authorities are collected. The Court there adopted the dissenting views of *Chief Justice Taney* and *Justice Catron* in *Moore v. Brown,* 11 How. (U. S.), 414, where it is said: "If every legal defect in the title papers of a purchaser in possession, as they appear on the record, may be used against him after the lapse of seven years, the law itself is a nullity and protects nobody. The statute has no reference to titles good in
(88) themselves, but was intended to protect apparent titles void in law, and supply a defense where none existed without its aid. Its object is repose. It operates inflexibly and on principle, regardless

of particular cases of hardship. The condition of society and the protection of ignorance, as to what the law was, required the adoption of this rule. The law should be liberally construed."

If we adopt this principle and apply it to the facts of our case, it follows, we think, that the Whitehead allotment, as well as the will of Josiah Riddick, is color of title; the allotment, because the proceedings at law in which it was made profess to operate upon the entire estate in the land as being in the cotenants named therein; and the will, because if defectively probated, it is not a whit more defective than was the will of John McConnell, which was held to be good color of title; it is really less defective, and is more apt to mislead a man of ordinary capacity, for we may go further and say that a very serious question has been presented to us, as to whether the probate is not a valid one, though we do not decide it.

There are other considerations which, perhaps, would lead us to the same conclusion we have reached, but they need not be stated, as those already mentioned are quite sufficient to support the judgment. The other assignments of error are based upon a view of the law contrary to the one we have adopted, and must consequently be overruled. The jury have found that plaintiff has had sufficient adverse possession of the land in dispute for seven years under color to bar the defendant's right, if they ever had any, and as the State has parted with the original title, judgment was properly entered in favor of the plaintiff, upon the verdict.

No error.

BROWN, J., did not sit.

Cited: Lumber Co. v. Cedar Works, 168 N.C. 350 (1g); *Alsworth v. Cedar Works,* 172 N.C. 22 (1g); *Alexander v. Cedar Works,* 177 N.C. 142, 148 (1f); *Adderholt v. Lowman,* 179 N.C. 550 (1l); *Bradford v. Bank,* 182 N.C. 233 (1j); *Jackson v. Mills,* 185 N. C. 55 (1p); *Walker v. Walker,* 185 N. C. 386 (1p); *Crocker v. Vann,* 192 N.C. 430, 431 (1d); *Crews v. Crews,* 192 N.C. 685, 686 (1l); *Bailey v. Howell,* 209 N.C. 715 (1p); *Cox v. Wright,* 218 N.C. 349 (1l); *Perry v. Bassenger,* 219 N. C. 847 (1f).

(89)

W. T. WHITEHEAD v. F. C. PITTMAN.

(Filed 25 February, 1914.)

1. Constitutional Law—Two Offices—Acceptance.

Where one holding an "office or place of profit" accepts another such office or position in contravention of Article XIV, sec. 7, of the Constitution, the first is vacated *eo instanti*, and any further acts done by him in connection with the first office are without color, and cannot be *de facto*.

2. Same—Quo Warranto—Cities and Towns—Cotton Weigher.

In an action to oust a present incumbent from the position of cotton weigher of a town elective by its commissioners, where the complainant is dependent upon a vote in his favor by a commissioner who had accepted the position of county superintendent of public instruction, the vote relied upon is void, and the action will fail.

WALKER, J., concurs in result only.

APPEAL by plaintiff from *Peebles, J.*, at the Spring Term, 1914 of HALIFAX.

W. E. Daniel for plaintiff.
George C. Green for defendant.

CLARK, C. J. This is an action to oust the defendant from the office of cotton weigher of the town of Enfield. In August, 1913, the board of commissioners of Enfield was composed of four members besides A. S. Harrison, who had been elected commissioner with the others in May, 1913. But in June, 1913, he had been elected and qualified as superintendent of public instruction for Halifax County, and was acting as such in August, 1913.

In August, 1913, the board of commissioners of Enfield balloted for the position of cotton weigher of said town. The plaintiff Whitehead received the votes of only two commissioners besides the vote of A. S. Harrison. The defendant Pittman, who was the incumbent, received one vote and one vote was given for another party. The statutory number of the board of commissioners was seven.

(90) The judge finds as a fact that Harrison resigned, and his resignation was accepted. But even if he had not, his acceptance of the position of county superintendent of public instruction *eo instanti* vacated his position on the board of commissioners. *Midgett v. Gray*, 159 N. C., 443; *Barnhill v. Thompson*, 122 N. C., 493. There were therefore only two votes cast for the plaintiff out of the four legal votes cast, and he was not elected.

The Constitution, Art. XIV, sec. 7, provides: "No person who shall hold any office or place of trust or profit under the United States, or any department thereof, or under the State, or under any other State or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either House of the General Assembly: *Provided,* that nothing herein contained shall extend to officers in the militia, justices of the peace, commissioners of public charities, or commissioners for special purposes."

In *S. v. Smith,* 145 N. C., 476, it is said that in the purview of this section it is immaterial whether one of the positions, or both, are "offices" or "places of trust or profit."

In *Barnhill v. Thompson,* 122 N. C., 493, it is held: "The acceptance of a second office by one holding a public office operates *ipso facto* to vacate the first. While the officer has a right to elect which he will retain, his election is deemed to have been made when he accepts and qualifies for the second." The acceptance of the second office is of itself a resignation of the first.

In this case the court finds as facts not only that Harrison accepted the second office and was exercising its duties, but, also, that he had sent in his resignation as a commissioner and the same had been accepted.

This is not the case of one holding an office under color of title, and therefore a *de facto* officer, whose acts are valid (*Norfleet v. Staton,* 73 N. C., 551); for Harrison's acceptance of the second office and his resignation, and either of these acts, was a vacation of the first office, and he was hence no longer commissioner either *de facto* or *de jure.* He was a mere usurper, whose acts were utterly void. *Van Amringe v. Taylor,* 108 N. C., at p. 201, and cases there cited.

Neither is this the case of a *de facto* officer, whose acts are held (91) valid as to third parties and the public, from exercising the functions of his office for a "considerable length of time," as in *Hughes v. Long,* 119 N. C., 52, where it was held that the probate of a *de facto* clerk was valid. Nor is it the case of a *de facto* officer under a questionable election or appointment, whose acts are held valid until his title is decided in an action for that purpose. *Norfleet v. Staton, supra.* But here Harrison was a mere usurper, having vacated his office as commissioner both by resignation duly accepted and by accepting another office and exercising its duties, which was notice to the public that he was not a *de facto* town commissioner, though he continued to act.

The court properly adjudged that the plaintiff was not entitled to the office of cotton weigher.

Affirmed.

WALKER, J., concurs in result only.

Cited: Smith v. Carolina Beach, 206 N.C. 837 (2b); *In re Barnes,* 212 N.C. 739 (1g); *Brigman v. Baley,* 213 N.C. 123 (1f); *Berry v. Payne,* 219 N.C. 177 (2b); *In re Yelton,* 223 N.C. 850 (1l); *In re Advisory Opinion in re Phillips,* 226 N.C. 777 (1f).

J. C. NEWSOME AND WIFE, DORA, v. BANK OF AHOSKIE.

(Filed 4 March, 1914.)

Pleadings—Trials — Evidence — Questions for Jury — Bills and Notes — Banks and Banking—Collaterals—Fraud—Rights of Creditors.

The plaintiffs, husband and wife, in their action against a bank, alleged that the defendant was endeavoring to apply collateral notes of the *feme* plaintiff to the security of a note held by the bank, made by her husband to its director and obtained by fraud and collusion between him and the defendant. These allegations were denied in the answer, which further alleged that the male plaintiff was the owner of the lands, securing the collateral notes, and that these notes were given for the purchase price, and that he had had the lands conveyed to his wife to defraud his creditors, one of whom was the director, its indorsee; the answer also alleged that the *feme* plaintiff was not the real owner of the collaterals, but if so, she had given full authority for the defendant to hold them as collateral to her husband's note: *Held,* the pleadings raised issues of fact to be submitted to the jury, and a judgment thereon in plaintiff's favor was erroneous.

(92) APPEAL by defendant from *Peebles, J.,* at October Term, 1913, of HERTFORD.

Civil action heard upon motion by the plaintiff for judgment upon the pleadings. The court, upon such motion, rendered the following judgment:

This cause coming at this term to be heard, all parties being before the court, and the court, after hearing the pleadings and admissions in open court, that J. R. Garrett, named in the pleadings, is a director of the defendant, being of the opinion that the *feme* plaintiff, Dora M. Newsome, is the owner and entitled to the possession of the collateral notes described in the complaint and answer, towit, note against T. B. Hall for $765 and interest; note against N. Hall for $600, and note against Hoard Newsome for $700, all payable to said *feme* plaintiff, subject only to the payment of the note against J. C. Newsome for $1,100 and interest, set forth in the pleadings:

It is, on motion of plaintiffs' counsel, considered and adjudged that upon the payment of said note for $1,100 and interest, by the plaintiffs,

or by any one for them, that the receivers, hereinbefore appointed to take charge and control of said collateral notes by Lane, judge, at February Term, 1913, of this court, shall deliver said collateral notes to the said *feme* plaintiff, Dora M. Newsome.

By consent of all parties to this action, it is ordered and adjudged that the said receivers, John E. Vann and Stanly Winborne, proceed to collect said collateral notes against Hall and Hoard Newsome, above described, by sale under the mortgage or deed of trust securing the same, or otherwise, as to them may seem best, with interest thereon, and apply the collection so made as follows:

1. To the payment of the said $1,100 note and interest due the defendant bank by J. C. Newsome.

2. Of the balance, retain enough to pay the $700 note of J. C. (93) Newsome to J. R. Garrett, now claimed by said bank and described in the pleadings, together with the cost of this action, to await the decision of the Supreme Court as to such appeal as may be taken from this judgment; and

3. Any balance, after deducting the amounts named in sections 1 and 2 above, pay over to *feme* plaintiff, Dora M. Newsome, or to her attorneys of record.

It is further adjudged that the defendant pay the cost of this action, to be taxed by the clerk, including $2 for the stenographer. This judgment is, by consent, without prejudice to plaintiffs' right to show fraud or want of consideration for the said note for $700 executed by J. C. Newsome to J. R. Garrett, and that the defendant bank is not the *bona fide* owner of said note.

The plaintiff is also taxed with $2 for benefit of stenographer.

R. B. PEEBLES,
Judge Presiding.

From this judgment the defendant appeals.

No counsel for plaintiffs.
Winston & Matthews for defendant.

BROWN, J. The complaint in substance alleges: In the year 1911 Dora M. Newsome borrowed of defendant $1,000, and deposited with said bank, as collateral for a loan, several notes of Hall, Newsome, and others, said notes being given to Dora M. Newsome for land sold them; that Dora M. Newsome never indorsed said collateral to the bank, but did authorize her husband to deposit them with the bank as collateral for the loan to her of $1,000, and no more, and that the cashier had knowledge of these facts; that a note for $1,000 was given for the loan, and

when same was due, the cashier, without the knowledge or consent of the *feme* defendant, induced her husband to renew the note and to include the sum of $100 which the husband personally owed the bank, and for which the collateral was not liable; that on 15 January, 1912, J. R. Garrett, a director of the bank, through deceit and cunning,
(94) induced J. C. Newsome to give him an accommodation note for $731.67, stating that he wanted to buy land, and stating that J. C. Newsome would never have the note to pay; that by teasing and begging and whiskey, Garrett finally got the accommodation note without consideration, and that Newsome owed Garrett nothing thereon; that soon thereafter J. C. Newsome saw the note in the hands of the Bank of Ahoskie and asked the cashier what he was doing with same, to which the cashier replied that he was simply transferring same from Garrett to Harmon, and that Newsome then and there explained the circumstances under which the note was given, and that the cashier agreed that he would not handle the note, and that under no circumstances would the bank seek to hold the collateral responsible therefor; that later the cashier came and tried to induce *feme* plaintiff to sign a paper authorizing the application of the collateral to this note; that owing to the strange actions and words of the cashier, attorneys for the plaintiffs tendered the cashier $1,100 and demanded the collateral, which the cashier refused to accept, and notified them that he held the collateral responsible for the $731.67 note as well as the $1,100 note; that at the time of the tender, and at the time of filing the complaint, Dora M. Newsome owed the bank no more than $1,100; that holding the collateral as security for the $731.67 is a plot and conspiracy between the bank and J. R. Garrett; that the bank's refusal to surrender the collateral has injured *feme* plaintiff's credit.

The *feme* plaintiff demands judgment for possession of the collateral upon payment of $1,000; for $1,000 damages for the detention of the notes, and costs of action.

The answer denies categorically the several allegations of the complaint, except as to the tender and refusal, and avers that the bank is a *bona fide* purchaser for value and without notice before maturity of the $731.67 note, and holds the same lawfully secured by said collateral. The answer also denies that the *feme* plaintiff did not indorse the three collateral notes.

The answer also sets out at great length an affirmative defense, and asks equitable relief. It avers that in 1907 the husband, John C.
(95) Newsome, purchased the land described in the deed in trust securing the three collateral notes of T. B. Hall for $765, N. Hall for $600, and J. H. Newsome for $700, and paid the purchase money and took a deed therefor; and

15. That on 11 March, 1908, or thereabouts, the said John C. Newsome married the plaintiff, Dora M. Newsome; and then being heavily indebted, and especially being indebted unto J. R. Garrett, and to hinder and delay and defeat the said Garrett and his other creditors in the collection of their debts against him, the said John C. Newsome destroyed the deed for said land which the said R. E. Cowand and wife had made and delivered to him, and falsely and fraudulently procured said Cowand to make and deliver the deed for said land in the name of his wife, the *feme* plaintiff, Dora M. Newsome, who paid nothing therefor and was ignorant of the fact that said deed was so made, and who took said deed and title as trustee for her husband, and for those whom he owed.

16. That at the time the said J. C. Newsome so fraudulently had said deed made to his wife he was indebted, not only to said J. R. Garrett, but also to C. W. Mitchell, since reduced to judgment, in the sum of $238.53, with interest and costs; to Lynchburg Shoe Company in the sum of $144.65, with interest and costs; Petersburg Dry Goods Company in the sum of $164.66, with interest and costs; Etchison Hat Company in the sum of $68.85, with interest and costs, and to Montague & Bunting in the sum of $36, with interest and costs, all of which amounts and claims were reduced to judgments in the year 1905, and which defendant is informed and believes, and so avers, have not been paid, but are now due and owing by the said John C. Newsome; and that he procured said deed to be made to his said wife for the purpose of hindering, delaying, and defrauding them in the collection of their debts, all as above alleged.

The answer then avers that the plaintiff and wife sold the land and took the three collateral notes and deed in trust aforesaid payable to *feme* plaintiff in pursuance of their fraudulent scheme aforesaid.

His Honor evidently rendered the judgment above set out (96) upon the theory that the creditors alleged to be defrauded are not parties to this action, and are not seeking the relief prayed for by the defendant, and that such creditors must fight their own battles, and that this defendant cannot fight for them.

It is to be noted that among the creditors alleged to have been defrauded is J. R. Garrett, to whom the $731.67 note was given, and who indorsed it to defendant, and to secure which the defendant avers the collateral is bound, and it is substantially alleged that this indebtedness existed at the date of the fraudulent transaction. It is denied that this note is accommodation paper, and the inference is that the defendant claims that the consideration for this note is the indebtedness to Garrett alleged to be existing prior to 11 March, 1908.

The defendant further alleges that Dora M. Newsome is not the real owner of said notes, but that if she is such owner, she gave her husband full authority to negotiate them to secure this indebtedness, and that under his indorsement and the terms of the paper-writing, Exhibit B, they became bound for his entire indebtedness.

It is plain that the answer raises issues of fact, which must be determined by a jury before the rights of the parties can be finally adjudicated.

The judgment practically determines that the collateral notes, under the allegations of the complaint, which must be taken to be true, are not in any view of the case security for the $731.67. In this there was error.

The cause is remanded, to the end that the issues raised by the pleadings be submitted to a jury.

Reversed.

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(97)

B. J. BOWDEN v. W. F. ENGLISH AND C. W. OLIVER.

(Filed 4 March, 1914.)

1. Trials—Evidence—Questions for Jury—Cotton Seed—Weights.

In an action to recover the difference in money between the actual weight of a car-load of cotton seed sold and delivered to the defendants, and the weight paid for by them, the plaintiff's evidence tended to show that after the delivery of the seed he weighed three loads of other seed upon the same wagon, of the same quality and condition, loaded by the same men and in the same manner, and that it showed an average of 58½ bushels to the load of 30 pounds to the bushel, making the total weight of the twenty-one wagon loads of seed delivered 37,000 pounds to the car. There was evidence of a variation of the weights of wagon loads of seed from 50 to 150 pounds to the load; and on behalf of the defendants, that by actual car-load weight, there were 25,700 pounds of seed for which they admittedly paid: *Held*, the evidence was sufficient to go to the jury upon the plaintiff's contention, and a motion to nonsuit was properly overruled.

2. Appeal and Error—Instructions—Harmless Error.

The statement made by the judge in his charge to the jury in this case, that all of the witnesses were of good character, was impartial in its application, and not held for reversible error.

APPEAL by defendants from *Daniels, J.*, at the October Term, 1913, of WAYNE.

Civil action tried on appeal from a justice's court.

The action was to recover the sum of $107.27, alleged to be the balance due on sale of a car-load of cotton seed, shipped in car No. 48273, etc.,

plaintiff claiming that the weights of defendants, upon the basis of which plaintiff had been paid, were incorrect to the amount sued for. There was verdict in plaintiff's favor for $53.69.

Judgment on the verdict, and defendants excepted and appealed.

W. S. O'B. Robinson & Son for plaintiff.
Langston & Allen for defendant.

HOKE, J. It was contended chiefly for defendants that the (98) motion for nonsuit should have been allowed because there was no evidence worthy to be submitted on part of plaintiff tending to show the mistake claimed; but the position, in our opinion, cannot be sustained. Plaintiff contended that he had sold defendants a certain carload of cotton seed and shipped same by their direction to the Southern Cotton Oil Company, at Goldsboro, N. C., where the weight was taken and stated at 25,700 pounds, and defendant had only paid for that amount; that the car contained, approximately, 37,000 pounds of cotton seed, and it was for the difference that the suit was instituted. On this question, plaintiff, a witness in his own behalf, testified that he put into this car and shipped 21 loads of cotton seed, averaging 58½ bushels, at 30 pounds to the bushel, amounting to about 37,000 pounds; that he did not weigh the loads put into the car or any of them, but that he had the same wagon, loaded by the same men, packed in the same manner and from seed of the same quality and condition; that he weighed three loads of such seeds, and it showed an average of 58½ bushels to the load of 30 pounds to the bushel, and that the difference between the amount of the invoice and the amount loaded into the car and shipped, at the price agreed upon, would come to $107.27. The witness also gave the dimensions of the wagon, etc., and stated further that seed of that kind, packed in that way, would vary one load with another, from 50 to 150 pounds to the load, etc.

The hands who assisted in the loading testified that they loaded the test wagon, and it was the same wagon, packed in same way with seed of same kind as those that were shipped, etc.

James Lewis, a witness for plaintiff, testified, giving the dimensions of the wagon in which the seed were hauled; further, that he was a farmer, accustomed to hauling cotton seed, and that a wagon body of that kind, loaded with cotton seed and packed as described, would hold something like 55 bushels.

There was evidence in contradiction on the part of the defendant and tending to show that the car was accurately weighted at the Cotton Oil Company in Goldsboro with the seed in it, and then after (99)

they were unloaded, and the net weight of the seed was only 25,700 pounds; that being the amount that defendants paid for.

Several witnesses for defendant testified that wagon loads of cotton seed, the same kind of seed and packed or tramped apparently in the same way, would vary from 50 to 800 and 1,000 pounds.

While the evidence tending to support defendants' claim may have showed the more accurate method of ascertaining the true weight, we think that on the part of the plaintiff was sufficient to carry the case to the jury. It was relevant, material, and had a reasonable tendency to establish the plaintiff's position, and the motion to nonsuit was, as stated, properly overruled.

The Court charged the jury, in effect, that plaintiff could not recover unless he established by the greater weight of the evidence that there was a mistake, as claimed, in the weighing of the seed at the Oil Mill in Goldsboro, a charge that assuredly gives defendant no just ground of complaint.

The statement in his Honor's charge that all of the witnesses were of good character was no doubt an inadvertence, but it was certainly an impartial utterance, and, on the record, we do not think it should be held for reversible error.

The case is very largely an issue of fact, which seems to have been fairly presented to the jury, and we find no good reason for disturbing their decision of the matter.

No error.

S. W. KENNEY, ADMINISTRATOR, v. SEABOARD AIR LINE RAILWAY. COMPANY.

(Filed 4 March, 1914.)

1. Appeal and Error—Supreme Court—Pleadings—Amendments—Interpretation of Statutes.

The Supreme Court has the power to allow amendments to pleadings (Revisal, sec. 1545); and in this action on appeal to recover damages under the Federal Employer's Liability Act, the plaintiff's motion to amend the complaint so as to allege that there are persons living who have a reasonable expectation of pecuniary benefit from the continued life of the deceased, etc., is granted, with leave to defendant to traverse these allegations.

2. Railroads—"Kicking Cars"—Flying Switch—Trials—Negligence—Evidence.

In railroad parlance, "kicking" a car is equivalent to making a "flying switch," and where there is evidence that the death of a brakeman was

caused in this manner while he was engaged in his duties to the defendant railroad company, the violent contact of the car "kicked" with the one whereon he was employed throwing him down to his death, it is sufficient upon the question of actionable negligence and should be submitted to the jury.

3. Railroads—Federal Employer's Liability Act—"Assumption of Risks"—Trials—Negligence—Instructions—Appeal and Error—Harmless Error.

As to whether assumption of risks, under the Federal Employer's Liability Act, is a defense for a railroad company in an action to recover for the wrongful injury or death of its employee, *Quære.* But in this case, the jury having found the issue of defendant's negligence for the plaintiff, under correct instructions thereon, if there was any error committed by the court in relation to the doctrine of assumption of risks, it was harmless.

4. Railroads—Federal Employer's Liability Act—Measure of Damages.

In an action to recover damages of a railroad company for the wrongful killing of its employee, under the Federal Employer's Liability Act, the measure of damages, where recovery is permitted, is not the present value of the net earnings of the deceased based upon his expectancy. The correct rule is laid down in *Dooley v. R. R.*, 163 N. C., 454; *Irvin v. R. R.*, 164 N. C., 5.

5. Courts—Set Aside Verdict—Agreement—Offer of Party—Appeal and Error.

Where a verdict has been returned by the jury, it is within the province of the trial court alone to set it aside in whole or in part, and it may not be done only upon the agreement of the parties, without the consent of the court. Hence, an offer of agreement of one party made to the unsuccessful one, that the verdict be set aside on a certain issue, is held in this case to be ineffectual on appeal to prevent the appellee having a new trial on that issue for errors of law committed in the Superior Court, or having alleged errors committed on the other issues passed upon on appeal.

6. Railroads—Federal Employer's Liability Act—Negligence—Measure of Damages.

Under the Federal Employer's Liability Act contributory negligence is not a complete defense, but material only in reduction of damages.

APPEAL by defendant from *Peebles, J.*, at November Term, 1913, (101) of BERTIE.

This is an action to recover damages for the alleged negligent killing of the plaintiff's intestate, tried under the Federal Employer's Liability Act.

The defendant moves in the Supreme Court to dismiss the action for failure to allege in the complaint that there are persons living who have a reasonable expectation of pecuniary benefit from the continuance of the life of the deceased, or next of kin who are dependent upon him.

The plaintiff moves to amend the complaint. Evidence was introduced on the trial without objection, which was uncontradicted, tending to prove that there are such beneficiaries.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was refused, and the defendant excepted.

The following verdict was returned by the jury:

1. Was the death of plaintiff's intestate caused by the negligent and wrongful act of the defendant company, as alleged in the complaint? Answer: Yes.

2. If said death was so caused, what sum by way of damages is plaintiff entitled to recover of the defendant by reason thereof? Answer: $1,250.

3. Did plaintiff's intestate, by his own negligence, contribute to his death? Answer: No.

4. Did plaintiff's intestate voluntarily assume the risk of injury, as alleged in the answer? Answer: No.

His Honor charged the jury, if they believed the evidence, to answer the fourth issue "No," and the defendant excepted.

(102) There were also exceptions on the issue of contributory negligence, which need not be set out.

His Honor charged the jury on the issue of damages, in substance, that the plaintiff would be entitled to recover, if anything, the present value of the net earnings of the deceased based on his expectancy, and the defendant excepted.

There was a judgment in favor of the plaintiff upon the verdict, the damages being reduced to $1,000 with the consent of the plaintiff, and the defendant appealed.

After the adjournment of court the plaintiff served notice on the defendant that he would consent to a new trial on the issue of damages, to which the defendant made no reply.

Winston & Matthews for plaintiff.

J. B. Martin and Murray Allen for defendant.

ALLEN, J. (1) The Supreme Court has the power to allow amendments to process and pleadings (Revisal, sec. 1545), and in the exercise of that power the motion of the plaintiff to amend the complaint by alleging that there are beneficiaries and other facts connected therewith, is granted, without passing on the sufficiency of the complaint as it now stands.

The defendant will have leave to traverse the allegations of the amendment, if so advised.

(2) No exception is relied on in the brief of the appellant, relating to the issue of negligence, except upon the refusal to nonsuit, which was properly denied.

The evidence of the plaintiff, which was accepted by the jury, shows that the intestate was a brakeman in the employment of the defendant; that he was on the top of a car in the performance of his duties; that another car was "kicked" against the car he was on with unusual violence, and that he was thereby thrown from the car and killed.

A witness for the plaintiff testified: "After they got the car out, they kicked it. They kicked the car with the engine. I saw the car from the time it left the switch until it hit the other car. It was like a peal of thunder when it hit. The minute it struck, I saw Bob Isaac Capehart fall between the cars."

In *Farris v. R. R.*, 151 N. C., 487, the Court quotes with ap- (103) proval from *Allen v. R. R.*, 145 N. C., 214, that "The word 'kicking' seems to be used in railroad parlance as synonymous with making a flying switch," and from Elliott on Railroads (2d Ed., v. 3), sec. 1265 g, that, "The practice of making running or flying switches is inherently dangerous, and is so considered by the courts in numerous decisions. The courts have not hesitated to hold railroad companies liable for injuries to trespassers on the track, thus inflicted, on the ground of negligence."

(3) Conceding that assumption of risk is a defense under the Employer's Liability Act, although this has not been finally determined by the Supreme Court of the United States, we find no evidence to support the plea, and the defendant presents no reason to sustain his exceptions to the charge upon this issue directing the jury to answer the issue in the negative, except that if the witnesses for the defendant are believed, the cars collided in the usual way and without violence, and that upon this aspect of the evidence the intestate should be held to have assumed the risk. The difficulty about this position is that if this view of the evidence had been accepted the issue of negligence would have been answered in the negative and the issue of assumption of risk would never have been reached; and his Honor so held, as he charged the jury on the first issue as to negligence:

"If you find the fact to be that that car was sent back there in the manner in which they were usually coupled, and that the compact between the two cars was not great, as testified to by several of the witnesses for the defendant, why then you would find the first issue 'No,' because there would be no negligence on the part of the company if the shifting of those cars was done in the ordinary way, and as a man of ordinary prudence would perform the same duty."

(4) The instructions on the issue of damages recoverable under the Employer's Liability Act are erroneous. *Dooley v. R. R.,* 163 N. C., 454; *Irvin v. R. R.,* 164 N. C., 5.

(104) The question is fully considered in these cases, and in the latter a clear and accurate charge is set out and approved.

(5) The plaintiff insists, however, that although there may be error in the issue, the defendant is not entitled to be heard, because after judgment was entered, notice was served on the defendant that the plaintiff would consent to a new trial on the issue of damages.

This contention arises from a misconception of the relation of the court to the trial of a cause.

The parties have the right before trial to settle their differences by agreement and compromise, but when they have submitted the controversy to the court, and a verdict has been returned, it requires the exercise of the judicial function to set aside the verdict or to order a new trial.

As was said in *Smedley v. R. R.,* 45 Ill. App., 427, "The granting of a new trial is a function of judicial practice for the exercise of the court alone. Where both parties are dissatisfied with the verdict of a jury, and ask the court to set it aside, it is still for the court, not upon the consent of the parties, but upon a review of the evidence, instructions, and all matters occurring upon the trial, to deny or sustain the motion."

Again, in *Phelan v. Ruiz,* 15 Cal., 90: "After a cause has once been fully tried and determined, the parties have not an arbitrary discretion to renew the litigation as, and to any extent, they may please. They cannot dispose of the time of the court at their own pleasure. If so, courts of justice might be turned into moot courts for the mere amusement of lawyers concerned in a trial. When a court sees that a case has been fully heard and properly disposed of, it may, in its discretion, refuse to try it over, although the parties, consent to the retrial."

Again, in *Aiken v. Brunn,* 21 Ind., 142: "The court was not bound to grant a new trial even though both parties were willing for it. If the court was satisfied with the trial had, it was not bound to waste its time in witnessing voluntary contests of the parties in the judicial forum or elsewhere."

These authorities and *Rock Island v. McEniry,* 39 Ill. App., 218, and *Nichols v. Sixth Ave. R. R.,* 10 Bosw. (N. Y.) 260, which are in

(105) point, are cited to support the text in 14 Ency. Pl. and Pr., 933, that "If substantial justice has been done, the court is not bound to grant a new trial, although requested by both parties to do so," and substantial justice is frequently attained when neither party secures all he claims, and when both are dissatisfied with the result.

It follows, therefore, that as the court alone could set aside the issue of damages, the offer of the plaintiff to do so, without the consent of the court, was ineffectual, and that the defendant was under no obligation to accept or reject the offer.

It also appears that the defendant relies on exceptions arising upon other issues, which would have been abandoned if the offer had been accepted.

(6) A new trial is therefore ordered on the issue of damages, and also on the issue of contributory negligence, as under the Federal Act the negligence of the intestate, if any, is not a defense, but is material in reduction of damages.

Partial new trial.

Cited: In re Bailey, 180 N.C. 31 (5f); *Gerow v. R. R.,* 188 N.C. 79 (4f); *Cobia v. R. R.,* 188 N.C. 496 (6f).

J. G. JOHNSON ET ALS. *v.* BRANNING MANUFACTURING COMPANY.

(Filed 25 February, 1914.)

Deeds and Conveyances—Descriptions—Parol Evidence—Trespass.

In an action for trespass upon land, the defendant denies the trespass upon plaintiff's land and alleges the acts complained of were done upon its own land which had been conveyed to another in its own title and reserved from the plaintiff's deed; to sustain this contention the defendant tendered in evidence a deed to "50 acres adjoining P. R., bounded on White Oak road and adjoining A. S. R. and P. S." *Held,* the description was sufficiently definite to permit of identification of the lands by parol evidence, the ambiguity being latent, for with the three boundaries given, the third could readily be established by running a line a sufficient distance from the road to include the 50 acres conveyed.

APPEAL by defendant from *Lane, J.,* at April Term, 1913, of (106) BERTIE.

W. R. Johnson, Daniels & Swindell, and Murray Allen for plaintiffs.
Winston & Matthews and Pruden & Pruden for defendant.

CLARK, C. J. This is an action to recover damages for trespass on the "White" tract of land, which the plaintiffs claim title to under the will of Sallie E. Ward, described as "lying on the White Oak road, and

adjoining the lands of Patterson Ruffin, A. S. Rascoe, and others, and containing 191 acres."

The defendant admits that Sallie E. Ward owned the "White" land, but contends that it did not at her death include the whole 191 acres, because she had conveyed to W. A. Ward 50 acres thereof, and in her devise of the "White land" to the plaintiffs she had reserved the 50 acres, because the devise is "that portion of the White tract of land which is *not sold and is not now owned by me.*" The defendant contends that the plaintiffs should have shown what portion of the land Mrs. Ward had not sold off, and that they have introduced no evidence on that point.

The defendant in its answer denies the alleged trespass or that it has cut any timber it did not own or has destroyed any undergrowth or damaged the freehold.

The second and third exceptions are that the court refused to allow the deed from Sallie E. Ward to W. A. Ward to be read to the jury, and excluded all evidence offered to identify the land described in it and tending to show that the 50 acres were included in the 191 acres of the "White" tract claimed by plaintiffs. This deed from Sallie E. Ward had been put in evidence without objection; but when the defendant offered to read it to the jury the court excluded it, holding that, as a matter of law, it was "void for lack of description," and that "the deed did not describe any land." The description is "50 acres adjoined by P. R., bound on the White Oak road and joining A. S. Rascoe and P. Ruffin." The deed has apt words of conveyance and is sufficiently formal. It does not convey an indefinite 50 acres "out of" the White land,
(107) but a tract of 50 acres, which was a part of the White land, "on the White Oak road" adjoining the lands of A. S. Rascoe and P. Ruffin.

We think his Honor erred in excluding parol testimony to identify this tract of land. It was a latent and not a patent ambiguity. It may be that the defendant could have shown that the boundaries had been actually run and marked. At any rate, it was not impossible to lay off 50 acres of the "White" tract, taking the White Aak road as one boundary. The other boundary in such case (unless it had been actually run and marked) would have been parallel to said White Oak road and far enough from it to make up the acreage of 50 acres. In *Farmer v. Batts,* 83 N. C., 387, there in an interesting discussion in which the cases are cited, where the words of description have been held too indefinite to admit parol testimony, and other cases in which the description has been held sufficient. We think this case falls in the latter class.

Among the later cases in point in *Hudson v. Morton,* 162 N. C., 6, in which the Court held that a description "being one acre of land

adjoining L., in one corner of the field now turned out and lies near and including the spring, it being a portion of the H. tract conveyed by D. to M.," was held sufficiently definite to permit of parol testimony to fit the description to the deed. Among the cases cited therein is *Edwards v. Deans,* 125 N. C., 61, where a deed for "30 acres in the western part of a tract of 112 acres" was held sufficient to offer proof of a survey of said 30 acres, followed by possession. In *Perry v. Scott,* 109 N. C., 374, the language, "on the south side of Trent River, adjoining the lands of Colgrove, McDaniel, and others, containing 360 acres," was held not too vague and indefinite to permit identification by parol.

In *Stewart v. Salmonds,* 74 N. C., 518, *Pearson, C. J.,* says that the words "29 acres off the north end of a tract of land containing 129 acres, of an irregular figure, and bounded by eight lines, all straight, and with definite courses and distances, can be ascertained and cut off with mathematical precision. The question is, Can the 29 acres be identified by the rules of mathematics so that the cutting off of the 29 acres will involve no discretion, but be a mere ministerial act? We think (108) the 29 acres can be identified by a mere ministerial act." This case has been often cited and approved; see Anno. Ed.

In *Warren v. Makely,* 85 N. C., 12, the description is: "A parcel of land lying and being in Currituck Township, near the head of Smith Creek, being the easternmost portion of the farm I purchased of my brother, John E. Fortescue, known as the Russell land, containing 100 acres." This Court held that the court below properly refused to tell the jury, from a simple inspection of the deed, that the 100 acres could not be ascertained, and added: "If the larger tract be known, it is apparent the area of 100 acres can be cut off from its eastern part by a line running due north and south." To similar purport is *Webb v. Cummins,* 127 N. C., 41, and *Shaffer v. Hahn,* 111 N. C., at p. 11. Here the description, "50 acres on the White Oak road," is sufficient to admit of parol proof.

In *Cox v. Cox,* 91 N. C., 256, the Court held that the acreage is material in questions of doubtful boundary. Here the 50 acres is a part of the "White tract," and is on the White Oak road. That is to say, the land being a part of the "White" tract, and one boundary, "the White Oak road," being given, as well as the adjoining owners, P. R. Ruffin and A. S. Rascoe, parol testimony was admissible either to show an actual survey, if one had been made, and possession thereunder, as in *Edwards v. Dean, supra,* or the tract could be located, as we have said, by running a line parallel with the White Oak road so as to cut off 50 acres, as in *Stewart v. Salmonds* and *Warren v. Makely* and other cases, *supra.*

As these errors require a new trial, it is unnecessary to discuss the other exceptions.

Error.

Cited: Bachelor v. Norris, 166 N.C. 509 (f); *Higdon v. Howell,* 167 N.C. 457 (b); *Patton v. Sluder,* 167 N.C. 503 (f); *Stockard v. Warren,* 175 N.C. 286 (f); *Freeman v. Ramsey,* 189 N.C. 797 (f); *Bissette v. Strickland,* 191 N.C. 262 (f).

(109)

J. H. LEROY v. PASQUOTANK AND NORTH RIVER STEAMBOAT COMPANY ET AL.

(Filed 25 February, 1914.)

1. Estoppel—Subclaimants—Possession.

One claiming possession of the *locus in quo under* the title of another cannot dispute the title of such other person until the possession so obtained is fully surrendered, and this applies to leases, licenses, contracts of purchase, or any other transaction by which possession of property is acquired from another upon an acknowledgment, express or implied, that he is the owner; and where a defendant corporation claims the *locus in quo* and its possession as successor to a corporation of which the plaintiff was an officer, and the jury has found upon a controlling issue as to title that the property had been bought and paid for by the plaintiff in his own right, and not that of his corporation, the defendant will not be permitted to dispute the plaintiff's title, for whatever right of possession it may have was derived thereunder.

2. Estoppel—Judgments—Parties—Privies—Corporations—Officers.

To constitute an estoppel by judgment, there must be an identity of parties as well as of the subject-matter, or the person sought to be estopped must be in privity with the parties, and where a corporation is a party to an action wherein a judgment has been rendered, an officer thereof is not as such alone in privity with the corporation so as to be estopped by the judgment therein rendered, for the action as to him is *res inter alios acta.*

3. Estoppel in Pais—Officers of Corporations—Affidavits—Constructive Notice—Misled to Prejudice.

The plaintiff bought and paid for a steamboat landing which is claimed by the defendant as successor to a corporation of which the plaintiff was an officer at the time and which continued in possession of the *locus in quo.* The plaintiff had charge, as such officer, of an action brought by his company, claiming the ownership of the wharf, against a third party, who claim the wharf to be a public one, and, therefore, that he had a right to its use. The plaintiff inadvertently filed a complaint alleging ownership in his corporation, and thereafter, and before the defendant had acquired

any rights, filed an affidavit in the cause correcting the mistake and alleging ownership in himself: *Held*, that even if the defendant did not have constructive notice of the last affidavit filed in the former action, it having been found by the jury that the defendant was not misled to its prejudice by plaintiff's alleged conduct, the doctrine of equitable estoppel does not apply as against the plaintiff. The elements of estoppel *in pais* discussed and applied by WALKER, J.

APPEAL by defendants from *Bragaw, J.*, at October Special (110) Term of CURRITUCK.

This action was brought to recover the possession of two wharves or piers, one at Newbern's landing, and the other at Maud's, and damages for the trespass in taking possession of the same. The jury, upon issues submitted to them by the court, found for the plaintiff as to the Newbern pier, and for the defendant as to the other. The evidence is voluminous, but we need only refer to the substance of it. Plaintiff's claim to the wharves is based on deeds made to him, J. H. LeRoy, by W. S. Newbern, Sr., and Thomas E. Newbern, for the privilege of constructing and using the wharves in connection with the navigation of the adjacent waters by steamboats. The Newberns were the occupants of the adjoining lands, and claimed the water rights as riparian proprietors.

The pleadings of the parties, the evidence, and charge of the court, show that the question in dispute was whether the wharves were built by and for the use of the Virginia-Carolina Inland Steamship Company, which was succeeded by the LeRoy Steamboat Company, by a change in the name of the former company, both companies being corporations of this State, or whether the plaintiff built them for himself and paid for the same. If they were built by the plaintiff and for himself, and not the Virginia-Carolina Steamship Company, then that company and its successor, the LeRoy Steamboat Company, were in possession of the wharves under the plaintiff.

The jury, under the evidence and the charge of the court, found that plaintiff had built the wharf at Newbern's landing for himself and paid for the same, but that the wharf at Maud's landing was built by the LeRoy Steamboat Company.

Defendant, however, alleged that a suit had formerly been (111) brought by the LeRoy Steamboat Company against the Farmers and Merchants North Carolina Line, in which the LeRoy Company alleged its ownership of the Newbern wharf and the said defendant denied it, so that an issue was made up, involving the title to the wharf, and tried before the court and a jury. The verdict and judgment were for the plaintiff, the LeRoy Steamboat Company. In this connection, defendant in this case alleged that the plaintiff was an officer of the LeRoy

Steamboat Company; that he managed the said case in behalf of the LeRoy Company, verified the complaint himself, and, in addition, made affidavits alleging that the LeRoy Steamboat Company was, at that time, the owner of the Newbern wharf, and that he thereby was estopped to deny the ownership of that company as against this defendant, his conduct making him, in law and constructively, a party to that suit, and therefore concluded by the judgment therein.

The plaintiff denied the legal deduction from the facts alleged, and further alleged that when he signed and verified the papers, which were drawn by counsel, he was not aware of the statement in them that the LeRoy Company owned the wharf. That the title or ownership of that company was not actually or legally involved in that suit, but, as he thought and as was the fact, the LeRoy Company was relying merely upon the right acquired from him to the possession and use of the wharf, and the defendant therein, admitting the possession of the LeRoy Company, averred simply that the wharf was a public one, and being such, it had the right to use the same for the purpose of landing and docking its vessels there; that the action was for a trespass, based upon possession of the LeRoy Company, and it prayed for an injunction forbidding the Farmers and Merchants North Carolina Line from using the wharf.

The defendant in this action further alleged that plaintiff, J. H. LeRoy, is equitably estopped to deny its right or title to the wharf, by reason of the fact that it was misled by the acts and conduct of the plaintiff LeRoy in connection with the management and prosecution of that case, and especially by the papers filed therein and verified by
(112) him, in which the ownership of its assignor, the LeRoy Steamboat Company, was expressly alleged; that said statements were knowingly made by J. H. LeRoy, were calculated to mislead a purchaser from the LeRoy Company of the property described in the pleadings and other papers in the cause, and did actually mislead it, and to permit him now to allege the contrary would greatly prejudice the defendant.

Plaintiff replies that the question of title to, or ownership of, the wharf was not in controversy between him and the LeRoy Company in that suit, but only the possession of the LeRoy Company, which was sufficient to support its cause of action, and that after the papers, which had been verified by him, were filed, he made an affidavit in the said case, which was also filed in the record, in the following words: "By virtue of an agreement between this affiant and the plaintiff company, the plaintiff company is using the wharf or pier at Newbern's landing known as the LeRoy wharf or pier, situate on the lands conveyed by W. S. Newbern to this affiant, and described in the complaint as being owned and in possession of the plaintiff company." This affidavit was dated and filed

with the other papers in the cause on 5 June, 1909, one month after the filing of the complaint, and more than two years before the defendant, Pasquotank and North River Steamboat Company, acquired its alleged right or title from the LeRoy Steamboat Company by deed of the latter date, and that defendant was fully informed thereby of the true relation between the LeRoy Company and this plaintiff with respect to the ownership of the property, and that if the defendant purchased the property from the LeRoy Steamboat Company in reliance upon any previous statement by him in said case, or any acts or conduct of his in connection therewith, it did so in its own wrong, and that plaintiff, therefore, is in no way estopped now to assert title to, or ownership of, the property as against it.

Much testimony was introduced by the respective parties to support these various contentions. The jury returned the following verdict: (113)

1. Is the plaintiff the owner of the wharf at Newbern's landing and entitled to possession of same? Answer: Yes.

2. Does the defendant unlawfully exclude the plaintiff from the possession thereof? Answer: Yes.

3. What damage is plaintiff entitled to recover therefor? Answer $200 per year.

4. Is the plaintiff the owner of the wharf at Maud's, and entitled to possession of same? Answer: No.

Judgment was entered thereon, and defendant appealed, after reserving exceptions.

J. Kenyon Wilson and Ward & Thompson for plaintiff.

Ehringhaus & Small for defendant.

WALKER, J., after stating the case: The jury having found, under proper instructions from the court, that plaintiff constructed the Newbern wharf and himself paid for the same, and that the LeRoy Steamboat Company, or its predecessor, did not pay for it, this being the main question in dispute, it follows that the LeRoy Steamboat Company was in possession under license or permission of plaintiff, and as defendant claims under the said steamboat company, it is not in a position to dispute the plaintiff's right to the property, unless its other defenses are good and valid in law, for it cannot deny plaintiff's title, under such circumstances, as mediately through its assignor it acquired the possession from him. The principle applies to leases, licenses, contracts of purchase, or any other transaction by which possession of property is acquired from another upon an acknowledgment, express or implied, that

he is the owner, and the title cannot be disputed until the possession so obtained is fully surrendered, it being a rule founded on a principle of honesty, which does not allow possession to be retained in violation of that faith on which it was acquired or continued, as said by *Justice Dillard* in *Farmer v. Pickens,* 83 N. C., 549. The doctrine is well supported by that case and the following: *Hartzog v. Hubbard,* 19 N. C., 241; *Love v. Edmonston,* 23 N. C., 152; *Springs v. Schenck,* 99 N. C., 551; *Stewart v. Keener,* 131 N. C., 486, and *Campbell v. Everhart,*
(114) 139 N. C., 503, where the principle is fully discussed and the authorities collated. The rule applies as well to the assignee or undertenant of the person who has thus acquired the possession of the property, and to the same extent, as it does to his assignor. *Stewart v. Keener, supra,* and *Campbell v. Everhart, supra,* and cases cited on this point.

There are other reasons for holding the plaintiff to be entitled to the possession of the wharf, unless he has been estopped or his right barred as alleged by the defendant. This is said to have been done in two ways:

First. That plaintiff's conduct in connection with the suit of the LeRoy Steamboat Company against the Farmers and Merchants North Carolina Line makes him constructively a party thereto, and estops him to deny the title of the LeRoy Steamboat Company. It is true that a judgment is an estoppel upon parties and privies; but to constitute a judgment an estoppel, there must be an identity of the parties as well as of the subject-matter; that is, it is necessary that the parties, as between whom the judgment is claimed to be an estoppel, should have been parties to the action in which it is rendered, or else be in privity with the parties in such former action, and, as a general rule, it is conclusive only between them. 23 Cyc., 1237; 24 A. and E. Enc. of Law (2 Ed.), 724; *Armfield v. Moore,* 44 N. C., 157; *Owens v. Alexander,* 78 N. C., 1; *Wood v. Sugg,* 91 N. C., 93; *Dickens v. Long,* 109 N. C., 165. Every estoppel must be reciprocal, that is, it must bind both parties, since a stranger can neither take advantage of an estoppel nor be bound by it. Co. Lit., 352 a; Taylor Ev., 586; *Peebles v. Pate,* 90 N. C., 348; *Allred v. Smith,* 135 N. C., 443. The bar, therefore, must be mutual to the parties in the later action.

Under this definition of an estoppel of record and the scope of its operation upon parties and privies with respect to the subject-matter in litigation, there is no reason for holding the plaintiff bound by the judgment in the suit between him and the other company. This Court said in *Falls v. Gamble,* 66 N. C., 455: "No estoppel of record is created against one not a party to the record, even though he had instigated the trespass on account of which the action was brought, aided in the

defense of the action, employed counsel, introduced his deeds in (115) evidence, and paid the costs, and though he and the present defendant claimed by deeds under the present trespasser." Speaking of this principle, now asserted by the defendant, *Chief Justice Pearson,* in *Falls v. Gamble,* thus examines and repudiates it: "The defendant says, true, Falls is not a privy of record, but he instigated Orpe to commit the trespass, aided in the defense of the action, employed counsel and paid the costs, and Orpe read the title deed of Falls in evidence on the trial. Take all this to be so: how can these matters *dehors* constitute him a party or a privy so as to work an estoppel of record? If this be so, Falls would lose his title, not by record or by deed, but by parol evidence, a thing never before heard of except in one case, *Kennersly v. Orpe,* 2 Douglass, 517, on which case *Lord Ellenborough* comments in this wise in *Outram v. Moorewood,* 3 East, 366: 'As to the case of *Kennersly v. Orpe,* it is extraordinary that it ever should for a moment have been supposed that there could be an estoppel in such a case.' " He also adds that "Falls was not a party to the action, although conducting it outside, could not be recognized by the court, and had no right of appeal." But we need not invoke the authority of that case, although it has been often cited by this Court, seemingly with approval.

The plaintiff did nothing which, in law, should bind him as a party to the record in that case, and certainly nothing that prejudiced the defendant by the verdict and judgment rendered. Besides, as to this defendant, it was *inter alios acta.* The controversy was with the Merchants and Farmers North Carolina Line, and not with it; nor was it a party or privy to the suit, or in any degree bound by the judgment therein.

Under the principle that estoppels must be mutual and bind only parties and privies, and that one who is not bound by an estoppel cannot take advantage of it, the conclusion is inevitable that defendant cannot rely upon the record in that case, nor upon the conduct of the plaintiff as working an estoppel against him.

We find it stated in Starkie on Ev., 332, that "When parties (116) are not the same, one who would not have been prejudiced by the verdict cannot afterwards make use of it, for between him and a party to such verdict the matter is *res nova,* although the title turn upon the same point." But the titles relied on in the two cases do not turn upon the same point, and for this reason the rule, as stated by Mr. Starkie, is most strongly against the defendant. The Farmers and Merchants North Carolina Line is not a party to this suit, nor does the defendant claim under it. Considered, therefore, from any standpoint of the law, this plea of estoppel has nothing to rest upon. *Allred v. Smith, supra,* and cases cited therein.

But defendant contends, lastly, that the plaintiff is equitably estopped to set up any title to the wharf, as against it, whether the LeRoy Steamboat Company itself had title thereto or not, because it alleges that plaintiff, by verifying the complaint and filing an affidavit in the case between the LeRoy Steamboat Company and the Farmers and Merchants North Carolina Line, alleging ownership of the wharf in the LeRoy Company, deceived it and caused it to buy the property from said LeRoy Company. But plaintiff testified that this was done by inadvertence, if the allegation is equivalent to an admission by him that the LeRoy Company owned the wharf, and that he did not intend to mislead any one. The jury have found, under correct instructions from the court, presenting the question to them fully and fairly, that defendant was not misled by anything that plaintiff is alleged to have done. But the argument against defendant's contention goes far beyond this finding of the jury.

We doubt seriously if the conduct of plaintiff in respect to that suit, it being *res inter alios acta,* is, in law, such matter as was calculated to mislead the defendant, under the admitted circumstances, so as to bind plaintiff by an equitable estoppel. *Boddie v. Bond,* 154 N. C., 359. There is no sufficient evidence that he actually intended to mislead the defendant; and, again, when he discovered the nature of his former statement respecting the ownership of the wharf, which he says was drawn by counsel and inadvertently verified by him, he filed an affidavit
(117) correcting it, and alleging therein that he, and not the LeRoy Company, was the owner of the wharf; and this was notice to the defendant, as much so as the other papers in that cause. It was not necessary that the LeRoy Company should have had the entire interest or estate in the wharf in order to recover against the defendant in that case for using it without its consent. It was quite sufficient that it had the actual possession and the right thereto under J. H. LeRoy, as it was an action to vindicate such right and to enjoin the defendant from unlawfully using the wharf.

But the jury have found, as we have said, that defendant was not misled to its prejudice, and this finding completely destroys the defense, now set up, of an equitable estoppel. This we decided in *Boddie v. Bond,* 154 N. C., 359. This case is very much like that one in its general features, so far as the plea of an equitable estoppel is concerned. In the *Boddie case* we held:

"1. A party claiming title to lands only by reason of an equitable estoppel of the other party to the action, arising from his alleged acts and conduct respecting a line between adjoining lands, must show that the acts and conduct relied on have misled and caused him loss or damage.

"2. A party seeking in his action to estop another by his acts and conduct from claiming certain lands, must show that he had been misled and prejudiced in some way; otherwise, the acts and conduct relied on would not appear to cause him loss or damage."

What is more to the point, the Court said in the opinion: "The plaintiff made no assertion or statement of fact which has misled the defendant. She has simply conveyed a part of her land to Mrs. Miles and fixed the northern line or boundary as set out in her deed, without having any transaction or communication with the defendant. It is, therefore, nothing but just that she should be allowed to stand upon her right and assert her real title to the disputed land. The reference in the deed to the 'northern line' as having been agreed upon by the interested parties must be restricted in its operation to her and Mrs. Miles—the only parties to the deed—and its effect, as to the defendant, is not extended beyond that produced by the other description in the (118) deed. It works no estoppel and cannot be treated as a ratification. There is no room in this case for the contention that it amounts to either of these, so as to give the defendant any right to the land which he did not have before."

Bispham (5 Ed.), sec. 282, says of this kind of estoppel: "Equitable estoppel, or estoppel by conduct, has its foundation in the necessity of compelling the observance of good faith; because a man cannot be prevented by his conduct from asserting a previous right, unless the assertion would be an act of bad faith towards a person who had subsequently acquired the right. It is the presence of this bad faith, either in the intention of the party or by reason of the result which would be produced if he were permitted to deny the truth of his statement, that distinguishes this species of estoppel from estoppel at common law."

There should be no estoppel in equity, or any principles of equity, unless the person who asks relief from the rigor of the law is a purchaser, in the large and liberal sense of that term, which includes all who have given value, or changed their position for the worse, in reliance on the act or declaration of the other party, without knowledge or notice that the conduct or statement was not what it was represented to be. A party who has not been deceived or misled to his prejudice cannot be said, in any just or reasonable sense, to have been defrauded. Herman on Estoppel, sec. 797.

The essential elements of an equitable estoppel applicable to our case are: (1) There must be conduct—acts, language, or silence—amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or, at least, the circumstances must be such that knowledge of them is

necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, *and at the time when it was acted upon by him.* (4) The conduct must be done with the intention, or at least with the *expectation,* that it will be acted upon by the other
(119) party; or under such circumstances that it is both natural and probable that it will be so acted upon. There are several species in which it is simply impossible to ascribe any *intention* or even *expectation* to the party estopped, that his conduct will be acted upon by the one who afterwards claims the benefit of the estoppel. (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must, in fact, act upon it in such a manner as to change his position for the worse; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it. 16 Cyc., 726; 2 Pomeroy's Eq. Jur., 805.

These, perhaps, embrace all of the constituent elements; but those thus stated may be subject to some explanation in special cases, as, for instance, that a man may be presumed to intend that which is the natural and probable consquence or effect of what he says or does. But even as they are stated most favorably for the defendant, its case is not brought within their operation. The jury have found that it had notice, or that it did not rely upon the statement, if it had any knowledge of it, or that it was not prejudiced thereby, if it did; and we think the verdict was fully warranted by the evidence, if there be any tending to show that defendant acted upon the alleged representation or was misled to its prejudice thereby, when it purchased from the LeRoy Company.

What was said by this Court in *Holmes v. Crowell,* 73 N. C., 613, is worthy of mention, as being quite pertinent to the facts of this case:

"In order to create an *estoppel in pais,* it must appear:

"1. That the party knew of his title.

"2. That the other or second party did not know, and relied upon the representations so made by the first party.

"3. That the second party was deceived; and some add a fourth element, that the first party *intended* to mislead him; but it is not necessary to decide it in this case (said the Court), as all the other requirements are wanting."

(120) And so we say in our case, it is not necessary to set precise limits to the doctrine, as two, at least, of the essentials are lacking. The defendant had notice from the affidavit filed two years before he bought, as to the true ownership, and should not have been misled,

and, as the jury say, was not misled; and, besides, the defendant in this case was not a party to that suit.

We have been referred by the learned counsel of defendant to *Sample v. Lumber Co.,* 150 N. C., 161, for the principle that where both parties claim from the same source of title, neither will be permitted to deny the validity of the title so derived, and the priority of title then determines the ownership as between the parties, unless he who has the later deed can show a superior outsanding title and connect himself with it. This is a rule adopted by the courts for convenience, and is binding upon the parties, and it would apply here if the jury had found that the LeRoy Steamboat Company owned the wharf, and the plaintiff claimed under it; but they found that it was built and paid for by plaintiff, and the LeRoy Steamboat Company was in possession under him; so that the case is more like *McCoy v. Lumber Co.,* 149 N. C., 1, cited and approved in *Sample v. Lumber Co., supra,* which held that when one acquired possession, or a limited interest in real property, from another, he cannot keep the possession and dispute his title. This is but the same in substance as the rule we have already stated and applied.

Counsel cited us to Pomeroy's Eq. Jur. (Ed. of 1882), secs. 803, 804, 805, and 806, for the law as to equitable estoppels. We have recited substantially all that is there stated by Dr. Pomeroy on the question. It is true that actual or intentional fraud is not a requisite element of an equitable estoppel, but there is nothing in this case upon which fraud can be imputed to plaintiff, even implied or constructive fraud, nor do we think the defendant was justified in relying upon plaintiff's conduct, under the circumstances as disclosed, if it really contained any fraudulent element. It was not intended or expected that defendant would be misled. *Mason v. Williams,* 66 N. C., 564, also cited by defendant, has no bearing on the matter, as the conduct of the party, as shown in that case, was directly misleading to the other party, who (121) bought the property in his presence and hearing, supposing that he was not the owner, and his silence, when he was called upon to assert his claim, if he had one, was calculated to deceive and did induce the purchase, so that it was imputedly fraudulent, if not intentionally so. He lost his property under the maxim that "A man who does not speak when he ought, shall not be heard when he desires to speak." (*Qui tacet consentire videtur.*)

If defendant would otherwise have had the right to rely upon plaintiff's conduct, the latter spoke and divulged his right to the wharf before the defendant bought. Nor is Bigelow on Estoppel, pp. 147, 148, also cited, any more in point for the position that plaintiff is bound by his conduct as constructively a party of record. It refers to cases where the

party whose conduct is alleged to have that legal effect is liable over to one who is a party and has been duly notified or vouched to come in and defend, as he is bound by some former undertaking to do, as in the instance of a covenant of warranty. *Jones v. Balsley,* 154 N. C., 61.

We have considered the case somewhat at length, because each position was asserted on the one side and contested on the other with unusual zeal and ability by counsel, who have submitted to us well prepared and exhaustive briefs upon the disputed questions.

If there was any error in the other rulings, it was not material in the view we take of the case, and certainly not sufficient to justify a reversal. But we do not concede that there was any error, but, on the contrary, our conclusion is that the legal merits of the case are with the plaintiff, and the verdict and judgment are in accordance with the facts as disclosed by the evidence.

No error.

Cited: Patterson v. Franklin, 168 N.C. 78 (3f); *King v. McRackan,* 168 N.C. 625 (2f); *Buchanan v. Hedden,* 169 N.C. 224 (2b); *Timber Co. v. Yarbrough,* 179 N.C. 340 (1f); *Strickland v. Shearon,* 193 N.C. 603 (2b); *Development Co. v. Bon Marche,* 211 N.C. 273 (3f); *Davis v. Montgomery,* 211 N.C. 324 (3f); *Meacham v. Larus Bros. Co.,* 212 N.C. N.C. 648 (2f); *Rabil v. Farris,* 213 N.C. 416 (2f); *Hester v. Motor Lines,* 219 N.C. 745 (2f); *Corp. Com. v. Bank,* 220 N.C. 51 (2f).

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(122)

W. M. AINSLEY, ADMINISTRATOR, v. JOHN L. ROPER LUMBER COMPANY.

(Filed 12 March, 1914.)

1. Master and Servant—Safe Appliances—"Known, Approved," etc.—Further Duty of Master.

An employer owes it as a duty to his employee working at machines driven by mechanical power and more or less dangerous and intricate, to supply him with appliances, etc., which are reasonably safe and suitable, and to exercise the care of a prudent man in looking after his safety; and this duty may not always be fully discharged by furnishing him such implements and appliances as are "known, approved, and in general use."

2. Same—Trials—Evidence—Negligence—Knowledge Implied—Questions for Jury.

While engaged in his duties in operating a power-driven lathing machine, the plaintiff's intestate was killed by a piece of timber flying back from the machine and striking him. The verdict established the fact that the machine causing the injury was "known, approved, and in general use,"

but there was further evidence tending to show that a large hood, a part of the machine, was placed over the saws for the purpose of preventing the timbers from thus flying back, and because of a large opening therein some of the timbers would oftentimes fly back, the danger from which could practically have been removed in a certain manner at a comparatively small expense and without lessening the efficiency of the machine: *Held*, this further evidence was sufficient upon the question of defendant's actionable negligence to be submitted to the jury; and, further, that the dents in the wall caused by the flying timbers before the injury, the length of time the machine had thus been used there, etc., were evidence sufficient upon the question of defendant's implied knowledge of the danger to the employee in thus working. The charge in this case is approved.

APPEAL by defendant from *Bragaw, J.*, at October Term, 1914, of BEAUFORT.

Civil action to recover damages for the alleged negligent killing of plaintiff's intestate.

It was proved that, on or about 4 August, 1912, the intestate, a boy of 14 years of age, was killed while operating a lathing machine, as employee of the defendant company; that this machine had two circular saws which revolved towards the operator; over the (123) saws was a hood for the purpose of preventing sawdust and pieces of timber from being thrown back towards the operator, and, to a certain extent, was efficient for the purpose. There was also an iron spring curving towards the saw, 1½ inches wide, designed primarily to hold the bolts of wood to the guide or side boxing as same were moved onto the saws; that this spring had also some effect in protecting the operator, but, owing to its size, there was a opening left, and through this pieces of timber were not infrequently hurled back with great violence, threatening the safety of the employee, and that marks and dents on the wall, 20 feet back, made by these timbers, gave evidence of this condition, and that it had been going on since the machine had been in operation, for a good length of time, and that the intestate was struck and killed by a piece of timber thrown back in this manner. There was testimony also to the effect that, by making the spring slightly wider, as much as 5 or 6 inches, it would have closed the gap or opening and afforded full protection to the operator, and that this could have been done at very small expense and without in any way impairing the efficiency of the machine. There was evidence on the part of the defendant, uncontradicted, so far as the record discloses, that this was a good specimen of machine, of a type that was known, approved, and in general use.

A motion to nonsuit, made in apt time, was overruled, and defendant excepted.

In the course of his Honor's charge the jury were directed as follows: "The only allegation of negligence in this case is the use of this lathe machine with the spring not high enough to act as an obstruction or guard to prevent the hurling back to and through the front of the machine pieces of wood which might be inside. In this case I charge you that plaintiff has not shown that the defendant has been negligent in failing to use a machine such as was known, approved, and in general use in mills of that kind at that time, and upon that question and allegation you would not be justified in answering this first issue in the plaintiff's favor.

(124) "The plaintiff contends that after the defendant installed this machine, in its operation it hurled missiles out of the front, to the danger of the man or boy feeding it, before the injury to Ainsley, sufficiently frequent and for such a length of time for defendant to have known of this, or in the exercise of ordinary care to have learned it, and that in the face of this knowledge defendant continued to use it with the narrow spring, when it could have corrected it by using a wider spring and have thereby prevented missiles or slivers or pieces of wood from being thrown back through the front end, to the danger of the feeder of the machine.

"(I charge you that, unless you are satisfied by the greater weight of the evidence, the burden being upon the plaintiff, that this machine had, previous to the injury to Ainsley, thrown out missiles or pieces of wood with such force, frequency, and for a sufficient length of time prior to this injury to Ainsley, that defendant knew of it, or in the exercise of reasonable care and diligence could have known it, you should answer the first issue 'No.' The only evidence of negligence in this case, if any, to be considered by the jury upon the first issue is the failure of defendant to have a spring of additional width or height, and unless you find by the greater weight of the evidence that such spring would have prevented the injury, and that the defendant in the exercise of ordinary care ought to have provided the same, you are instructed to answer the first issue 'No.')"

To that part of the charge in parentheses the defendant excepts. This constitutes defendant's exception 7.

"It was not the duty of the defendant to furnish the best or most improved machine that could have been gotten or devised, but only such as was in general and approved use at the time, and the failure of defendant to have any particular appliances or devices on this machine is not actionable negligence. The basis of defendant's negligence in this case, if any, depends upon whether it exercised that degree of care which a reasonably prudent man would have exercised in the same situation, and

this test is made if you are not satisfied from the evidence that the machine and appliances in question were such as were in general and approved use at the time, or such as a reasonably prudent (125) man in the same situation would have provided; and if you so find from the evidence, you would answer the first issue 'No.'

"If you find from the evidence, by its greater weight, that the defendant was negligent in the respect alleged, you must further find, before answering the first issue 'Yes,' that such negligence was proximate—that is, the real or moving cause of the injury. In other words, you must find from the evidence, by its greater weight, not only that this defendant was negligent in the manner alleged, but that the injury would not have occurred otherwise; and if you are not satisfied, then you are instructed to answer the first issue 'No.'

"(But if you are satisfied by the greater weight of the evidence that after defendant had installed this machine, in its operation it threw pieces of wood out of the front end next to the feeder, subjecting the one feeding it to danger from these flying missiles in the proper discharge of his duty, these pieces flying over the top of this spring, and you further find by the greater weight of the evidence that this could have been corrected and prevented by the use of a spring of sufficient width to obstruct and turn these flying pieces, and that this could have been done without impairing the efficiency of the machine or interfering with its work, and you should further find that the failure to use a wider spring under the circumstances was a failure to do what a reasonably prudent employer would have done under the circumstances, or that the continued use of this spring under such conditions was doing what a reasonably prudent employer would not have done, and you further find by the greater weight of the evidence that this was proximate cause of Ainsley's injury, you should answer the first issue 'Yes.')"

To this part of the charge defendant excepted.

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

Ward & Grimes for plaintiff.

A. D. McLean and W. B. Rodman, Jr., for defendant.

HOKE, J., after stating the case: It is the accepted rule in this (126) State, applied in numerous decisions of the Court, that "an employer of labor, in the exercise of ordinary care, that care that a prudent man should use under like circumstances and charged with a like duty, must provide for his employees a reasonably safe place to do their work and supply them with machinery, implements, and appliances

reasonably safe and suitable for the work in which they are engaged, and such as are known, approved, and in general use." *Kiger v. Scales Co.,* 162 N. C., 133; *West v. Tanning Co.,* 154 N. C., 47; *Patterson v. Nichols,* 157 N. C., 406; *Blevins v. Cotton Mills,* 150 N. C., 493; *Pressly v. Yarn Mills,* 138 N. C., 410; *Marks v. Cotton Mills,* 135 N. C., 287; *Witsell v. Manufacturing Co.,* 120 N. C., 557.

There has been no occasion with us to make extended or critical reference to that portion of this obligation referring to implements and appliances which are "known, approved, and in general use," for in the causes in which the question has thus far appeared, the absence of such implements, etc., has been such as to permit the inference of negligence; the proximate cause of the alleged injury, and a perusal of the authorities cited, and many others of like kind, will disclose that this requirement, while peremptory in terms and effect, is in addition to the more general one of supplying appliances, etc., which are reasonably safe and suitable, and both are included in the general obligation on the employer to exercise the care of a prudent man in looking after the safety of his employees. Thus, in the recent case of *Kiger v. Scales Co., supra,* p. 136, the prevailing rule is stated by the Court as follows:

"It has been repeatedly held in this State that in the exercise of reasonable care employers of labor are required to provide for their employees a safe place to do their work, and appliances safe and suitable to do the work in which they are engaged. And as a feature of this obligation, in the operation of mills and other plants where the machinery is more or less complicated, such employers are held to the duty of supplying machinery and implements which are known, approved, and in general use."

(127) And in *Marks v. Cotton Mills, Associate Justice Walker,* delivering the opinion, said: "The employer does not guarantee the safety of his employees. He is not bound to furnish them an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements, and appliances, but only such as are reasonably safe and fit and as are in general use. He meets the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment. . . . It is the negligence of the employer in not providing for his employees safe machinery and a reasonably safe place to work that renders him liable for any resulting injury to them, and this negligence consists in his failure to adopt and use

all approved appliances which are in general use and necessary to the safety of the employees in the performance of their duties."

Speaking, then, further to this rule that an employer must furnish implements, etc., which are known, approved, and in general use, a fuller statement of the requirement is that where machinery is more or less complicated, and especially when driven by mechanical power, there must be supplied, for the employees, machinery, implements, and appliances which are "known, approved, and in general use by prudent and skillful employers and in well regulated concerns." From this we think it follows that an employer is not protected, as a conclusion of law, because he is operating a machine which is "known, approved, and in general use," but, although such a machine or appliance may have been procured, if its practical operation should disclose that employees are thereby subjected, not to the ordinary risks and dangers incident to their employment, but to obvious and unnecessary dangers which could be readily removed without destroying or seriously injuring the efficiency of the implement, such conditions, if known or if allowed to continue, might permit the inference of culpable negligence against the employer; that he had not, in the particular instance, measured up to the (128) standard of care imposed upon him by the law; a position upheld by many authoritative cases and by text-writers of approved excellence. *Tex., etc., Ry. v. Behymer,* 189 U. S.,468; *Wabash Ry. v. McDaniels,* 107 U. S., 454; *Wilson v. R. R.,* 29 R. I., 146; *Reichla v. Grueusfelder,* 52 Mo. App. Rep., 44; *Block Co. v. Gibson,* 160 Ind., 319; *R. R. v. Mugg,* 132 Ind., 168; *Gadszewski v. Barker,* 131 Wis., 494; *Niko Wita v. Interstate Iron Co.,* 103 Minn., 103; *Coin v. Lounge Co.,* 222 Mo., 488; 3 Labatt on Master and Servant (2nd Ed.), sec. 940; in 1st Ed., sec. 44; 26 Cyc., p. 1108.

In the case of *Wabash Ry. v. McDaniels, Associate Justice Holmes,* speaking to this question, said: "What usually is done may be evidence of what ought to be done; but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not."

In *Reichla's case,* 52 Mo. App., *supra,* it was held among other things: When fencing can be resorted to without inconvenience, and its absence renders the machinery unnecessarily dangerous, the existence of a practice to use the machinery without it will not prevent the inference of negligence." Speaking generally to the question in 26 Cyc., p. 1108, it is said: "While not conclusive on the question of negligence, evidence is generally admissible in an action for personal injuries to show whether or not the master's machinery, appliances, ways, and methods are such as are in ordinary and general use by others in the same business; but customary negligence, either on the part of himself or others, is no defense to the master," etc.

In Labatt, *supra,* the author refers to the correct statement of the rule we are discussing, as follows: "A doctrine which has been extensively applied may be enunciated thus: Where the only inference that can reasonably be drawn from the evidence is that the master conformed to the general usage of the average member of his profession or trade in respect to the adoption or retention of the instrumentality in question, he may be declared, as a matter of law, to have been in the exercise of due care. The language in which this doctrine is formulated or referred to would, if taken literally, often convey the idea that the gener-
(129) ality of the usage and the similarity of the business or establish ment of which the usage is adduced as a standard of comparison are the only points to be considered, and that the manner in which that business or establishment is conducted and the character of the persons engaged in it are not material factors in the question to be determined. But it is clear that, under the general principles of the law of negligence, these latter elements must be material, and that the test really propounded is not usage of any employers, however imprudent or unskillful, or of any concerns, however ill regulated, but the usage prevailing among prudent and skillful employers and in well regulated concerns."

The same general principle is involved and the doctrine indirectly approved in a line of well considered cases holding that a promise by an employer to make additions or structural changes in a machine required by the accepted standards of prudence will be as efficacious to repel the assumption of risk as a promise to repair, *Suchomel v. Maxwell,* 240 Ill., 231; *Barny Dumping Boat v. Clark,* 112 Fed., 920; *Homestake Mining Co. v. Fullerton,* p. 923, and the position is clearly recognized in the recent and well considered case of *Rogers v. Manufacturing Co.,* 157 N. C., 484.

The case at bar was submitted to the jury in the light of these general principles, and we find no valid reason for disturbing the results of the trial. While it was proved that the machine in question was one that was "known, approved, and in general use," there were also facts in evidence tending to show "that in its practical operation the machine oftentimes would hurl these blocks or pieces of wood back towards the operator with tremendous force"—a constant menace of serious injury, and one of which had caused the intestate's death; that this had been going on for some time, and there were numerous dents made in the wooden wall 20 feet back of the workman, giving evidence of the force of the impact and of the continued existence of the condition complained of; and, further, that by broadening the iron spring to 5 or 6 inches, which could have been done at a small cost and without impairing the usefulness of the
(130) machine, the defect could have been removed and the danger

practically avoided. These facts, if accepted, permit the inference of negligence on the part of the employer, and justifies the conclusion reached by the jury.

In our opinion, the learned judge, in his carefully restricted charge, has laid down the correct rule for the guidance of the jury, and the judgment on the verdict is affirmed.

No error.

Cited: Hornthal v. R. R., 167 N.C. 629 (p); *Lynch v. Veneer Co.,* 169 N.C. 172 (f); *Gregory v. Oil Co.,* 169 N.C. 457 (g); *Wooten v. Holleman,* 171 N.C. 464 (g); *Dunn v. Lumber Co.,* 172 N.C. 137 (f); *Hux v. Reflector Co.,* 173 N.C. 99 (f); *Taylor v. Lumber Co.,* 173 N.C. 114 (f); *Lynch v. Dewey,* 175 N.C. 158, 159(f); *Butner v. Lumber Co.,* 180 N. C. 619 (j); *Cook v. Mfg Co.,* 182 N.C. 209 (f); *Gaither v. Clement,* 183 N.C. 456 (g); *Lacey v. Hosiery Co.,* 184 N.C. 22 (f); *Dellinger v. Building Co.,* 187 N.C. 848 (f); *Bradford v. English,* 190 N.C. 746 (g); *Almond v. Oceola Mills,* 202 N.C. 100 (f); *Murray v. R. R.,* 218 N.C. 399 (g).

IN RE WILL OF J. J. PARKER.

(Filed 11 March, 1914.)

1. Appeal—Brief—Exceptions Abandoned.

Exceptions not brought forward in appellant's brief are deemed abandoned on appeal. Rule 34.

2. Wills—Mental Capacity — Evidence — Appeal and Error — Harmless Error.

In an action to caveat a will, the witness's answer to a question directed to the mental capacity of the testator, who had devised his property to one not related to him, that he did not think the testator "meant for his folks to have any of his property, from the way he talked, and that he had sense when he was around, so far as he knew," is held competent under the rules laid down in *McLeary v. Norment,* 84 N.C. 235; but if otherwise, it was not reversible error in this case.

3. Wills—Undue Influence—Evidence.

Where the beneficiary and the testator are not related, and the evidence discloses that the latter sent for the former when the will was written, who at his request sent for the attorney who drew the will and for the witnesses thereto; that there was no relationship of confidence or trust except that the testator looked to him in time of need, and that he lived alone, neglected by his kinsmen, it is not sufficient to be submitted to the jury upon the question of undue influence.

APPEAL by caveator from *Whedbee, J.*, at November Term, 1913, of PITT.

(131) This is an action to caveat a will for mental incapacity of the testator, and for undue influence.

W. F. Evans and Harding & Peirce for propounder.

Julius Brown and H. S. Ward for caveator.

CLARK, C. J. The first and second exceptions are abandoned, not being brought forward in the brief. Rule 34.

Exceptions 3 and 4 are to the following question and answer: "What would you say as to his having a clear understanding of the nature of the business in which he was engaged, of the kind and the value of the property which he held, and the persons who are the natural objects of his bounty, and the nature in which he desired his property to be distributed? State if you think he had that mental capacity?" To which he replied: "I don't think he meant for his folks to have any of it, from the way he talked; and he had sense when I was around, as far as I know."

While the answer was crude, it was not of such import as to influence the jury, nor of such gravity as to amount to a reversible error; indeed, it was competent under the rules laid down in *McLeary v. Norment*, 84 N. C., 235.

The 5th, 6th, 11th, and 12th exceptions are to the charge of the court, in that he restricted the caveator's attack to a lack of mental capacity, and did not submit to the jury the aspect of undue influence. A careful consideration shows no testimony tending to prove undue influence and no exception to any exclusion of testimony in that view. The caveators admitted that the will was duly signed in the presence of two witnesses, and placed their attack on the ground of mental incapacity. The testator lived alone, neglected by his kinsmen, and the propounder seems to have been the person to whom he looked for aid in time of need, but there is no evidence that he occupied any fiduciary relation to the testator. The testator on the day the will was made, early in the morning, sent a servant to the propounder, asking him to come to his house. The propounder knew nothing as to why he was wanted until his arrival, and then at the request of the testator he went for an attorney and

(132) some witnesses. The attendant circumstances show no element of undue influence. Indeed, the caveator asked for no instruction as to undue influence, and tendered no issue. It is true that in *Fowler's case*, 159 N. C., 203, it was held that a submission of an issue

of that kind is not necessary; yet the failure to ask any instruction on that point confirms our view of the evidence.

The other exceptions do not require discussion.

No error.

Cited: S. v. Davis, 168 N. C. 144 (1f); *S. v. Heavener,* 168 N.C. 161 (1f); *In re Will of Efird,* 195 N.C. 84 (3g).

D. L. WHITE v. AMERICAN PEANUT COMPANY.

(Filed 18 March, 1914.)

1. Courts, Justice of the Peace—Appeal—Trial de Novo—Scope.

An appeal from a court of a justice of the peace comprehends in its scope a new trial of the whole subject-matter of the action (Revisal, secs. 607, 608, and 609), and any determination by the magistrate of an incidental question involved therein, though not directly appealed from, is, when relevant and necessary, to be considered and determined by the appellate court.

2. Same—Special Appearance—Process—Service—Corporation—Agent.

The trial judge should find the facts upon which he, upon special appearance of the defendant for the purpose, dismisses an action for the want of proper service of process; and when it appears on appeal that the action commenced in a magistrate's court, and service of process had been attempted upon the alleged agent of a corporation and upon the Secretary of State (Revisal, sec. 1243), and the judgment of the magistrate was that service on the Secretary of State was a valid service and that on the agent was insufficient, which latter ruling was reversed in the Superior Court, it was error in the trial judge to refuse to hear and consider the affidavit tending to show a valid service on the agent, as that was a question also presented and involved in the appeal.

APPEAL by plaintiff from *Peebles, J.,* at November Term, 1913, of BERTIE.

Civil action, heard on appeal from justice's court, and on mo- (133) tion to dismiss for lack of proper service of process made on special appearance in the Superior Court.

There was judgment dismissing the action on ground stated, and plaintiff, having duly excepted, appealed.

Winston & Matthews for plaintiff.

Gilliam & Davenport, Murray Allen, and W. D. Pruden for defendant.

HOKE, J. The action was instituted before a justice of the peace to recover a sum within his jurisdiction alleged to be due for a lot of peanuts sold by plaintiff to defendant company, through one J. E. Overton, their agent. Service was had on defendant, through said Overton as agent, and, on return day, defendant, having entered special appearance for the purpose, moved to dismiss on the ground that no jurisdiction of the cause could be obtained by such service. Hearing was continued and an additional summons in cause was issued and attempted service had under provisions of the Revisal, 1243, by leaving copy of the summons with Secretary of State.

On return day, 18 July, 1913, defendant, on special appearance, moved to dismiss for lack of proper service on Secretary of State.

The justice sustained motion to vacate as to service on Overton, and being of opinion that there was valid service under section 1243, overruled motion as to that process; tried the case, giving judgment for plaintiff; and defendant appealed.

On the hearing in Superior Court and on special appearance made, his Honor was of opinion that plaintiff not having appealed from the ruling of the justice in reference to the attempted service on Overton, the agent, was concluded by such action of the justice's court, and it was not open to him to have same considered, and, on that ground, declined to hear or consider any evidence or affidavits in reference to such service. Plaintiff duly excepted.

Considering the case, then, in reference only to the attempted service on Secretary of State, his Honor, holding that the court had
(134) acquired no jusidiction to try the cause by reason of such service, dismissed the action, and plaintiff, having duly excepted, appealed.

On these the relevant facts sufficient to a proper understanding of the question presented, we must hold there was error in the ruling of his Honor in refusing to hear the evidence as to service of process on Overton, the agent, and to consider that phase of the case.

Our statute in reference to appeals from a justice of the peace, among other things, provides that, on such appeal, "the case shall be placed on the trial docket for a new trial of the whole matter," and the case should be heard on the original papers, and no copy need be furnished, etc. Revisal, secs. 607, 608, 609.

This law, by correct interpretation, requires that, on the hearing, every material matter properly incident to the cause then pending and involved in the appeal shall be heard and passed upon. In the present case the substantial question presented before the justice and involved in the appeal was whether that court had acquired jurisdiction to try the case. The justice held that he had jurisdiction; tried cause, and

gave judgment in plaintiff's favor. On appeal, the same general question was presented, whether the court had acquired jurisdiction, and every method involved in that general issue and presented by the record was pertinent, and should have been considered in determining the main question.

While the entry of the justice in this respect took the form of setting aside service on Overton, having retained jurisdiction and tried the cause against the company, it amounted to no more than an expression of the justice's opinion as to the efficacy of such a service.

These justices of the peace, while they do valuable and satisfactory work in the adjustment of causes within their jurisdiction, are often called on to act without expert advice, and, in matters of form, it would give rise to endless complications and seriously tend to impair their usefulness to hold that every adverse ruling made by them and the reasons for it would estop the party affected unless he then and (135) there excepted and appealed. It is for this reason that our statutes governing appeals from these courts are very broad and liberal in their provisions and should be properly construed and applied in furtherance of the legislative purpose.

It has been held that, in dismissing a cause on special appearance of this character, it is proper for the judge to find the facts, and his Honor having erroneously declined to hear pertinent evidence and to consider and pass upon facts that were relevant to the inquiry, the imperfect finding of facts as made by him, and his judgment thereon, will be set aside and the cause remanded for further hearing.

Reversed.

Cited: Fochtman v. Greer, 194 N.C. 675 (d).

S. T. CARSON v. NATIONAL LIFE INSURANCE COMPANY AND GEORGE BRILEY.

(Filed 11 March, 1914.)

1. Appeal and Error—Second Appeal—Former Decision.

Upon a second appeal, the Supreme Court will not rehear and reconsider the questions determined on the former appeal.

2. New Trial—Newly Discovered Evidence—Requisites.

A motion for a new trial for newly discovered evidence will not be granted when it appears that it was accessible at the trial to the appellant

by the exercise of proper diligence; that it was cumulative, and that a new trial would not probably produce a different result.

APPEAL by plaintiff from *Daniels, J.*, at January Term, 1914, of PITT.

Julius Brown and S. I. Everett for plaintiff.

Albion Dunn and Harry Skinner for defendant.

WALKER, J. It appears from the record that this appeal was taken for the purpose really of reviewing the former decision of this (136) Court in the same case. 161 N. C., 441. The facts are substantially identical and the points raised by the exceptions of plaintiff, who appealed, are so closely analogous as not to be distinguishable. When this is the case, we follow the former decision, which cannot be thus reviewed by a second appeal. *Bank v. Furniture Co.*, 120 N. C., 475. The matters now presented were then carefully considered and decided upon full deliberation, and we abide by the conclusion reached at that time. On the second trial below, the learned judge followed strictly the principles which we had said should govern the case, and we find no error in any of his rulings.

The motion for a new trial, upon the ground of newly discovered testimony, is denied, for the reason that plaintiff has not brought his application within the terms of the rule applicable to such cases. The proposed testimony is cumulative, and it does not appear to us probable that it would cause a reversal of the verdict if a new trial were granted. There is evidence to show that it was accessible to plaintiff by the exercise of proper diligence. For these reasons, and others, which might be stated, the application does not impress us so favorably as to induce the exercise of our sound discretion in plaintiff's behalf. *Johnson v. R. R.*, 163 N. C., 431, and Clark's Code (3 Ed.), pp. 518, 519, and cases there noted. Plaintiff has had two chances, and a third, under our ruling as to the law, it seems, would be of no avail to him.

No error.

Cited: Latham v. Fields, 166 N.C. 215 (1f); *S. v. Casey,* 201 N.C. 625 (g).

FIDELITY INSURANCE COMPANY AND PIEDMONT INSURANCE COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 11 March, 1914.)

1. Insurance, Fire—Wrongdoer — Subrogation — Equity — Limitation of Actions.

There is no privity of contract between an insurer and one who negligently destroys the property covered by a policy of insurance, the right of the insurer to recover of the wrongdoer being in subrogation of the rights of the insured, both under the relevant provisions of the statutory or standard form of policy and under the equitable principles of subrogation; and where the statute of limitations has run against the right of recovery of the insured in his action against such wrongdoer, the insurer cannot acquire any further right, upon making payment under the terms of its policy, and its right of action will also be barred.

2. Insurance, Fire—Wrongdoer—Payments for Damages—Payment by Insurer—Fraud—Judgments—Evidence—Trusts and Trustees.

Where one who has negligently destroyed property covered by an insurance policy has been forced by judgment to pay to the insured the amount of his loss, with knowledge that the insurer has paid, under its policy, for the same loss, such payment cannot be evidence of fraud against the insurer. *Semble:* The insured would be deemed a trustee for the benefit of the insurer for such moneys as he may have thus received.

APPEAL by defendant from *Daniels, J.,* at August Term, 1913, (137) of WAYNE.

Civil action tried upon these issues:

1. Did defendant negligently burn the property of M. C. Korengay, as alleged in the complaint? Answer: Yes.

2. If so, did M. C. Kornegay sue defendant Atlantic Coast Line Railroad Company for the total loss suffered by him through said negligent burning, after the payment to him by each of the plaintiffs of the amount of the policies of insurance held by him, as alleged in the complaint? Answer: Yes.

3. Did M. C. Kornegay, the insured, recover judgment in said action against the said railroad company after the payment to him by said insurance companies for the full amount of the damage to his property? Answer: No.

4. Did said M. C. Kornegay, the insured, recover judgment in said action against said railroad company for the loss covered by said policies of insurance mentioned in the complaint? Answer: No.

5. Was said judgment paid by said Atlantic Coast Line Railroad Company to said M. C. Kornegay, plaintiff in said action, after the commencement of this action? Answer: Yes.

(138) 6. Was this action begun more than three years after said property was so destroyed by said Atlantic Coast Line Railroad Company? Answer: Yes.

7. Was this action begun within three years after the payment to said M. C. Kornegay by said insurance company of the loss covered by said policies? Answer: Yes.

8. What was the value of the property of said M. C. Kornegay destroyed by the fire alleged? Answer: $2,854.57.

The court rendered judgment against the defendant in favor of the two insurance companies, plaintiffs, and the defendant appealed.

Langston & Allen for plaintiffs.

George B. Elliott, O. H. Guion for defendant.

BROWN, J. Upon the coming in of the verdict, the jury having found, what was practically admitted, that this action was begun more than three years after the property was destroyed by the defendant, the latter tendered the judgment set out in the record, that the plaintiffs recover nothing, and that the defendant go without day and recover costs. The court declined to sign such judgment, and the defendant duly excepted and assigns error accordingly. In this there was error, as the cause of action was barred by the statute of limitations.

The standard policy of fire insurance contains this clause: "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

From the terms of the contract of insurance between the plaintiffs and Kornegay, it is plain that the plaintiffs' claim is based solely and exclusively on the right of subrogation.

While an insurer, who has paid a loss to the insured, is subrogated to the rights of the latter, as against tort feasors responsible for the destruction of the property insured, yet the underwriter does not and cannot acquire by subrogation any rights which the assured himself could not enforce.

(139) There is no privity or legal relation between the insurer and the tort feasor, and every right the former can possibly acquire must come through the insured and is subject to every defense and limitation which could be interposed against the owner of the property. The rights of the underwriter cannot be greater nor different from those of

the insured. This appears to be well established by all the authorities. 27 A. and E., 263; 37 Cyc., 385.

Subrogation involves the idea of a right existing in one person, with which another person under certain circumstances is clothed, and it necessarily follows that the rights of the adversary party are neither increased nor diminished thereby.

Chief Justice Cooley, in discussing this question in *Perrott v. Shearer,* 17 Mich., 48, says: "He (the tort feasor) has no concern with any contract the plaintiff may have with any other party in regard to the goods, and his rights or liabilities can neither be increased nor diminished by the fact that such a contract exists."

Therefore, it is held that an insurance company, which is compelled to pay a loss caused by fire set out by the negligence of a railroad company *after the owner has collected its value from the railroad company,* cannot maintain an action against the railroad company to compel it to make good its loss. *Ill. Central Ry. Co. v. Hicklin,* 23 L. R. A., N. S., 870.

The rights of the insured and the relations of the insurer to the third person, who causes the loss, are elaborately discussed by *Mr. Justice Gray* in *Insurance Co. v. Erie Trans. Co.,* 117 U. S., 320. The learned judge says:

"When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss.

"No express stipulation in the policy of insurance, or abandonment by the insured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance, as a contract of indemnity, the insurer, when he has paid to the assured the (140) amount of the indemnity agreed upon between them, is entitled by way of salvage to the benefit of anything that may be received, either from the remnants of the goods or from damages paid by third persons for the same loss.

"But the insurer *stands in no relation of contract or privity* with such persons. His title arises out of the contract of insurance, and is derived from the insured alone, and can only be enforced in the rights of the latter.

In a court of common law, it can only be asserted in his name, and even in a court of equity or admiralty it can only be asserted in his right. In any form of remedy the insurer can take nothing by subrogation but the rights of the assured.

"That the right of the assured to recover damages against a third person is not incident to the property in the thing assured, is clearly shown

by the fact that the insurer acquires a beneficial interest in that right of action, in proportion to the sum paid by him, not only in the case of a total loss, but likewise in case of a partial loss, and when no interest in the property is abandoned or accrues to him." *Comeys v. Vasse,* 1 Peters, 193; *Fretz v. Bull,* 12 How., 466; *The Monticello,* 17 How., 152; *Garrison v. Memphis,* 19 How., 312; *Hall v. R. R.,* 13 Wall., 367; *The Potomac,* 105 U. S., 630; *Mobile Ry. v. Jurey,* 111 U. S., 584; *Clark v. Wilson,* 103 Mass., 219; *Simpson v. Thomson,* 3 App. Cases, 279.

The learned justice proceeds further: "The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action, none passes to the insurer; and that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations and restrictions."

Applying these principles, it has been held that where one paid a mortgage debt and thereby became entitled to be subrogated to the rights of the mortgagee, the statute of limitations against the enforcement
(141) of subrogation began to run from the maturity of the debt secured by the mortgage, and not from the date such person seeking subrogation paid the debt. *Fullerton v. Bailey,* 17 Utah, 85.

It has likewise been held that a surety subrogated to a judgment cannot maintain an action against his principal after the expiration of the time limited for bringing an action thereon by the original creditor. *Cathcart v. Bryant,* 28 Wash., 31.

And a surety on a judgment, who pays the judgment, must take steps to enforce his right of subrogation within the period prescribed as a limitation to the enforcement of simple contracts, for this merely equitable right will not be enforced at the expense of a legal one. 15 Pa. Sup. Ct., 96.

In this case of *Northwestern National Bank v. Great Falls Opera House Co.,* 23 Mont., 1, it is held that if the surety enforces contribution through the claim of the creditor, his right of action is barred when the creditor would be barred had he brought the suit, and not before.

It is useless to multiply authorities. It seems to be universally held that the right of subrogation, like other rights of action, is barred by failure to take steps to enforce it within the time prescribed by law for the enforcement of the right upon which the claim to be subrogated is based.

If that right of action is barred, it cannot be revived in favor of one who claims to be subrogated to it. The right of subrogation is an equitable right, and due diligence must be exercised in asserting it.

In a supplemental brief, the learned counsel for the plaintiff insist, quoting their language, that: "It appears in the record that the defendant company paid the insured, M. C. Kornegay, with full knowledge that these plaintiffs had made payments under their policies. This being so, it seems to us that this fraud enlarges the equity of this case, and unquestionably brings it within the ten-year statute of limitations. The fraud in his case is established by the pleadings and evidence, and is uncontradicted, and is the same as if the jury had answered an issue of fraud under instructions from the court, and the statute of limitations cannot avail one against whom an issue of fraud is found. (142) And so, when a defendant electing to set up the statute of limitations, previously by deception, *or any violation of duty toward plaintiff,* has caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which equity will not allow him to hold."

It has been said that where the wrongdoer pays the insured with knowledge of the fact that the insurer has made a payment under the policy, *it is a fraud* upon the insurer, and will not protect the wrongdoer. *Connecticut F. Ins. Co. v. Erie Ry. Co.,* 73 N. Y., 399; *Allen v. Chicago Ry. Co.,* 94 Wis., 93. This principle, if it be well founded, has no application to this case.

There is no allegation, and not a scintilla of evidence, that the defendant paid Kornegay for the destruction of his property with any purpose to defraud the plaintiffs. The payment by the defendant was not voluntary, but at the end of a lawsuit wherein judgment had been pronounced against the defendant, and it had been compelled to pay.

Even then, according to the contention of plaintiffs in this case, Kornegay only recovered of defendant the difference between the value of the property destroyed and the insurance money. But if Kornegay had recovered of defendant the full value of his property, the plaintiffs would have only the right to hold Kornegay as a trustee for their benefit to the extent of the insurance money paid. They could not recover of the defendant.

It is well settled that the wrongdoer cannot be made to pay twice for the same property. When the insured obtains full satisfaction from the wrongdoer, he must account to the insurer. *U. S. v. Am. Tobacco Co.,* 166 U. S., 468; 27 A. and E., 262; *Assurance Co. v. Packbarn,* 92 Md., 464; *Hart v. R. R.,* 54 Mass., 99; 19 Cyc., 891.

The judgment of the Superior Court is reversed, and the cause remanded with directions to enter the judgment tendered by defendant.

Reversed.

Cited: Ins. Co. v. Lumber Co., 186 N.C. 270 (1g); *Buckner v. Ins. Co.,* 209 N.C. 647 (1g).

(143)

J. J. LYON v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 11 March, 1914.)

1. Appeal and Error—Harmless Error—Carriers of Goods—Connecting Lines—Judgments.

In an action to recover damages to a shipment of goods against two connecting carriers alleged to have been caused while in their possession, an issue as to each carrier was submitted to the jury, and the issue of negligence as to one of them was answered in defendant's favor and, as to the other, in plaintiff's favor: *Held*, exceptions arising under the first of the issues are harmless as to the appealing defendant.

2. Carriers of Goods—Bills of Lading—Parol Contracts.

When a carrier has received goods for transportation over its own and a connecting line which were not delivered, and upon consignor's parol request it has them reshipped to the initial or starting point, the latter agreement for reshipment, though resting in parol, is sufficient in an action for damages to the goods occurring while in the carrier's possession.

3. Carriers of Goods—Delivery—Bad Condition—Prima Facie Case—Trials—Burden of Proof.

Where a shipment of goods is received by the consignee from the final carrier in bad condition, and there is evidence that this carrier received the goods from its connecting carrier in good condition, a *prima facie* case of negligence is made out against the delivering carrier, and presents sufficient evidence thereof to be submitted to the jury, with the burden of proof on it.

4. Carriers of Goods — Connecting Lines — Joinder — Interpretation of Statutes.

Where a carrier has accepted a shipment beyond its own line, and upon its not being delivered, agrees by parol to have it reshipped to the starting point, and delivery is made there in bad condition, a joinder of causes of action against the two defendants to recover damages to the shipment while in their possession is proper. Revisal, sec. 469.

5. Pleadings—Liberal Construction—Connecting Lines—Carriers of Goods—Interpretation of Statutes.

Pleadings should be liberally construed so as to present the case upon its real merits (Revisal, sec. 495), and in this case they are held sufficient to determine the negligence of either of the two connecting carriers in damaging a shipment of goods while in their possession, either in shipping to the first destination, where failure of delivery was made, or upon the return trip, agreed upon by them.

6. Carriers of Goods—Connecting Lines—Carmack Amendment.

The Carmack amendment, exempting a carrier from liability for damages to goods caused by the negligence of a connecting carrier, has no application where the damages arise from its negligence, on its own line.

7. Carriers of Goods—Receipt in Good Condition—Trials—Evidence.

A carrier is responsible for damages to a shipment caused by its own negligence, and a receipt by the consignee for the goods, as being in good condition, and without objection, is only evidence upon the question as to whether the carrier had damaged them.

8. Appeal and Error—Court's Discretion—Weight of Evidence.

Objection that the verdict of the jury is contrary to the weight of the evidence should be addressed to the discretionary power of the trial judge.

APPEAL by defendant from *Whedbee, J.*, at December Term, (144) 1913, of PITT.

This action was brought to recover damages for negligently failing to ship and deliver to plaintiff certain dry goods and bedends with rails attached. The goods were delivered to defendant at Ayden, N. C., and consigned to plaintiff at Newport News, Va. (via Pinner's Point, Va.), where plaintiff was living at the time. The goods were transported by defendant to Pinner's Point, and there delivered to the Old Dominion Steamship Company, and were carried by it to Newport News. Plaintiff inquired at the office of the steamship company for the goods, and was told that they were not there. They remained there about six months, as it appears, when plaintiff, after changing his residence from place to place, finally returned to Ayden, and requested the defendant's agent at Ayden to have the goods reshipped to him at that place. This was done, but when they were received from defendant at Ayden they were found to be in a badly damaged condition; some of the goods were moth-eaten, and others were either broken or missing from the package.

The court submitted three issues to the jury, and they returned the following verdict:

"Did the defendant, the Atlantic Coast Line Railroad Com- (145) pany, or its connecting carrier, the Old Dominion Steamship Company, negligently fail to promptly and safely transport the goods of plaintiff in question from Ayden, N. C., to Newport News, Va., as alleged in the complaint? Answer: No.

"2. If so, what damages is plaintiff entitled to recover of the defendant by reason thereof? Answer: Nothing.

"3. Did the defendant, the Atlantic Coast Line Railroad Company, negligently fail to promptly and safely transport and deliver to plaintiff the goods in question, after they had received the same from the Old

Dominion Steamship Company at Pinner's Point, Va., on the return trip? Answer: Yes; by reason A. C. L. Railroad.

"4. If so, what damage is plaintiff entitled to recover of defendant by reason thereof? Answer: $200."

There was judgment upon the verdict, and defendant, after duly excepting and assigning errors, appealed to this Court.

Julius Brown for plaintiff.

Harry Skinner and Louis G. Cooper for defendant.

WALKER, J., after stating the case: The exceptions relate mostly to the first issue, which was found in favor of the defendant, and this fact rendered harmless any error committed by the court in regard to that issue, and the judgment is not reversible for that reason. *Vickers v. Leigh,* 104 N. C., 248; *Graves v. Trueblood,* 96 N. C., 496; *Perry v. Insurance Co.,* 137 N. C., 402. But we do not see that there was any error, so far as the first issue is concerned.

As to the second issue: There was evidence that plaintiff requested the agent at Ayden to have the packages returned to him at Ayden from Newport News, and defendant undertook to do so. This meets the position that there was no contract for carriage from Newport News to Ayden, but only one from the latter to the former place. The evidence sufficiently showed the relation of shipper and carrier. *Porter v. R. R.,* 132 N. C., 71. Defendant then contended that there was no evidence that the damage to the goods occurred on its line. All the evidence in the case tends to show that the damage was done on its part (146) of the route. The goods were shipped from Newport News to Ayden, and delivered to defendant at Pinner's Point in good condition. This being so, the principle, as formerly stated by this Court, applies: "On proof that any carrier on the route received the goods in good condition, the burden of proof rests upon such carrier to show delivery in the same condition to the next carrier or to the consignee, it being peculiarly and almost solely within its power to make such proof." *Meredith v. R. R.,* 137 N. C., 478, citing 3 Wood on Railways, 1926; *R. R. v. Tupelo Co.,* 67 Miss., 35; *R. R. v. Emrich,* 24 Ill. App., 245; *Brintnall v. R. R.,* 32 Vt., 665; *U. S. v. R. R.,* 191 U. S., 84. See also *A. C. Line v. Riverside Mills,* 219 U. S., 186. The case falls directly within the principle of *Mitchell v. R. R.,* 124 N. C., 236, where it was held: "Common carriers, while they may limit their common-law liability by special contract, reasonable in its essential features and not contrary to public policy, cannot except themselves from the results of their own negligence. In cases of limited liability, proof of shipment

and loss or injury makes a *prima facie* case for the shipper, and then the burden is upon the carrier to show that the circumstances of the loss bring it within the excepted causes; and when this is shown, the burden still rests upon the carrier of showing that the loss or injury was not due to its own negligence. It is a principle of law, when a particular fact necessary to be proved rests peculiarly within the knowledge of one of the parties, upon him rests the burden of proof. Among connecting lines of common carriers, the one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption." What the Court said in the opinion is specially applicable to our facts: "It is the duty of a common carrier, irrespective of contract, but subject to reasonable regulations, to accept, safely carry and deliver all goods intrusted to it. If the goods are lost, it must show what become of them, and if they are damaged, it must prove affirmatively that they were damaged in some way that would relieve it from responsibility. The plaintiff has a *prima facie* case when he shows the receipt of goods by the carrier, and their nondelivery or delivery in a damaged condition. Any further (147) defense is in the nature of confession and avoidance." But, as we have said, the evidence on this branch of the case was, that the defendant received the goods in good order and delivered them to plaintiff in bad condition, as it turned out; therefore, whatever the presumption may be, or wherever the burden of proof may rest, the jury could hardly have found otherwise than they did. It was admittedly the duty of the carrier to transport the goods in reasonable time, and, if he received them in good order, to deliver them to the plaintiff in the like condition. *Meredith v. R. R., supra.* It was competent for the parties to make an oral agreement for the shipment of the goods (*McConnell v. R. R.*, 163 N. C., 504; *Berry v. R. R.*, 122 N. C., 1003); but whether we view the case with respect to defendant's common-law liability, or according to the stipulations of its usual contracts, as shown in its bills of lading, there was no escape from liability on its part to the plaintiff, the jury having found, as a fact, that the goods were damaged while in its possession.

We do not think the plaintiff was required to elect as to the cause of action upon which he would proceed to trial. He had the right to join the two causes of action, as they were of a kindred nature, though separate and distinct. They arose out of transactions connected with the same subject of action; they both could be made to sound in tort, or both in contract, at plaintiff's election, depending upon how he pleaded them, and they also were for injuries to property. So that they answer to several of the requisites for a joinder, as permitted by the statute. Revisal, sec.

469. Plaintiff was entitled to recover damages upon each separately; on the one, for delay in delivery, or failure to deliver, at Newport News, and on the other, for the damage to the goods during the latter part of the transit, when on their return journey to Ayden. The joinder could be made, and both causes prosecuted to judgment, just as in the case of two promissory notes given by the defendant at different times, which may be united in two separate counts of the complaint and judgment given upon both. The cases cited by defendant in support of his (148) motion to compel an election by the plaintiff are not applicable. They refer to a confused joinder in one count, or to two inconsistent causes of action improperly joined. In such cases, plaintiff may properly be required to adopt one and abandon the other, or to reform his complaint, so as to make it square with the rules of good pleading. Besides, no harm has come to defendant, as the jury found for it on the first issue.

Defendant attacks the complaint, as a pleading, because it is so inartificially drawn as not to allege a cause of action for damage to the goods on the return trip. We think, though, that while it is not very full or accurate, it is sufficiently so, by liberal construction—which we are bound to give—to warrant the submission of the second issue and to support the judgment. In order to promote justice and to eschew mere technicalities, so that cases may be decided upon their real merits, we are enjoined to be liberal in construing pleadings. Revisal, sec. 495; *Blackmore v. Winders,* 144 N. C., 212; *Jones v. Henderson,* 147 N. C., 120. If defective, the pleading has been aided and its deficiencies supplied by the verdict. *Garrett v. Trotter,* 65 N. C., 430. There was no material variance, as defendant could not have been misled. Revisal, secs. 575, 576.

The Carmack amendment is foreign to this case. There was no attempt to make defendant, as the initial carrier, responsible beyond its own line, except under the first issue, which the jury answered in its favor. It has been held responsible only as the final carrier in the course of transit, and the one from whom the goods were received by the plaintiff in a damaged condition. It is liable, as we have shown, by the principles of the common law. The doctrine of connecting carriers, therefore, has no application to the case.

Defendant's prayer for instruction was properly refused. It was not the apparent condition of the goods at the time it delivered them to plaintiff, but their actual condition, that determined its liability. The receipt for the goods by the plaintiff as being in apparent good order, and without objection at the time, was merely evidence for the jury upon the question as to their condition.

It is possible that the jury have found that the damage was (149) done between Pinner's Point and Ayden, when, in fact, they should have found that it all occurred at Newport News, while the goods were lying in the warehouse of the steamship company, and this is plausible, if not probably the correct view; but the mistake, if thus made, should have been corrected below by application for the exercise of the discretionary power of the court to set aside the verdict. We cannot help the defendant here.

The other exceptions are fully covered by what has already been said, and require no further discussion.

No error.

Cited: Mewborn v. R. R., 170 N.C. 208 (3g, 7f); *Plemmons v. Murphey*, 176 N.C. 675 (1f); *Howell v. R. R.*, 186 N.C. 240 (2g); *Lykes v. Grove*, 201 N.C. 257 (5b); *Hill v. Stansbury*, 221 N.C. 342 (5g).

W. P. BRITTON, ADMINISTRATOR OF W. E. ALBRITTON, v. THE METROPOLITAN LIFE INSURANCE COMPANY OF NEW YORK.

(Filed 11 March, 1914.)

1. Insurance, Life—Policies—Contracts—Expressed Consideration—Parol Evidence.

The consideration expressed in a policy of life insurance may not be contradicted or varied by parol when the effect will be to invalidate the policy contrary to its express terms.

2. Insurance, Life—Policies—Contracts — Equity — Reformation — Questions of Law—Trials—Courts.

A policy of life insurance may be reformed on the ground of mistake so as to express the true agreement of the parties, but the mistake must be mutual on the part of the insured as well as the insurer; and it is a matter of law as to whether the pleadings and evidence are sufficient to establish it.

APPEAL by defendant from *Peebles, J.*, at August Term, 1913, of HALIFAX.

This is an action to recover on a policy of insurance, issued by the defendant upon the life of plaintiff's intestate by the defendant, and tried upon this issue:

1. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: $1,000, with interest from 1 March, 1911.

From the judgment rendered, the defendant appealed.

(150) *A. P. Kitchin, E. L. Travis for plaintiff.*
Winston & Biggs for defendant.

BROWN, J. The following is a copy of the policy of insurance sued on, together with the indorsements on the back:

Endowment 20 Years.
Age 27; Amount $1,000.
Seminannual Premium, $21.86

Metropolitan Insurance Company, in consideration of the application for the policy, copy of which application is attached hereto and made part thereof, and of the payment of the semiannual premium of $21.86, and of the payment of the like amount upon each first day of November and May hereafter until twenty (20) full years premiums shall have been paid, or until the prior death of the insured:

Promises to pay at the home office of the company in the city of New York, to William Ethelbert Albritton, of Scotland Neck, State of North Carolina, on the 1st day of May, 1929, if the insured be then living, or upon receipt at said home office of due proofs of the prior death of the insured, to his estate, $1,000, less any indebtedness hereon to the company.

On the back of said policy of insurance is written:

Nonparticipating Endowment—twenty years.
Insurance on the life of William Ethelbert Albritton, Scotland Neck, N. C.
Amount, $1,000.
Semiannual premium, $21.86.
Due November and May of each year.
Date of policy: May 1, 1909.

The defendant introduced evidence tending to prove that when this policy was issued, the insured asked leave to pay the premium quarterly instead of semiannually, as required by and stated in the policy; that this arrangement was made by the defendant's agent, House, and the assured before the policy was delivered; that the assured, Albrit-
(151) ton, paid only the quarterly premium in advance, which was sent to the New York office of the defendant, but the policy itself, which recited the payment of a semiannual premium, was not changed, nor was any change made in the words of the policy contracting for the payment of a semiannual premium.

This evidence tended further to prove that the policy delivered went into effect 1 May, 1909, and the quarterly premium paid by the assured put said policy into effect for three months, towit, until 1 August, 1909. The total amount paid by the assured was $11.14, which is the quarterly premium on a twenty-year endowment policy for $1,000.

The evidence tends, also, to prove that the home office sent out a quarterly receipt, and not a receipt for the six months period. This receipt has not been found, and is not in evidence.

The defendant contends that the policy lapsed for nonpayment of premium on 1 August, 1909, and was canceled 13 September, 1909. The material parts of all this evidence were objected to by the plaintiff in apt time.

At the conclusion of all of the evidence, the court ruled that all evidence offered by the defendant showing that the premiums were payable quarterly instead of semiannually would be withdrawn from the jury, and ruled out. And to this ruling the defendant excepted.

His Honor ruled "that the acknowledgment in the policy of the receipt of the premium estops the company to test the validity of the policy on the ground of nonpayment of the premium," and excluded the evidence offered by the defendant, and charged the jury if they believed all the evidence to find for the plaintiff.

The several assignments of error bring before us for review the correctness of this ruling.

We are of opinion that the agreement specified in the written paper that the premiums are payable semiannually is a contract binding alike upon the insurer and the insured. It is something more than a receipt for money, but is a statement of a definite and fixed time when the money is to be paid.

The insured would not be permitted to prove by parol evidence (152) in the face of that written agreement that when it was entered into another and longer period had been agreed upon when premiums were to be paid, so as to avoid the forfeiture of the policy. *Walker v. Venters,* 148 N. C., 388; *Basnight v. Jobbing Co.,* 148 N. C., 350.

This Court has held that the acknowledgment in a policy of the receipt of a premium for a definite period is something more than a receipt. It is a solemn admission, which, as long as it stands, estops the insurer from contesting the policy for nonpayment of premium. *Grier v. Insurance Co.,* 132 N. C., 543; *Kendrick v. Insurance Co.,* 124 N. C., 315.

In those cases it is held that if the premium is not paid, the acknowledgment of payment in the policy, so far as it is a receipt for money, is only *prima facie,* and in an action to recover the premium may be contradicted by parol evidence, as the receipt in a deed may in an action

for the purchase money of land; but so far as the acknowledgment is contractual, it cannot be contracted so as to invalidate the contract. *Rayburn v. Casualty Co.*, 138 N. C., 379; *Waters v. Casualty Co.*, 144 N. C., 663.

This subject is very ably and fully discussed by *Chief Justice Beasley* in *Basch v. Insurance Co.*, 35 N. J. Law, 429, in which case the policy of insurance contained a provision that the company should not be liable until the premium should be actually paid to the company. The policy also contained a receipt for the full premium. It was held that the company was estopped from setting up the nonpayment of the premium for the purpose of avoiding the instrument. In the opinion the learned *Chief Justice* says: "The usual legal rule is that a receipt is only *prima facie* evidence of payment, and may be explained; but this rule does not apply when the question involved is not only as to the fact of payment, but as to the existence of rights springing out of the contract. With a view of defeating such rights, the party giving the receipt cannot contradict it. An acknowledgment of an act done, contained in a written contract, and which act is requisite to put it in force, is as con-
(153) clusive against the party making it as is any other part of the contract; it cannot be contradicted or varied by parol." See also *Provident Insurance Co. v. Fennell*, 49 Ill., 180; *New York Insurance Co. v. National Pro. Insurance Co.*, 2 Barb., 471.

Chancellor Kent in his Commentaries says: "The receipt of the premium in the policy is conclusive evidence of payment, and binds the insurer unless there be fraud upon the part of the insured." 3 Kent Com., p. 260.

In his treatise on Insurance, Vance says: "Although there is some conflict of opinion among the authorities, the prevailing opinion seems to be that such a receipt concludes the insurer as far as the validity of the policy is concerned, but is only *prima facie* evidence of payment in so far as the premium itself is concerned; that is, the insurer cannot deny the truth of the receipt in an action against him in the policy, but may do so in an action against the insured for the purpose of recovering the premium due." Vance on Insurance, p. 180

The policy sued on acknowledges receipt of premium for six months, and contains a provision that the premium is to be paid semiannually. The law will not permit the defendant to avoid the policy in the face of such recital.

But the defendant in its answer seeks equitable relief, and asks the court to correct and reform the insurance contract so as to provide for a quarterly premium, and so that it may show on its face that only the quarterly premium of $11.14 was actually paid.

The answer avers: "That the policy of insurance sued upon erroneously recites that the premium thereon has been paid for six months, beginning 1 May, 1909, and ending 1 November, 1909; that this error and mistake in the policy occurred in the way hereinbefore set forth, and the fact that the premium for six months had not been paid was well known to the said William E. Albritton as well as to the defendant's agent, and the said policy of insurance should be reformed and corrected so as to recite the fact to be as it occurred: that the assured paid $11.14 by way of quarterly premium, and not the sum of $21.86 semiannual premium, as recited in said policy."

It is now well settled that a policy of insurance may be (154) reformed upon proper allegations and proof, as much so as a deed or any other contract, and that is true even after loss. *Snell v. Insurance Co.*, 98 U. S., 89; *Henkle v. Royal Exchange*, 1 Ves., Sr., 318.

But the reformation is subject to the same rules of law as applied to all other instruments in writing. It must be alleged and proven that the instrument sought to be corrected failed to express the real agreement or transaction because of mistake common to both parties, or because of mistake of one party and fraud or inequitable conduct of the other.

A mere misunderstanding of facts is not sufficient ground for asking reformation. 34 Cyc., p. 907. Where the mistake has been on one side only, reformation will not be decreed. The mistake must have been common to both parties. *Meekins v. Newberry*, 101 N. C., 18; *Basnight v. Jobbing Co.*, 148 N. C., 357.

There is no allegation in the answer of the defendant that there was any fraud practiced by the insured whereby the defendant entered into a contract it did not intend to make, nor is there any allegation that the contract failed to express the true agreement because of a mutual mistake.

And there is likewise no proof to sustain any such allegation if it had been made. According to the evidence, if any mistake was made in the written policy, it is to be attributed solely to the defendant.

The insured, Albritton, had nothing to do with the preparation of the policy, and there is no evidence that he knew that any such claim of mistake was ever made. The defendant's own evidence shows that defendant received the premium for the quarter, and with full knowledge of the contents of the policy delivered it after receiving such premium.

The defendant made no unwitting mistake. It knowingly delivered the policy it intended to deliver. This is practically admitted in defendant's brief, wherein it is said: "This arrangement was made by the agent, K. L. House, and the assured, Mr. Albritton, paid a quarterly premium

in advance, which was sent to the New York office, but the policy (155) itself, which recited a semiannual premium, was not changed, this being the usual custom of the company.

A court of equity will certainly not on the ground of mistake relieve against the consequences of an act which a party knowingly and intentionally commits and when no fraud is practiced. The defendant better change its custom rather than knowingly to embody in its policies statements it declares are untrue.

The question here is not whether the evidence offered to reform the policy is strong, cogent, and convincing, as in *Lehew v. Hewitt,* 130 N. C., 22, but as to whether upon the pleadings and proofs offered, taking them to be true, there is equitable ground for a reformation of the contract.

That must necessarily be a question of law for the court, and not an issue for a jury.

In the judgment of the Superior Court there is

No error.

Cited: McRae v. Fox, 185 N.C. 348 (2j); *Welch v. Ins. Co.,* 196 N.C. 550 (2f); *Burton v. Ins. Co.,* 198 N.C. 501 (2f); *Welsh v. Brotherhood of R. R. Trainmen,* 200 N.C. 189, 190 (2f); *Williamson v. Ins. Co.,* 212 N. C. 378, 379 (2f); *Creech v. Assurance Co.,* 224 N.C. 146 (1f).

T. W. HOLTON v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 18 March, 1914.)

Carriers of Goods—Negligence—Live Stock—Trial—Issues—Evidence.

It appearing in this case that the question of defendant railroad company's negligence and its liability for damages to a shipment of live stock was made to depend upon an issue as to whether a stock chute, used for unloading the stock, was defective, and as a fact from the record on appeal that the "chute was of the character and construction ordinarily" used for the purpose, "was in good condition and apparently had no defects," a new trial is ordered.

APPEAL by defendant from *Whedbee, J.,* at November Term, 1913, of CRAVEN.

Civil action to recover damages for injuries to live stock shipped over road of defendant company. Verdict and judgment for plaintiff, and defendant excepted and appealed.

Moore & Dunn for defendant. (156)
No counsel contra.

HOKE, J. The evidence in the cause is not very fully stated in the case on appeal agreed upon by counsel, and we find some difficulty in making satisfactory disposition of the questions presented. From a perusal of the evidence, in so far as given, and a statement of the positions of the parties, plaintiff and defendant, made in his Honor's charge to the jury, it appears that a lot of live stock, horses and mules, were shipped to plaintiff over defendant company's road; that they were transported to New Bern, the terminal point, in good condition, and one or more of them were injured in being unloaded. It seems that plaintiff was present at this unloading, and that some of the stock pushed against others as they were passing down the stock chute, and the rail of the chute gave away, causing one or more of the horses to fall, by reason of which the injury occurred.

It is well understood that railroad companies transporting live stock, under an ordinary contract of shipment, are considered as common carriers and held as insurers of safe delivery, except "for injuries arising from the natural vices or the inherent nature and propensities of the animals themselves or from the vitality of the freight, as it is sometimes expressed," and as to these, the carriers are only responsible for injuries attributable to their negligence. *Harden v. R. R.*, 157 N. C., 238.

In recognition of this principle, the present case was determined on an issue as to the company's negligence, and the court, being of opinion that the question depended on whether the stock chute was rotten or defective, submitted the case in that aspect, and there was verdict for the plaintiff. In the opening of the case on appeal, however, the statement appears: "That the slide or chute was of the character and construction ordinarily used by the road for this purpose"; "that the same was in good condition and apparently had no defects." From this it would seem, as the record now appears, that there was no testimony tending to show that the chute was rotten or defective, and there was prejudicial error in (157) directing the jury to decide the issue on that question.

After giving the matter most careful consideration, we are of opinion that there should be a new trial of the cause, and it is so ordered.

New trial.

Cited: Fuller v. R. R., 214 N.C. 652 (g).

S. C. TAYLOR v. R. Q. BROWN.

(Filed 18 March, 1914.)

1. Wills—Intent—Construed as a Whole.

In construing a will, the primary purpose is to ascertain the intention of the tetsator, from the will as a whole, giving effect to every part thereof when it is possible.

2. Same—Estates—Debts—Limitations—Executors and Administrators.

A devise and bequest in the first item of a will of all the testator's real and personal property to his wife, and in item 4 thereof "that after the death of the widow . . . all of the property then left after having paid her burial expenses shall be equally divided between all of my children," and it appearing that the widow died intestate without having disposed of any of the property: *Held*, items 1 and 4 of the will are consistent and should be construed together, and the intent of the testator gathered therefrom was to provide for the widow for life, and an equal distribution of the property among the testator's children at her death, not subject to the debts of the first taker, except her funeral expenses, specifically provided for. As to whether the widow took a life estate or determinable fee, *quære*.

APPEAL by defendant from *Whedbee, J.*, at the February Term, 1914, of DUPLIN.

Civil action heard upon the following case agreed:

It is stipulated and agreed between the plaintiffs and defendants that this action be submitted to his Honor, H. W. Whedbee, judge presiding, a jury trial having been waived, upon the petition of the plaintiffs and the answer of the defendants and the facts agreed as hereinafter set out, towit:

(158) 1. That Isham U. Taylor, at the time of his death, was domiciled in North Carolina, and was at his death the owner of the land described in plaintiffs' petition.

2. That the said Isham U. Taylor, on 28 February, 1894, executed his last will and testament, which upon his death was propounded for probate, was duly proven and recorded in record of wills, book 4, page 448, in the office of the clerk of the Superior Court of Duplin County, which said last will and testament is in the following words and figures, towit:

In the name of God, Amen. I, Isham U. Taylor, being of sound mind and memory, and having the fear of God and the love of my family before me, do make and declare this to be my last will and testament, that is to say, as follows:

ITEM 1. I will to my wife, Elizabeth Taylor, all of the property I die possessed of, including land, horses, cattle, household and kitchen furniture, money, notes, etc.

ITEM 2. I desire that all my debts, funeral expenses, and all other expenses shall be paid out of my property.

ITEM 3. I hereby appoint and designate my son Luther my lawful executor, with full power to sell enough of my property to pay off all just debts and expenses, and to look after the property of the widow, Elizabeth Taylor; to collect all rents for her, and to attend to her business generally.

ITEM 4. I also will that after the death of the widow, Elizabeth Taylor, that all of the property then left after having paid her burial expenses shall be equally divided between all of my children.

I. U. TAYLOR.

28 February, 1894.

Witnesses:
F. J. LAMBERT.
D. M. MCINTIRE.

3. That Elizabeth Taylor, the widow of Isham U. Taylor, died in Wayne County, North Carolina, about 8 January, 1913, without having conveyed, either by deed or will, the land described in the petition.

4. That R. Q. Brown qualified as administrator of the estate (159) of Elizabeth Taylor, before the clerk of the Superior Court of Wayne County, by taking the oath and giving the bond required by law, on 22 April, 1913.

5. That the said Elizabeth Taylor left some debts and obligations at her death, including $70 burial expense, and said administrator contends that her personal estate is not sufficient to discharge the same, which is left an open question.

6. That the following named children were born to the said Elizabeth Taylor by her marriage with the said Isham U. Taylor, towit: George L. Taylor, Isham Taylor, John H. Taylor, Mrs. Della McCullen, the plaintiffs W. R. Taylor, S. C. Taylor, and the defendant Florence Brown, and the said children above named are the only heirs at law of the said Elizabeth Taylor. That in addition to the above named children of Isham U. Taylor, there was born to him, by a former marriage, the following children, towit: B. F. Taylor, James W. Taylor, Cenus Taylor, Buck Taylor, Luther Taylor, and Mrs. Emma McCullen, who, together with the children born to the said Isham U. Taylor by his marriage with the said Elizabeth Taylor, above named, are the heirs at law of the said Isham U. Taylor.

7. It is agreed by and between the parties hereto that the allegations in the petition and answer in regard to the interest of the respective

parties in the land shall not be binding upon the respective parties, but that the same will be reformed in accordance with the opinion of the Supreme Court in the construction of the will, should such construction make it necessary to reform them in any respects mentioned.

Upon the foregoing facts, the plaintiffs contend that under the will of Isham U. Taylor, Elizabeth Taylor took only a life estate, with power to dispose of the same in her lifetime, and that the remaining fee went to all the children of Isham U. Taylor at the death of Elizabeth Taylor, his wife, subject to the charge of $70 funeral expenses.

The defendants contend that under said will Elizabeth Taylor took a fee-simple estate, and that same descended to the heirs at law of Elizabeth Taylor, subject to her debts. It is therefore agreed between
(160) the plaintiffs and defendants that judgment may be rendered upon the foregoing statement of facts by his Honor, H. W. Whedbee, out of term and out of county, as of the January Term, 1914, of the Superior Court of Duplin County; and that from any judgment which he may render herein, either party may except and appeal to the Supreme Court in the same manner as if the said judgment was rendered in term.

Upon the case agreed, his Honor rendered the following judgment:

This cause coming on to be heard upon the foregoing state of facts agreed to by counsel for both plaintiffs and defendants, and the court being of the opinion that the land in controversy descended to all of the thirteen children of Isham U. Taylor, subject to charge of $70, the agreed amount of the funeral expenses of the said Elizabeth Taylor, and it being admitted that the plaintiff, S. C. Taylor, has by deed acquired the interest of all children of Isham U. Taylor, except W. R. Taylor and Florence Brown:

It is thereupon ordered, adjudged, and decreed by the court that S. C. Taylor is the owner of 11/13 interest in the land, subject to the payment of 11/13 of $70 to the administrator of Elizabeth Taylor for her burial expenses, and that W. R. Taylor is the owner of 1/13 undivided interest in said lands, subject to the payment of 1/13 of the burial expenses of said Elizabeth Taylor, towit: 1/13 of $70, and that defendant Florence Brown is the owner of a 1/13 undivided interest in said lands, subject to the payment of 1/13 of the burial expenses of said Elizabeth Taylor, towit: 1/13 of $70.

Let this cause be remanded to the clerk to determine whether an actual partition of the said lands can be had without injury to the parties in interest. Let each party pay cost in proportion to their interest.

H. W. WHEDBEE,
Judge Presiding.

To the foregoing judgment defendants except, and appeal to the Supreme Court.

Stevens & Beasley for plaintiff. (161)

A. S. Grady and H. D. Williams for defendant.

BROWN, J. This contest is between the children of Isham U. Taylor, who are seeking to partition the lands among themselves, and the administrator of the said Elizabeth Taylor, who seeks to subject the land to the payment of debts, contracted by Elizabeth Taylor in her lifetime, other than funeral expenses.

It is admitted that Elizabeth Taylor made no disposition or conveyance of any kind of the lands in controversy during her lifetime, and, therefore, it is unnecessary to determine whether she took a life estate under the will or a determinable fee. Under these circumstances, if she did not take a fee simple, the limitation over vested the title at her death in the children of the testator under the fourth paragraph of her will. It is elementary that a will must be so construed as to effectuate the evident intent of the testator. *Lynch v. Melton,* 150 N. C., 595; 27 L. N. S., 773; *Fellowes v. Durfey,* 163 N. C., 305. The primary purpose is to ascertain the intention of the testator from the language used by him, taking the will as a whole, and not separate parts of it.

It is manifest from the context of this will that the testator did not intend to give his wife an absolute estate in his lands under the first clause of his will; otherwise the words used in the fourth clause would be meaningless and unnecessary. It is the duty of the courts in construing a will to give effect to every part of it, if possible.

The testator's children were evidently in his mind when he made his will, and were as much the objects of his bounty as his wife. He evidently intended to provide for the care of his wife as long as she lived and then that his children should share his estate between them.

It is contended that by use of the words in paragraph 4, "that all of the property *then left* after paying her burial expenses shall be equally divided among all of my children," testator gave to the widow a *jus disponendi,* both as to lands and personalty, and that such right is inconsistent with any other estate than an absolute one, and enlarges her estate into a fee.

This subject was very thoroughly threshed out in the case of (162) *Herring v. Williams,* 158 N. C., 1, and it was there held that a devise and bequest to A. of real and personal property to have and to hold during the term of her natural life, and at her death the said property or so much thereof as may be in her possession at the time of

her death is to go to B., her heirs and assigns forever, gave A. only a life estate in the lands, with remainder to B. in fee.

It was further held the words, "or so much thereof as may be in her possession at the time of her death," referred to personal property only, and not to the realty, which is of a permanent nature.

In the present case the question as to whether the widow had any power to sell the land and convey it in fee, provided she exercised it during her life, does not arise, for she never attempted to exercise it. A case which bears strongly upon the one under consideration is *Smathers v. Moody,* 112 N. C., 791.

John Leatherwood made a will giving and bequeathing to his wife four tracts of land, some negroes, cattle, household and kitchen furniture, etc. "At her death they shall descend to and become the property of my three blind sons, towit, Edwards, Elias, and Jason, to be equally divided between them for their support; to be managed for them by my executor. In case one of them should die, then said property with its increase shall descend to and become the property of the other two; in case two of them shall die, then the aforesaid property shall inure and become the property of the remaining one; at his death all the *property that remains* I will to be sold by my executor to the best advantage, and the moneys arising from said sale shall be equally divided among all my grandchildren of whatever name."

It was contended that the will gave the sons a general estate with a power of disposition, and, therefore, they had a fee-simple estate in the lands, and in a contest between the administrator and parties representing the survivor of the three blind sons it was held by the Court that they had but a life estate. The Court says: "We think it very plain that the testator's intention was that upon the happening of this event—the death of the last survivor of the three blind sons—all the property (163) committed by him to his executor for their support, the land and as much of the personal property as had not been consumed or lost, should be sold then for division as above stated." *Smathers v. Moody,* 112 N. C., 791.

It is contended that the fourth item of Isham Taylor's will is inconsistent with the first. We think that both items are entirely consistent and reflect clearly the intention of the testator to provide for both his widow and children; but if they were inconsistent, there is no reason to strike out the fourth item.

It is generally held that if two clauses in a will are entirely inconsistent, one with the other, that the latter must prevail, upon the principle that the first deed and the last will must stand. But to produce this effect, however, the two clauses must be wholly inconsistent and incapable

of reconciliation. If this can be reconciled, they both can stand—upon the principle that every part of a will shall have some effect given to it. *Baird v. Baird,* 42 N. C., 266; 40 Cyc., 1417.

We have examined with care the cases cited in the brief of the learned counsel for defendants, and we do not think any of them conflict with the construction we have placed upon the will of Isham Taylor, and we do not deem it necessary to review them.

The judgment of the Superior Court is

Affirmed.

Cited: Bank v. Johnson, 168 N.C. 307 (1g); *Hunt v. Jones,* 173 N.C. 553 (1g); *White v. Goodwin,* 174 N.C. 725 (1g); *Smith v. Moore,* 178 N.C. 373 (2d); *McIver v. McKinney,* 184 N.C. 396 (1g); *Ledbetter v. Culberson,* 184 N.C. 490 (2g); *Kidder v. Bailey,* 187 N.C. 507 (1g); *McCullen v. Daughtry,* 190 N.C. 219 (1g); *Jolley v. Humphries,* 204 N.C. 674 (1g); *Heyer v. Bulluck,* 210 N.C. 327 (1g); *Bank v. Corl,* 225 N.C. 101 (2g).

MARCUS TYLER v. HILTON LUMBER COMPANY ET AL.

(Filed 18 March, 1914.)

Actions—Joint Tort-Feasors—Pleadings—Surplusage.

Several defendants may be jointly sued for damages for the same tort arising from one and the same transaction, and where such a cause of action is sufficiently stated, and the complaint further alleges the same tort as to each of the defendants, separately, these further counts will be treated as surplusage. The effect of judgments obtained against joint tort-feasors in separate actions discussed by WALKER, J.

APPEAL by defendants from *Whedbee, J.,* at the January Term, (164) 1914, of DUPLIN.

Action for personal injuries caused by the negligence of defendants. Plaintiff sued both defendants, Hilton Lumber Company and Hilton Railroad and Logging Company, alleging that he was severely injured by the careless handling of logs by the servants of defendants, while loading one of their log cars, by the use of a skidder. There are three counts in the complaint: one against the defendants jointly, as "owners and operators of the railway"; the second against the Hilton Lumber Company alone for the same tort, and the third against the other company for the same tort, and the language of each count describing the tort is substantially identical. Defendants demurred upon the ground of a mis-

joinder both of the parties and causes of action. The demurrer was overruled, and the defendants appealed.

No counsel for plaintiff.

E. K. Bryan and H. D. Williams for defendants.

WALKER, J., after stating the case: The case is a simple one. If we keep steadily in mind the fact that each count refers to the same tort, arising out of one and the same transaction, the case is relieved of any possible difficulty. This makes it appear clearly that there is no joinder of different causes of action against different defendants, but the statement of the same cause of action in different forms against the same defendants. There was no necessity for declaring upon the second and third counts, as the entire controversy can be settled upon the first. The last two counts, therefore, are superfluous, and may be disregarded, as "the persons injured by joint tort-feasors may sue and recover against all, any number, or only one of them. The liability is joint and several. Indeed, he may bring different forms of action against different participants—trespass against one, trover against another, and so on. The law does not recognize degrees of culpability between wrongdoers, and will not apportion compensatory damages between them. They are alike guilty and alike responsible." Hale on Torts, p. 123. The
(165) principle was tersely stated in *White v. Preston,* 15 S. W., 712, where it is said, "that any number of joint-feasors may be joined in the same action for the same tort, but for different torts committed by different tort-feasors separate actions must be brought." *Lord Kenyon* thought, in *Mitchell v. Tarbutt,* 5 Term (Durnf. and East), 649, that it was settled upon authority, and especially in *Boson v. Sanderford,* Skin., 278, Salk., 440, that a plaintiff, where the cause of action is *ex delicto,* may sue all or any of the parties, upon each of whom individually a separate trespass attaches, and it was immaterial whether the tort was committed by the defendant or his servant, under the rule *qui facit per alium, facit per se,* as the act of the agent is imputed to his principal. The same rule was applied to a statutory penalty which, though in form *ex contractu,* is founded in fact upon a tort. The liability is joint and several, and judgment may be entered against all of the defendants, or only against some, and in favor of others as to whom the proof has failed. *Chaffee v. U. S.,* 85 U. S., (18 Wallace), 516; L. Ed., 908. See also *S. M. Telephone Co. v. Buchanan,* 62 S. E., 928, and *Pirie v. Tvedt,* 115 U. S., 41, cited in *White v. R. R.,* 146 N. C., 340. So in our case, under the first cause of action, which is stated against the defendants jointly, the plaintiff may recover accordingly, or he may have judgment

against only one of them. A joint judgment will enable him to proceed under his execution against both or either one, as he may elect, but he can have only one satisfaction. When there are two separate suits for the same trespass or wrong, and judgment recovered in each, plaintiff may elect, as it is said, *de melioribus damnis,* that is, he may choose, as between the judgments, to take the larger one, or to pursue the solvent party; but when either is satisfied, it discharges all, except, perhaps, as to costs. Hale on Torts, 192, 193, 194, where the subject is fully discussed and the difference between the old and the new rule stated *Knickerbocker v. Culver,* 8 Cowen (N. Y.), 111.

It will be seen from this consideration of the law, as shown by the better authorities, that the plaintiff can have all the relief he seeks under his first cause, and by adding the second and third counts he has merely stated separately, and by repetition, the several liability (166) of the defendants, which, as the law views it, he had already stated in the first count, as the first embraced fully the other two. There is no misjoinder of different causes, as there is but one cause in the first count, which includes the others, and those, on the trial, may well be disregarded as surplusage. We can see from the entire scope of the complaint that but one cause of action was intended to be alleged, and that is one for the joint and several tort of the defendants, who are alleged to be owners of the railway. We must give the pleading a liberal construction with a view to a trial upon the merits and the awarding of substantial justice, unimpeded by mere technicalities. *Womack v. Carter,* 160 N. C., 286. The real issue is, Was the plaintiff injured by the negligence of the defendants, either or both of them, as alleged in the complaint? If the case is so tried, there is no danger that defendants will be vexed by a multiplicity of suits or subjected to unnecessary costs.

There was no misjoinder of different causes of action, or of different parties, and the court was right in overruling the demurrer.

Affirmed.

HENRY P. NICHOLS, ADMINISTRATOR OF EDWARD S. NICHOLS, v. THE TOWN OF FOUNTAIN.

(Filed 11 March, 1914.)

1. Cities and Towns—Governmental Duties—Liability.

A municipal corporation is not liable for torts of its officers done in performance of purely governmental powers for the benefit of the public at large.

2. Same—Jails—Destruction by Fire—Wrongful Death.

A town has performed its imperative duties to its prisoners when it has properly constructed and furnished its jail or prison, and is then not responsible for the death of a prisoner caused by the destruction of the jail by fire at night, who had been incarcerated in a helpless condition and left without someone to look out for him; and it is held that a lock-up of a village of 150 inhabitants, upstairs in a two-story wooden building, with no building nearer than 50 feet, the lower floor used for the town market, sufficiently meets the requirements.

(167) APPEAL by plaintiff from *Whedbee, J.*, at September Term, 1913, of PITT.

Civil action brought by plaintiff as administrator of Edward S. Nichols, deceased, to recover damages for the death of his intestate.

At the close of the evidence, the court sustained a motion to nonsuit. The plaintiff excepted and appealed.

Harry Skinner and Albion Dunn for plaintiff.

F. G. James & Son, Moore & Long for defendant.

BROWN, J. In their brief the learned counsel for plaintiff contend that his Honor erred in granting defendant's motion of nonsuit:

1st. For that the testimony of plaintiff establishes an actionable cause of negligence against the defendant, in that it shows:

(*a*) That the plaintiff's intestate was arrested in defendant town while in a state of intoxication, and was placed, while dead drunk, in defendant's town lock-up, which said lock-up was located in the second story of a wooden building.

(*b*) That plaintiff's intestate was in an unconscious condition, and in said condition was locked in a cell, without the ability to protect himself from harm or escape from danger.

(*c*) That the town authorities knew of said condition.

(*d*) That knowing said condition, the defendant failed to provide a night watchman or a guard to look after plaintiff's intestate and provide for him a means of escape in case of fire.

(*e*) That while plaintiff's intestate was confined in said cell the said building was burned, and he being in a helpless condition and being locked in said cell, and the defendant not having a guard or watchman, by reason thereof plaintiff's said intestate was burned to death.

(168) 2d. That it was the duty of the town to provide a guard or watchman for one in the condition of plaintiff's intestate, and failing to do so, defendant was guilty of gross negligence, for which it is liable in damages.

The evidence shows that the "Town of Fountain" is a rural village of 150 inhabitants, with a municipal building of wood, the lower story used as a market house, and the upper as a courtroom with a lock-up of two cells for prisoners. There was no building situated nearer than 50 feet. The town employs only one policeman. About 1 o'clock at night a fire broke out and destroyed the building and burned to death plaintiff's intestate. The origin of the fire is unknown.

The cases bearing upon the liability of municipalities for the torts of its officers are very numerous, and many nice distinctions are taken, but it seems to be quite well settled that they are not liable for the acts of their officers done in performance of purely governmental powers for the benefit of the public at large, and not for their private benefit, for otherwise it would be impossible to say where their liabilities would end, or how heavy would be the burdens of those who sustain their existence.

This principle is very well stated by Shearman and Redfield Negligence, sec. 253, and Dillon on Mun. Corp., 966-968, and is embodied in numerous judicial decisions in this and other States.

A very learned and exhaustive discussion of the subject will be found in *Mendel v. Wheeling,* 28 W. Va., 245, where the subject is discussed in its various phases and many cases cited and commented upon.

In this State the general principle as herein stated is recognized and applied, and in respect to jails and "lock-ups" the municipality is held only to the duty of properly constructing and furnishing the prison, and in exercising ordinary care in providing the usual necessaries for the prisoners.

It is held that if the municipal authorities comply with these requirements, the municipality is not liable in damage for the negligence of its officers to properly care for and administer to the wants of the prisoners. *Coley v. Statesville,* 121 N. C., 301; *Shields v. Durham,* 116 N. C., 394; *Moffitt v. Asheville,* 103 N. C., 237; *McIlhenny v. Wilming-* (169) *ton,* 127 N. C., 146; *Hines v. Rocky Mount,* 162 N. C., 411.

Applying these principles, it was held by the Supreme Court of West Virginia in *Brown, administrator, v. Town of Guyandotte,* 12 S. E., 707, that a town is not liable for damages for the death of a person caused by the burning of its jail while such person was confined therein by town authority for a violation of its ordinances, though such fire was attributable to the wrongful acts of the officer or agent of the town.

In this case many cases are cited and instances given where the municipality has been exonerated from liability for the negligence of its officers.

The declaration alleged that the defendant "wrongfully, willfully, and negligently suffered, permitted, and caused" the jail to be destroyed by fire, whereby the plaintiff's decedent was so badly burned that he died. The Court in the opinion, after stating the general rule that a municipality cannot be held liable for acts of its officers done in the performance of purely governmental powers, said: "I think the duty and function of keeping a jail and confining therein offenders against the municipal ordinances of the town are plainly purely governmental in character, and fall within the rule just stated. The declaration does not tell us to the negligence or act of what officer of the town the burning is chargeable. It says, 'The town suffered and permitted and caused the said jail or lock-up to be destroyed by fire.' The question arising on demurrer, it might occur to the mind that the act of expressly causing the burning may have been, not that of a subordinate officer or keeper of the jail, but the chief officer, or even by order of its council; but such a criminal act would be *ultra vires,* not within the corporate powers conferred by law on the town, and for it the town would not be liable."

The same principles of law are recognized in England, and in a recent case brought on appeal before the Privy Council the judgment of the Supreme Court of British Columbia is affirmed, and it was held

(170) that a small rural township is not bound to have a watchman constantly on duty to guard against the risk of fire in a wooden cell used for the custody of prisoners, and that the township was not liable for the death of a prisoner in such jail, caused by a fire originating in the cell. *McKenzie v. Chilliwack,* Ann. Cas., 1913 B. This case is on all-fours with the one we are considering. In the opinion, the President says: "It was not unreasonable, in their lordships' view, for the defendants in the small rural municipality of Chilliwack to allot to Calbeck the other duties to some of which he attended on the evening of the fire; nor was it the duty of the respondents in the circumstances to keep Calbeck or any other person constantly at the lock-up. No breach of duty on their part caused or contributed to the death of the deceased."

The judgment of the Superior Court is

Affirmed.

Cited: Parks v. Princeton, 217 N.C. 364 (f); *Dixon v. Wake Forest,* 224 N.C. 626 (f); *Gentry v. Hot Springs,* 227 N.C. 666 (f).

LUCINDA BROCK ET AL. v. J. ELLIS WELLS ET AL.

(Filed 18 March, 1914.)

1. Deeds and Conveyances—Title of Plaintiff—Trials—Burden of Proof.

In an action to recover lands the plaintiff must depend upon the strength of his own title, and a defect in that of a defendant who does not claim thereunder will not avail him.

2. Deeds and Conveyances—Possession of Tenant—Trials—Evidence.

Where it is contended by a plaintiff, in an action to recover lands, that the defendant entered into the possession of the *locus in quo* under a grantor in his chain of title, and was therefore estopped to deny plaintiff's title, the testimony of a witness to that effect is incompetent, it appearing that it was from hearsay, or that the witness only knew of this fact, that the defendant merely entered into possession of the *locus in quo* after the abandonment of the plaintiff's grantor, and not how he entered, and was qualified to speak to this fact alone.

APPEAL by defendant from *O. H. Allen, J.*, at November Term, 1913, of DUPLIN.

This action was brought to recover the possession of a tract of (171) land. On 3 April, 1854, John Wilson conveyed the land to his daughter, Mary A. Bowen, wife of Stephen Bowen, for life, with remainder to her surviving children. Bowen and his wife then entered into possession of the land and occupied it until two years before they left this State, which was in 1857. They never returned, nor was any claim to the land made by them or their heirs for many years. About one month after they left the land, John Gibb Fussell entered into possession of the same and cultivated it several years, when he conveyed it to James Wells, 22 January, 1876, and Wells occupied it until 1893, when he conveyed it to his two sons, the defendants in this action, and they have occupied it ever since that time. Stephen Bowen died in 1873, and Mary Ann Bowen, his wife, in 1885, and plaintiffs are their children and grandchildren and their heirs at law. A witness for plaintiffs, W. H. Fussell, testified, among other things, that the Bowens left John G. Fussell in possession of the land, but that all he knew about it was that John G. Fussell "lived there and worked the place," and he did not mean to say that he knew that Fussell was in possession under them. He afterwards said that he knew Fussell was their tenant, "but he did not know how he knew it," and "that all he knew was that he lived and worked there." He also stated, over objection of defendant, that he knew the circumstances and conditions of his possession by hearsay. There was evidence of a long continued adverse possession of defendants and those under whom they claim, and

of the disabilities of some of the plaintiffs during that period of time, but it is not necessary to set it out in detail.

The jury found for their verdict that certain of the plaintiffs, Sallie Couch and others, owned two-fifths of the land. Judgment on the verdict, and defendants appealed.

H. D. Williams for plaintiff.
Stevens & Beasley for defendant.

WALKER, J., after stating the case: We need not discuss the questions raised on the argument as to plaintiffs' disabilities or defendants'
(172) title to the land by adverse possession, as we are of the opinion that there was no competent evidence to show that plaintiffs owned the land or any part thereof. The title was not shown to be in John Wilson, who conveyed it to his daughter, Mrs. Bowen, under whom they derive title, and no other claim of title was set up in behalf of Mrs. Bowen. In truth, she had none, nor did Wilson have any, so far as this case shows.

Plaintiffs contend, though, that defendants are estopped to claim the title, or rather to deny their title, as John G. Fussell acquired the possession from the Bowens, as their tenant, and defendants claim under Fussell.

If a party takes possession under another, as a tenant or permissive occupant, he cannot dispute the title of the person from whom he got the possession, until he has fully surrendered it or given it back to him from whom he received it. *Farmer v. Pickens,* 83 N. C., 549; *Springs v. Schenck,* 99 N. C., 552, and *LeRoy v. Steamboat Co., ante,* 109, and cases therein cited. But when the evidence in the case is properly considered, there was none of a competent nature for submission to the jury, that Fussell acquired the possession from the Bowens. They left the land, and a month afterwards Fussell took possession of it. There was nothing to show any connection between him and the Bowens, except the mere sequence of events as we have stated them, unless the testimony of W. H. Fussell supplies the missing link; and we do not think that, if it is susceptible of that construction, it should be allowed to do so, as it was hearsay. It is perfectly evident that he knew nothing about it—that is, had no competent knowledge of the facts. He admitted as much, and expressly stated that he was speaking from hearsay, which was incompetent, and should have been excluded when defendant objected; and he further said that *all* he knew was that "Fussell lived and worked there." It was so clear that he was basing his statements upon hearsay, or upon his own confession of an entire want of knowledge,

that the court should not have considered them as evidence of the disputed fact. There was error in this respect. Nor is the testimony of B. W. Blanton any more definite. There is nothing to show that Fussell was let into possession by the Bowens. The (173) mere fact that he was in possession after they left does not tend to show it. There must be something more than this isolated fact. Plaintiff's own witness, Blanton, testified that Fussell did not take possession until a month after the Bowens had left the land.

It was error to admit the hearsay testimony of W. H. Fussell against the objection of the defendants, and because of this error the appellants are entitled to another jury.

We have not considered the exceptions of defendants which are based upon their claim of adverse possession, and the evidence they offered to support it, and for the obvious reason that the burden is upon the plaintiff in the first instance to show a good title, before the defendant is called upon to say anything in defense. "The rule is well settled," as was said in *Rumbough v. Sackett,* 141 N. C., 495, "that a plaintiff in ejectment must recover, if at all, upon the strength of his own title, and not upon the weakness of his adversary's. He must, in other words, show a title good against the world, or good against the defendant by estoppel," citing *Mobley v. Griffin,* 104 N. C., 112; *Campbell v. Everhart,* 139 N. C., 503. One reason for the rule is, that possession, being *prima facie* evidence of ownership, will protect the defendant, unless the plaintiff shows a superior title, or a right to oust him, as was held in *Mitchell v. Garrett,* 140 N. C., 397, citing 2 Lewis Blk., p. 663, note (7); Tyler on Ejectment, 204; Newell on Ejectment, 433 (13). A new trial is ordered because of the error indicated.

New trial.

Cited: Carstarphen v. Carstarphen, 193 N.C. 547 (1f).

(174)

R. W. MASSIE AND A. N. PIERCE ET ALS., TRADING AS MASSIE & PIERCE, v. J. W. HAINEY.

(Filed 18 March, 1914.)

1. Judgments—Court's Jurisdiction—Parties—Motion in Cause—Laches.

When a judgment rendered against a plaintiff is sought to be set aside by him on the ground that the action had been brought by one assuming to act for him without authority, and objection is raised to the jurisdiction of the court, relief may be obtained by motion in the cause at the same

or a subsequent term of the court, provided there has been no laches or other interfering principle; and where the plaintiff has made such motion upon the ground stated, and offers affidavits to that effect in support of his motion, with allegations tending to show that he has received no benefits from the action and has not in any manner waived his rights to the relief sought, it is error for the judge to refuse to consider the evidence in support of the motion and hold that the remedy was by independent suit.

2. Same—Excusable Neglect—Interpretation of Statutes.

The statute requiring that proceedings to set aside a judgment obtained by reason of surprise, excusable neglect, etc., be instituted within one year from the time of judgment entered, applies when the judgment is otherwise in all respects regular, the court having jurisdiction of the parties, and does not extend to cases where no jurisdiction has been acquired over the party moving in the cause to have it set aside.

APPEAL by plaintiffs from *O. H. Allen, J.*, at October Term, 1913, of SAMPSON.

Cause heard on motion to set aside judgment. On the hearing it was properly made to appear that, heretofore, in 1908, an action of claim and delivery was instituted in the cause in the name of plaintiffs and by their agent, one D. A. Shaw, against defendant, and certain personal property was seized therein by the sheriff, and, at the return or trial term, towit, in May, 1910, no complaint in the action having been filed, it was adjudged that the property seized should be returned, and, in default thereof, that defendant recover on the bond of plaintiff in the sum of $1,000, signed by D. A. Shaw, said agent, etc.

(175) No property having been found, at July Term, 1912, a jury was impaneled, and, the value of the property having been assessed at $500, there was judgment in favor of the defendant against the plaintiff for $1,000, the penalty of the bond to be discharged on payment of $500 and costs, etc.

At August Term, 1913, on notice issued, plaintiffs moved to set aside said judgment, setting forth the grounds of the motion in terms as follows:

1. None of the members of said former firm of Massie & Pierce were properly made parties to such proceedings.

2. The acts of one D. A. Shaw, by which he attempted to make the members of said firm parties plaintiffs in said action, was without authority from said firm or any member thereof.

3. D. A. Shaw, who purported to sign the prosecution and the claim and delivery bonds for and in behalf of the said former firm, did not at the time of signing said bonds, or at any prior time thereto, have any authority from the said firm of Massie & Pierce, or from any member thereof, to sign any bonds which would be binding upon said firm or any member thereof.

4. The said former firm of Massie & Pierce has never, nor have any of the individual members of said former firm ever, received any portion of the property purported to have been seized by the sheriff of Sampson County in the claim and delivery proceedings heretofore issuing from the Superior Court of said county.

5. The said former firm of Massie & Pierce has never, nor have any of the individual members of said former firm ever, by any word, acts, or deeds, ratified or confirmed the acts of the said D. A. Shaw in attempting to bind them or either of them in the institution of said proceedings in their name, or in the signing of their name to any bond or bonds.

6. No member of said former firm of Massie & Pierce ever had any notice of the institution of said suit against the defendant, J. W. Hainey, or of any judgments rendered therein until 13 August, 1913, when certain orders and other papers, looking to the enforcement of a purported final judgment, were served upon R. W. Massie and W. T. Bowen, two members of the former firm, named as parties plaintiffs in (176) said proceeding.

7. No counsel purported to represent the said former firm of Massie & Pierce in said proceeding, and if any counsel had purported so to act, it would have been without authority from and in no way binding upon the said firm or any member thereof," and offered affidavits tending to establish the facts as suggested in the written motion.

The court being of opinion that if any remedy was open to plaintiffs it was by an independent action, denied the motion and entered judgment thereon as follows:

"This cause coming on for hearing upon written motion of the plaintiffs, duly made and served, to set aside judgment heretofore rendered in this action against plaintiffs, and the court being of the opinion that, inasmuch as the record is regular and shows that the plaintiffs were parties to this action, that a motion in the cause is not the proper remedy, and that an independent action to set aside said judgment is the only remedy available to the plaintiffs:

"It is thereupon considered and adjudged that plaintiffs' motion be and the same is overruled and disallowed, and that the cost of said motion be taxed by the clerk against the plaintiffs."

Thereupon plaintiffs, having duly excepted, appealed.

Rose & Rose for plaintiff.

Faison & Wright for defendant.

HOKE, J., after stating the case: There are several decisions of this Court in support of the position that a final judgment terminating a cause may not be vacated or materially altered at a subsequent term except by an independent action; a principle more especially insistent where the judgment has been in whole or in part performed, as in *England v. Garner,* 84 N. C., 213; but this must ordinarily be understood in reference to cases where it is sought to disturb the judgment by reason of facts *dehors* the record and affecting the substantial rights of the parties as between themselves. Even in cases of fraud, where the general principle is more frequently instanced, it has been held
(177) not to apply when the facts only tended to establish a fraudulent imposition on the court in procuring the judgment. *Roberts v. Pratt,* 152 N. C., 731. In that case the defendant was endeavoring to resist enforcement in this State of a judgment rendered in the courts of South Dakota, on the ground of fraudulent imposition on that court, whereby the judgment had been procured. It appeared that defendant had appeared in the South Dakota court and moved to set aside the judgment on the same ground, and the motion had been formally denied. In holding that defendant was concluded on the issue of fraud by the action of the South Dakota court in making adverse disposition of his motion, this Court said: "Courts administering justice according to course and practice of the common law would not, as a rule, entertain a proceeding to disturb a final judgment by motion made after the term in which it was rendered." To effect such a purpose a bill in equity was generally required. *Brinson v. Schultan,* 104 N. C., 410; *Mock v. Coggins,* 101 N. C., 366.

The rule stated, however, does not apply when on the face of the record, or otherwise, it was made to appear that a judgment had been entered contrary to the course and practice of the court, including also all cases where errors would be corrected by writs of error *coram nobis* or *vobis.* The scope and purpose of these writs, it seems, being the same, the former being the proper designation when the proceedings were heard in the Court of King's Bench, where the monarch was presumed to be present, and the second when the matter was carried on in courts of lesser dignity, but having full jurisdiction. The power to correct errors by means of these writs was very generally regarded as inherent in common-law courts of general jurisdiction; and wherever it formerly prevailed the same results may be obtained in modern practice by means of a motion. In systems like ours, where the law and equity are combined and relief administered in one and the same jurisdiction, the power is universally exercised, and, when not regulated by statute, there is a disposition and tendency to extend its scope and application. *Brinson*

v. Schultan, supra; Craig v. Wroth, 47 Md., 281; 5 Enc. Pl. and (178) Pr., pp. 27, 28, 30; 7 Enc. U. S. Supreme Court Rep., 592.

In 7 Enc. S. C. R., it is said: "It is believed to be the settled modern practice that in all instances in which irregularities could formerly be corrected upon a writ of error *coram vobis* or *audita querela,* the same objects may be effected by motion to the courts as a mode more simple, more expeditious, and less fruitful of difficulty and expense."

It may be well to note that the authority referred to in this citation, erroneously stated as *Brinson v. Schultan,* 104 N. C., should be *Bronson v. Schulten,* 104 U. S., 410, and an examination of that case will be found in general support of the position as stated.

Under our former system, these writs referred to had recognized place (*Williams v. Edwards,* 34 N. C., 118, and *Tyler v. Morris,* 20 N. C., 487) and there is direct authority elsewhere for the position that they afforded the proper method for obtaining relief when a judgment had been rendered against a party without notice. *Holford v. Alexander,* 12 Ala., 280; *Wyme v. The Governor,* 9 Tenn., p. 149; *Jeffrey v. Fitch,* 46 Conn., 601. As we have just seen, relief in such cases is now obtained by motion in the cause, as being the more simple and expeditious remedy, and, accordingly, it is now very generally held that, where a court has entered judgment against a party without having acquired jurisdiction, either by failure to serve process upon him or because of the institution of a suit entirely without authority, relief may be obtained by motion in the cause at the same or subsequent term, provided there has been no laches or other interfering principle. If this lack of jurisdiction appears of record, the judgment may be treated as a nullity when and wherever relied upon; but in most instances, and this is true where a party, though without authority, appears of record as plaintiff, it is both desirable and necessary that relief should be obtained by direct proceedings, the appropriate method, under our present system, being as stated, by motion in the cause. *Rackley v. Roberts,* 147 N. C., 201; *Flowers v. King,* 145 N. C., 234; *Grant v. Harrell,* 109 N. C., 78; *Sutton v. Schonwald,* 86 N. C., 198; *Yeargin v. Wood,* 84 N. C., 326; (179) *Doyle v. Brown,* 72 N. C., 393; Black on Judgments, sec. 307.

In *Doyle v. Brown* it was held, as more directly relevant to the question presented: "If a record shows one to be plaintiff when in fact he was not, it stands as where the record shows one to be defendant when he was not. In both cases the record stands till corrected by direct proceedings for the purpose."

In the present case the affidavits offered by the plaintiffs tended to show that the suit in which defendant had obtained a judgment against them had been instituted without authority, and that they had never in

any way profited by the judgment nor done anything to ratify it, and under the authorities cited and on motion properly entered, his Honor should have considered the evidence offered and rendered decision upon it.

We are not inadvertent to the position also suggested in plaintiff's motion, that the judgment was obtained against them by reason of surprise, excusable neglect, etc., and that under the statute an application of this character must be preferred within one year from the time of judgment entered. But the statute and the limitations established by it are properly held to apply when the judgment is otherwise in all respects regular, the court having jurisdiction of the parties, and does not extend to cases where no jurisdiction has ever been acquired over the moving party. *Calmes v. Lambert,* 153 N. C., 248.

For the error indicated, the judgment will be set aside and the cause remanded, that the same may be further considered.

Error.

Cited: Cox v. Boyden, 167 N.C. 321 (1f); *Lowman v. Ballard,* 168 N.C. 18 (1f, 2f); *Moody v. Wike,* 170 N.C. 544 (1g); *Starnes v. Thompson,* 173 N.C. 468 (1g); *Chavis v. Brown,* 174 N.C. 124 (1f); *Graves v. Reidsville,* 182 N.C. 332, 333 (1f, 2f); *Lyman v. Coal Co.,* 183 N.C. 587 (1f); *Clark v. Homes,* 189 N.C. 708 (1f); *Ellis v. Ellis,* 190 N.C. 422 (1f); *Foster v. Allison Corp.,* 191 N.C. 173 (2g); *Dunn v. Wilson,* 210 N.C. 494 (1f); *Downing v. White,* 211 N.C. 42 (1g); *In re Taylor,* 230 N.C. 569 (1g).

(180)

J. J. HARPER v. AMMA RIVENBARK.

(Filed 11 March, 1914.)

1. Pleadings—Allegations—Ownership and Possession—Special Property Rights.

Allegations in the complaint that the plaintiff was the owner of certain lands and had possession thereof, and that the defendant wrongfully and forcibly took possession thereof to his damage, are comprehensive enough to include a special property right therein with a present right of possession.

2. Tenants in Common—Contracts or Agreements for Possession.

An agreement made by tenants in common, that one of them shall have sole or exclusive possession of the common property, is valid and enforceable.

3. Same—Conversion—Trials—Damages—Negligence.

A. having purchased from a partnership, B. & C., a sawmill under an agreement to take possession of the property and pay the partnership debts, thereafter agreed with B., for a further consideration, that the latter should have a one-half interest after the debts were paid. C. claiming by a subsequent purchase from B. of the latter's interest, took forcible possession of the property, and while operating it, it was destroyed by fire: *Held*, C.'s right to the property was subject to the agreement between A. and B. that the former should retain possession, etc., and A., having a special property right of possession, was entitled to recover his damages in his action against C. for the latter's wrongful conversion, without proof of negligence.

APPEAL by plaintiff from *Connor, J.*, at October Term, 1913, of NASH.

This is an action to recover damages for the loss of a sawmill plant.

The plaintiff alleges in his complaint that he is the owner of said plant, which is denied by the defendant.

Evidence was offered tending to prove that prior to 30 May, 1906, W. J. Teachey and the defendant Rivenbark were the owners of said plant; that on said day they sold the same to the plaintiff for $1,250, under an agreement that he would pay the debts of the partnership of Teachey and Rivenbark; that the plaintiff subsequently agreed with said Teachey that he would buy certain standing timber and would operate the mill, and after paying the debts paid by the plaintiff, (181) all expenses and costs of new equipment out of profits, that said Teachey should have a one-half interest in the plant; that the plaintiff then took exclusive possession of the plant and operated it until February, 1907; that after February, 1907, said plant was not operated until March, 1909, but during this time the plaintiff had exclusive possession, and had an agent in charge of it; that in March, 1909, the defendant Rivenbark took forcible possession of the plant, driving off the agent of the plaintiff, and began operating the same, and some time thereafter, while being operated by the defendant, it was burned; that the plaintiff has never been reimbursed the amounts expended by him out of the profits or otherwise.

The defendant offered evidence tending to prove that the plaintiff did not buy the interest of Teachey in said plant, and that after the purchase by the plaintiff the said Teachey sold his interest to the defendant, and that he took possession of the plant rightfully.

The following verdict was returned by the jury:

1. Was the plaintiff in June, 1909, the sole owner of the property described in the complaint? A. No.

2. Did the defendant wrongfully and unlawfully take possession of the same in June, 1909, and operate it, as alleged in the complaint? A.....

3. Did the defendant negligently and carelessly permit the said plant to be burned, as alleged in the complaint? A. .....

4. What damage has the plaintiff sustained thereby? A. .....

His Honor charged the jury, among other things:

"If the jury shall find from the evidence that Harper bought the property on 30 May, 1906, for himself, and acquired the interest of both Rivenbark and Teachey, but subsequently agreed with Teachey that instead of paying Teachey for his interest in the property, that he would take charge of the property, run it and manage it, and that when all the debts and advancements made by Harper had been paid out of the proceeds of such operation, they—that is, Teachey and Harper—should both run and manage the mill, then the court charges (182) you that by virtue of such an agreement, if you find such an agreement was made, Harper and Teachey became the owners of the property as tenants in common; and if you shall further find that Teachey subsequently sold his interest in said property to defendant Rivenbark, prior to June, 1909, then the court charges you that in June, 1909, the plaintiff and defendant were tenants in common of said property; that the plaintiff was not the sole owner of the said property, and you should answer this issue "No." Plaintiff excepted.

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

Bernard & Bernard and N. Y. Gulley for plaintiff.

F. S. Spruill for defendant.

ALLEN, J. The plaintiff alleges that he was the owner and had possession of the property in controversy at the time of the alleged wrongful acts of the defendant, and these allegations are comprehensive enough to include a special property therein with a present right of possession. 38 Cyc., 1550; *Cumbey v. Lovett,* 26 Minn., 229; Penland *v. Leatherwood,* 101 N. C., 515.

In the Minnesota case the Court says: "In an action of claim and delivery the plaintiff is not required to plead specially the source of his title, or the particular facts which entitle him to the possession of the property. He may allege generally that he is the owner and entitled to the immediate possession, and under that prove any right of property, general or special, that entitles him to such possession."

In the *Penland case* the plaintiff, a constable, sued to recover the value of certain goods in his hands by virtue of the levy of certain executions, which had been seized by the defendant, and it was held that the plain-

tiff "had such special property in and ownership of the goods in dispute as entitled him to recover."

If this position is sound, and the plaintiff is entitled to maintain his action upon proof of a special property, under an allegation of ownership, it follows that his Honor was in error when he in substance charged the jury to answer the first issue "No," although they might find from the evidence that the plaintiff bought the inter- (183) est of Teachey and the defendant Rivenbark, and had the property in his possession under an agreement with Teachey that he would manage it, and when all the debts and advancements made by the plaintiff had been paid out of the proceeds of operation, both should run and operate it.

If these facts recited in the instruction are established, the plaintiff at the time of the entry by the defendant was in any event the absolute owner of one-half of the property, and he had a special property in the whole, coupled with possession, for the purpose of repaying the items of expenditure included in the agreements with Teachey, and the defendant having bought from Teachey subsequent to his agreement with the plaintiff, took subject to this agreement.

If so, conceding that the defendant is a tenant in common with the plaintiff, he had no right to the possession, as "it is competent for tenants in common to agree among themselves that one of them shall have sole or exclusive possession of the common property, and such an agreement is valid and enforcible (38 Cyc., 19), and upon these facts his entry would be wrongful, and he would be liable in damages for a conversion without proof of negligence (38 Cyc., 295), the amount of the recovery being dependent on the value of the interest of the plaintiff and the value of the property at the time of conversion.

For the reasons stated, a new trial is ordered, with directions to strike out of the first issue the word "sole," and to submit such additional issues as may be necessary to settle the controversy between the parties.

New trial.

(184)

C. B. PATE AND WIFE v. SAMPSON LUMBER COMPANY.

(Filed 18 March, 1914.)

1. Deeds and Conveyances—Parol Evidence—Partnership Lands.

Where each member of a partnership conveys all of his right, title, and interest in and to all assets and lands of the partnership, or to all the assets and property of the firm, it is sufficient, under the doctrine of *"id*

certum est quod certum reddi potest," to admit of parol evidence, in an action involving title to lands, to show that the *locus in quo* was owned by the partnership, and to pass the title to the grantee in the deed when it is so established.

2. Reformation—Deeds and Conveyances—Pleadings—Evidence.

In order to reform a deed to lands upon the ground of mutual mistake or fraud, the proper allegations should be made in the pleading, or evidence thereof is inadmissible.

3. Statute of Frauds—Deeds and Conveyances—Parol Evidence—Trials—Questions for Court.

Where a deed, expressed in unambiguous language, purports to convey the whole of certain lands, parol evidence that it was the grantor's intention to only convey a part thereof is inadmissible, the construction of the deed as to its meaning and purport being a question of law for the court.

APPEAL by plaintiffs from *O. H. Allen, J.*, at August Term, 1913, of SAMPSON.

This was a civil action to recover possession of a tract of 30 acres of land in Sampson County, N. C., now held by the defendant.

At the close of the evidence his Honor held that upon the record of evidence of title the plaintiffs were not entitled to recover and rendered judgment in favor of the defendant. The plaintiffs appealed.

Fowler & Crumpler, E. G. Davis for plaintiffs.

Rose & Rose for defendant.

BROWN, J. It is admitted that the *locus in quo*, the 30-acre tract, was owned by one Sessoms, who conveyed it on 4 January, 1906, to C. B. Pate and B. C. Hall, who owned it as co-partners. The latter (185) afterwards conveyed his interest to Pate.

It is admitted that the defendant claims title by virtue of a deed executed by R. W. Massie and A. N. Pierce on 2 January, 1912, and that Massie and Pierce claim title by virtue of certain conveyances by plaintiff C. B. Pate and also by a deed from B. C. Hall, both dated 4 January, 1908.

It is stated in the brief of the learned counsel for the plaintiffs: "It seems to us that the main question presented by this appeal is as to whether or not the description contained in the paper-writing executed by C. B. Pate to the firm of Massey & Pierce is sufficiently definite to pass title to the 30-acre tract of land in dispute; or as to whether or not the said description is sufficiently definite as to permit the defendant to offer parol evidence in attempting to locate the lands therein conveyed, in so far as it affects the 30 acres in dispute between the parties."

It appears in the record that in a settlement had between C. B. Pate, the plaintiff, and his partner, B. C. Hall, with a firm of Massie & Pierce, they executed certain conveyances for all the property of the former firm of "Pate & Hall," and "C. B. Pate & Co." In Pate's conveyance he conveys to Massie & Pierce "all my right, title, and interest in and to all of the assets *and lands,* and all property of every kind and description . . . wherever located, heretofore owned by the firm of Pate & Hall and C. B. Pate & Co., either or both.

In Hall's conveyance these words are used: "all my right, title, and interest in and to all of the assets of every kind and description, and in all *property* of every kind and description . . . and their assets, heretofore owned by said Pate & Hall."

His Honor being of the opinion that both Pate and Hall had by these conveyances parted with all their interests in the *locus in quo,* sustained the defendant's motion for judgment at the close of all the evidence.

We agree with his Honor that the description in the two conveyances is sufficient to pass the entire interests of C. B. Pate and B. C. Hall to all the lands and property of every kind and description "heretofore owned by the firm of Pate & Hall, and C. B. Pate & Co., either or both."

If Pate's deed conveyed his interests to Massie & Pierce, then (186) the defendant is entitled to such interests as he had at the date of his conveyance, 4 January, 1908; and the same is true of B. C. Hall's conveyance of the same date. Such being the case, then B. C. Hall and wife had no interest in the 30 acres when he attempted to make a conveyance to C. B. Pate by deed dated 28 January, 1911, as any interest Hall had in the land had already passed to Massie & Pierce.

The deeds are not void for uncertainty. *Id certum est quod certum reddi potest.* What lands, property, assets, or the interests therein, Pate & Hall had on 4 January, 1908, could easily be ascertained from the records and from the property which they actually had in possession or under their control. And it appears that on the date named Pate & Hall did have a deed duly executed to C. B. Pate and B. Colin Hall for the particular 30 acres in dispute.

There are many cases which hold that the description in these deeds is not void for uncertainty, but is sufficient to convey the grantor's right, title, and interest in all the lands coming properly within the terms of the instrument.

In Words and Phrases Judicially Defined, vol. 1, under the word "All," there are many citations sustaining the defendant's contention. The phrases: "All my land," "All my property," "All my real or personal

estate and property," each, receive their share of sustaining citations, too numerous to mention.

The case of *Moayon v. Moayon,* 60 L. R. A., 415, is a well considered case by the Kentucky Court of Appeals, and in that case the Court holds that a contract to convey "one-third of all the grantor's estate, real, personal, or mixed, of whatever kind or nature, belonging to him in his own right, which he acquired under the will of his mother, as well as all the other estate otherwise acquired and now owned by him," is binding. See numerous citations on page 423. There are numerous cases in this State which bear out the same construction.

Power of attorney to sell and convey "all of our land in the State of North Carolina" is sufficient description. *Janney v. Robbins,* 141 N. C., 400.

(187) "All my lands on both sides of Haw River, in Chatham County." Also "the land of which A. died seized and possessed." *Henley v. Wilson,* 81 N. C., 405.

"A conveyance of 'all the property I possess,' where there is no apparent motive for making an exception, conveys all property the party owned." *Brantley v. Kee,* 58 N. C., 332.

Designation of land by the name it is called by is sufficient description to enable its location to be determined by parol proof. *Euliss v. McAdams,* 108 N. C., 507; *Farmer v. Batts,* 83 N. C., 387; *Carson v. Ray,* 52 N. C., 609; *Robeson v. Lewis,* 64 N. C., 734.

The plaintiffs offered certain parol evidence for the purpose of proving that at the time the conveyances to Massie & Pierce were made it was not the intention of the parties to include the 30-acre tract. His Honor excluded it, and the plaintiffs assign the ruling as error.

It is unnecesasry to consider whether such evidence would be competent in an equitable proceeding against this defendant to reform the deeds upon the ground of mutual mistake or fraud. The pleadings contain no such allegations, and ask for no such relief. *Britton v. Insurance Co., ante,* 149.

In the absence of proper allegations as a basis for reforming a deed, such evidence is uniformly held to be incompetent. *Britton v. Insurance Co., supra,* and cases therein cited.

It is elementary that the terms of a written instrument cannot be contradicted by parol evidence. The descriptive words of these deeds are ordinary words of everyday use, and not in the least ambiguous. Their meaning and what they purport are matters of construction for the court, and are not open to explanation by witnesses as to what the parties to the deeds intended.

In *Robeson v. Lewis, supra,* it is said: "The defendant should not have been allowed to prove what it was his intention to convey by the deed. 1 Greenleaf Ev., sec. 277.

"If a solemn conveyance of land can be interpreted, added to, or diminished by the secret intentions of the grantor, or by his parol declarations afterwards, it will be anything but a muniment of title. The intention is to be ascertained from the deed, and with (188) certain exceptions stated in the text-books, it is a question of law for the court."

The judgment of the Superior Court is
Affirmed.

Cited: Hollowell v. Manly, 179 N.C. 265 (3g); *Burton v. Ins. Co.,* 198 N.C. 501 (2g, 3g); *Ferguson v. Ferguson,* 225 N.C. 379 (1g).

CHARLIE DAUGHTRIDGE v. THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 11 March, 1914.)

1. Railroads—Sick Benefit Departments—False Representations—Frauds—Trials—Burden of Proof.

In an action to recover the sick benefits alleged to have been due the plaintiff by reason of his membership in the relief department of a railroad company, defendant resisted recovery upon the ground that the plaintiff, in his application for membership, had made a material and false representation in answer to a question asking if he had had a certain venereal disease, which had resulted in the acceptance by it of the application. It appeared from the application that these questions were prefaced by certificate of the applicant, in effect, that his habits were temperate, "so far as I am aware"; that he had no disease except as is shown in the "accompanying statement," etc., and to avoid the contract it is *Held,* that the defendant must show that the representations were knowingly false or made with a fraudulent purpose to mislead the defendant. Revisal, sec. 4808, has no application to this case.

2. Railroads—Sick Benefit Departments—Fraud—Trials—Evidence Sufficient—Questions for Jury.

Where resistance to recovery is made by a defendant railroad company in a suit by an employee, a member of its relief department, for sick benefits, on the ground of false and material representations made in his application for membership, and it is required that the intent to misrepresent is necessary to defeat recovery, evidence is held sufficient upon the question of defendant's liability which tended to show that the plaintiff had been required by the company to join this department, was examined

and passed by the defendant's physician at the time when the disease, alleged to have been misrepresented, should have been existent and observable; that the company had for a number of months deducted the membership dues from the plaintiff's pay, and where the plaintiff denies ever having had the disease, and there is evidence tending to show that his sickness resulted from being overworked in the defendant's service.

(189) APPEAL by defendant from *Connor, J.*, at October Term, 1913, of EDGECOMBE.

Civil action heard on appeal from justice's court.

Plaintiff sued to recover the sum of $182 for sick benefits alleged to be due him by reason of his membership in the relief department of defendant company, and offered evidence tending to show that such an amount was due, provided that plaintiff was a rightful claimant under his contract of membership.

Defendant resisted recovery on the alleged ground that the plaintiff had made false and material representations in his application for membership and by reason of which his claim was invalid, the statements being in reference to his having syphilis at the time of application made.

On the issue, plaintiff, a witness in his own behalf, testified as follows: "I worked for the Atlantic Coast Line Railroad Company about seven years ago; again in 1911—in boiler shop as helper to boilermaker, putting in and taking out grates. These grates I had to handle; they weighed about 200 pounds. Had to take out and set in fire-box of engines when hot, etc.; had been working six months before I was paralyzed; had been putting patch on dome; had worked two nights and two days successively; said work had to be done; this dome had to be completed. Foreman required me to continue this work continuously for two days and two nights, only taking time to eat day before I was paralyzed, which caused my sickness. I went home and slept day and night and went back to work. I worked that day and next day. When I went home I fell down paralyzed, February before last, and have been sick and housed up since then. Have not been able to work since then, and have been so I could not walk. When I went to work last time I went to see Mr. Williams, who told me to go to see Mr. Painter. He told me

I had to join the relief department. Doctor examined me and (190) wrote it on paper and sent it to the shop. I joined the relief department about 1 September, 1911, and joined first class. I paid 75 cents a month, and was to get 50 cents a day for fifty-two weeks. They have refused to pay me anything."

Cross-examination: "I wrote my name in two places on paper. They refused to pay me my benefits because they said when I joined the department I had syphilis. I denied it. I have known Dr. Burnett two years,

and had been my doctor when I had the stroke. I had never had gonorrhœa. I went to railroad hospital. I did not then have running gonorrhœa. Dr. McCall attended me. I went to the hospital after the stroke, and have had no medical treatment since I left the hospital. I am now 30 years old, and had never been sick before the stroke. I never had syphilis in my life. I had never received the relief department benefits, and went to the hospital right after the stroke."

Redirect examination: "Dr. Burnett came to see me twice. Four or five days after, I went to the hospital and stayed one day. I saw Dr. McCall there. I was examined about six months before I went with the defendant the last time by railroad doctor to find out if I could join relief department. From that time I continued to work. I worked two days and nights without stopping except to eat."

Dr. McCall, a witness for defendant, testified: "I had charge of the hospital at South Rocky Mount. I know the plaintiff and saw and examined him. He had paralysis in right leg, arm, face, and tongue, right side, and was carried into the hospital by two men. I made examination of him physically, and he was almost completely paralyzed. There was a small scar on the genital organ of the plaintiff. He said it was not sore; his legs were also in bad shape. I gave him treatment for syphilis. He came back and showed some improvement He had enlarged glands in his neck, which were symptoms of syphilis. In my opinion, the plaintiff's paralysis was the result of syphilis, and my opinion that plaintiff had syphilis is caused by the scar on his genital organ referred to, the enlarged glands, and the general condition followed by the paralysis, and that these symptoms indicated the (191) existence of syphilis at the time he joined the relief department.

"Hemorrhagic paralysis almost always follows a strain on the part of the patient. Syphilis is one of its prime causes. So is excessive intoxication, heavy eating, septic poison. Also happens most frequently in old age. In my opinion, plaintiff's paralysis is embolic. This happens most frequently between the ages of 20 and 30. In embolys syphilis is put down as one of the prime causes. In my opinion, embolic paralysis may be due to syphilis. It may also be due to a great many other causes."

The record states that two other doctors gave substantially similar testimony.

Dr. Bass, for plaintiff, testified: "That if the jury should find plaintiff was 28 years of age, was sitting quietly in his chair by the fire at the time he was stricken by paralysis, that he had been up to that time apparently healthy, that in his judgment the cause of his paralysis was

embolys; that this was not often caused by syphilis, but was more frequently caused by other things."

The following question was propounded to Dr. Bass by defendant on cross-examination, towit: "If the jury find the facts to be that plaintiff, about the time of the stroke of the paralysis, had enlargement of the post-cervical glands and of the glands of the groin, suffering with gonorrhœa, and had a scar on the head of his genital organ, then what, in your best opinion, nothing else appearing, was the primary cause of the paralysis?" The answer was: "I would suspect syphilis, but would not know it."

Defendant also introduced the application and contract of membership, made by plaintiff, containing, among others, the following statements, more directly relevant: "I certify that I am correct and temperate in my habits; that, so far as I am aware, I am now in good health, and have no injury or disease, constitutional or otherwise, except as shown on the accompanying statement made by me to the medical examiner, which statement shall constitute a part of this applica-
(192) tion." And, in the application, after certain preliminary statements as to plaintiff and relations, there appears answer as to certain diseases, in groups as follows:

"Have you ever had any of the following:

Pneumonia?	None.	Syphilis?	None.
Pleurisy?		Stricture?	
Asthma?		Urinary Trouble?	
Bronchitis?	None.	Appendicitis?	None.
Spitting of Blood?		Chronic Dyspepsia?	
Hay Fever?		Dysentery?	
Fits?	None.	Hemorrhoids (Piles)?	None.
Dizzy or Fainting Spells?		Rupture?	
Sunstroke?		Rheumatism?	

Among other things, the court charged the jury as follows:

1st. If you shall find from the evidence that the plaintiff did have syphilis at the time of joining the relief department, and you shall further find from the evidence that the plaintiff knew he had syphilis or had reasonable grounds to believe that he had it, but falsely represented to the defendant he did not have syphilis, and thereby misled the defendant so as to induce the defendant to receive him as a member of the relief department, when it would otherwise not have received him as a member of the relief department, then you will answer the first issue 'No'; but if the defendant has failed to so satisfy you, you will answer the first issue 'Yes.'"

2nd. "If you find that the plaintiff did have syphilis at the time of joining the relief department—and the burden is on the defendant to prove to you that he did have it—and you find from the facts that he did have it, then the defendant must also prove to you, as above stated, that the plaintiff knew, at the time he made the statement, that he had the syphilis, and that he made the statement that he did not have it to deceive and fraudulently mislead the defendant so that the defendant would receive him as a member. If the defendant fails to so prove and satisfy you, you will answer the issue 'Yes.'"

Defendant excepted. Verdict and judgment for plaintiff, and (193) defendant excepted and appealed.

R. T. Fountain and G. M. T. Fountain & Son for plaintiff.

F. S. Spruill for defendant.

HOKE, J. In reference to regular contracts of insurance, section 4808 of Revisal makes provision as follows: "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and not warranties; nor shall any representation, unless material or fraudulent, prevent a recovery on the policy."

This section is no more than a succinct statement of the law which ordinarily obtains in the interpretation of contracts, and, construing the same in *Fishblate v. Fidelity Co.*, 140 N. C., 589, it was held, among other things, that "Every fact untruly asserted or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of premiums." This principle was approved and again applied in *Bryant v. Insurance Co.*, 147 N. C., 181, and in several well considered cases since that time, notably in *Alexander v. Insurance Co.*, 150 N. C., 536, and *Gardner v. Insurance Co.*, 163 N. C., 367; 79 S. E., 809.

In *Alexander's case, Associate Justice Brown,* delivering the opinion, said: "The company was imposed upon, whether fraudulently or not is immaterial, by such representations, and induced to enter into the contract. In such case it has been said by our highest Court that: 'Assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned,'" citing *Insurance Co. v. Fletcher,* 117 U. S., p. 519; and the same view is presented and well sustained in the recent case of *Gardner v. Insurance Co.*, opinion by *Associate Justice Walker.* While, therefore, it is the fully established

position as to ordinary contracts of insurance, coming within the statutory provision, there are so many conditions distinguishing this from such a contract, that we think his Honor was clearly correct in
(194) his view that the contract of membership in the relief department is unaffected by the statute, and in charging the jury, as he did in effect, that in order to sever the plaintiff's membership and deprive him of its benefits it was necessary to show that the vitiating statements were knowingly false or made with a fraudulent purpose to mislead the defendant.

From a perusal of plaintiff's evidence, uncontradicted in these respects, so far as the record shows, it appears that plaintiff was required by the company to join the relief department; that he was examined by the physician of the company, who himself seems to have written out the answers in the application; that every mark or indication of syphilis, now relied upon by defendant to defeat recovery, was existent and observable at the time of examination made, and, further, that for the six months that plaintiff was employed and until he was paralyzed, after 48 hours of continuous and very heavy work, "taking only time to eat," there had been deducted from his payroll 75 cents, the monthly charge for membership, and that there is no offer to return any part of this amount. While these considerations might not, of themselves, avail to change the terms of a contract otherwise plain of meaning, they, or some of them, are relevant where interpretation is permitted, and were no doubt given consideration by the company in framing their printed form of application for membership. For it will be observed that, in this form signed by the plaintiff, the representations are not positive in terms as in usual and voluntary applications for insurance, but, as heretofore noted from the evidence, they are prefaced and affected by the statement: "I certify that I am correct and temperate in my habits; that, *so far* as I *am aware,* I am now in good health and have no injury or disease, constitutional or otherwise, except as shown in the accompanying statement made by me to the medical examiner, which statement shall constitute a part of this application." From the language of the stipulation, with the relevant facts and circumstances attending its execution, we concur, as stated, with the court below in holding good faith on the part of the applicant is all that the company have required or should rea-
(195) sonably require, and that the cause in this respect has been properly submitted to the jury.

There is no error, and the judgment in plaintiff's favor is affirmed.

No error.

WALKER, J., dissenting: If the case had been submitted to the jury under the first instruction given by the Court, and the same verdict had followed as is now found in the record, there would have been no error in the charge; but in the second instruction an affirmative verdict was made to turn upon whether plaintiff had made the false statement as to his health and physical condition with the actual intent to deceive and defraud the defendant. We think this is contrary to the elementary law and to the former decisions of this Court. *Fishblate v. Fidelity Co.*, 140 N. C., 589; *Bryant v. Insurance Co.*, 147 N. C., 181; *Alexander v. Insurance Co.*, 150 N. C., 536; *Gardner v. Insurance Co.*, 163 N. C., 367; and also to our statute, Revisal, sec. 4808. We believe this is admitted in the majority opinion, provided those authorities and the statute apply to the particular facts of this case or to agreements of this kind; but it is held not to be an insurance contract. This, we think, is a total misapprehension of the character of this agreement. It is generally considered as relief benefit insurance, and so far and so exactly partakes, in its essential elements, of the true nature of insurance as to fall under that denomination.

29 Cyc., at p. 8, says of these orders or associations: "While these organizations are thus distinct from insurance companies, yet where they agree with their members, in consideration of the payment of dues and assessments, to indemnify them or their nominees against loss from certain causes, such as accidental personal injury, sickness or death, they conduct an insurance business, and the distinction is in so far without a difference. The certificate issued to the member stands in place of the ordinary insurance policy and is essentially a contract of insurance. Upon this view, in many States, these societies are deemed insurance companies, and their rights and liabilities are governed (196) accordingly, and the statutory regulations prescribed for insurance companies apply to them, in the absence of statutes regulating benevolent or friendly societies with insurance features."

It is impossible for us to conclude, after comparing this contract and one for simple insurance, that the same principles which govern in the latter as to good faith in making representations, and their materiality, should not be strictly applicable to the former.

But it is not necessary, in order to show the plain error of the charge, that we should be able to assimilate the two kinds of contracts, or assign them both to the same category in law. The doctrines which govern as to the validity and enforcement of insurance contracts are, in all important respects, applicable to contracts generally. Bigelow (Ed., 1890), p. 8, says, referring to what is necessary to constitute fraud: "But the truth is, as Lord Kenyon virtually said, and as others have pointed out, such

a case is falsehood told *scienter;* for the person who makes such a statement declares by plain implication that he is possessed of knowledge of facts sufficient to justify it; and that, by the very terms of the case, he knows to be false. This for many years has been held enough. The fraud is in the means, not in the 'endeavor.'" And again at p. 117: "Though it is usual in actions for fraud to charge expressly a fraudulent intent, where the fraud is alleged to consist in intention, and the *quo animo* is the gist of the inquiry, still there is no rule requiring a fraudulent intent to be averred where the intent is a legal conclusion drawn from the facts alleged, and where the existence of those facts, and not the fraudulent intent, is the gist of the inquiry and the foundation of the rights asserted in the action." Practically the same rule is stated in 9 Cyc., pp. 409-411: "Contracts of insurance are of a special nature, within this rule, so that an innocent misrepresentation or concealment of material facts will avoid the policy. The test of fraud, as opposed to misrepresentation, is that the former does, and the latter does not, give rise to an action *ex delicto.* Therefore mere representation,
(197) although false and material, if not knowingly false, so as to constitute fraud, will not support an action for damages, unless it is a term of condition in the contract, or the parties stand in a fiduciary relation. In contracts *uberrimae fidei* (where one party relies on the other party's knowledge of the facts), and where merely innocent misrepresentation avoids the contract, such misrepresentation may be set up as a defense to defeat an action at law on the contract. The same is true where the parties occupy a fiduciary or confidential relation. And as we have seen, an innocent misrepresentation may be ground for rescinding or reforming a contract in equity, or for refusing to compel specific performance. Fraud is a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it to his damage. It differs from mere misrepresentation in that it has the element of knowledge; and its most frequent example in the law of contracts is the making of false representations to induce consent to an agreement. It may be laid down as a general rule that any false representation of a material fact, made with knowledge of its falsity, and with intent that it shall be acted upon by another in entering into a contract, and which is so acted upon, constitutes fraud, and will entitle the party deceived thereby to avoid the contract or to maintain an action for the injury sustained."

But decidedly more to the very point is the statement of the law upon this subject to be found in 20 Cyc. (Title, Fraud), p. 37: "The proposition, that a fraudulent or dishonest intent is necessary, means nothing

more than that the misrepresentation must be made with knowledge of its falsity or with what the law regards as the equivalent of such knowledge, and with the intent that it shall be acted upon or in such a manner as naturally to induce the other person to act upon it. If these circumstances exist, the misrepresentation is fraudulent both in morals and in law, and is made with all the fraudulent intent which the law requires; a motive to obtain benefit or cause injury is not an essential element. So where the representation relates to a material fact and (1) is made with knowledge of its falsity, or (2) recklessly, without any (198) knowledge of its truth or falsity and as a positive assertion calculated to convey the impression that the speaker knows it to be true, a fraudulent intent will always be inferred; and independent evidence to establish it is not required."

The fraud consists in this, that the applicant for admission to this relief society has made a false representation of the fact inquired about as to the state of his health, when a truthful statement was required in order that the society might determine whether to admit him to membership, and he, of necessity, knew this to be so, and yet made a statement which was knowingly false, which, as has been shown, was vitally material and which misled the company.

If, under the first instruction, these facts alone had been found, plaintiff could not recover; but the judge complicated them with an immaterial element, namely, the actual intent to deceive or defraud the defendant, and the latter, thereby, lost the verdict. The answer was material, having been made in answer to a direct question (*Bobbitt v. Insurance Co.*, 66 N. C., 70), and if false, so as to deprive the defendant of a fair opportunity to exercise its judgment upon the question whether it would admit the plaintiff to the benefits of the society, it was, in law, fraudulent and vitiated the contract, without regard to the particular dishonest intent in the mind of plaintiff at the time he gave the answer. The very situation of the parties, the nature of their negotiations, and the questions asked of the applicant, made it essential that the answers should be true, and certainly not knowingly false, whether actually intended to deceive or not. Vance on Insurance, p. 269, says: "A false representation avoids a contract of insurance when material, and wholly without reference to the statute." Commenting on that statement, in *Gardner v. Insurance Co.*, 163 N. C., at p. 374, we said: "Every fact which is untruly stated or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium," citing *Fishblate v. Insurance Co.*, (199)

supra; Alexander v. Insurance Co., supra, and many other authorities.

The *Alexander case* expressly holds it to be immaterial whether the statement was intentionally fraudulent or deceitful, and it is said therein: "The company was imposed upon by such representation, and induced to enter into the contract. In such case it has been decided by the highest Court that, 'Assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned,'" citing *Insurance Co. v. Fletcher,* 117 U. S., 519, and *Bryant v. Insurance Co., supra.*

When plaintiff was asked for the information, he was bound to know what was expected of him, and that a false answer would mislead the defendant and induce it to make the agreement. Every man of intelligence and honesty would necessarily know the effect or consequence of a false affirmation as to the state of his health; and to charge that defendant must prove, and the jury must find, that plaintiff actually had a dishonest motive in giving the false answer, was going beyond what the law required to defeat a recovery. But for the erroneous instruction, the jury may have found the facts, as contained in the first instruction, and answered the issue "No." The same idea was involved in *Boddie v. Bond,* 154 N. C., 359, 366, where we declared substantially the same principle, as applicable to a case of equitable estoppel. We there held that when a man knowingly induces his neighbor to regard as true that which is false, he will not be allowed to take advantage of any resulting agreement, if the person to whom the misrepresentation was made was thereby misled to his injury by the asseveration or conduct of the other party, citing *Kirk v. Hamilton,* 102 U. S., 68; *Light Co. v. Bristol Gas Co.,* 99 Tenn., 371. The rule of honesty is the rule of the law, and strict compliance with it is exacted, and he who breaks it must pay the penalty if loss or injury results.

It seems to be conceded in the majority opinion that our statute, Revisal, sec. 4808, "is but a succinct statement of the law which
(200) ordinarily obtains in the interpretation of contracts," and this being so, if a representation is knowingly false, material, and induces another to enter into a contract, relying upon the truth of the statement, the contract is not enforcible.

It can make no difference in the result that plaintiff was required to join the society as a condition of entering into the defendant's service. He had an option to enter into the service or not, and a full opportunity to exercise it. His action was, in every respect, voluntary. There is no finding that defendant knew of the plaintiff's condition at the time the contract was made. Nothing was said in the charge about it, nor was a finding in regard to it, one way or another, required by the court.

The amount involved in this case is not large pecuniarily, but the principle announced by the Court is important in its consequences, and be followed as precedent hereafter. We respectfully think it will tend to unsettle the law upon the subject of fraud in the making of contracts. It is better to hold fast to the established principle that a false statement which in its very nature must produce a certain impression upon another and induce him to act in accordance therewith, or, in other words, which is calculated necessarily to mislead, and which does actually mislead him into a course of action which otherwise he would have rejected, is fraudulent in law, if knowingly made, and will avoid a contract which is the result of it, without any specific intent to defraud. The law will not permit a man to take advantage of conduct on his part which has prejudiced another. It will presume that he intended the evil consequences which have resulted, without actual proof that he did so intend, and will hold him bound by his act. It is not his particular motive that the law regards so much as the certain tendency of his conduct to mislead the one who is dealing with him.

JUSTICE BROWN concurs in the dissenting opinion.

Cited: Gay v. Woodmen, 179 N.C. 210 (1f); *Howell v. Ins. Co.,* 189 N.C. 217 (1g).

(201)

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

(Filed 25 March, 1914.)

1. Wills—Interpretation—Intent—Defeasible Estates—Statutes.

The intent of the testator as gathered from the entire will controls its interpretation; and this rule applies to the construction of Revisal, sec. 3138, when it appears that the testator devised certain lands without the words of inheritance, and that his intent, gathered from a separate item of the will, was to create a defeasible estate in the first taker, contingent upon his dying at any time, whether before or after the death of the testator, leaving issue surviving him.

2. Wills—Intent—Contingent Remainders—Die Without Issue—Statutes.

A devise of lands to J., with limitation that if she should die without leaving issue, then over, refers the contingency upon which the estate shall vest to the death of J., and not to that of the testator, since the act of 1827, now Revisal, sec. 1581.

3. Wills—Intent—Contingent Remainders—Die Without Issue.

A testator devised certain of his lands to his daughter J., without words of inheritance, by one item of his will, and by the next item of the will

provided that in case J. died leaving issue, then to such issue and their heirs; but should J. die without issue surviving her, then to another daughter and a son of the testator, or their heirs, share and share alike: *Held*, the two items of the will are not repugnant to each other, the intent of the testator, as gathered from the entire will, being that J. should take an estate in the lands defeasible upon the contingency of her dying at any time without leaving issue surviving her; and that at the death of J. the estate would vest in accordance with the happening of either one or the other contingency specified in the will.

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

This is a petition to rehear the above entitled case, which was decided at the last term (164 N. C., 128). The facts are stated in the former report of the case, and need not be fully repeated here. The single question is, whether the plaintiffs, as devisees under the will of Mrs. Jennie Lind Lee, can make a good title to the house and lot at (202) the corner of East and Jones streets in the city of Raleigh, under their contract with the defendant, Mrs. Charlotte Grimes Williams. We held before that they could not do so, and we are now asked to reverse that ruling. The decision of the question turns upon the construction of Mrs. Lee's will, the following items thereof being pertinent to the injury:

"1. My house and lot situated on corner of East and Jones streets 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.

"2. 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.

"3. 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.

"4. 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.

"5. 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. Litchford guardian of my daughter Jennie Lee.

"6. My son, Harry Lee, is not to have control of his stock, only to 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."

The will was dated 30 June, 1905, and was probated 13 April, 1906. Jennie Lee, who has since intermarried with A. S. Rees, Mrs. Schlesinger and her husband, and Harry Lee are the plaintiffs. All the devisees are married. Mrs. Lee has had no children. It does not appear that there were any to the other marriages, nor does it appear when the testatrix died, except by inference, between 30 June, 1905, and 13 April, 1906. Plaintiffs have duly tendered a good and sufficient deed for the premises, with proper covenants, and filed it with the clerk of the (203) court, to be delivered upon payment of the price agreed upon, towit, $7,500. The court below held that plaintiffs' deed will convey a good title, and entered judgment accordingly. Defendant appealed. We reversed the judgment here.

Winston & Biggs for plaintiff.
Ernest Haywood for defendant.

WALKER, J., after stating the case: The question is, whether Mrs. Jennie Lee Rees, formerly Jennie Lee, took a fee simple absolute at her mother's death, under the latter's will. The contention of the plaintiff is that at the death of the testatrix, Mrs. Rees, as she survived her mother, acquired an absolute estate in fee under the will, as the contingency expressed in the limitation referred to her death, with or without issue, during the textatrix's lifetime; and this is based upon the ground that the will gives her a fee, but if either of the contingencies, that is, "dying with or dying without issue," should occur, she would be deprived of that estate, and a repugnancy in the terms of the will would arise, the first estate being a fee and the contingencies upon which it is limited cutting it down to a life estate. But this argument, if otherwise it should be allowed to prevail, is predicated upon the false assumption that the testatrix has given an estate in fee in terms which clearly show an intention to do so. It may be conceded, as contended by learned counsel, that taking the two clauses together, by which the estate is limited over upon the contingencies stated, that is, dying with issue then living or dying without such issue, and reading them in the alternative, as we have done, they exhaust every possible contingency and involve the certainty that Mrs. Rees will have only an estate for her life; but we cannot agree to the deduction therefrom that, in this case, it produces such a repugnancy as requires us to consider the event of her dying as one to take place in the lifetime of the testatrix,

so that, at her death, Mrs. Rees, surviving, took an estate in fee absolute.

There are authorities, we admit, and perhaps many of them, to (204) the effect that where an estate is given to one in fee, by express terms or clear implication, with a limitation over to others if the first taker should die with or without issue, the death mentioned is one which must take place in the lifetime of the testator in order to avoid a repugnancy beween the two limitations, as otherwise the first taker would get only a life estate, instead of the fee so limited to him. But this doctrine, where it has been applied, is, we are told, restricted to cases where a clear intention is manifest to make an absolute gift to the first taker. *Lumpkin v. Lumpkin,* 25 L. R. A., at p. 1104; *Cooper v. Cooper,* 1 Kay and J., 658; *Gosling v. Townshend,* 2 Week. Rep., 23. When the testatrix gave the estate to Mrs. Rees, she did not add words of inheritance, and but for our statute, Pell's Revisal, sec. 3138, the gift would import only a life estate. That section provides: "When real estate shall be devised to any person, the same shall be held and construed to be a devise in fee simple, unless such devise shall, in plain and express words, show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity." Applying these words to the will, we conclude it plainly appears that Mrs. Lee did not intend to give Mrs. Rees an estate in fee, to become absolute in her daughter at the mother's death, if she were then living, but only such an estate as she would get if, at anytime, she should die with or without issue, which, of course, would be substantially a life estate. We must construe the will as an entirety. It was said in *Price v. Johnson,* 90 N. C., 592, while deciding a similar question: "The first and most important rule in the interpretation of wills, to which all other rules must yield, is that the intention of the testator expressed in his will shall prevail, provided it be not inconsistent with the rules of law. 1 Blk. Rep., 627. A will is defined to be the 'legal declaration of a man's intentions which he wills to be performed after his death.' 2 Blk. Com., 499. These intentions are to be collected from his words, and ought to be carried into effect, if they be consistent with law. . . . It is a rule of construction that the whole will is to be considered together,

and every part of it made to have effect, so as to effectuate the (205) intention of the testator; and if there are any apparent inconsistencies in its provisions, it is the duty of the court to reconcile them if possible." It is said that a rule referring the death of the first taker, with or without any issue, to a time during the life of the testator, is extremely technical in its character. "It does not apply where there are indications, however slight, that the testator intended a death without issue occurring subsequent to his death. The rule which construes death

without issue to mean death without issue prior to that of the testator is not favored by the courts. . . . In such a case, particularly where at the date of the execution of the will any of the primary devisees are unmarried, it may be fairly presumed that the testator had in contemplation a future marriage and birth of issue, and that, intending to keep the property in his family, he meant a death without issue to take place after his death. If, therefore, the primary devisees survive him, they take an estate in fee which is defeasible by their subsequent death without issue." 1 Underhill on Wills, sec. 348.

We are assuming, for the sake of discussion, that the rule upon which plaintiffs rely has heretofore been adopted by us, and if so, we must yet look at the entire will and there find the true intention of the testatrix. Looking at this will as a whole, and giving effect to all of its parts, we discern clearly an intention of the testatrix not to give to her daughter Jennie Lee an estate in fee simple absolute. If the statute, Revisal, sec. 3138, presumes that she intended such a fee, the presumption is rebutted by subsequent clauses of the will. There is no rule which requires us to reject the later for the earlier clauses of a will. The rule is the other way when they are conflicting. Underhill on Wills, sec. 357. But we must reconcile them, if it can be done, as the testator is presumed to have intended both to take effect. *Ibid.*, sec. 359. We cannot reject either lightly, or without good reason. Underhill, sec. 359, expresses it well, when he says: "Every possible effort should be made by the court to reconcile the clauses seemingly repugnant, and to give effect to the whole will; for the presumption is that the testator meant something by every sentence and word in his will, and no court is justified in rejecting any portion of it until it is (206) positively assured that the portion which it rejects cannot be reconciled with the general intention of the testator as expressed in some other portions of the will. And even where the general rule of repugnancy is applied of necessity, and the latter of the two inconsistent clauses is permitted to prevail over the former, it is a settled rule that the earlier of the two clauses will not be disturbed or rejected any further than is absolutely necessary to carry out the presumed intention of the testator as shown in the latter clause." Rejection, therefore, is the last resort, and it must be imperative; and why should we reject, in this case, the last in favor of the first at all, and especially when they can be joined together in perfect harmony? It must be remembered that the testatrix has not given a fee to Jennie Lee *expressly*, and it is more than likely that she did not intend to do so; but it is very certain she intended that, if she, Jennie, died with issue, the property should go to her children, and if without children, then to her brother and sister, her purpose be-

ing, in any event, to keep the property in her immediate family, or in the line of her own blood, as long as she could do so by restrictive conditions, and not merely to prevent a lapse. If the estate is released at her death from the contingency, and is made absolute, this clear intention is frustrated. In order to sustain such a construction, we must interpolate words by adding to those in the will, that is, "dying with or without issue," the following, "in my lifetime," instead of adopting the natural meaning, which her own language conveys and which does not so limit the devise. Where the rule upon which plaintiff relies has been adopted, it is said to maintain its hold somewhat weakly, and with a doubtful grasp, and yields easily to any fact or circumstance indicating a different intention. The tendency in this regard is to lay hold of slight circumstances in a will to vary the construction and to give effect to the language according to its natural import. *Matter of Cramer,* 170 N. Y., at p. 276.

Such a technical rule of construction, if it really exists with us, should not be permitted to overrule the clear intention of the
(207) devisor. There is a significant fact in the case, which shows that the testator did not expect her daughter Jennie Lee, now Mrs. Rees, to die in her lifetime, but, on the contrary, she anticipated that she would survive her, and made provision in her will accordingly, by appointing Henry E. Litchford as her guardian, and by clothing him with the power, as her executor, to change the investments, if thought by him to be best for the interests of his children, which, of course, included Mrs. Rees. These facts show that the testatrix contemplated that her daughter Jennie Lee would outlive her, and her dying with or without issue consequently should not be referred to a time preceding the testatrix's death. Circumstances like these were given this effect in *King v. King,* 215 Ill., 100.

There are cases decided in this Court which seem to sustain the plaintiffs' view that the first taker will get a fee absolute at the death of the testator, if he survives so long, but they are cases where the wills were executed prior to 1827 or are founded upon the principle stated in *Hilliard v. Kearney,* 45 N. C., 221, as to survivorship between tenants in common. More recent decisions are to the effect that in such limitations the term "dying with or without issue" refers to a death at any time, whether before or after the testator's death, and they are based, at least principally, upon the change in the law which was made by the act of 1827 (Revisal, sec. 1581), which requires limitations of this kind to be so interpreted as to take effect *when* the first taker shall die, not having issue living *at the time of his death,* and this, of course, without reference to the time when such death may occur. The clear and exact mean-

ing of this statute, and its direct application to a state of facts such as we have here, was decisively set at rest by the case of *Buchanan v. Buchanan,* 99 N. C., 308, where *Chief Justice Smith,* after critically reviewing former decisions, especially *Hilliard v. Kearney, supra,* concludes with these words, which effectually dispose of plaintiff's present contention: "The true principle, which runs through all the cases, is to ascertain the intent of the testator, gathered from the will itself and all its provisions, and to give the instrument an interpretation which will effectuate that intent. The testator, in the will before us, limits the property to one son, upon the death of the other without (208) issue, and with no other qualifying restrictions. How, then, by construction, can such a restriction as requires the death to occur before the death of the testator be introduced into the clause and it be made to speak what the testator has not said? Does not the testator intend that Andrew shall have all if Richmond dies, and whenever he dies, with no child to succeed him? Why should his estate become absolute if he dies just before, and be defeasible if he dies just after, the testator's death, and in each case childless? Annex the explanatory words of the statute (and the will construed in *Hilliard v. Kearney* was made in 1775, long before the enactment), so that it will read, Should Richmond die without a bodily heir, 'not having such heir living at the time of his death'—can there be any serious doubt as to the meaning of the clause, and especially when the act declares that the ulterior limitation shall then take effect? If it ties up the contingency to the death, as an independent fact, so as to avoid too remote a limitation under former rulings, why should it not equally exclude an interpretation which refers to an earlier period for the vesting? Without disturbing the ruling in *Hilliard v. Kearney,* the cogent reasons for which are presented in the able opinion as applicable to a tenancy in common, we are of opinion that the limitation over is valid." That case has many times been approved and followed by this Court. *Harrell v. Hagan,* 147 N. C., 113; *Dawson v. Ennett,* 151 N. C., 543; *Perrett v. Bird,* 152 N. C., 220; *Elkins v. Seigler,* 154 N. C., 374; *Smith v. Lumber Co.,* 155 N. C., 389. To the same effect are cases in other jurisdictions having a similar statutory provision. *Smith v. Piper,* 231 Pa., 378; *Weybright v. Powell,* 86 Md., 573; *Harvey v. Bell,* 118 Ky., 512; *Stone v. Franklin,* 89 Ga., 195; *Condict v. King,* 13 N. J. Eq. (2 Beas.), 375. There are also cases of earlier date in this Court, which state and apply the same doctrine. *Jones v. Spaight,* 4 N. C., 157; *Garland v. Watt,* 26 N. C., 287; *Ward v. Jones,* 40 N. C., 400; *Smith v. Brisson,* 90 N. C., 284; *Galloway v. Carter,* 100 N. C., 112; *Williams v. Lewis,* 100 N. C., 142; *Trixler v. Holler,* 107 N. C., 617; *Kornegay v. Morris,* 122 N. C., 199 (*s. c.,* on rehearing, 124 (209)

N. C., 425; *Sain v. Baker,* 128 N. C., 256; *May v. Lewis,* 132 N. C., 115. There can be no sound distinction, under these decisions, between a limitation over in one event, or upon the happening of a single contingency, and one where there is a gift over in two or more events, one of which must occur and reduce the devisee's estate to one for life. If it is once clear that the devisee is to take an absolute interest, a gift over in one event is just as inconsistent with that absolute interest as a gift in several, one of which must take place. In either case, the absolute interest in fee may be defeated and cut down to a life estate. This is clear. Our case is very much like that of *Jones v. Spaight, supra,* where the words of the devise are substantially the same. It was there held that the limitation over was good as an executory devise, under the act of 1784, ch. 204 (Revisal, sec. 1587), by which a fee tail is converted into a fee simple, and without the aid of the act of 1827, as it had not then been passed. The words of the limitation themselves, in that case, as in this, made the failure of issue definite by confining it to those living at the death of the first taker.

Plaintiffs rely upon *Hilliard v. Kearney, supra; Baird v. Winstead,* 123 N. C., 181, and *Whitfield v. Garris,* 134 N. C., 31, but none of those cases sustains their position.

We have already referred to the special doctrine which controlled the decision in *Hilliard v. Kearney,* and which is not applicable here. The other cases are far from deciding that the first estate became a fee simple absolute at the death of the testator, but, on the contrary, held, in harmony with the cases we have just cited, that the dying without issue was not confined to the lifetime of the testator, so as to make the estate absolute and indefeasible at his death, if the contingency had not then happened, but that it extended beyond his lifetime and meant a dying at any time, and that, as the devisee died leaving children, the ulterior limitation was defeated, though it would have been otherwise if the contingency had not happened, as then the land would have gone to the ulterior devisees. In the *Whitfield case* we held, citing some of the cases *supra,* that the children took no estate by implication or
(210) construction of law, but that their father acquired by the gift a conditional fee, which was defeasible upon his dying without children, but as he left children, his estate was converted thereby into a fee simple absolute, the ulterior estate being defeated by the terms of the devise, and his children, therefore, took from him only by descent, and their inheritance was in its turn defeated by his deed to others for the property. This decision necessarily extended the contingency to a period subsequent to the testator's death. The gist of that decision will be found in this extract from Underhill on Wills, sec. 468, upon which

reliance was there placed by the Court: "Where real or personal property is given to a person absolutely, but if he should die without leaving children, then over, the primary devisee takes a common-law fee conditional, which is defeasible on his death without leaving children, though the children, if he leave any, take no estate as purchasers under the will, by implication. If the first taker shall die, leaving children surviving, by which event the remainder is defeated, they will take by descent from their parent, and not as purchasers under the will. He has an estate in fee, with full power of disposal, and the only effect of mentioning the children in the will is to indicate the contingency upon which his estate in fee is to be defeated."

A careful examination of the case has convinced us that our former decision was correct. Our conclusion is that Mrs. Lee did not intend to devise an absolute estate in fee at her death to her daughter Jennie Lee, but a defeasible one, even if by the contingencies it be reduced practically to a life estate, and further, she intended that, at the death of Jennie Lee, now Mrs. Rees, whenever it occurred, the gift over should take effect, according as the one or the other event had taken place, upon which it was made to depend. Mrs. Rees, therefore, cannot convey to the defendant a good and indefeasible title to the land, as she has contracted to do.

All the persons who may take under the will are not parties to the record, as it cannot be determined who they will be until the death of Mrs. Rees, for if she has children who survive her, they will take in preference to Mrs. Schlesinger and Harry Lee, who can only (211) take in their turn, if there are no such children of Mrs. Rees. As to her, the law does not consider the possibility of issue as now extinct.

Petition dismissed.

Cited: Bank v. Johnson, 168 N.C. 309 (f); *Hobgood v. Hobgood,* 169 N.C. 489 (f); *O'Neal v. Borders,* 170 N.C. 484 (f); *Jenkins v. Lambeth* 172 N.C. 470 (f); *Bowden v. Lynch,* 173 N.C. 207 (f); *Kirkman v. Smith,* 175 N.C. 582 (f); *Patterson v. McCormick,* 177 N.C. 455 (f); *Cherry v. Cherry,* 179 N.C. 6 (g); *Thompson v. Humphrey,* 179 N.C. 51, 53 (p); *Love v. Love,* 179 N.C. 117 (f); *Jarman v. Day,* 179 N.C. 319 (f); *Ex Parte Rees,* 180 N.C. 193, *S.d.,* holding that sale for reinvestment valid; *Goode v. Hearne,* 180 N.C. 479 (l); *Willis v. Trust Co.,* 183 N.C. 271 (f); *Poole v. Thompson,* 183 N.C. 598 (p); *Pratt v. Mills,* 186 N.C. 398 (f); *McCullen v. Daughtry,* 190 N.C. 219 (g); *Westfeldt v. Reynolds,* 191 N.C. 808 (l); *Hampton v. West,* 212 N.C. 318 (g).

CLAREMONT COLLEGE v. J. L. RIDDLE.

(Filed 25 March, 1914.)

1. Corporations—Defective Organization—Legislative Amendments.

Semble, the place for recording articles of incorporation taken out before the clerk were properly filed and recorded in the office of register of deeds of the county under Laws of 1871-72, ch. 199, sec. 8; but were it otherwise, a corporation thus formed having all the attributes of a corporation *de facto*, to wit, a *bona fide* attempted organization under a statute, and the consequent actual user of the incidental powers, can make a valid deed to lands it has thus acquired; and its powers to thus act can only be drawn in question by the State, on suit regularly entered.

2. Same—Curative Acts.

A defective organization of a corporation under a general law authorizing it is cured by a legislative amendment to its original charter, and especially when the amendment distinctly recognizes its corporate existence, is the State thereafter concluded from setting up the original defects.

3. Corporations—Deeds and Conveyances—Restrictive Powers—Conditions Subsequent.

The original charter of a corporation provided, among other things, that the purpose of the corporation was to establish a female college, with authority to take, receive, and hold property, real and personal, which may be conveyed to the corporation, or its trustees and their successors for its use and benefit, etc.: *Held*, a habendum in a deed to land made to the corporation, its successors in office, for the only proper use and benefit of the corporation, does not so restrict the use of the lands to school purposes, under conditions subsequent, as to invalidate a conveyance of the lands to a third person. *Church v. Ange*, 161 N. C., 314, cited and distinguished.

4. Same—Statutes—Intent.

A deed to lands to be held for school purposes reserves in the grantor a possibility of reverter, which may be removed by a subsequent and unconditional deed from him; and the deed in question bearing date in 1880, it was made subject to the statute of 1879, now Revisal, sec. 946, and is to be construed in fee, it not appearing by construction that it was the intent of the grantor to pass an estate of less dignity.

5. Corporation—Deeds and Conveyances—Restrictive Powers—Parties—Tender of Deed—Judgment—Estoppel.

A conveyance of lands was made to Claremont Female College, which by legislative amendment was changed to Claremont College and a conveyance of the land made from the trustees of the college under its former name to that under the amendment. The amendment placed the control and management of the college under the "Classis of North Carolina Reformed Church of the United States," providing for a governing body of trustees to take and hold the property of the college. The objection that the Reformed Church of the United States should be made a party to an action involving the validity of a conveyance of the lands by the corporation to

another, to be used for other than school purposes, is untenable, the local part of that organization, especially charged with looking after its interest there, through its accredited representatives, having been made parties plaintiff and joined in the tender of the deed.

6. Corporations—Charter Provisions—Management—Deeds and Conveyances—Purchaser.

Where an educational corporation has agreed to convey certain of its lands, the purchaser may not refuse the deed upon the ground that it would render the corporation unable to conduct a school in accordance with its charter, as such matter affects the internal management of the corporation and does not concern the purchaser.

APPEAL by defendant from *Cline, J.*, at October Term, 1913, of (212) CATAWBA.

Civil action, heard and determined by consent before his Honor.

On the hearing it appeared that, plaintiff having bargained a piece of real estate to defendant at the price of $1,400 and tendered a deed for same, defendant resisted recovery on the ground that the title offered is not a good one. On the issue presented, the pertinent (213) facts and conclusions of law thereon were declared and stated by the court as follows:

"First. That in or about July, 1880, John F. Murrill, J. G. Hall, A. M. Peeler, *et als.* filed articles of incorporation in the office of the clerk of the Superior Court and received a charter from the said clerk of the Superior Court, incorporating Claremont Female College; said articles of incorporation were filed 28 July, 1880, in the office of the register of deeds for Catawba County in Book 14, at page 58 *et seq.*; the said articles are hereby made a part hereof, and will appear in the record of this cause; that the said parties organized under their said charter, received and held property, both real and personal, established a female school or college, and they or their successors have maintained and conducted the school under said charter without any amendments thereto from that time continuously to the present.

"Second. That on 1 February, 1881, Henry W. Robinson of Catawba County, now deceased, who was seized in fee of the tract of land in said county hereinafter mentioned, executed and delivered to John F. Murrill, J. G. Hall, A. M. Peeler, *et als.* a deed for that tract of land fully described therein, now known as the Claremont College property, in Hickory, which deed was filed in the office of the register of deeds, 31 December, 1885, and was registered in Book 27, page 522, reference to which is hereby made for the full terms of said deed and description of property, and copy of which will be found in the record.

"Third. That on 12 February, 1909, the General Assembly of 1909 passed an act to amend the charter, which is chapter 58 of the Private Laws of 1909, reference to which is hereby made.

"Fourth. That on or about 19 September, 1913, J. L. Murphy, K. C. Menzies, *et als.*, being present trustees of Claremont College, executed as trustees under their hands and seals deed to Claremont College as a corporation, which deed is duly registered in the office of the register of deeds for Catawba County in Book . . ., reference to which is hereby made, and a copy of which will be found in the record.

(214) "Fifth. That the plaintiff, Claremont College, prior to the institution of this action, was duly and properly authorized by its board of trustees to sell off certain lots from the tract of land described in the Robinson deed and use the proceeds thereof for advancing the purposes and interests of the corporation, and that said authority was given in the exercise of the best judgment of the trustees, and the court finds that the same was duly and timely made and given.

"Sixth. That prior to the institution of this action the said plaintiff, with proper authority from its trustees, contracted and agreed with the defendant to sell and convey to the defendant that lot fully described in the fourth paragraph of the complaint, and known as Lot No. 1 of the Claremont College plat, prepared by J. E. Barb, surveyor, at the price of $1,400, and the defendant contracted and agreed upon his part to pay to the plaintiff therefor the said sum of $1,400.

"Seventh. That prior to the institution of this action the plaintiff tendered to the defendant a deed purporting to convey to the defendant in fee the said Lot No. 1, and demanded the purchase money therefor, but the defendant declined and refused to accept said deed and pay the purchase money therefor, upon the ground that the plaintiff could not make title in fee for said lot.

"Eighth. That this action was thereupon begun for the purpose of requiring and compelling said defendant to accept said deed and pay the purchase money to the plaintiff.

"Upon the foregoing findings of fact, the court concludes and holds as a matter of law:

"First. That Claremont College, the name being so changed from Claremont Female College by the General Assembly of 1909, was and still is a corporation, as alleged by the plaintiff, for all the purposes of this action.

"Second. That Henry W. Robinson was, prior to and on the first day of February, 1881, seized in fee of the tract of land described in his deed to John F. Murrill, J. G. Hall, A. M. Peeler, *et als.*, trustees of Clare-

mont Female College, and on said day conveyed to them as such trustees, their successors and assigns, in fee, the land in said deed described.

"Third. That the deed from J. L. Murphy, K. C. Menzies, (215) and others, present trustees of Claremont College, dated 19 September, 1913, conveys to Claremont College, Incorporated, in fee the eight (8) lots therein fully described.

"Fourth. That the contract and agreement entered into between the plaintiff and defendant was good and valid and enforcible in law against the defendant, for that Lot No. 1, covered by said agreement, was one of the lots mentioned in the last paragraph above, and the said plaintiff had and still has a fee simple estate in said lot, and is able to convey same to the defendant, his heirs and assigns, in fee.

"Fifth. That the deed tendered by the plaintiff to the defendant is sufficient in form and substance to convey to the defendant in fee the said Lot No. 1.

"Sixth. That the plaintiff is entitled to judgment against the defendant for the sum of $1,400, recoverable upon the delivery to him of said deed, and for the costs of this action."

Judgment thereon for plaintiff, and defendant excepted and appealed.

Charles W. Bagby and B. B. Blackwelder for plaintiff.

A. A. Whitener for defendant.

HOKE, J. We concur in his Honor's view that the title offered in this case is a good one, and that defendant must pay the contract price. As we understand his position, it was objected for defendant: (1) That the original incorporation of Claremont Female College was defective in that the proposed charter was registered in the office of the register of deeds, and not before the clerk, as required by The Code of 1883, sec. 678, and now in the office of Secretary of State, Revisal 1905, sec. 1139. So far as we can ascertain, at the time this incorporation was had or attempted, in 1880, the law applicable was that of 1871-'72, and, under that act, the registry in the office of the register of deeds seems to have been the proper place (Laws 1871-72, ch. 199, sec. 8); but if we are in error about this, and some amendment has escaped attention, and if it be conceded that the registry had was not the proper method, it would not avail defendant in this instance, for the reason that, upon all the testimony and the facts as found by his Honor, the Claremont (216) Female College had and possessed all the attributes of a corporation *de facto,* towit: "A statute under which it might have been organized. (2) A *bona fide* attempt to organize pursuant to the statute. (3) An actual user of the corporate powers incident to such an organi-

zation." 10 Cyc., 252-253. And as such, and in reference to third persons, it could take and hold property and exercise, under its charter, all the powers of a corporation *de jure*. *Finnegan v. Noerenburg,* 52 Minn., 239; *Investment Co. v. Davis,* 7 Ind. Ter., 152; *Marshall v. Keach,* 227 Ill., 35; 1 *Clark and Marshall,* sec. 81, pp. 230-233. Its powers to act could only be drawn in question by the State, on suit regularly entered, and this source of interference is removed by the action of the Legislature amending the original charter. Private Laws 1909, ch. 58. Not only does an amendment, in distinct recognition of the corporate existence, conclude the State in this respect (*R. R. v. City of St. Louis,* 66 Mo., 228; *Bashor & Stebbins v. Dressel,* 34 Md., 503; *People v. Perrin,* 56 Cal., 345), but this statute expressly provides (section 3), "That the original charter of said college is in all respects wherein the same is not inconsistent herewith, recognized, ratified, and confirmed."

It was further insisted that, under the first deed from H. W. Robinson, the original owner, the specific property was restricted to school purposes, and not otherwise, and this by reason of the language of the habendum, as follows, the deed being to J. F. Murrill *et al.,* incorporators and trustees of the college: "To have and to hold the aforesaid lands and premises to the party of the second part and their successors in office forever, for the only proper use and behalf of said Claremont Female College as aforesaid." The original charter makes provision that it is to establish a female college, and for that purpose, among other things, may take, receive, and hold property, real and personal, which may be conveyed to said corporation or to said trustees and their successors for the use and benefit of the same, etc., and it is held with us and by the weight of authority elsewhere that the words of this habendum do not have the effect contended for by the defendant, appropriat-
(217) ing the specific property to school purposes, under condition subsequent, but, unless there is imperative and express provision to the contrary, as in *Church v. Ange,* 161 N. C., 314, these and words of similar import shall be held to express only the purpose of the grantor in making the deed, and that as to third persons the power of the trustees or other corporate authority to convey the property is not impaired. *Fellowes v. Durfey,* 163 N.C., 305; *St. James v. Bagley,* 138 N. C., 384; *Dowden v. Rayburn,* 214 Ill., 342; *Rawson v. School District,* 89 Mass., 125; *Hunter v. Murphy,* 126 Ala., 123; *Carroll Co. Academy v. Gallatin Academy,* 104 Ky., 621. And, in any event, there would only be a possibility of reverter in H. W. Robinson and his heirs, and, as we interpret the record, this has been entirely removed in the present

case by a subsequent deed of Robinson, conveying the property to the college, without any qualifying words whatever.

In this connection, it may be well to note that this property was acquired and the deeds bear date in 1880, and, after that time, making same subject to the statute of 1879, now Revisal, sec. 946, and by which it is provided that all deeds shall be construed to be in fee, with or without the word "heirs," unless it is shown by "plain and express" words or it shall plainly appear by the conveyance or some part thereof that the grantor intended an estate of lesser dignity. The decision of *Allen v. Baskerville,* 123 N. C., 126, is not controlling, therefore, on the construction of the present title; and it will be noted further that to cure or remove any defect, or the appearance of it, by reason of the original deed having been made to the trustees by name, these trustees have all executed a deed conveying the property to the college under its present and proper title of "Claremont College."

Again, it is contended that under the statute amending the charter the property has been placed under the control and management of the "Classis of North Carolina Reformed Church of the United States," and that they should be made party to the suit; but this position cannot be sustained. True, the Reformed Church had been placed in the control of the school and the property, but a perusal of the statute will disclose that a governing body of trustees is provided for, who are (218) to take and hold the property and are sufficiently representative to bind the church by decree entered in the cause to which they are parties. And the suggestion finally made that the property is required for school purposes is not one presented in the record. Doubtless if it were properly made to appear that a proposed sale or conveyance of this property or any part of it would render the trustees unable to continue or conduct a school, as provided and contemplated by the charter, a court would interfere to stay the sale; but this is a matter which affected the internal management of the corporate affairs and does not concern the purchaser. *Willkinson v. Brinn,* 124 N. C., 723.

It would seem from a perusal of the present charter as amended that the Corinth Reformed Church of Hickory, N. C., is the body more especially charged with the duty of looking after this interest, and that church, by its accredited representatives, has been made a party plaintiff, and thereby joins in this tender of title, and certainly is concluded by the decree. There is no error, and the judgment is

Affirmed.

Cited: Wood v. Staton, 174 N.C. 253 (1f); *Page v. Covington,* 187 N.C. 625 (3g); *Shannonhouse v. Wolfe,* 191 N.C. 773 (3l); *Woody v. Christian,* 205 N.C. 618 (3g); *Bond v. Tarboro,* 217 N.C. 295 (3j).

A. D. WARD v. JOHN ALBERTSON AND THE HILTON LUMBER COMPANY.

(Filed 25 March, 1914.)

1. Contracts—Options—Deeds and Conveyances—Statute of Frauds—Registration—Statutes.

An option on lands is a conditional contract for a short period of time on the part of the owner that upon the payment of the contract price and the performance of the conditions named he will convey the same to the holder of the option; and while an agreement of this character is not a completed contract to convey the lands, it comes within the statute of frauds and our registration laws.

2. Contracts—Options—Consideration—Deeds and Conveyances.

The agreed price for lands upon which an option of purchase has been obtained and the opportunity afforded the owner to sell, form the actual consideration upon which such contracts rest; and a further cash consideration of $5 is adjudged sufficient to bind the contracting parties.

3. Contracts—Options — Deeds and Conveyances — Equity — Specific Performance.

The holder of a valid and binding option for the purchase of lands is entitled to specific performance of his contract.

4. Contracts—Options—Deeds and Conveyances—Tender.

Where a valid and binding option for the sale of lands has been registered, and the owner has since then and contrary to its terms sold and conveyed them to another, it is required of the holder of the option, having notice of the conveyance, to make a lawful tender to the vendee, in accordance with the terms of his option; but where the vendor and his vendee are both parties to the action brought to enforce specific performance of the option, and the latter denies any rights of the plaintiff to recover, the tender of the agreed purchase price becomes unnecessary.

(219) APPEAL by defendant from *Whedbee, J.*, at January Term, 1914, of DUPLIN.

Civil action for specific performance of contract for sale of timber.

On the hearing it was properly made to appear that on 14 November, 1912, plaintiff, for and in consideration of $5 then paid, obtained an agreement in writing from defendant, John Albertson, in terms as follows:

Received of A. D. Ward $5, and I agree that if he pays me $995 prior to 1 January, 1913, to convey to him all the timber and trees 12 inches in diameter and upward 12 inches above the ground, with the usual rights of way and a term of ten years to remove the same, situate on my Dixon Charity Fund tract of 119 acres and my E. A. Farrior tract of 12 acres

situate in Kenansville Township, Duplin County, North Carolina, adjoining each other and adjoining the lands of Kittie Farrior, Silas Barden, A. J. Pickett, R. B. Murray, and others. Timber to be reserved for firewood and ordinary plantation purposes on this my home farm.

Witness my hand and seal. JOHN ALBERTSON. [SEAL]

That on 20 November, 1912, this paper, having been duly pro- (220) bated, was filed in office of register of deeds of Duplin County at 8:44 o'clock, and was duly registered on 21 November, 1912; that on 18 November, 1912, said Albertson, by telegram, withdraw or attempted to withdraw the offer of sale contained in said written agreement, and also wrote said Ward to that effect, inclosing Ward's check, originally given, which said check was immediately returned by Ward, and Albertson, having refused to take same out of office, the postmaster returned same to plaintiff, and offer of payment is made in pleadings, etc., in addition to balance due on purchase; that on 21 November, 1912, said Albertson sold and conveyed the timber, referred to and described in the contract, to the defendant the Hilton Lumber Company, which said conveyance was duly filed for registration in Duplin County on 21 November, 1912, and registered 23 November, 1912; that on 24 November, 1912, said A. D. Ward, by letter, notified defendant Albertson that he would purchase the timber according to the terms of the option, and on 26 December he tendered the $1,000 to Albertson, in gold coin, which tender was refused, defendant notifying Ward that the option was not binding, and that he would not convey the timber; that on 26 November plaintiff A. D. Ward notified the defendant the Hilton Lumber Company of his decision to purchase the timber under the terms of the contract, and also of the tender made to Albertson; that he was ready and would continue in readiness to pay for the timber, and demanded performance of contract made with Albertson. On 27 December defendant company, by letter, notified plaintiff, in effect, that they claimed ownership of the lumber under their deed, and declined to comply with plaintiff's demands. It was further admitted that A. D. Ward has at all times been ready, able, and willing to pay the $1,000, and that no part of the timber has yet been cut.

There was judgment for specific performance, on payment of $1,000, etc. Defendant excepted and appealed.

G. R. Ward and J. A. Gavin, Jr., for plaintiff.

Stevens & Beasley, H. D. Williams, and E. K. Bryan for defendant.

HOKE, J. On the argument it was chiefly urged for error: (221) (1) That the contract was not one coming within our registration

laws, and there being no evidence of notice *ultra* at the time of its purchase, the Hilton Lumber Company is not bound. (2) That the consideration of $5 paid by plaintiff is not sufficient to justify or uphold the remedy by specific performance. (3) There is no evidence of any tender of performance within the specified time, made to the defendant lumber company, but, in our opinion, on the facts in evidence, neither position may be allowed to affect plaintiff's recovery.

These contracts, by which one acquires, for limited period, the right to buy another's property, have a recognized place and fill an important purpose in our business life, and it is now very generally held, here and elsewhere, that in proper instances the remedy by specific performance is available to the holder. *Winders v. Kenan,* 161 N. C., 628; *Gaylord v. McCoy,* 158 N. C., 325; *Bateman v. Hopkins,* 157 N. C., 470; *Timber Co. v. Wilson,* 151 N. C., 154; *Hardy v. Ward,* 150 N. C., 385; *Watts v. Kellar,* 56 Fed., 1; *Ross v. Parks,* 93 Ala., 153; *Ide v. Leisar,* 10 Mont., Pomeroy on Specific Performance, sec. 168. And in reference to the status or obligation of the proposed vendor, while it is frequently said and held that it constitutes only an offer to sell on his part, and does not amount to a contract to convey, this must be understood to refer to a complete or perfect contract to convey, for when the agreement concerns real property, both in its terms and purpose, it amounts to conditional contract to sell, and, in its spirit and meaning, comes well within our statute of frauds and of our registration laws, giving priority of right to him who first registers his instrument.

In Pomeroy on Contracts, sec. 169, the author, in speaking of options, said: "The contracts of this kind are really conditional agreements. Upon the happening of the conditions, that is, upon making the request or declaring the option, they become absolute," etc.

In 39 Cyc., p. 1232, it is said: "An option, in the proper sense is a contract by which the owner of property agrees with another that he shall have the right to purchase the same at a fixed price within (222) a certain time. It is in legal effect an offer to sell, coupled with an agreement to hold the offer open for acceptance for the time specified, such agreement being supported by a valuable consideration, or, at common law, being under seal, so that it constitutes a binding and irrevocable contract to sell if the other party shall elect to purchase within the time specified." And in *Watts v. Kellar, supra, Judge Caldwell,* in delivering the opinion, referred generally to these contracts as follows: "An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right to have them specifically enforced that imparts to them their usefulness and value. An option to buy or sell a town lot may be valuable

when the party can have the contract specifically enforced, but, if he cannot do this, and must resort to an action at law for damages, his option in most cases will be of little or no value. No man of any experience in the law would esteem an option on a lawsuit for an uncertain measure of damages as of any value. The modern, and we think the sound, doctrine is that when such contracts are free from fraud, and are made upon a sufficient consideration, they impose upon the makers an obligation to perform them specifically, which equity will enforce."

In reference to the $5 paid by plaintiff as the consideration for his interest, it is the accepted position, in this State, that a "binding contract to convey land, where there has been no fraud, mistake, undue influence, or oppression, will be specifically enforced, and, as a rule, the mere inadequacy of price, without more, will not affect the application of the principle" (*Combes v. Adams,* 150 N. C., 64, citing *Boles v. Candle,* 133 N. C., 528, and *Whitted v. Fuquay,* 127 N. C., 68); and where the contract has been perfected by acceptance within the time or proper tender of performance, on suit for specific performance, the real consideration is the contract price, which must be paid before the interest is finally acquired, in this instance the $1,000, and, as to the option itself, which only provides for holding the privilege open for a short period of time and involving also the opportunity to effect a sale by the potential vendor, the $5 paid may very properly be held as a sufficient consideration to bind the party (*Alabama Ry. v. Long,* 158 Ala., 301; (223) *Ross v. Parks, supra; Smith v. Bangham,* 156 Cal., 359; Elliott on Contracts, sec. 232); and there is high authority for the position that, in States where this matter has not been regulated by statute, the seal itself conclusively imports a consideration. *Watkins v. Robinson,* 105 Va., 269; *Willard v. Taylor,* 75 U. S., 557; *Adams v. Canal Co.,* 230 Ill., 469. And on the failure to make tender to the Hilton Lumber Company, the authorities, as far as examined, seem to hold that, when the property, the subject matter of the agreement, has been conveyed to a third person, and the fact is known to the purchaser, the tender required by the contract should be made to the assignee. *McLaughlin v. Royce,* 108 Iowa, 254.

The question, however, does not necessarily arise in this case, for all the authorities are to the effect that, "Where a party has disabled himself from performance, or has openly taken position denying the other's right, a formal tender is not required." In such case the injured party need only show a readiness and ability to perform. *Bateman v. Hopkins,* 157 N. C., pp. 470-474; *Bradford v. Foster,* 87 Tenn., 4; *Sharp v. West,* 150 Fed., 458; *McLeod v. Hendry,* 126 Ga., 167; Pomeroy on Contracts, sec. 361; 28 A. and E., p. 5.

In the citation to Pomeroy, it is said: "An actual tender by the plaintiff, before suit brought, is unnecessary when, from the acts of the defendant or the situation of the property, it would be wholly nugatory, a mere useless form. If, therefore, before or at the time of completion the defendant has openly or avowedly refused to perform his part or has declared his intention not to perform at all events, then the plaintiff need not make a tender or demand before suit; it is enough that he is ready and willing and offers to perform, in his pleadings."

On careful examination, we find no error in the record, and the judgment for plaintiff is affirmed.

No error.

Cited: Blalock v. Hodges, 171 N.C. 135 (3f); *Timber Co. v. Wells,* 171 N.C. 264 (1g); *Cozad v. Johnson,* 171 N.C. 642 (3f); *Mizell v. Lumber Co.,* 174 N.C. 71 (1g); *Williams v. Lumber Co.,* 174 N.C. 231 (1g); *Jerome v. Setzer,* 175 N.C. 395 (1g); *Thomason v. Bescher,* 176 N.C. 627 (2f, 3f, 4f); *Hudson v. Cozart,* 179 N.C. 250 (1g); *Dill v. Reynolds,* 186 N.C. 296 (1g, 4f); *Samonds v. Cloninger,* 189 N.C. 612 (2f); *Samonds v. Cloninger,* 189 N.C. 613 (3f, 4g); *Bryant v. Lumber Co.,* 192 N.C. 610 (3p); *Cotton Mills v. Goldberg,* 202 N.C. 508 (4g); *Knott v. Cutler,* 224 N.C. 432 (3f); *Johnson v. Noles,* 224 N.C. 547 (4f); *Crotts v. Thomas,* 226 N.C. 387 (2g); *Trust Co. v. Frazelle,* 226 N.C. 728 (3j, 4g).

(224)

IDA AMAN, TRADING AS A. W. AMAN, AGENT, v. G. A. WALKER, THE PARKSLEY LUMBER COMPANY, ET ALS.

(Filed 25 March, 1914.)

1. Pleadings—Demurrer—Employer and Employee—Wages Due—Injunction—Garnishment—Supplementary Proceedings—Employer.

A demurrer by an employer to a complaint which alleges that he discharged his employee, knowing that the latter owed the plaintiff, amount not stated, and which seeks to restrain him from paying his employee, is good.

2. Deeds and Conveyances—Fraud on Creditor—Equity.

Where a conveyance of lands is made by a grantor with the intent and purpose of defrauding his creditors, which intent is participated in by the grantee, the transaction will be set aside at the suit of a creditor, irrespective of whether his debt accrued before or after the date of the deed, or whether a valuable consideration passed. The principles relating to conveyances in fraud of creditors' rights discussed by ALLEN, J.

3. Same—Reconveyance—Parties.

Where a deed is sought to be set aside, as in fraud of the grantor's creditors, with allegation that the fraudulent intent was participated in by the grantee, and the latter has conveyed the lands to a third person, it is necessary to the determination of the controversy that such person be made a party thereto.

APPEAL by defendant from *O. H. Allen, J.,* at September Term, 1913, of SAMPSON.

This is an appeal from a judgment overruling a demurrer to the complaint. The plaintiff alleges three causes of action:

In the first, that the defendant Waller is indebted to him in the sum of $454.74, and that while this debt was being contracted in 1910 and 1911 said Waller was in the employment of the defendant lumber company, and that the lumber company, knowing of the existence of the debt to the plaintiff, discharged Waller, while indebted to him, and that the company ought to be restrained from paying Waller.

In the second, in addition to the facts alleged in the first cause of action, that on 25 January, 1910, the defendant Waller executed a mortgage to the defendant lumber company, purporting to con- (225) vey practically all of his property to secure a pretended indebtedness of $2,400; that on 8 October, 1910, said Waller executed to said lumber company a bill of sale for certain property; that at the time of executing said mortgage and said bill of sale the said Waller did not retain sufficient property to pay his debts, and that both were made with the intent to hinder, delay, and defraud the creditors of the said Waller, and that this intent was participated in by said lumber company.

In the third, the same allegations are made, and the additional ones, that practically all the property of said Waller was included in said mortgage and bill of sale; that this was in legal effect an assignment; that no schedule of debts and assets was filed; that in 1912 said lumber company sold the property embraced in said mortgage and bill of sale to E. H. Hagman & Son for $3,000.

The defendant lumber company filed the following demurrer:

"First. As to the first cause of action, the complaint does not state facts sufficient to constitute a cause of action, in that no privity is alleged between the plaintiff and these defendants, and said complaint does not allege that these defendants are now indebted to the other defendants in any sum whatever, nor does it allege that they were ever indebted to the other defendants in any stated amount. Wherefore these defendants pray that said first cause of action be dismissed.

"Second. As to the second cause of action, said complaint does not state any facts sufficient to constitute a cause of action, in that it is

alleged in the first cause of action (which is reiterated and made a part of the second cause of action) that the defendants, other than G. A. Waller and wife, are copartners, and that the bill of sale referred to therein was made to a corporation, which bill of sale could not convey any property to said copartnership. It is also alleged that the mortgage complained of was dated 25 January, 1910, which was before any of the debts due the plaintiff by G. A. Waller or L. M. Waller & Co. were contracted, and the plaintiff cannot complain of the same, as it antedated the debts now sued on.

(226) "Further, these defendants allege as a matter of law that both of said conveyances were made more than four months before the institution of this action, and therefore, under the statute, chapter 918 of the Public Laws of 1909, the plaintiff cannot recover in this action.

"Third. As to the third cause of action, the complaint does not state facts sufficient to constitute a cause of action, for that all of the debts alleged to be due the plaintiff by G. A. Waller, or by L. M. Waller & Co., were contracted after the execution and registration of the chattel mortgage referred to therein.

"And further, because it is alleged in the complaint that the goods were sold to L. M. Waller & Co., and said goods were sold after the execution and registration of the bill of sale referred to in the complaint.

"Fourth. The defendants further demur to the entire complaint because it does not contain facts sufficient to constitute a cause of action, in that it is nowhere alleged that the defendants are indebted to G. A. Waller at this time in any sum whatever, nor is it alleged anywhere that these defendants were ever indebted to L. M. Waller & Co. in any sum whatever.

"Wherefore this defendant prays that they be dismissed hence and recover their costs of the plaintiffs and the surety on their prosecution bond."

The demurrer was overruled, and the lumber company excepted and appealed. Judgment was rendered against the defendant Waller for the amount of the debt claimed by the plaintiff upon admissions made in open court.

Faison & Wright for plaintiff.

Fowler & Crumpler and H. A. Grady for defendant lumber company.

ALLEN, J. The demurrer to the first cause of action ought to have been sustained. The plaintiff does not allege in this cause of action that the lumber company owes him anything or has incurred any obligation

to him, and the only ground of complaint is that the defendant Waller is indebted to the plaintiff, and that the lumber company is indebted to Waller in an amount not stated.

This furnishes no reason for interference by a court of equity (227) to restrain the payment to Waller, and the plaintiff has an ample legal remedy by garnishment, or by proceedings supplemental to the execution.

The demurrer to the second and third causes of action was properly overruled. It is alleged in these causes of action that the mortgage and bill of sale were executed with the intent to defraud creditors, and that this fraudulent intent was participated in by the lumber company, which, if true, would make both void, although supported by a valuable consideration.

The principles to be deduced from the authorities as to fraudulent conveyances, in so far as they are applicable to the facts alleged, are:

(1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid.

(2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally.

(3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained.

(4) If the conveyance is upon a valuable consideration *and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee* and of which intent he had no notice, it is valid.

(5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the *grantor,* participated in by the *grantee* or of which he he has notice, it is void. *Black v. Saunders,* 46 N. C., 67; *Warren v. Makely,* 85 N. C., (228) 14; *Credle v. Carrawan,* 64 N. C., 424; *Worthy v. Brady,* 91 N. C., 268; *Savage v. Knight,* 92 N. C., 498; *Clement v. Cozart,* 112 N. C., 420; *Hobbs v. Cashwell,* 152 N. C., 188; *Powell v. Lumber Co.,* 153 N. C., 58.

As a cause of action is stated, without reference to the allegation of failure to file a schedule of debts under the assignment law, it is not necessary to pass upon the effect of chapter 918, Public Laws 1909, and best not to do so until the facts are fully developed.

No objection is made on account of a defect of parties, but it appears from the complaint that the property in controversy has been sold, and the purchaser not a party to the record. His presence is necessary to a complete determination of the controversy, as it now appears, and he should be made a party. *Bank v. Harris,* 84 N. C., 206.

The judgment of the Superior Court is modified in accordance with this opinion, and as thus modified is affirmed. The appellant will pay the costs of the appeal.

Modified and affirmed.

Cited: Garland v. Arrowood, 117 N.C. 374 (2g); *Sutton v. Wells,* 177 N.C. 527 (2g); *Bank v. Pack,* 178 N.C. 391 (2g); *Tire Co. v. Lester,* 190 N.C. 414, 417 (2g); *Wallace v. Philips,* 195 N.C. 671 (2g); *Bank v. Mackorell,* 195 N.C. 744 (2g); *Rhodes v. Tanner,* 197 N.C. 462 (2f); *Bank v. Finch,* 202 N.C. 295 (2g); *Theiling v. Wilson,* 203 N.C. 810 (1f); *Foster v. Moore,* 204 N.C. 12 (2g); *Dillard v. Walker,* 204 N.C. 70 (2g); *Bunn v. Harris,* 216 N.C. 372 (2g).

J. M. FAIRCLOTH v. G. W. KENLAW.

(Filed 1 April, 1914.)

1. Contracts—Principal and Agent—Parol Agreement—Statute of Frauds—Value of Services—Implied Promise—Measure of Damages.

A parol agreement made by the owner of land with an agent for the sale thereof, that the agent shall receive a certain number of acres of the land in consideration of his services, should he effect a sale, is void under the statute of frauds and will not be enforced when the statute is insisted upon; but the law will imply an agreement upon the part of the owner to pay a reasonable price for the services rendered by the agent when the sale has been consummated, and while the value of the land is not controlling upon the measure of damages, it is competent evidence to be considered by the jury in ascertaining the reasonable value of the services rendered by the agent.

2. Courts—Jurisdiction—Pleading—Good Faith.

The amount of recovery demanded in good faith in the complaint determines the jurisdiction of the court.

APPEAL by defendant from *Lyon, J.*, at November Term, 1913, (229) of HOKE.

Plaintiff, at defendant's request, agreed to sell 70 acres of land for him at $2,500, with the understanding that, if he did so, defendant would convey to him the remaining 4 acres of the land. Plaintiff secured a purchaser for the land, to whom the defendant sold and conveyed it, but refused to pay the plaintiff for his services, and instead of performing his part of the contract as it was made, he pleads the statute of frauds to this action for the value of plaintiff's services so rendered to him. Plaintiff alleged in his complaint and testified that the land is reasonably worth $250, and sues for that amount.

The jury returned the following verdict, in response to the issues submitted by the court:

1. Did the defendant employ the plaintiff to sell the land and agree to give him 4 acres of the land if he would sell 70 acres for $2,500? Answer: Yes.

2. Did the plaintiff sell the 70 acres for $2,500? Answer: Yes.

3. What is the value of the 4 acres that the plaintiff claims he was to have? Answer: $200.

Defendant excepted to the first and third issues. Judgment for plaintiff upon the verdict, and defendant appealed.

A. S. Hall for plaintiff.

Shaw & Currie for defendant.

WALKER, J., after stating the case: The defendant cannot escape liability for the value of the services rendered by the plaintiff, at his request, by pleading the statute of frauds. He asked for the services, and has received the full benefit of them, and the law implies a promise to pay for them what they are reasonably worth; otherwise, the statute would be turned into an instrument of fraud instead of (230) executing the purpose for which it was passed. It was intended to prevent and not to promote fraud. What was said by an able and learned court in a similar case is applicable here: The case would fall under a familiar rule—that he had incurred expense and trouble at the request of the defendant—and a right to compensation would follow as a matter of course, not for the loss of the bargain, but for the loss actually sustained, or for the trouble and loss of time incurred. It is a salutary principle of law that every man is bound to the observance of good faith to the extent that he knows that he is trusted; and it is not necessary, to hold him liable, that he was not in a situation to be benefited; he must act so as not to injure another by his conduct. The defendant knew the

extent to which he was trusted, and had, by his own act, secured the confidence of the plaintiff. He could not be ignorant of the trouble and expense which would necessarily be incurred by the plaintiff if he reposed such confidence in the assurance of the defendant as one man may reasonably repose in another. Under such circumstances, while it is unquestionably true that no action can be maintained, either to recover damages for the loss of the land or a good bargain, or for a specific performance, yet to hold that the action cannot be sustained to recover for the injury or loss already named would be equivalent to saying that the subject was one in regard to which fraud or bad faith could not be practiced. *Frazer v. Howe,* 106 Ill., at p. 563. It is well settled by the authorities that where payments are made or services rendered upon a contract void by the statute of frauds, and the party receiving the services or payments refuses to go on and complete the performance of the contract, the other party may recover back the amount of such payments, or the value of the services, in an action upon an implied assumpsit. A party who refuses to go on with an agreement void by the statute of frauds, after having derived a benefit from a part performance, must pay for what he has received. *Galvin v. Prentice,* 145 N. Y., 162, citing *King v. Brown,* 2 Hill, 487; *Lockwood v. Barnes,* 3 Hill., 128.

(231) It is said in Browne on the Statute of Frauds (5 Ed.), sec. 118: "One who has rendered services in execution of a verbal contract which, on account of the statute, cannot be enforced against the other party, can recover the value of the services upon a *quantum meruit.*" *Judge Bryan,* in *Baker v. Lauterbach,* 68 Md., 64, at p. 70, expresses the principle with great force and accuracy: "It must be observed that although contracts within the statute of frauds are void unless they are in writing, yet the voluntary performance of them is in no respect unlawful. If services be rendered in pursuance of a contract of this kind by one party, and be accepted by the other, they must be compensated," citing *Ellicott v. Peterson,* 4 Md., 491.

A rule, based upon the same reason, has often been applied in this Court, where a party has entered into the possession of land and made valuable improvements under a parol contract of the owner to convey the same to him. We have recently uniformly held that the owner, if he repudiates the contract, must pay for the improvements to the extent that they have enhanced the value of the land. *Albea v. Griffin,* 22 N. C., 9; *Hedgepeth v. Rose,* 95 N. C., 41; *Tucker v. Markland,* 101 N. C., 422; *Vick v. Vick,* 126 N. C., 123.

Eviction of the vendee by parol agreement from the premises will be granted only upon condition that the vendor repay what he has received from him in money or in benefit. In *Tucker v. Markland, supra, Justice*

Merrimon says: "It would be inequitable and against conscience to allow the latter (the vendor) to turn him out of possession thereof without restoring his outlay in cash and for valuable improvements he put on the land while so in possession. The contract was void under the statute if the vendor saw fit to avail himself of it, but he could not be allowed to take fraudulent advantage of a contract he might and did treat as void. He took the purchase money and induced the vendee to take possession of the land and make valuable improvements on it, believing he would get the title therefor. Shall the Court allow the vendor to keep the money of the vendee, which he thus obtained, while it helps him to get possession of the land? Surely not. The court of equity will not enforce the contract, because the statute pleaded renders it void, (232) but it will not help the vendor to consummate a fraud," citing many cases.

In the case under consideration no recovery can be had on the contract, for the reason that it is void; no damages can be recovered on account of its breach for the same reason, and upon the same principle, the contract being void, the value of plaintiff's services cannot be concluded by its terms. *Steel Works v. Atkinson,* 68 Ill., 421.

The serious question in the case, therefore, is, What is the measure of damages, and how are they to be proved? We think it clear that plaintiff is entitled to recover only the value of his services in selling the land, and not the value of the land as the legal measure of his recovery. Cyc. of Law and Procedure, at p. 300, says: "In an action to recover the value of services rendered on a void contract, the price agreed by parol to be paid is admissible on the question of the value of the services, and this rule has in some cases been carried to the extent of holding the agreed price to be the measure of damages; but the better rule would seem to be that while the agreed price may be admissible on the question of the value of the services, it does not control it and is not necessarily the measure of damages." And for this statement of the law many cases are cited in the notes as supporting the text. If plaintiff were permitted to recover the value of the land, without regard to the value of his services, we would be practically allowing a recovery for breach of a contract void under the statute, and this would not do, for the latter applies to an action for a breach as well as to an action for an enforcement of the contract. We take this to be the true and the sensible rule, that in a suit for work and labor performed, under a contract void by the statute of frauds, evidence of the terms of the contract with reference to plaintiff's compensation is admissible to show the value of his services, as agreed upon by the parties, but is only evidence, and not controlling as matter of law. It is for the jury to consider in making

their estimate, and they may award such sum as they may find, upon all the evidence, including that drawn from the contract, is a rea-
(233) sonable value of the services (*Moore v. Nail Co.*, 76 Mich., 606; *Schauzenbach v. Brough*, 58 Ill. App., 526); the inquiry at last being, What are the services really worth? And the contract price is some evidence upon that question, it being in the nature of an admission or declaration of the parties as to the value, and having no more effect as evidence. It is certainly not conclusive upon the jury. Browne on the Statute of Frauds (5 Ed.), sec. 126.

There was error, therefore, in submitting the third issue as to the value of the 4 acres of land. The inquiry should have been as to the reasonable value of the services performed by plaintiff.

It was urged upon us that this being an action for services rendered in the sale of land, it is not within the statute of frauds, and *Abbott v. Hunt*, 129 N. C., 403, and other like cases were cited in support of the contention; but in those cases the promise was not to convey land, but to give money in compensation for the services. There is, therefore, no analogy between them and this case.

Defendant further contended that the court was without jurisdiction, as plaintiff recovered only $200; but he sued for $250, and apparently in good faith. At least, there is nothing to show that his claim was made in bad faith. It is the amount demanded in good faith that determines the jurisdiction, and not merely the amount of the recovery. *Boyd v. Lumber Co.*, 132 N. C., 184; *Thompson v. Express Co.*, 144 N. C., 389.

There was error in submitting the third issue, and thereby in effect confining the damages to the contract price.

New trial.

Cited: Deal v. Wilson, 178 N.C. 602 (1f); *Redmon v. Roberts*, 198 N.C. 164 (1f); *Grantham v. Grantham*, 205 N.C. 368 (1f); *Lipe v. Trust Co.*, 207 N.C. 796 (1f); *Norton v. McLelland*, 208 N.C. 138 (1f); *Price v. Askins*, 212 N.C. 588 (1f); *Stewart v. Wyrick*, 228 N.C. 432 (1f).

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MARTHA REGISTER, ADMINISTRATRIX OF JAMES C. REGISTER, v. TIDEWATER POWER COMPANY.

(Filed 1 April, 1914.)

1. Appeal and Error—Assignments of Error—Insufficiency.

Assignments of error which do not inform the Court upon the error alleged will be disregarded, and in this case they are held insufficient.

2. Electric Company—Master and Servant—Incidental Dangers—Trials—Negligence—Nonsuit.

The plaintiff sues an electric power, etc., company for the killing of her intestate, alleging negligence on the part of the defendant in not shutting off its current while the intestate, an employee, was engaged in his employment of working upon the wires of the company: *Held*, the intestate assumed the risks of all danger necessarily incident to the employment he was engaged in, and it appearing from the testimony of his own witnesses that the injury would not have occurred had he used the rubber gloves furnished him, and that he was an experienced person and should have known the danger in thus acting, a judgment as of nonsuit upon the evidence was properly rendered. The effect of the Fellow-Servant Act in its application to common carriers discussed by CLARK, C. J.

APPEAL by plaintiff from *Rountree, J.*, at October Term, 1913, of NEW HANOVER.

William J. Bellamy and John D. Bellamy & Son for plaintiff.
Davis & Davis and K. O. Burgwyn for defendant.

CLARK, C. J. The defendant moves to dismiss the appeal because the assignment of errors does not set out the exceptions and group them, but simply refers to the exceptions themselves.

The first assignment of error is: "The court erred in allowing the motion of the defendant to strike out certain portions of the complaint, as set forth in the first exception."

The second assignment of error is: "The refusal of the court to admit certain testimony, as set forth in the second exception." The assignments of error 3, 4, 5, and 6 are of like tenor.

These assignments give the Court no information, and must (235) be disregarded. *Porter v. Lumber Co.*, 164 N. C., 396; *Keller v. Fiber Co.*, 157 N. C., 575; *Jones v. R. R.*, 153 N. C., 419; *Smith v. Manufacturing Co.*, 151 N. C., 260; *Thompson v. R. R.*, 147 N. C., 413; *Lee v. Baird*, 146 N. C., 361. If these were the only assignments of error, the appeal would be dismissed. But the seventh assignment of error is for "sustaining the motion to nonsuit," which is as full as that can be made, and the eighth assignment is to the judgment, which being a matter on the face of the record proper, is deemed excepted to without any assignment. *Reade v. Street*, 122 N. C., 301.

The whole case, therefore, depends upon the correctness of the judgment of nonsuit.

The plaintiff's intestate was one of a gang of men employed by the defendant in removing certain electric light and power wires in Wilmington, N. C., from one pole to another, in the daytime, in June, 1912,

on a clear, dry day. While engaged in this work the plaintiff's intestate received an electric shock which killed him.

This action for wrongful death is based entirely upon the fact that the defendant did not shut off its current while the plaintiff's intestate was working on the wires. The plaintiff's witness Womack testified that it is "not customary, nor is it necessary, to do so." He testified that the employees of the company stood no possible danger of any injury in this work if they followed the directions of their employer and properly used the instrumentalities furnished them for their safety. He said that if Register had used the rubber gloves furnished him by the company he would not have been hurt. Register was an experienced electrician, had been working for the company eight years, and knew well the dangers incident to his employment. He knew that he could work in perfect safety upon any one of these wires, no matter how high the voltage, if he did not let himself come in contact with other wires, thus making a short circuit. Womack testified that the deceased was subjected to no unusual or extraordinary risks. He assumed the dangers necessarily incident to his employment, which was one of obvious
(236) and constant danger to those who did not employ caution and care and who failed to use the safeguards which were furnished them. There is no claim that the defendant could have made the risk less, or avoided the danger, by any means except by cutting off the current.

The plaintiff's witness Womack testified that if they had cut out the current at the power plant they would have cut out the entire light and power energy for the whole city for half a day. He further testified that it would have been just as dangerous to "cut out the wires" as to do the work they were doing. In sum, the testimony is that Register was not exposed to any risk beyond that incident to the business; that he was furnished with all necessary safe appliances, and that if he had used them he would not have been hurt.

The "Employment Liability" acts in thirty-eight States of the Union, the Federal statute, and similar acts in England, France, Germany, Australia, and in some other countries, have abolished the defenses of assumption of risk and contributory negligence, in whole or in part; but this has been done in this State only as to common carriers. Laws 1913, ch. 6. The plaintiff quotes the very just statement of Mr. Asquith, Prime Minister of Great Britain, that it is "revolting to every sentiment of justice that men who meet with death or injury through the necessary exigencies of their daily work should entail the whole loss upon their families." But to place any part of such loss upon the employer when

free of negligence requires legislation, which has not yet been enacted here as to all employments.

There was no evidence for the defendant. The court, at the conclusion of the plaintiff's testimony, properly held that no actionable negligence on the part of the defendant had been shown. The judgment of nonsuit is

Affirmed.

Cited: Rogers v. Jones, 172 N.C. 158 (1f); *Clements v. Electric Co.,* 176 N.C. 16 (2g); *Baker v. Clayton,* 202 N.C. 743 (1f).

(237)

T. L. TORREY ET AL. v. J. L. McFADYEN ET AL.

(Filed 1 April, 1914.)

1. Contracts—Reformation—Matters of Law.

For a written instrument to reform itself, without the intervention of a jury, the intent of the parties that it should be so regarded must be clear and should appear from the writing itself, and evidence *dehors* will not be considered.

2. Contracts—Options—Contracts to Convey—Time of the Essence.

A. executed and delivered to B. a paper-writing in which he acknowledged the receipt of $322.75 and agreed to "sell and convey" to him "the exclusive right and option to purchase on or before 1 December, 1911," a certain tract of land, fully described, for the price of $1,783.88, payment to be made at stated times: *Held*, the form of the writing is that of an option, though called in its premises or preamble an indenture, and requires payment in strict accordance with its terms, and is not a contract to convey the lands, wherein time is not of the essence of the contract in respect to such payment, and where damages for its breach may be recovered.

3. Contracts—Reformation—Fraud—Mistake—Money Received—Trials—Preponderance of the Evidence.

Where an unregistered option on lands has been given, which is sought to be reformed into a contract to convey them, and the lands have come into the hands of an innocent purchaser for value, so as to defeat the equity, the optionee, in his action to recover the money paid upon the allegation of false and fraudulent representations, is only required to establish his case by the preponderance of the evidence; and it is *Held* that the case may be tried upon one of two aspects: whether the parties mutually intended a contract instead of an option, and if so, whether the parties failed to express their real agreement by mutual mistake, or by the fraud of the one inducing the mistake of the other; or whether one of them was induced to part with his money by the fraud and deceit of the other.

TORREY *v.* MCFADYEN.

APPEAL by defendant from *Lyon, J.*, at November Term, 1913, of HOKE.

This action was brought to recover $322.75, paid by the plaintiffs to the defendant under the following circumstances: Defendant prepared, signed, and delivered to the plaintiffs, on 11 February, 1911, a paper-writing, not registered, in which, for the consideration of $322.75 (238) paid to him by them, he agreed to "sell and convey" to them "the exclusive right and option to purchase on or before 1 December, 1911," a certain tract of land fully described in the instrument for the price of $1,783.88, to be paid in three equal installments, the first of which was to be paid on 1 December, 1911. McFadyen bound himself to the agreement in the sum of $2,000 to make a good title to the land, with covenants of seisin and warranty and for further assurance, and also against encumbrances, but only upon payment to him of the purchase money within the time aforesaid. The instrument is called in the premises or preamble an "indenture." Plaintiffs paid the $322.75, but failed to pay the first installment of the purchase money on 1 December, 1911, or otherwise to signify their acceptance of the offer to sell, and on 8 December, 1911, after plaintiff's default, the defendant sold and conveyed the land to a purchaser for value and without notice of the transaction between plaintiffs and defendant or of any right plaintiffs had in or to the land.

Plaintiffs contend that the agreement, as we will call it for convenience, is a contract to sell the land to them, and also introduced evidence tending strongly to show that it was so intended by the parties, and that the defendant had represented to them that it was a contract or a deed for the land, and that they would not lose the money paid to him, but it would be paid back to them if they were unable to pay the balance.

Defendant denied all these allegations, and introduced contradicting evidence, claiming and testifying that the instrument is an option, and was so intended by the parties, and that the whole matter was fully explained to the plaintiffs.

The court held that the paper-writing was a contract to convey, and time of payment was not, therefore, of the essence of the contract, and that by not paying on the day fixed, plaintiffs did not forfeit their right to a return of the money paid by them, and it being admitted that defendant had disabled himself to perform the contract, judgment was entered for the plaintiffs to the effect that they recover the sum of $322.75 (239) and costs. Defendant excepted and appealed.

H. S. Kilpatrick and McIntyre, Lawrence & Proctor for plaintiffs.

Shaw & Currie, B. A. Justice, and Sinclair & Dye for defendant.

WALKER, J., after stating the case: If the instrument is an option, plaintiffs cannot recover, as they have not complied with it by accepting the offer and paying the first installment of the purchase money on the day named (*Weaver v. Sides,* 216 Pa. St., 301); but if it is a contract, they can recover, as defendant has conveyed the land to a person entitled to hold it against the plaintiffs, he being a *bona fide* purchaser for value and without notice. *Sprinkle v. Wellborn,* 140 N. C., 163, and cases cited; *Pritchard v. Smith,* 160 N. C., 79. The agreement bears a close resemblance to a contract to convey or bond for title, but we must hold it to be in form an option, as there is not sufficiently clear indication on its face that the parties intended it for a contract of purchase, so as to invoke the jurisdiction of a court of equity to reform or amend it, or to treat it as such a contract, upon a bare inspection or examination of the instrument itself, under the rule laid down in *Vickers v. Leigh,* 104 N. C., 248; *Smith v. Proctor,* 139 N. C., 314; *Bryan v. Eason,* 147 N. C., 284, where there is proper allegation upon which to base the exercise of its jurisdiction in this way. In such a case, that is, where the judge or chancellor acts by himself, without a jury, and makes the instrument reform itself, as the intent of the parties is apparent from its context, the evidence of the mistake of the parties in expressing their agreement is required to be drawn exclusively from the instrument, and facts *dehors* will not be considered. *Smith v. Proctor, supra; Helms v. Austin,* 116 N. C., 751.

The context of this paper-writing does not manifest an intention to give more than an option to buy, and the case, therefore, calls for evidence *dehors* the deed, if it is sought to establish a contract to sell or a bond for title. This necessarily requires the intervention of a jury to pass upon the disputed questions of fact.

The power to decree a reformation, upon the bare face of the (240) instrument, should be exercised sparingly and only in a clear case, as the authorities state. If this were not so, we would, of course, be in danger of making the agreement between the parties, instead of merely declaring what it is, as expressed in the instrument, or as plainly deducible therefrom.

There is ample evidence of the mistake in drawing the agreement and of the fraud, and this should be submitted to the jury, with proper instructions as to the law. Plaintiffs would also be entitled to recover if the payment was made under a false and fraudulent representation of the defendant, of which there is allegation and evidence.

This case does not impress us very favorably for the defendant. The written instrument is almost sufficient of itself to show a contract to sell the land, or a bond for title, as it is sometimes called, and not an option;

but it is not sufficiently so to warrant us in declaring it to be such on its face, or as matter of law, as the court below decided.

The plaintiffs, it appears, are illiterate, and, if their testimony is true, they were misled by false representations of the defendant into the acceptance of a paper which they thought either conveyed them the land or secured the title to them by contract upon their paying the balance of the purchase money, and there is much in the nature, circumstances, and surroundings of the transaction to sustain their allegation. If defendant falsely led them to believe that he was giving them a contract, when in fact it was an option, and they were induced thereby to take it, in the belief that it was a contract, the fraud of the defendant and the mistake of the plaintiffs brought about or induced thereby will lead the court either to reform or to cancel the instrument, as the justice of the case may require. *Wilson v. Land Co.*, 77 N. C., 445; *Sykes v. Insurance Co.*, 148 N. C., 13; Eaton on Equity, p. 304 (128).

It is immaterial which of the remedies is applied under the facts and circumstances of this case, as either will result in restoring the money paid by plaintiffs to them. Plaintiffs may recover if they establish their case by a preponderance of the evidence, provided they seek merely
(241) to recover the money back as having been obtained from them by a false and fraudulent representation. *Culbreth v. Hall*, 159 N. C., 588. If one party obtains money from another by a false and fraudulent representation, he is liable to the defrauded party for the amount so received in an action for the deceit, and it requires only a preponderance of evidence to establish his case. *Pritchard v. Smith*, 160 N. C., 79, at p. 87. If he seeks to reform the instrument because of the other's fraud and his mistake, or because of a mutual mistake, the proof is required to be clear, strong, and convincing.

The case may be tried in any one of two aspects: first, whether the parties mutually intended a contract instead of an option, and if so, whether the parties failed to express their real agreement by mutual mistake, or whether they so failed by the fraud of the defendant and the mistake of the plaintiffs induced thereby; or, second, whether the plaintiffs were induced to part with their money by the fraud and deceit of the defendant. 20 Cyc., p. 87; Bigelow on Fraud, 63-67; *Van Gilder v. Bullen*, 159 N. C., 291. A verdict for plaintiffs in either aspect will entitle them to judgment for the money paid to defendant. The pleadings may be amended, if desired and the parties are so advised, though we do not intend by this to intimate that all of the views may not be well presented in the present pleadings. There does not seem to be any distinct allegation of mistake, though we perhaps might infer it by a most liberal construction of the complaint.

The court erred in holding, as matter of law, that the agreement is a contract to convey, and not an option.

New trial.

(242)

O. W. SASSER v. HALES-BRYANT LUMBER COMPANY.

(Filed 1 April, 1914.)

Trials—Verdicts Consistent—Contributory Negligence — Negligence — Assumption of Risks—Damages.

In an action to recover damages for a personal injury alleged to have been negligently inflicted on the plaintiff, the jury, by their verdict, found the defendant guilty of negligence, the plaintiff of contributory negligence, that there was no assumption of risks, and assessed the damages: *Held*, the jury having found the issue as to contributory negligence against the plaintiff, the judgment for defendant was properly rendered, the findings upon the issues of negligence, contributory negligence, and damages not being insensible and inconsistent, and the finding as to assumption of risk not relieving the plaintiff of the consequences of his contributory negligence.

APPEAL by plaintiff from *Lyon, J.*, at September Term, 1913, of CUMBERLAND.

Civil action tried upon these issues, viz.:

1. Was the plaintiff injured by the negligence of defendants, as alleged? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to his injury? Answer: Yes.

3. Did the plaintiff voluntarily assume the risks and dangers incident to and attendant upon the operation of the edger? Answer: No.

4. What damages, if any, is plaintiff entitled to recover? Answer: $1,500.

Upon the return of the verdict, under a consent order, it went over to the October Term, 1913, of the Superior Court. At the October, 1913, Term of said court plaintiff moved the court to set aside the verdict and for a new trial, contending that the court could not proceed to judgment on the verdict, for the reason that the answers to the issues were inconsistent and contradictory.

The court overruled the plaintiff's motion, and rendered judgment upon the issues that the plaintiff was not entitled to recover anything, and that the defendant go without day and recover costs.

From the judgment rendered, the plaintiff appealed.

(243) *Stringfield & Stringfield and O. P. Dickinson for plaintiff.*
Winston & Biggs for defendant.

BROWN, J. It is settled by the decisions of this Court that, in an action of this character, where the jury find that the plaintiff was injured by the negligence of the defendant, and further find that the plaintiff by his own negligence contributed to his injury, and then assess damages, the plaintiff is not entitled to recover, and the defendant is entitled to judgment upon the issues.

The force and effect of the establishing on contributory negligence upon the part of the plaintiff is only obviated by the further finding under a third issue that the defendant by the exercise of ordinary care could have avoided the injury notwithstanding the negligence of the plaintiff. *Baker v. R. R.,* 118 N. C., 1016; *Harvell v. Lumber Co.,* 154 N. C., 262; *Hamilton v. Lumber Co.,* 160 N. C., 51.

In the case *Justice Allen* says: "The plaintiff cannot recover as long as the answer to the second issue (establishing contributory negligence) stands." This case cites and approves *Baker v. R. R., supra,* and holds that the respective findings of negligence, contributory negligence, and damages are not insensible and inconsistent, and the defendant is entitled to judgment.

The finding of the jury upon the third issue in this case relating to assumption of risk does not relieve the plaintiff of the consequences of his contributory negligence.

"There is a clearly marked line of divide between assumption of risk and contributory negligence," said *Justice Walker in Pigford v. R. R.,* 160 N. C., 97. They are not one and the same thing, and, as is said by *Justice Hoke* in *Pressly v. Yarn Mills,* 138 N. C., 414, "It is usual and in most cases desirable to submit this question to the jury on a separate issue as to assumption of risk."

Affirmed.

Cited: Holton v. Moore, 165 N.C. 550 (f); *Oates v. Herrin,* 197 N.C. 173 (g); *McKoy v. Craven,* 198 N.C. 781 (f); *Allen v. Yarborough,* 201 N.C. 569 (g); *Crane v. Carswell,* 203 N.C. 556 (f).

(244)

A. A. CARTER v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 1 April, 1914.)

1. Appeal and Error—Trial—Instructions—Verdict—Harmless Error.

Error in the charge of the judge upon an issue answered in appellant's favor is cured by the verdict, and is harmless.

2. Carriers of Passengers—Alighting from Moving Train—Invitation—Contributory Negligence.

A passenger upon a moving railway train is not justified in jumping therefrom to his injury by the mere fact that he is being carried away from his station; though he may recover for the consequent damages he has sustained if his act was upon the inducement or suggestion of an employee of the train, acting within the scope of his duties, when the circumstances are such that a person of ordinary care and caution would apprehend no danger in doing so, and provided he otherwise exercised due care in alighting. When the evidence is conflicting, the question is one for the jury.

3. Same—Trials—Evidence—Verdict—Judgments.

Where a passenger on a railway train has been injured by jumping therefrom while the train is in motion, and the evidence in his action to recover damages is conflicting as to whether he did so upon the inducement or invitation of the porter thereon, or whether the train was moving at such speed that a person of ordinary prudence and caution would, notwithstanding, have not done so, and under proper instructions the jury have answered the issue of contributory negligence in the defendant's favor, it is established by the verdict that the plaintiff was negligent in either one or the other of the views presented, and a judgment denying recovery is properly rendered, though the first issue, as to defendant's negligence, has been found in plaintiff's favor.

4. Instructions—Prayers Substantially Given—Appeal and Error.

It is not error for the trial judge to give, in his own language, a requested prayer for instruction, if he substantially gives it without weakening its force.

5. Carriers of Passengers—Alighting from Moving Train—Contributory Negligence—Trials—Evidence.

It is contributory negligence for a passenger to attempt to alight from a railway train running 10 to 15 miles an hour, notwithstanding he was told to do so by an employee in charge of the train; and in this case it is further held that the manner in which the plaintiff struck the ground and was injured was some evidence as to the speed of the train, and it was not improper for the court to so state in the charge.

APPEAL by plaintiff from *Peebles, J.*, at September Term, 1913, (245) of WARREN.

Action to recover damages for personal injuries alleged to have been caused by defendant's negligence, in that plaintiff alighted from a moving train under direction from the porter, and when it was not apparently dangerous to alight. The jury found, upon the issues submitted to them, that defendant was negligent and plaintiff was guilty of contributory negligence.

The court charged the jury, on the first issue, that if plaintiff went upon the train, with the knowledge of the conductor, to assist Mr. W. J. Clark in helping his blind wife to get into the coach, and in procuring a seat for her, and he was not allowed reasonable time to do so before the train started again, they should answer the first issue "Yes"; but that plaintiff had no right to stay on the train longer than was reasonably necessary for that purpose, and if he did so, the fault was his, and not the defendant's. He then stated that one witness, a railroad employee, had testified that the train stopped four minutes at Littleton, where plaintiff was hurt, but directed the jury afterwards to be guided by their own recollection of the testimony, and not by his, if he had stated it incorrectly.

Plaintiff testified that, at Mr. Clark's request, he assisted Mrs. Clark, who was blind, and the train started before he could get her a seat. When they had gone as far as the middle of the car, he saw that the train was moving. He left Mrs. Carter standing in the aisle with her husband, and started back to the platform. The aisle and platform were crowded, and the porter said to him "You can get right off here" (designating the place with his hand), and he then alighted and thought it was safe, as the train was moving slowly—just moving along. After he stepped off, he struck a pile of rock at the end of a culvert and stumbled over it and fell 5 or 6 feet into a ditch, and was bruised and scarred, and his clothes were torn.

(246) One of plaintiff's witnesses, J. H. Harvey, testified that as he started to jump, he looked back towards the train and towards him, with his right foot forward, and when he jumped he struck the ground about 5 feet this side of the culvert and fell over it "about as far as from here to the table"—about 6 or 8 feet—the top of the culvert being 4 feet higher than the place where he fell. It had been there a long time.

The witnesses differed as to its distance from the station, one saying 100 feet and another as much as 280 or 290 feet.

The conductor and porter testified in contradiction of plaintiff, both saying they were in another part of the train and did not see him, and did not know he was on board, and the porter that he did not show him the place from which he could alight; that he was at the rear end of the train.

There was evidence corroborating plaintiff as to the porter seeing him when he alighted from the train, and also evidence that he was "full of liquor" on Sunday before the Easter Monday (8 April, 1912) when he was hurt. He got three packages of liquor from the express office on Saturday before, but those who assisted him after he fell stated that there was no indication, at that time, that he had been drinking.

There also was evidence that plaintiff had stated that it was his own fault, and he did not blame the company; that he did not notify the conducter, and there was no employee there when he jumped.

One witness for defendant, L. F. Shearin, plaintiff's business partner, testified: "While I was carrying Mr. Carter home I asked him how he got hurt, and he said Mr. Clark asked him to help get his wife on the train, and when he got on the train he started back out of the car; that there was a crowd in the aisle and delayed him when he got to the door; that the train started off and he did not think it was running fast enough to hinder him from getting off, and it threw him. He did not say anything about seeing the conductor there, or the porter. He said if he had been attending to his business, he would not have gotten hurt; that he had no business on the train." Others of defendant's witnesses testified that he did not mention the conductor or the porter in (247) speaking to them about the accident.

The jury, under the evidence and instructions of the court, answered the first issue, as to negligence, "Yes."

Upon the second issue plaintiff requested the following instruction: "If the jury find from the evidence that the plaintiff, not being a trespasser upon the defendant's train, and while in the act of alighting from the same, was induced by the words or the acts of the porter to get off the said train while the same was in motion, and that the train was going slow, and was so slow that the danger of stepping or jumping off was not apparent to a reasonable man, and he did so and was injured, it would not be contributory negligence, and you will answer the second issue No."

This instruction was not given, except as it is covered by the charge upon the second issue, which was as follows:

"1. Did the plaintiff by his own negligence contribute to his injury? The plaintiff admits that he jumped off the train while it was moving. I think he said, or one witness said, he fell as far as from the chair to the table; if he moved out and off the train while it was moving, then he was guilty of contributory negligence, and you should answer the second issue 'Yes,' unless you are satisfied that the porter caused him to jump off. (He did not say that the porter caused him to jump off; he said that he started off at the end where he got on, and found that the aisle

was full, and that he turned and went to the other end of the coach and found some people on the steps and found difficulty in getting down there, and some one with a uniform on like a railroad porter said, 'Here is a place you can get off'; he then turned and got off on the other side.)

"2. If he was induced to get off there by the porter, that the porter caused him to do it, you will answer that issue 'No,' unless you are satisfied from all the evidence that the train was running at a speed so great as to show plainly to everybody, a reasonable man, that it would be dangerous to jump off at that place. (If the train was going at the rate of 15 or even 10 miles an hour, it was his duty not to notice anything the porter said to him at all, because it would be evident (248) that it would be dangerous to get off. One of the witnesses said it was slow—so slow that he thought he could get off. Some of the witnesses said it was running 15 miles an hour. Whenever you come to consider the speed that it was running, you may take into consideration what the plaintiff said, what that witness said, and what the plaintiff said about his falling about as far as from the chair to the table. You may take that evidence into consideration when you come to consider how fast the *train was moving.*)

"3. If I get the evidence wrong, you must be guided by your recollection and not by mine; after all, you are the sole judges of what they say. And now, if the porter did tell him to get off, and he was negligent in getting off, you will answer the second issue 'Yes.' (When any man gets off a moving train, it is his business to look ahead and see where he is going to land, to see whether there is any obstacle there to increase the danger of getting off; and if he could, by the exercise of ordinary care, have seen the culvert was there and it was dangerous to jump off near it, he was guilty of contributory negligence in getting off at that *particular point.*)"

Plaintiff excepted to the part of the charge in parentheses. The jury answered the second issue, as to contributory negligence, in the affirmative. Judgment was entered for the defendant, and plaintiff, thereupon, appealed.

S. G. Daniels and J. H. Kerr for plaintiff.

Murray Allen for defendant.

WALKER, J., after stating the case: If the judge expressed any opinion as to how long the plaintiff remained on the train, it was in the part of his charge upon the first issue, and as the jury answered that issue in favor of the plaintiff, the error, if any, was thereby cured and became harmless. This is a well settled principle, and is undoubtedly a correct

one. *Vickers v. Leigh,* 104 N. C., 248; *Graves v. Trueblood,* 96 N. C., 495; *Thornburg v. Mastin,* 93 N. C., 258; Clark's Code (3 Ed.), p. 771, note to section 550, and cases; 3 Womack's Digest, pp. 18 and 19, where the numerous cases are referred to. Where the jury cor- (249) rects an error, if one has been committed by the trial court, it is disregarded, because unprejudicial and eliminated by the verdict. Error alone is not sufficient to reverse, but there must be some harm to the party who excepts, by reason thereof; not that he must affirmatively show injury, but if it appears that there is none, his exception fails. 3 Cyc. (title, Appeal and Error), p. 383 *et seq.* There was evidence by two witnesses, and taken from the record, that the train stopped four minutes, but whether plaintiff had fully this time to perform his act of gentle courtesy and leave the train before it resumed its journey, related to the first issue, as we have shown, and plaintiff won on that part of the case. He has not, therefore, been hurt.

The real question is, Was he guilty of negligence himself when leaving the train? This is to be determined by his conduct at the time. If the train was running at the rate of 10 or 15 miles the hour, and increasing its speed, he was clearly negligent in jumping from it. Such an act was, on its face, a reckless one. But the court, as we think, correctly instructed the jury according to the accepted doctrine of the courts, and of this Court especially, which may be thus stated: Although the passenger, by the refusal of the railway company to stop its train, may be carried beyond his destination unless he alights while the train is in motion, he will not be justified in attempting to alight, notwithstanding an invitation to do so by an employee acting in the line of his duty, if the speed of the train is so great that the danger of alighting is apparent, or if circumstances exist making the attempt obviously perilous. In such cases, prudence would require him to submit to the wrong and to seek his redress for it in an action against the carrier, if he should be blamable. A passenger would only be justified in such attempt to avoid the inconvenience by leaving the vehicle while in motion when the circumstances were such as to induce a person of ordinary prudence and caution to believe that no danger was to be apprehended from such a course. 3 Hutchison on Carriers, sec. 1180 and notes. This accords with our own decisions.

In *Johnson v. R. R.,* 130 N. C., 488 (opinion by the present (250) *Chief Justice*), this Court approved a charge not, in substance, unlike that of Judge Peebles in this case. It was held that if the carrier's employee, acting within the line of his duty, either by his words or conduct induces another, who is lawfully on the train, to alight therefrom, the latter is justified in doing so, provided it would not appear to

a man of ordinary prudence dangerous to make the attempt at the time, and provided further, he otherwise exercised due care in alighting. Said the Court: "If upon such an invitation the plaintiff did alight, the speed of the train not being such as to put him on guard" not to act on the assurance thus given by the employee, the contributory negligence of plaintiff was not so manifest as to become a matter of law, but was for the jury upon the facts, as they found them to be. This is the clear substance of the opinion, with some of the language of the Court.

This was the view taken by Judge Peebles in the case at bar, and he therefore left it to the jury to say, by their verdict, whether the invitation to alight, express or implied, was given by the porter, and if it was, whether alighting, at the time and under the circumstances, would have appeared to a man of ordinary prudence obviously dangerous, and if they found the danger was so apparent that an ordinarily prudent man would not have taken the risk, plaintiff was guilty of contributory negligence in doing so. So he submitted the question in two branches: first, was the invitation given, and, second, was the plaintiff negligent, notwithstanding the invitation, in taking an obviously dangerous chance of being injured? The jury found, either that no invitation was given, or, if it was, that the plaintiff had himself been negligent, as the danger was obvious.

The Court held, in *Browne v. R. R.*, 108 N. C., 34 (cited in *Johnson's case, supra*), that the act of getting on or off a moving train is evidence of contributory negligence, and imposes on one who is injured in doing so the burden of proving that the peculiar circumstances of the case justified him in such course. A common carrier of passengers is under no
(251) obligation to delay the departure of its trains, or to look after the safety of persons who attempt to enter them, when they have been stopped long enough to allow passengers to embark and disembark; but it may be liable for injuries suffered by one who, by the invitation or command of persons in charge of the trains, attempts to get on or off while the cars are in motion, provided he does not expose himself to manifest danger.

Burgin v. R. R., 115 N. C., 673 (opinion by *Shepherd, J.*), was a case where plaintiff alleged merely that the conductor promised to stop for him to get off at Round Knob, but failed to do so, and that being, at the time, on his way home and anxious to see his child, who was sick and in a dying condition, he jumped from the train as it was passing the station, and was injured; held, on demurrer, that the complaint was bad, the Court saying: "We think there can be no question as to the correctness of the ruling sustaining the demurrer. The general rule is that passengers who are injured while attempting to get on or off a moving train

cannot recover for the injury. *Browne v. R. R.*, 108 N. C., 34; Hutchison Carriers, sec. 641. In *Lambeth v. R. R.*, 66 N. C., 494, it was said: 'If the intestate, without any direction from the conductor, voluntarily incurred danger by jumping off the train while in motion, the plaintiff is not entitled to recover.' In addition to these authorities, there are a number to be found in other jurisdictions which abundantly sustain the proposition that it is contributory negligence to 'attempt to alight from a moving vehicle, although, in consequence of the refusal of the carrier to stop, the passenger will be taken beyond his destination, unless he is invited to alight by some employee of the carrier whose duty it is to see to the safe egress of the passengers from the conveyance. The mere fact that the train fails to stop, as was its duty, or as the conductor promised to do, does not justify a passenger in leaping off, unless invited to do so by the carrier's agent, and the attempt was not obviously dangerous,'" citing *Walker v. R. R.*, 41 La. Ann., 795; *Jewell v. R. R.*, 54 Wis., 610; *R. R. v. Morris*, 31 Grattan (Va.), 200; *Nelson v. R. R.*, 68 Mo., 593; 2 Wood on Railways, 1133, and adding that there are many other cases to the same effect.

There was some evidence in *Lambeth v. R. R.* (66 N. C., 495), (252) which, though, was disputed, that plaintiff alighted from a moving train by the invitation or command of the conductor, and the Court said with respect to this phase of the case: "If the intestate, without any direction from the conductor, voluntarily incurred danger by jumping off the train while in motion, the plaintiff is not entitled to recover. If the motion of the train was so slow that the danger of jumping off would not be apparent to a reasonable person, and the intestate acted under the instructions of the manager of the train, then the resulting injury was not caused by contributory negligence or a want of ordinary care," citing Sh. and Redf. on Negligence, chs. 15 and 27. These authorities have all been since approved by this Court as stating the true principle applicable to such cases. *Morrow v. R. R.*, 134 N. C., 92; *Denny v. R. R.*, 132 N. C., 340; *Hinshaw v. R. R.*, 118 N. C., 1047; *Hodges v. R. R.*, 120 N. C., 556; *Watkins v. R. R.*, 116 N. C., 962.

We said in *Morrow v. R. R., supra,* that "All of our cases are based upon what was held by this Court in *Lambeth v. R. R.*, 66 N. C., 494 (8 Am. Rep., 508), which has been conceded, for many years, to be the leading and controlling authority with us upon the question." And in *Watkins v. R. R., supra, Justice Clark* said: "The case of *Burgin v. R. R.*, (115 N. C., 673) holds that the passenger is not justified in leaping from the train while in motion, unless invited to do so by the carrier's agent, and when it is not obviously dangerous," and approves *Lambeth's case.*

The reason for this being an exception to the general rule, that it is negligence for a person to alight from a moving train, is that the invitation of the conductor, porter, or other employee of the carrier, acting in the course of his duty, to alight, is equivalent to an assurance that it can safely be done at the time and place, and the person may reasonably act upon this implied assurance, in the absence of any facts or circumstances which obviously show that it is dangerous, so that a man of ordinary prudence would not take the chance of injury thus facing him. It is not only a firmly settled rule, but is also an eminently just and (253) reasonable one, and it has been adopted in a case of great weight (*R. R. v. Egeland,* 163 U. S., 93). The court, therefore, properly left the question to the jury, whether the invitation was given, and if so, whether the danger was so obvious that a man of ordinary prudence would not have acted upon the invitation and incurred the risk.

The judge did not give the instruction in the language used by counsel in framing it, nor was he required to do so. No rule of practice is better settled than that a judge is not bound to give instructions in the identical words of a request, if the matter or principle embraced therein is correct and amply presented. *Annuity Co. v. Forrest,* 152 N. C., 621. It is sufficient to comply with the request in substance, with this cautionary limitation, that while the judge is not confined to the exact language of a prayer for instructions, as selected by counsel, and keeps within the law if he gives it substantially and so that the jury may fully understand its meaning, he cannot so alter the phraseology as thereby to weaken its force. *Graves v. Jackson* 150 N. C., 383; *Rencher v. Wynne,* 86 N. C., 268. It may often be proper to change the language so as to enlarge or restrict the scope of the instruction, or to apply correct legal propositions, abstractly stated, to the concrete case presented by the evidence. We think the judge fully complied with this rule, although he departed from the very words of the instruction, as he had the right to do. He explained to the jury the principle of law as applicable to the different phases of the evidence, and did it with perfect accuracy. He told the jury that if the porter gave the invitation, and plaintiff was induced or caused thereby to get off at the place where the culvert was, they would answer the second issue "No," unless they were satisfied, from all the evidence, that the train was moving at a speed so great as to show plainly to everybody—a reasonable man—that it would be dangerous to jump off at that time and place. How could he have expressed it any better or more strongly for the plaintiff? What he added to this instruction surely did not vitiate it. If the train was running at the rate of 10 or 15 miles an hour, it was reckless to jump from it. There could be no two reasonable opinions as to his negligence in such a

case. *Burgin v. R. R., supra; Morrow v. R. R., supra; Whit-* (254) *field v. R. R.,* 147 N. C., 236, and the other cases already mentioned. His danger from jumping was not only obvious, but may well be said to have been imminent and inevitable. His escape from it would have been almost miraculous and, at least, providential. There could be no justification for taking any such risk, and the injury would be imputable to his own folly, and he would have himself to blame as the real author of his misfortune.

The jury found that he did not receive the invitation from the porter, or that he acted negligently, when he could see the danger for himself and correctly gauge the risk, and this being so, the answer to the second issue was right.

The other exceptions become unimportant, in view of what we have said. They relate to the first issue, or were taken to harmless rulings.

It is immaterial as to which side of the platform he jumped from; whether he was invited to do so by the porter and it was not dangerous, or he was not thus invited, or it was obviously dangerous. In the first view he was not, and in the last he was, guilty of contributory negligence. His own conduct was under review, without regard to the particular part of the steps or platform he used as the *locus a quo,* and he was given the full benefit of this phase of the case.

We have treated the question as if plaintiff was rightfully on the train, with substantially the privileges of a passenger, under *Morrow v. R. R., supra,* and *Whitley v. R. R.,* 122 N. C., 987; and not as a trespasser, or a mere licensee. But he is subject, also, to the rule applicable to passengers, as laid down in *Johnson v. R.R., supra,* and other cases of like tenor, which we have cited, and which have been approved recently by us in *Owens v. R. R.,* 147 N. C., 357, where the Court, quoting from *Johnson v. R. R.,* says: "It is the duty of the passenger, who sees the train in motion, to ask for it to be stopped; and if it is not done, he ought not to get off"; and also in *Reeves v. R. R.,* 151 N. C., 318, where it is said: "We admit the general rule, as well established, that persons injured while attempting to get on or off a moving train cannot recover for any injuries they may sustain," excepting, however, (255) train hands, brakemen, and the like, under certain circumstances.

Our first impression of the case was that the judge had not recited the evidence correctly to the jury, but had told them that the plaintiff was directed by the porter to get off at one side of the platform, when he disobeyed, crossed over to the other side, and jumped from the steps. A careful examination of the record convinces us that we misapprehended what the judge did say, as to this feature of the case, and find that he

substantially and fairly followed the course of the evidence throughout, and also cautioned the jury to rely on their own recollection of it.

We do not see the impropriety of the judge stating that the manner in which the plaintiff struck, or fell on, the ground might be considered by them upon the question as to the speed of the train. It was a circumstance tending to prove the fact, and, besides, was somewhat in conflict with plaintiff's statement that the train was moving very slowly.

A critical review of the record has not disclosed any error committed on the trial of the case. The jury having found that the plaintiff's negligence contributed to his injury, judgment was properly entered for the defendant. *McAdoo v. R. R.*, 105 N. C., 140; *Baker v. R. R.*, 118 N. C., 1015; *Harvell v. Lumber Co.*, 154 N. C., 262; *Hamilton v. Lumber Co.*, 160 N. C., 51; *Sasser v. Lumber Co., ante*, 242.

The exceptions as to damages are now immaterial.

No error.

Cited: Holton v. Moore, 165 N.C. 551 (3f); *Guano Co. v. Mercantile Co.,* 168 N.C. 226 (4g); *S. v. Kincaid,* 183 N.C. 718 (4f); *S. v. Beam,* 184 N.C. 742 (1f); *Leavister v. Piano Co.,* 185 N.C. 155 (4f); *S. v. Miller,* 185 N.C. 683 (1g); *McKoy v. Craven,* 198 N.C. 781 (3f); *Stamey v. R. R.,* 208 N.C. 669 (5f); *Caldwell v. R. R.,* 218 N.C. 72 (4f); *Carter v. Bailey,* 221 N.C. 278 (5g).

ALLEN ALSTON v. K. P. HILL ET ALS.

(Filed 1 April, 1914.)

Deeds and Conveyances—Contracts—Consideration—Criminal Prosecution—Trials—Question for Jury.

While the court will declare null and void notes or conveyances made upon the sole consideration of suppressing or stifling a criminal prosecution, they will not do so as a matter of law upon the pleadings to set aside alleged transactions of this character when the facts are not admitted; and whatever inferences may be drawn from the pleadings are questions of fact for the determination of the jury.

(256) APPEAL by defendants from *Cooke, J.*, at February Term, 1914, of FRANKLIN.

Civil action. The court rendered judgment in favor of the plaintiff upon the pleadings. Defendant appealed.

B. G. Mitchell, T. T. Hicks for plaintiff.

W. H. Yarborough, Jr., Bickett, White & Malone for defendants.

BROWN, J. This is a civil action, brought to set aside a certain deed of trust upon the ground that its execution was procured by an agreement to suppress a criminal prosecution.

There are also allegations in the complaint practically charging, further, that the said deed was executed under duress. It appears from the complaint that the defendants charged the plaintiff with having bought seed cotton upon which the defendants had a mortgage, from one Fowler, in the nighttime, contrary to the statute in such cases made and provided; that a warrant was duly issued by a justice of the peace, and upon this warrant plaintiff was arrested; that after his arrest he assumed the payment of the debt secured by the mortgage on the cotton he was charged with having bought in the nighttime, and the said mortgage was transferred to him; that thereafter the magistrate dismissed the case against the plaintiff upon the ground that no one appeared to prosecute him.

The plaintiff alleges that he was practically forced into signing the mortgage under threats of criminal prosecution, and was told that he would be discharged if he executed the paper.

These allegations are denied by the defendants.

Then the defendants in their answer aver that "The facts in relation to the whole matter are as follows:

"That one John Fowler was indebted to the Hill Live-stock Company in a large amount, towit, . . . and secured by crop liens and chattel mortgages; that said mortgagees were reliably informed (257) that said plaintiff, Allen Alston, had conspired with said John Fowler to cheat and defraud them by an unlawful disposition of the said crops, by the purchase during the nighttime from the said Fowler of crops conveyed to them in said liens.

"Acting upon such information, said mortgagees had plaintiff arrested upon a warrant charging him with the buying of seed cotton from said Fowler during the nighttime.

"After his arrest, and before he came to Louisburg, said plaintiff told said Hudson that he wanted to fix the matter up and arrange it; that he admitted his guilt, and said in the presence of said Fowler and son that he had bought the cotton from them; said plaintiff at first denied to Hudson that he had bought cotton from Fowler and son, and when he was brought in the office of defendant he again denied it, and said he would like to face the man who would say he bought the cotton from Fowler at night; then the Fowlers were brought from jail and told him that he had

bought the cotton from them at night, but had not paid them for it, except some shoe work; then said plaintiff admitted that he had bought cotton, and agreed that he would take and secure the Fowler claim if they would transfer it with the mortgage to him.

"He then agreed to execute the trust deed, as set out in the complaint, and directed said mortgagees to transfer the Fowlers' mortgages and notes to him, which was done.

"No threats of prosecution were made to plaintiff, but, on the other hand, the plaintiff begged and entreated the defendant Hill to allow him to make said arrangements and to assume the payment of the Fowler debt to them.

"While said Alston was under arrest, he asked that he might see a lawyer, and the defendant Hill said that they would send for any lawyer that he wanted to see, or the officer would take him up town to see one."

The single question presented by this appeal is whether or not the court was justified in finding as a fact upon the pleadings that
(258) the deed of trust was executed in consideration of an agreement to stifle a criminal prosecution.

There is no question that an agreement to suppress or stifle a criminal prosecution, if made as the sole consideration for a note or conveyance of property, will avoid the transaction, and the courts will declare such contracts or deeds null and void. *Lindsay v. Smith,* 78 N. C., 329; *Griffin v. Hasty,* 94 N. C., 438; *Commissioners v. March,* 89 N. C., 268.

There are undoubtedly facts and circumstances admitted in the pleadings in this case from which it could be inferred, if such pleadings are put in evidence, that there was an agreement not to prosecute the plaintiff, and that such was the consideration for the deed in trust, but it is for the jury to draw such inference, and not the judge.

A motion for judgment upon the pleadings is in the nature of a demurrer, and every intendment must be taken against the party making such motion. Every fact necessary to be established as a basis for the judgment asked must be admitted either by a failure to deny a specific allegation or by a specific admission of the facts.

Averments in the pleadings of the moving party are not necessarily to be taken as true, unless there is an absolute failure to deny them, or unless they are specifically admitted. 31 Cyc., 605.

We do not find such admissions in these pleadings as necessarily establish as matter of law the cause of action set out in the complaint.

The cause is remanded, with direction to submit appropriate issues to a jury. The parties may amend their pleadings and make them more specific, if desired.

Reversed.

Cited: Churchwell v. Trust Co., 181 N.C. 25 (g); *Pridgen v. Pridgen*, 190 N.C. 104 (g); *Barnes v. Trust Co.*, 194 N.C. 373 (g); *Oldham v. Ross*, 214 N.C. 698 (g); *Cody v. Hovey*, 216 N.C. 393 (g).

(259)

SAMUEL MARCOM v. DURHAM AND SOUTHERN RAILWAY COMPANY.

(Filed 1 April, 1914.)

1. Trials—Instructions—Appeal and Error—Railroads—Negligence.

In the trial of causes in the Superior Court, when material evidence has been introduced presenting or tending to present a definite legal position or having definite legal value in reference to the issues or any of them, and a specific prayer for instruction concerning it is properly preferred which correctly states the law applicable, such prayer must be given, and unless this is substantially done either in direct response to the prayer or in the general or some other portion of the charge, the failure will constitute reversible error; and in this action to recover damages for a personal injury it was error for the judge to refuse to give a prayer for instruction predicated upon evidence of the defendant tending to show that the injury complained of did not occur as claimed by plaintiff, but while he was attempting to ride upon its train for his own purposes.

2. Appeal and Error—Negligence—Distribution of Recovery—Harmless Error.

In an action to recover damages of a railway company for a personal injury alleged to have been negligently inflicted on the plaintiff, where all the parties are properly before the court, the distribution of the amount of the recovery, should any be had, is of no legal interest to the defendant; nor can it complain of error alleged in the charge restricting the amount of recovery, as such is in its favor.

APPEAL by defendant from *Cooke, J.*, at May Special Term, 1912, of WAKE.

Civil action to recover for loss of services of a minor, attributed by plaintiff to the negligence of defendant company.

P. J. Olive, R. N. Simms, and Little & Barwick for plaintiff.

Herbert E. Norris for defendant.

HOKE, J. It is a recognized rule with us that in the trial of causes in the Superior Court, when material evidence has been introduced presenting or tending to present a definite legal position or having definite legal value in reference to the issues or any of them, and a specific prayer for instruction concerning it is properly preferred (260)

which correctly states the law applicable, such prayer must be given, and unless this is substantially done either in direct response to the prayer or in the general or some other portion of the judge's charge, the failure will constitute reversible error. *Irvin v. R. R.*, 164 N. C., 6; *Mosely v. Johnston*, 144 N. C., 258; *Baker v. R. R.*, 144 N. C., 36; *S. v. Gaskins*, 93 N. C., 547; *Brink v. Black*, 77 N. C., 59; *S. v. Dunlop*, 65 N. C., 288; Thompson on Trials, sec 2347.

A very full and satisfactory statement of the principle, with differing phases of its application, will be found in *Baker's case, supra*, opinion by *Associate Justice Walker*, pp. 41 and 42, as follows: "It is also true that the court is not obliged to adopt the very words of an instruction asked to be given, provided in responding to the prayer it does not change the sense or so qualify the instruction as to weaken its force. *Brink v. Black*, 77 N. C., 59; *Chaffin v. Manufacturing Co.*, 135 N. C., 95. These are rules which are observed in all appellate courts. But it is an equally well established rule that if a request is made for a specific instruction, which is correct in itself and supported by evidence, the court, while not required to adopt the precise language of the prayer, must give the instruction, at least in substance, and a mere general and abstract charge as to the law of the case will not be considered a sufficient compliance with this rule of law. *Knight v. R. R.*, 110 N. C., 58; *Chesson v. Lumber Co.*, 118 N. C., 59; *S. v. Dunlop*, 65 N. C., 288; *Young v. Construction Co.*, 109 N. C., 618.

"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 especially 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. We have so distinctly held recently in the case of *Horne v. Power* (261) *Co.*, 141 N. C., at p. 58, in which *Justice Connor*, speaking for the Court and quoting with approval from *S. v. Dunlop*, 65 N. C., 288, says: 'Where instructions are asked upon an assumed state of facts which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the questions so presented and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts; and so in respect to every state of facts which may be reasonably assumed upon the evidence.' "

In the case before us there was evidence on part of plaintiffs tending to show that, in December, 1910, Sammy Marcom, the minor, was engaged in unloading a freight car of defendant at the depot at Apex, N. C., and, while so engaged, defendant company backed a freight train against the car without notice or warning, just as said minor was moving a barrel of lime from the car, and by force of the impact and subsequent movement of the car to which the train had been coupled said Sammy Marcom was thrown down and rolled between the car and a platform, etc., and thereby received serious and painful injury.

There was evidence on the part of defendant introduced tending to show that, before moving against the car, the agents and employees of defendant made an examination of the same, and found no one in the car at the time, and, further, that said Sammy Marcom, at the time, was seen standing with another boy at a fire, away from the car, and that he was injured afterwards by voluntarily endeavoring to ride on the car as it was moved back and forth along the track, etc. In apt time written prayers for instructions, signed by counsel of defendant, as to the legal bearing of defendant's testimony, if accepted by the jury, were presented to the court, and we find no sufficient response made thereto either directly or in the general charge, and, under the rule, as stated, the failure must be held for reversible error.

All of the persons interested in the minor's services having been made parties plaintiff, the correct division of the proceeds, in case of recovery had, would seem to be of no legal interest to defendant (*Hocutt v. R. R.*, 124 N. C., 214), and the restriction on the (262) amount of recovery appearing in his Honor's charge is a question not presented in this appeal, for the error, if any, is in defendant's favor, and plaintiffs have not appealed. For the error indicated, defendant is entitled to a new trial of the cause, and it is so ordered.

New trial.

Cited: Coal Co. v. Fain, 171 N.C. 647 (1b); *Lumber Co. v. Lumber Co.,* 176 N.C. 503 (1p); *S. v. Fulcher,* 176 N.C. 730 (1b); *In re Hinton,* 180 N.C. 215 (1b); *Parks v. Trust Co.,* 195 N.C. 455 (1f); *S. v. Lee,* 196 N.C. 716 (1f); *Metts v. Ins. Co.,* 198 N.C. 200 (1f); *Calhoun v. Highway Com.,* 208 N.C. 426 (1f).

BERT TILLERY v. ROYAL BENEFIT SOCIETY AND ROYAL FRATERNAL ASSOCIATION.

(Filed 11 March, 1914.)

1. Appeal and Error—Courts—Jurisdiction—Motion to Dismiss—Supreme Court.

A motion to dismiss for want of jurisdiction may be made for the first time in the Supreme Court on appeal.

2. Courts—Jurisdiction—Pleadings—Good Faith.

The amount demanded in the complaint in good faith determines the jurisdiction of the trial court, and when this is sufficient, a recovery of a less amount will not defeat the jurisdiction.

3. Appeal and Error—Exceptions—Instructions—Courts.

The failure of the trial judge to charge upon particular phases of the controversy is not alone sufficient to be held for reversible error. The appellant should offer prayers for special instruction covering the matter, and except and appeal from the refusal of the court to give them.

APPEAL by defendant from *Whedbee, J.*, at October Term, 1913, of CARTERET.

This is an action, commenced in the Superior Court, to recover the amount of an insurance policy and certain sick benefits which had accrued prior to the death of the insured.

The plaintiff alleges that he is entitled to recover $150, the face of the policy, and $52 sick benefits, and demands judgment for $202.

The policy is not in the record, and there is nothing to show that the demand of the plaintiff is not made in good faith.

(263) The plaintiff recovered $142, and the defendant moves in the Supreme Court to dismiss the action for that the Superior Court did not have jurisdiction, contending that the amount in controversy is less than $200.

The defendant, the Royal Benefit Society, introduced evidence tending to show that Starkey Tillery was more than 55 years of age at the time he became a member of the Royal Benefit Society. No offer to return premiums received was made by the defendant, the Royal Benefit Society; no application for membership was introduced as evidence. There was no evidence that Starkey Tillery knew of any age limit to become a member, and there was no evidence that Starkey Tillery represented what his age was when he became a member.

There were no requests for instructions.

The defendant assigns the following as errors:

1. That the court erred in failing and refusing to charge the jury that if Strakey Tillery was more than 55 years of age at the time he made application for membership in the Royal Benefit Society, the defendant was not liable on the policy, as the same was procured under a misrepresentation of the age of the said Starkey Tillery.

2. That the court erred in entering judgment as set out in the record.

3. That the court erred in refusing to grant a new trial.

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

E. H. Gorham for plaintiff.

C. R. Wheatly for defendant.

ALLEN, J. A motion to dismiss for want of jurisdiction may be made for the first time in the Supreme Court (*McDonald v. McArthur,* 154 N. C., 122); but it is not the recovery which determines jurisdiction. It is the amount demanded in good faith (*Brock v. Scott,* 159 N. C., 516); and as it appears that the plaintiff demanded $202, and there is nothing in the record from which bad faith can be inferred, the motion to dismiss must be denied.

The first assignment of error is without merit. There was (264) no request for a special instruction, and if one had been requested, covering the statements in the assignment, it could not have been given, because it would have required the judge to express an opinion upon a fact—that the policy had been procured under a misrepresentation as to age—which he could not do, if there had been evidence to support it; but it also appears from the record that the application for membership was not introduced, and that there was no evidence that the insured made any representation as to his age.

The other assignments are formal, and require no discussion.

No error.

Cited: R. R. v. Iron Works, 172 N.C. 191 (2f); *Trust Co. v. Leggett,* 191 N. C. 363 (1f); *Dependents of Thompson v. Funeral Home,* 205 N.C. 804 (1f); *Hopkins v. Barnhardt,* 223 N.C. 621 (2f); *Hilgreen v. Cleaners & Tailors,* 225 N.C. 661 (2f).

A. J. LUCAS AND W. J. LEWIS v. NORFOLK SOUTHERN RAILWAY COMPANY ET AL.

(Filed 11 March, 1914.)

1. Carriers of Goods—Unsuitable Cars—Connecting Carriers—Negligence.

A carrier should use cars suitable for the transportation of goods delivered to it, and its failure to do so will subject it to liability for the damages the goods sustain in consequence; and the connecting carrier will also be liable for the damages to the goods thus caused while they are being transported over its own line.

2. Same—Trials—Nonsuit—Appeal and Error—Harmless Error.

A carrier furnished an unsuitable car for the shipment of merchandise, and the connecting carrier received this car with its contents and forwarded it to its destination, where, upon delivery the goods were found by the consignee to be in bad condition. In an action to recover for the damage alleged thus negligently to have been caused to the shipment, it is held that a judgment as of nonsuit upon the evidence rendered in favor of the delivering carrier is only to the prejudice of the plaintiff, and if erroneous was harmless as to the initial carrier appealing therefrom.

3. Carriers of Goods—Unsuitable Cars—Trials—Negligence—Evidence.

Where a consignor makes a shipment of potatoes to his own order, which arrives at destination in a bad or damaged condition, and there is evidence that the carrier loaded them in an unventilated car, recently used for transporting fertilizer, with some of the fertilizer remaining therein, and testimony by witnesses qualified to speak from their own experience and observation that potatoes so shipped would rot or spoil in the time required for their transportation, it is sufficient to be submitted to the jury upon the question of the liability of the defendant for the damages caused by its negligent use of an unsuitable car.

4. Appeal and Error—Joint Defendants—Evidence as to One—Trials—Instructions.

Where in an action against two defendants evidence is properly admitted as to one of them, objected to by the other, and the jury properly instructed as to which defendant it should be considered, it will be presumed on appeal that the jury had sufficient intelligence and honesty to understand and apply the instruction, and no error will be found.

5. Trials—Instructions—Contentions—Appeal and Error.

Where a part of a charge of the court to the jury, excepted to, does not purport to be a statement of the law, but only the contentions of the adversary party, it will not be held for error on appeal.

(265) APPEAL by defendant from *Daniels J.*, at January Term, 1914, of CRAVEN.

This is an action to recover damages for injury to a shipment of potatoes from New Bern, N. C., to Atlanta, Ga., under a bill of lading to the order of the plaintiff.

Evidence was introduced tending to prove that the potatoes were delivered in good condition to the defendant Norfolk Southern Railroad Company at New Bern on 10 April, 1912; that said defendant selected the car in which the potatoes were shipped; that the shipment was transported promptly by said defendant, and delivered to the defendant the Southern Railway Company, a connecting carrier, at Goldsboro, in apparent good condition, and was so receipted for by said Southern Railway Company; that the Southern Railway Company promptly transported the shipment from Goldsboro to Atlanta; that the car was sealed when it left New Bern and the seal was unbroken (266) when it reached Atlanta; that the potatoes were in a decayed condition when they reached Atlanta; that this decayed condition was because the car in which the shipment was made was unsuitable, in that it had been used for carrying fertilizer, and the ventilators were closed. There was also evidence to the contrary.

During the trial the court admitted in evidence a letter written by an agent of the Southern Railway Company, and the Norfolk Southern Railroad Company excepted.

The court instructed the jury at the time the letter was introduced that it could not be considered against the Norfolk Southern Railroad Company, and at the conclusion of the evidence repeated the instruction, and withdrew this evidence from the jury.

When the evidence was closed the court sustained the motion of the Southern Railway for judgment of nonsuit, and the Norfolk Southern Railroad Company excepted.

The defendant the Norfolk Southern Railroad Company moved for judgment of nonsuit, which was denied, and it excepted.

His Honor charged the jury, among other things:

"1. Now, the allegation of negligence made by the plaintiffs in this case is that they delivered this shipment to the defendant Norfolk Southern Railroad, to be sent by it to Atlanta, Ga., and that the defendant owed them the duty of exercising ordinary care to provide a suitable car in a suitable condition to carry the goods of this sort with reasonable safety to the shipment from the point at which they were delivered to the defendant to their destination, and that the defendant failed in that duty in that it furnished a car in which some fertilizer had been shipped previously and in which some fertilizer still remained, and that this car was not ventilated; that the vents were all closed, and that by reason of this negligence, this condition of the car, the potatoes were injured

and arrived at the destination in bad condition." The defendant
(267) excepted.

"2. The plaintiff relies upon the testimony you have heard read from some depositions; the agent of the consignee was one who testified that the morning after the arrival of the shipment at Atlanta he went in the car and examined the potatoes, and found them in such bad condition that he refused to take them; thereupon the Southern Railway Company disposed of them. Then the testimony of another witness to the effect that he noticed in the car remains of some fertilizer in the bottom of the car; and the testimony of another witness that when the car arrived in Atlanta the vents were all closed." The defendant excepted.

The only question submitted to the jury was whether the defendant furnished a suitable car, and, if it failed to do so, was this the real cause of the injury?

There was a verdict and judgment in favor of the plaintiff, and the Norfolk Southern Railroad Company appealed.

R. A. Nunn for plaintiff.

Moore & Dunn for defendant.

ALLEN, J., after stating the case: It is the duty of the initial carrier to furnish cars suitable for the transportation of goods delivered to it, and if it fails to perform this duty, it will be liable for any subsequent damage arising from the defective condition of the car, although such damage develops on the line of a connecting carrier. Hutchison on Carriers, vol. 2, sec. 499; *Forrester v. R. R.*, 147 N. C., 554.

When the connecting carrier accepts the shipment, it adopts the car or vehicle provided by the initial carrier, and is responsible for any damages caused by its unfitness for the carriage of the goods. Hutchison on Carriers, vol. 2, sec. 501; *Wallingford v. R. R.*, 26 S. C., 258; *Shea v. R. R.*, 66 Minn., 102; *St. Louis R. R., v. Carlisle*, 78 S. W. R., 553.

If, therefore, there is any evidence that the car was unsuitable at the time it was furnished by the initial carrier, and that it remained so, both the initial and the connecting carrier would be liable to the plaintiff, and the motion for judgment of nonsuit ought to have been denied as to both, and we think there is such evidence.

(268) The car was sealed at New Bern, and the seals had not been broken when it reached Atlanta. The vents were closed at Atlanta, according to the evidence of one witness, and no witness for the defendant testified that the vents were open when the car left

New Bern. They do say the car was in good condition, and then admit that they do not remember this car.

A witness for the plaintiff testified: "The signs in the car indicated that it had been loaded with acid or fertilizer; the odor indicated this also. I don't remember whether or not the car had vents. I have been a dealer in potatoes five years. From my observation and experience the effect on sweet potatoes being shut up in a car without ventilation, in which there were remains of a shipment of fertilizers, would be that the potatoes would heat and rot very quickly. They would deteriorate more quickly than if the car had been clean and well ventilated."

Another witness testified: "The first time I saw the car it was on Madison Avenue team track; the seals were intact, the vents were closed; there was no odor that I could detect with the vents and doors closed. After the vents were opened and they went into the car, there was some odor," and one of the plaintiffs, that "the effect upon a car-load of potatoes, if put in a car that had been previously loaded with fertilizer with the openings and vents shut up tight and shipped across the country from New Bern to Atlanta, would be to ruin them entirely. They would be no good. A No. 1 hog would not eat them."

It follows necessarily, as there is evidence that the car was unsuitable, that the motion for judgment of nonsuit ought to have been denied as to both defendants, but the error in allowing it as to the Southern Railway Company is prejudicial to the plaintiffs, who do not appeal, and not to the codefendant.

If the liability of the Norfolk Southern Railroad Company was secondary, there would be ground for its complaint, but if liable at all, it is because it furnished an unsuitable car, sealed it, and delivered it in apparent good condition to the Southern Railway Company, and its act was the primary and orginiating cause of the injury. *Gregg v. Wilmington*, 155 N. C., 22.

The letter, which was objected to by the defendant, was only (269) admitted against the Southern Railway Company, and his Honor was careful to instruct the jury twice that they should not consider it against the present defendant, and withdrew it from the jury.

We must assume that the jury were sufficiently intelligent to understand the instruction and honest enough to follow it. *Cooper v. R. R.*, 163 N. C., 150.

The exceptions to the charge cannot be sustained. The first part of the charge excepted to does not purport to be a statement of the law, but of the allegations of the plaintiff; but if treated as determining the ground of liability, it is supported by the authorities before referred to.

The defendant, in its brief, does not complain that the evidence was not correctly recited in the second part of the charge excepted to, and we see nothing in it that would justify a reversal of the judgment.

No error.

Cited: Tucker v. R. R., 194 N.C. 497 (11); *S. v. Howard*, 222 N.C. 298 (4g).

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

(Filed 8 April, 1914.)

1. Clerks of Court—Executors and Administrators—Appointment—Incomplete Letters.

Upon application for letters of administration, which is not required to be in writing, the clerk is authorized to ascertain the jurisdictional facts empowering him to act, by affidavit or otherwise (Rev., sec. 26); and his passing upon the question of issuing the letters is a judicial act, while the making up of the record is a ministerial one, furnishing evidence of the appointment.

2. Same—Courts—Orders Nunc Pro Tunc.

Where the court has appointed an administrator, but has failed to fill out the blank spaces left in the printed forms of the letter, and the applicant has in all respects conformed to the law as to the matters required of him, it is proper for the court, in an action brought by such administrator, to permit the clerk to fill out the spaces as of the date of the appointment.

3. Railroads—Trials—Negligence—Evidence—Nonsuit.

In an action by an administrator to recover of a railroad damages for the negligent killing of his intestate, a child two or three years of age, and there was evidence tending to show that the intestate was upon the defendant's track, on a clear day, where the track was straight, and the employees on the train were not keeping a lookout along the track, a judgment as of nonsuit upon the evidence will be denied, for it was for the jury to determine whether the defendant's employees were negligent in not seeing the danger to the child and stopping the train in time to have avoided the killing.

(270) APPEAL by defendant from *Rountree, J.*, at September Term, 1913, of PENDER.

This is an action by E. R. Dallago, administrator of William Dallago, to recover damages for the negligent killing of his intestate.

The defendant in its answer denies that the plaintiff is administrator, and also denies the allegation of negligence.

It appears that the plaintiff signed an application in blank for letters of administration; that he and a surety signed a bond payable to the State, which was in blank; that the clerk signed letters of administration in blank; and that the plaintiff took the oath as administrator, and subscribed an oath in blank, and the surety justified to the bond.

The clerk testified that he issued letters to the plaintiff, who did all that was required of him, and that he expected to fill out the papers, and neglected it.

The court permitted the clerk to fill out the papers, and to make the record of the appointment of the plaintiff *nunc pro tunc,* and the defendant excepted.

There was evidence tending to prove that the intestate was a little child two or three years of age; that he was on the defendant's track when he was run over and killed by a train of the defendant; that the killing was on a clear day; that the track was straight for several miles, and that the employees on the train were not keeping a lookout along the track. There was also evidence to the contrary.

The defendant moved for judgment of nonsuit, which was (271) refused, and the defendant excepted.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

E. K. Bryan for plaintiff.

Davis & Davis, J. T. Bland, and K. O. Burgwyn for defendant.

ALLEN, J. The statute does not require applications for letters of administration to be in writing, and the clerk is authorized to ascertain the jurisdictional facts, empowering him to act, *by affidavit or otherwise.* Rev., sec. 26.

Before letters are issued the applicant must take and subscribe an oath before the clerk and must give the required bond. Rev., sec. 29.

The provisions of the statute were performed so far as the plaintiff is concerned. He made the application, he was sworn and subscribed an oath, he filed a bond with surety, who was examined under oath, and the clerk signed the letters of administration. The only irregularity is the failure of the clerk to fill out the blank places in the different papers.

The clerk says he issued letters to the plaintiff, which statement, when read in connection with the evidence, can only mean that he made the appointment, but failed to make a complete record of it. The appointment by the clerk is the judicial act, and making the record is ministe-

rial (19 A. and E. Enc. L., 1st Ed., 205). The first confers the authority, and the other furnishes evidence of it.

In *Spencer v. Cahoon,* 15 N. C., 226, there was an order of appointment, but no bond was filed, and the appointment was held valid; and upon a second appeal in the same case, reported in 18 N. C., 28, this ruling was adhered to, the Court saying: "It (the record) does not state that the oaths of office were taken, it is true; and for that reason, and because the bond turns out to be defective, the administration might probably be repealed as obtained irregularly and by surprise.

(272) But no other court can declare it void, for it was granted by the competent court, and must be respected until revoked, although committed without taking bond or administering oats."

This case was affirmed in *Davis v. Lanier,* 57 N. C., 310, and in *Jones v. Gordon,* 55 N. C., 354.

These authorities establish the proposition that when an appointment has been made and entered of record, irregularities in taking bond, and in the performance of other duties required of the clerk, do not invalidate the appointment, and it is equally well settled that whenever, by accident or neglect, there has been an omission to record any proceeding or order of a court, the court has the power to have the proceeding or order entered as of its proper date. *Foster v. Woodfin,* 65 N. C., 30; *McDowell v. McDowell,* 92 N. C., 227.

In the first of these cases the Court says: "Whenever, by any accident, there has been an omission by the proper officer to record any proceeding of a court of record, the court has the power, and it is its duty on the application of any person interested, to have such proceeding recorded as of its proper date. *Philips v. Higdon,* Bus., 380." And in the second: "The power of the court to allow amendments of its record is essential, and cannot be questioned, and it ought to exercise such power when it appears that some action was taken, but no minute of it was entered as ought to have been done, as when a judgment was granted, but not entered upon the minutes of the court proceedings at a former term. And an amendment should not be made by simply noting the order to amend, but it should be actually made by turning back to the minutes of the former term and making the proper correction and entry there, so that the entry will stand and be read as if no amendment or correction had ever been necessary. *S. v. King,* 5 Ired., 203; *Jones v. Lewis,* 8 Ired., 70; *Foster v. Woodfin,* 65 N. C., 29."

We are therefore of opinion, as it appears that the clerk appointed the plaintiff administrator, but failed to make proper record of his action, that he had the power to complete the record thereafter, as of the date of his judicial act, and that having done so, there is no error

in holding that the plaintiff is entitled to maintain this action.

The motion for judgment of nonsuit was properly denied. (273)

The age of the child made him helpless. He was killed on a straight track on a clear day, and there is evidence that the employees on the train were not keeping a lookout.

The jury had the right to infer from these facts and the evidence that no proper lookout was maintained, and that by the exercise of ordinary care the child could have been discovered in its helpless condition in time to stop the train and avoid the killing; and if so, the defendant was negligent.

No error.

Cited: Gray v. R. R., 167 N.C. 436 (3g); *Barnes v. R.R.*, 168 N.C. 514 (3g).

CLARENCE E. TATE v. STANDARD MIRROR COMPANY.

(Filed 8 April, 1914.)

1. Master and Servant—Negligence—Safe Appliances—Known, Approved, etc.—Rule of the Prudent Man.

While the employee assumes the risk of dangers incident to his employment in operating a machine which is run by electrical power, it is nevertheless the duty of the employer to use reasonable care, under the rule of the prudent man, in providing him with safe tools and appliances and a safe place in which to do his work; and while it is competent, upon this question, to show that the appliances furnished were known, approved, and in general use, this does not fill the full measure of the employer's duty, though it may be evidence upon the question of whether or not he has performed it.

2. Master and Servant—Negligence—Safe Appliances—Known, Approved, etc.—Comparisons—Evidence—Trials.

Where an employee has brought his action to recover damages from his employer for a personal injury alleged to have been negligently inflicted on him, and the question has arisen as to whether the tools and appliances furnished for doing the work were known, approved, and in general use, it is substantial similarity and not entire sameness that is required for the test in making comparisons between those furnished and those elsewhere used. *Helms v. Waste Co.*, 151 N. C., 370, cited and applied.

3. Master and Servant—Negligence—Proximate Cause—Dangerous Conditions—Unsafe Appliances—Continuing to Work—Obvious Danger—Trials—Questions for Jury.

In an action to recover damages for a personal injury alleged to have been inflicted upon an employee by the negligence of the employer in not

furnishing proper tools and appliances for doing work at a machine driven by electrical power, the plaintiff is not barred of his right of recovery merely because he continued to perform the work under the circumstances, for it must be shown that, in the exercise of due care for his own safety, he should have known or appreciated his own danger, and had continued in the performance of the work in the presence of the obvious peril.

4. Master and Servant—Safe Appliances—Negligence — Trials — Expert Evidence—Questions for Jury.

The plaintiff, an employee of the defendant, had his foot caught and injured by its catching in a belt running a machine, driven by electrical power, at which he was at work, and there was evidence tending to show that the belt was imperfectly laced, and there was a certain defect in the machine, which proximately caused the injury; that in accordance with a custom, known to the defendant, the plaintiff attempted to shift the belt with his foot, when the injury occurred, and there was no appliance furnished for this purpose, which should have been done, and there was further evidence, in defendant's behalf, that it had furnished an iron pipe, which should have been used on this occasion, and had the plaintiff used it the injury would not have occurred: *Held*, under the evidence, it was for the jury to determine as a matter of fact whether the defendant or plaintiff was guilty of negligence, and if such negligence proximately caused the injury; and *Held further*, that it was competent for a witness, expert and qualified to speak in such matters, to testify as to the tensile strength of the belt and as to whether it was properly or improperly fastened together at its ends.

(274) APPEAL by defendants from *Lane, J.*, at November Term, 1913, of FORSYTH.

Action to recover damages for injuries caused by the negligence of defendant. The plaintiff alleged and offered evidence tending to prove the following case, the truth of which must be assumed, as the jury answered the issues in his favor: He was employed by the defendant as an operator of a glass smoothing stone, run by a quarter-turn belt from a pulley on the spindle, upon the top of which the stone
(275) was attached to a pulley on the main-line shaft, which was some 20 inches from the floor and 8 or 10 feet from the stone, the motive power being electricity, the stone at which plaintiff was working being one of six, all receiving their power from the same source, so that, in order to stop one, it was necessary to cut off the power at its source, and thus stop all; the pulley on the main-line shaft was within 3 inches of a 6-inch coupling, which had no nut collar. In the orderly and necessary course of the work, plaintiff was frequently required to stop the stone at which he was at work, and the same was true of the other operators of the smoothing stones; and the only way to do this was to throw the belt off the mainline pulley while the machinery was in motion; there was provided no means or method of throwing the belt,

as by a tight and idle pulley, a belt shifter, or other device, but the operator was required to get it off the best way he could, while the machinery was in motion; and this resulted in a custom of shoving it off with the foot, which was known to and acquiesced in by the defendant's foreman, Metnett. A short time prior to the date on which the plaintiff was injured, the belt used to run the stone at which he was at work had been cut, it having become too loose, and in fastening it back it was too short, and consequently tight, so that it stretched the lacing by which the ends were fastened together, leaving a space between the ends wider than formerly. The defendant permitted and required the belt to be shifted by the use of the foot, which custom and condition had existed for a long time, to the knowledge and with the acquiescence of the foreman, Metnett, who was in charge of the plaintiff and who hired him, and had a right to discharge him. On 10 January, 1911, it became necessary for the plaintiff to remove the belt from the main-line pulley, and in endeavoring to do so in the usual and required manner, towit, by pushing it off with his foot, the sole of the shoe of his left foot was caught in the space where the ends of the belt were fastened, drawing his foot to the shaft, catching the heel of his shoe between the unprotected coupling and the pulley, fastening his foot and crushing both the bones between the ankle and the knee, so that his leg was badly injured.

The allegations of negligence are that the defendant— (276)

1. Failed to provide such appliances and to so equip and maintain its machinery and so conduct its business and operations as to afford a reasonable protection against dangers incident to the work, thereby exposing and subjecting its employees to unreasonable and unnecessary risks and dangers.

2. It failed to furnish the plaintiff a reasonably safe place to work, in that it allowed the work to be habitually conducted in a manner needlessly dangerous.

3. It failed to provide some means of shifting the belt, either by idle and tight pulleys, a belt shifter, or a clutch; these devices being known, approved, and in general use.

4. Its machinery, in the light of the requirement and the custom to shift the belt with the foot, was negligently equipped and maintained, in that the pulley on the main-line shaft, over which the belt ran, was in a few inches of a coupling, said coupling being unprotected.

5. That in repairing the belt shortly before the day on which the plaintiff was injured, it had been cut so short that, in the orderly use of it, the fasteners were pulled apart, leaving a larger space than usual between the ends. The plaintiff's evidence was that there was no device

or appliance of any kind furnished; that the foreman knew of the use of the foot by the plaintiff and others to remove the belt, and had himself thrown off belts in that way in the presence of the men in the factory; that the other operators threw off the belt like the plaintiff did.

This was plaintiff's contention.

Defendant, on the contrary, alleged and offered strong evidence to show that the plaintiff was provided with a perfectly safe method of throwing or shifting the belt, so as to stop the machine, namely, an iron pipe, which, if it had been used, instead of the foot, would have accomplished the desired purpose, and that plaintiff kicked, or attempted to kick, the belt from the pulley or drum of his own volition and in direct violation of instructions. It contended that this was shown by witnesses who testified for plaintiff, and also by defendant's witnesses. There was no contention by plaintiff that the stopping of the machine was
(277) made necessary by any negligence of the defendant, but the only negligence was in the method of stopping it, even when it was necessary to do so in its normal operation.

Under the evidence and instructions of the court, the jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to his injuries, as alleged in the answer? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover? Answer: $4,500.

Manly, Hendren & Womble for plaintiff.

Watson, Buxton & Watson for defendant.

WALKER, J., after stating the case: This case, as it appears to us, even under a critical examination of the rulings and charge of the court, has been tried in exact accordance with well settled legal principles, so much so that the record presents little more than the decision by the jury of a question of fact adversely to the appellant.

We have so often stated the rules applicable to the relation of master and servant, employer and employee, that there is nothing more to say without vain and useless reiteration. The issue between the parties in this case was clear-cut. It involved two leading and decisive questions: first, whether, by failure to supply reasonably safe and proper tools and appliances to the servant for the performance of his work, the master had been guilty of negligence which proximately caused the injury; and, second, whether the servant, in the exercise of due care, should have

known of the risk and understood and appreciated the apparent danger, and nevertheless has continued in the performance of the work in the presence of this obvious peril. Both of those propositions were fully and clearly explained to the jury by the court, in the light of the evidence, considered in both of its phases, and as it bore upon the contentions of each party.

The master's duty does not end when he has supplied safe machinery, for the methods of its operation must also be reason- (278) ably safe and such as would be compatible with the exercise of ordinary care, this being the general standard by which to measure the extent of that duty, and the obligation of the master to his servant. The master should not be permitted to so conduct his business operations that he constantly exposes his servants to a needless and unreasonable danger, that is, a danger that could be avoided by the exercise of ordinary care, as it would give the employer of labor a privilege that other persons do not possess, for the maxim, *sic utere tuo*—unless, indeed, the employer of labor is to be an exception thereto—requires that no man in conducting his business may unnecessarily and without reason disregard the rights of others, whether employees or strangers. "A salutary principle like this, which constitutes the very foundation stone of private rights, is not lightly to be broken in upon, and the grounds upon which any exception to it claims recognition should be closely scrutinized. Can it fairly be said that the reasons for thus putting employers in a class by themselves are stronger than those which would subject them to the same responsibility as other persons?" Labatt on Master and Servant, sec. 962. This same principle we announced in *Marks v. Cotton Mills,* 135 N. C., 287: "The employer does not *guarantee* the safety of his employees. He is not bound to furnish them an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements and appliances, but only such as are reasonably fit and safe and as are in general use. He meets the requirement of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable." And again: "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 (279)

risk of his employer's negligence. When any 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 employees. 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 approximately caused by his negligence."

The law applies the golden rule, that the master must do for the servant what, if placed in the same situation and under the same circumstances, he would do for himself. There is no reason of logic or justice which requires that he should do less. This rule has been applied by us to causes here with great frequency and uniformity. We have not departed in the least from its essential principle in a single case that we are aware of. It is perfectly just to the employer and is required by a proper sense of fairness to the employee. It is the abstract maxim which we are constantly told should govern our conduct towards our fellow-man in the everyday affairs of life, and it is so commendable in itself as to call for a strict observance of it when we come to the practical discharge of our duties to others, especially those in subordinate positions, and who must depend for their safety upon the care of their superiors.

The master must supply not only reasonably safe machinery, but a reasonably safe place for his servant to perform the work. He fails in this respect, we said in *Terrell v. Washington,* 158 N. C., at p. 289, "if he allows work to be conducted there habitually in a manner needlessly dangerous to servants." We said in *Pigford v. R. R.,* 160 N. C., at pp. 100 and 101: "It is well understood, however, that an employer of labor may be held responsible for directions given or methods established of the kind indicated, by reason of which an employee is injured. It is as much the duty of the master to exercise care in providing the
(280) servant with reasonably safe means and methods of work, such as proper assistance for performing his task, as it is to furnish him a safe place and proper tools and appliances. The one is just as much a primary, absolute, and nondelegable duty as the other. When he intrusts the control of his hands to another, he thereby appoints him in his own place, and is responsible for the proper exercise of the delegated authority, and liable for any abuse of it to the same extent as if he had been personally present and acting in that behalf himself. This rule is well settled." These principles have been often adjudicated, and in fact they are but self-evident propositions, suggested by the prompt-

ings of natural justice. They have been applied in numerous cases. *Shaw v. Manufacturing Co.*, 146 N. C., 239; *Tanner v. Lumber Co.*, 140 N. C., 475; *West v. Tanning Co.*, 154 N. C., 44; *Hamilton v. Lumber Co.*, 156 N. C., 523; *Norris v. Cotton Mills*, 154 N. C., 474; *R. R., v. Herbert*, 116 U. S., 642; *Shives v. Cotton Mills*, 151 N. C., 290; *Ainsley v. Lumber Co., ante*, 122.

Our cases have all converged to this result, that while absolute safety in the protection of the employee is not exacted of his employer, yet the duty of the latter requires that he make every provision for the former's security against injury, while performing his work, which would be suggested to one using ordinary care and skill in like circumstances; and this duty extends to all machinery, tools, appliances, places of work and the means and methods of performing it, and the employer should attend to these things in the same way, and make reasonable provision for his employee's safety, as he would for himself if placed in the same situation. *West v. Tanning Co., supra.*

Whether the master fully discharges his duty by furnishing appliances generally used and approved by others engaged in similar employment, is a question not necessarily before us. It has been held that the final test of negligence (in this respect) is not usage or custom merely, but the inflexible rule which fixes reasonable care as the standard by which conduct of the master to his servant is measured (*Schiller v. Breweries*, 156 Mo. Ap., 569), and that the appliances furnished, methods employed, and places provided for the safety of the servant (281) should be such as commend themselves to an ordinarily prudent man. *Geno v. Paper Co.*, 68 Vt., 568; 3 Labatt (Ed. 1913), sec. 947 and notes.

We will not now say more upon this question, as it has not arisen so as to require any expression of opinion from us as to what should be the exact rule to be followed by the employer. Without dissecting the charge and examining it in detail, it is sufficient to say that the court charged fully and correctly upon the first issue, and in accordance with the principle we have stated, and which is thus epitomized in *Smith v. Baker* (1891), A. C., 325: "An employer is bound to carry on his operations so as not to subject those employed by him to unnecessary risk, and he is not less responsible to his workmen for personal injuries occasioned by a defective system of using machinery than for injuries caused by a defect in the machinery itself."

Some of the exceptions of the defendant seem to be directed to what is alleged to be an imperfect comparison of methods and appliances adopted by this defendant and those used in similar businesses. It is not required, in making the comparison of usages, "that the establish-

ment which is adduced by the servant as furnishing the proper standard of safety and suitability should be precisely similar to that of the defendant. A reasonable similarity is sufficient. But evidence of usage should be rejected unless there is a fairly close parallelism between the conditions to which the evidence relates and those which existed at the time and place with which the action is concerned." Labatt (Ed. 1913), sec. 950. It is substantial similarity and not entire sameness that is required for the test. This is the rule we have adopted in making comparisons of value, when the conditions are substantially the same. You cannot hope for exactitude in such matters, for it is rarely that two things are precisely alike, although they may be sufficiently so for the purpose of a safe comparison. *Warren v. Makely,* 85 N. C., 12; *Chaffin v. Manufacturing Co.,* 135 N. C., 95; *Johnson v. R. R.,* 163 N. C., 431; *Bruner v. Threadgill,* 88 N. C., 361.

(282) There was no error in respect to the proof of custom and usage in other mills of a like kind, either in the admission of the evidence or the treatment of it afterwards. What is said by *Justice Hoke* in *Helms v. Waste Co.,* 151 N. C., 370, is decisive of this question: "The position urged by counsel, that the testimony was incompetent because it was not applied to machines of the very same kind as the ones presented here, that is, a waste chopper, is not tenable. The danger arises from the method of applying the power, by the shifting of the belt, the negligence being the failure to furnish the usual device by which the incident danger was minimized, and it does not appear that the character of the machine would seriously or substantially affect the result. It was the drawing power of the belt, the danger of being caught in it, which rendered the use of a shifter desirable, and necessary for the employee's protection, and therefore the testimony as to its customary and general use in this and other mills, where the power was similarly applied and the belt controlled, was competent under the rule." See, also, *Phillips v. Iron Works,* 146 N. C., 209. The case of *McGar v. N. P. W. Mills,* 22 R. I., 347, is a more direct authority, as it deals with similar facts.

Whether it was practical for the defendant to use any other device than a metal pipe for the purpose of insuring safety to its employee, and whether ordinary prudence required the use of it, were questions for the jury, which were properly submitted to them. If the situation called for the use of a different device, and this would have appeared to the ordinarily careful man, under the same circumstances, it was the duty of the defendant to supply it, instead of needlessly subjecting his servant to danger. *Rogers v. Manufacturing Co.,* 157 N. C., 44. There was evidence which warranted the submission of all these questions to

the jury, and the charge in this, as in every respect, was eminently fair to the defendant.

Whether the plaintiff carelessly exposed himself to the danger, or continued to perform his work in the presence of an obvious peril, were also questions for the jury, subject to proper direction from the court, which was given. The court, among other things, said upon this phase of the case: "An unusual and unnecessary risk, if created (283) by the master's negligence, although the servant may know of it, will not defeat a recovery, should he remain in the service and continue to do the work subject to that risk, unless the danger to which he is exposed thereby is so obvious and imminent that the servant sees and understands it fully. Where the master by his own negligence has brought about a dangerous condition with which the servant is confronted, the obviousness of the danger and the impression the situation would make upon a man of ordinary prudence and discretion, with respect to his own safety, determines the servant's measure of duty to himself. Under such circumstances, the fact that the particular service was rendered with the knowledge and approval of the employer or his vice principal, or under his express direction, and the servant's reasonable apprehension of being discharged in case he does not perform the work prescribed by the master, are circumstances relative to the inquiry and may be considered by the jury." The court charged further, in substance, that to constitute assumption of risk or contributory negligence, it was necessary to show: "That the plaintiff knew and appreciated the danger which he was incurring; *or,* in the exercise of reasonable care, should have known and appreciated it; *or* that the manner in which he was doing the work was so obviously dangerous that a man of reasonable prudence would not have done it; *or* that, in the performance of his work, he did not exercise reasonable care for his own safety; *or* was warned or instructed not to use his foot." There was no error in these instructions, and they were fully explained to the jury in their application to the facts. *Pigford v. R. R., supra; Hamilton v. Lumber Co., supra.* We said in *Pigford's case:* "The servant is not required to retire from the service or to refuse to go on with his work unless, as we have said, the danger is obvious or he knows and appreciates it. He may know of the risk without fully appreciating the danger. Whether such a situation was presented to him at the time of the injury is a question for the jury, to be decided generally upon the rule of the prudent man." What would be an obvious danger, requiring the servant to look out for his own safety and to take care of himself in the exercise of proper care, (284) was also clearly defined by the court to the jury, according to the rule laid down in *Hinshaw v. R. R.,* 118 N. C., 1053; *Hicks v. Manufac-*

turing Co., 138 N. C., 328, and *Pressly v. Yarn Mills,* 138 N. C., 410, and especially in *Mincey v. R. R.,* 161 N. C., 467; *Hamilton v. Lumber Co., supra,* and *Pigford v. R. R., supra.* If the plaintiff was instructed to use an implement which was sufficient to perform the work with safety to himself, and failed to do so, and was thereby proximately injured, the result was, of course, caused by his own fault; but this was explained to the jury. The fault here was that of the defendant in permitting a dangerous method to be constantly used, with the full knowledge thereof, through its vice principle.

The expert testimony of the witnesses J. L. Critz and L. E. Fishel, as to the use of a certain device for removing a belt, the purpose for which it is used and its effect with reference to the safe operation of the machine, and as to the tensile strength of the belt when laced or fastened together at its ends with hooks of the kind shown to the witnesses, and as to the effect upon the hooks and the belt if it pulls apart, was competent, as they qualified themselves to express an opinion upon the matter. Cyc. of Law and Procedure, vol. 17, at p. 71, says: "Those persons who are skilled in mechanical matters are competent to testify as to relevant facts which are familiar in the mechanic arts. Such facts may be simple and involve little of the element of reasoning; as, for example, the action of natural laws, the limits of ordinary observation, the lightness or the tensile or other strength of materials or appliances; under what strain they are at a given time, or how their strength is affected by given imperfections, or the facts may be more complicated without losing their essential character as facts; as where the witness states the cause of observed phenomena, the dangers attendant upon the use of particular machinery, or the prosecution of certain lines of business, how injuries from these dangers can be prevented, how mechanic operations should be conducted, the physical effects of certain mechanical devices, the result of specific defects, and in general what certain appearances would (285) indicate to an observer experienced or skilled in mechanical trades. He may even state a conclusion regarding the sufficiency of mechanical devices for certain purposes." It is not necessary that we indorse all that is here said in regard to the competency of such testimony, for all of it is not applicable to this case, but so much as is, upholds the ruling of the court, and the text is supported by a full citation of the best authorities.

The case was ably presented to us by counsel for the defendant, and we have given careful attention to his argument and brief, but are unable to find any cause for a reversal.

No error.

Cited: Cochran v. Mills Co., 169 N.C. 61 (1g); *Lynch v. Veneer Co.*, 169 N.C. 172 (1f); *Wooten v. Holleman*, 171 N.C. 464 (1f); *Gaither v. Clement*, 183 N.C. 456 (1g); *Medford v. Spinning Co.*, 188 N.C. 128 (3f); *Crisp v. Thread Mills*, 189 N.C. 92 (3f); *Bradford v. English*, 190 N.C. 745 (4g); *Jefferson v. Raleigh*, 194 N.C. 481 (4g); *Ogle v. R. R.*, 195 N.C. 797 (4g); *Smith v. Ritch*, 196 N.C. 76 (4g); *Bateman v. Brooks*, 204 N.C. 183 (4g).

MORGANTON MANUFACTURING AND TRADING COMPANY ET ALS. v. E. L. ANDREWS AND C. A. CREWS.

(Filed 15 April, 1914.)

1. Liens—Material Men—Contract—Principal and Surety—Bond—Interpretation.

Where the material man sues the owner of the building, claiming a lien thereon for material furnished, and seeks to hold the surety liable under a bond indemnifying the owner against loss, if any, arising to him under the contract, the bond of indemnity and the agreement with the contractor should be construed together.

2. Same—Contracts—Expressed—Payment Under Contract—Liability of Surety.

Where the owner of a building erected under an agreement with the contractor that the latter should build the house specified for a sum certain and turn it over to the owner completed, stipulations in the contracts that the contractor furnish the materials add nothing to the agreement of the contractor already expressed; and when the bond expressly states that it was solely an indemnity against personal loss to the owner, there can be no liability of the surety implied contrary to the terms of the writing, and the owner not being liable to the lienor who has failed to notify him of his lien when there was money due by him to the contractor, there can be no liability on the part of the surety thereon. *Supply Co. v. Lumber Co.*, 160 N. C., 428, etc., cited and distinguished.

3. Statutes—Codification—Interpretation—Meaning Reconciled.

Statutes enacted upon the same subject-matter should be construed together and their meaning reconciled when possible, and where various enactments have been codified by the Legislature, it is permissible, in their construction, for the courts to regard the original statutes and their history in the light of former decisions.

4. Liens—Statutes—Interpretation—Material Men—Funds Due—Moneys Prorated.

Where the owner of a building erected under contract has not sufficient funds in his hands to pay all the lienors thereon for material furnished, the amount due the contractor, subject to the liens, shall be distributed by

the owner among the several claimants under the provisions of section 2023 of the Revisal; and construing this section with other relevant sections of the Revisal, it is held that it does not conflict with section 2035, requiring "that liens created and established by this chapter (48) shall be paid and settled according to priority of the notice of the lien filed with the justices or the clerk," for this latter section relates to liens filed with the proper officers, and does not affect the provisions as to subcontractors who acquire a lien by notice to the owner.

(286) APPEAL by plaintiff from *Lane, J.*, at September Term, 1913, of FORSYTH.

This is an action by the Morganton Manufacturing and Trading Company and other creditors to enforce liens for materials furnished.

The defendant E. L. Anderson was the owner of a lot in Winston, and on 28 August, 1911, he entered into a contract with the defendant C. A. Crews as contractor, by which the latter agreed to build a house thereon for $4,600.

The parts of the contract material to be set out are:

"The contractor shall and will provide all the materials and perform all the work for the erection and completion of a two-story frame residence located on lot fronting Brookstown Street, in the city of Winston, N. C.

. . . . . .

"To secure the true and faithful performance of all and every of the covenants and agreements herein mentioned, the party of the first part shall, at his own expense, within ten days from this date, furnish
(287) said party of the second part a bond signed by the American Surety Company in the sum of $1,000, to protect the second party against damage suits, for personal injuries, for liens, for material or labor; to remain in full force and effect until representation of satisfactory evidence of the satisfaction of all such claims.

"The final payment shall be made within ten days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued.

"If at any time there shall be evidence of any lien or claim for which, if established, the owner of the said premises might become liable, and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any liens on said premises made obligatory in consequence to the contractor's default."

By agreement, the bond provided for in the contract was executed by the defendant the Maryland Casualty Company, instead of by the American Surety Company, and the penalty in the bond was $4,600 and not $1,000.

The bond contains the following provisions, among others:

'Now, therefore, the condition of this obligation is such that if the said principal shall faithfully perform said contract on his part, according to the terms, covenants, and conditions thereof (except as hereinafter provided), then this obligation shall be void; otherwise, to remain in full force and effect.

"This bond is executed by the surety upon the following express conditions, which shall be conditions precedent to the right of the owner to recover hereunder:

. . . . . .

"The surety shall not be liable under this bond to any one except the owner; but it is agreed that the owner, in estimating his damage, may include the claims of mechanics and material men, arising out of the performance of the contract, and paid by him, only when the same by the statutes of the State where the contract is to be (288) performed are valid liens against his property."

The Morganton Manufacturing and Trading Company furnished materials for said building, and which were used therein, of the value of $1,063.31, and the other creditors materials of the value of $1,877.18, all of which were furnished under contract with the said Crews, contractor.

All of said creditors filed notice of their claims with the defendant Anderson, and at the time of filing such notice there was due the contractor, Crews, who is insolvent, by the owner, Anderson, $1,328.39.

Said creditors also filed notice of lien in the office of the clerk of the Superior Court, the notice of lien of the Morganton Manufacturing and Trading Company being the first filed.

The matters in controversy were tried before a referee, Mr. J. E. Alexander, and upon the facts found by him, substantially as herein stated, his Honor adjudged that the Maryland Casualty Company was not liable to the creditors, and that the balance in the hands of Anderson should be distributed pro rata among all the creditors, to which the creditors excepted and appealed.

The creditors other than the Morganton Manufacturing and Trading Company except to (1) "the refusal of the court to find as a matter of law that the Maryland Casualty Company was bound to said parties who furnished material in the completion of the house of E. L. Anderson; and further except to the judgment of the court that the bond executed by the surety company was bound only to the extent of protecting

E. L. Anderson, and did not protect material men and laborers for work done and material furnished."

The Morganton Manufacturing and Trading Company excepts (1) "To the ruling of the court overruling the said plaintiff's first exception to the report of the referee, and holding that this plaintiff was not entitled to priority by reason of filing the first lien in the office of the clerk of the Superior Court of Forsyth County, as set forth in said exception, which is hereby referred to and made a part hereof as (289) fully as if written herein." (2) "To the ruling of the court in overruling said plaintiff's second exception to the report of the referee, and holding that the parties were entitled to prorate in the fund, and that this plaintiff was not entitled to priority, as set forth in said exception which is hereby referred to and made a part hereof as fully as if written herein." (3) "To the judgment of the court that the fund should be prorated between all claimants, notwithstanding this plaintiff had filed the first lien in the office of the clerk of the Superior Court of Forsyth County."

J. T. Perkins for Morganton Manufacturing and Trading Company.

Watson, Buxton & Watson and L. M. Swink for other creditors.

F. P. Hobgood, Jr., for Maryland Casualty Company.

ALLEN, J. The contract entered into between the defendants Anderson and Crews, and the bond executed by the Maryland Casualty Company to secure its performance, must be considered together, as contented by the creditors, in order to properly determine the extent of the obligations of the bond; and when we examine the contract, we find first an agreement upon the part of the contractor to provide all the materials and to perform all the work necessary to erect the building.

The contention of the creditors is that this is an agreement to furnish the materials and labor and impliedly to pay for them, and as the bond was executed to secure performance of the contract, the Casualty Company is bound for the payment of the claim for materials.

If this is a proper construction of the contract, and the Casualty Company is bound for obligations not expressed in the bond, the conclusion contended for would seem to follow, in the absence of restrictive words in the bond; but we are of opinion this is not a correct view of the agreement of the parties.

The stipulation that the contractor will furnish the materials and labor adds nothing to the agreement to build the house, because it could not be built without the materials and labor, and there can be (290) no implied promise to pay between the contractor and the

owner, the parties to the contract, as the contractor was to furnish the materials, and consequently there could be no implied promise to pay him for them, and the owner made the express promise to pay $4,600 for the building, which included materials.

The parties undertook to reduce their agreement to writing, and presumably inserted every provision regarded material, and it is a well recognized principle that there can be no implied contract where there is an express contract between the parties in reference to the same subject-matter. 9 Cyc., 242; *Lawrence v. Hester,* 93 N. C., 79.

The other part of the contract relied on simply protects the owner against liens upon his property, and against amounts he may be compelled to pay, and cannot extend the liability of the Casualty Company upon its obligation to see that the contract is faithfully performed beyond the amount for which the owner is liable.

If, however, this position was doubtful, the terms of the bond put the matter at rest.

It is therein expressly provided that, "The surety shall not be liable under this bond to any one except the owner," and that in estimating his damages, only those claims of mechanics and material men *"paid by him"* shall be included.

We therefore conclude, as it is not contended that the owner has paid any of the material men, and as he makes no claim against the Casualty Company, that his Honor properly held that the Casualty Company was not liable to the creditors.

The cases from North Carolina principally relied on by the creditors in support of their contention (*Gastonia v. Engineering Co.,* 131 N. C., 363; *Voorhees v. Porter,* 134 N. C., 591; *Supply Co. v. Lumber Co.,* 160 N. C., 428) are easily distinguishable from the one before us.

In the *Gastonia case* the reasonable intendment to pay grows out of the provision in the contract "for the payment of all material used and wages of all laborers employed by said contractor." These words occur in the contract, and there was nothing in the bond to indicate that the bond did not guarantee such payment. The case also (291) involved conditions which made it impossible for material men and laborers to protect themselves by filing liens, for the reason that the property belonged to a municipality and was not subject to liens.

In the *Voorhees case* the purchaser of goods expressly agreed to pay the debts of the seller, and it was held that one who guaranteed the performance of the contract to pay was liable to a creditor.

The *Supply Company case* was tried on demurrer. The demurrer necessarily admitted the truth of the allegation in the complaint, that the contractor agreed to pay for the material and labor, and that the

bond simply guaranteed such payment. The bond contained neither restriction nor condition. It merely provided that, if the contractor should perform his contract it should be null and void, and that otherwise it should remain in full force and effect. If the contractor agreed to pay for material and labor, and the bond guaranteed that he would do so, it necessarily followed that there was a breach of the condition of the bond when he failed to do so, and the court could not do otherwise than declare that by reasonable intendment the bond in that case was made for the benefit and in the interest of material men and laborers. There was no suggestion in it that liability under it was confined to the owner.

In all these cases there was an express promise to pay in the contract, and a bond without restrictions to secure performance, while in the case under consideration there is no express promise, and the right to recover on the bond is limited to the owner.

This brings us to the exception of the Morganton Manufacturing and Trading Company to the ruling of his Honor, that the funds in the hands of the owner, being the balance due the contractor, shall be distributed pro rata among the claims of the material men, and not according to priority in filing the notice of liens with the clerk.

The controversy arises because of the apparent conflict between section 2023 of the Revisal and section 2035, both being parts of the same chapter, the first section providing that, "It shall be the
(292) duty of the owner to distribute the amount (remaining due the contractor) pro rata among the several claimants," and the second that, "The liens created and established by this chapter shall be paid and settled according to the priority of the notice of lien filed with the justice or the clerk."

When laws have been codified, it is permissible to examine the original legislation as an aid to correct interpretation (*Rodgers v. Bell,* 156 N. C., 386), and a brief history of the lien laws, enacted to secure the payment of claims for labor done and materials furnished, now collected in chapter 48 of the Revisal, will furnish light in the solution of the question.

The first of these in chapter 117, Laws 1868-69, which, with some enlargement, is now section 2016 of the Revisal and the succeeding sections regulating the filing and the enforcement of the lien. Section 2035 of the Revisal was a part of this statute.

Soon after its enactment, it was held by the Supreme Court that no right to a lien was conferred by the statute unless there was a contract, express or implied, with the owner, creating the relation of creditor and debtor (*Wilkie v. Bray,* 71 N. C., 205), and as a result, subcontractors

were excluded from its benefits, because they had no express contract with the owner, and none could be implied from the use of the materials as they were furnished to the contractor, and under the express contract between him and the owner.

The next step was the act to give subcontractors a lien (ch. 44, Special Session of 1880), which, with the act amendatory thereof (ch. 67, Laws 1887), is now sections 2019 to 2023, inclusive, of the Revisal, and it is in this last act of 1887 that we find for the first time the provision requiring the distribution pro rata among the subcontractors of the amount due the contractor, in the hands of the owner at the time he receives notice of their claims, which is now incorporated in section 2023 of the Revisal.

An instructive case discussing these statutes is *Lester v. Houston,* 101 N. C., 609, in which the Court says:

"The Constitution requires the General Assembly to 'provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor.' Art. XIV, (293) p. 4. And the statute gives the lien 'for the payment of all debts contracted for work done on the same or material furnished.' The Code, p. 1781. In the construction of this section, it is declared, in *Wilkie v. Bray,* 71 N. C., 205, that 'in order to create the lien, the circumstances must be such as first to create the relation of debtor and creditor, and then it is for the debt that he has the lien.'

"The effect of this ruling, which makes the statutory lien an incident to and the offspring of the contract out of which the indebtedness springs, and confines it to the party to the contract, made at June Term, 1874, was followed by the enactment of 29 March, 1880, entitled 'An act to give subcontractors, laborers, and material men a lien for their just dues,' the provisions of which constitute sections 1801, 1802, and 1803 of The Code in chapter 41.

"It was not intended to supersede the lien of the contractor, for it in direct terms gives the lien in favor of subcontractors, laborers, and material men a preference, 'the mechanics' lien now provided by law,' and provides that when notice is given, the aggregate of such liens shall not exceed the amount then due the original contractor.

"The legislation is intended to extend the remedy to those who work or furnish materials from which the owner derives a benefit in the improvement of his property, even where there are no contract relations between them and the owner, and enable them to secure, in order to the payment of what is due them, the indebtedness due from the debtor to the contractor."

If, therefore, there was no codification of the statutes, there could be no conflict between the provision as to priorities contained in the acts of 1868-69 and relating to materials furnished under contracts with the owner, express or implied, and the requirement of the act of 1887, that the balance in the hands of the owner shall be distributed pro rata among the subcontractors when there is no contract with the owner, because contained in different statutes, and applicable to different classes and conditions.

(294) If so, does the incorporation of the two statutes into chapter 48 of the Revisal as one statute bring about a conflict, and are the two sections of the Revisal irreconcilable?

It is evident that neither the commissioners who codified the statutes nor the members of the General Assembly who adopted their work thought there was any conflict, as otherwise one of the sections would have been omitted from the Revisal; and it is our duty to give effect to both sections, if it can be done by any fair and reasonable interpretation. *Rodgers v. Bell, supra.*

When we turn to the chapters on liens we find that it has nine subdivisions, the second being devoted to subcontractors, and the section as to priorities being in the sixth.

The lien of the subcontractor is acquired by notice to the owner (Rev., sec. 2020), and there is not only no requirement that he shall file notice of lien with a justice or a clerk, but it is expressly provided in section 2022 that the sums due for furnishing materials, etc., shall be a lien "without any lien being filed before a justice of the peace or the Superior Court," and in the succeeding section (2023) that: "In the event the amount due the contractor by the owner shall be insufficient to pay in full the laborer, mechanic, or artisan for his labor, and the person furnishing materials for materials furnished, it shall be the duty of the owner to distribute the amount pro rata among the several claimants, as shown by the itemized statement furnished the owner."

The section relied on by the Morganton Manufacturing Company (sec. 2005) purports to deal with "the liens created and established by this chapter," it is true; but it says, also, that they shall be paid "according to the priority of the notice of the lien filed with the justice or the clerk," and as the provisions in favor of subcontractors are segregated, giving the means of acquiring the lien and of enforcing it, and have no reference to filing a lien with a justice or a clerk, except when it says it is not necessary to do so, we are of opinion that the two sections are not in conflict, and that section 2035 relates to liens required to be filed with the proper officers, and does not affect the provisions as to subcontractors, who acquire a lien by notice to the owner.

This is not only in accordance with law, but also with justice (295) and equity, for when men have put their money and labor in a building, and the balance due is insufficient to pay all, it is not right for one to have the whole fund, in the absence of negligence, because he gets to the clerk's office first.

We find no error.

Affirmed.

Cited: Bond v. Cotton Mills, 166 N.C. 23 (f); *Brick Co. v. Pulley,* 168 N.C. 375 (2p); *Fore v. Feimster,* 171 N.C. 553 (2p); *Granite Co. v. Bank,* 172 N.C. 357 (4f); *Foundry Co. v. Aluminum Co.,* 172 N.C. 706 (4f); *McCausland v. Construction Co.,* 172 N.C. 711 (3f); *McCausland v. Construction Co.,* 172 N.C. 712 (2f); *West v. Laughinghouse,* 174 N.C. 219 (4f); *Building Supplies Co. v. Hospital Co.,* 176 N.C. 89 (4f); *Ingold v. Hickory,* 178 N.C. 616 (3p); *Dixon v. Horne,* 180 N.C. 587 (1f, 2b); *Alexander v. Lowrance,* 182 N.C. 644 (3f); *Hicks v. Comrs.,* 183 N.C. 404 (3f); *Warner v. Halyburton,* 187 N.C. 415 (2p); *Campbell v. Hall,* 187 N.C. 465 (4p); *Porter v. Case,* 187 N.C. 634 (4p); *Rose v. Davis,* 188 N.C. 357 (2g); *Noland Co. v. Trustees,* 190 N.C. 253 (2g); *Brick Co. v. Gentry,* 191 N.C. 639 (1f); *Brick Co. v. Gentry,* 191 N.C. 640 (2f); *Electric Co. v. Deposit Co.,* 191 N.C. 656 (1f); *Trust Co. v. Construction Co.,* 191 N.C. 665 (2f); *State Prison v. Bonding Co.,* 192 N.C. 394 (2b); *Mfg. Co. v. Blaylock,* 192 N.C. 411 (1f); *Mfg Co. v. Blaylock,* 192 N.C. 412 (2g); *Supply Co. v. Plumbing Co.,* 195 N.C. 635 (2p); *Lumber Co. v. Lawson,* 195 N.C. 845 (2p); *Foundry Co. v. Construction Co.,* 198 N.C. 179 (1f, 2b); *White v. Riddle,* 198 N.C. 514 (4p); *Overman v. Indemnity Co.,* 199 N.C. 738 (1f); *Boykin v. Logan,* 203 N.C. 200 (4g); *Briggs & Sons v. Allen,* 207 N.C. 13 (4g); *Pearson v. Simon,* 207 N.C. 354 (1f, 2b).

G. F. PARROTT AND WIFE v. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY AND NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 8 April, 1914.)

1. Railroads—Contracts—Easements — Flag Stations — Specific Performance—Public Policy—Issues—Limitation of Actions—Abandonment—Trials—Evidence.

In 1859 the defendant railroad company acquired a right of way over the lands of the plaintiff's ancestor in consideration of stopping its trains upon being signaled, at a flag station thereon, which in two years was entered

upon and continuously used by the company and its lessee road, under a sealed and registered instrument of writing, to within a short time previous to the commencement of the action, when the lessee road refused to continue the arrangement upon the ground that it interfered with its duties to the public: *Held*, (1) the right acquired by the owner ran with the land, and the lessee road was bound to the performance of the contract, unless public policy had intervened; (2) whether the interests of the public now require the discontinuance of the flag station is for the determination of the jury, with the burden of proof on defendant; (3) except where the rights of the public intervene, specific performance of the contract by the company will be decreed; (4) the consideration for the right of way continued with its use, and the contract was not of uncertain duration; (5) in this case the statute of limitations had not run, and there is no evidence of abandonment by the owner.

2. Railroads—Easements—Flag Stations — Contracts — Specific Performance—Decree—Corporation Commission—Damages.

In this suit by the owner to enforce specific performance of a contract made with a railroad to stop its trains at a flag station on plaintiff's lands, in consideration of which the plaintiff had granted a right of way thereon, it is *Held*, that should the issue as to public policy be found against the company, the decree for specific performance should contain a provision that the defendant shall not be estopped thereby to institute proceedings at any future time, should conditions materially change, under Revisal, 1098, before the Corporation Commission, subject to appeal, etc. As to whether the plaintiff may recover damages for breach of contract when specific performance thereof is denied him, *Quære*.

3. Corporation Commission—Stations—Contracts.

Revisal, 1097 (1), providing that a railroad company may not be required by the Corporation Commission to establish a flag station within 5 miles of one already existing, has no application to the facts of this case, in which a valid agreement to maintain the station on the part of the railroad had been made in 1859, and had since been continuously complied with and the right of way enjoyed by it.

ALLEN, J., concurring; BROWN and WALKER, JJ., dissenting.

Appeal by defendants from *O. H. Allen, J.*, at November Term, 1913, of Lenoir.

Loftin & Dawson and G. V. Cowper for plaintiffs.

Rouse & Land and J. K. Warren for defendants.

(296) CLARK, C. J. On 31 March, 1859, James M. Parrott, father of the plaintiff, George F. Parrott, and the Atlantic and North Carolina Railroad Company, entered into a contract under seal by which said James M. Parrott granted to said railroad company the right of way through his lands in the county of Lenoir in consideration of the

agreement therein that said railroad company should establish a flag station where its track crossed the avenue running from Parrott's dwelling, and that upon proper notice passengers and freight would be put off and taken on at said flag station. This was within two years of the completion of the railroad through said lands. This contract was duly recorded in the office of the register of deeds of Lenoir County, where the land lies.

The jury finds that the contract was acted on up to within less than twenty years of the beginning of this action, but that the defendant Norfolk and Southern Railroad Company, which is now (297) operating the franchise of Atlantic and North Carolina Railroad Company (under a lease whereby it undertook to discharge all the contracts and duties of the lessor company), in 1910 refused to continue the flag station at this point, on the ground that it had since established a regular station within 2 miles of said flag station.

This action was brought for specific performance. The defendants pleaded that the right had been abandoned and was barred by the statute of limitations, and, furthermore, that it was against public policy, and its execution will seriously interfere with the performance of its duty as public carrier and will seriously inconvenience and retard the handling of freight and passenger trains over said railroad, and, further, that under the law they could not be compelled to establish a station at that point.

The defendants also contend that the plaintiffs' relief should be sought by a proceeding before the Corporation Commission.

If this were a proceeding to require the establishment of a station or a flag station at said point, the relief would be sought before the Corporation Commission, and in such case a new station cannot be required within less than 5 miles of one already existing. Revisal, 1097 (1). But here the plaintiffs are seeking to enforce a contract which was valid when made, and which was recognized and acted upon for a long number of years, and as to which the defendants are not shown to have made any denial till 1910.

It is very clear, therefore, that the right is not barred by any statute of limitations, and there is no evidence of abandonment. Neither was the contract against public policy.

The validity of such contract is upheld in *Taylor v. R. R.*, (Fla.) 16 L. R. A. (N. S.), 307, and in *R. R. v. Camp*, (Ga.) 15 L. R. A. (N. S.), 594; *s. c.*, 14 A. and E. Anno. Cas., 439, with full citation of authorities in the notes to those cases. In the note to the latter (p. 441) it is said: "It is a well settled rule that a contract by a railroad to locate its station at a certain point or place or within certain limits, which

does not prohibit or restrict the location of any other station, is
(298) not contrary to public policy, and is valid and enforcible." Then follow numerous citations to that effect.

It is held in these cases that upon such contract the company may be compelled "to maintain the station and schedule unless the public interests may require their discontinuance, and the other party to the contract has a right of action for damages for the breach of such contract." The other party took the contract with the knowledge that the increase in the business of the carrier might in course of time require the cessation of the station at such point; and, therefore, should the defendant prove in this case that the handling of its trains is seriously interfered with by the continuance of the rights of the plaintiffs, then the court will not decree specific performance; but the burden is upon the defendants to prove such state of facts. If the jury should so find, then, since the carrier retains the consideration, the jury should also assess the damages which the plaintiffs will sustain by their loss of the rights they have under the contract.

The court properly refused the ninth issue tendered by the defendants, "Is there any reasonable public necessity for, or benefit to be derived from, the said proposed station?" We may note that the word "proposed" was not pertinent, for the plaintiffs are not seeking to "establish" a station, but are demanding specific performance of the contract under which the flag station had been established.

The court, however, erred in refusing the eighth issue, "Will the said station impede, retard, or interfere with the defendants in the performance of their duties to the public in the carriage of freight and passengers?" and also in excluding evidence in support of such issue.

For these errors there must be a new trial. Should the jury find this last issue in the negative, then there should be a decree for specific performance; but it should contain a provision that the defendants shall not be estopped thereby to institute a proceeding at any future time, should conditions materially change, under Revisal, 1098, before the Corporation Commission, subject to appeal to the Superior Court and the ascertainment of damages accruing to the then owners of the
(299) land, for permission to abandon the continuation of the flag station at that point, by reason of the increased business which shall then be found incompatible with the longer maintenance of the station without detriment to the duties due the public in handling its trains.

The authorities that a contract of this kind is enforcible by a decree for specific performance, unless its further exercise, by reason of changed circumstances, becomes detrimental to the public interests, and

that in such case the plaintiff is entitled to recover damages, are so numerous and compelling that it is unnecessary to do more than to refer, as we have done, to the large number of cases cited in the notes to 15 L. R. A., 594; 16 L. R. A., 307, and 14 A. and E. Anno. Cas., 441.

Solomon v. Sewerage Co., 142 N. C., 439, is entirely different from this case. There the plaintiff had made an agreement with the sewerage company to pay it $2 per year rental, without specifying any duration for the contract. It was held that by reason of the increased cost of the service, the sewerage company, having raised its rates, was compelled to charge the plaintiff the same rental it charged others; besides, in that case, there was no duration specified for the contract. This case would have been like that if there had been an agreement by this defendant to charge certain rates and fares to the plaintiff's flag station, and subsequently the charges of the carrier had been raised as to other persons. In such case the plaintiff could not require specific performance of charging less rates to that station than to others, and there being no duration expressed in the contract, he could not exact damages for the breach. But here the defendant received a sum certain, once for all, *i. e.,* the right of way across the Parrott land, and it still retains that consideration. In return therefor it must comply with its contract to give the facilities of a flag station at that point, unless and until it becomes detrimental to the public in handling the business of the road. And in such case it must return to the plaintiffs the consideration which it still holds and hourly enjoys. As it cannot, of course, surrender the right of way, it must in such case pay damages in lieu (300) thereof.

The easement runs with the land. If the right of way was surrendered or abandoned, the owners of the land through which it runs would hold it freed of such burden. As it is, they hold their land subject to the burden. In *Norfleet v. Cromwell,* 64 N. C., 1, the subject of easements is fully discussed, and it is held that such covenants *"run with the land,"* even as against assignees in fee. To same effect, *Herring v. Lumber Co.,* 163 N. C., 486; *Gilmer v. R. R.,* 79 Ala., 569; *Whalen v. R. R.,* 108 Ind., 1.

The defendant railroad acquired this easement in the Parrott land, and as sole compensation therefor contracted to give Parrott a flag station at that point. This is not a contract of uncertain duration, for the defendant received the right of way, and its assignee still holds and uses it, and it must render the agreed compensation, unless, as we have said, it becomes injurious to the operation of the road, and then it must pay its value.

This was not a personal contract with Parrott, for if it were, his assignee of the land might at any time have put an end to the easement and have required its abandonment by the railroad. On the other hand, if Parrott had died the following week, the railroad would have gotten the easement for nothing.

The railroad company, in exchange for the detriment to the land and of the benefit to themselves by reason of the right of way over the land, contracted to give the facilities of a flag station at that point, and the present owners of that part of the land through which the defendant's tract runs are entitled to enforce the agreed compensation of having a flag station at that point, except in the event, as above stated, of its termination being adjudged by reasons of public policy.

We do not find any error as to the issues which have been found, and the finding as to them is sustained. But the case will go back for the submission of the following issues: "Would the continuance of the flag station impede, retard, or interfere with the defendants in the performance of their duties to the public in the carriage of freight
(301) and passengers?" And the further issue, "If so, what damages will the plaintiffs sustain the cessation of the flag station?"

The costs in this Court will be divided.

Partial new trial.

ALLEN, J., concurring: The defendant is using and claiming a right of way about a mile in length, under a deed executed by the ancestor of the plaintiff, and under whom the plaintiff claims, and the sole consideration for the deed, as expressed therein, is the promise and agreement that trains running along this right of way shall, upon notice, stop at a platform erected and maintained by the owner of the land, and it would seem to be unjust to permit the defendant to retain the right of way and at the same time repudiate the agreement, which it proposes to do.

I concur in the opinion of the Court, that the agreement is valid and enforcible in a court of equity, because it is not exclusive and does not limit the power of the defendant to locate and relocate depots; and I agree fully in the opinion expressed by *Mr. Justice Brown,* that "it seems to be universally well settled that contracts undertaking to obligate a railroad company to establish its depot *exclusively* at a particular point are void as against public policy." (The italics are mine.)

The case of *R. R. v. Summer,* 106 Ind., 59, classifies contracts of this character and clearly points out the distinction between those that are valid and those that are invalid. The Court says:

"Covenants of the character in question, so far as they have been the subject of judicial interpretation, are of three classes:

"1. There are those which stipulate for the location of stations or depots at particular places, and which prohibit the location of others within prescribed limits. All such as contain restrictive stipulations by which the railway company undertakes to prohibit itself from thereafter erecting other stationhouses or depots within prescribed limits are uniformly held to be void, as being violative of public policy. Railroad corporations are regarded as public agencies, owing duties to the public generally. Accordingly, they can make no contract which (302) shall prohibit them from serving the public as the future demands of business or concentration of population may require. *Williamson v. C. R. I. and P. R. R. Co.*, 53 Iowa, 126 (36 Am. Rep., 206); *St. Louis, etc., R. R. Co. v. Mathers*, 104 Ill., 257; *St. Louis, etc., R. R. Co. v. Mathers*, 71 Ill., 592 (22 Am. Rep., 122); *St. Joseph, etc., R. R. Co. v. Ryan*, 11 Kan., 602 (15 Am. Rep., 357).

"2. Another class consists of those cases in which an officer or other person supposed to be influential with a railway company, for a consideration promised him, agrees to secure the location of a station, depot, or railway at a particular place. A conspicuous case in this class is *Fuller v. Dame*, 18 Pick., 472. All such contracts are void as against public policy. *Bestor v. Wathen*, 60 Ill., 138; *Linder v. Carpenter*, 62 Ill., 309.

"3. Still another class is that to which the case under consideration is allied. Such are the cases in which an agreement has been made, between an individual and a railway corporation, for the location of a station or depot at a particular place, in consideration of a donation of money or property to the corporation, without any restriction or prohibition against any other location. No case has been brought to our notice in which this question was involved, and the decision of which was not controlled by other considerations, which condemns such an agreement. On the contrary, it has been held that an agreement to pay a railway company a stipulated sum in consideration that it would locate its route at a particular place is valid, and may be enforced. *Cumberland R. R. Co. v. Baab*, 9 Watts, 458; *First National Bank v. Hendrue*, 49 Iowa, 302 (31 Am. Rep., 153). So a conditional subscription of stock is valid. *New Albany, etc., R. R. Co. v. McCormick*, 10 Ind., 499; *Jewet v. Lawrenceburgh, etc., R. R. Co.*, 10 Ind., 539. A voluntary grant to a railroad, on condition that it would locate its route and establish a depot at a certain place, was sustained as not being in contravention of public policy. *McClure v. Mo. Riv., etc., R. R. Co.*, 9 Kan., 373."

(303) The quotation by *Mr. Justice Walker* in *Edwards v. Goldsboro,* 141 N. C., 70, from *People v. R. R.,* 130 Ill., 184, "that contracts materially limiting their power to locate and relocate depots are against public policy, and therefore void," condemns contracts of the first class, and the case of *Fuller v. Dame,* 35 Mass., 473, belongs to the second class, as in this last case the action was on a note given to Fuller, who was one of the proprietors of the railroad, in consideration of his promise to induce the railroad to establish a depot at a particular place.

In *R. R. v. State,* 31 Fla., 508, there was no contract, and the action was to compel the establishment of a depot for public convenience; in *Wilson v. R. R.,* 99 F. R., 645, the contract was to establish a depot, and that no other should be established within a certain distance; in *Holliday v. Patterson,* 5 Ore., 177, the contract was to pay the plaintiff, who owned a controlling interest in the road and was a director, certain sums if a different and more expensive route should be adopted than the one surveyed; in *R. R. v. Mathers,* 71 Ill., 598, the contract required the establishment of a depot at Ashland, and provided that no other depot should be established within 3 miles of that place; in *R. R. v. Seely,* 45 Mo., 222, the contract was to establish a depot on several considerations, and among others, a conveyance of lands for speculative purposes; in *R. R. v. People,* 132 Ill., 183, there was no contract, and the action was to prevent a change of depot; in *Marsh v. R. R.,* 64 Ill., 415, the contract was to locate at a certain place and at no other in town; in *R. R. v. Mathers,* 104 Ill., 257, the contract was to locate a depot and no other within 3 miles.

In these cases, where there were contracts, they were held invalid because they contained limitations upon the power to establish other depots, or on account of speculative provisions or inducements to officers of the railroads to have routes or depots established at certain places. The contract before us contains no such stipulation, and such contracts have almost without exception been held to be valid and enforcible. *Bank v. Ayers,* 12 Wis., 517; *Gray v. R. R.,* 189 Ill., 408; *R. R. v. Miller,* 31 Mo., 20; *Chamberlain v. R. R.,* 15 Ohio St., 248; *Harris*
(304) *v. Roberts,* 12 Neb., 634; *R. R. v. Robards,* 60 Tex., 549; *R. R. v. Dowson,* 62 Tex., 260; *Matterson v. R. R.,* 74 Pa. St., 215; *R. R. v. Parks,* 86 Tenn., 229; *Herzog v. R. R.* (Cal.), 17 L. R. A. (N. S.); *Griswold v. R. R.,* 12 N. D., 441; *R. R. v. Camp,* 130 Ga., 1; *Lyman v. R. R.,* 190 Ill., 321; *R. R. v. Sumner,* 106 Ind., 59; *Gilmer v. R. R.,* 79 Ala., 572; *Whalen v. R. R.,* 108 Ind., 11.

In the note to the case from Georgia, reported in 14 A. and E. Ann. Cases, 441, the cases are collected and classified, and the editor says: "(1) It is a well settled rule that a contract by a railroad to locate its

station at a certain point or place or within certain limits, which does not prohibit or restrict the location of any other station, is not contrary to public policy, and is valid and enforcible. The rule stated above is so well settled that in many cases the validity of such contracts has not been questioned, but has apparently been conceded by the litigants and recognized by the courts. See the following cases: . . . (2) Contracts that materially limit the power of a railroad company to locate and relocate its stations are against public policy, and therefore void. Accordingly, in all cases where a railroad company agrees with an individual to preclude itself from establishing or locating depots or stations on its roads at any other than certain localities, or within certain prescribed limits, such agreements are void. (3) Another class of void agreements respecting the location of stations are those whereby a private individual or an officer or agent of a railroad company, under an assumption of influence with that corporation, agrees for a consideration to secure from the corporation the location of stations or depots in a particular locality."

The next question presented is, whether such contracts can be enforced in a court of equity by specific performance. If the contract belongs to the first or second class mentioned in the Indiana case, it is void, and a court of equity cannot aid it; but if it belongs to the third class, performance will be enforced. *Lytton (Sir Edward Bulwer) v. R. R.*, 69 Eng. R. Reprint, 836; *Herzog v. R. R.*, 17 L. R. A. (N. S.), 429; *Taylor v. R. R.*, 54 Fla., 638; *McCowen v. Pew*, 153 Cal., 741; *Lawrence v. R. R.*, 36 Hun., 474, approved in *R. R. v. R. R.*, (305) 144 N. Y., 153.

In *Taylor v. R. R., supra,* the contract was to maintain a spur track and depot, and to stop regular passenger trains at a certain point in consideration of the conveyance of a right of way, and it was held that the plaintiff was entitled to specific performance; the Court, speaking through *Mr. Justice Whitfield,* saying: "It is the duty of a common carrier railroad corporation to have regard for the rights of the public in the service it engages to perform under the franchises the State permits it to use primarily for the benefit of the public. This requirement embraces the duty to render a service adequate to meet all the just requirements of the public, including reasonable dispatch, convenience, regularity, and promptness in the transportation of passengers, provision and maintenance of adequate depot facilities suited to the business and convenience of the communities along the road, and the performance of the duties and the rendering of the service due to the public, without unjust discriminations of any character as to persons, localities, or conditions. This duty, however, does not relieve the corporation from its

contract obligations to individuals when an observance of the obligations does not materially and injuriously affect the rights of the public. It is the duty of the corporation to observe the obligation of its contracts with individuals that are made in good faith, and that do not necessarily, directly, and materially affect injuriously substantial rights of the public, until the corporation is relieved from such contracts by due course of law. . . . The defendant appears to have asked for and received in kind the property and advantages from the complainants under the contract, and promised in consideration thereof to perform its stated undertakings. Under the facts alleged it is *prima facie* equitable that the complainants should have the benefit of a performance by the defendant of the agreement on its part in the manner and to the extent agreed on, at least in the absence of a proper showing of superior rights of the public against the corporation as a common carrier. . . .
(306) while equity will not ordinarily decree the specific performance of contracts requiring continuous acts involving skill, judgment, and technical knowledge, contracts relating to the operation of railroads have been specifically enforced in a number of cases. Where a railroad company, in consideration of the conveyance to it of land, makes a reasonable agreement to perform, in return for such conveyance, certain service that is fairly within its corporate powers and purposes and that is not essentially inconsistent with the company's duty to the general public, such agreement, if not otherwise illegal or unenforcible, will be specifically enforced in equity upon proper allegations and proofs."

This case from Florida is reported in 14 A. and E. Ann. Cases, 472, and in the note the authorities are collected and the comment is made that, "Although there are but few cases wherein specific performance of a contract by a railroad to erect a depot or station has been actually decreed, it is generally recognized that a contract between a railroad company and a landowner whereby the landowner conveys certain land in consideration of an agreement by the railroad company to erect and maintain a suitable depot may be enforced in equity."

The case of *R. R. v. Marshall,* 136 U. S., 393, is not in conflict with these authorities. In that case the city of Marshall conveyed certain land and other property to the railroad in consideration of an agreement to make Marshall a terminus of the road and to locate and maintain its machine and car shops there, and the action was brought to prevent the removal of the shops after their erection. The city of Marshall contended that the contract required the railroad to maintain the shops permanently, and that it could not remove them, although required by the public interest; and it was in reference to this contention that the Court said: "But we are further of opinion that, if the contract is to be

construed as the appellant insists it should be construed, it is not one to be enforced in equity," and that the remedy for the violation of *such a contract* is an action at law to recover damages.

In *Conger v. R. R.*, 120 N. Y., 32, specific performance was denied, but on the peculiar facts of the case, the Court saying in explanation of its judgment and in recognition of the right to the equity (307) in a proper case: "As we have seen, the Long Clove gorge is located upon the side of a steep mountain, in a sparsely settled district, and is approached by a steep grade, and that a passenger station with an approach thereat could be constructed only at a considerable expense. These are reasons worthy of consideration; but if there were no others, the trial court might not have deemed them sufficient to refuse specific performance. But they are followed by another, which gives additional force and weight, and that is that public travel will be delayed by the stoppage of trains, and that the public convenience will not be promoted."

In *Carp v. R. R.*, 7 Ont., 332, the right to specific performance was also denied on account of peculiar conditions.

If the contract is valid and enforcible in equity, can the plaintiff, who holds under the original grantor, maintain this action? And this depends on whether the agreement or covenant is personal or one running with land.

In *Gilmer v. R. R.*, 79 Ala., 569, it was held that "A covenant by a railroad corporation, in consideration of a grant of the right of way through plaintiff's lands 50 feet wide on each side of the track, to erect a 'flag station' at a point convenient to his house, to permit him to cultivate all the land embraced in the grant which was not needed for use by the railroad company, and if a depot was built, not to permit the sale of ardent spirits on the premises, runs with the land," and in *Whalen v. R. R.*, 108 Ind., 11, in which the plaintiff was not the original grantor, that covenants (1) to construct and maintain a turn-out and siding at a certain place, (2) to take up and set down at said siding by its passenger cars all persons going to and from the farm, were covenants running with the land; and I think there is no authority in this State opposed to this view, and I have found none elsewhere.

This seems to me to be in accord with reason and right.

The defendant is in the enjoyment of a right of way or easement across the land of the plaintiff, the title to the fee being in the plaintiff. This easement can be conveyed from time to time, and rests as a burden on the land in the hands of successive owners, and the (308) same deed which passes the easement contains the agreement or promise which is its price.

Both go hand in hand—the easement and the promise—and are continuous in their nature.

I am, therefore, of opinion that the contract is valid and enforcible in equity, and that the plaintiff may maintain this action, but that his right is subject to the proper performance of the duties the defendant owes to the public. How far this idea of private rights yielding to public necessity, frequently without compensation, ought to go, is a question of serious moment, but it pervades all departments of the law. The tendency is to destroy individuality, and to deal with men *en masse,* which may not conduce to the public good.

I do not express an opinion as to the right to recover damages in that event, as the question is not before us.

BROWN, J., dissenting: I am compelled to enter my dissent to the opinion of the Court because in my judgment it is contrary to the decisions of this Court, as well as against the overwhelming weight of authority.

This action is brought to compel specific performance of a contract made 31 March, 1859, between James M. Parrott, the plaintiff's ancestor, and the Atlantic and North Carolina Railway Company, the material part of which contract is as follows:

"And in the second place, the said railroad company covenants and agrees with said James M. Parrott, his heirs, executors, and administrators, that the passenger trains run, and hereafter to be run, on said road shall, on due notice being given, stop at the platform to be erected according to the subsequent terms of this agreement, for the purpose of landing and of reception of passengers and baggage, and that whatever freight may be hereafter directed and destined to said place where said platform is to be erected any freight train shall stop at said platform for the delivery of the same, and the said freight trains shall also, on due notice being given, stop at said platform for the reception of such freight as may be there ready for transportation."

(309) The motion to nonsuit should be granted.

1. The contract is against public policy and void.

In *Edwards v. Goldsboro,* 141 N. C., 70, this Court said: "The question has frequently arisen in the establishment of railroad depots. Railway companies are *quasi*-public corporations, and it has been said that the public have an interest in the location of their depots, the public convenience and accommodation being involved. It is in recognition of the paramount duty of railway companies to establish and maintain their depots at such points and in such manner as to subserve the public necessities and convenience, that it has been held by all courts, with very few exceptions, that contracts materially limiting their power to locate and relocate their depots are against the public policy, and therefore void.

"It seems to be universally well settled that contracts undertaking to obligate a railroad company to establish its depot exclusively at a particular point are void as against public policy. Cases and text-books to the same effect can be cited numerously. We give only a few of them: *R. R. v. State,* 31 Fla., 508; *R. R. v. Ryan,* 11 Kan., 602; *R. R. v. Seeley,* 45 Mo., 212; *R. R. v. People,* 132 Ill., 559; *R. R. v. Marshall,* 136 U. S. Supreme Court, 393; *R. R. v. Louisville,* 71 Ky., 417; *Holladay v. Patterson,* 5 Oregon, 177; *Marsh v. R. R.,* 64 Ill., 414; Greenhood on Public Policy, 319; 2 Beach on Contracts, sec. 1517."

This opinion of *Mr. Justice Walker,* delivered as late as 1906, was approved by a unanimous Court, and is cited and followed in subsequent cases: *Solomon v. Sewerage Co.,* 142 N. C., 449; *Smathers v. Insurance Co.,* 161 N. C., 103; *Floyd v. R. R.,* 151 N. C., 540.

The validity and feasibility of such contracts should not be submitted to a jury. "When a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though in that particular instance no actual injury may have resulted to the public, as the *test* is the evil tendency of the contract, and not the actual result." 15 A. and E., 934; *Edwards v. Goldsboro, supra; Glenn v. Commissioners,* 139 N. C., 412; *Bridge Co. v. Commissioners,* 81 N. C., 491.

In addition to the above cases, see *People v. C. and A. R. R.,* (310) 130 Ill., a very strong opinion fully sustaining this opinion and approved in *Edwards v. Goldsboro, supra. R. R. v. Mathers,* 71 Ill., 592, and 104 Ill., 257; Taylor on Corporations, sec. 162, and authorities cited.

In *Woodley v. Telephone Co.,* 163 N. C., 284, this Court says: "Our decisions are to the effect that these public-service corporations, including telephone and telegraph companies, take and hold their charters subject to the obligations of rendering service at uniform and reasonable rates and without discrimination, and, further, that they have no right to make or to continue in the performance of a contract which renders them unable to perform the duties imposed upon them by their charter, and whether such contract is evidenced by municipal ordinance or by agreement between the parties."

In Clark on Contracts, on page 424, the author says: "Railroad and other common carriers, for instance, are regarded to some extent as public servants, and it is contrary to public policy for them to make any agreement whereby they may be hindered in serving the public. For this reason, most courts have refused to uphold subscriptions or other contracts with railroad companies under which they bind themselves to build their road along a particular route or to locate their station or depot at a particular point or not at a particular point."

This subject was fully considered by *Chief Justice Shaw* in *Fuller v. Dame,* 35 Mass., 473. It was an action of assumpsit on a note given in consideration of an agreement to locate a railroad station on certain land of payee, and although the station had been erected, the Court held that the note was not enforcible, because against public policy.

This is a leading case and has been almost universally approved and followed. In that case the Court says:

"The work is a public work, and the public accommodation is the ultimate objection. In doing this, a confidence was reposed in them, acting as agents for the public—a confidence which it seems could be safely so reposed, when it is considered that the interests of the corporation as a company of passenger and freight carriers, for the profit (311) was identical with the interests of those who were to be carried—that is, the public interest.

"This confidence, however, could only be safely so reposed under the belief that all of the directors and members of the company should exercise their best and unbiased judgment upon the question of such fitness without being influenced by distinct and extraneous interests, having no connection with the accommodation of the public or the interests of the company.

"Any attempt, therefore, to create and bring into efficient operation such undue influence has all the injurious effects of a fraud upon the public, by causing a question which ought to be decided with a sole and single regard to the public interests, to be affected and controlled by considerations having no regard to such interests. . . . It is obvious that if one large landholder may make a valid conditional promise to pay a large sum of money to a stockholder, or influential citizen, on condition that a work of great public improvement may be so fixed as to enhance the value of his estate, all other great landholders may make like promises, on similar conditions, and great public works, which should be conducted with a view of public interest, and to the just rights of those who make advances for the public benefits, would be in danger of being overlooked and sacrificed in a mercenary conflict of separate local and private interests."

In 1859, when this contract was made, the General Assembly had the same authority it now has in the regulation and control of railroad corporations, but it had not asserted it to the same extent.

Now the statute law vests in the Corporation Commission the power to require railroads to locate stations, etc., with a proviso that the Commission shall not require any railroad company to establish any station nearer to another station than 5 miles. Revisal, sec. 1097.

The evidence shows that Parrott's Avenue is within 2 miles of the station of Falling Creek, established in 1870; 4 miles of Kinston, and 2 miles of a station called Hines Junction. The purpose of this limitation upon the power of the Commission is for the benefit of the traveling public, who are interested in the speed of the trains (312) and the quick termination of their journeys. Whether or not the railroad company can make this particular stop without detriment to the public service is not a matter a jury can pass on. It is a matter of legislative regulation through the established governmental agency.

If the railroad company has made other contracts like this, the issue may be decided in different ways by different juries.

The safest and wisest course is to follow our previous decisions and the overwhelming weight of authority, and declare such contracts void.

2d. The action is brought to compel specific performance, and regardless of whether the contract is valid in law, a court of equity should not decree specific performance, as the plaintiffs have an adequate remedy at law, and should therefore seek their redress, if any, by an action at law for damages; and no time being fixed, the contract is indefinite, and if perpetual, a court of equity would be assuming an endless duty, inappropriate to its function. *Wilson v. Winchester and R. R. Co.*, 99 Fed., 642; *Marsh & Fairbury v. P. and W. R. R. Co.*, 64 Ill., 414; *Conger v. New York W. S. and B. R. Co.*, 120 N. Y., 29; *R. R. v. State of Florida*, 20 L. R. R. (O. S.), 419; *Mobile and Ohio Ry. Co. v. People*, 132 Ill., 559; *Holladay v. Patterson*, 5 Oregon, 177; Clark on Contracts, sec. 292; Bispham's Equity (6th Ed.), secs. 375-77; Fry on Specific Performance (3d Ed.), secs. 68-9; *Soloman v. Sewerage Co.*, 142 N. C., 439.

Texas and Pacific Ry. v. City of Marshall, 136 U. S., 393, is a case in which the Supreme Court of the United States refused to decree specific performance of a contract very much like this. In the opinion *Mr. Justice Miller* says:

"But we are further of opinion that if the contract is to be construed as the appellant insists, it is not one to be enforced in equity. We have already shown that to decree the specific enforcement of this contract is to impose upon the company an obligation without limit of time, to keep its principal office of business at the city of Marshall, to keep its main machine shops there, etc., etc., although the exigencies of railroad business in Texas may imperatively demand that these establishments be removed to places other than the city of Marshall and that this (313) would be also required by the convenience of the public.

"It appears to us that if the city of Marshall has under such a contract a remedy for its violation, it is much more consonant to justice that the injury suffered by the city should be compensated by a single judgment

in an action at law, and the railroad placed at liberty to follow the course which its best interests and those of the public demand. Nor do we see any substantial difficulty in ascertaining this compensation.

"Though there may not be any rule by which these damages can be estimated with precision, this is not a conclusive objection against a resort to a court of law, for it is very well known that in all judicial proceedings for injuries inflicted by one party on another, whether arising out of tort or out of contract, the relief given by way of damages is never the exact sum which compensates for the injury done, but, with all the rules which have been adopted for the measurement of damages, the relief is only approximately perfect."

And in same case, on page 390, the Court says:

"If the court had rendered a decree restoring all the offices and machinery and appurtenances of the road which have been removed from Marshall to other places, it must necessarily superintend the execution of the decree. It must be making constant inquiry as to whether every one of the subjects of the contracts which have been removed has been restored.

"It must consider whether this has been done perfectly and in good faith, or only in an evasive manner. It must be liable to perpetual calls in the future for like enforcement of the contract, and it assumes, in this way, an endless duty, inappropriate to the functions of the court, which is as ill calculated to do this as it is to supervise and enforce a contract for building a house or building a railroad, both of which have in this country been declared to be outside of its proper functions, and not within its powers of specific performance."

In *Soloman v. Sewerage Co.*, 142 N. C., 448, our Court holds that the plaintiff was not entitled to specific performance, as there was no
(314) time fixed for the duration of the contract, and on page 448 says: "The difficulties in attempting to make or enforce a decree in such a case are pointed out in *Texas, etc., R. R. v. Marshall,* 136 U. S., 393." See, also, Fry on Spec. Performance, sec. 286; Waterman Spec. Perf., 196; *Ten Eyck v. Manning,* 52 N. J. Eq., 47; *Marble Co. v. Ripley,* 77 U. S., 339.

It is useless to multiply authorities. The courts appear to be unanimous that equity will not decree specific performance of a contract of this kind, but will leave the party to his remedy at law.

3d. The contract has no fixed duration, and does not continue forever. It has been fully complied with by the stopping of trains during the lifetime of James M. Parrott, and after his death until 1885.

The contract passed on by the Supreme Court of the United States in the *City of Marshall case* had no limit, and that Court said in reference

to it: "It appears to us so far, from this, that the contract on the part of the railroad company is satisfied and performed when it establishes and keeps a depot, and sets in operation car works and machine shops, and keeps them going for eight years, and until the interests of the railroad company and the public demand the removal of some or all of these subjects of the contract to some other place."

In *R. R. v. Scott,* 37 L. R. A. (O. S.), 94, the Court had under consideration a contract like this, and said: "It cannot be true that an agreement on the part of a railway company to establish a station at a particular point is an agreement to keep it there forever. It must be that such agreement is made subject to the general exigencies of business, the public interests, and to the change, modification, and growth of transporation routes, as these may affect the requirements of the railway company's business. The contract having this limitation, we think that the establishment of a railway station, and its maintenance, to the full extent expected or claimed, for thirty years, is, under all the circumstances, a substantial and sufficient compliance with the terms of the contract relied on here. So that, viewing this case from either standpoint, assuming the contract to be valid or invalid, we are satisfied that no cause of action is shown against the railway company." (315) *R. R. v. Florida,* 20 L. R. A., 419; *Wilson v. Ry. Co.,* 99 Fed., 642.

4th. Another reason why specific performance should not be decreed is that the plaintiffs and those under whom they claim have been guilty of gross laches.

The evidence shows that the platform, which is required by the contract to be kept up by James M. Parrott, was abandoned prior to 1885 and never rebuilt, and the evidence fails to disclose that the defendants' trains recognized the place as a flag station or stopped there from 1885 to the present date. Under such circumstances, the contract is deemed to have been abandoned.

Those who unduly sleep on their rights need not appeal to equity for aid. *Vigilantibus et non dormientibus jura subveniunt.* Bispham Eq., 376.

5th. The paper-writing sued on is a personal contract with James M. Parrott, and is not a convenant running with the land. Therefore the action cannot be maintained by Parrott's heirs at law, but, if at all, only by his administrator for damages.

The obligations contained in the agreement rest only in personal covenant, and are entirely extinguished by a sale of the land or by the death of Parrott. There can be no room for doubt that the parties did not intend to create a burden or servitude upon the land to be borne by it for all time. The contract does not operate as a grant, and creates no

easement or burden upon the land which the railroad company can enforce.

If the owners of the land refuse or neglect to keep up the platform, as they have done, the defendants cannot compel them to do so.

In order that a covenant may run with land, that is, that its benefit or obligation may pass with the ownership, it must respect the thing granted or demised, and the act covenanted to be done must concern the land or estate conveyed. 11 Cyc., 1080.

"If a man covenants for himself and his assigns, yet if the thing to be done be merely collateral to the land, and does not concern the (316) thing demised in any sort, the assignee shall not be charged."

Spencer's case, 1 Smith L. C.; *Nesbit v. Nesbit,* 1 N. C., 494; *Norfleet v. Cromwell,* 64 N. C., 12.

It seems to be clear that the agreement upon which this action is based was a personal contract upon the part of James M. Parrott, made for his personal convenience, and that it created no burden upon the land, but was collateral to it.

WALKER, J., concurring in dissenting opinion of JUSTICE BROWN: There is one reason that condemns this contract, which is, that it contravenes the settled public policy of the State. Every citizen holds his property, or his contract rights, which is precisely the same thing, subject to the exercise of the police power by the State (*Durham v. Cotton Mills,* 141 N. C., 615; *S. v. Whitlock,* 149 N. C., 542; 1 Dillon Mun. Corporations (3 Ed.), sec. 141; *Mugler v. Kansas,* 123 U. S., 623), and though the exercise of this power by the State in any particular way may have lain dormant for a long time, it can be brought into activity whenever the State, in its judgment, thinks it necessary for the public welfare. It cannot now be doubted that railway corporations are subject to the control of the State in the exercise of this power, and with reference to the subject now under consideration, the State has seen fit to declare its policy and to take charge of the location of railroad depots or stations, a matter of great and vital importance to the public at large.

In the discussion of this question, so far, the injury to the public in the enforcement of this contract seems to have been overlooked, and especially the declared policy of the State in regard to the location of railroad stations. In one of the cases mentioned in the concurring opinion, *Conger v. R. R.,* 120 N. Y., 32, the Court says that if the public will be delayed by the stoppage of trains or the public convenience will be injuriously affected, contracts such as this one will not be enforced; and so we said in *Edwards v. Goldsboro,* 141 N. C., 70, that the public has an interest in the location of railroad stations, its convenience and

accommodation being involved. The State, recognizing this fact, has assumed control over railroad companies in matters of construction and operation, as well as in those of transportation. It has (317) provided that stations shall be established within 5 miles of each other. Revisal, sec. 1097 (Laws 1899, ch. 164, sec. 2). That is the minimum distance allowable, and the Corporation Commission, to which is committed the duty and general power to locate stations, with reference to the public convenience and accommodation, is prohibited from so exercising its power as to establish stations at shorter intervals than 5 miles. This prohibition was regarded as essential to the public accommodation, as the more frequent stoppage of trains to take on and let off passengers and freight than allowed by this provision of the law would tend greatly to impede the making and enforcement of proper and convenient schedules. It was considered of more importance to serve the public expeditiously than to afford additional facilities to a single landowner for the use of the trains, whether for passengers or freight, or to enable a railroad company to acquire its right of way by a system of commutation rather than by paying the money for it.

In this particular case the rights or interests of the public seem not to have been taken into consideration by the parties at all, or to have been counted in providing for the convenience of the landowner and the release of the railroad company from the payment of pecuniary compensation for the right of way; and yet they are of paramount importance. Mere private convenience must give way to the public good, is not only a maxim of the law, but has been crystallized into a fixed principle in the government of railroads and the location of stations by our statute.

It was evidently intended that no railroad company should establish a station within 5 miles of another station, that being the minimum distance, in the judgment of the Legislature, which should separate them, so as to subserve the public interest and convenience in the furtherance of transportation of goods and passengers. If the Corporation Commission cannot require or compel the location of any two stations nearer to each other than 5 miles, the railroad company surely should not be allowed to do so by its own act, in disregard of this (318) declaration of the public policy.

That the contract between these parties has always been subject to the police power, when the Legislature should choose to exercise it, is established beyond any doubt by the recent case of *L. and N. R. R. v. Mottley,* 219 U. S., 467 (55 L. Ed., 297), in which the following propositions were decided by the Court:

"1. An interstate carrier cannot make a valid contract to issue annual passes for life in consideration of a release of a claim for damages since

the enactment of the act of 29 June, 1906, sec. 6, expressly prohibiting any carrier from demanding, collecting, or receiving 'a greater or less or different compensation' for the transportation of persons or property, or for any service in connection therewith, than that specified in its public schedule of rates.

"2. An agreement by an interstate carrier to issue annual passes for life in consideration of a release of a claim for damages, though entered into prior to the act of 29 June, 1906, was made unenforcible by the prohibition of section 6 of that act, against demanding, collecting, or receiving 'a greater or less or different compensation' for the transportation of persons or property, or for any service in connection therewith, than that specified in the carrier's published schedule of rates.

"3. Congress, in the exercise of its power over commerce, could enact the provisions of the act of 26 June, 1906, sec. 6, which rendered unenforcible a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages.

"4. The constitutional liberty of the citizen to make contracts was not infringed by the enactment by Congress, in the exercise of its power over commerce, of the provisions of the act of 29 June, 1906, sec. 6, which rendered unenforcible a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages."

(319) It appears in the record of this case that there are three other stations within 5 miles of the one proposed to be established, which would seem to be a palpable violation of the spirit and intent of the statute, if not of its letter. Revisal, sec. 1097, is very broad and comprehensive in conferring jurisdiction, so to speak, upon the Corporation Commission with reference to the location of stations. It is given thereby the sole power of deciding and directing where "the public necessity demands" that stations shall be established and "what depot accommodations will be commensurate" with the business and revenue of the railroad company, with limitation, as we have pointed out, that stations shall not be nearer to each other than 5 miles. And it may order a change of stations and of depot facilities "to promote the security, convenience, and accommodation of the public." This matter is not left to be determined by the personal whims or selfish interests of individuals or of the railroad company, but to an administrative body, supposed to represent impartially the great body of the people, and especially the traveling public, whose interests it vitally affects, and which has a deep concern in the proper location of stations, so that their number and proximity may not seriously retard transportation. If these views are correct, and

they seem clearly to be so, it will be unnecessary to inquire whether the contract was valid and enforcible in equity at the time it was made, as it has since become invalid, being against the expressed policy of the State, and is, therefore, unenforcible at this time.

The legislature could not well have declared the State's policy more plainly than it has in the section of the Revisal to which I have referred. It has manifested its will in unmistakable language, that stations shall be 5 miles apart, and this was done for the sake of the public and without regard to private interests. If the Corporation Commission, having general charge of such matters, cannot authorize what is proposed to be done here, why should the railroad company and the plaintiffs, for their own convenience, be permitted to do it, contrary to the evident policy of the statute which was passed, not to favor the railroad company, but to prevent any too great restriction being placed on transportation for the sake of public; and for that reason the Legislature pre- (320) scribed what distance between stations would subserve the desired purpose.

Agreements of this character introduce mercenary considerations to influence the conduct of parties, instead of those arising from the nature of their duties and the most efficient way of discharging them. They are, therefore, baneful in their tendencies. *Woodstock Iron Co. v. R. and D. Extension Co.*, 129 U. S., 643; *Providence Tool Co. v. Norris*, 69 U. S., 48. As said in the latter case, at p. 58: "The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." A like rule was thus stated in *Holladay v. Patterson*, 5 Oregon, 177: "A railroad company is a *quasi*-public corporation, and the public have an interest in the location of their lines of road and depots. An agreement which tends to lead persons, charged with the performance of trusts or duties for the benefit of others, to violate or betray them, will not be enforced." See, also, *R. R. v. Marshall*, 136 U. S., 393. We find it also stoutly maintained in *R. R. v. Seely*, 45 Mo., 212. The Court there said: "But the broad position is taken that the company is a private corporation, and has the right to buy and hold all kinds of property the same as an individual. This position is wholly indefensible. Whilst it is true, in one sense, that it is a private corporation, yet the public is deeply interested in it. Its chartered privileges and franchises were not granted solely and exclusively for private benefit and emolument, but to subserve a great public interest. In *Walther v. Warner*, 25 Mo., 277, this Court decided that the building of a railroad by a private corporation, under the authority of the Legislature, for the public accommodation, was a public use for which private property might be lawfully

taken. In all these enterprises there is a mingling of both public and private benefit, and the interests of the public are not to be sacrificed to mere private gain." That case also decides expressly that an agreement to give land in exchange for the location of a station at a specified place on plaintiff's other land will not be enforced, as it is contrary to public policy.

(321) "The specific execution of a contract in equity," the Court held in *Marsh v. R. R.,* 64 Ill., 414, "is a matter not of absolute right in the party, but of sound discretion in the court, and in deciding whether specific performance should be enforced against a railway company, the court must have regard to the interests of the public. *Raphael v. R. R.,* Law Rep. 2 Eq. Cases, 37.

The location of railroad depots has much to do with the accommodation of the wants of the public. And when once established, a change of affairs may require a change of location, in order to suit public convenience. We cannot admit that an individual is entitled to call for the interference of a court of equity to compel a railroad company to locate unchangeably its depot at a particular spot to subserve the private advantage of such individual. Railroad companies, in order to fulfill one of the ends of their creation—the promotion of the public welfare—should be left free to establish and reëstablish their depots wheresoever the accommodation or the wants of the public may require. To grant the relief asked for by the complainant, we would regard as against public policy; and he must be left, for whatever remedy he may have, to his suit at law for damages." *St. Joseph and D. C. R. R. v. Ryan,* 11 Kan., 302 (opinion by *Brewer, J.*), holds that, "Railroad corporations are, as we have seen, public agencies and perform a public duty. They are agencies created by the public, with certain privileges, and subject to certain obligations. A contract that they will not discharge, or by which they cannot discharge, those obligations, is a breach of that public duty, and cannot be enforced." It was also said that they are under an obligation to use the utmost human sagacity and foresight in the construction and operation of their roads, and this duty they must exercise impartially for the public good, and not neglect in any particular or degree, in order to advance their own or other private interests. The purchased consent of the railroad to the establishment of a station, where it is discharging a duty owing to the public, is against the law's policy, because it is unjust to that public, as it deprives the company of the freedom of action which it should always have in order to

(322) serve those from whom it derived its franchise, instead of its own selfish interests. This principle is profusely illustrated in *Drain v. Chicago City Ry.,* 160 Ill., 22. In another case (*Burney's*

Heirs v. Ludeling, 47 La. Ann., 73), where it is held that contracts of the kind we are now considering are void, as being against public policy, the Court said: "The railroad corporation was a *quasi*-public agent, and it was its duty, independent of any agreement to secure an advantage to it, to establish its stations at points most convenient for the public interests. An agreement, therefore, by the corporation for a part of the land, to establish its depots or stations at particular points, is illegal. All agreements which tend to injure the public service are illegal." For the very reason that where private interests are at stake the public welfare is sure to be overlooked, if it conflicts, the Legislature has wisely assumed control of this matter in this State by providing the minimum distance between stations, in the interest of the public convenience. It clearly had the power to do so. "The property of railroad corporations is devoted to a public use. The truth of this proposition is nowhere questioned. Such corporations may exercise the right of eminent domain by taking lands for their roads against the will of the owners. The business of providing highways and arranging conveniences to enable people easily to pass from place to place is a part of the public business which may be done by the State. If the State grants franchises and delegates the transaction of this business to corporations, it retains the right to regulate the business for the public good in any reasonable way. It may do this in the exercise of the police power, which is a power inherent in every well ordered system of government."

It will not answer this position to say that the railroad company and individuals may violate this provision of law so long as the Corporation Commission does not intervene in behalf of the public. The point is that the Legislature has declared its will to be that a proper distance for the public interests is 5 miles, as it was considering only the public welfare in passing the law, and prescribed a rule that would promote it. In none of the cases cited in support of the Court's (323) conclusion had the Legislature thus spoken upon the matter.

Cited: Davis v. Robinson, 189 N.C. 600 (1g); *Garrison v. R. R.,* 202 N.C. 851 (1c).

ISHAM HODGES ET AL. v. A. R. WILSON ET AL.

(Filed 8 April, 1914.)

1. Deeds and Conveyances—Mental Capacity—Fraud—Trials—Evidence.

In this action to set aside a deed for alleged mental incapacity of the grantor, and for fraud and undue influence on the part of the grantee in obtaining it, it was competent for a witness to testify that the grantor did not have sufficient mind to make the conveyance, in reply to matter brought out on his cross-examination; and it is further *Held*, if the testimony was erroneously admitted, it was harmless under the circumstances, and in view of the findings upon the issues.

2. Evidence—Deceased—Transactions and Communications—Statutes.

The testimony of a witness as to his communications and transactions with a deceased person respecting his title to lands, in dispute, is held not to be objectionable under Revisal, sec. 1690, for at the time it did not appear that the witness had any interest in the controversy.

3. Appeal and Error—Objections and Exceptions — Questions — Answer Irrelevant—Motions.

Where a question asked a witness is competent, and the answer is not responsive, and incompetent, the exception should be to the answer and not to the question; the procedure being upon motion to strike out the answer, or that the jury be instructed to disregard it.

4. Deeds and Conveyances—Fraud and Mistake—Time of Discovery—Trials—Evidence.

In an action to correct or set aside a deed for fraud and mistake, it is competent to show when the mistake was discovered, as bearing upon the plaintiff's promptness and diligence, after the discovery thereof was made by him, in enforcing his remedy.

5. Deeds and Conveyances—Mental Incapacity—Trials—Evidence—Non-expert Witnesses.

It is competent to show by nonexpert testimony that the maker, at the time of executing a deed to lands, was mentally incapacitated, when that question is involved in the controversy.

6. Trials—Evidence—Nonsuit.

When there is sufficient evidence, viewed in the light most favorable to the plaintiff, to sustain a verdict in his favor, a motion as of nonsuit will not be granted.

7. Trials—Issues—Evidential.

When the issues submitted to the jury by the court are sufficient to present the case in all its essential aspects, the refusal of the court to submit the issues tendered by the appellant will not be held as error. The issue tendered in this case was merely evidential and improper.

8. Deeds and Conveyances—Fraud—Trials—Burden of Proof.

Where a contract is sought to be set aside for fraud, the fraud must be alleged and established by distinct proof, though it is only required to preponderate in the plaintiff's favor.

9. Deeds and Conveyances—Fraud—Trials—Evidence.

While mere weakness of mind, physical infirmity, or inadequacy of price are not alone or separately sufficient to set aside a contract, courts of equity will consider them in connection with other circumstances of the case tending to show that the contract was obtained by fraud, as where the contract was made by an illiterate, old, and feeble man, who executed it relying upon the good faith of the other party to the contract, who represented that it was a conveyance of 10 acres of land, whereas it conveyed 76 acres; recited a consideration of $300, when $75 only was paid, etc.

10. Trials—Remarks of Counsel.

The remarks of plaintiff's counsel to the jury, made in reply to the defendant's counsel, who preceded him, are not held as error in this case.

11. Trials—Instructions—Incorrect in Part—Construed as a Whole—Appeal and Error.

Where the charge of the judge to the jury, construed as a whole, is correct, and the part thereof objected to, when considered with the context, is not erroneous or misleading, it will not be held as reversible error.

12. Trials—Issues—Answers—Harmless Error.

Where the answer to an issue by the jury is sufficient to sustain a judgment against appellant rendered in the lower court, instructions on another issue, even if erroneous, are harmless.

13. Deeds and Conveyances—Recited Considerations—Fraud — Trials — Evidence.

The consideration recited in a deed attacked for fraud and undue influence may be shown to be incorrectly stated, and evidence of the real consideration and its inadequacy is competent, where there are circumstances tending to show that the transaction was fraudulent.

APPEAL by defendants from *Lyon, J.*, at September Term, 1913, (325) of CUMBERLAND.

This action was brought for the cancellation or reformation of a deed, the plaintiff alleging that it conveyed 76½ acres of land, contrary to the agreement of the parties that it should pass only 10 acres, and that this was brought about by the fraud of A. R. Wilson, the grantee, and the mistake of Isham Hodges, the grantor, induced thereby.

The original parties died pending the suit, and their heirs were brought in by order of the court.

Plaintiffs amended their complaint by stating that Isham Hodges, their ancestor, was not mentally capable of making the deed at the time of its alleged execution. Evidence was taken, and under the same and

the charge of the court, the jury returned the following verdict, which will fully explain the matters in controversy:

1. Did Isham Hodges on 25 June, 1910, have sufficient mental capacity to execute the deed in controversy? Answer: No.

2. If not, did A. R. Wilson have knowledge of such mental incapacity? Answer: Yes.

3. Did M. A. Hodges, his wife, have sufficient mental capacity on 25 June, 1910, to execute the deed in controversy? Answer: No.

4. If not, did A. R. Wilson have knowledge of such mental incapacity? Answer: Yes.

5. Was the deed of 25 June, 1910, procured to be executed by the fraud and misrepresentation of A. R. Wilson? Answer: Yes.

(326) 6. What consideration did A. R. Wilson pay for the execution of the deed of 25 June, 1910? Answer: $75.

Isham Hodges had sold and conveyed to A. R. Wilson 40 acres of the tract containing 116½ acres, and afterwards agreed to sell an additional 10 acres. Wilson drew the deed for 76½, reciting a consideration of $300, whereas only $75, the price of a buggy and harness, was actually paid by him. He represented that the deed conveyed only 10 acres, as agreed upon, and Isham Hodges, being old, infirm, and illiterate, and of unsound mind, was led by this false representation to execute the deed of 25 June, 1910, in the form prepared by A. R. Wilson. There was evidence that the land was then worth $1,000. This is plaintiff's version of the facts, which was denied. The respective parties offered evidence to support their contentions. Judgment was entered upon the verdict, and defendants appealed, after reserving their exceptions.

Sinclair & Dye and Shaw & McLean for plaintiff.

Clifford & Townsend for defendant.

WALKER, J., after stating the facts: There are many exceptions in this case, and we will consider them in their order as stated in the record.

First exception: The question asked of John Carter, who testified to Isham Hodges' mental incapacity, was competent, as it was proper, in reply to the matter brought out on the cross-examination; and even if erroneous, it was harmless and could not have influenced the jury. Counsel were really engaged in cross-firing with small ammunition, and it turned out to be practically a bloodless encounter.

Second exception: The testimony of H. P. Godwin, as to his communications and transactions with A. R. Wilson, was admissible, he not being an incompetent witness under Revisal, sec. 1690. The objection to this evidence must be overruled on several grounds: (1) At the time

the question was asked and answered, it did not appear that the witness had any interest in the controversy. (2) The part of the answer relating to the communication is not strictly responsive to the question. Objection, therefore, should have been made to the (327) answer rather than to the question, and a motion submitted to strike it out. This is generally true when the answer is objectionable and is not responsive to the question. It was held in *McRae v. Malloy,* 93 N. C., 154, that if, on the examination of a witness, he makes a statement not responsive to a legitimate inquiry or foreign to it, the proper course is a request that the incompetent matter be stricken out or withdrawn, or that the jury be directed to disregard it, and there are numerous cases which require that course to be taken in order to save the party's rights. *Deming v. Garney,* 95 N. C., 528; *Wiggins v. Guthrie,* 101 N. C., 661; *Blake v. Broughton,* 107 at page 229, are some of them. (3) It does not appear that the testimony prejudiced the defendants, or could do so. On the contrary, it may all be true, and yet the deed be valid. It was, therefore, harmless. What he said was entirely immaterial to the controversy.

Third exception: We do not see why it was not relevant to prove when the mistake in the deed was discovered. It tended to show that plaintiffs had acted with promptness and diligence in having the deed corrected or set aside after the discovery was made.

Fourth exception: It was competent to show by nonexpert testimony that Isham Hodges was mentally unsound. *Clary v. Clary,* 24 N. C., 78; *McRae v. Malloy,* 93 N. C., 154; *Smith v. Smith,* 117 N. C., 314; *Whitaker v. Carter,* 26 N. C., 465; *Cogdell v. R. R.,* 130 N. C., 326; *McLeary v. Norment,* 84 N. C., 235; *Atwood v. Atwood,* 37 L. R. A. (N. S.), 591, and notes.

Fifth and sixth exceptions: The court properly refused to nonsuit the plaintiffs. There was evidence to support their contentions, which upon such a motion must be viewed most favorably to them. *Snider v. Newell,* 132 N. C., 614; *Bivings v. Gosnell,* 133 N. C., 574; *Boddie v. Bond,* 154 N. C., 359; *Ball-Thrash Co. v. McCormick,* 162 N. C., 471.

Seventh exception: The issue tendered by the defendants was fully covered by those submitted by the court. When this is so, and opportunity is afforded to present the case in all its essential aspects, it is not error to reject the issue so tendered. *Clark v. Guano Co.,* 144 N. C., 64, and cases cited; *Jackson v. Telegraph Co.,* 139 N. C., (328) 347; *Main v. Field,* 144 N. C., 307; *Johnson v. Lumber Co., ibid.,* 717. Besides, the issue tendered by defendants was merely evidential.

Eighth exception: This exception is taken to the fifth issue, and upon the ground that there is no evidence of fraud. But we think otherwise.

The evidence tends to show that Isham Hodges was poor and in necessitous circumstances; that he was infirm in health, being afflicted with dropsy and heart disease to such an extent that he required constant medical attention for at least ten years; that his mind was greatly impaired and he was not capable of understanding the nature and effect of an ordinary business transaction; that he was frequently in a comatose condition, which produced a state of drowsiness or stupor; that he and his wife, who signed the deed with him, were both mentally incapable of executing a deed, both being "halfwitted," as stated by a medical expert; the land was worth $1,000, whereas the grantee only paid $75 for it, a grossly inadequate price, which would cause any one to exclaim that he practically got it for nothing; and there were also false representations made to obtain the deed. This recital, which does not, by any means, embrace all the facts, is sufficient to show the futility of this objection.

What does the law, as administered in a court of equity, say in regard to these facts? A party who alleges fraud in the making or execution of a contract must establish his case by a preponderance of the evidence and to the satisfaction of the jury. *Flamm v. Flamm,* 163 N. C., 71; *Dare County v. Construction Co.,* 152 N. C., 23. Fraud is not to be assumed on doubtful evidence or merely suspicious circumstances, but must be alleged and established by distinct proof, though it is only required to preponderate. *Lord Hardwicke* has, perhaps, given us the best classification of fraud such as will invalidate a deed or contract, in *Chesterfield v. Janssen,* 1 Atk., 301, 1 Lead. Cases in Equity, star page 341 (4 Am. Ed., 773):

1. Fraud arising from the facts and circumstances of imposition;

(329) 2. Fraud arising from the intrinsic matter of the bargain itself;

3. Fraud presumed from the circumstances and condition of the parties contracting;

4. Fraud affecting third persons not parties to the transaction. Bispham on Equity (5 Ed.), sec. 24.

The third species of fraud, according to *Lord Hardicke's* classification, is that which is presumed from the circumstances and conditions of the parties contracting; and this may, perhaps, be again subdivided into two classes, viz.: first, where one of the parties is laboring under some mental disability; and, second, where the transaction takes place under undue influence.

As to the first of these two classes, mere weakness of mind is not of itself a sufficient ground for equitable interference. It would be impossible to carry on the business of the courts if they undertook to inter-

fere in every case in which a superior and more astute intellect obtained an advantage in a bargain over a dull or feeble mind. But an entire absence of intellectual power, or great mental aberration, will be sufficient to cause a contract to be rescinded. Hence, the contracts of idiots and lunatics are void, or, at least, voidable. And while mere weakness of mind will not be enough, of itself, to justify a rescission, it will, nevertheless, always constitute an important element in actual fraud. If, therefore, a transaction be in the slightest degree tainted with deceit, the intellectual imbecility of the injured party will be laid hold of by a chancellor to make out a case of actual fraud, which might otherwise be incapable of proof. Bispham Equity (5 Ed.), sec. 230. These are substantially the observations of Mr. Bispham. He further says: "Whatever be the cause of the mental weakness—whether it arises from permanent injury to the mind, or temporary illness, or excessive old age—it will be enough to make the court scrutinize the contract with a jealous eye; and any unfairness or overreaching will be promptly redressed. As has been said by the Supreme Court of the United States, 'wherever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness, or any other cause, though not amounting to an absolute disqualification, and the consideration (330) given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party or his representatives or heirs, interfere and set the conveyance aside.' 'The result of the decisions,' says an English chancery judge, in a modern case, 'is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set the transaction aside.' A mere latent suspicion of unfairness, however, will not be enough. On the other hand, it need scarcely be remarked that the mere circumstance of old age or physical feebleness will not render a transaction fraudulent, if, in point of fact, the party is intelligent and capable." Bispham's Equity (5 Ed.), sec. 230, pp. 330, 331.

This Court laid down an analogous principle in *Hartly v. Estis*, 62 N. C., 167, by *Judge Battle:* "Weakness of mind alone, without fraud, is not a sufficient ground on which to invalidate an instrument, nor will old age alone, without fraud, have that effect. But excessive old age, combined with weakness of mind, may constitute a ground for setting aside a conveyance. *Smith v. Beatty*, 2 Ire. Eq., 456. Neither weakness of mind nor old age is of itself a sufficient ground to invalidate an instrument. To have that effect there must be some fraud in the transaction, either expressly proved or to be inferred from the circumstances. *Suttles v. Hay*, 6 Ire. Eq., 124. Mere inadequacy of price is no ground

for setting aside a contract, unless it be such as amounts to *apparent fraud;* or the situation of the parties is so unequal as to give one of them an opportunity for making his own terms. *Potter v. Everitt,* 7 Ire. Eq., 152. Where a person standing in a confidential relation to another uses the influence and advantages of his position to make an unequal contract with his dependent or inferior, a court of equity will relieve against it. *Mullins v. McCandless,* 4 Jones Eq., 425. It is an established doctrine, founded on a great principle of public policy, that a conveyance obtained without any proof of fraud, by one whose position gave him power and influence over the donor or grantor, shall not stand at all if (331) without consideration, and shall stand as a security only for the sum advanced if upon a partial and inadequate consideration. *Futrill v. Futrill,* 5 Jones Eq., 61."

We must be careful to note what was formerly said by the same judge, for the Court, in *Suttles v. Hay, supra,* at p. 127, in regard to his quotation from *Smith v. Beatty, supra,* concerning excessive old age and mere weakness of mind, as follows: "It is well settled that neither weakness of mind nor old age is, in the absence of fraud, a sufficient ground to invalidate an instrument. *Smith v. Beatty,* 2 Ire. Eq., 456. And although it is said in the same case, 'that excessive old age, with weakness of mind, may be a ground for setting aside a conveyance obtained under such circumstances,' yet, it is manifest, that to have this effect there must be some fraud in the transaction, expressly proved or inferred from the circumstances. It is incumbent, then, upon the plaintiffs to prove their charge that the deed was procured from the grantor by the fraudulent exercise of undue influence over him by the grantee and his wife." The subject is fully discussed, with ample citation of authorities, in 2 Pomeroy's Eq. Jur. (1882), secs. 922 to 929 and 943 *et seq.*

With these authorities before us, we have but little difficulty or hesitation in considering the transaction between Isham Hodges and A. R. Wilson, and declaring it as having a sufficiently infectious element to induce a cancellation of the deed which the latter obtained by his fraudulent practices.

We said in *Dorsett v. Manufacturing Co.,* 131 N. C., at p. 260, what appears to be much in point here: "It is true that inadequacy of consideration alone is not sufficient to set aside a written instrument 'unless the consideration is so inadequate as to shock the moral sense and cause reasonable persons to say he got it for nothing.:' But it is proper evidence to be considered upon an issue of fraud, and may, in connection with other evidence and circumstances tending to show fraud, be sufficient to establish the fraud and to set aside the instrument. *McLeod v. Bullard,* 84 N. C., 515. And the rule to be observed in cases where the

validity of the instrument is attacked upon the ground of fraud is the preponderance or the greater weight of the evidence. *Harding v. Long,* 103 N. C., 1; 14 Am. St., 775, where the distinction is (332) drawn between cases for the reformation of the instrument and those sought to be set aside for fraud."

We have, in this case, to start with, evidence of the inadequacy of price. As said in *Worthy v. Caddell,* 76 N. C., 82: "The party assuming to be a purchaser for valuable consideration must prove a fair consideration, not up to the full price, but a price paid which would not cause surprise or make any one exclaim, 'He got the property for nothing; there must have been some fraud or contrivance about it.'" *Printing Co. v. Herbert,* 137 N. C., 317; *Collins v. Davis,* 132 N. C., 109, and *Fullenweider v. Roberts,* 20 N. C., 278, where it is defined as "a fair and reasonable price, according to the common mode of dealing between buyers and sellers." There is a great disproportion between $1,000 and $75. Besides this, there is proof of old age, great mental weakness and imbecility, false representations as to the contents of the deed, and of an evident purpose to overreach "those poor and half-witted people," formerly slaves, in the transaction.

It may be conceded that old age, physical infirmity, and weakness of mind are not in themselves, and without some fraudulent element, sufficient to arouse the conscience of the court to action in behalf of those who are thus afflicted, and who appeal for protection or relief against one who, by virtue of greater strength in those respects, has acquired an advantage over them, as it is said that a court of equity will not measure the size of people's understandings or capacities (1 Mad. Ch. Pr., 280), provided they have sufficient intelligence to understand the nature and effect of the transaction. But instead of having only a few of the necessary elements besides old age and weakness of mind, we have about every conceivable one, that is, if the evidence, and every reasonable inference therefrom, is to be considered in the most favorable light for the plaintiffs, and this is enjoined upon us. Our conclusion is that there was ample evidence to support the verdict and judgment of the court. What is here said applies with equal force to the ninth exception.

Tenth exception: There is no merit in this assignment of (333) error. The comment of plaintiff's counsel was only in reply to what defendant's counsel, who preceded him in the argument to the jury, had said. If there was technical error in not ruling out all reference to the pleading, we do not see that it was of sufficient importance for a reversal, as it added little or nothing to the weight of the other evidence.

There are many exceptions to the charge of the court, but a careful scrutiny of it has convinced us that no substantial error was committed by the court, if error at all. It stated the questions in controversy with clearness and fullness and with entire impartiality, arraying the various contentions of the parties, and correctly explained the law as applicable to the facts. If the definition of fraud was not accurate, the error was corrected by the subsequent parts of the charge, explaining fully what facts the jury must find in order to constitute fraud. We must read the charge as a whole, and not any single or detached portion, in order to fairly and properly construe it. *Aman v. Lumber Co.,* 160 N. C., 369, citing *S. v. Exum,* 138 N. C., 599, and *S. v. Lance,* 149 N. C., 551.

But in this case the verdict finds that Isham Hodges and his wife were mentally incapable of executing the deed, and that A. R. Wilson knew it, and as this finding is, of itself, sufficient to invalidate the deed, any error on the issue as to fraud becomes immaterial and harmless. *Sprinkle v. Wellborn,* 140 N. C., 163. Eliminating the fifth issue, and enough is still left in the verdict, which is free from error, to support the judgment. But there was no error as to the fifth issue, and the combination of facts shown by the evidence, and which passed into the verdict, as much so as if therein set forth, was sufficient to authorize the surrender and cancellation of the deed as decreed by the court. *West v. R. R.,* 151 N. C., 231. The court properly refused to charge, if there was any doubt, the jury should find for defendant. It is so expressly held in *Asbury v. R. R.,* 125 N. C., 568. The charge was full and correct as to the burden and quantum of proof. It is competent to show the consideration of the deed to be other than the one recited therein,
(334) when it is attacked for fraud and undue influence, as in this case. *McLeod v. Bullard,* 84 N. C., 515; *Powell v. Heptinstall,* 79 N. C., 206. There was sufficient allegation as to the plaintiffs being the heirs of Isham Hodges, and defendants being the heirs of A. R. Wilson. The facts, in this respect, are really found by the judge, and his order making them parties was based upon the finding.

There was something said on the argument before us about the return of the $75 paid by A. R. Wilson to Isham Hodges. Whether defendants are entitled, as matter of legal right, to this return, is a question of some moment, and is not free from difficulty, but we are relieved of any discussion of the matter by the offer of plaintiffs here to make the return. When the law cancels a contract or deed, it seeks to place the parties in *statu quo,* as nearly as this can be done, for while the one party may have been wronged, its judgment is not punitive, and the wrong is considered adequately avenged if the *status quo* is fully restored. This is not intended as an intimation of our opinion upon the legal rights of the

parties, but as preliminary to a suggestion that the offer of plaintiffs to restore the money is responsive to the general principle of equity, and, at least, is a just concession of the moral right involved and creditable to them. The proper amendment of the judgment will be made to carry out this agreement.

We find no error in the record. Defendants will pay the costs of this Court.

No error.

Cited: Gray v. R. R., 167 N.C. 435 (6g); *Reynolds v. Palmer*, 167 N.C. 454 (11g); *Lloyd v. R. R.*, 168 N.C. 649 (6g); *Lamb v. Perry*, 169 N.C. 443 (9g); *Lamb v. Perry*, 169 N.C. 444 (8f); *Glenn v. Glenn*, 169 N.C. 731 (8p); *Hopkins v. R. R.*, 170 N.C. 487 (6g); *Johnson v. Johnson*, 172 N.C. 531 (8p); *Boone v. Lee*, 175 N.C. 385 (8p); *Dixon v. Green*, 178 N.C. 210 (9g); *Bell v. Harrison*, 179 N.C. 195, 198 (9g); *White v. Hines*, 182 N.C. 289 (11g); *S. v. Baldwin*, 183 N.C. 683 (11g); *S. v. Dill*, 184 N.C. 650 (11g); *Plyler v. R. R.*, 185 N.C. 362 (11g); *Godfrey v. Power Co.*, 190 N.C. 31 (3g); *Milling Co. v. Highway Com.*, 190 N.C. 697 (11g); *Luttrell v. Hardin*, 193 N.C. 270 (3g); *Keller v. Furniture Co.*, 199 N.C. 416 (3g); *Brown v. Featherstone*, 202 N.C. 572 (p); *Bolich v. Ins. Co.*, 206 N.C. 151 (9g); *Gilbert v. West*, 211 N.C. 466 (p); *Edgerton v. Johnson*, 217 N.C. 317 (3g); *Carland v. Allison*, 221 N.C. 122, 123 (9g); *S. v. Gentry*, 288 N.C. 650 (3g); *Steelman v. Benfield*, 228 N.C. 654 (3g); *Tarkington v. Printing Co.*, 230 N.C. 359 (10g).

CHARLES S. RILEY & CO. v. CARTER & PRATT.

(Filed 15 April, 1914.)

1. Mortgages—Deeds of Trust—After Acquired Property.

A purchaser at a foreclosure sale under a deed of trust made by a lumber company required by the terms of the instrument to be kept in operation and embracing after acquired property for the period of three years, whether the trustees were in possession or not, gets a good title to timber which had been purchased by the trustor within the period prescribed.

2. Trials—Evidence—Records—Certified Copies—Originals.

Original records are admissible in evidence, though, in certain instances, certified copies thereof are also admissible; and in this case it is held that the admission of the original was competent to show that a commissioner therein named had knowledge of his conveyance of certain timber to another when he later attempted to acquire title thereto for himself.

3. Trials—Evidence—Void Deeds—Color of Title—Common Sense.

A void deed is color of title for the purpose of showing that the parties litigant in an action involving ownership of timber claimed it from a common source.

4. Appeal and Error—Harmless Error.

It is held in this case, involving the title to certain standing timber, that the unnecessary admission of certain records in evidence, upon the question of title to the lands, was harmless error.

5. Deeds and Conveyances—Timber Deeds—Trials—Evidence—Nonsuit—Statutes—Contracts.

Where the plaintiff in an action involving the title to standing timber has introduced evidence to show title from a common source with the defendant, a motion for judgment as of nonsuit upon the evidence cannot be allowed; and the statute protects the rights of both parties until the final termination of the action, and prohibits the cutting of the trees by either of them until then. Revisal, sec. 808.

6. Trials—Courts—Evidence—Verdict, Directing.

Where there is no conflict in the evidence in a civil action, or the facts are virtually admitted, the court may direct a verdict as a matter of law.

7. Deeds and Conveyances—Mortgages—Deeds in Trust — Recitations — Decrees—Evidence—Registration—Notice.

Commissioners appointed by the court to sell lands under a deed of trust are officers of the court, and their recitation in the deed of conveyances of decrees of the court respecting the sale are *prima facie* evidence of the correctness of such statements, and affect subsequent purchasers with notice, though the decrees may not be registered. It is otherwise when the order or judgment of the court creates the lien.

(336) APPEAL by defendants from *Rountree, J.*, at September Term, 1913, of PENDER.

Bland & Bland, Herbert McClammy, and John D. Bellamy & Son for plaintiffs.

E. K. Bryan and R. G. Grady for defendants.

CLARK, C. J. As to assignments of error 1 and 9, the Peregoy Company was a lumber plant operating much machinery, and under article 23 of the deed of trust the plant was required to be maintained and kept in operation. On foreclosure under article 4, a sale being made, all the estate of the company was to vest in the purchaser, "whether said trustee be in possession thereof or not, and whether the same be now owned or shall be hereafter acquired." Article 9 vests in the trustee all the legal and equitable rights to all property then owned by the company, "and all property and rights of any kind whatever acquired or owned

during a period of three years" from its date. The deed, therefore, should be construed to convey all the property that was owned then or acquired within three years.

As to the second assignment of error, while certified copies of records are admitted in evidence, the originals are not thereby made incompetent. *Iron Co. v. Abernathy,* 94 N. C., 545; *S. v. Voight,* 90 N. C., 741; *S. v. Hunter, ib.,* 829. These papers were not offered in evidence for the purpose of establishing a link in plaintiffs' title, but to show Bryan's authority, as commissioner, to make the deed and the knowledge which he possessed of this conveyance to Stewart when later seeking to acquire for himself this same property.

Assignment 2: The deed from Ricaud, receiver, to Grady, though void and conveying no title, was competent to show the source of defendants' claim of title and to create an estoppel by connecting both parties with a common source. *Bond v. Beverly,* 152 N. C., 56. A void deed is color of title for the purpose of creating an estoppel. 1 Cyc., 1085; *McNeill v. Fuller,* 121 N. C., 212; *Williams v. Council,* 49 N. C., 207; *Wilson v. Land Co.,* 77 N. C., 459; 16 Cyc., 688, sec. 18; Bigelow Estoppel, 356.

Exception 5: The admission of the record and proceedings (337) may not have been necessary, but was harmless. The plaintiffs' claim was to the timber and not to the land.

Exception 6: This is to the refusal of a nonsuit, and cannot be sustained. The plaintiff had introduced evidence to show title from a common source by estoppel. Revisal, 808, provides that when there is "a *bona fide* contention on both sides upon evidence constituting a *prima facie* title, no order shall be made pending such action permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees shall be finally determined in such action," with a proviso that "the time within which such timber or trees may be cut or removed by the party claiming the same, and all other rights required in connection therewith, shall not be affected or abridged, but the running of the term shall be suspended during the pendency of such action."

In *Moore v. Fowle,* 139 N. C., 52, it was held that where the court finds that the plaintiffs' claim is *bona fide,* the injunction should not be dissolved, but continued to the hearing. Here the suit was brought 9 September, 1907, and the deed for the timber right made 16 December, 1895, was for 15 years, and would have expired, therefore, 16 December, 1910. The injunction did not interfere with any vested right, but merely prevented either party from taking any advantage of the other pending the litigation, and the statute extended the time for cutting the timber for the period that the injunction lasted.

The court having held that the decree giving leave to sell the timber was void (*Bank v. Peregoy,* 147 N. C., 294), the deed made under it was void.

Exception 8: There being no conflict of testimony, and the facts being virtually admitted, the court could direct a verdict or instruct the jury as it did. *Purifoy v. R. R.,* 108 N. C., 100.

Exception 10: The conveyances containing recitals of the decrees were registered. These recitals being in conveyances made by an officer of the court, are *prima facie* evidence of such decrees, though the decrees themselves were not registered. *McKee v. Lineberger,* 87 N. C., (338) 181; *Iron Co. v. Abernathy,* 94 N. C., 545. It is not always necessary to register the decrees. *Skinner v. Terry,* 134 N. C., 306.

The purpose of the act of Congress as to docketing judgment when obtained in the Federal Court, and of our statute, Revisal, 576, is to place such judgments on the same footing as those obtained in the State courts and to make them a lien from the date of docketing. A judgment in the Federal court on a money demand would not be a lien on real property until docketed in the county where the land is situated. *Alsop v. Mosely,* 104 N. C., 60; *Bernhardt v. Brown,* 122 N. C., 593. There is, however, a distinction between judgments which create liens and decrees enforcing liens already existing. In this case the lien was not created by the decree, but by the deed of trust, and the judgment merely directed the sale of the property to satisfy the mortgage lien.

No error.

Cited: Blalock v. Whisnant, 213 N.C. 420 (2g); *Cox v. Wright,* 218 N.C. 348 (2g); *Dunn v. Tew,* 219 N.C. 290 (6g).

A. H. SLOCUMB v. RALEIGH, CHARLOTTE AND SOUTHERN RAILROAD COMPANY.

(Filed 8 April, 1914.)

1. Railroads—Contracts—Leases—Interpretation—Damages by Fire—Location of Cause—Words and Phrases.

Contracts will be construed to effectuate the intention of the parties, and in some instances the conditions surrounding the contracting parties may be considered as well as the nature of the instrument; and where the lessee of a railroad company of lands upon which to operate a turpentine distillery, and upon which the company is to lay for the benefit of the plain-

tiff a switch or siding sufficient to accommodate two cars, agrees in the lease, "that any fires originating within the boundaries hereby leased shall not be chargeable to the company," and that the company should not be held responsible therefor, it is *Held*, the defendant is not responsible in damages for the destruction of the distillery caused by a spark from its train negligently operated off the leased premises, and which flew thereon and ignited the plaintiff's property.

2. Railroads—Leases—Negligence—Limitation of Liability—Public Policy —Public Duties.

In making a lease of its lands to private shippers and placing thereon a switch or siding for their use, a railroad company is not performing a public duty such as will invalidate a stipulation in the lease, whereby the lessee agrees not to hold the company liable for fires occurring on the leased premises through its negligent acts.

APPEAL by plaintiff from *Lyon, J.*, at October Term, 1913, of (339) CUMBERDAND.

This is an action to recover damages for the destruction by fire of a turpentine distillery. The jury returned the following verdict:

1. Was the property of the plaintiff burned by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Was said property burned by the contributory negligence of the plaintiff? Answer: No.

3. What damage, if any, has the plaintiff sustained? Answer: $1,800.

4. Did the plaintiff, Slocumb, execute the contract dated 15 July, 1908, and go in possession of said land in pursuance thereof? Answer: Yes.

The contract referred to in the fourth issue is a lease of a lot of land belonging to the defendant, for the purpose of erecting and maintaining a distillery thereon, in which it is stipulated among other things that the defendant would "lay for the benefit of the plaintiff a switch or siding upon the premises leased sufficient to accommodate two cars for the use and benefit of the plaintiff," and further, "that any fire originating within the boundaries hereby leased by the party of the first part to the party of the second part shall not be chargeable to the party of the first part, and the party of the first part will in no wise be answerable or responsible therefor."

The property leased is a parallelogram. It begins 28 feet from the center of the track of the defendant, and runs parallel with the track 160 feet, and at right angles with the track 400 feet.

The fire which destroyed the distillery resulted from a spark (340) from an engine of the defendant on its track, being blown into the inclosure.

His Honor signed judgment upon the verdict in favor of the defendant, holding that the fire originated in the inclosure, and that the defendant was relieved of liability by the contract, and the plaintiff excepted and appealed.

C. W. Broadfoot and H. L. Cook for plaintiff.
Robinson & Lyon for defendant.

ALLEN, J. The construction of the language used in the lease, "fire originating within the boundaries hereby leased," is not free from difficulty.

If it means that the primal cause of the destruction by fire must be within the boundaries, the stipulation affords no protection to the defendant, on the facts before us, because there would have been no fire but for the spark which came from beyond the boundaries, and, on the other hand, if the proper interpretation of the language is that it was intended thereby to locate the place of combustion with inflammable matter, and the stipulation is valid, there is no liability on the part of the defendant, as the spark ignited the property of the plaintiff within the boundaries of the lease.

In the construction of contracts words are to be taken in their ordinary and popular sense, and while a spark is fire, it is customary, when combustion ensues, to speak of it as a cause rather than the fire itself.

Fire is defined in the Century Dictionary as "The visible heat or light evolved by the action of a high temperature on certain bodies which are in consequence styled inflammable or combustible—combustion, or the heat and light evolved during the process of combustion," and according to this definition there was a cause outside of the boundaries, which came in contact with inflammable matter within the boundaries and resulted in a fire there.

That this is not an unreasonable construction is shown by the evidence of the plaintiff, who testified, among other things, "44 feet and 3 inches from main track *to where fire started.*"

(341) In *Mitchell v. Insurance Co.*, 183 U. S., ..., the Court had under consideration a clause in an insurance policy exempting the company from liability from explosions unless there was also a fire, and it was held that a match lighted and coming in contact with vapor was not a fire.

In *Insurance Co. v. Foote*, 22 Ohio St., 340, a similar provision was considered. The explosion was caused by a burning gas-jet, and the Court says: "The gas-jet, though burning, was not a destructive force, against the immediate effects of which the policy was intended as a pro-

tection, although it was a possible means of putting such destructive force in *motion*; it was no more the peril insured against than a friction match in the pocket of an incendiary."

These authorities are not conclusive, but they furnish some analogy because in each the policy insured against loss by fire, and exempted from loss by explosions, and it was held there was no liability on the part of the company resulting from explosions which would not have occurred but for the lighted match or gas-jet.

Again, in the construction of contracts, "it is necessary that regard shall be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view" (9 Cyc., 588), and a construction should be adopted, if possible, which will uphold the contract and make it operative.

What was the condition of the parties and what did they have in view when the lease was executed?

The plaintiff was the owner of a turpentine distillery, which, with its products, was highly inflammable, and he desired to place it near the track of the defendant for convenience in receiving and forwarding freights. Both parties to the contract knew that trains would constantly pass along the track of the defendant within 28 feet of the leased premises, and hot sparks would probably escape. The plaintiff could insure the distillery, and the defendant could not, because it had no intenest in the property.

In the absence of a clause in the lease relieving of responsi- (342) bility from loss by fire, there could not have been any liability on the defendant except for fires arising from its negligence, and the only cause for such fires that could have been anticipated was the escape of sparks from the engines.

The stipulation against liability for fires could not have been intended to cover fires arising from the operation of the plant of the plaintiff, nor fires when the defendant was not negligent, because in neither case did the defendant need protection, and it would be practically inoperative and of no effect unless it covered fires caused by sparks escaping from engines and thrown on the premises.

The only circumstance that militates against this view is that the defendant agrees to lay a switch or siding on the premises, the argument being that the lease contemplated that the engines of the defendant would enter upon the premises to place and remove cars, and that only fires originating on the premises from those engines were intended to be provided against.

It is sufficient answer that there is no such restriction in the lease; but aside from this, is the position reasonable, and probably what the parties intended?

The switch or siding was required to be of sufficient length to accommodate two cars, and the plant and products on hand at the time of the fire were worth $1,800.

It is not clear the engines would have to enter the premises to place or remove the cars, or that they did so, as the work could have been done by moving backward as well as forward; but assuming that they would enter, it would only be occasionally, and it does not appear to us to be a fair and just inference that the parties intended to provide against a danger occurring at infrequent intervals, and leave unprovided for conditions of equal danger existing many times each day.

We therefore conclude that the better and sounder position is that the stipulation in the lease was intended by the parties to cover a loss by fire caused as was the one in this case. If so, is the stipulation valid?

(343) It is well settled here and elsewhere that a common carrier while performing its duties to the public cannot contract against its negligence; but the public had no interest in the plant of the plaintiff or in the lease between him and the defendant, and the authorities seem to be uniform that such contracts are not against public policy and are enforcible. Elliott on Railroads, vol. 3, sec. 1136 (2d Ed.); Thompson on Negligence, vol. 2, sec. 2837; *Woolworth v. R. R.* (Tex.), 86 S. W., 942; *Griswold v. R. R.*, 90 Iowa, 256; *Stevens v. R. R.*, 109 Cal., 86; *Ordelhide v. R. R.*, 80 Mo. App., 357; *Blitch v. R. R.*, 122 Ga., 711; *Hartford Fire Insurance Co. v. R. R.*, 175 U. S., 91; *R. R. v. Saulsbury*, 115 Tenn., 402.

Mr. Elliott says in the section cited: "So far as we have been able to discover, there are few cases in the books governing the validity of a contract exempting a railway from liability for negligently firing and burning property. We think that ordinarily a contract exempting a company from liability for negligently burning property not on the right of way or premises of the company would be held void. But where property is placed on a railway right of way by virtue of a contract in which the owner releases the railroad company from any and all liability on account of fire, and the property is afterwards destroyed by fire negligently set by the railway company, the contract is not void, and the company cannot be held liable." And the editor, in the note to the *Saulsbury case*, which is reported in S. A. and E. Ann. Cases, 744, says that "The courts of the various States seem to have held uniformly, in accordance with the doctrine of the reported case, that provisions in contracts by railroads exempting them from liability for fires communicated by them to buildings or other property, situate on their right of way, do not contravene public policy, and are valid as between the parties thereto."

"The reason given by the courts for so holding is that no question is involved in which public rights are affected. They take the view that a railroad does not make such contracts in its capacity as a common carrier, and that, therefore, it has the same right as an individual to limit its liability by contract. *Stephens v. Southern Pac. R. Co.,* 109 Cal., 86; 41 Pac. Rep., 783; *American Cont. Ins. Co. v. Chicago,* (344) *etc., R. Co.,* 74 Mo. App., 89," citing a long list of authorities.

We are therefore of opinion that the contract is valid and protects the defendant from liability.

No error.

Cited: Barrow v. R. R., 184 N.C. 204 (2g); *Godfrey v. Power Co.,* 190 N.C. 35 (2g); *Perry v. Surety Co.,* 190 N.C. 291 (1g); *Singleton v. R. R.,* 203 N.C. 464, 465 (1g, 2g); *Collins v. Electric Co.,* 204 N.C. 326 (1b, 2b).

MERCHANTS NATIONAL BANK OF INDIANAPOLIS v. W. A. BRANSON ET AL.

(Filed 8 April, 1914.)

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

Where fraud in the execution of a negotiable note has been shown, the burden of proof is on the plaintiff, an indorser thereof, and claiming as a holder in due course, to show not only that he acquired the paper for value before maturity, but also without notice of the infirmity of the instrument. Revisal, secs. 2201, 2208.

2. Same—Constructive Notice.

Where the plaintiff sues on a negotiable note, claiming to be a holder in due course, and fraud in its execution is shown, the defendant may prove actual or constructive notice of fraud in rebuttal of the plaintiff's evidence, if he has offered sufficient proof to require it, or he may rely upon the plaintiff's own evidence upon the issue as to whether he knew or should have known of it.

3. Same—"Without Recourse"—Trials—Evidence.

An Indiana bank sued the maker of a note, given for a Percheron horse, in our courts, the execution of which was shown to have been procured by the fraud of the payee. The testimony of the plaintiff's cashier, in its behalf, tended to show that the payee, a corporation, already owing the bank in a large amount, executed its note to the bank, indorsed by one of its solvent officers, and pledged the note in question with a number of like notes, all indorsed without recourse, as collateral, without any investigation of the solvency of their makers; and, at the request of the payee, agreed to have

recourse against the makers of the collateral notes before suing the payee and its indorser on the principal note, and who lived in the same city with the plaintiff. His testimony was conflicting as to whether the plaintiff really accepted the collateral notes without recourse: *Held*, that while the indorsement without recourse was no evidence upon whether the plaintiff acquired the note sued on as a *bona fide* purchaser without notice of its imperfection, it was sufficient to go to the jury, taken in connection with the other circumstances of the case.

(345) APPEAL by defendant from *Lane, J.*, at January Term, 1914, of GUILFORD.

Action to recover $600, the amount of one of two notes given in the purchase of a Percheron horse. Defendant pleaded that the note was obtained by the fraud of the payee, Maywood Stock Farm Importing Company, which had indorsed it "without recourse" to the plaintiff, with other notes of a like kind aggregating $35,285.62, as collateral to secure loans made and to be made by the bank to the payee, the said importing company. The fraud was admitted by the plaintiff, and the sole question is, whether the plaintiff was a purchaser of the note in due course.

Oscar F. Frenzel, cashier of the bank and witness for the plaintiff, testified that neither he nor any of its officers had notice of the fraud. He further testified:

Q. When indorsed without recourse, how can you use it as a collateral note to secure the payment of loans and advances? A. Well, I suppose we can use it. At least, we took it so.

Q. So indorsed, have you an action against the Maywood Stock Farm Importing Company or its president, Sterling R. Holt, on this note, if it is not collected? A. No, sir.

Q. Then, Mr. Frenzel, that being so, it is really not a collateral note, is it? A. Yes, sir; it is.

Q. Then, really, you would have an action, as this is a collateral account of the Maywood Stock Farm Importing Company, against its said account or against Sterling R. Holt, its president, would you not? A. We would.

Q. You said a moment ago you would not. A. If they were solvent.

Q. Then you do have an action against the company, Maywood Stock Farm Importing Company, or against its president, Sterling R.
(346) Holt, for the payment of the note or notes for which this note is a part of the collateral? A. We do.

Q. Did your bank make a practice of taking notes indorsed without recourse, made by farmers in another State, about whom you have no possible way of securing information as to their financial standing? A. It does not.

Witness was then asked, on cross-examination, by questions addressed to him as to each one of the makers of the note, if he knew of any of them, and to each question he answered that he did not. He was then asked if he made any inquiry about their financial standing and ability, before taking the notes for the bank, and he stated, in reply, that he had not; that he took the notes with an indorsement "without recourse," because the Maywood Stock Farm Importing Company, the payee, insisted upon it.

Q. Have you an understanding with the Maywood Stock Farm Importing Company, or with Sterling R. Holt, its president, or with any of its officers, that if you do not collect this note of its makers, that the Maywood Stock Farm Importing Company, or Sterling R. Holt, or any of its officers, will pay this note? A. No, sir.

Q. How do you expect to collect the other notes against them, indorsed without recourse, if they have gone out of business? If they have gone out of business, how do you expect to collect other notes or the note itself given by the Maywood Stock Farm Importing Company, of which the note sued on is collateral? A. That is a question; we will have to try and find something.

Q. How do you expect to collect? A. Well, I think they have some property, and we may be able to collect it from Mr. Holt.

Q. Mr. Holt is solvent, isn't he? A. I think he is.

Q. Then, really, you can collect the amount of the note for which you say the note sued on and the other notes were given as collateral? A. We don't know. I am not positive.

Q. You have made no attempt to collect, have you? A. No, sir; we have not attempted to collect it because they insisted on our collecting the collateral first.

Q. Mr. Frenzel, did you or did you not receive a letter from an (347) attorney representing the defendants, before suit was brought, stating that they refused to pay this note because of fraud on the part of the indorser or transferrer? A. I never saw such a letter.

The plaintiff objected to this testimony, which was elicited on cross-examination of its witness, as irrelevant, and moved the court to suppress that part of the witness's deposition, which motion was denied, and plaintiff excepted.

The court charged the jury in part as follows: "If you find from the evidence in this case, and by its greater weight, that notwithstanding there was fraud used in the procurement of the signatures to the note, that this plaintiff, the Merchants National Bank of Indianapolis, purchased this note in good faith, without notice of any infirmity or defect, and before maturity and for value, you will answer the second issue

'Yes.' Unless you so find by the greater weight of the evidence, you will answer the second issue 'No.'" The jury returned the following verdict:

1. Were the signatures to the note sued on procured by fraud? Answer: Yes.

2. Did the plaintiff purchase said note in good faith and without notice of any infirmity or defect and before maturity and for value? Answer: No.

3. Are the defendants indebted to the plaintiff, and if so, in what amount? Answer: Nothing.

Judgment was entered for defendants on the verdict, and plaintiff appealed.

Alfred S. Wyllie for plaintiff.

B. L. Fentress, T. E. Whitaker, and A. Wayland Cooke for defendant.

WALKER, J., after stating the case. The fraud in the execution of the note being admitted, the burden was cast upon the plaintiff to show that he was a holder in due course, which means that the instrument was taken under the following circumstances: (1) That the instrument is complete and regular upon its face; (2) That he became the (348) holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact; (3) That he took it in good faith and for value; (4) That at the time it was negotiated to him, he had no notice of any infirmity or defect in the title of the person negotiating it. Revisal, sec. 2201. This was so before the enactment of the Negotiable Instruments Law, Revisal, vol. 1, ch. 54. "Where the maker of negotiable paper shows that it has been obtained from him by fraud, a subsequent transferee must, before he is entitled to recover thereon, show that he is a *bona fide* purchaser or that he derived his title from such a purchaser. It is not sufficient to show simply that he purchased before maturity and paid value; he must show that he had no knowledge or notice of the fraud." *Vosburg v. Diefendorf,* 119 N. Y., 357; *Tatam v. Haslar,* 23 Q. B. Div. (1889), p. 345; and *Bank v. Fountain,* 148 N. C., 590, and cases cited. The terms of our statute, with reference to the burden of proof in such cases, are as follows: "Every holder is deemed *prima facie* to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course." Revisal, sec. 2208. It is further provided that, "The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtains the instrument, or any signature thereto, by

fraud, duress, or force and fear or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud."

With reference to these provisions of the statute, this Court said, by *Justice Hoke,* in *Bank v. Fountain, supra:* "The fraud having been established or having been alleged, and evidence offered to sustain it, the circumstances and *bona fides* of plaintiff's purchase were the material questions in the controversy; and both the issue and the credibility of the evidence offered tending to establish the position of either party in reference to it were for the jury and not for the court. *S. v. Hill,* 141 N. C., 771; *Riley's case,* 113 N. C., 651." And again: (349) "As heretofore stated, when fraud is proved or there is evidence tending to establish it, the burden is on the plaintiff to show that he is a *bona fide* purchaser for value, before maturity, and without notice, and the evidence must be considered as affected by that burden. If, when all the facts attendant upon the transaction are shown, there is no fair or reasonable inference to the contrary permissible, the judge could charge the jury, if they believed the evidence, to find for plaintiff, the burden in such case having been clearly rebutted. But the issue itself and the credibility of material evidence relevant to the inquiry is for the jury, and it constitutes reversible error for the court to decide the question and withdraw its consideration from the jury." And that case has been approved and followed in more recent decisions with reference to this very question. *Myers v. Petty,* 153 N. C., 462; *Trust Co. v. Ellen,* 163 N. C., 45; *Bank v. Exum, ibid.,* 199; *Manufacturing Co. v. Summers,* 143 N. C., 102; *Park v. Exum,* 156 N. C., 231; *Vaughan v. Exum,* 161 N. C., 494; *Bank v. Walser,* 162 N. C., 63. In *Bank v. Exum, supra,* the *Chief Justice* said: "When there is evidence tending to show fraud in the execution of the note, the burden is thrown upon the plaintiff to show that it was a *bona fide* purchaser, and not upon the defendants to show the negative of that proposition." So in this case, as the fraud was not only proved, but admitted, we start with the burden on the plaintiff to establish that it was a purchaser in due course; which is, that it acquired the notes in good faith, for value, before "overdue" and without notice of the defenses against it. It was for the jury, therefore, to decide whether these facts had been shown to their satisfaction.

And this disposes of the second assignment of error, which was that the court refused to charge the jury to find for the plaintiff on the second issue, that it was a holder in due course, if they believed the evidence, for there surely was some evidence in the case, if not very strong proof, that it did not buy in good faith without notice of the

fraud. As the fraud was admitted, the burden was on the plaintiff to show the transaction to be such as will sustain its right to recover
(350) upon the paper. This is the just principle, and is in perfect accordance with the rule that the burden should rest upon him who has peculiar knowledge of the facts to be proven, at least in the first instance. The defendant in this case may show actual or constructive notice of the fraud in rebuttal, if plaintiff offers sufficient proof to require it, or he may rely on plaintiff's testimony. There may, therefore, be express notice, or such as is implied, or to be inferred from the circumstances, and the jury must find whether there has been either, or, more plainly and simply stated, whether plaintiff knew of the fraud or should have known of it. In finding the facts, the jury could consider, of course, that the transaction was an unusual one and not likely to be engaged in by prudent business men; and also the relations of the parties and other circumstances which are calculated to cast a well-grounded suspicion upon the dealings between the parties with reference to the paper.

It appears that the importing company was, at the time, largely indebted to plaintiff, and desired a further extension of credit. Sterling R. Holt was surety on the note for the existing indebtedness, and the bank promised, upon the giving of this and other similar collateral notes, to lend, and it did lend, a large additional sum to the importing company. In view of these admitted facts, the bank agrees to take the collaterals without the slightest inquiry as to the solvency of the makers, and discharges the borrower, who had property subject to execution, from all liability by permitting an indorsement "without recourse" to it. This looks gravely suspicious, and required full and frank explanation, which the cashier did not give. His testimony is unsatisfactory, if we say the least of it, and may fairly be considered as inconsistent, if not contradictory. He evidently did not wish to discharge the importing company as indorsers, but it insisted that this be done. The bank made no effort to collect from the importing company upon the original or principal indebtedness, but, at the urgent request or upon the "insistence" of the importing company, it pursued the defendants first, having, at the time, a solvent principal to the original debt who was
(351) within easy reach and to whom it could look for payment. Was it not natural for him to have inquired why the importing company should not only request, but insist, that the bank should first sue defendants before resorting to it for payment of the secured debt? It may have been accommodation to the company, but it was none to the bank, as it was a distinct inconvenience and detriment when it is considered that the principal indebtedness secured by the collaterals was

good, the company and Holt, the indorser, being solvent, and that defendants lived in a distant State. This circumstance may not be very strong, but it, at least, adds to the suspicion, and should be met by a full and candid avowal of the truth.

The conduct of the importing company and the usual character of its dealings with the bank were enough to "open its eyes" and cause it to scrutinize the transaction and to inquire as to the validity of the notes and the solvency of the defendants. A careful business man, it seems, would, at least, have done this much. To risk a large loan upon security of which it had no knowledge was a hazardous, if not a haphazard way of conducting its business. It was almost extraordinary, and could only impress the jury with the conviction that there was something wrong, and that all this uncommon method of dealing in such important matters was intended to conceal a secret understanding between the parties by which the importing company should be favored in the collection of this debt through a third party, in order to avoid the legal consequences of its own admitted and fraudulent act. It tended to show that it was not a real transaction, but a simulated one—a mere pretense or feigned device to avoid condemnation of the note. Instead of proceeding upon safe and sound business principles, and according to the usual practice in such cases, it was risking its money upon the merest chance of recovering it back with its interest.

There are other views that might be advanced, but this is sufficient to show that there was evidence for the jury upon the question whether the bank had notice of the fraud. The importing company has confessed to one fraud, and was conspiring with the bank to commit another upon defendants, so the jury found upon ample evidence, as they believed that honest and prudent business men do not deal that (352) way, but rather pursue correct methods. Jones on Evidence (1908), sec. 49, says: "Presumptions of this character are perhaps most frequently indulged in in respect to negotiable paper. It is presumed that such paper was regularly issued for a valuable consideration, and that the payee or the one who has purchased it before maturity is a *bona fide* holder and entitled to recover the full amount. But if the defendant can show that the note was originally obtained by duress, secured through fraud, or that it was lost or stolen, the burden is changed, and the presumption then arises that the guilty person will part with the instrument for the purpose of enabling some third party to recover for his benefit." The law says that where fraud in procuring the note is shown, and especially where it is admitted, it calls for explanation from the indorsee, who claims to hold the note *bona fide* and for value and without notice, and to have taken it before overdue, and, therefore, casts

the burden upon him to defend his title and to show that it was honestly acquired. This burden has not been discharged by the plaintiff, so as to suggest more proof from the defendants.

It follows from what we have said that the evidence of the cashier, upon which we have thus commented, was competent and relevant, and therefore properly admitted by the court, and that the plaintiff's prayer for a peremptory instruction, or what amounted to it, should not have been given.

It was not alone sufficient that plaintiff should have given value; the other facts must appear which are required to constitute a purchaser in due course. The note must have been taken in good faith before it was overdue, and without notice of the fraud. We are not deciding that the qualified indorsement of the paper is evidence, by itself, of notice so as to discredit the paper, for we held otherwise in *Evans v. Freeman,* 142 N. C., 61, and *Bank v. Hatcher,* 151 N. C., 359, to which authorities may be added the following: "The expression, 'without recourse,' does not throw any suspicion on the paper, or affect the *bona fide* character of a purchaser, although it may be evidence that value was not (353) received by the indorser. Neither will such addition affect the negotiability of the instrument." 2 Randolph on Commercial Paper (2 Ed.), sec. 722; 1 Daniel Neg. Instr., 627; 1 Edw. Bills and Notes, sec. 398; *Stevenson v. O'Neal,* 71 Ill., 314; *Kelley v. Whitney,* 45 Wis., 110; *Borden v. Clark,* 26 Mich., 410; *Richardson v. Lincoln,* 46 (Mass.) (5 Metc.), 201; *Russell v. Ball,* 2 Johns (N. Y.), 50; *Thorpe v. Mindeman,* 123 Wis., 149 (107 Am. St., 1003); *Brotherton v. Street,* 124 Ind., 599, and other authorities cited in *Evans v. Freeman, supra.* It was held in *Stevenson v. O'Neal, supra,* 314: "In a suit by the assignee in good faith and for value, of a note assigned, without recourse and before maturity, and without any knowledge on the part of the assignee of any claim of defense by the maker, the mere fact that the assignment is without recourse is not sufficient to charge the assignee with notice of defense against the note, on the part of the maker, nor is it sufficient to put him on inquiry in reference thereto." The Court said in *Kelley v. Whitney, supra,* 110, 117: "The note, it is claimed, was indorsed by the payee and mortgagee 'without recourse.' But that is not sufficient to charge the assignee with notice of a defense against the note, on the part of the maker, nor is it sufficient to put him on inquiry in reference thereto." And in *Borden v. Clark, supra,* it was held that, "The fact of the vendor of a promissory note indorsing it 'without recourse' has no tendency to show that his vendee is not a *bona fide* purchaser." And again: "The proposition relied upon by the plaintiff in error, that the indorsement being without recourse, tended to show

that the plaintiff had not taken the note *bona fide,* is equally without foundation, and requires no comment." In that case the note was given for a patent right. This, though, is far from holding that such a qualified indorsement may not be considered as a circumstance, with others, "to aid in creating a suspicion and put the assignee on inquiry," as said in *Stevenson v. O'Neal, supra.*

The bank held a large debt against the importing company, and took these collaterals to secure it, and for a large additional loan, as plaintiff would have us believe, and released the payee of the (354) collateral notes from all liability in them (*Rice v. Stearns,* 3 Mass., 225), which, of course, required the bank to rely solely upon the solvency of the makers, and all this was done without the slightest inquiry into their financial ability to pay the notes or their responsibility therefore. Alone, this kind of indorsement does not cloud the note or affect the position of the indorsee as a holder in due course; but it may become evidence if combined with other suspicious facts. "Where a party (says the Court in *Stevenson v. O'Neal, supra,* citing *Russell v. Hadduck,* 3 Gilm., 233) is about to receive a bill or note, if there are any such suspicious circumstances accompanying the transaction, or within the knowledge of the party, as would induce a prudent man to inquire into the title of the holder or the consideration of the paper, he shall be held bound to make such inquiries; or if he neglects so to do, he shall hold the paper subject to all equities. In other words, he shall act in good faith, and not willfully remain ignorant when it was his duty to inquire into the circumstances, and know the facts." In our case there were suspicious circumstances, which were properly submitted to the jury upon the question of plaintiff's standing as a *bona fide* indorsee, and they tended to show that there was notice of fraud, if not fraudulent collusion between the parties to deprive the payees of their defense to the note.

We find no error in the record.

No error.

Cited: Bank v. Drug Co., 166 N.C. 100 (1f); *Smathers v. Hotel Co.,* 167 N.C. 475 (1g); *Wilson v. Lewis,* 170 N.C. 48 (3g); *Moon v. Simpson,* 170 N.C. 337 (1f); *Discount Co. v. Baker,* 176 N.C. 547 (1f); *Holleman v. Trust Co.,* 185 N.C. 53 (1g, 3l); *Bank v. Sherron,* 186 N.C. 299 (1f); *Bank v. Wester,* 188 N.C. 376 (1f); *Walter v. Kilpatrick,* 191 N.C. 462 (3p); *Clark v. Laurel Park Estates,* 196 N.C. 638 (1f); *McCoy v. Trust Co.,* 204 N.C. 723 (1f).

J. N. BENTON, ADMINISTRATOR OF WILLIAM B. BENTON, v. NORTH CAROLINA PUBLIC-SERVICE CORPORATION.

(Filed 15 April, 1914.)

Electricity—Wires Through Trees—Boys—Trials—Negligence—Contributory Negligence—Trespass.

An electric company is presumed to know the likelihood that boys will climb trees with low hanging branches on populous streets of a city, through which its highly charged wires run, and is held to exercise that high degree of care required of those who engage in a business of such dangerous character; and where an immature boy is killed by coming in contact with such wires, where the insulation has been rubbed off, of which the company had had previous actual notice, or notice implied from the length of time such condition had been permitted to exist, contributory negligence is not imputable to the intestate, in an action for damages brought by his administrator, nor was the intestate in any respects a trespasser, and the company is responsible for the negligent killing.

(355) APPEAL by defendant from *Lane, J.*, at January Term, 1914, of GUILFORD.

Civil action. These issues were submitted:

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

2. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: $2,000.

From the judgment rendered, the defendant appealed.

John A. Barringer for plaintiff.

J. I. Scales for defendant.

BROWN, J. All the evidence in this case was introduced by the plaintiff and none by the defendant. The two exceptions to the evidence are without merit and need not be discussed. Without considering *seriatim* the several exceptions to the charge of the court, the merits of the appeal, and the only point presented by it, may be considered under the motion to nonsuit.

The evidence tends to prove that the plaintiff's son, 12 years old, and not well grown for his age, was killed on 22 June, 1909, by coming in contact with an uninsulated high-power wire of the defendant, carrying some 2,300 volts of electricity. The boy was attending a Sunday-school party on Eugene Street, one of the main thoroughfares of the city of Greensboro, with some other boys, and when they got through with the entertainment in the house, went out on the street and were standing

around on the sidewalk under and near to the tree in which the intestate of the plaintiff was killed.

Two other boys besides the intestate of the plaintiff climbed up (356) the tree, and three or four more were standing around the tree on the sidewalk. The intestate of the plaintiff came in contact with the wires in the tree, one of them burning his hand the other his left leg as if a hot iron had been run across the flesh.

The other boys in the tree were not injured. The wires were exposed from 1½ to 2 feet in the trees and were about 20 feet above the ground. The insulation was rubbed off by the limbs coming in contact with the wires and rubbing against them. The tree was between 30 and 40 feet in height, and the limbs came within 7 feet of the ground, making it an easy tree to climb.

The evidence also tended to prove that Eugene Street is a thickly settled and populous street, and that the defendant's wires along this street were in very bad condition as to insulation, especially where they passed through the trees, and that at night especially the wires in this and the other trees near-by could be seen "sparking."

The evidence is that this condition existed from 1907 up to this occurrence. The city inspector also called the defendant's attention to the condition of its wires on Eugene Street two or three times some time previous to June, 1909, but the wires were not repaired.

We do not think it necessary to appeal to the doctrine of *res ipsa loquitur* to sustain the verdict in this case. It has no application, since the cause of the death is not disputed, and the negligence of the defendant in respect to the condition of its wires not at all in doubt.

The only question here presented under the undisputed evidence relates to the liability of the defendant under such state of facts for the death of the intestate. Was there a breach of duty committed, which defendant owed the plaintiff's son?

It is well settled by the decision of this and other courts that those who deal in electricity, and furnish it for use, are held to the highest degree of care in the maintenance and inspection of their wires through which the electric current passes.

The general subject is fully discussed by *Mr. Justice Walker* (357) in *Ferrell v. Cotton Mills,* 157 N. C., 528, and many cases cited where recoveries have been sustained for the death of children caused by coming in contact with such wires.

It is immaterial to consider whether the boy killed was a trespasser. He certainly was not trespassing upon any property of the defendant. He was one of the general public who had a right to expect that the defendant would keep its wires in a reasonably safe condition. Besides,

he was a child of immature years, who could not reasonably be expected to appreciate the danger of approaching electric light wires, and could not exercise that care which a mature person would exercise.

The case of *Temple v. Electric Light and Power Co.*, 10 A. and E. Ann. Cases, 924, is practically on all-fours with this case.

That case holds that an electric light company is liable for injury resulting to a boy by coming in contact with an uninsulated wire while climbing a tree, whose branches extended close to the ground, and through which the wire passed, as the company might reasonably expect small boys to climb such trees, from their immemorial habit of doing so, and that the company must take notice of such habit in insulating its wires as safely as is practicable and use the highest measure of care and skill to prevent injury.

This language is used in the opinion: "It is perfectly idle for the appellee to insist that it was not bound to have reasonably expected to have the small boys of the neighborhood climb that sort of a tree. The fact that a boy would very likely climb such a tree as it was, was a fact that according to every principle of law and sound common sense this company must have appreciated. The immemorial habit of small boys to climb little oak trees with small branches reaching almost to the ground is a fact of which a corporation must take notice."

While the decisions are not in accord upon the question of the duty and liability to children of electric light companies, who maintain highly charged wires, the principle announced in the aforesaid case finds support not only in reason and a sound policy, but in a number of decided cases. *Electric Light Co. v. Healy*, 65 Kan., 798; *Daltry v. Elec-*
(358) *tric Light Co.*, 208 Pa. St., 403; *Nelson v. Lighting Co.*, 75 Conn., 548; *Mullen v. Electric Co.*, 229 Pa St., 54.

It is useless to discuss the exceptions to the charge, for in our view the court might well have instructed the jury that if the evidence in any view of it is to be believed, the defendant was guilty of negligence, which was the proximate cause of the death of the plaintiff's intestate.

No error.

Cited: Shaw v. Public-Service Corp., 168 N.C. 618 (g); *Cochran v. Mills Co.*, 169 N.C. 63 (g); *Ragan v. Traction Co.*, 170 N.C. 93 (g); *Ferrell v. R. R.*, 172 N.C. 689 (g); *Butner v. Brown*, 182 N.C. 700 (j); *Graham v. Power Co.*, 189 N.C. 390 (g); *Helms v. Power Co.*, 192 N.C. 787 (g); *Ellis v. Power Co.*, 193 N.C. 361 (g); *Small v. Utilities Co.*, 200 N.C. 721 (g); *Lynn v. Silk Mills*, 208 N.C. 11 (g).

J. H. RANGELEY, JR., v. C. R. HARRIS AND WIFE, MINNIE HARRIS.

(Filed 8 April, 1914.)

1. Bills and Notes—Fraud and Collusion—Trials—Evidence—Principal and Agent—Burden of Proof—Contracts—Consideration.

The plaintiff sued defendant on a note of the latter given for the sales rights of a patented article in a certain territory, the contract or deed therefor being signed by the plaintiff as agent. Parol evidence of the contents of a written appointment of the plaintiff as agent of D. was received without defendant's objection. There was testimony tending to show that defendant bought the sales rights solely for A. at his request and upon his statement that the plaintiff, a partner of his, would not deal with him; and also that A., for whom the plaintiff assumed to act, was in fact the same person as D. The defendant pleaded as a defense, fraud and collusion between the plaintiff and A., and a lack of consideration for the note: *Held*, (1) the burden of proof was upon the plaintiff to establish his agency for D., the sufficiency and credibility of the testimony being for the jury; (2) the evidence of fraud and collusion between the plaintiff and A. was sufficient to sustain an affirmative verdict on that issue and to set the transaction aside for failure of consideration.

2. Witness, Expert — Qualifications — Appeal and Error—Assignments of Error.

The findings of the trial judge upon the question of whether a witness had qualified as an expert, when there is evidence thereof, is conclusive on appeal; and when an assignment of error relates solely to the sufficiency of such qualification, it may not be extended so as to include objections raised otherwise to his testimony.

APPEAL by plaintiff from *Lane, J.*, at October Term, 1913, of (359) SURRY.

Civil action, tried upon these issues:

1. Were the checks and note set out in the complaint executed by defendants without a consideration? Answer: Yes.

2. Are Joe Allen and J. D. Diffie the same person? Answer: Yes.

3. Did J. D. Diffie make false and fraudulent representations to defendants, as alleged in the answer? Answer: Yes.

4. If so, were they made with the knowledge and consent of J. H. Rangeley, Jr.? Answer: Yes.

5. Were the defendants induced by reason of said false and fraudulent representations to execute the checks and note set out in the complaint? Answer: Yes.

6. Is the plaintiff indebted to the defendants, and if so, in what sum? Answer: Yes; in the sum of $100.

7. Are the defendants indebted to plaintiff, and if so, in what amount? Answer: No; nothing.

The court rendered judgment against the plaintiff, who appealed.

J. C. Buxton, J. F. Hendren, W. L. Reece for plaintiff.
R. L. Burns, W. F. Carter for defendant.

BROWN, J. This action is brought by the plaintiff to recover of the defendant C. R. Harris upon two bank checks, for $100 and $200 respectively, and to recover of both defendants upon a note for $400, all payable to the plaintiff.

The defendants plead a total lack of consideration, and that the execution of the checks and note were obtained by the false and fraudulent representations and conduct of the plaintiff. The plaintiff assigns error: 'The refusal of the court for judgment at the close of the defendants' testimony on the checks and note sued on, which motion was renewed at the close of all the testimony, upon the ground that
(360) there was no evidence in the defendants' testimony to sustain the allegations contained in their answer."

The only consideration for the checks and note sued on is an alleged assignment of a certain trade-mark No. 7077 granting to C. R. Harris the exclusive right to make and sell Snowflake Soap within a certain territory. The trade-mark was registered in the name of Mary E. Taylor, who assigned it to J. D. Diffie, The assignment to the defendant is signed J. D. Diffie by J. H. Rangeley, Jr., agent.

A paper-writing purporting to appoint H. M. Word and J. H. Rangeley, Jr., "agents and attorneys in fact for and in my name to execute deeds to the Mary E. Taylor patented trade-mark" is in evidence, signed J. D. Diffie by W. Alfred.

There is nothing in evidence tending to prove any authority to W. Alfred to make such conveyances for J. D. Diffie except this testimony of J. H. Rangeley, Jr.: "I saw paper-writing." (Objection by defendants.) It said:

"I, J. D. Diffie, do hereby appoint Alford for my agent to sell unsold territory in the United States to sell Snowflake Washing Powder, and that he (Diffie) ratified all the sales heretofore made." Name of J. D. Diffie was to this paper and notary seal attached and signed by some one as notary public. It is also said he was to make deeds and appoint agents.

There is no allegation in the pleadings that such power of attorney has been executed, and either lost or destroyed. There is no evidence that search has ever been made for it, and no foundation laid to admit parol evidence of its contents. The plaintiff in his evidence does not remember the name of the notary before whom it was probated. But as

the court admitted this evidence, the defendants had a right to attack the sufficiency of it, and the credibility of the witness before the jury under the first issue, for if the plaintiff failed to satisfy the jury as to his right to execute the assignment to the defendant, the consideration totally failed.

It is not contended there was any other. The burden of proof was on the plaintiff to prove his agency and his right to execute the deed to the defendant, and it appears he failed to do so.

There is also evidence tending to prove that a fraudulent con- (361) spiracy was entered into between the plaintiff and J. D. Diffie to sell this trade-mark to the defendant. The defendant testified that he was acting for one Joe Allen in purchasing the trade-mark, viz.:

"Before I wired the plaintiff about territory, a man known to me as Joe Allen called me up over the telephone and told me to buy out his partner, the plaintiff in this action, for him, Joe Allen, as he and Rangeley were at outs. I knew Joe Allen's voice. He asked me to give my note and checks for the territory controlled by Rangeley, and not to let Rangeley know that I was buying for him (Allen). He said that Rangeley would not sell to me if he knew that I was buying for him (Allen). And Allen said, 'As quick as you buy of Rangeley, to notify him' (Allen), and he would come over and take the territory off my hands and pay me the amount I had to pay for the territory. Allen said do this for him as a brother Mason." Witness testified he was a Mason, and that Joe Allen had before this time boarded at his home for two weeks, and that Allen had convinced the witness that he was a Mason.

Witness testified:

"I then asked Allen what price I should pay for the territory Rangeley had control of, and he said, "Buy at any price." I told him that I thought we had best agree upon a price, and he (Allen) said for me to offer Rangeley $800 for the territory. He (Allen) told me to communicate with Rangeley at Elkin, N. C., and I did so the next day, and Rangeley agreed, in reply, to take $800, the price I offered him.

"Joe Allen wanted me to purchase all of the unsold territory controlled by Rangeley. Rangeley had control of about thirty-four counties. I would not have bought it for myself from Rangeley. I bought for Joe Allen."

There is some evidence that J. D. Diffie, the owner of the trade-mark, and Joe Allen were one and the same person. From all this defendants contend that there was a fraudulent conspiracy between the plaintiff and J. D. Diffie, whereby the defendant was to be induced to buy the trade-mark for Diffie *alias* Allen, who was already the reputed owner of it.

There are many other "ear-marks" of fraud about this trans-
(362) action which it is unnecessary to discuss. We think his Honor did not err in submitting the issue of fraud to the jury upon the evidence introduced.

The plaintiff further assigns error: "That the court erred in admitting the statement in the deposition of J. E. Caviness, in his opinion, the handwriting on the Diffie and Allen letters were the same, on the ground that Caviness had never qualified himself as an expert."

The testimony objected to was admitted for the purpose of showing that Diffie and Allen were one and the same person. The witness compared specimens of the handwriting of each, and testified that the writing was done by one and the same person. While we are inclined to think such evidence competent for the purpose of identifying Allen and Diffie as one and the same person, the question is really not raised by the assignment of error, because the assignment is limited by its terms to the ground that Caviness was not an expert. We think the witness qualified himself, under the decisions of this Court, to testify and express an opinion as to the handwriting of the Allen and Diffie letters. The court, being of the opinion that witness had so qualified himself to express an opinion, and finding the same to be a fact, told the jury that it was for the jury to say what weight should be given the opinion and testimony of the witness. In this there was no error. Jones on Evidence, sec. 546 (559), p. 688; Cyc., vol. 17, p. 156; *Beverly v. Williams,* 20 N. C., 378; *Yates v. Yates,* 76 N. C., 144 (149).

There is some evidence that the witness is an expert, and therefore the finding of the court to that effect is final. *S. v. Wilcox,* 132 N. C., 1120; *Abernethy v. Yount,* 138 N. C., 345; *Nicholson v. Lumber Co.,* 156 N. C., 66.

There are only two other assignments of error, and they relate to questions of evidence. We think they are without merit, and need not be discussed.

No error.

Cited: S. v. Hughes, 208 N.C. 552 (1g).

(363)

MERCHANTS NATIONAL BANK v. J. SPRUNT NEWTON ET ALS.

(Filed 8 April, 1914.)

Statutes—Evidence—Motions to Inspect and Copy—Court's Discretion.

It is within the discretion of the trial judge to refuse an application to inspect and photograph a note, the subject of the controversy, under the statute; but the denial of such motion is without prejudice, for an affirmative order may nevertheless be rendered under conditions appearing to the trial court to call for it.

APPEAL by defendant from *Cooke, J.*, at January Term, 1914 of WAKE.

In this action, pending in the Superior Court of Wake County, before his Honor, C. M. Cooke, judge, the same issue being presented as to the forgery of the note sued on, application was made for an order to inspect and photograph the note in question, and the motion was denied by the court, "all without prejudice," and defendants excepted and appealed.

Winston & Biggs for plaintiff.

Shaw & McLean, McLean, Varser & McLean, and Jones & Bailey for defendant.

HOKE, J. A perusal of the statute will disclose that the question rests in the sound legal discretion of the court, and, as we find no such abuse of discretion on the part of his Honor as to raise a legal question for our decision, the judgment is affirmed.

We deem it not improper to say that this ruling is not to be considered as a final disposition of the matter. It is one of those questions which, for good reasons shown, may be renewed in the progress of the cause, and, if presented under different conditions, may call for a different decision. In any event, it is open to the parties in this instance, as the court has very properly made his ruling without prejudice.

There is no error, and the judgment of the court is

Affirmed.

Cited: Evans v. R. R., 167 N.C. 416 (g); *LeRoy v. Saliba*, 180 N.C. 17 (g); *R. R. v. Power Co.*, 180 N.C. 428 (g); *Dunlap v. Guaranty Co.*, 202 N.C. 655 (g); *Mfg. Co. v. R. R.*, 222 N.C., 333 (g).

(364)

H. A. COZZINS v. TOMLINSON CHAIR COMPANY.

(Filed 15 April, 1914.)

1. Master and Servant—Safe Appliances—Trials—Negligence—Evidence.

In an action to recover damages for a personal injury inflicted upon an inexperienced employee while engaged under the direction of his superior, at work at a power-driven jointer machine in defendant's chair factory, it was admitted that the use of a guard over the revolving knives of the machine would have prevented the injury, and there was evidence that the machine was constructed for the guard; also, that in some factories guards of this character were used, in some they were not, and that an unused guard was then hanging up in the factory: *Held*, sufficient to be submitted to the jury upon the question of defendant's negligence in not properly equipping the machine with a guard, necessary for the protection of the employee, and as to whether such appliance was approved and in general use.

2. Same—Notice Implied—Natural Evidence.

A master is held to the duty of inspecting dangerous power-driven machines at which his employees work in the discharge of their duties; and notice to the master will be implied from natural evidence of a long existing defect in the machine which caused an injury to the employee, such as, in this case, the worn and gapped condition of the knives in a jointer machine, showing that, by proper inspection, the defendant should have been aware of the defect.

APPEAL by defendant from *Shaw, J.*, at November Term, 1913, of GUILFORD.

Civil action tried upon these issues:

1. Was the plaintiff injured by reason of the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff by his own negligence contribute to the injury complained of, as alleged in the answer? Answer: No.

3. What damage, if any, is plaintiff entitled to recover? Answer: $100.

The defendant appealed.

W. P. Bynum, R. C. Strudwick for plaintiff.

F. P. Hobgood, Jr., for defendant.

(365) BROWN, J. The plaintiff, a carpenter in the employ of the defendant, was injured while operating a jointer in its factory. The evidence shows he had no experience operating such a machine, and was doing it under instructions of the defendant's superintendent.

The specific allegations of negligence are: (1) That the jointer at which he was injured was not equipped with a guard or protector; (2)

That the guard or protector described was at that time an appliance approved and in general use; (3) That the jointer was in bad condition in that its knives were dull and gapped; and (4) That by a reasonable inspection by the master, this dangerous condition of the jointer could and would have been discovered.

The first contention of the appellant is that there is not evidence sufficient to be submitted to the jury tending to show that the guard, the absence of which is complained of, was an appliance approved and in general use.

While one witness testifies that he had seen some four hundred machines without guards, and some fifty with guards, the same witness gives instances of a number of mills where guards are used. But the strongest evidence that guards should be placed over these rapidly revolving knives is that places are provided in the machine for fitting the guard to it. One was actually provided for the defendant's machine and at the time of the injury was not in use, but was hanging up near-by. It is admitted that if the guard had been in place, the injury would not have been inflicted.

In *Rogers v. Manufacturing Co.*, 157 N. C., 485, this Court says, in substance, that the evidence that shields were in general use on machines of that kind (in that case a lathe) was competent, and further, that where the plaintiff showed that such guards had been seen in use in nine different mills was sufficient to justify the court in leaving it to the jury to say whether the defendant had been guilty of negligence in not having a protector of this kind.

The defendant fails to show that the use of the guard was impracticable, or to account for its absence from its proper place. The appellant assigns error to the refusal of the trial judge to charge (366) the jury that there was no evidence that the knives of the jointer were dull and out of repair at the time the plaintiff was injured.

The plaintiff's evidence is to the effect that the knives had gaps in them about one-sixteenth of an inch in size, and that they were in bad condition when he was hurt. There is other evidence amply sufficient to be submitted to the jury as to the bad condition of the knives.

The defendant contends that there is no evidence that the defendant had notice of the condition of the knives.

Assuming that there is no evidence of actual verbal notice given the defendant's officers, we think the facts in evidence are sufficient to fix the defendant with constructive notice.

The evidence of Iseley as to the condition of the knives on the day of the injury is such that it is probable that it had continued for some time.

It is a reasonable inference which a jury is at liberty to draw that knives of this character, upon machines of this kind, do not grow dull or have large gaps in them in a day; that this deterioration is a gradual process, and if the defendant had been ordinarily diligent in discharging its duty of inspection of this machine, it would have discovered the faulty and dangerous condition of the knives. In other words, that there was natural evidence tending to show that the master had or should have had knowledge of the condition of the machine.

Our decisions seem to support the trial judge in leaving this question to the jury to determine. *Cotton v. R. R.*, 149 N. C., 227; *Chesson v. Lumber Co.*, 118 N. C., 59; *Steeley v. Lumber Co., ante,* 27.

It is to be noted further that while the judge charged the jury that there was no evidence of actual notice, there is evidence by the plaintiff that the superintendent used this machine only a day or two before the injury. If so, that would seem to be some evidence of actual notice of its condition, and if the judge erred, it would be an error in defendant's favor.

(367) In regard to constructive notice, Labatt says: "If the plaintiff introduces any evidence which fairly tends to show that the master had either actual or constructive knowledge of the abnormal conditions which caused the injury, the case must be submitted to the jury." Labatt on Master and Servant (2 Ed.), vol. 3, sec. 1039.

"How long a defect must have existed before a master can be charged with knowledge of it is primarily a question of fact for the jury, to be determined with reference to the character of the instrumentality, the difficulty of discovering the conditions constituting the defect, and the master's opportunities for observation, due account being taken of the nature and extent of the obligations which the law imposes on him with respect to the regular periodical inspections in case of the particular instrumentality." Labatt on Master and Servant (2 Ed.), sec. 1032, p. 2731.

There is no evidence offered in this case of such inspections. It was the duty of defendant to carefully inspect its machinery at regular intervals, and the law will charge the defendant with knowledge of whatever conditions such inspection, if made, would have disclosed. We find.

No error.

Cited: Bunch v. Lumber Co., 174 N.C. 11 (2g); *Highfill v. Mills Co.*, 206 N. C. 585 (2g).

GEORGE T. WOOD ET AL. v. DUKE LAND AND IMPROVEMENT COMPANY.

(Filed 15 April, 1914.)

Municipal Corporations—Cities and Towns—Judicial Powers—Street grading—Abutting Owner—Procurement of Ordinance.

Unless the Constitution or some statutory regulation otherwise provides, an abutting owner may not recover damages to his property caused by changing the grading of an established street, when such change is made pursuant to proper municipal authority and there is no negligence in the method or manner of doing the work; nor can an action for damages be maintained by one abutting owner on the street against another, upon the ground that the defendant procured the municipality to change the grade when such change was done in a manner to relieve the municipality from liability. *Brown v. Electric Co.*, 138 N. C., 535, cited and distinguished.

APPEAL by plaintiff from *Devin, J.*, at September Term, 1913, (368) of DURHAM.

Civil action to recover damages for changing grade of street.

There was evidence on part of plaintiff tending to show that, in 1912, plaintiff was the owner of a house and lot in the city of Durham, abutting on New Street in said city, the house being situated about 10 feet from the line and 4 feet above the grade line of the street; that this New Street was an established street in the city of Durham, having a recognized grade line, and plaintiff had turfed the slope down to the street and had a fairly good driveway at the side, permitting the entry of vehicles, etc., into his yard; that, in the fall of said year, defendant company had cut down the grade of said street to the depth of 3 additional feet, leaving his house 7 feet or more above the street, rendering access to same much more difficult, temporarily shutting off the entrance of vehicles, causing some of the turfing to fall and entailing an expense of $300 and more in the reasonable effort to make the approaches to his home desirable or even practicable.

On the part of defendant company it was shown that the grading in question was done pursuant to a resolution formally passed by the city government of Durham having authoritative control of the matter; that the present grade line was established and the work done under the direction of the city engineer having the matter in charge under like authority, and although defendant had been active in the effort to have the resolution passed, and, owning property on the street which would be benefited, had agreed to bear half the expense of the improvement, yet the work was done, as stated, entirely under the authority conferred by the city, under the direction of the city engineer, for the public benefit, and that the street which before that time was an unpaved street and

hardly passable in wet weather, was now, and by reason of this improvement, a desirable and attractive thoroughfare, affording the only
(369) passway for the public between Carr and Warren streets, both well populated for a distance of 1,200 feet. There was evidence, further, on part of defendant, tending to show that the value of plaintiff's lot had been much enhanced by reason of such improvement.

At the close of the testimony, on motions duly entered, there was judgment of nonsuit, and plaintiff excepted and appealed.

B. S. Skinner and Manning, Kitchin & Everett for plaintiff.
Fuller & Reade for defendant.

HOKE, J., after stating the case: It is well established in this State, and very generally held elsewhere, that, unless the Constitution or some statutory regulation otherwise provides, an abutting owner may not recover for damages to his property caused by changing the grade of an established street when such change is done pursuant to proper municipal authority and there is no negligence in the method or manner of doing the work. *Harper v. Lenoir,* 152 N. C., 723; *Dorsey v. Henderson,* 148 N. C., 423; *Jones v. Henderson,* 147 N. C., 120; *Wolf v. Pearson,* 114 N. C., 621; *Meares v. Wilmington,* 31 N. C., 73; McQuillan on Municipal Corporations, sec. 1975.

The position referred to is usually made to rest upon the theory that any and all changes of this character are supposed to have been allowed for or released at the time of the original dedication of the street, and an abutting owner acquires and improves his property with full notice that such change may be made. Nichols on Power Eminent Domain, secs. 81, 82, 83; Lewis on Eminent Domain (3 Ed.), sec. 134.

In Nichols, *supra,* after laying down the rule that "when a highway is raised or lowered in grade so that it may be made safer or more convenient for travel, the owner is not entitled to compensation," the author says: "The true reason for the rule, stated in the heading of this chapter, is that when a highway is laid out the easement taken includes the right to grade and construct the highway *then* or at any future time, in
(370) such manner as the public authorities may deem conducive to safe and convenient traveling."

And in Lewis on Eminent Domain, *supra,* it is said, among other things, that "When a street or highway is laid out, compensation is given once for all, not only for the land taken, but for damages which may, at any time, be occasioned by adapting the surface of the street to the public needs."

The authorities on the subject are also to the effect that this power to further grade and improve the streets is a continuing one, to be exercised in the legal discretion of the municipal government whenever the public good may require it. *Dorsey v. Henderson, supra; Jones v. Henderson, supra; Meade v. Portland,* 200 U. S., 148; *Gosler v. Georgetown,* 19 U. S., 593; *Galt v. Chicago,* 174 Ill., 605; *Estes v. Owen,* 90 Mo., 113; *McCormack v. Patchen,* 53 Mo., 33; 1 Elliott on Streets and Roads (3 Ed.), sec. 551. And although a legal discretion, one that may not be interfered with by the courts, except in cases of manifest and gross abuse. *Luther v. Commissioners,* 164 N. C., 241; *Rosenthal v. Goldsboro,* 149 N. C., 134; *Small v. Edenton,* 146 N. C., 527; *Broadnax v. Groom,* 64 N. C., 244.

On the facts presented in the record, the principles announced and sustained by these authorities are in full support of his Honor's ruling in directing that a nonsuit be entered. While the testimony shows that defendant company was active in procuring the order for lowering the grade, and received some benefit from it, this was only as another abutting owner, and it also appears that the charge was made under authority regularly conferred by the city government, and the work was done under the immediate direction of the city engineer, or certainly in accordance with a survey and plans supplied by him, and there is no allegation nor proof that there was any negligence in the plan or execution of the work. The case is thus brought directly within the decision of *Wolf v. Pearson,* 114 N. C., 621. In that case the defendant, without procuring authority, had lowered the grade of the street, causing damage to plaintiff, an abutting owner, and was protected by reason of a resolution of the board of aldermen, subsequently made, going much further (371) than is required to uphold the decision in the present case.

It is urged for plaintiff that his cause comes rather under the decision of *Brown v. Electric Co.,* 138 N. C., 535; but we may not concur in this view. That case was made to rest chiefly on the position that notwithstanding a previous dedication and use as a public street, an abutting owner continued to have a proprietary interest in a shade tree standing on or near his sidewalk, and affording shade and shelter to his lot, which the law would protect and which could not be taken from him without compensation except when required by the public interests. It was accordingly held that a resolution and ordinance of a municipal board, by which it was attempted to confer authority on a private company to cut down such a tree without making compensation and for its own interest would afford no protection to the company; a principle reaffirmed and applied in the recent case of *Moore v. Power Co.,* 163 N. C., 300. But, in the case before us, the defendant company, acting, as we

have seen, under authority of the city regularly conferred to that end, violated no right of plaintiff in lowering the street to the required grade. They were, as agents of the city, only doing a lawful thing in a lawful way, and if harm came to plaintiff's property under such circumstance, it must be considered as *damnum absque injuria* and giving him no legal right to redress. *White v. Kincaid,* 149 N. C., 415; *Thomason v. R. R.* (plaintiff's appeal), 142 N. C., 318; *Oglesby v. Attwell,* 105 U. S., 605; *Transportation Co. v. Chicago,* 199 U. S., 605.

There is no error, and the judgment of nonsuit is

Affirmed.

Cited: Crotts v. Winston-Salem, 170 N.C. 27 (g); *Bennett v. R. R.,* 170 N.C. 392 (l); *Lumber Co. v. Drainage Comrs.,* 174 N.C. 650 (g); *Keener v. Asheville,* 177 N.C. 5 (b); *Powell v. R. R.,* 178 N.C. 247 (l); *Milling Co. v. Highway Com.,* 190 N.C. 699 (l); *Calhoun v. Highway Com.,* 208 N.C. 426 (g).

(372)

BLUTHENTHAL & BECKART, INC., v. RALPH KENNEDY.

(Filed 8 April, 1914.)

Intoxicating Liquors—Actions to Recover—Public Policy—Courts.

An action to recover upon an account for spirituous liquors sold and delivered here for the purposes of sale cannot be maintained in the courts of this State, for such transactions are against our public policy; and the fact that the contract was made in a State recognizing its validity does not alter the matter.

APPEAL by plaintiff from *Rountree, J.,* at December Term, 1913, of NEW HANOVER.

Civil action tried upon these issues:

1. Did the plaintiff sell and deliver to the defendant the goods specified in the complaint? A. Yes.

2. What was the value of those goods? A. $433.

3. Where was the contract of sale made? A. Baltimore.

4. Is the defendant indebted to the plaintiff? If so, in what amount? Answered by the court, "No."

5. Was the whiskey sold and delivered by the plaintiff to the defendant for the purpose of being resold in North Carolina, and contrary to the law of that State? A. Yes.

Both plaintiff and defendant moved for judgment upon the verdict, which motions were continued to the December term of the court.

At December term the court rendered judgment as follows:

Upon the hearing of these motions at this term, it is ordered and adjudged that the contract between the plaintiff and the defendant was made in the city of Baltimore, State of Maryland, and that, upon the verdict on the fifth issue, the plaintiff recover nothing of the defendant, and that the defendant recover his costs. GEORGE ROUNTREE,
Judge Presiding.

Plaintiff excepts and appeals to the Supreme Court.

Iredell Meares and G. F. Meares for plaintiff.
Kellum & Loughlin for defendant.

BROWN, J. We agree with the learned judge of the Superior (373) Court, that upon the entire evidence and upon the finding of the jury upon the fifth issue the plaintiff is not entitled to recover.

There are some conflicting decisions upon the question presented on this appeal, but we think the best considered cases hold that a note or contract valid in the State where it is made cannot be enforced in another State to whose public policy the transactions which form its consideration are contrary. *Windward v. Lincoln*, 64 L. R. A., 160, and notes; *Bank v. Earle*, U. S. Supreme Court (10 L. Ed.), 308; *Levison v. Boas*, 12 L. R. A. (N. S.), 576, and notes; *Brewing Co. v. Harriman*, 47 N. E., 864; *Woodford v. Hamilton*, 39 N. E., 47; *Furniture Co. v. Allsteine*, 51 L. R. A., 890.

That the sale of spirituous liquors within the State of North Carolina is against its declared policy is manifested by the legislation enacted on the subject.

Upon this principle cases are to be found in the decisions of this Court which hold that no contract, wherever made, in aid of the so-called, but erroneously termed, rebellion of the Southern States will be enforced by the courts of this State. *Leak v. Commissioners*, 64 N. C., 134; *Brickell v. Commissioners*, 81 N. C., 241.

Also, that the contract of a married woman, a citizen and resident of North Carolina, not a free trader, made in Maryland, and valid under the laws of that State, will not be enforced by the courts of North Carolina, because such contracts are not permitted here, or were not when that decision was made. *Armstrong v. Best*, 112 N. C., 59.

The reasoning of the opinion of *Chief Justice Shepherd* in that case covers the one under consideration. In it he says: "A very important qualification of private international law is to be considered, and this is that no State or Nation will enforce a foreign law which is contrary

to its fixed and settled public policy." See, also, *Bank v. Earle,* 13 Peters U. S., 519; Story Conflict of Laws, 37; *Bank v. Granite Co.,* 155 N. C., 45, in which the decision in *Armstrong v. Best* is commented upon and approved.

(374) The exact point is decided in *Gooch v. Faucett,* 122 N. C., 271, where it is held that a note given in consideration of a bet won on a horse race cannot be enforced in this State, although given in a State where wagering contracts are not invalid.

It is useless to multiply authorities. It is well settled that the courts of this State will not lend their aid to the enforcement of any contract made and entered into by both parties to violate the public laws of the State, and it matters not where the contract is made.

No error.

Cited: Smith v. Express Co., 166 N.C. 158 (g); *S. v. Cardwell,* 166 N.C. 317 (j); *Pfeifer v. Drug Co.,* 171 N.C. 215 (f); *Phosphate v. Johnson,* 188 N.C. 427 (f); *Howard v. Howard,* 200 N.C. 580 (b); *Shoe Co. v. Dept. Store,* 212 N.C. 79 (f).

GIRARD NATIONAL BANK v. ADAM McARTHUR ET AL.

(Filed 8 April, 1914.)

Statutes—Evidence—Motions to Inspect and Copy—Court's Discretion.

Where a note sued on is alleged to be a forgery, the judge of the Superior Court wherein the action is pending may, in his discretion, allow, upon due notice, the defendant to inspect the note and take a photographic copy thereof. Revisal, sec. 1656.

APPEAL by plaintiff from *Rountree, J.,* at February Term, 1914, of CUMBERLAND.

Civil action to recover on a note for $15,000, purporting to be signed by Adam and Mrs. M. C. McArthur and others and the execution of which was denied by the defendants named, heard on motion to permit the inspection and taking of photographic copy of the note in controversy.

Motion having been allowed, plaintiff excepted and appealed, assigning for error that the court had not power to make such an order.

Rose & Rose, H. S. Averitt, and Robinson & Lyon for plaintiff.

Shaw & McLean, McLean, Varser & McLean, and Jones & Bailey for defendant.

HOKE, J. The order made by his Honor comes clearly within (375) the provisions of our statute applicable to the case, which is as follows:

Revisal, sec. 1656: "The court before which an action is pending, or a judge thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both."

This statute was primarily designed and intended to afford the facilities for the ascertainment of truth that were formerly supplied by bill of discovery, and, while it is broader in its scope and effect, the decisions on the old method of procedure are in certain instances now helpful to its correct interpretation. *Fields v. Coleman,* 160 N. C., 11; *Bailey v. Matthews,* 156 N. C., 78, and, under our former procedure by bill in equity, or under statutes expressly referring to the equitable rules prevailing in such cases (Rev. Code, ch. 31, sec. 82; Rev. Statutes, ch. 31, sec. 86), on issue joined as to the genuineness of a note, its production for an inspection and copy was considered and held to be a proper instance for the exercise of this power by the court. *Scarboro v. Tunnell,* 41 N. C., 103; *McGibboney v. Mills,* 35 N. C., 163. In this last case *Nash, J.,* delivering the opinion, said: "Here the defense is that the instrument on which the action is brought is a forgery. How is it possible for the defendant to support his plea that it is not the deed of the testator unless he can have full access to it, both for his own inspection and that of his witnesses? Such testimony is pertinent to the issue the jury have to try. This, too, is the course of the English courts of chancery," citing *Beckford v. Beckford,* 16 Vesey, 438. Nor is the objection well taken that the copy is to be made by photography. Where a copy of an instrument or a locality has been ordered as properly relevant to the inquiry, this method affords, perhaps, the most correct and helpful impression of the object that could be obtained, and, in a case like the present, it is well-nigh indispensable if the purpose for (376) which a copy is required may be subserved. In *Hampton v. R. R.,* 120 N. C., 534, a photographic copy of the locality was rejected, a majority of the Court being of opinion that owing to the length of time intervening and certain changes in conditions the impression might have a tendency to mislead rather than aid the jury to a correct conclusion. Even in that case there was a dissent by the present *Chief Justice,* who gave forcible expression of his views as to the admissibility

of the copy in the particular instance and of the general value of the same as evidence when properly guarded and identified; views which have, in the main, since prevailed as the controlling opinion of the Court, *Pickett v. R. R.*, 153 N. C., 148, and *Davis v. R. R.*, 136 N. C., 115, and which are in accord with enlightened decisions in other courts of highest resort. *United States v. Otey*, 176 U. S., 422; *Marey v. Moses, Barnes et al.*, 16 Mass., 161; *Duffil v. The People of Ill.*, 107 Ill., 113; 1 Thompson on Trials, sec. 869.

On testimony of the same general character, we were referred by counsel for appellee to an impressive utterance of the New York Superior Court in *Frank v. Bank*, 37 N. Y., Sup. Ct., 34, and affirmed in 84 N. Y., 209, as follows: "The administration of justice profits by the progress of science, and its history shows it to have been almost the earliest in antagonism to popular delusions and superstitions. The revelations of the microscope are constantly resorted to, in protection of individual and public interests. It is difficult to conceive of any reason why, in a court of justice, a different rule of evidence should exist in respect to the magnified image, presented in the lens of the photographer's camera, and permanently delineated upon the sensitive paper. Either may be distorted or erroneous through imperfect instruments or manipulation, but that would be apparent or easily proved. If they are relied upon as agencies for accurate mathematical results in mensuration and astronomy, there is no reason why they should be deemed unreliable in matters of evidence. Wherever what they disclose (377) can aid or elucidate the just determination of legal controversies, there can be no well-formed objection to resorting to them."

We hold that, in this instance, the order in question has been providently made by the learned judge, and that the same was in pursuance of power conferred upon him by law.

There is no error.

Affirmed.

Cited: Lupton v. Express Co., 169 N.C. 672 (p); *Jones v. Guano Co.*, 180 N.C. 321 (g); *Dunlap v. Guaranty Co.*, 202 N.C. 654 (g).

Z. G. THOMPSON v. SEABOARD AIR LINE RAILWAY COMPANY.

(*Filed* 8 April, 1914.)

1. Railroads—Torts—Negligence — Damage by Fire — Timber Rights — Damages Remote.

There can be no recovery of damages occasioned unintentionally and indirectly to one from the tort of another; and recovery of damages will be denied to one who had a contract for cutting timber on the lands of another, alleged merely to have been caused by the negligence of a railroad company in setting fire to the timber growing thereon, and thus preventing the plaintiffs from making the profits he would otherwise have made under his contract.

2. Railroads—Torts—Negligence—Damages by Fire—Proximate Damages.

A railroad company negligently set fire to the lands of the owner, and was sued to recover damages, by one having a contract to cut the timber therefrom, arising from the loss of certain of his groceries, and the reconstruction of certain shack-houses he was permitted by the owner to use, occasioned by the defendant's tort: *Held*, these damages are not too remote for recovery.

APPEAL by defendant from *Lyon, J.*, at October Term, 1913, of BLADEN.

Civil action to recover damages for losses alleged to have been sustained by fire, tried upon exceptions by defendant to report of a referee.

The court overruled the exceptions, and the defendant appealed.

No counsel for plaintiff. (378)

W. H. Neal, McIntyre, Lawrence & Proctor for defendant.

BROWN, J. It appears from the findings of fact that the United Lumber Company was the owner of a lot of pine timber growing upon certain lands in Bladen County; the plaintiff had a contract with said company to cut and saw up all of said timber at $7.50 per thousand feet; that the plaintiff cut and sawed 12,670 feet, when the defendant's right of way, being in a foul condition, caught fire from sparks from the defendant's engine, which being communicated to this adjoining tract of timber, caused a large part of it to be burned over and destroyed.

After the fire, the plaintiff resumed operations and cut and sawed 242,571 feet. The evidence shows that the fire destroyed certain "shacks" that plaintiff had use of, and which he rebuilt in order to resume work after the fire; also that groceries and provisions belonging the the plaintiff were destroyed.

The referee and the court rendered judgment:

1. For the groceries and provisions, $65.

2. Damages accruing from destruction and loss of the buildings rebuilt by the plaintiff, $75 (reduced by the court to $25).

3. Loss of profits consequent upon the destruction of that part of the timber which the plaintiff could not cut, as it was destroyed by fire, $870. (This was reduced by the judge to $475.)

We think it plain that the plaintiff is entitled to recover the first and second items of damage awarded for loss of groceries and damage and cost incurred by destruction of the shacks. We do not deem it necessary to discuss the exceptions relating to those items.

We think it well settled that the plaintiff is not entitled to recover the $475 profits which he failed to make on the part of the timber destroyed by the fire. There is not the slightest evidence, and there is no contention, that the defendant had any knowledge of the plaintiff's contract, and set out the fire for the purpose of injuring the plaintiff.

It is admitted that the owner of the timber has recovered full compensation for the destruction of the timber, in which the plaintiff had no interest except a contract to cut it.

(379) The general principle of law is that no recovery can be had for an indirect unintended injury to one arising from a tort to another. The rule is thus stated in 8 A. and E. Enc., 600:

"Where, however, by the *willful* tort of a third person, one of two contracting parties is disabled from performing his contract, the wrong having been committed *with intent* to injure the other, it has been held that the latter may recover from the tort feasor in damages. But unless the wrong is done with a willful intent to injure the complaining party, the latter cannot recover."

Many cases illustrating the application of this principle are cited in the notes.

The rule is clearly stated in 1 Sutherland on Damages, sec. 33, as follows:

"Where the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, if the plaintiff sustains no other than a contract relation to such third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such third person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract, unless the wrongful act is willful for that purpose."

The author gives many illustrations of the application of this doctrine taken from decided cases. To the same effect are Sedgwick, Hale, Maine, and Joyce in their books on Damages. This doctrine is laid down by the English courts, and generally applied in the courts of this country.

See the opinions of the several judges in *Lumley v. Gye,* 75 E. C. Law, 217; *Ashley v. Harrison,* 1 Esp. N. P., 48.

The decided cases are too numerous to quote except from a few.

In *Anthony v. Slaid,* 11 Met. (Mass.), 290, it was held that one under obligation by contract to support a pauper could not recover the increased charges to which he was put by reason of an assault by the defendant on the pauper.

In *Dale v. Grant,* 34 N. J. L., 142, it is held that a party who has contracted for the output of a manufacturing establishment cannot recover damages of a wrongdoer who, by trespass, interrupted and (380) damaged the factory so that the quantity of the output is lessened.

In *Gregory v. Brooks,* 35 Conn., 437, it is held that where one is injured by the wrongful act of another, and others are indirectly and consequentially injured, but not by reason of any natural or legal relation, the injuries of the latter are too remote to constitute a cause of action. But the rule is different where the injury is done to one with a malicious or fraudulent design to injure another through a contract relation. A privity must exist between the act of a wrongdoer and the injury complained of in order to lay the foundation of a recovery. *McNary v. Chamberlin,* 34 Conn., 388, and cases cited; *Lumber Co. v. Telegraph Co.,* 123 Cal., 429.

Therefore, and for that reason, it is held in *Byrd v. English,* 117 Ga., 191, that a party to a contract, who is injured by reason of the failure of the other party to comply with its terms, cannot recover damages of a third person, a wrongdoer, whose negligence rendered the performance of the contract impossible. *Brink v. R. R.,* 53 L. R. A., 812.

A leading and often cited case on this subject of remote and indirect damages is *Insurance Co. v. R. R.,* 25 Conn., 265. It was a suit brought by an insurance company to recover damages for a loss in insurance money, paid out on the life of a person killed by the negligence of the railroad company. The relatives of the deceased had recovered damages of the railroad company for the value of the life of the person killed. The court held that the plaintiff insurance company could not recover, because there was no privity of contract between the insurers and the railroad company, and no direct obligation of the latter to the former growing out of the contract or relation between the insured and the railroad company.

In the course of an elaborate opinion, in giving the reasons for this doctrine, *Judge Storrs* says: "An individual slanders a merchant and ruins his business: is the wrongdoer liable to all the persons who, in consequence of their relations by contract to the bankrupt, can be clearly shown to have been damnified by the bankruptcy? Can a fire insur-

(381) ance company, who has been subjected to loss by the burning of a building, resort to the author of the injury who had no design of affecting their interests, in their own name and right?

"Such are complications of human affairs, so endless and far-reaching the mutual promises of man to man in business and in matters of money and property, that rarely is a death produced by a human agency which does not affect the pecuniary interests of those to whom the deceased was bound by contract.

"To open the door of legal redress to wrongs received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury would be to encourage collusion and extravagant contracts between men, by which the death of either, through the involuntary default of others, might be made a source of splendid profits to the other, and would, also, invite a system of litigation more portentous than our jurisprudence has yet known."

That case is reported in 65 Am. Decisions, and on page 577 are to be found the notes containing many cases sustaining it.

In *Squire v. Telegraph Co.,* 98 Mass., 232, *Chief Justice Bigelow,* in discussing this doctrine, says: "A rule of damages which should embrace within its scope all the consequences which might be shown to have resulted from a failure to perform a stipulated duty or service would be a serious hindrance to the operations of commerce, and to the transaction of the common business of life. The effect would be to impose a liability wholly disproportionate to the nature of the act or service which a party has bound himself to perform, and to compensation paid and received therefor."

"Courts of justice, therefore," says Sedgwick, commenting on that case, "allow recovery only for such damage as is the proximate consequence of the defendant's wrong, and exclude from consideration consequences which are remote." Vol. 1, pp. 201 to 202.

This Court has recognized that rule and held that "Consequential damage, to be recoverable in an action of tort, must be the proxi-
(382) mate conseqence of the act complained of, and not the secondary result." *Sledge v. Reid,* 73 N. C., 441, and cases cited.

We are, therefore, of opinion that the court erred in allowing the third item of $870, reduced to $475.

The cause is remanded to the Superior Court of Bladen County, with directions to enter judgment in accordance with this opinion.

The costs of this Court will be taxed against the plaintiff.

Error.

W. W. KELLY ET AL. v. A. H. McLEOD ET AL.

(Filed 25 April, 1914.)

Homestead—Metes and Bounds—Tenants in Common — Equity — Judgments—Cloud on Title.

The homestead laws should be liberally construed in favor of the one claiming the homestead, and may be allotted in the undivided interest in lands of a tenant in common when such interest does not exceed $1,000 in value, subject only to the rights of enjoyment of the lands by the other tenants in common, who alone may complain; and when the land is sufficiently identified the allotment is not open to objection that the homestead should have been "fixed and described by metes and bounds." Rev., sec. 688. Hence, where a judgment debtor has accepted and enjoyed a homestead allotted to him in his undivided interest in lands of a less value than $1,000 for a long period of time, he may not sustain his suit in the equitable jurisdiction of the court to set aside as void the proceedings under which the homestead had been laid off, and plead the statute of limitations as to the judgment lien, upon the ground that they were a cloud upon his title.

APPEAL by plaintiff from *Justice, J.*, at December Term, 1913, of ROBESON.

On 22 March, 1884, A. H. McLeod, intestate of defendant, recovered judgment before a justice of the peace against plaintiff, W. W. Kelly, for $177.23 and costs, which was docketed in the Superior Court 22 March, 1884. McLeod afterwards sued upon that judgment, and obtained another judgment on 22 March, 1891, for the amount (383) thereof and costs, and this judgment was docketed on 22 March, 1891. He also recovered judgment before said justice 22 March, 1884, against plaintiff, for $164.23 and costs, which was docketed in the Superior Court, and afterwards a judgment upon the last named judgment was recovered and docketed 21 March, 1901, within ten years after the rendition thereof. Execution was issued upon the last described judgment, and the homestead of W. W. Kelly, defendant in the judgment, was allotted and set apart to him in the one-seventh undivided interest in a tract of land devised to him and others by Duncan Kelly, as tenants in common, containing 362 acres and described in deeds referred to, which was valued by the appraisers at $475. No exception was filed to their report and no objection was ever made to the said allotment of homestead by W. W. Kelly, until the bringing of this action.

Plaintiff seeks to set aside the allotment and to have the judgments declared as a cloud upon his title to the one-seventh interest in the land, he alleging that as the homestead allotment was void, it did not suspend the running of the statute of limitations, and that the judgments, therefore, are now barred, but a cloud upon the title. The one-seventh interest

was all the land owned by W. W. Kelly at the time of the allotment or since that time.

Upon the case agreed reciting substantially the foregoing facts, the court held with the defendant, and adjudged that the liens of the judgments were valid and subsisting, and constitute no cloud on the title, nor did the allotment, which was also valid. The action was accordingly dismissed at plaintiff's costs, and plaintiff appealed.

McNeill & McNeill for plaintiff.

Johnson & Johnson and McIntyre, Lawrence & Proctor for defendant.

WALKER, J., after stating the case: Defendant contended here that this action was not maintainable, upon several grounds, and among others, that the allotment was merely irregular and not void, and (384) the remedy was by exception thereto, or by motion to set aside (*Welch v. Welch* 101 N. C., 565), and that if the allotment is void on its face, it is, for that reason, no cloud upon the title, relying on *Busbee v. Macy,* 85 N. C., 329; *Busbee v. Lewis, ibid.,* 332, and subsequent cases approving them; and further, that a court of equity will not aid a plaintiff to plead the statute of limitations; but as we hold with the defendant, upon another ground, it is not necessary to consider those mentioned.

Our opinion is that the allotment was valid, although it embraces only a one-seventh undivided interest in land, this being the objection to it urged by plaintiff.

Defendant's counsel concedes that under *Campbell v. White,* 95 N. C., 344, and *Oakley v. Van Noppen,* 96 N. C., 247, the allotment would be void if the interest was worth more than $1,000, the maximum value of the homestead exemption. There is now a statute providing for such cases (Revisal, sec. 2489; Laws 1905, ch. 429.), and this renders useless a discussion of the question, as such a case may not arise again, and, besides, it is not presented in this record. But assuming the position to be correct, we do not see that the difficulty of allotting the homestead in such a case lies in the way when the undivided interest is of a value less than $1,000. We can perceive no sound objection to the allotment of a homestead where all of the debtor's interest in the land does not exceed the allowable value of the exemption. The object of the law is to protect the embarrassed debtor and his dependent family against being wholly impoverished by the creditor so that they may become a charge upon the community or upon charity. It is a beneficent provision and is always construed most liberally to accomplish the desired end.

The provision of Revisal, sec. 688, that the homestead shall be "fixed and described by metes and bounds" applies manifestly to an interest capable of such a description, or, in other words, to land held in severalty. This Court has held that it is not essential to its validity that the "metes and bounds," or course and distance, should be given, but that any description that sufficiently identifies it will do. *Ray v. Thornton,* 95 N. C., 571. So we are not required to give the statute a literal (385) interpretation. The authorities upon this question are somewhat in conflict, but the best considered cases and the "reason of the thing" sustain our view.

The objection usually urged against allowing a homestead right to exist in an undivided interest is that it may interfere with the rights of the cotenants. "But this is a matter of which the other cotenants alone can complain, and if their rights are respected, persons who are not cotenants cannot object. The object is to protect the portion set off from judgment levies and sales, and not to give an assured title thereto. The cotenant of the claimant of a homestead cannot question the latter's 'right to acquire a homestead interest in the property, so long as the cotenant is allowed to enjoy all his rights and privileges in and to said property as a cotenant.' " *Brokaw v. Ogle,* 170 Ill., 115. The court in that case held that the fact of the land being held in common did not militate against the claim of a homestead, if in other respects the debtor's right thereto is established, citing with approval *Tarrant v. Swain,* 15 Kansas, 149. A good statement of the law and the reason therefor is given in the case just cited: "The laws, however, of the various States upon this subject differ, and several decisions may be found on the other side of the question. Of course, a tenant in common can obtain no such homestead interest as will interfere with the rights or interests of his cotenant, or any person rightfully holding under his cotenant. But this is probably the only limitation upon his acquiring a homestead interest in such property. Third parties cannot say that, because a tenant in common cannot obtain such a homestead interest as will defeat or destroy the interest of his cotenant, that therefore he cannot obtain any homestead interest at all. Neither can his cotenant question his right to acquire a homestead interest in the property, so long as such cotenant is allowed to enjoy all his rights and privileges in and to said property as a cotenant." *Tarrant v. Swain, supra;* and that case is supported fully by *McGuiar v. Barr,* 81 Ky., 32; *Giles v. Miller,* 36 Neb., 346; *Kaiser v. Haas,* 27 Minn., 406. We find it stated in 21 Cyc., p. (386) 505, that the policy of the exemption laws, liberally construed, is deemed to be that the debtor and his family may be protected in their possession of a home, irrespective of the character or extent of the estate

owned by him, provided he be not an intruder, and many authorities are cited in the notes to sustain the text. Judge Thompson, in his work on Homesteads and Exemptions, sec 181, adopts what Freeman (who, he asserts, is a careful and judicious writer) has said upon this question: "The fact that a homestead claim might savor of such an assumption of an exclusive right as is inconsistent with the rights of the other cotenant, and that the maintenance of such claim might interfere with proceedings for partition, form no very satisfactory reason for denying the exemption. If the rights of the other cotenant are threatened or endangered, he alone should be permitted to call for protection and redress. The law will not sanction any use of the homestead in prejudice of his rights. But, as long as his interests are respected, or so nearly respected that he feels no inclination to complain, why should some person having no interest in the cotenancy be allowed to avail himself of the law of cotenancy for his own, and not for a cotenant's, gain? The homestead laws have an object perfectly well understood, and in the promotion of which courts may well employ the most liberal and humane rules of interpretation. This object is to assure to the unfortunate debtor and his equally unfortunate, but more helpless, family the shelter and influence of *home*. A cotenant may lawfully occupy every parcel of the lands of the cotenancy. He may employ them, not merely for cultivation or for other means of making profits, but may also build houses and barns, plant shrubs and flowers, and surround himself with all the comforts of home. His wife and children may of right occupy and enjoy the premises with him. Upon the land of which he is but a part owner he may, and in fact he frequently does, obtain all the advantages of a home. These advantages are none the less worthy of being secured to him and his family in adversity because other cotenants are entitled to equal advantages in the same home. That he has not the whole is (387) a very unsatisfactory and a very inhumane reason for depriving him of that which he has," citing Freeman on Cotenancy and Partition, sec. 54, which is fully sustained in almost identical language by *Clark v. Thias,* 173 Mo., 628. See *King v. Wellborn,* 83 Mich., 195, and cases cited.

In this case it appears that the debtor accepted the allotment of the homestead without any objection, and has for many years occupied and enjoyed the same and held off his creditors How is he prejudiced in the least degree by receiving his undivided seventh interest in the whole tract, to do with as he pleases during the continuance of the exemption? If he wishes to hold it in severalty, he may, perhaps, have partition, and the judgment lien, subject to the homestead exemption, will rest upon his several interest. In no possible way can he be injured, nor can his cred-

itor, by an allotment of his interest in the joint estate, as he must wait until the time comes to subject the debtor's interest to the payment of his debt, and it being worth less than $1,000, he cannot reach it in the meantime, whether it is allotted as a joint or several interest. It is a strange and illogical argument, advanced by some, which would lead to his losing it simply because the law cannot protect him in the sole enjoyment of it. If he cannot agree with his cotenant, let him have and enjoy his share of the joint profits. This is better than nothing, and more sensible, it seems, than taking it all away because he cannot fully enjoy it except in severalty.

The homestead is sufficiently described by reference to the deeds, recorded in the county, by book and page of the registry.

Affirmed.

Cited: Holley v. White, 172 N.C. 78 (g); *Hicks v. Wooten,* 175 N.C. 602 (d); *Smith v. Eakes,* 212 N.C. 383 (g); *Trust Co. v. Watkins,* 215 N.C. 296 (p); *Rostan v. Huggins,* 216 N.C. 390 (p).

(388)

S. A. WALTERS v. DURHAM LUMBER COMPANY.

(Filed 22 April, 1914.)

1. Jurors — Selection — Improper Questions — Prejudice — Principal and Surety—Parties—Interest.

When it appears that a defendant is sued for damages for a personal injury alleged to have arisen in tort, which are covered by an indemnifying bond of another corporation, it is competent for the plaintiff, in selecting the jurors in the case, to ask them if any of them were interested as agent or otherwise in the indemnity company, for while that company was not made a party defendant, it was directly interested in the result of the trial.

2. Jurors—Selection—Prejudice—Trials—Court's Discretion—Appeal and Error.

It is within the province of the trial judge to see that questions extraneous to the case and tending to prejudice the jury are not asked the jurors being selected for the trial, and such matters as are within his discretionary power are not reviewable on appeal in the absence of its abuse. In this case, it appearing among other things that the appellant had not exhausted his peremptory challenges, his exception is untenable.

3. Master and Servant—Incompetency of Fellow-servant—Negligence.

The master is responsible for damages for a personal injury caused by one fellow-servant to another arising from the incompetency of the former

which was previously known to the master. *Walters v. Lumber Co.*, 163 N. C., 541.

4. Master and Servant—Assumption of Risks — Master's Negligence — Fellow-servant.

A servant assumes the risk of injury incident to a dangerous employment engaged in by him, but does not assume those resulting from the negligent selection of an incompetent fellow-servant by the master.

5. Master and Servant—Incompetency of Fellow-servant—General Character—Witness.

In an action to recover damages of the master arising from his alleged negligent employment of an incompetent fellow-servant, evidence of the general character of such fellow-servant is properly excluded when he has not testified as a witness.

6. Trials—Instructions—Measure of Damages.

The charge of the court is held to be correct upon the measure of damages in this action for a personal injury alleged to have been negligently inflicted upon a servant while engaged in the discharge of his duties. *Johnson v. R. R.*, 163 N. C., 451, cited and applied.

7. Trials—Evidence—Nonsuit.

Defendant's motion for a nonsuit upon the evidence will be denied when there is any legal evidence to support plaintiff's cause of action, as it will be construed, upon such a motion, most strongly in plaintiff's favor, its weight and credibility being for the jury to determine.

(389) APPEAL by defendant from *Lyon, J.*, at January Term, 1914, of DURHAM.

J. A. Giles and Bryant & Brogden for plaintiff.

W. L. Foushee and Manning, Everett & Kitchin for defendant.

WALKER, J. This case was here at the last term, and is reported in 163 N. C., at p. 536. Nearly all of the questions now raised in this appeal were decided at that time.

First. Plaintiff, for the purpose of exercising his right of challenge, was permitted to ask the jurors, then in the box, over defendant's objection, if any of them had any business connection or relation with the Fidelity and Casualty Company of New York, it having been admitted that defendant was insured by that company against loss on account of this claim to a certain amount. It seems to us that this objection is fully answered on two grounds in *Norris v. Cotton Mills*, 154 N. C., 474, in the language of *Justice Allen:* "The exception to the question asked the jurors, 'Is there any member of the jury who has an interest as agent, or otherwise, in the Maryland Casualty Company, an in-

surance Company?' is without merit. We must assume the question was asked in good faith, and the defendant says in its brief: 'The Maryland Casualty Company had insured the defendant in respect to the plaintiff's accident.' In *Blevins v. Cotton Mills,* 150 N. C., 497, it was held that an employee of the defendant was incompetent as a juror, and the casualty company was practically a defendant. In any event, it does not appear that the question prejudiced the cause of the defendant. No person was excused on account of his connection with the (390) casualty company, and the defendant did not exhaust its challenges."

It does not appear in this case that any juror was rejected because of his interest or bias, or that defendant exhausted its peremptory challenges. If, under the circumstances, the question was calculated to prejudice the defendant before the jury, the court should have exercised its discretionary power so as to remove the prejudice and insure a fair trial. This must be left largely to the presiding judge, who has ample power to prevent any injustice to parties litigating before him, and the power should be used fully for this purpose, as we said recently in *Hensley v. Furniture Co.,* 164 N. C., 148. We will not revise his rulings unless there is clear and unmistakable abuse. This is the principal exception in the case.

The case of *Akin v. Lee,* 206 N. Y., 20, cited by appellant, is not applicable, as there the general question was asked, Is the defendant insured? without any particular motive or purpose, except to prejudice the defendant. The Court in that case very properly said: "Such evidence, almost always, is quite unnecessary to the plaintiff's case, and its effect cannot but be highly dangerous to the defendant's; for it conveys the insidious suggestion to the jurors that the amount of their verdict for the plaintiff is immaterial to the defendant. It was a highly improper attempt on plaintiff's part to inject a foreign element of fact into his case, which might affect the juror's minds, if in doubt upon the merits, by the consideration that the judgment would be paid by an insurance company. While frequently, in the exercise of the authority conferred upon this Court, we disregard technical errors, when we see that they do not affect the merits of the controversy, the error committed in this case is of too grave a nature to be put aside as merely technical. In repeated instances, judgments have been reversed for its commission, and counsel must take notice that we shall adhere to our rule and that we shall order a new trial in all cases where, in such actions, a verdict may have been influenced by the consideration of such unauthorized evidence." The evidence was there admitted (391) by the court, and served no apparent purpose other than to

influence the jury against the defendant and to prevent a fair and impartial hearing by them. Not so in this case, as we have seen, but quite the contrary.

Second. The testimony as to the reputation of Milton Carden in the mill for carelessness and incompetency was fully considered before, and what was then said need not be repeated. "If the master becomes aware that the servant has become, for any reason, unfit for the service in which he has employed him, in such a sense as to endanger the safety of his other servants, it will become his duty to discharge the unfit servant; and if, failing in this duty, one of his other servants is injured by the negligence of the unfit servant, he will have an action for damages against the master." Thompson on Negligence, sec. 4050. "The hiring or retention of a servant whose unfitness for his duties, whether it arises from his want of skill, his physical and mental qualities, or his bad habits, if known, actually or constructively, to the master, is culpable negligence, for which the master must respond in damages to any other servants who may suffer injury through that unfitness. The essential ground upon which the liability thus predicated is based is that 'the master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service.'" Labatt on M. and S. (2 Ed.), sec. 1079. It therefore makes no difference that Milton Carden, whose negligence caused the injury, was a fellow-servant of the plaintiff, as the jury must have found that he was incompetent and that the master knew it before the plaintiff was hurt in the operation of the machine. *Walters v. Lumber Co.*, 163 N. C., 541.

Third. The charge as to the assumption of risk was correct and in accordance with the law as we have often declared it, and also substantially in response to defendant's own prayer. Plaintiff assumed the risk involved in the negligence of his fellow-servant, but not that arising out of the negligence of the master in selecting him, if he knew that he was incompetent, as the risk in that event would be caused by
(392) the master's own negligence, as will appear by reference to the authorities above cited, and *Orr v. Telephone Co.*, 132 N. C., 691; *Pressly v. Yarn Mills*, 138 N. C., 410; *Norris v. Cotton Mills*, 154 N. C., 485. We think this defense was properly submitted to the jury, so far as applicable under the pleadings and evidence. *Ammons v. Manufacturing Co., post*, 449.

Fourth. The general character of Milton Carden, he not being a witness, was not in issue, and evidence in regard to it was properly excluded. *McRae v. Lilly*, 23 N. C., 118; *Heilig v. Dumas*, 65 N. C., 214; *Clement v. Rogers*, 95 N. C., 253; *Norris v. Stewart*, 105 N. C., 457; *Marcom v. Adams*, 122 N. C., 225.

Fifth. The exception to that part of the charge relating to the measure of damages is untenable. The court charged according to the rule as stated in *Fry v. R. R.*, 159 N. C., 362, and recently in *Johnson v. R. R.*, 163 N. C., 451.

Sixth. Upon the motion to nonsuit, which was refused, there was evidence of defendant's negligence, which should be construed most favorably for the plaintiff. It may be that the jury should have found the other way, but we cannot say there was no evidence to support the verdict, nor do we mean to intimate that the verdict was not a correct one.

No error.

Cited: S. c., 163 N.C. 536; *Gray v. R. R.*, 167 N.C. 435 (7g); *Lloyd v. R. R.*, 168 N.C. 649 (7g); *Hopkins v. R. R.*, 170 N.C. 487 (7g); *Oliphant v. R. R.*, 171 N.C. 304 (1p); *Southwell v. R. R.*, 189 N.C. 420 (3g); *Fulcher v. Lumber Co.*, 191 N.C. 410 (1f); *Taylor v. Construction Co.*, 193 N.C. 780 (3g); *Shorter v. Cotton Mills*, 198 N.C. 30 (4f); *Sparks v. Holland*, 209 N.C. 707 (1f).

N. W. BROWN v. SOUTHERN RAILWAY COMPANY.

(Filed 22 April, 1914.)

1. Surface Water—Diversion of Flow—Negligence—Cause of Damages—Duty of Lower Proprietor.

Where damages are sought against a railroad for diverting the surface flow of water onto the plaintiff's land in the construction of a spur track, testimony is competent to show that the plaintiff did not keep the ditches on his own land open, when there is evidence that this neglect on the plaintiff's part was the sole cause of the injury alleged.

2. Surface Water—Diversion of Flow—Drain Pipes—Request of Lower Proprietor—Trials—Evidence.

In an action against an upper owner of lands to recover damages for diverting the surface flow of water onto the plaintiff's land under allegation that certain drain pipes were improperly provided for the purpose by the defendant on its own land, it is competent to show that the drains were put in in compliance with the plaintiff's request, and that he could not therefore complain.

3. Appeal and Error—Assignments of Error—Exceptions Abandoned.

Exceptions not brought forward in the assignments of error are deemed abandoned on appeal.

4. Surface Waters—Diversion of Flow—Artificial Increase—Trials—Instructions—Special Request.

It is only for damages for a diversion of the surface flow of water for which the upper proprietor may be held liable to the lower proprietor, and when the court has thus correctly charged the law, it will not be held for error that he failed further to charge that the upper proprietor cannot increase the discharge of the water, at any given point, in the absence of appellant's special request so to charge, for exceptions of this character must be to the refusal of the court to give such special requests.

(393) APPEAL by plaintiff from *Devin, J.*, at December Term, 1914, of ORANGE.

C. D. Turner and S. M. Gattis for plaintiff.

J. Dolph Long and Parker & Parker for defendant.

CLARK, C. J. This is an action for damages in overflowing the plaintiff's property by diverting the flow of surface water by building a spur track. The answer denied the allegations of the complaint and alleged that the damage was not caused by defendant diverting the flow of water, but because the plaintiff had permitted drains and ditches about his property to become filled up.

The plaintiff's property lies just outside the west limit of Hillsboro on the west side of the roadway whose continuation into the town is known as Nash Street. It is not controverted that the plaintiff's lot is flooded in times of heavy rain, and it seems that the roadway in
(394) front of his property is higher than the floor of his buildings which are flooded, and that the floor of said buildings is about on a level with the sidewalk in front of them. It also seems that there is no dispute that the drains or ditches in front of the plaintiff's property are filled up. His property is down hill from the place where the defendant's spur track crosses Nash Street.

The plaintiff introduced evidence tending to show that the defendant by building said spur track had diverted the natural flow of the water so that more water flowed down Nash Street upon his land than formerly. There was evidence introduced by the defendant tending to show that the spur track had not diverted the flow of the surface water at all and had not caused any more water to flow down Nash Street, and that the property of plaintiff had been flooded in times of heavy rains before said spur track was put in. It was also in evidence that where the spur track crossed Nash Street terra-cotta pipes had been put in large enough to carry off the water that flowed down Nash Street, so that it was not in any way retarded or diverted.

The first ten exceptions of the plaintiff are to the judge permitting witnesses to testify what would be the effect if the ditches in front of Brown's property were kept open. These ditches were not on railroad property. It was in evidence that they were filled up and that there was a considerable amount of water that would naturally flow down Nash Street regardless of any water diverted. These questions were pertinent as tending to show that the property would be as much overflowed anyway and tending to prove that the plaintiff's negligence to keep the drains and ditches open caused the damage which he sustained, and not the spur track.

The next three exceptions are to the judge permitting evidence to show that certain pipes were put in and certain drains were opened by the defendant on its own property at the request of the plaintiff, before the spur track was put in. This was competent to substantiate the defendant's claim that if this caused a diversion of water the defendant could not complain.

Exception 20 is because the court charged the jury that if (395) they should find that the defendant in the construction of its tracks and embankment provided certain pipes and culverts at its intersection with Nash Street to carry off through its right of way the waters coming down in the ditches or gutters of said street, and they were sufficient for that purpose, the defendant would not be liable for any damage arising from the filling up of the town or street ditches below the said right of way or the ponding of water caused by the said ditches being filled up, unless the water was diverted. In this there was no error.

The other exceptions to the charge cannot be sustained, for they are to instructions which are all based upon the principle that the defendant was liable if it diverted the water and thereby caused the injury, but if it did not do this, it would not be liable. Exceptions 15 to 18, for "failure to charge as requested, are abandoned, for they are not brought forward among the "assignments of error." Rule 21, 164 N. C., 546.

This case seems to have depended almost entirely upon issues of fact, and the jury have responded in accordance with the views advanced by the defendant as to the cause of the injury. The facts are somewhat similar to those in *Greenwood v. R. R.*, 144 N. C., 446, and the court seems to have conformed in its charge to the law set out in the headnote of that case, which reads as follows: "The lower proprietor must receive the surface water which falls on adjoining higher lands and naturally flows therefrom. In an action for damages to bottom-lands of plaintiff by water flowing down and across defendant's track and ponding plaintiff's land, it is error for the court below to charge the jury that the defendant owed to the plaintiff the duty to provide side ditches sufficient

to collect and carry off all surface water that came down from the land above in its natural flow." In that case the Court said: "The owner of the upper land may accelerate the flow of the water, but cannot divert it. *Porter v. Durham,* 74 N. C., 767. This is true as between the defendant and the plaintiff as owner of the land above the railroad track. And it is equally true as between the defendant and the plaintiff as the owner of the land below the railroad. . . . The plaintiff has no legal
(396) ground for his complaint, which is that the defendant has not kept open side ditches to divert and carry off the water coming down from above, but, permitting the ditches to fill up, has let the water from the plaintiff's land from above sweep across its track unimpeded and flow in its natural course upon the plaintiff's land below."

By putting in a spur track the defendant did not assume the duty of opening drains to keep off the water which came down Nash Street and would have flowed upon the plaintiff's land if the spur track had not been put in. The defendant would only be liable if it diverted the water by reason of its spur track, or otherwise, and threw upon the plaintiff's land water which otherwise would not have flowed over it. This was controverted by conflicting evidence. The law was clearly presented to the jury and the facts were found against the plaintiff.

The plaintiff in his brief makes the following citation from *Porter v. Durham,* 74 N. C., at p. 779: "An owner of lower land is obliged to receive upon it the surface water which falls on adjoining highland which naturally flows on the lower land. Of course, when water reaches his land, the lower owner can collect it in a ditch and carry it off to a proper outlet, so that it will not damage him. He cannot, however, raise any dyke or barrier by which it will be intercepted and thrown back on the land of the higher owner. While the higher owner is entitled to the service, he cannot artificially increase the natural quantity of water, *or change its natural manner of flow by collecting it in a ditch and discharging it upon the servient land at a different place or in a different manner from its natural discharge.*" This is a sound proposition of law (*Briscoe v. Parker,* 145 N. C., 17), but to collect the water and discharge it at a different place than it would naturally go would be a diversion, and is covered by the charge. If the plaintiff had wished this particular manner of diversion more clearly submitted to the jury, he should have asked for fuller instructions. The jury were granted the privilege of viewing the premises, in the discretion of the judge (*Jenkins v. R. R.,* 110 N. C., 438; *S. v. Perry,* 121 N. C., 535), and doubtless understood the case fully, under the charge.

No error.

Cited: Barcliff v. R. R., 168 N.C. 270 (4g); *Cardwell v. R. R.*, 171 N.C. 366 (4g); *Eller v. Greensboro*, 190 N.C. 720 (4p); *Winchester v. Byers*, 196 N.C. 384 (4g); *Darr v. Aluminum Co.*, 215 N.C. 771 (4g).

(397)

JOHN A. MURCHISON ET AL. v. M. TAYLOR FOGLEMAN ET AL.

(Filed 29 April, 1914.)

1. Husband and Wife—Joint Estates—Jus Accrescendi.

The right of survivorship applies to estates in land conveyed jointly to husband and wife, and vests in the heirs of the one surviving the other.

2. Same—Issues—Uses and Trusts—Trials — Deeds and Conveyances — Registration.

Where from the pleadings and evidence in an action to recover lands, brought by the heirs at law of the husband against the heirs at law of the wife, the rights of the parties depend upon the question of whether the lands were bought solely by the husband, to whom the conveyance was made, or partly with the moneys of the wife with the mutual intention that it should belong to them both jointly for a home, an issue is held sufficient and determinative: "Was the land in question purchased and paid for jointly by W. and N. as a home for both of them, as alleged in the answer?" And this issue being answered in defendant's behalf, the effect of the judgment accordingly rendered would be that after the death of the husband the principle of *jus accrescendi* would apply, the husband holding the title in trust for them both jointly, and it would become immaterial between the parties, being the heirs at law, whether the deed to the husband was permitted to be recorded pending the trial; and held further, that the failure to submit an issue raised by the answer asking for affirmative relief would not be prejudicial to the plaintiffs.

APPEAL by plaintiff from *Devin, J.*, at October Term, 1913, of ALAMANCE.

The plaintiffs sue as heirs at law of W. G. Murchison, to recover a tract of land fully described in the pleadings, of which they allege W. G. Murchison died seized and possessed. They allege that W. G. Murchison held this land under a deed from John R. Euliss and wife, dated in 1882, and that he had continuous possession of it until his death in 1902, and that then his widow continued in possession until her death in April, 1911. That said deed had never been registered, and that the same was lost or that it was in possession of defendants.

The defendants answered and denied the plaintiffs were the (398) owners of the land, and alleged that the defendants were the owners thereof, as the heirs at law of Nellie Murchison, wife of W. G.

Murchison, who before her marrigae was Nellie Fogleman; that at the time of the purchase of the property from John R. Euliss and wife, the said Nellie Murchison furnished more than half of the purchase money, and that the deed was intended to be a joint one, and they averred that John R. Euliss and wife executed another deed after the death of W. G. Murchison, on 12 February, 1909, and conveyed this property to Nellie Murchison.

The plaintiffs were permitted to introduce in evidence a deed, dated 9 May, 1882, executed by John R. Euliss and wife to W. G. Murchison, conveying to W. G. Murchison the real property described in the complaint. This deed was produced in open court by one of the defendants, M. Taylor Fogleman, under a subpœna *duces tecum*. John R. Euliss, the grantor in this deed, testified that in 1882 he lived on Cane Creek, in that part of Chatham County which was afterwards, in a proceeding in court to straighten the line between the two counties, adjudged to be a part of Alamance County; that he executed the deed dated 9 May, 1882, conveying the property to W. G. Murchison, and delivered it to W. G. Murchison, and that two months thereafter W. G. Murchison moved on the land and lived there to his death in 1902; that W. G. Murchison came to him to buy this property, and told him he had some money and his wife had some, and they wanted to buy this property so as to stop renting land and as a home for himself and wife, and that the trade was made, and that he, the witness, John R. Euliss, had the deed prepared and took it to where Murchison and his wife lived, and that W. G. Murchison, in the presence of his wife, Nellie Murchison, paid to this witness the sum of $150, and he delivered to them the deed; that in the fall thereafter he paid the other $100; that after the death of W. G. Murchison he executed the other deed to Nellie Murchison. That he did it because he was convinced that at the time the land was bought it was bought as a home for W. G. Murchison and Nellie
(399) Murchison; that Nellie Murchison lived on the land and controlled it and got all the rents after the death of W. G. Murchison, until her death.

At this point plaintiffs moved for permission to withdraw the deed of 1882 from the custody of the court, to have the same probated and placed of record, or that they be permitted to have the same probated and placed of record while in the custody of the court. Both of these motions were overruled, and plaintiffs excepted.

The witness John R. Euliss being recalled, further testified that Nellie Murchison, wife of W. G. Murchison, died in April, 1911, and that for two years before she died he saw her, and she was confined to her room,

and had to be confined because she was demented, and that she was so confined at the home of the defendant M. Taylor Fogleman.

There was evidence introduced that the plaintiffs were the heirs at law of W. G. Murchison.

The defendants introduced in evidence a deed from John R. Euliss and wife to Nellie Murchison, dated 22 February, 1909, and duly registered in the office of the register of deeds for Alamance County.

This deed specifically refers to the deed from John R. Euliss and wife to W. G. Murchison.

The defendant further introduced evidence that of the $250 paid for the land in 1882, that $150 was the money of Mrs. Nellie Murchison, and that the property was bought as a home for W. G. Murchison and Nellie Murchison.

The plaintiff tendered the following issue: "At the time of the execution of the deed from John R. Euliss and wife to W. G. Murchison, dated 9 May, 1882, was a mistake made in not executing it to W. G. Murchison and wife, Nellie Murchison?" The court refused to submit this issue, and plaintiffs excepted.

The court submitted the following issue: "Was the land in question purchased and paid for jointly by W. G. Murchison and Nellie Murchison, as a home for both of them, as alleged in the answer? And the plaintiffs excepted.

The issue was answered in the affirmative, and judgment was (400) entered thereon adjudging the title to the land to be in the defendants, and the plaintiffs excepted and appealed.

J. C. Cook and Parker & Parker for plaintiffs.

Long & Long for defendants.

ALLEN, J. The issue submitted to the jury arises upon the pleadings, and if determinative of the rights of the parties, and sufficient to sustain the judgment, the other exceptions become immaterial, because the plaintiffs could not be benefited by the registration of the deed under which they claim, if the judgment deprived them of title, and the failure to submit an issue raised by the allegations of the answer, asking for affirmative relief, would not be prejudicial to the plaintiffs, and that the issue is determinative and sufficient, is decided in *Ray v. Long,* 132 N. C., 892, which is approved in *Stalcup v. Stalcup,* 137 N. C., 307.

In the *Ray case* the only issue submitted to the jury, "Was purchase money paid for the land in controversy furnished equally by Elizabeth A. Ray from her separate estate and by H. M. Ray to procure a home for

said H. M. Ray and wife?" is in substance the same as the one in this action, and as to the sufficiency of the issue the Court says:

"This issue was objected to as insufficient by the defendant, who tendered seven different issues. We think that the issue as submitted was sufficient in form and substance to present every material fact necessary to a determination of this case." And as to its effect:

"We come now to the legal effect of the verdict. The jury have found upon competent evidence and under proper instructions that the purchase money for the land in question was furnished equally by the plaintiffs, who are husband and wife, for the purpose of procuring a home for them.

"When the case was here before, it was held that, with or without an agreement, if the wife's money went into the purchase of the land, a resulting trust was created whereby the husband became a trustee for his wife to the extent of her interest. Under the facts as now (401) found, the wife had a right to demand a conveyance jointly to herself and her husband; and she would now have a right to have the deed reformed so as to give full force and effect to her equities. This is the practical result of the judgment in this case, certainly as between the parties. The effect will be to create an estate in entireties, in which the parties will hold, in the ancient language of the law, *per tout et per my.*"

It has also been settled since the case of *Motley v. Whitemore,* 19 N. C., 537, that in such estates, conveyed to husband and wife, the rule of survivorship prevails, and as Mrs. Murchison survived her husband, the whole estate vested in her, and descended to her heirs.

No error.

Cited: Carter v. Oxendine, 193 N.C. 480 (21).

T. D. PINER v. B. F. BRITTAIN, JR.

(Filed 29 April, 1914.)

Bills and Notes—Failure of Consideration—Burden of Proof.

Where in an action upon a promissory note the plaintiff has shown its execution, the demand for payment at or after maturity and its nonpayment, the burden of proof is on the defendant, maker, to show the want of consideration, when such defense is relied on.

HOKE, J., dissenting.

APPEAL by defendant from *Rountree, J.,* at October Term, 1913, of NEW HANOVER.

John D. Bellamy & Son for plaintiff.
Kellum & Loughlin for defendant.

CLARK, C. J. The court charged the jury, among other things, as follows: "This is a suit upon a promissory note between the payee and the maker, but the burden of proof of the issue is upon the plaintiff to show the execution of the note, and that it has not been paid. The defendant, the maker, contends that it was given without consideration, for the accommodation of the plaintiff. Upon proof of (402) the note, placing it in evidence, showing demand for payment, and that it has not been paid, the plaintiff makes out a *prima facie* case in his favor, and shifts the burden of proof to the defendant. The defendant has offered testimony tending to show that the note sued upon is an accommodation note, and the plaintiff has offered testimony tending to show that it was executed for a valuable consideration. Now, the court charges you that the defendant must show, by the greater weight of the evidence, that the note was signed by him without valuable consideration, and if you find by the greater weight of the evidence that the note was given as an accommodation to the plaintiff, and the burden of this is on the defendant, then the court charges you that it was given without consideration."

The exception of the defendant raises but one question, Upon whom rests the burden of proof to show want of consideration? The note recites on its face "for value received," and the plaintiff having shown, without conflict of evidence, the execution of the note, demand for payment, and nonpayment, the court charged that if the jury should so find, the burden of proof was on the defendant to show lack of consideration.

Revisal, 2176, provides: "Absence or failure of consideration is a matter of defense against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto,* whether the failure is an ascertained and liquidated amount or otherwise." As to matter of defense, the burden of proof rests upon the defendant who asserts it.

This very point was passed upon by *Brown, J.,* in *Conservatory v. Dickenson,* 158 N. C., 207, in which it is said that although notes, as simple contracts, require a consideration to support them, it has been long settled that they import a consideration *prima facie,* so as to throw on the maker the burden to show a want of consideration. *McArthur v. McLeod,* 51 N. C., 475; *Campbell v. McCormac,* 90 N. C., 492. In the latter case *Mr. Justice Ashe,* quoting from Story and Daniel, says that "It is wholly unnecessary to establish that a promissory note was given upon a consideration; and the burden of proof (403)

rests upon the other party to establish the contrary and to rebut the presumption of validity and value which the law raises."

The defendant relies upon one case each from Massachusetts, Ohio, and Colorado. On the other hand, the ruling of this Court is sustained in *Lynds v. Valkenburgh,* 77 Kans., 36; *Carnwright v. Gray,* 127 N. Y., 92; *s. c.,* 24 Am. St., 424; *Tolbert v. McBride,* 75 Tex., 95; *Flint v. Phipps,* 16 Ore., 437; *Bank v. Anderson,* 28 S. C., 143; *Andrews v. Hayden,* 88 Ky., 455; *Bank v. Auchley,* 92 Mo., 126; *Lines v. Smith,* 4 Fla., 50.

We see no reason to abandon our own well considered opinion above cited, especially as there are numerous authorities to same effect, and we are further fortified by Story Promissory Notes, sec. 181, which says: "Between the original parties, and *a fortiori* between others who by indorsement or otherwise become *bona fide* holders, it is wholly unnecessary to establish that a promissory note was given upon a consideration. The burden of proof rests upon the other party to establish the contract and to rebut the presumption of validity and value which the law raises for the protection and support of negotiable paper." To same purport Daniel Neg. Instr., sec. 164.

No error.

HOKE, J., dissenting.

Cited: Bank v. Andrews, 179 N.C. 344 (f); *Hunt v. Eure,* 188 N.C. 718 (l); *Swift v. Etheridge,* 190 N.C. 167 (g); *Swift & Co. v. Aydlett,* 192 N.C. 348 (l); *McInturff v. Gahagan,* 193 N.C. 149 (p); *Taft v. Covington,* 199 N.C. 57 (g); *Stein v. Levins,* 205 N.C. 306 (q).

JOHN H. FORBIS ET AL. v. PIEDMONT LUMBER COMPANY.

(Filed 29 April, 1914.)

1. Intervenors—Judgments—Motions—Trials—Appeal and Error.

The plaintiffs in an action to recover of the defendant damages to their lands, seized certain personal property of the defendant under attachment, which the intervenors claimed as their own. The defendant filed no answer, the cause was regularly tried, and the jury found the issues in plaintiff's favor, including that as to the intervenors' ownership of the property. At a subsequent term of the court the trial judge set aside the judgment rendered against the defendant, upon motion of the intervenors, and on appeal by the plaintiff it is held for reversible error, for that the intervenors were only interested in the issue involving their title.

2. Trials—Evidence—Corporations—Issues—Partnerships—Objections and Exceptions—Appeal and Error—Harmless Error.

Where the right of the intervenors in an action involving the title to certain property, attached by the plaintiff, depends upon whether the defendant was a corporation or a partnership comprising the intervenors, admissions of the intervenors that the defendant was a chartered company, and had acquired and held property as such, are sufficient evidence for the jury upon the question; and if in this case there was error in admitting the evidence, it was rendered harmless by subsequent testimony to that effect of the same witness without objection.

3. Evidence—Declarations—Deeds and Conveyances—Interests—Trials.

Where the title to lands is in dispute, a deed in the chain of title of the party offering it is incompetent as the declarations of a deceased grantor, it being in the interest of such party.

APPEAL by plaintiffs and intervenors from *Adams, J.*, at De- (404) cember Term, 1914, of MOORE.

This action was commenced against the Piedmont Lumber Company, alleged to be a corporation, to recover damages for flooding the lands of the plaintiffs.

A warrant of attachment was issued in the action, under which certain personal property was levied on and seized as the property of the corporation.

The summons and notice of the attachment purported to be served by publication.

After the commencement of the action and the seizure of said property, R. S. Burrus and James T. Carter, by permission of court, intervened, claiming to be the owners of the property seized under the attachment, and filed their interplea, alleging such ownership, and the property was delivered to them, pending the action, upon the execution of a bond in the sum of $1,200.

The Piedmont Lumber Company filed no answer.

The action came on for trial at September Term, 1913, of the (405) Superior Court, when the following judgment was rendered, based on the verdict set forth therein:

"This cause coming on to be heard before his Honor, W. J. Adams, judge, and a jury duly sworn and impaneled to try this cause, upon the following issues submitted to the jury, towit:

"Are the plaintiffs the owners of the land described in the complaint, as therein alleged.?

"2. Did the defendant wrongfully and unlawfully obstruct the waters of Governor's Creek and thereby cause the waters of said creek to back and pond upon the lands of the plaintiff as alleged?

"3. If so, what damages are plaintiffs entitled to recover against the defendant?

"4. What was the value of the property attached by the plaintiffs in this cause, at the time of the execution by R. S. Burrus and James T. Carter and of their bond, as intervenors, and the delivery of said property to them by the sheriff of Moore County?

"5. Was the property attached by plaintiffs in this cause the property of R. S. Burrus and James T. Carter, intervenors, when attached?

"And the jury having answered the first and second issues 'Yes,' the third issue '$600,' the fourth issue '$1,500,' and the fifth issue 'No':

"It is, therefore, on motion of the plaintiffs, considered and adjudged by the court that the plaintiffs, J. H. Forbis and Samuel J. Forbis, recover of the defendant, Piedmont Lumber Company, and R. S. Burrus and James T. Carter, intervenors, and M. G. Dalrymple, surety on the bond of intervenors, the sum of $600, with interest thereon at the rate of 6 per cent per annum from 15 September, 1913, until paid, together with the costs of this action, to be taxed by the clerk of this court, the entire recovery, however, not to exceed the sum of $1,200 as against M. G. Dalrymple, surety."

An appeal from the judgment was perfected by said Burrus and Carter.

(406) At December Term, 1913, upon motion of said Burrus and Carter, intervenors, who at no time claimed to represent the corporation, the judgment of September Term, 1913, was set aside, upon the finding made by the court that the summons and notice of attachment had not been published, and the plaintiffs excepted and appealed.

U. L. Spence and George W. McNeill for plaintiffs.

H. F. Seawell for defendant.

PLAINTIFF'S APPEAL.

ALLEN, J. The motion to set aside the judgment rendered at September Term, 1913, is made by the intervenors, who were permitted to interplead for the purpose of asserting their title to the property attached, and not by any one purporting to represent the defendant corporation, and the ground upon which the motion rests is not any defect or irregularity connected with the interpleaders, but that process has not been served on the original defendant.

Intervenors, who claim property attached, raise but one issue between them and the plaintiffs, and that is, whether they are the owners of the property (*Bank v. Furniture Co.*, 120 N. C., 477; *Manufacturing Co. v. Tierney*, 133 N. C., 638), and they are not permitted to attack the

regularity of the attachment proceedings (*Blair v. Puryear,* 87 N. C., 102; *Cook v. Mining Co.,* 114 N. C., 618), nor can they deny the sufficiency and validity of the seizure of the goods and levy of the attachment, when the property is delivered to them upon the execution of a bond. *Pearre v. Folb,* 123 N. C., 243.

In *Bank v. Furniture Co., supra,* the intervenors excepted because evidence was rejected to prove that the attachment had never been levied on the property, and the Court, passing on the exception, says: "Intervenors in attachment proceedings are not allowed to make any such issue; it is none of their business. If the property is theirs, they recover it whether the attachment is levied or not; and if the property is not theirs, it makes no difference to them whether it is levied or not. The intervenors can have but one issue, viz., Does the property attached belong to them?" And in *Cotton Mills v. Weil,* 129 (407) N. C., 455, the intervenors having excepted to the refusal to give them a separate trial: "The intervenors' exceptions cannot be sustained, because it was interested in one issue only, 'Was the cotton attached by plaintiff its property when attached?' And that issue was submitted." And in *Dawson v. Thigpen,* 137 N. C., 468: "It is well settled that in an action involving the title to property an interpleader is restricted to the issue as to his title or claim to the property, and cannot raise or litigate questions or rights which do not affect such titles. *McLean v. Douglass,* 28 N. C., 233. He does not, speaking with accuracy, become a party to the action in the same sense and with the same status as the original parties, or those made so pending the action either by the court *ex mero motu* or upon application."

If, then, the intervenors are only interested in the fifth issue, there is no reason for setting aside that issue because of defect of service upon the original defendant, who is interested in the other issues, and they do not purport to represent the corporation, and cannot, therefore, move in its behalf.

So far as the record discloses, the intervenors are not injured by the judgment, as by their intervention they are in possession of the property of the value of $1,500, and can satisfy the judgment against them by the payment of $600 and costs.

We are not inadvertent to the statement in the record that the intervenors were denied the right upon the trial to introduce evidence as to the amount of the damages, but as they were not interested in that issue, they had no such right.

There is a suggestion in the record that there was but one company, known as the Piedmont Lumber Company, and that the real controversy was whether it was a corporation or a partnership. If the intervenors

wished to raise this issue, and to be heard upon the merits of the action, they ought to have asked to be made parties defendant, and as they have not done so, and have chosen the ground upon which to make the fight, they ought to abide the result.

There is error.

Reversed.

(408)

APPEAL OF INTERVENORS.

ALLEN, J. As stated in the brief of the intervenors, the principal question involved in this appeal is, whether there was any evidence contradicting Burrus, who testified that he and Carter were the owners of the property attached, and this question was made to depend, on the trial, on whether there was any evidence that the Piedmont Lumber Company was a corporation, and in our opinion there was evidence of the corporate existence as against the intervenors.

The admission of Burrus to the plaintiffs, that the Piedmont Lumber Company was a chartered company, the circumstance that deeds to land were taken in the name of the company, instead of in the names of individuals as partners, and the testimony of Burrus that, "at the time that this property was attached in this action, the Piedmont Lumber Company, corporation, didn't have any interest in the world in the property," furnish some evidence of the fact.

The witness Burrus was asked on cross-examination if he did not tell the plaintiff that the Piedmont Lumber Company was a chartered corporation, to which he answered: "I did not. It never was a chartered corporation."

Plaintiffs moved to strike out so much of the answer of the witness to the question as stated that the Piedmont Lumber Company was never a chartered corporation.

The court thereupon overruled the objection, and motion of the plaintiffs so far as the evidence may tend to show that R. S. Burrus and James T. Carter, trading under the name of the Piedmont Lumber Company, were not incorporated, and sustained the objection and motion so far as the evidence may tend to show the nonincorporation of any other company, and the intervenors excepted.

This seems to have given the intervenors the full benefit of the evidence; but if the ruling was erroneous, it was cured, as the witness afterwards testified, without objection, that they never took out a charter.

(409) There is nothing in the record to show the relevancy of the Yow deed, and if offered as declarations of the grantors, it was inadmissible, because in their favor.

The intervenors have no interest in the first, second, and third issues, which were necessary to determine the controversy between the original parties. The case was not tried at the return term, as in *Brown v. Rheinhart,* 112 N. C., 477.

We have considered the exceptions discussed in the brief of appellant, although the appeal could be dismissed because the judgment appealed from had been set aside, and we find no error.

It is possible the award of damages ($600) is larger than it would have been if the intervenors had been made parties defendant, and had contested the issue, but the condition of the record does not permit us to inquire into this.

No error.

Cited: Mitchell v. Talley, 182 N.C. 687 (1g); *Feed Co. v. Feed Co.,* 182 N.C. 691 (1f); *Bulluck v. Haley,* 198 N.C. 356 (1f).

ELIZABETH SEALS ET AL. *v.* ALEX. SEALS.

(Filed 25 April, 1914.)

1. Trials—Evidence—Declarations—Adverse Interests—Statutes.

Testimony of a witness as to declarations of a deceased person is competent when relevant to the inquiry and against the interests therein of the witness testifying, and it is not prohibited by Revisal, sec. 1631.

2. Deeds and Conveyances—Fraud—Color of Title—Limitation of Actions.

Except as to the creditors of the grantor, a deed obtained by fraud is color of title from its date, until set aside by a court of competent jurisdiction; and when not thus set aside, the *bona fide* adverse possession of the grantee for seven years under a claim of title will ripen into an absolute title under the statute of limitations. *Pickett v. Pickett,* 14 N. C., 6, relating to the rights of creditors in such a case, cited and applied.

APPEAL by defendant from *Adams, J.,* at September Term, 1913, of RICHMOND.

This is an action to recover the possession of 287 acres of (410) land. Plaintiffs claim the land as the widow and heirs at law of Travis Seals. Defendant is the brother of Travis Seals, who has since died. The defendant thus states his contentions in his brief:

"There are two causes of action alleged in the complaint, the first being in the nature of an action of ejectment, and the second for the surrender and cancellation of a deed made by the plaintiff Elizabeth

Seals to Alexander Seals on 21 April, 1893, which deed conveyed, or purported to convey, the land described in the complaint. It is the contention of the defendants that William Seals bought the land in controversy from Nathan Walters in 1856, and borrowed $200 of the purchase money from his son, Travis Seals, and to secure this $200 had the deed for the land made to Travis Seals. That in the fall of 1857 Travis Seals, in whose name said deed was made, demanded the $200 of William Seals; that William Seals paid to Travis Seals said amount, and instead of Travis Seals executing a deed to William Seals for the land, he delivered to him the original deed made to himself and which he had held as security, and promised to convey this land to him thereafter by deed. That William Seals went into the possession of this land when he purchased it from Walters, and remained in possession until the time of his death in 1872, holding the land as his own. In 1866 or 1867 William Seals agreed with Alexander Seals, verbally, that he would give him the tract of land upon the condition that he would stay with him and take care of him the rest of his life. Alexander Seals complied with this request, and after his father's death in 1872, he took charge of the land as his own, and has remained in possession of the same, adversely, to the present time. Travis Seals, under whom the plaintiffs claim, has never been in possession of said land at any time. For the purpose of perfecting his paper title, the defendant, Alexander Seals, on 21 April, 1893, secured a deed for said land from the wife of Travis Seals, Travis Seals being at the time in the State Hospital at Morganton. Elizabeth Seals executed the deed and the same was duly recorded in the office of the register of deeds for Richmond County, and the defendant,

(411) Alexander Seals, has remained in the possession of the land under this deed since that time. The defendant further contends that even if said deed had been procured by fraud of the defendant, as alleged in the complaint, it would still be color of title as against Elizabeth Seals from the time of its execution, and against the other plaintiffs from the time of the death of Travis Seals; and as more than seven years had elapsed since the death of Travis Seals and before the institution of this action, the possession of said land by the defendant Alexander Seals would ripen his title as against the heirs at law of Travis Seals. And for the same reason would ripen his title as against the plaintiff Elizabeth Seals."

The jury found that the deed from Elizabeth Seals to defendant was procured by false and fraudulent representations, and that plaintiffs are the owners of the land and entitled to the possession thereof, but giving no damages. Judgment was entered upon the verdict, and defendant appealed.

Walter H. Neal for plaintiffs.
J. P. Cameron for defendants.

WALKER, J. We need consider only two questions:

First. In order to show the adverse possession of his father, William Seals, under whom he claims, the defendant proposed to prove by a witness, Harris Seals, who is a brother of Travis Seals and defendant, being the son of William Seals, the transaction between Travis Seals and William Seals in regard to the payment of the $200, the surrender of the deed from Nathan Walters, and the promise of Travis Seals to convey the land by deed to William Seals. The court excluded this testimony upon the ground that it was a transaction or communication between the witness and a party deceased, within the prohibition of Revisal, sec. 1631. This ruling was erroneous. While the transaction was of the nature described by the judge, all such transactions are not excluded by that section of the Revisal. The witness must testify "in his own behalf" against the opposite party, who claims under the deceased person, that is, adversely to his own interest. The statute so declares in substance, and it has been so held by this Court. *Bunn v. Todd,* 107 N. C., 266; *Tredwell v. Graham,* 88 N. C., (412) 208. In *Bunn v. Todd, supra,* it is said that the following persons are disqualified: (1) Parties to the action. (2) Persons interested in the event of the action. (3) Person through or under whom those mentioned in the first two clauses derive their title or interest. It is then added: "A witness, although belonging to one of these three classes, is incompetent only in the following cases: Where he testifies in behalf of himself, or the person succeeding to his title or interest, against the representative of a deceased person, or committee of a lunatic, or any one deriving title or interest through them, as to a personal transaction or communication between the witness and the person since deceased or lunatic." And in *Tredwell v. Graham, supra,* it was said that, "Notwithstanding the statute, a party may be called to testify touching a transaction of the opposite party, when it is against his own interest." In *Weinstein v. Patrick,* 75 N. C., 344, *Justice Reade* said that "It would seem that there could be no objection against allowing a witness to testify against his own interest." It is not within the spirit or letter of the statute, as his own interest is supposed to be a sufficient protection for the opposite party against false or fabricated testimony. This appears to be well settled by the cases. Harris Seals, the witness, proposed to testify against his own interest, as his brother would get the land and exclude him, if the jury should be influenced by his testimony. The evidence of this transaction was relevant to the controversy, as it

tended to show that William Seals, notwithstanding that the legal title to the land was in Travis Seals by virtue of Nathan Walters' deed, was claiming the land in his own right, in opposition to Travis Seals, and that defendant was claiming under him in the same way.

Second. We think the court erred in holding that the deed of Elizabeth Seals to defendant was not color of title. It can make no difference that the deed, claimed to be color, does not in fact pass the title. It is sufficient if, on its face, it professes to do so, and defendant is in possession, claiming *bona fide* under it adversely. Color of title is that which in appearance is title, but which in reality is not title. (413) No exclusive importance is to be attached to the ground of the invalidity of a colorable or apparent title, if the entry or claim has been made under it in good faith. A claim to property under a conveyance, however inadequate to carry the true title, and however incompetent the grantor may have been to convey, is one under color of title, which will draw to the possession of the grantee the protection of the statute of limitations. *Wright v. Matteson,* 18 How. (U. S.), 50 (L. Ed., 280); *Beaver v. Taylor,* 1 Wall. (U. S.), 637 (17 L. Ed., 601); *Cameron v. U. S.,* 148 U. S., 301 (37 L. Ed., 461). And our cases are to the same effect. *McConnell v. McConnell,* 64 N. C., 342, and *Burns v. Stewart,* 162 N. C., 360, where the authorities are collected.

The deed of Elizabeth Seals was valid until set aside for the fraud. It was not void on its face, but required the intervention of a court of equity to declare it so. It was merely voidable at the instance of the grantor in it. When this is the case, the statute runs against him. *Havenden v. Lord Annerly,* 2 Sch. and Lef., 633. If the grantor never acts, the deed remains valid, and until he acts it will protect and ripen the possession of one claiming under it adversely as color. *Proter's Lessee v. Cocke,* 4 Tenn. (4 Peck M. and Y.). It was said in *Blantin v. Whitaker,* 2 Humphrey, 313, "to be clear that a deed, though fraudulent either in law or fact, is such an assurance of title as, coupled with seven years uninterrupted adverse possession, under and by virtue thereof, will vest in the possessor an indefeasible title to the land therein described. . . . There is no saving in the statute in favor of the true owner's right against a possession under such a deed, and the courts cannot add an exception thereto."

A very interesting and instructive discussion of the question will be found in *Oliver v. Pullam,* 24 Fed., Rep., 127, wherein the opinion was written by *Judge Dick,* formerly a member of this Court. After considering our statute and the authorities at length, he concludes as follows: "The phrase 'color of title' signifies some written document which appears to be a title to land, but is not a good title. The object of the

Legislature in enacting the statute of limitations to quiet the possession of land and settle titles was not to protect good titles, (414) as they could be secured in an action at law, but colorable titles that were void and worthless unless accompanied by possession. Even a fraudulent deed may be color of title and become a good title if the fraudulent grantee holds actual adverse possession for seven years against the owner, who has a right of entry and a right of action to recover possession, and is under no disability mentioned in the statutes. The adverse possession of the occupant exposes him to the action of the rightful owner, and if he neglects to assert his rights in the manner provided by law, he must accept the result of his own folly and negligence."

If this were simply an action of ejectment, plaintiffs could not attack the deed collaterally for fraud. It would require a resort to the equitable power of the court, by proper allegations, to set it aside for that reason. If it is valid at law, until canceled by proper proceedings, how can it be otherwise than color of title until it is so canceled for the fraud? It is like a judgment obtained by fraud, when its invalidity does not appear on its face. It is valid until reversed or set aside, and will protect those claiming under it.

But we think that our own cases declare it to be color of title. In *Pickett v. Pickett,* 14 N. C., 6, the Court held that a fraudulent deed was not color of title against a creditor until the land was sold under his execution, and from that time it was color as against the purchaser. The reason why it was not color against the creditor is because, until there was a sale, he had no right to the possession of the land, and the statute, therefore, could not run against him. Referring to the adverse possession of one who claimed under a fraudulent deed, as color of title, the Court, by *Judge Ruffin,* said: "Against the creditor, it is true that no length of time will be a bar, because he has no specific right in the thing, and because it would be an obstruction to the statutes against fraudulent conveyances. It is likewise true that the purchaser has not a legal title until he gets a deed. But he has an inchoate right by his purchase, which is the principal ingredient of his title; and he has a perfect right to call for a conveyance, which the sheriff hath power to make, which will complete the title. No reason of policy (415) or justice authorizes a delay in perfecting his title to the specific thing purchased. But the peace of society, the security of titles, and every other consideration which induces the enactment of statutes of repose, demand that he should complete and enforce his title within the time prescribed for other legal proprietors." It will be seen, even by a cursory reading of that case, that the Court admitted the fraudulent deed to be color of title. The whole argument was predicated upon that

assumption, and the only question remaining was, whether the adverse possession of the fraudulent grantee would operate against the purchaser at the execution sale, from *its* date or the date of the sheriff's deed, the Court adopting the former as the true one under the doctrine of relation. There was no use in arguing this question, if the deed itself was not color. It will be observed that the Court says it is color from the date of the sheriff's sale, and this is enough for our purpose. The knowledge of the possessor that his deed, claimed to be color, does not pass the title, is not material. It was argued in *Reddick v. Leggat,* 7 N. C., 539, that a person who knew he had no title would be a *"mala fide"* possessor, but *Henderson, J.,* said that would make no difference, as there is no such exception in the statute. "Whether he knew or not of any other title, the Legislature, which passed the act of 1715, did not consider material," and as to the bad faith of the possessor, it was further said, that was a matter to be litigated and determined by proof, which was not contemplated by the lawmakers, and there is nothing to show that the bad faith of the transaction could be inquired into or should affect the character of the deed as color. *Judge Henderson,* in this connection, says: "For us, as mere expounders of the law, it is sufficient to say that there is no such exception in the words of the act; nor is there in the act anything which authorizes us to say that the Legislature meant otherwise than as they have plainly expressed themselves on the subject now under consideration. Believing, therefore, that the jury were misdirected on this point, the rule for a new trial must be made absolute." The judge below had (416) charged that if the defendant Leggat acted *mala fide,* his deed was not color. Where there has been fraud merely in the treaty, the deed is valid until set aside, at least against all persons not creditors of the grantor. See, also, *Taylor v. Dawson,* 56 N. C., 86, and *Ellington v. Ellington,* 103 N. C., 54, where *Chief Justice Smith* says: "While we deem the law settled in this State, whatever may have been the rulings elsewhere, by the case of *Riggan v. Green,* 80 N. C., 236, that the deed of one *non compos is voidable and not void,* it can make no difference when such is offered as evidence of color of title only, whether it be the one or the other, to sustain a possession under it." If a deed is color of title, though the grantee may know that another than his grantor has the true title (*Burns v. Stewart,* 162 N. C., at p. 366), why is not a fraudulent deed, which passes the title, unless action is taken by the grantor to set it aside? Color of title presupposes that the deed does not pass a good and indefeasible title, and there is no reason why this principle should not apply to a fraudulent deed, which may or may not pass the title, being voidable only at the election of the grantor, or the person defrauded.

We are of opinion that the deed is color of title, and so hold. There was error.

New trial.

Cited: Alsworth v. Cedar Works, 172 N.C. 22, 23 (2g); *Sorrell v. McGhee,* 178 N.C. 281 (1f); *Price v. Edwards,* 178 N.C. 495 (1f); *Butler v. Bell,* 181 N.C. 89 (2g); *Berry v. Cedar Works,* 184 N.C. 190 (2f); *Crocker v. Vann,* 192 N.C. 429 (2g); *Glass v. Shoe Co.,* 212 N.C. 73 (2g).

MYRTLE L. PRUITT, ADMINISTRATRIX, v. CHARLOTTE POWER COMPANY.

(Filed 29 April, 1914.)

1. Removal of Causes—Federal Courts—Petition and Bond—Time for Filing—Answer—Statutes.

The filing of the petition and bond by a foreign defendant for the removal of a cause from the State to the Federal court for diversity of citizenship comes too late after the expiration of the statutory time allowed for answer.

2. Removal of Causes—Federal Courts—Jurisdiction—Waiver—Time to Plead.

An agreement between the parties, approved by the court, allowing a nonresident defendant time in which to answer the complaint, is a waiver by the defendant of his right to remove the cause to the jurisdiction of the Federal court, though the subject-matter is within the jurisdiction of that court; and especially so, on appeal to our Supreme Court, where it is found by the lower court that the order allowing time to answer was filed before the filing of the petition for removal.

3. Removal of Causes—Federal Courts—Pleadings—Joint Tort—Fraudulent Joinder—Allegations—Jurisdiction—Certiorari—Appeal and Error—U. S. Supreme Court.

Where several defendants are sued for the same tort, the allegations of the complaint are determinative as to whether they are sued jointly or severally; and where a joint tort is alleged against a resident and nonresident defendant, and in proceedings to remove to the Federal court the nonresident alleges that the joinder was made in fraud of the jurisdiction of that court, general or broadside allegations of that character are insufficient to stop *eo instanti* the proceedings in the State court and leave the determination of the question of the fraudulent joinder exclusively to the courts of Federal jurisdiction. But in such instances a *certiorari* for the transcript of the record may issue out of the Federal court, which the clerk of the State court is bound to obey, and the cause may proceed through these two separate channels to the Supreme Court of the United States.

(417) APPEAL by defendant from *Harding, J.*, at November Term, 1913, MECKLENBURG.

J. Lawrence Jones, Stewart & McRae, and Shannonhouse & Jones for plaintiff.

Osborne and Cocke & Robinson for defendants.

CLARK, C. J. This is an appeal from the refusal of a motion to remove the cause to the United States District Court. The summons was served 7 August, 1912, returnable to September term of the Superior Court of Mecklenburg. Complaint was filed on 25 September, 1913. On 11 October the defendant asked for time to file answer until the last day of the next term of the court, and by consent of the plaintiff the order was made accordingly, and thereafter, on the same day, the defendant's counsel presented to the court the petition and bond for the removal of the cause.

(418) The entering into the stipulation for an extension of time to file the answer, which was duly approved by the judge, was a general appearance in the State court and waived the right to remove. It was an acceptance of the jurisdiction of the State court. *Howard v. R. R.*, 122 N. C., 944; *Duffy v. R. R.*, 144 N. C., 23. The provision in the agreement that the stipulation should be made an order of court does not affect the matter, especially as the judge finds that the order was signed before the petition and bond for removal were presented to the court. Though there is some authority that where an order of court is made extending the time to answer the time therein specified will be considered the day when the answer is due, yet the greater weight of authority is "a petition for removal filed after the statutory time has expired comes too late even though filed within the time allowed for answering by order of the court, where such order is based on the stipulation of the parties." *Bank v. Keater*, 52 Fed., 377; *Austin v. Gagan*, 39 Fed., 626; *Velay v. Indemnity Co.*, 40 Fed., 545; *Martin v. Carter*, 48 Fed., 596; *Mining Co. v. Hunter*, 60 Fed., 305; *Shippior v. Cordage Co.*, 72 Fed., 803; *Heller v. Lumber Co.*, 178 Fed., 111; *Wayt v. Standard Co.*, 189 Fed., 231.

Besides, the petition to remove does not sufficiently allege a fraudulent joinder. "Where resident defendants are joined with a nonresident, and the latter applies for removal for fraudulent joinder, the question of fraud can be raised only by stating facts from which the fraudulent joinder necessarily appears, and not by a single averment of fraud or by alleging fraud in general though positive terms that the residents were joined for the sole purpose of applying for removal, and not with the

honest intent of seeking relief against them." *Smith v. Quarries Co.*, 164 N. C., 351.

The complaint filed by the plaintiff states a joint cause of action against each of the defendants. All three defendants are charged with operating and maintaining (as principal and subsidiary companies) a line of wire which caused the death of the plaintiff's intestate. It is fundamental as well as elementary that the allegations set out in the complaint are to be construed by the State court as true, upon the petition for removal. "Whether there was a joint liability or (419) not, was a question to be determined upon the averment of the plaintiff's statement of his cause of action, and is a question for the State court to decide." *R. R. v. Sheegog*, 215 U. S., 308. The motive of the plaintiff taken by itself does not affect the right to remove. *R. R. v. Schwyhart*, 227 U. S., 184.

In *Staton v. R. R.*, 144 N. C., 135, it was held: "Two defendants participating in the commission of a tort to the injury of the plaintiff are jointly and severally liable, and when the plaintiff has proceeded against them in a single action the cause is not separable, and cannot be removed by foreign defendants to the Federal court, though different answers may be made and different defenses relied upon." In *Hough v. R. R.*, 144 N. C., 692, the Court said: "At common law and under Revisal, 469, an action in tort against several defendants is joint or several according to the declarations in the complaint, and the plaintiff's election determines the character of the tort, whether joint or several," and further says: "The mere allegation in the petition of the foreign defendants that the joinder of the resident with the foreign defendant was a device of the plaintiff for the fraudulent purpose of defeating the defendant's right of removal is insufficient."

In this case the complaint alleges joint ownership and joint negligence against all these defendants, and on the face of the complaint a joint cause of action is alleged against each of the defendants, one of whom is a resident of this State. It is not material that the actual purpose of the plaintiff in joining the resident defendant was to prevent the removal to the Federal court. *Armstrong v. R. R.*, 192 Fed., 608; *R. R. v. Dowell*, 229 U. S., 102.

It is true that when a verified petition for removal is filed, accompanied by a proper bond, and the petition contains facts sufficient to require a removal under the statute, the jurisdiction of the State court is at an end. But this applies only when the allegations of fact are such as to authorize the right of removal, and not when the petition on the ground of alleged fraudulent joinder merely asserts, as in this case, fraud and bad faith in general terms, without a full (420)

and direct statement of facts sufficient to demonstrate a fraudulent purpose. Where such facts are sufficiently alleged, and there is a denial, then the issue arising must be determined by the Federal court. *Smith v. Quarries Co., supra.*

Rea v. Mirror Co., 158 N. C., 24, relied on by the defendant, differs from this case. In that case, upon the filing of the petition for removal, the plaintiff took a voluntary nonsuit and brought a new action against the defendant company, joining its treasurer as a party defendant. This fact was alleged in the petition for removal, and sufficiently alleged bad faith on the part of the plaintiff.

In this case the plaintiff has sued three defendants, alleging a joint cause of action against them all, and the only allegation is the charge of bad faith and that the resident defendants are not guilty of negligence and did not own or operate the wire. All the latter allegations are mere matters of proof and defense, and there was nothing presented in the State court, other than this "broadside" allegation, upon which it could base a finding as to the charge of fraudulent joinder.

It is well settled that the State court should not surrender its jurisdiction unless the petition shows upon its face a removable cause and unless such petition and accompanying bond are filed in the State court within the time required by the act of Congress. *R. R. v. Daugherty,* 138 U. S., 298; *Stone v. S. C.,* 117 U. S., 430; *Howard v. R. R.,* 122 N. C., 944; *Corporation Commission v. R. R.,* 151 N. C., 447; *Higson v. Insurance Co.,* 153 N. C., 38. Whether the petition in its tenor, and time of filing, authorizes the removal is a matter for decision by the State court in the first instance.

That court is not paralyzed by the simple presentation of a petition to remove. It is true, the Federal court may, notwithstanding the refusal of the State court to remove, send a *certiorari* to the State court for the transcript of the record, which the clerk of the State court must obey. In such case, as was said in *Howard v. R. R.,* 122 N. C. at p. 953:

"The strange spectacle may be presented of the same cause (421) between the same parties being tried at the same time in the State court and in the Federal court, and finally going up to the United States Supreme Court by different routes. Upon the final decision of that tribunal, the proceedings of the court which is held not to have had jurisdiction are simply a nullity. Such unseemly cases have occurred, but rarely (*Carson v. Hyatt,* 118 U. S., 279; *R. R. v. Koontz,* 104 U. S., 5), owing both to the comity of the courts of the two jurisdictions to each other and the unwillingness of counsel to subject themselves to double labor and their clients to double costs." This matter is

fully discussed and so held by *Chief Justice Waite* in *Stone v. S. C.*, 117 U. S., 430; see, also, *Higson v. Insurance Co.*, 153 N. C. at p. 42.

The refusal of the motion to remove is

Affirmed.

Cited: Patterson v. Lumber Co., 175 N.C. 92 (2f); *Fore v. Tanning Co.*, 175 N.C. 584 (3g); *Morganton v. Hutton*, 187 N.C. 738 (3g); *Crisp v. Lumber Co.*, 189 N.C. 736 (3g); *Burton v. Smith*, 191 N.C. 603 (2l); *Burton v. Smith*, 191 N.C. 609 (2j); *Patton v. Fibre Co.*, 192 N.C. 50 (3g); *Butler v. Armour*, 192 N.C. 515 (2f).

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

(Filed 29 April, 1914.)

Trials—Acquiescence—Implied Consent—Appeal and Error—Objections and Exceptions.

As to whether permanent damages to the plaintiff's land should have been assessed in this action, *quære*. But it appearing that no exception to this issue was taken upon the trial, or in the assignments of error, and that upon a former appeal the defendant concurred in or insisted upon the correctness of the position that they should be so assessed, and a new trial on that issue alone was granted, it is held that the defendant is concluded on this appeal by his conduct or acquiescence from contending that such an issue was improperly submitted or passed upon on the second trial.

APPEAL by defendant from *Lyon, J.*, at January Term, 1914, of DURHAM.

Civil action to recover damages for an alleged nuisance.

A succinct statement of case appears in the judgment, as follows:

"This action having been tried before Whedbee, judge, at July Term, 1912, upon the following issues, towit: (422)

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

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

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

"And the jury at said term having for their verdict responded to the first issue 'Yes,' to the second issue 'Yes,' and to the third issue 'Three hundred dollars ($300),' and the plaintiffs having appealed to the

Supreme Court of North Carolina from the judgment rendered upon said verdict, and the opinion and judgment of the Supreme Court having been certified down to this court and filed, in which said judgment the said Supreme Court directed a new trial upon the issue of damages, and affirmed the judgment rendered upon the first and second issues above set out; and this action coming on to be tried before his Honor, Lyon, judge, and a jury, at this January Term, 1914, in the Superior Court of Durham County, and the following issues having been submitted to the jury, towit:

"1. What damages, if any, has the plaintiff sustained up to the commencement of this action?

"2. What permanent damages, if any, has the plaintiff sustained?

"And the jury for their verdict having responded to the first issue 'Seven dollars ($7),' and to the second issue 'Eight hundred eighty-eight and no/100 dollars ($888)':

"Now, therefore, it is ordered and adjudged that the plaintiff, Bessie K. Brown, recover of the defendant the sum of seven dollars ($7) annual damages, and the further sum of eight hundred eighty-eight and no/100 dollars ($888) permanent damages, with interest therefrom from 5 January, 1914, and the costs of this action to be taxed by the clerk of the court.

"It is further ordered and adjudged that upon the satisfaction of this judgment, the defendant have and enjoy, as it affects the plaintiffs' property, the permanent right, privilege, and easement to con-
(423) duct its business at the place it is now conducted, and in the manner it is now conducted, and was conducted at the beginning of this action."

Defendant, having duly excepted, appealed.

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

HOKE, J. On a former trial of cause there was verdict for plaintiff, fixing liability for a nuisance in the maintenance and operation of a manufactory of commercial fertilizers and assessing permanent damages at $300. Judgment having been entered on the verdict, plaintiff appealed, assigning for error a portion of the judge's charge on the issue as to permanent damages. A new trial was awarded on this issue (see case, 162 N. C., 83), and the opinion having been certified down, the cause came on for a new trial of that issue before his Honor, C. C. Lyon, judge, as stated.

On the present trial, defendant maintained that this was not a case permitting an award of permanent damages, and, in order to present the question in a determinative form, issues were submitted, both as to recurrent and permanent damages. Verdict having been rendered, his Honor gave judgment for the permanent damages assessed. Defendant excepted and appealed.

As an original or independent proposition, the Court is not prepared to differ with defendants' view that the cause is not one permitting the award of permanent damages as a matter of right. The cases in which that principle has been thus far allowed to prevail in this State are those where it was expressly established by statute or where the injuries arose from structures or conditions permanent in their nature and their continued maintenance was protected and guaranteed by the statutory power of eminent domain, as in case of roads and railroads, or because the interest of the public in this continued existence was of such an exigent nature that the right of the individual owner was of necessity and to that extent subordinated to the public good. See cases *Harper v. Lenior,* 152 N. C., 723; *Geer v. Durham Water Co.,* 127 N. C., 349; *Parker v. R. R.,* 119 N. C., 677; *Ridley v. R. R.,* 118 N. C., 996.

The question, however, in our opinion, is not necessarily pre- (424) sented on this appeal, and we do not decide it, for, while the plaintiff may not have been permitted, in this instance, to sue for permanent damages as a matter of right, the parties have the undoubted privilege of determining the case on that theory if they so elect. It is one usually sought by defendant in order to protect himself from the cost and harassments of repeated suits and to acquire the right of conducting his business by designated methods, and where both parties have elected to have their rights determined on such an issue, it is not open to them, in the discretion of either, to change front and insist on a different method.

From a perusal of the record, we think it clear that this position should prevail in the present case. The plaintiff in the action sought to recover permanent damages for the alleged wrong. The defendant joined issue on the demand in that form, and on verdict and judgment for plaintiff not only filed no exception, but appeared in this Court on appeal and insisted that the cause had been properly tried and determined.

Apart from this, the Court only ordered a new trial on the issue as to permanent damages, and defendant, having once tried out his case on that theory, it is no longer open to him to insist on another. Authority elsewhere is in support of this view. *Chesapeake R. R. v. Resin,* 99 Va., 18; *Winona Zinc Co. v. Durham,* 56 In. App., 351; *Scott v. Nevada,* 56 Mo. App., 189.

There is no error in entering judgment for permanent damages, and the same is affirmed.

No error.

Cited: S.c., 162 N.C. 83; *Barcliff v. R.R.* 176 N.C. 41 (g); *King v. R. R.,* 176 N.C. 306 (g); *Lipsitz v. Smith,* 178 N.C. 100 (g); *Hill v. R. R.,* 178 N.C. 612 (g); *Starr v. O'Quinn,* 180 N.C. 94 (g); *Ingram v. Power Co.,* 181 N.C. 413 (g); *Morrow v. Mills,* 181 N.C. 425 (g); *Bizzell v. Equipment Co.,* 182 N.C. 103 (g); *Walker v. Burt,* 182 N.C. 330 (g); *Pinnix v. Smithdeal,* 182 N.C. 413 (g); *Clemmons v. Jackson,* 183 N.C. 384 (g); *Berry v. Lumber Co.,* 183 N.C. 387 (g); *R. R. v. Nichols,* 187 N.C. 155 (g).

(425)

VIRGINIA AND CAROLINA SOUTHERN RAILROAD COMPANY v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 29 April, 1914.)

1. Railroads—Condemnation—Railroads Crossing Railroads—Statutes—Court.

Revisal, sec. 2556 (5) and (6), give the right to a railroad company "to condemn and acquire a right of way across the road of another company to construct a spur track to manufacturing plants," etc., which is also given to the plaintiff in this action of condemnation by its charter; and the courts cannot restrict this statutory right to be exercised by a railroad to cases in which the courts may approve its reasonableness or expediency.

2. Same—Yard Limits—Former Appeal.

The question involved on this appeal by the defendant railroad from a judgment permitting the plaintiff railroad company to cross its roadway, within its yard limits, by condemnation, in order to put in a spur at an industrial plant, was decided adversely to the defendant on a former appeal of this case, with suggestion of location and method of procedure, under which the defendant may now act, if so advised. 161 N. C., 531.

DEFENDANT'S petition to rehear.

McLean, Varser & McLean for plaintiff.

R. N. Simms for Kingsdale Lumber Company.

McIntyre, Lawrence & Proctor and Murray Allen for defendant.

CLARK, C. J. This is a petition to rehear this case, reported 161 N. C., 531. The facts are there stated, with a map of the location, and

it is not necessary to repeat them. It is sufficient to say, as there stated, that this is a "proceeding by the plaintiff to condemn a right of way across the track of the defendant in order to extend a spur track to the Lumberton Cotton Mills and the Kingsdale Lumber Company plant on the south side of the defendant's track and to make connection with the track of Raleigh and Charleston Railroad Company." After full consideration, we held that "the plaintiff had the right conferred by its charter and under Rev., 2556 (5) and (6), to condemn and acquire a right of way across the road of another company to construct a spur track to manufacturing plants or other business enterprises (426) for the handling of their freight." On the former hearing, the defendant's brief said: "This is the only question presented."

The petitioner on rehearing does not assign error in this respect, but contests the correctness of the former decision on two grounds:

1. Because the judge found that the extension of the spur track to the two industrial plants on the south side of the defendant track and to make connection with the Raleigh and Charleston Railroad was not necessary.

But this was not a question within the scope of his Honor's jurisdiction. When the General Assembly authorized the construction of the plaintiff railroad, with the power to construct spur tracks, that was the decision of a political question (*Ruffin, C. J.*, in *R. R. v. Davis,* 19 N. C., at p. 465), which the courts of course cannot review. The power conferred embraced the right of eminent domain and everything incidental for executing the powers granted by the charter. It may be that the construction of the railroad between the points named in the charter and the construction by it of spur tracks to industrial plants or the other extensions authorized did not seem necessary to many people. But the Legislature settled that matter when it granted the charter. If the company sees fit to put up the money, it takes the risk of the necessity of the work.

The General Assembly by granting the plaintiff's charter with the powers therein conferred, has found as a fact that the construction of the road was necessary for the public welfare, and neither the Superior Court nor this Court has the power to review that finding or set aside any of the powers therein conferred. The defendant cannot on appeal call in question the appropriation of the land, if within the power, but can only review the amount of the compensation awarded. *Walker, J.*, in *Jeffries v. Greenville,* 154 N. C., 497.

The defendant company itself has put in spur tracks to both of these industrial plants and to make connection with the Raleigh and Charleston Railroad.

(427) The defendant contends that the proposed spur track is not needed; but the fact that it has so vigorously opposed the extension by the plaintiff of these spur tracks to the same plants and to make connection with Raleigh and Charleston Railroad Company is, however, strong evidence that as a matter of fact the monopoly which the defendant had of the business of those plants was profitable and that competition is beneficial to those plants. Indeed, there is evidence that while the plaintiff railroad receives only $7.20 per car for hauling freight 58 miles, the defendant charged for shifting plaintiff's car with minimum car-load over its spur track to said plant, 400 yards, $9.20 per car. This may or may not be excessive, and it may or may not be true, as the defendant insists, that it is cheaper than the plaintiff can do the shifting over its own spur track, but the plaintiff prefers to put in its own spur track to do this work for itself, and, as we have held, it had the right under its charter and the general law to do so. Whether its action is financially wise or not, is a matter for its own decision. Besides this, the plaintiff and the Kingsdale Lumber Company assert that the defendant has unduly delayed the plaintiff's cars unless the freight was shipped out northward over the defendant's line. It certainly would have opportunity to do so. The Interstate Commerce Commission has held that complaints as to such matters of delay in interstate commerce cannot be reviewed by the State Corporation Commission. To make complaint at Washington would be inconvenient and expensive, and it may well be that the plaintiff would prefer on that ground also to put in its own spur tracks.

The public policy of this State is against monopoly, especially as to common carriers, and competition is a far better regulator, when open and fair, than regulation by the decree of any commission. The danger that commissions are created to guard against is combination between carriers, not competition. *Industrial Siding case,* 140 N. C., 239; *R. R. Connection case,* 137 N. C., 71. As we have said, the power having been conferred on the plaintiff, as on the defendant, to put in spur tracks, the question whether it will be financially to the benefit of the (428) plaintiff to do so when the defendant avers that it is ready to do the work much more cheaply for the plaintiff than it can do the work for itself, is a matter which the plaintiff has a right to decide for itself. It may be unwise or ungrateful for the plaintiff to reject the benevolent offer of the defendant, but the latter cannot invoke the law to protect the plaintiff from its own folly. Evidently the defendant does not think that the competition of the plaintiff's spur track will be to the defendant's interest.

2. The other proposition advanced is that the plaintiff should not be allowed to cross the defendant's track within what it calls its "yard limits," that is, at any point where it has a side track. There are very many instances in this State, as at Charlotte, at Wilmington, at Raleigh, and elsewhere, where one railroad crosses another within the yard limits of the latter. In the present case the point of crossing is over one-half a mile east of the defendant's station at Lumberton. The commissioners to lay out a crossing will always consider such and any other objection to its location, and their action is subject to the supervision of the trial judge. Not only the higher damages necessitated by crossing at a point that is in any way objectionable to the other company will be a deterrent to the plaintiff road from seeking it, but the sound judgment of the commissioners and of his Honor will prevent the crossing being located at a point that will be unnecessarily detrimental to the defendant. If, however, this is done, the remedy is in correcting the location, and not, as in this case, by forbidding the competing railroad from extending its track across the line of another railroad at all because the presiding judge may happen to think that the industrial plant seeking a competitive outlet for its business does not really need the benefit of any competition. It is worth noting that the defendant agreed that the damages from crossing at this point is $300.

Indeed, it will be sufficient to repeat, on this point, *verbatim* what we said in this case, 161 N. C., at p. 537, as follows: "The defendant urges that it will be great inconvenience to it for the plaintiff to condemn a right of way across its track at a point where it has a side-track, and thus interfere with the use of that siding for shifting and for (429) placing box cars. The plaintiff replies that the defendant has only recently extended its side-track to that point, and for the very purpose of creating this grievance. However that may be, an examination of the map shows that less than 100 yards east of the point where the plaintiff seeks to cross the defendant's track, the defendant's side-track ends and a public road crosses there the defendant's track. There is no reason, so far as this evidence shows, why the plaintiff cannot extend its track along the north side of the defendant's track before crossing, and condemn a right of way just beyond the end of defendant's side-track near the point where the public road now crosses. While the plaintiff has a right, both under its charter and the general law, to condemn a right of way across the defendant's track, this right should be exercised with due regard to the convenience of both parties and with as little interference with the defendant's use of its tracks as can be obtained without a great increase in the cost and decrease in its convenience to the plaintiff. We do not see that a requirement that the plaintiff should cross at the point

herein suggested will add at all to the length of the plaintiff's proposed extension of its track nor to the cost thereof. If it should, this matter can be considered by the judge and jury in the assessment of damages for crossing at said point. His Honor, in consideration of the case, when it goes back, will adjudge as to the feasibility of the suggested alteration in the route of the proposed extension of plaintiff's track, calling in the aid of a jury, if necessary.

"We need not consider the numerous other exceptions made in this case, for, as his Honor held and the briefs for both parties admit, *there is but a single point* upon which all other matters depend, and that is the one which we have discussed as to the *right conferred by statute* upon the plaintiff to extend its tracks for the purposes above named.

"The ruling of the court below must be set aside and the cause will be proceeded in as indicated in this opinion."

(430) The defendant has not sought to execute this suggestion, but its petition to rehear is based on opposition to the extension by the plaintiff of its spur track across the defendant's line at any point whatever, upon the ground that it is not necessary, because it has spur tracks itself to the industrial plants, and avers that it will do the work as well and as cheaply as the plaintiff can. This is but another way of saying that the plaintiff's competition will interfere with its profits, and the defendant does not deem that this is necessary or desirable, and therefore it has strenuously resisted the competition of the plaintiff's spur track.

As a matter of fact, it was admitted on the argument here that the plaintiff's spur track has been located across the defendant's line at the point in question, under the orders of Judge Cooke, and has been in actual operation for some two years. It has not been made to appear that the result has been detrimental to the defendant's use of its side-track. Should the defendant *bona fide* desire the location of the crossing to be made at the point indicated in our former opinion, beyond the terminus of its side-track, and near where the public road crosses, or elsewhere, because the present location has proven a hindrance in the use of its side-track, this question can be investigated in this proceeding, under the former opinion of this Court, as above set out. If it is found as a fact that such crossing should be located at the point indicated as feasible in our opinion, or elsewhere, instead of its present location, and it is found that its removal from its present location is necessary, this action can be had by proceeding under our former opinion, and not by this petition to set that decision aside.

Petition dismissed.

Cited: S.c., 161 N.C. 531; *R. R. v. Mfg. Co.,* 166 N.C. 172 (g).

(431)

Y. F. CECIL v. CITY OF HIGH POINT.

(Filed 29 April, 1914.)

1. Statutes—Interpretation.

Statutes upon the same subject-matter should be construed together so as to harmonize different portions apparently in conflict, and to give to each and every part some significance, if this can be done by fair and reasonable interpretation.

2. Actions—Venue—Damages—Lands—Official Acts—Statutes—Interpretation.

The venue of an action to recover from an incorporated town damages to the lands of an owner situated in an adjoining or different county, caused by the improper method of emptying its sewage into an insufficient stream of water, is properly in the county wherein the town is situated, for such arise by reason of the official conduct of municipal officers and is regulated by Revisal, sec. 420, and this interpretation of the statute is not irreconcilable with the provisions of section 419, requiring, among other things, that an action to recover damages to lands shall be brought in the county where the lands or some portion thereof is situated, for the first named section being in general terms, the latter should be construed as an exception to its provisions.

APPEAL by plaintiff from *Lane, J.*, at February Term, 1914, of DAVIDSON.

Civil action heard on motion for change of venue.

From a perusal of the pleadings, it appears that the action was instituted in Superior Court of Davidson County, against the city of High Point in Guilford County, to recover damages caused by reason of its sewerage plant and system, operated in the corporate limits of the city.

The complaint alleged, with great fullness of detail, that defendant corporation, in the operation of the sewerage system, dumps its sewage into a branch in the northwestern limits of the city, the same being entirely inadequate, going dry in certain seasons, and in time of sufficient rainfall the deposit is carried down on and upon the lands of plaintiff, situate in the county of Davidson, wrongfully creating a nuisance thereon, to plaintiff's great damage.

In apt time, the defendant, by motion duly entered, requested (432) that the cause be removed for trial to the county of Guilford. Motion allowed, and plaintiff excepted and appealed.

Phillips & Bower, McCrary & McCrary, and E. E. Raper for plaintiff.

Walser & Walser, Peacock & Dalton, and B. W. Parham for defendant.

HOKE, J., after stating the case: Section 419 of our Revisal, among other things, provides generally that actions to recover real property or any interest therein or for injuries thereto shall be brought in the county where the subject of the action or some part thereof is situated; section 420, that actions against a public officer or person specially appointed to execute his duties for an act done by him by virtue of his office must be instituted in the county where the cause or some part thereof arose, etc., etc. In numerous cases in this State, interpreting this latter section, 420, the Court has held that where the action involved, in whole or in part, the official conduct of a municipal officer in the county of its situs, the cause of action should be said to have arisen in that county, within the meaning of the section, and the same should be instituted and tried there, subject to the right of the court, by subsequent order, to charge the place of trial in "cases provided by law." *Brevard Light and Power Co. v. Board of Light and Water Commissioners of Concord,* 151 N. C., 558; *Jones v. Statesville,* 97 N. C., 86; *Steele v. Commissioners of Rutherford,* 70 N. C., 137; *Jones v. Commissioners of Bladen,* 69 N. C., 412; *Johnston v. Commissioners of Cleveland,* 67 N. C., 101.

In *Jones v. County Commissioners,* 69 N. C., *supra,* plaintiff sued in his own county on a bond of defendant. On motion, the action was dismissed under the practice as it then prevailed, the Court holding that the suit should have been brought in defendant's county. *Rodman, J.,* dissented on the ground that, it being the duty of the debtor to find his creditor and pay him, the default occurred in the county of plaintiff's residence; but this view, as we have seen, was rejected, the
(433) Court holding, as stated, that 'suits against county commissioners, as such, must be brought in the county of which they are commissioners."

In the subsequent case of *Steele v. County Commissioners, Reade, J.,* referring to the case and to the position taken by the dissenting judge, said: "The dissenting opinion of our learned brother, *Rodman,* was based upon the first clause above, and upon his conclusion that the proximate cause of the action was the failure of the commissioners of Bladen to seek their creditor, who lived in Cumberland County, to which the suit was brought, and pay him his debt. We did not think that the failure to pay the debt was the cause of action spoken of in the statute; but that the debt itself was the cause of action. And that the expression, 'where the cause of action arose,' meant where the debt was contracted or originated. And that view is strengthened by the second clause above, 'against a public officer . . . for an act done by him by virtue of his office.' Now, as an officer's official acts are confined to his county,

and as the cause of action is his official act, it follows that the cause of action spoken of 'arose' in the county in which the commissioners acted, and not out of their county where they did nothing 'by virtue of his office.' It seemed to us to be the policy to require that all public officers, when sued about their official acts, should be sued in the county where they transact their official business. And the same policy is extended to executors, administrators, and guardians, where they are sued. *Stanley v. Mason,* 69 N. C., 1."

The language of section 420 more especially pertinent to the inquiry is that an action against a public officer for an act done by virtue of his office shall be tried in the county where the cause of action or *some part thereof* arose, and our cases just referred to, construing the statute, are in accord with authoritative decisions in other States, in which it is held that where the cause of an alleged grievance is situate or exists in one State or county and the injurious results take effect in another, the courts of the former have jurisdiction. In the absence of a statute, doubtless the courts of either would entertain the suit (434) (*Nanville County v. Worcester,* 138 Mass., 89; *Foot v. Gilbert & Edwards,* 3 Blatch., C. C. Rep., 316; *Stillman v. Manufacturing Co.,* 23 Fed. Cases, No. 13446), and the position finds support in a line of cases holding that actions against municipal corporations or municipal officers, on account of official conduct within their bailiwick, are inherently local in their nature, and unless a statute to the contrary is explicit and peremptory, a sound public policy forbids that such officer, in cases of that character, should be required, for unlimited and uncertain periods of time, to forsake their civic duties and attend the courts of a distant forum. The private convenience in such case must yield to the public good. *Mayor and City of Nashville v. Webb,* 114 Tenn., 432; *Board of Directors v. Bodkins Bros.,* 108 Tenn., 700; *Oil City v. McAbuy,* 74 Pa. St., 249; *Packwoods & Co. v. The Township of Greenbush,* 62 Mich., 122, and the cases of *Hecksher and others v. City of Philadelphia,* 9 Atlantic, 281, and *Walter Horne et al., Commissioners, v. City of Buffalo,* 56 N. Y. Supreme Court, 76, seem to be direct authorities in support of his Honor's ruling. This being the authoritative interpretation of our Revisal, sec. 420, the position must, in our opinion, prevail, notwithstanding the provision of section 419, to the effect generally that "actions concerning realty or rights therein must be determined in the county where the same or some part thereof is situate." If these two sections were in direct and necessary conflict, there is authority for the position that section 420, being later in point of arrangement, should control (*Hand v. Stapleton,* 135 Ala., 156), but, apart from this, it is well understood that a law should be construed so as to harmonize the different por-

tions, giving each and every part some significance, if this can be done by fair and reasonable interpretation, and further, that when a statute expresses first a "general intent and afterwards an inconsistent particular intent, the latter shall be taken as an exception of the former, and both shall stand." *School Commissioners v. Aldermen,* 150 N. C., pp. 191-198; 1 Lewis Sutherland Statutory Constructions, sec. 268; Black Interpretation of Laws, p. 60. And applying these two (435) recognized rules of statutory construction, we are of opinion that, to the extent that they are inconsistent, the latter section should be considered an exception to the former. The general rule being that where an action is to recover realty or for injuries to same or to determine rights or interests therein, the proper venue is in the county where the land or some part thereof is situate, but in cases where the injury is caused by reason of the official conduct of municipal officers, within their territory, then section 420 applies, and actions against the municipality must be instituted in the county of its situs.

We are of opinion that his Honor made correct decision in directing a change of venue, and the judgment is

Affirmed.

Cited: Board of Education v. Comrs., 167 N.C. 116 (1g); *Bramham v. Durham,* 171 N.C. 198 (1g); *Keith v. Lockhart,* 171 N.C. 456 (1g); *Hannon v. Power Co.,* 173 N.C. 522 (1g, 2l); *Rankin v. Gaston County,* 173 N.C. 684 (1g); *R. R. v. Brunswick County,* 178 N.C. 256 (1g); *Kornegay v. Goldsboro,* 180 N.C. 452 (1g); *Young v. Davis,* 182 N.C. 203, 204 (1g); *Alexander v. Lowrance,* 182 N.C. 644 (1g); *Perry v. Comrs.,* 183 N.C. 390 (1g); *Hicks v. Comrs.,* 183 N.C. 404 (1g) *Lloyd v. Poythress,* 185 N.C. 184 (1g); *Lloyd v. Poythress,* 185 N.C. 188 (1j); *Armstrong v. Comrs.,* 185 N.C. 408 (1g); *Felmet v. Comrs.,* 186 N.C. 252 (1g); *McFadden v. Maxwell,* 198 N.C. 225 (2g); *Boyd v. Bank,* 199 N.C. 687 (2g); *R. R. v. Gaston County,* 200 N.C. 782 (1g); *Banks v. Joyner,* 209 N.C. 263 (2g); *Rogers v. Davis,* 212 N.C. 36 (1g); *Murphy v. High Point,* 218 N.C. 598, 599, 600, 601 (2f); *Charlotte v. Kavanaugh,* 221 N.C. 263 (1g); *Godfrey v. Power Co.,* 223 N.C. 650 (c); *Godfrey v. Power Co.,* 224 N.C. 660 (2g); *Power Co. v. Bowles,* 229 N.C. 150 (1g).

CITY OF CHARLOTTE v. W. R. BROWN.

(Filed 29 April, 1914.)

1. Municipal Corporation—Cities and Towns—Taxation—Street Improvements—Excessive Levy—Statutes—Equity—Injunction.

Where a municipality levies a special tax for street improvements upon the land of an abutting owner in excess of that allowed by a statute applicable, the excess is a nullity and may be enjoined; and where the limitation prescribed is a certain per cent of the taxable value of the property, that valuation must control, whether the property lies upon one or several streets.

2. Municipal Corporations—Cities and Towns—Street Improvements—Excessive Levy—Statutes—Court's Jurisdiction.

It is not required of the abutting owner of lands upon a street of a city to comply with the prescribed procedure of objecting, etc., to an excessive special levy upon his property for street improvements, when the excess is void under the statute, for such assessment is jurisdictional and can be taken advantage of by the owner, in respect to such excess, at any time it is sought to be enforced in the courts.

APPEAL by plaintiff from *Harding, J.*, at Spring Term, 1914, of MECKLENBURG.

Controversy without action. From a judgment for the defend- (436) ant, the plaintiff appealed.

Brenizer, Black & Taylor for plaintiff.

Maxwell & Keerans for defendant.

BROWN, J. This is a controversy without action to determine the validity of a local assessment.

The city of Charlotte, by virtue of its charter of 1911, section 7 (9-12), made a special assessment against the lot of the defendant, amounting to $697, located on the corner of East Boulevard and Cleveland Avenue, in the city of Charlotte, fronting 50 feet on East Boulevard, and running back 150 feet along Cleveland Avenue. The lot was included in two improvement districts. The frontage on East Boulevard was assessed at $268, and the depth fronting on Cleveland Avenue was assessed for $429, making the total sum assessed against said lot $697.

Section 7 of the amended charter provides as follows: "*Provided further,* that no assessment against any piece of property improved as in this act provided shall in any case exceed the amount of special benefit to, or enhancement in value of, 20 per cent of the assessed taxable value thereof."

The assessed taxable value of said lot was then, and is now, $1,600. Thus it appears that the plaintiff assessed the defendant's lot at more than 43 per cent of its taxable value, or $697 instead of $320, which is 20 percent of such value.

We do not understand the plaintiff to claim any legal right to exceed the limit provided in the charter in making assessments of this character, but it is contended that the charter provides the procedure whereby the property owner's rights are preserved, and that it was the duty of the defendant to avail himself of such method, and to appeal from the assessment, and that, failing to do so, he is now precluded from asserting his rights.

We admit that the learned counsel for the plaintiff has some authority for his position, but we agree with the judge below, and we are of
(437) opinion that the 20 per cent clause in the charter is a limitation upon the power of the plaintiff, and that the attempted levy in excess thereof is a nullity.

Ordinarily, the defendant should have made in due season any objections he had to the methods of procedure in assessing his property, but that rule applies where the assessing board acts within the jurisdiction and not in violation of it.

The doctrine is tersely and correctly stated in 28 Cyc., page 1668: "Levies in excess of a right or amount permitted by law are illegal and void, although if the taxes are separable, the excess only is invalid"; and at page 958 the same authority says: "The provisions of such charters or statutes must be complied with, or it will result that an order to make the improvement or an assessment to pay for the same is void." To the same effect is 27 A. and E. Enc., 612.

Judge Dillon in his great work on Municipal Corporations, sec. 1377, declares: "It is a principle universally declared and admitted, that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred." Our own Court has often enforced this well known principle.

In *Winston v. Taylor,* 99 N. C., 213, the Court says: "It is also clear that the authorities of the town can impose no taxes except as authorized by its charter."

"The commissioners of an incorporated town have no right to impose any taxes but such as are expressly authorized by act of incorporation." *Asheville v. Means,* 29 N. C., 406.

To the same effect are *Pullen v. Commissioners,* 68 N. C., 451; *S. v. Bean,* 91 N. C., 554; *Board v. County,* 107 N. C. 110; *S. v. Webbes,* 109

N. C., 962; *Barbee Asphalt Co. v. Watts,* 26 So., 70; Cooley Taxation, p. 419; *Bennett v. City of Emmetsburg,* 115 N. W., 583.

The fact that the lot is a corner lot, and in two improvement districts, is immaterial. It is the taxable value of the entire lot that is to be considered in fixing the limit beyond which the assessment may not go. The excess of 20 per cent of the assessment being void, under the charter of the plaintiff, the defendant may enjoin the collection (438) of the excess.

A void assessment is jurisdictional, and can be taken advantage of at any time when the assessment is sought to be enforced. The clause in section 8 as to appeals refers to matters of which the board had jurisdiction, such as passing upon the petition, laying out improvement districts, benefits accruing up to 20 per cent assessed valuation, etc., but not upon the 20 per cent limitation assessment. The charter fixed this, and the board had no jurisdiction to enlarge it.

In *Spence v. Milwaukee,* 113 N. W., 38, it is held that "One failing to avail himself of the right given by Milwaukee City charter to appear before the board of public works to correct defects in an assessment for benefits and damages, and of the right given by section 11 to appeal to the Circuit Court from a confirmation of the assessment, may sue in equity to set aside the assessment, notwithstanding section 12, providing that the right of appeal to the Circuit Court shall be the only remedy for the recovery of any damages, etc., and no action at law shall be maintained therefor."

"Where an assessment for benefits and damages is void, the remedy of a property owner is in equity, by injunction to set aside the assessment and to restrain the sale of the property."

"An assessment which includes items and amounts which could not be legally assessed for, or is for an amount grossly in excess of what could be legally assessed, is void. Lot owners did not waive jurisdictional defects in proceedings for assessing special assessments by failure to appear and object to the assessment, or failure to appeal from the order of the council adopting the assessment resolution. Equity will grant relief by injunction against an assessment, void for want of jurisdiction." *Bennett v. City of Emmetsburg,* 115 N. W., 583-4-5-6-90 (Ia.).

"Delay in proceeding against a void special assessment does not, of itself, amount to laches, and the party would not be estopped to assert the invalidity of such an assessment, even if he were one of the petitioners for the improvement." *Batty v. City of Hastings,* 88 N. W., 139-40-1 (Neb.).

(439) To the same effect is *Paving Co. v. Verso,* 107 Pac., 590; *Ryan v. Altshal,* 37 Pac., 340; *In re Church,* 66 N. Y., 395; *Birdseye v. Village of Clyde,* 55 N. E., 169 Ohio.

The judgment of the Superior Court is

Affirmed.

Cited: Charlotte v. Alexander, 173 N.C. 519 (1g); *Tarboro v. Forbes,* 185 N.C. 65 (1g); *Flowers v. Charlotte,* 195 N.C. 601 (1f); *In re Assessment against R. R.,* 196 N.C. 762 (2d); *Jones v. Durham,* 197 N.C. 132 (1c, 2d); *Sechrist v. Thomasville,* 202 N.C. 114 (1g); *Crutchfield v. Thomasville,* 205 N.C. 716 (1d); *High Point v. Brown,* 206 N.C. 667 (1d); *Winston-Salem v. Smith,* 216 N.C. 4, 6 (2f).

MARY MOORE, ADMINISTRATRIX, v. SOUTHERN RAILROAD COMPANY.

(Filed 29 April, 1914.)

1. Railroads—Master and Servant—Fellow-servant—Baggage Master—Negligence with Firearms—Trials—Damages—Statutes.

Where a baggage agent of a railroad company, in the course of his employment in getting some baggage checks from a drawer to a desk in the baggage room, removes a pistol which he knew to be loaded, takes it in his hand, and in a careless manner opens another drawer to the desk, and in doing so causes the pistol to fire, by pressing the trigger with his finger, and kills his assistant, and this is done without the exercise of ordinary care and without due regard to the direction in which the pistol was pointing at the time, his negligent acts in causing the death of the deceased are attributable to the company employing him, and it is held liable for the consequent damages, in an action by the administrator of the deceased. Revisal, sec. 2646. The distinction between this case and instances not within the terms of the statute, pointed out, CLARK, C. J.

2. Same—Appeal and Error—Trials—Instructions—Harmless Error.

Where, in an action for damages, a railroad company is held responsible for the negligent manner in which its baggage master handled a pistol, in the course of his employment, which caused the death of another employee of the company, it is error for the trial judge to charge the jury that they must find that the baggage master was also negligent in leaving the pistol in the drawer of a desk in the baggage-room, from the evidence thereof; but the jury having found the issue of negligence in plaintiff's favor, it is not prejudicial to the defendant, the appellant.

3. Railroads—Master and Servant—Joint Employment—Trials—Evidence—Nonsuit.

Where a baggage master is employed at a union station to handle the baggage of two or several railroad companies, is paid his salary by one of

these companies, and in the course of his employment negligently kills his assistant, and the administrator of the deceased enters a suit for damages against the company by whom his salary was paid, the defendant may not avoid liability upon the ground that at the time of the negligent act the baggage master happened to be performing a duty for another of these companies; and where the evidence is conflicting, a motion for nonsuit should be denied, the evidence being construed in a light most favorable to the plaintiff, and taken as true.

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

APPEAL by defendant from *Devin, J.*, at February Term, 1914, (440) of FORSYTH.

Louis M. Swink and Hastings & Whicker for plaintiff.
Manly, Hendren & Womble for defendant.

CLARK, C. J. This is an action for the wrongful death of plaintiff's intestate through the negligence of a fellow-servant. The baggage agent of the defendant left a loaded revolver in a drawer in the desk in the baggage room. It was lying upon some baggage checks, and the baggage agent in removing the pistol from the drawer in order to get the checks, held it in one hand while pulling open another drawer, causing the pistol to fire. It was directed towards the deceased, a fellow-servant in the employ of the defendant, and was discharged, thereby killing him.

The court charged the jury that if they found that the defendant company through its agent left a loaded revolver in said desk where it was necessary to be handled in order to transact the business of the department, and should also find that in moving the pistol from the drawer in the course of his employment said agent took hold of and handled the pistol without the exercise of ordinary care as to the manner in which he was handling it, and carelessly and without the exercise of ordinary care, and without due regard to the direction in which it was pointed, pressed the trigger, and as a result of such careless conduct and want of care the plaintiff's intestate was killed, and the jury should further find that by the exercise of ordinary care the injurious (441) result ought reasonably to have been anticipated as a consequence of such conduct, to find the first issue "Yes"; otherwise, to answer it "No."

In this we find no error of which the defendant can complain. Indeed, in requiring, in addition to the last two circumstances, the jury to find further that there was negligence in leaving the pistol in the drawer, there was error, but of this the defendant cannot complain. It was an immaterial circumstance.

If the baggage agent had suddenly and forcibly pulled the drawer open, without observing the fact that another employee was standing close by, and by reason of such negligence and unusual and forcible manner of pulling open the drawer the sharp corner of the drawer had struck the deceased on the temple, killing him, and by the use of ordinary care the agent could reasonably have anticipated such consequence, the defendant would have been liable for the negligence, just as if one employee has negligently thrown a cross-tie or a lump of coal on another, as in *Fitzgerald v. R. R.*, 141 N. C., 531, where the point is thoroughly discussed, or dropping a bar of iron on his foot, *Horton v. R. R.*, 145 N. C., 132, and many similar cases.

The injury was an accident in the sense only that the killing was not intentional. The jury under the last paragraph of the charge must have found that the killing was in consequence of the negligence of the baggage agent from the careless manner in which he held the pistol while pulling open another drawer. He was in the discharge of his duties in the course of his employment. He was negligent, as the jury find, both in the manner of holding the pistol while pointed at another and in pulling open the drawer at the same time. The statute is explicit, that for "injury caused by the negligence, carelessness, or incompentence of a fellow-servant," the defendant is liable. Rev., 2646.

The able and experienced counsel of the defendant do not base their motion for a nonsuit upon the ground that the witness Wall was
(442) the agent solely for the Southern Railway, and that the death of the decedent was caused by him when acting solely as agent of the Norfolk and Western, either by exception on the trial or by taking such point in their briefs. But as the suggestion is made, it is well to refer to the testimony of Wall himself, who says: "I was the *joint* agent of the Norfolk and Western and the Southern Railway companies. Lincoln Moore (the deceased) was employed to help me look after the baggage for the Southern *and* Norfolk and Western." He also says: "I was assistant baggage agent at the union station at Winston-Salem, and worked in the baggage room." On the motion to nonsuit, the evidence must be taken as true in the aspect most favorable to the plaintiff. According to the evidence above set out, it appears that Wall was the joint agent of the two railroads, and operating the joint baggage room at the union depot in their behalf. That being so, it cannot be said that any one service was done by him at the responsibility of one railroad and the other service at the responsibility of the other. The witness testified that he was the "joint" agent of both roads, operating the "joint" business of both roads. It follows, therefore, that the plaintiff could have sued either or both roads, at her option. It was a joint

employment and he was a joint agent. There is no evidence tending to show, and it is unreasonable to suppose, that he was paid according to the trains he served. He was doubtless employed by the month, as is customary, and whatever work he did, according to his testimony, was as joint agent in the joint or common business of the two roads.

A case almost exactly in point is *R. R. v. Dorsey,* 66 Texas, 158. In that case the plaintiff was employed by one railroad company to act as night watchman in a union yard jointly kept and used by that company and two others. While performing his duty upon a train and track of one of the latter companies, and because of some negligence of that company, he received personal injury, and it was held: "(1) Between the plaintiff and his employer the relation of master and servant existed, by express contract. Between plaintiff and the other (443) companies that relation arose by inference from the service and the connection of the companies.

"(2) No proof being offered as to the contract between the companies, their duties respecting the yard where the plaintiff was injured could only be inferred from the manner in which the premises were used.

"(3) It appearing that the plaintiff was employed to work in the 'union yard,' that it was used by the three companies in common, and the plaintiff was injured while performing his duty, it was not error to instruct the jury that if the injury resulted from the negligence of either company, all were liable jointly and severally."

This is a well considered case, and there are many others like it.

In *Vary v. R. R.,* 42 Iowa, 246, it did not appear whether the plaintiff was injured on the road of the defendant or of the company by which he was employed. His engagement was to serve both companies very much in the same way as the plaintiff's intestate in this case, and it was held that he could sue either or both, and it was said: "This principle is elementary, and needs no citation of cases in its support." Among other cases to the same purport is *Buchanan v. R. R.,* 75 Iowa, 393, in which it is said: "The idea that the employee was under the employment of one company for five minutes, and then another for a few minutes, and another for a short time, and that he changed his employers with the facility with which the kaleidoscope shifts an array of colors involves an absurdity," and adds that this would make the service "not only the ridicule of the public, but a system of deception, to the great peril of the most prudent and careful drivers." Another case is *Brow v. R. R.,* 157 Mass., 399, which held that in such cases where an employee is in a common employment at a union station, rendering service first for one company and then the other, that one injured by the negligence of such servant could recover out of either or all of the companies, though

there was no express contract between the companies as to his employment.

(444) If, as Wall testified, he was the joint agent of both companies, they were jointly and severally liable. If, however, as he also testified (and which is not incompatible) he was appointed and paid by the Southern to attend to the joint business for both companies in the baggage room, both companies are liable. Certainly the Southern Railway, which is the one sued here, cannot object that Wall was not in its service when he was handling baggage by its direction for the other company.

Nor are we impressed with the suggestion that a farmer would not be held responsible for the negligence of his servant in a case of this kind, and therefore the railroad should not be. The railroad would not have been liable until the enactment of chapter 56, Laws 1897, now Rev., 2646, which provides: "Any servant or employee of any railroad company operating in this State who shall suffer injury to his person, or the personal representative of any such servant or employee who shall have suffered death in the course of his services or employment with such company by the negligence, carelessness, or incompetency of any other servant, employee, or agent of the company, or by any defect in the machinery, ways, or appliances of the company, shall be entitled to maintain an action against such company." This statute has been sustained by repeated decisions of this Court, and indeed such statutes have been now almost universally adopted.

This being a motion for a nonsuit, the evidence must be taken as true. The witness testified that he was the *joint* agent of both railroads, and so was the deceased, who was his helper. The latter was killed "in the course of his services or employment," and the jury found that this was done "by the negligence, carelessness, or incompetence of the other servant." Wall testified that he was appointed and paid by the defendant, the Southern Railway. But he also says that he was the joint agent of both companies, in their joint business of looking after the baggage that came to the union depot.

No error.

(445) BROWN, J., dissenting: I am of opinion that the conclusion reached by the majority of my brethern is in contravention of the previous decision of this Court, and that the motion to nonsuit should be sustained. As the facts are not stated fully in the opinion, I set them out from the record.

The only witness examined who testified to the facts was J. A. Wall, introduced by the plaintiff.

After testifying that he was assistant baggage agent at the union station in Winston-Salem, the witness says: "About seven days before Lincoln Moore was killed, I found a pistol in an old desk in the baggage room. This desk set on the back side, where we kept all our checks and some supplies. I found the pistol a few days after Mr. Minter, the baggage agent, took charge. I took it out and rubbed it up, and got the dust off of it. Mr. Minter saw me when I found it.

"When I put the pistol in the drawer immediately after finding it, I did not put it in the drawer where we kept the baggage checks. The drawer in which I put it contained a book and some old circulars.

"On the morning that Lincoln Moore was killed, the pistol was in the drawer on top of Norfolk and Western Railway checks. I put it there. It was put in that place the evening before Moore was shot. There was one cartridge in the pistol. Up to the time I put it in the drawer just spoken of, it had been in the drawer where the circulars and book were.

"Mr. Minter said to me: 'I found a cartridge I believe will fit your old gun.' When he told me about this cartridge, I took the pistol out and put the cartridge in it.

"Lincoln Moore had been working in the baggage room about two months and a half. He was hired by Victor Davis; his duties were to help load baggage going out and unload baggage coming in. He was under my instructions and did what I told him to do. We were both at the station that morning, getting the baggage off on the 5:40 Southern train. The next train that left after that was the 7:05 train over the Norfolk and Western for Roanoke. After getting the baggage off on the Southern, Lincoln Moore and I came around near my (446) desk, and Lincoln Moore sat on a stool inside of the office and was combing his hair.

"I went to get some Norfolk and Western checks to put strings on them to prepare to check the baggage going out on the 7:05 Norfolk and Western. Opening the drawer, I found the pistol lying on top of the checks, and I picked it up with my right hand and was going to lift it back into the other drawer, and just as I went to pull the drawer it got hung.

"I stepped back like this (indicating), and as I stepped back, it went off, the bullet striking Lincoln Moore and killing him. I had pistol in my right hand and was trying to open the drawer with my left hand, and in jerking, the pistol went off."

It is not contended that the defendant or its officers either authorized or knew of the keeping of the pistol in the desk by the baggage agent, Wall. In my opinion, it was the unauthorized and personal act of Wall, for which the defendant is not liable.

1. Wall was not acting within the scope of his authority or in furtherance of this defendant's business. He says his purpose in opening the drawer was to get checks to put on baggage for the 7:05 Norfolk and Western train, and that the pistol was lying on top of those checks, and that he picked it up for the purpose of putting in the other drawer from which he had taken it. He was no more acting for the defendant when he took the pistol up to remove it to the other drawer and accidentally killed Moore, than he would have been had he willfully and intentionally discharged it.

Suppose a merchant's clerk had placed a pistol in his desk without the knowledge or authority of his master, and, in going into the desk to get out papers in his master's business, he had taken the pistol off the needed papers, and in so doing had accidentally but negligently killed a fellow clerk, does any one for a moment suppose that this Court would hold the merchant liable for such unauthorized act? If the merchant would not be held liable under such circumstances, then this defendant, although a railway company, ought not to be!

(447) The test laid down by *Justice Hoke* in *Sawyer v. R. R.*, 142 N. C., 1, is: "Where the question of fixing responsibility on corporations by reason of the tortious acts of their servants depends exclusively upon the relationship of master and servant, the test of responsibility is whether the injury was committed by authority of the master expressly conferred or fairly implied from the nature of the employment, or the duties incident to it."

And in the same case it is held that private corporations are liable for their torts (of this character) under such circumstances as would attach liability to natural persons. In this case a railway company was exonerated from liability for the tortious conduct of a superintendent when refusing employment to one who had applied to him for it.

This case is cited and approved in *Marlowe v. Bland,* 154 N. C., 141, where a farmer ordered his servant to cut and pile cornstalks, who, after piling them, without authority from his master, set fire to them and caused damage. The master was held not liable.

This same idea is expressed by Wood in his work on Master and Servant, section 307, quoted in *Marlowe v. Bland.*

"The simple test is whether they were acts within the scope of his employment; not whether they were done while performing the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties intrusted to him by the master, even though in opposition to his express and positive orders."

In *Jones v. R. R.*, 150 N. C., 475, it is said: "Certainly no one will seriously contend that a master is an insurer of his servant's conduct in respect to torts committed by him while in his employment, without regard to the pivotal question whether such conduct had any relation to or was in the scope of the employment."

This subject is so fully discussed in the cases I have cited, as (448) well as by *Justice Walker* in *Jackson v. Telegraph Co.*, 139 N. C., 347, and *Daniel v. R. R.*, 136 N. C., 517, that it is useless to cite other authorities.

It is true the pistol was on top of the checks, but the declared purpose in taking the pistol out of the drawer was not so much to get at the checks as to put the pistol back in the other drawer from which witness had taken it. The checks could easily have been taken out by lifting up the pistol and not removing it from the drawer. It was not at all necessary, in order to accomplish the master's work, that the pistol should have been taken out of the drawer it was in. That was the personal act of Wall, for which the defendant should not be held liable, as it neither knew of it nor could by any sort of means have prevented it.

2. There is another ground upon which it appears to me the motion to nonsuit should be sustained. This action is brought against the Southern Railway, and not against the Norfolk and Western.

While under the statutes of North Carolina these two railway corporations are compelled to coöperate in maintaining a union station in Winston-Salem, they are not and cannot be in any sense copartners, and neither is liable for the contracts or torts of the other.

The fact that the Southern Railway assisted in maintaining this union station, and employed Wall to load its baggage, did not make it responsible for Wall's acts when he was acting exclusively for the Norfolk and Western in checking and loading its baggage.

Wall testifies that the Southern Railway train had been loaded with baggage and had gone. At the time of the injury he was getting Norfolk and Western checks for the baggage on that train. He was performing no act whatever for the Southern Railway when he went in the desk and removed the pistol.

It is surely permissible for one person to act as agent for two others in performing separate and distinct duties at different times for each principal without making both principals liable jointly (449) for all his acts, there being no partnership or privity between the principals.

It is true that this particular reason for sustaining the nonsuit is not urged in the brief, but it is our duty to consider it when we pass on the sufficiency of the evidence to warrant a recovery of this defendant.

MR. JUSTICE WALKER concurs in this dissent.

Cited: Ange v. Woodman, 173 N.C. 35 (1g); *Cole v. R. R.,* 211 N.C. 596 (1g); *Smith v. Kappas,* 219 N.C. 856 (1g).

G. P. AMMONS v. WYSONG & MILES MANUFACTURING COMPANY.

(Filed 22 April, 1914.)

1. Master and Servant—Fellow-servant—Concurring Negligence.

While the master, unless otherwise provided by statute, is not answerable in damages caused to his servant by the negligent acts of his fellow-servant, the exemption from such liability is when the negligence of the fellow-servant is the sole cause of the injury complained of; and where the failure of the master to provide a safe place to work and safe appliances for its prosecution concurs with the negligent act of the servant in producing the injury, the master is held responsible for the consequent injury.

2. Trials—Master and Servant—Negligence—Evidence — Nonsuit — Questions for Jury—Contributory Negligence.

The plaintiff, a servant of the defendant, was engaged with a fellow-servant in unloading a heavy machine from a railroad car. The method of unloading was to jack up the object 7 or 9 inches from the car floor and fasten around it a heavy chain hitched to a traveling crane, and in moving the machine the employees walked along with it to hold it in position. The plaintiff's fellow-servant had fastened the chain around the machine while the plaintiff was temporarily absent, and as they moved off, in the manner described, the machine suddenly dropped upon the plaintiff's foot, causing the injury complained of. There was evidence tending to show that the hooks of the chain were defective from long service, of which the defendant had actual or constructive notice, which prevented them from being securely fastened, and that if they had not been defective, the injury would not have occurred: *Held,* it was for the jury to determine upon the evidence whether the injury was attributable to the employer's negligence in not providing a proper chain, if so found, or whether such negligence concurring with that of the fellow-servant in fastening the chain produced the injury; and further held, the issue as to contributory negligence was properly submitted to the jury; and that a motion as of nonsuit should have been denied.

(450) APPEAL by plaintiff from *Shaw, J.,* at November Term, 1913, of GUILFORD.

Civil action to recover damages for alleged negligent injury on part of defendant company. At the close of plaintiff's testimony, on motion duly made, there was judgment of nonsuit, and plaintiff excepted and appealed.

J. A. Barringer for plaintiff.

F. P. Hobgood, Jr., for defendant.

HOKE, J. There was evidence on part of plaintiff tending to show that, on or about 19 June, 1912, plaintiff, an employee of defendant company, while in performance of his duties, was hurt by reason of a heavy machine, called a planer and matcher, falling on his feet and causing very painful and serious injuries; that the machine in question weighed from two to three tons, and plaintiff was directed by the superintendent or boss to assist another employee, named Sanes, in removing the machine from a car on the defendant's premises; that this was done by jacking up the object 7 to 9 inches from the floor; then a heavy chain was fastened around it, hitched to a traveling crane and removed, the employees walking along to hold same in position; that plaintiff, being employed elsewhere, was delayed a little, and, when he reached the place, Sanes had the machine encircled with the chain; the same was jacked up and he and Sanes being in position to guide the movement, plaintiff was asked by another employee, named Walker, to show him the ticket on the machine; he wished to ascertain where it was from, and, as witness turned his head to reply, machine, for some reason, fell on both of plaintiff's feet.

There was also evidence tending to show that the chain sup- (451) plied for the purpose had diamond shaped hooks at the end by which it could, when the hooks were in proper condition, have been securely fastened, either to each other or by catching in a link of the chain, but that, by use in hoisting or moving heavy bodies, these hooks had spread so that the fastening was insecure and they were liable to slip their hold; that the condition had existed for six to eight months, and the superintendent of defendant had been notified about it by Sanes or some other of the employees; that witness was hired as a helper in the overhauling room of defendant's shop and was to go and help at different things as directed by Mr. Will Vaughn, the machinist.

Speaking directly to the occurrence and his position at the precise time, the plaintiff, testifying in his own behalf, said: "He had it fixed when I got out there. It fell on me. We were ready to push it in the house. Me and him was around on the west side of the machine, and I was a little in front of him, to get around, and he was right behind me. I got around and got myself in position to move it as a man will work. I got around and got to my place, which was anywhere I could get hold. I was on the east side of it. About the time I got around there, Mr. Waller came and wanted to see the ticket. This was just before Mr. Sanes got around. I told Mr. Walker I didn't know anything about

the ticket. I had seen one on it, but I didn't know what it was nor where it was from. That is what he wanted to see, to see where the machine was from. It was a second-hand machine, and he came and walked up and he reached over after the ticket and came up to my left side. I don't know whether he touched me on the shoulder or not. Everything was done so quick, just like firing a gun. The next thing I knew I was hollering for them to get it off. The front end of the machine fell on both of my feet, but it caught more of my left foot than it did of my right one. Just caught two toes of my right foot."

On this, a fair summary of plaintiff's evidence, the Court is of opinion that the cause should have been submitted to the jury.

(452) It is established by repeated adjudications in this State that an employer of labor, in the exercise of reasonable care, must provide for his employees a safe place to do their work and supply them with machinery, implements, and appliances safe and suitable for the work in which they are engaged, and to keep such implements, etc., in safe condition as far as this can be done by the exercise of proper care and supervision. *Pigford v. R. R.*, 160 N. C., 93; *Young v. Fiber Co.*, 159 N. C., 376; *Alley v. Pipe Co.*, 159 N. C., 327; *Patterson v. Nichols*, 157 N. C., 406; *Mercer v. R. R.*, 154 N. C., 399.

Our cases further hold that while an employer, unless otherwise provided by statute, as it is in case of railroads, is not liable when an injury arises from the negligence of a fellow-servant, this must be understood in cases where the injury complained of is due entirely to the wrongful conduct of the fellow-servant, and the principle does not apply when the negligence of the employer and the fellow employee concur in the result, the plaintiff having been free from blame. *Wade v. Contracting Co.*, 149 N. C., 177.

On careful perusal of the evidence as it is now presented, and applying the rule which uniformly prevails when judgment of nonsuit is ordered, that the evidence making in support of plaintiff's claim must be accepted as true and interpreted in the light most favorable to him, we think the case presents the permissible inference that plaintiff's injuries may be fairly attributed to the employer's negligence in failing to supply a proper chain for this work, or that defective chain and negligent manner of fastening same may have concurred in producing the result.

It is earnestly urged that the facts clearly disclose a case of contributory negligence on part of plaintiff, and that the judgment should be sustained on that ground, but we may not adopt this view as a necessary conclusion from the facts as they now appear. In this aspect of the matter, this case is not unlike that of *Shaw v. Manufacturing Co.*,

143 N. C., 131, and the issue of contributory negligence must also be submitted to the jury in the light of that well considered decision.

There is no error, and this will be certified, that the judgment (453) of nonsuit be set aside and the cause submitted to the jury.

Reversed.

Cited: McAtee v. Mfg. Co., 166 N.C. 456 (1g); *Holt v. Mfg. Co.,* 177 N.C. 178 (1g); *Beck v. Tanning Co.,* 179 N.C. 125 (1f); *Cook v. Mfg. Co.,* 183 N.C. 56 (1f); *Gaither v. Clement,* 183 N.C. 456 (1g); *Almond v. Oceola Mills,* 202 N.C. 100 (1g).

STANDARD FASHION COMPANY v. J. L. GRANT.

(Filed 29 April, 1914.)

1. Illegal Contracts—Statutes—Exclusive Sales—Courts.

A recovery may not be had in the courts of this State upon a contract made in violation of an express prohibition of our statutes, as in this case, for goods sold and delivered under a contract in consideration that the purchaser should not sell the same commodity in his store manufactured by other parties, for such provision is in violation of chapter 167, sec. 1 (a), Public Laws 1911.

2. Appeal and Error—Objections and Exceptions—Trial Court—Procedure—Quantum Valebat—Contracts.

The Supreme Court will not decide a question on appeal that has not been properly presented to the consideration of the trial judge, and exceptions noted as required by the rules of procedure, and in this case the plaintiff having only sued upon a contract for the exclusive sale of goods in violation of our statute, it is held that the question as to whether a recovery could be had upon a *quantum valebat* may not be determined.

APPEAL by plaintiff from *Shaw, J.,* at February Term, 1914, of STANLY.

Civil action on a contract. From judgment of nonsuit the plaintiff appealed.

The complaint alleges:

1. That the plaintiff, Standard Fashion Company, is a corporation duly organized under and by virtue of the laws of the State of New York.

2. That on 5 March, 1912, J. L. Grant, the defendant entered into a contract with the plaintiff, a copy of which contract is hereto attached,

marked Exhibit "A," and asked to be made a part of this complaint as fully as if written herein.

(454) 3. That in accordance with the said contract, and in pursuance to the terms thereof, the plaintiff sold and delivered to the defendant, J. L. Grant, certain goods, wares, and merchandise to the value of $299.96, an itemized statement of which is hereto attached, marked Exhibit "B".

4. That the defendant is due plaintiff the sum of $299.96, and that the defendant has not paid the same, or any part thereof, though payment has been often demanded by the plaintiff.

Wherefore the plaintiff demands judgment for $299.96 and costs.

The defendant, answering, admits signing the contract marked Exhibit "A" and made a part of the complaint, and says:

2. That he admits signing the pretended contract set out in paragraph 2 of the complaint, but avers that said contract is illegal and void, in that said contract and the consideration upon which it is based, which contract speaks for itself, is an unreasonable restraint of trade, and is contrary to public policy; and further the defendant avers that said pretended contract is illegal and void for that it purports to make a sale or sales of merchandise to the defendant upon the consideration and condition that the defendant shall not deal in the goods, wares, merchandise, articles, or things of value of a competitor or rival in the business of the plaintiff making such sales under said pretended contract to the defendant.

3. That he admits that the plaintiff shipped to him the bill of goods set out in Exhibit "B" mentioned in paragraph 3 of the complaint, under and pursuant to the pretended contract set out in paragraph 2 of the plaintiff's complaint, but denies that said merchandise is worth the sum of $299.96; and further answering said paragraph, the defendant avers that the said pretended contract, under and pursuant to which the plaintiff shipped said goods to the defendant, is illegal and void, as set out and recited in paragraph 2 of this answer, and the defendant denies that he is liable to the plaintiff in any sum whatever on said account.

(455) The answer then sets up a counterclaim.

A. C. Honeycutt for plaintiff.

J. R. Price for defendant.

BROWN, J. The contract sued on contains these provisions:

The party of second part, the defendant, agrees to purchase and pay for, for free distribution, 9,000 Standard fashion sheets and handy

catalouges to a number of not less than 100 per annum; to purchase and pay for $200 value in Standard patterns at net invoice prices.

The contract further provides:

"Second party also agrees not to assign or transfer this agency, nor to remove it from its original location without the written consent of the said first party; not to sell or permit to be sold on the premises of second party during the term of this contract any other make of patterns, and not to sell Standard patterns except at label prices.

"Second party further agrees to permit first party or its representatives to take account of pattern stock whenever it desires, to pay proper attention to the sale of Standard patterns, to conserve the best interests of the agency at all times, to reorder promptly all patterns as sold, and to give the department a prominent position on the ground floor in the store."

The contract then provides that it may be terminated upon three months notice, and upon "expiration of such notice, second party agrees to promptly return to first party all Standard patterns bought under this contract and then on hand, which first party agrees to credit on receipt in good order at three-fourths cost, paying to second party, within thirty days after receipt of same, in cash, any balance due."

It is contended that this contract, on account of the provision therein in which the defendant is made to agree not to sell or permit to be sold any other make of patterns, and not to sell Standard patterns except at labeled prices, is in direct violation of chapter 167, sec. 1, subsec. A, page 321, Public Laws 1911, wherein it is provided that it shall be unlawful for any person, firm, or corporation to directly or indirectly be guilty of any of the acts and things specified in any (456) of the subsections of this act. Subsection A of this act is as follows, to wit:

"(*a*) For any person, firm or corporation or association to make a sale or sales of any goods, wares, merchandise, or things of value whatso ever in North Carolina, whether directly or indirectly, or through any agent or employee, upon the condition that the purchaser thereof shall not deal in the goods, wares, merchandise, articles, or things of value of a competitor or rival in the business of the person, firm, corporation or association making such sales."

The contract sued on appears to have been made at Albemarle, in this State, 5 March, 1912, after the enactment of the statute. But it is immaterial as to where this particular contract was entered into. It will not be enforced by the courts of this State, as it is plainly in violation of the statute cited. The antagonism of the contract to the statute is so manifest that it need not be discussed.

It is well settled that the courts of a State will not lend their aid to the enforcement of a contract—

1. When the contract in question is contrary to good morals.

2. When the State of the forum, or its citizens, would be injured by its enforcement.

3. When the contract violates the positive legislation of the State of the forum.

4. When it violates its public policy. *Cannady v. R. R.*, 143 N. C., 439.

The principle of the rule is that no man ought to be heard in a court of justice who seeks to enforce a contract founded in, or arising out of, moral or political turpitude. In Story Ag., sec. 348, "The distinction between the cases where a recovery can be had and the cases where a recovery cannot be had of money connected with illegal transactions, which seems now best supported, in this: That wherever the party seeking to recover is obliged to make out his case by showing the illegal contract or transaction, or where it appears that he was privy to the original illegal contract or transaction, then he is not entitled to
(457) recover any advance made by him connected with that contract." *Culp v. Love*, 127 N. C., 461.

The subject is also discussed, and many other authorities cited, in *Bluthenthal v. Kennedy, ante*, 372

It is suggested that his Honor erred in sustaining the motion to nonsuit, and that he should have submitted an issue as to the actual value of the goods, and that the plaintiff should be permitted to recover such value in this action.

We are not prepared to say, under the statute cited, that the plaintiff can recover as upon a *quantum valebat* without violating the spirit and purpose of the law if the question was presented upon this record, but the point is not raised. The plaintiff tendered no such issue, offered no such evidence, asked no such instruction, took no such exception, and has not assigned it as error. In no form did the plaintiff give the court below an opportunity to pass on such question. Therefore, we will not consider it.

This is an action upon the contract solely, and it is made a part of the complaint, and upon such contract we hold that the plaintiff cannot recover the contract price.

Affirmed.

Cited: Bluthenthal v. Kennedy, 165 N.C. 372 (1g); *Smith v. Express Co.*, 166 N.C. 158 (1g); *Pfeifer v. Drug Co.*, 171 N.C. 215 (1g); *Marshall v. Dicks*, 175 N.C. 39 (1g); *Shute v. Shute*, 176 N.C. 465 (1f);

Rush v. McPherson, 176 N.C. 565 (1g); *Phosphate Co. v. Johnson,* 188 N.C. 426, 427 (1f); *Bundy v. Commercial Credit Co.,* 200 N.C. 517 (1b); *Shoe Co. v. Dept. Store,* 212 N.C. 77, 78, 79 (1f); *Patterson v. R. R.,* 214 N.C. 47 (1l); *Beam v. Wright,* 224 N.C. 686 (1j); *Oil Co. v. Garner,* 230 N.C. 501 (1c).

IN THE MATTER OF WILLIAM LUCK WIGGINS.

(Filed 29 April, 1914.)

Habeas Corpus—Appeal and Error—Certiorari.

An appeal from the determination of the judge before whom the proceedings upon a writ of *habeas corpus* is heard will not lie, except in cases concerning the care and custody of children; though an applicant in proper cases where an adverse judgment presents questions of law or legal inferences and amounts to a denial of a legal right may have the judgment reviewed on *certiorari.* Constitution, Art. IV, sec. 8.

APPLICATION for discharge on writ of *habeas corpus,* heard before *Devin, J.,* in the county of FORSYTH, 17 March, 1914.

On the hearing it appeared that the petitioner was held on (458) requisition and warrant charging him with larceny and embezzlement in the State of Florida and being a fugitive from justice from said State.

The court having duly heard and considered the case, gave judgment denying the application, and ordered the petitioner into the custody of J. F. Gordon, the duly authorized agent of said State, for removal to that jurisdiction.

The applicant, having duly excepted, appealed.

Stras & Williams for Gordon, agent of State of Florida.

HOKE, J. Our statute on *habeas corpus,* Revisal, ch. 39, sec. 1854, only allows an appeal in ordinary form in cases concerning the care and custody of children, and the fact that express provision of this kind is only made in these cases gives support to the practice that has always prevailed in this State, that in other causes no such appeal will lie. *In re Tinner Holley,* 154 N. C., 166, citing *S. v. Herndon,* 107 N. C., 934; *S. v. Miller,* 97 N. C., 451; *S. v. Lawrence,* 81 N. C., 522.

With certain limited and well defined exceptions, our law extends the privilege of this great writ to every one restrained of his liberty, and

makes cogent provision that the same shall be issued by any and every Supreme or Superior Court judge in the State to whom application is properly made. Having thus secured to every person the opportunity to have his cause publicly investigated before a judge of general jurisdictional powers, our lawmakers have thus far not thought it well that, in addition, the right of indiscriminate appeal should be given, which, by ill-considered abuse, might become a serious hindrance to the well-ordered administration of justice. In proper instances, however, an applicant is not deprived of all right to have his cause reviewed by the court *in banc*. And it has been held in *Holly's case* and others that where in *habeas corpus* proceedings an adverse judgment presents questions of law or legal inference and amounts to the denial of a legal right it may be reviewed on *certiorari* under and by virtue of Article IV, sec. 8, (459) of our Constitution conferring on this Court the power to issue "any remedial writs necessary to give it general supervision and control over the proceedings of inferior courts."

Under the principles stated, we must hold that no appeal lies in the present case, and the same is dismissed.

Appeal dismissed.

I. S. ROBINSON v. ED. D. HUFFSTETLER.

(Filed 6 May, 1914.)

1. Vendor and Purchaser—Contracts—Conditions of Warranty—Return of Goods.

Where there is a warranty of personal property, with express provision that the property shall be returned if not found to be as warranted, within a certain fixed time, this provision is a condition annexed to the contract, precluding the vendee from any redress under the terms of the warranty unless the property is returned within the time specified.

2. Same—Trials—Instructions—Conflicting Evidence.

The plaintiff and defendant exchanged mules, and the evidence was conflicting, on the plaintiff's part, as to whether the defendant warranted the mules he gave in exchange as being sound, and if not as warranted, to be returned within a reasonable time, and on the defendant's part, whether, if the mules were not as warranted, they should be returned within a week, which was not done. A charge of the court is held for reversible error, that if the defendant warranted the mules to be sound when they were not, to answer the issue in the plaintiff's favor, for it disregarded the defendant's evidence, that as a condition annexed to the warranty, the mules were to be returned within a week, which admittedly was not done, and withdrew that phase of the evidence from the consideration of the jury.

3. Vendor and Purchaser—Contracts—Warranty—Return of Goods—Reasonable Time—Trials—Questions for Jury.

Where a warranty in a sale of goods only provides for the return of the goods to the vendor, if not as warranted, they should be returned by the purchaser within a reasonable time for him to get redress under the terms of the contract, it being for the jury to determine what length of time is reasonable under the surrounding circumstances.

4. Vendor and Purchaser—Contracts — Warranty — Breach — Return of Goods—Damages.

Upon the vendor's breach of his warranty in an executed agreement for the sale of goods, the purchaser may return the goods in a reasonable time, and recover the consideration he has paid for them; or he may retain the goods and recover such damage as he may have sustained arising from the breach of the vendor's warranty.

APPEAL by defendant from *Webb, J.*, at October Special Term, (460) 1913, of GASTON.

This action is to recover two mules.

The plaintiff testified in substance that he and the defendant exchanged mules; that the defendant warranted his mules to be sound, and agreed that if they were not sound the plaintiff might return them, and get his own mules; that the mules were not sound, and that he offered to rescind the trade on the eighth day after the exchange.

The contention of the plaintiff is that the warranty is one of quality; that he had a reasonable time within which to examine the mules; that he acted within a reasonable time, and that he is entitled to recover the mules he originally owned.

The defendant testified in substance there was an exchange of mules between him and the plaintiff; that he told the plaintiff his mules were sound as far as he knew, and agreed if he, the plaintiff, was dissatisfied he might return them within one week. He also offered evidence tending to prove that the mules were sound.

The first issue submitted to the jury was as to the ownership of the mules by the plaintiff, upon which his Honor charged, among other things:

"If you find that there was a contract, and if you further find that there was no fraud in bringing about such contract, yet if you find that there was a breach of warranty as to quality—that is to say, if the defendant guaranteed that the mules which he offered to sell were sound when they were not sound—then you would answer the (461) first issue 'Yes,' " and the defendant excepted.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

George W. Wilson for plaintiff.
Mangum & Woltz and A. C. Jones for defendant.

ALLEN, J. When personal property is sold by sample, or upon a representation as to quality, *which does not amount to an express warranty,* the purchaser is given a reasonable opportunity for inspection and examination, and if not according to the sample or representation, he may reject them when tendered, or return them after delivery, provided he acts within a reasonable time, and can recover anything of value parted with as the consideration for the trade.

What is a reasonable time is dependent upon conditions and circumstances, as in some cases the defect may be discovered by inspection, while in others trial and use would be necessary. If the purchaser retains the property, after such reasonable opportunity for discovering the defect has been afforded him, he cannot under ordinary circumstances, be heard to complain, and it will be assumed that he has accepted the property as a compliance with the contract of sale.

These positions are fully sustained by the case of *Parker v. Fenwick,* 138 N. C., 209.

If, however, there is *an express warranty as to quality,* there is much conflict of authority as to the rights of the purchaser. All seem to be agreed, if the warranty is false, that so long as the contract is executory the purchaser may, upon discovery of the defect, rescind the contract and recover anything paid out or parted with as the consideration for it, or he may accept and recover damages for breach of the warranty; but if the contract is executed there is a difference of opinion as to the rights of the purchaser, a majority of the courts holding in such case that his remedy is on the warranty.

(462) The doctrine is stated in 35 Cyc., 434, with ample citation to support the text.

"In the absence of an agreement giving him the right to return the goods, it is the rule in most jurisdictions that the buyer in an executed contract of sale of goods cannot on a breach of warranty return the goods, his remedy in such case being on the warranty. On the other hand, in other jurisdictions it has been held that the buyer may resort to either remedy, and his right is recognized generally when the sale is executory."

Among the courts holding that the purchaser may resort to either remedy are those of California, Iowa, Kentucky, Maine, Maryland, Massachusetts, Missouri, Nebraska, Oklahoma, and Wisconsin; and while the question has not been discussed fully and the distinctions noted in our reports, we have at least three cases in which it is either held

that the purchaser may pursue either remedy or the right is assumed to exist.

In *Kester v. Miller Bros.*, 119 N. C., 476, the plaintiffs sold the defendants an engine, with a warranty as to quality, and after acceptance of the engine and its use it was discovered that it was defective, and speaking of the rights of the purchaser, the Court says:

"The defendants, when they discovered the defect in the engine, had the right to reject it and bring an action against the plaintiffs for such damages as they had sustained by reason of the plaintiffs' nonperformance of the contract, if they chose so to do; or they could have kept the engine and set up by way of counterclaim against plaintiffs' demand for the contract price the breach of warranty in reduction."

Again in *Manufacturing Co. v. Gray*, 124 N. C., 325:

"If the property purchased is present and may be inspected, the warranty is collateral to the contract and the title to the property immediately passes to the purchaser. And if the warranty is false, the purchaser's redress is an action for damages upon the warranty. But if the property is not present, where it might be inspected, the warranty may be treated as a condition precedent, as well as a warranty. And if the property purchased is not what it was warranted to be, the purchaser, upon delivery of the property, may treat the warranty as a condition precedent and refuse to receive or accept the property, (463) and notify the party from whom he purchased; and if he has not paid for the property, he need not do so; and if he has paid the purchase money or any part of it, he may recover the money so paid from the seller. The purchaser is not compelled in all cases to reject the property, at once, upon its receipt. If it is machinery, he has a reasonable time to operate the machinery for the purpose of testing it."

And in *Critcher v. Porter Co.*, 135 N. C., 547, which was dealing with a contract for the sale of an engine with warranty:

"If the plaintiff had, immediately upon the receipt of the engine, ascertained that it did not develop 25 horse-power as warranted to do, rejected it, or, as he expresses it, 'put it aside,' notifying the defendant thereof, it is clear that he would have been entitled to recover the amount paid and to a cancellation of his notes and the trust deed, together with such damage as he sustained and which were within the contemplation of the parties in his effort to use it."

The use of the word "immediately" impairs the force of the last quotation, but when considered in connection with the context, it appears that the defect— the failure to produce certain power—would not appear at once, but only after delivery and by use.

The rule is, however, further modified when there is a warranty and an agreement to return the property if not as warranted.

This qualification is stated to be that "The contract of warranty may, however, provide that if the article fails to fulfill the warranty, it shall be returned to the seller, and in such case the condition is part of the warranty and must be complied with, and the fact that within the time stipulated notice of dissatisfaction is given will not relieve the buyer from the conditions of the contract. The condition may be that the article shall be deemed to fulfill the warranty unless returned within a specified time. Under such conditions, if the buyer retains the goods he cannot avail himself of the breach, either in an action for dam-
(464) ages or by way of recoupment or counterclaim. If the provision of the contract is not imperative, but merely permits the buyer to return the property, he may, at his election, resort to that remedy or his remedy on the warranty, the remedies being cumulative. So, too, the contract may impose on the seller the duty of remedying defects or taking back the machine, in which case it is not incumbent on the buyer to return the machine in order to avail himself of the breach of warranty as a defense in an action for the price. The purchaser is entitled to a reasonable time within which to test the articles purchased for defects, and to return them if not as warranted. If the contract specifies the time within which return shall be made, a compliance with the contract in this regard is necessary." 35 Cyc., 437 *et seq.*

It is the same principle applied in *Manufacturing Co. v. Lumber Co.*, 159 N. C., 510.

It seems, therefore, to be settled that when there is an express warranty in the sale or exchange of personal property, and it is a part of the contract of sale that the property is to be returned within a specified time, if not as warranted to be, that the complaining party can have no redress by reason of the warranty, in the absence of fraud, without offering to return the property within the time named.

If so, the charge of his Honor is erroneous. The plaintiff and defendant agree that there was a contract between them for the exchange of mules, and the only differences between them as to the terms of the contract are, first, the plaintiff says the defendant warranted the mules to be sound, while the defendant says he warranted them to be sound as far as he knew; second, the plaintiff says it was agreed that if the mules exchanged were not as warranted to be, and either party was dissatisfied, they would rescind the contract, each party taking the mules he originally owned, while the defendant says that the time within which this right to rescind the contract could be exercised was restricted to one week.

The plaintiff did not offer to return the mules he got from the defendant until after the expiration of one week from the trade.

The charge given presents only the contentions of the plaintiff (465) upon this difference as to the terms of the contract, his Honor telling the jury, in the absence of fraud, if they found from the evidence that the defendant guaranteed the mules to be sound, when they were not, they would answer the first issue, as to the ownership of the mules, "Yes," which, if ordinarily a correct statement of the law, would not be true if the parties by agreement had limited the time within which the contract could be rescinded to one week.

The charge is predicated upon the assumption that the plaintiff's version of the contract is correct, and ignores the evidence of the defendant, which he had the right to have considered by the jury.

It is unnecessary to consider the other exceptions, as a new trial is ordered on account of the error pointed out.

New trial.

Cited: Oltman v. Williams, 167 N.C. 314 (1f); *Guano Co. v. Live-Stock Co.,* 168 N.C. 447 (1g); *Frick v. Boles,* 168 N.C. 657 (1f); *Wilson v. Lewis,* 170 N.C. 48 (1d); *Cotton Mills v. Mfg. Co.,* 170 N.C. 671 (1f); *Winn v. Finch,* 171 N.C. 275 (3g); *Farquhar Co. v. Hardware Co.,* 174 N.C. 376 (1f); *Fay v. Crowell,* 182 N.C. 535 (1f); *Swift & Co. v. Aydlett,* 192 N.C. 345 (1g).

CAROLINA AND NORTHWESTERN RAILWAY COMPANY v. O. D. CARPENTER AND THE HARDEN MANUFACTURING COMPANY.

(Filed 6 May, 1914.)

1. Deeds and Conveyances—Interpretation—Intent.

A deed must be interpreted as a whole, with the view of ascertaining the true intent of the parties, regarding the circumstances attending the transaction, the situation of the parties, and the status of the thing granted, when such are necessary and relevant.

2. Same — Railroads — Easements — Forfeiture — Covenant — Breach—Equity.

In construing a deed to lands—in this case a grant of an easement to a railroad company—conditions subsequent to the vesting of the title, which would work a foreclosure, should be strictly construed and taken most strongly against the grantor; and courts of equity will relieve against a forfeiture for breach of covenants in the conveyance when a just compensation can be made in money or other things of value.

3. Same—Conditions Subsequent.

The plaintiff granted a right of way over and upon his lands to the defendant railroad company in consideration of $1 and the benefits to accrue to his lands, with provision also that the defendant should locate on its road, within a specified time, a sidetrack and flag station and other conveniences usually given to mill companies; and after the habendum and tenendum clause, the conveyance expressly sets forth certain conditions the failure to observe which would work a forfeiture, such as the failure to operate the railroad, etc., through and upon said lands, etc.: *Held*, the deed should be construed as a whole, and it appearing therefrom that the construction of the road was necessarily of a permanent character and for the public use, and the conditions unperformed, the subject of the controversy, not appearing in that part of the deed containing the conditions subsequent, the latter will be considered as covenants running with the land, which, by the acceptance of the company, it will be obligated to perform, and upon its failure to do so, the grantor's right of action will either be for specific performance or sound in damages.

(466) APPEAL by defendant from *Webb, J.*, at October Special Term, 1913, of GASTON.

Civil action to enjoin defendants from interfering with the plaintiff's occupation of its right of way and station, upon these issues:

1. Have the defendants, O. D. Carpenter and Harden Manufacturing Company, wrongfully and unlawfully claimed and asserted a right to the exclusive possession and use of the plaintiff's siding, freight station facilities, and right of way at the station of Hardens, on said plaintiff's line of railway? Answer: Yes.

2. What damage, if any, has the plaintiff sustained thereby? Answer: $1.

J. H. Marion, A. L. Bulwinkle for plaintiff.

Cansler & Cansler, Mangum & Woltz for defendant.

BROWN, J. The controversy, in our opinion, is to be settled by a proper construction of the following deed:

(467) STATE OF NORTH CAROLINA—COUNTY OF GASTON.

Know all men by these presents, that the Harden Manufacturing Company of the said county and State, for and in consideration of the sum of five dollars ($5) to it paid by the Carolina and Northwestern Railway Company, the receipt whereof is hereby acknowledged, and in further consideration of the benefits to accrue to it by the use and occupation of the premises hereinafter described by said railway company for the purpose hereinafter indicated, do hereby bargain, sell, and convey

unto the said Carolina and Northwestern Railway Company the following described premises:

All that certain belt or strip of land lying within twenty-five (25) feet of the center line of said railway company as now located, through said manufacturing company's lands, with so much more land as may be actually necessary to build, maintain and operate said railway, only, through said strip or belt of land, not to exceed fifty (50) feet in width from the center line.

Provided said railway company locates or causes to be located within twelve months from this date, or within three months after it begins to operate trains over said strip or track, a side track, flag station, and other conveniences given other mill companies, at some suitable point on said manufacturing company's lands.

To have and to hold, all and singular, the said premises unto the said Carolina and Northwestern Railway Company, its successors, and assigns forever.

But this deed of conveyance is made upon the express consideration that said premises shall not be used or occupied by said railway company, its successors or assigns, for any other purpose or purposes than the building thereon of railway tracks and other works and structures necessary or incident to the operation of a railroad line or lines through and upon said land, such use and occupation to commence within two years from this date, and in the event such use of the said premises shall not be commenced within the said period, or in the event the said premises should ever thereafter cease to be used by said railway company, its successors or assigns, for the purpose aforesaid, for (468) a longer period than one year, then this deed of conveyance shall be null and void.

In testimony whereof the Harden Manufacturing Company have hereunto set its hand and affixed its seal, this 9th day of August, A. D. 1901.

HARDEN MANUFACTURING COMPANY, [L. S.]
O. D. CARPENTER, [L. S.]
Secretary and Proprietor.

We do not agree with the defendants that the proviso in the descriptive part of the deed is a condition subsequent, a failure to perform which divests the plaintiff's title and revests it in the defendant.

We must interpret the deed as a whole, and endeavor to ascertain the true intent of the parties. *Gudger v. White,* 141 N. C., 508.

The extent of the rights acquired must, therefore, depend upon the construction placed upon the terms of the grant, and in construing such

instruments, the Court will look to the circumstances attending the transaction, the situatoin of the parties, and the state of the thing granted, to ascertain the intention of the parties.

In cases of doubt, the grant must be taken most strongly against the grantor. Conditions subsequent working a forfeiture of the estate conveyed should be strictly construed, as such conditions are not favored in law, and are to be taken most strongly against the grantor to prevent forfeiture. 14 Cyc., 1201.

Courts in such cases will look to the good sense and sound equity—to the object and spirit—of the contract. Courts of equity will not aid in divesting an estate for a breach of a covenant—a contract—when a just compensation can be made in money or other valuable thing, but will relieve against forfeitures claimed by strict construction of any common-law rule. 12 Cyc., 706; *Robinson v. Ingram,* 126 N. C., 327.

This instrument sets out the intent and purpose of the parties, which was to convey a certain strip of land, as a right of way for a
(469) railway, in consideration of the benefits to accrue to the grantors. The use was a public use, as much, or more, for the public benefit as for the private advantage of the trustors.

It was not for a temporary purpose, but to secure the construction of a permanent structure to be constructed at great expense for the public service.

There are certain conditions subsequent in the deed, especially set out after the tenendum and habendum. Those conditions are to the effect that the grantee, its successors and assigns, shall use and occupy the land conveyed exclusively for railroad purposes, and that in the event such use shall not commence within two years from the date of the deed, or in the event the premises shall ever thereafter cease to be used for such purposes, for a longer period than one year, then the deed shall be void.

If the grantor had intended that the proviso set out in the descriptive part of the deed should ever take effect as a condition subsequent, he would have inserted it among the conditions subsequent expressly enumerated in the closing part of the deed. *Expressio unius est exclusio alterius.*

The proviso contains no words of forfeiture, and nothing to indicate that a failure to perform it should avoid the deed. Of course, it was inserted for the grantor's benefit, and that effect is given it by construing it to be a covenant or contract upon the part of the grantee, which an acceptance of the deed obligated it to perform.

If the defendant has failed to perform such contract, the plaintiff may compel it to do so, or recover damages for the breach by proper legal proceedings. *Parrot v. R. R., ante,* 295; *Oregon Ry. v. McDonald,* 32 L. R. A. (N. S.), 117.

There is nothing in this opinion which militates against the right of the defendant to sue on the contract or covenant mentioned.

The judgment of the Superior Court is

Affirmed.

Cited: Hinton v. Vinson, 180 N.C. 397 (2g); *Hinton v. Vinson,* 180 N.C. 402 (2j); *Ferguson v. Fibre Co.,* 182 N.C. 735 (2g); *Blue v. Wilmington,* 186 N.C. 325 (1g. 2b); *Shields v. Harris,* 190 N.C. 525 (2g); *Benton v. Lumber Co.,* 195 N.C. 365 (1g).

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W. E. BUCHANAN v. W. M. RITTER LUMBER COMPANY.

(Filed 6 May, 1914.)

Master and Servant—Disobedience of Orders—Negligence—Trials—Instructions.

An employee who acts in disobedience of the known rules and positive and direct instructions of his employer and leaves his place of duty and places himself in a dangerous position on his employer's premises, with which he was familiar, and consequently receives the injury, the subject of his alleged cause of action for damages, is knowingly and without excuse at a place he has no right to be, and an instruction upon the issue of contributory negligence is held for reversible error which is made to depend upon the findings of the jury upon the question of whether he exercised ordinary prudence and could have gotten to a place of safety after becoming aware of his danger.

APPEAL by defendant from *Webb, J.,* at August Term, 1913, of CALDWELL.

Council & Yount and Lawrence Wakefield for plaintiff.

Edmund Jones for defendant.

CLARK, C. J. This is an action for personal injuries. The plaintiff was engineer of the defendant's yard locomotive, his duty consisting in operating the engine and in shifting empty and loaded cars on the tracks and switches in said yard. He had been so employed for three years at the time of the injury complained of. At the time of the injury he was not on his engine, but was some distance away, sitting under a "loading dock." A fellow-servant named Cobb was rolling and pushing a heavy piece of timber for the purpose of shoving it over the dock, just above the plaintiff's head. He testifies that he looked over the dock, and, not

seeing any one, he slided the piece of timber over, and just then he saw a foot sticking out from below, but it was too late to stop the timber. It was a piece 4 by 10 inches and 14 feet long, of green oak. He testifies that the plaintiff told him that afternoon that he didn't blame him;

that if he (plaintiff) had attended to his work and let liquor alone
(471) he would not have gotten hurt; that he went up there to take a

drink of liquor with another man, but seeing the superintendent coming along, he went up through the mill under the loading dock and sat down until the superintendent passed. The superintendent testifies that he saw the plaintiff there just before he was hurt, and asked him what he was under the dock for, and told plaintiff to go immediately and get a certain car with his engine that the plaintiff at that time was 125 feet from where the engine was, but he did not pay any attention to the order. The plaintiff told him after the injury that he had gone under there to get a drink of whiskey, and that the "whiskey was to blame for the accident." It was against the rules of the company for employees to drink on the premises during work hours. Witness had never seen Buchanan, or any one else before, resting under that dock.

The court charged on the second issue as to contributory negligence that "The plaintiff had a right to get off his engine and a right to sit down under the dock, and if the jury should find, while sitting there, he did not hear the man above him handling the lumber, or could not have heard him by the exercise of ordinary care and prudence, and should find that he sat under there and did not know this lumber was going to come on him, and did not see it in time to get out of the way, and did not know that the fellow-servant was going to throw this lumber over the dock, and could not have known it by the exercise of ordinary care and prudence, and could not have gotten out of the way after he saw it before it fell on him and injured him, then the plaintiff was not guilty of contributory negligence." We think this instruction was erroneous. The evidence of the plaintiff himself is that he was 125 feet from his engine; that he knew the purpose of the loading dock, and that timber was shoved over it when in use; that he went under there to take a drink, which was contrary to the orders of the company, and to hide from the superintendent, who was coming up; that the superintendent told him to move his engine and take up the car, and he again disobeyed orders by remaining under the dock a while longer, until he was hurt. He was where he had no

business to be; he was away from his work and doing a prohibited
(472) act and hiding from the superintendent; when found, he did not

obey orders by going back to his work, but remained in the place of danger. Upon these circumstances the court erred in telling the jury that he had a right to go there and a right to leave his engine and was

not guilty of contributory negligence unless he saw or should have seen the falling timber in time to have avoided its falling upon him. For this reason there must be a

New trial.

W. J. PETTIGREW v. R. S. McCOIN.

(Filed 6 May, 1914.)

Actions Pending—Issuance of Summons—Statement.

Under the express provision of our statute a civil action commences upon the issuance of a summons from a court of competent jurisdiction (Revisal, sec. 359), and as the statute fixes the time of the inception of the action, it is pending from that time. Hence an action between the same parties upon the same subject-matter, returnable to a different jurisdiction, will abate, and upon motion will be dismissed, when it appears that the summons was subsequently issued, though served in priority of time.

CLARK, C. J., dissenting.

APPEAL by defendant from *Devin, J.*, at September Term, 1913, of DURHAM.

This is an appeal from the refusal of a motion to dismiss the present action, upon the ground of the pendency of another action in Vance County, heard upon the following facts:

"The defendant in this action caused a summons to be issued against the plaintiff here from the Superior Court of Vance County, on 5 March, 1913, entitled R. S. McCoin v. W. J. Pettigrew and the American Bonding Company of Baltimore, Maryland, which was immediately sent by mail to the sheriff of Durham County for service. It was in the office in Durham on the morning of 6 March, but the (473) sheriff was out of town and only received it on the morning of the 7th; but was unable to find the defendant, who was out of town, until the night of 8 March, when the summons was duly served, about the hour of 9 p. m.

"The summons in this action was issued on 7 March, 1913, from the Durham Superior Court, and sent by special messenger to Henderson, Vance County, on 8 March, 1913, when it was delivered to the sheriff of Vance County and served upon the defendant in this action early in the afternoon of that day, between the hours of 1 and 2 p. m., before the service of the Vance County summons upon the defendant in that case in Durham.

"Both actions are upon the same cause in courts of this State and between the same parties, with the addition in the Vance action of the surety upon the bond of the said Pettigrew for the performance of the contract set out in the complaint. Both actions are still pending and undecided.

"Upon the foregoing facts his Honor was of the opinion, and held, that the Superior Court of Durham was entitled to entertain and proceed with the action begun on 7 March, and denied defendant's motion to abate and dismiss this action," and . . . "the defendants excepted and appealed."

L. L. Lilley and Manning, Everett & Kitchin for plaintiff.

T. T. Hicks and T. M. Pittman for defendant.

ALLEN, J. The question presented by this appeal is whether an action is pending from the issuing of the summons or from its service.

There is a diversity, but not necessarily a conflict, of opinion on the point, due to the fact that it is held in some States that the action is commenced when the complaint is filed, in others when the process is issued, and in others when the process is served (1 A. and E. Pl. and Pr., 119), and this apparent conflict in the decisions as to the time of the commencement of the action seems to have originated in the difference in the rule at law and in equity, before the Code practice was adopted.

(474) "At common law the suit was considered as pending from the issuance of the writ; in equity the writ was issued after bill filed, and the suit regarded as commenced from the time of the service of the writ." *Handlon v. Handlon,* 37 W. Va., 491.

The authorities seem, however, to agree that the action is pending from the time of its commencement (1 A. and E. Enc. Pl. and Pr.), and our statute (Rev., sec. 359) declares in express terms that "An action is commenced as to each defendant when the summons is issued against him." Pending is defined in Black's Law Dictionary as "begun, but not yet completed; unsettled; undetermined. Thus an action or suit is said to be pending from its inception until the rendition of final judgment"; and as our statute fixes the inception of the action at the time of lawfully issuing the summons, we are of opinion it is thereafter pending.

The action has been commenced and is undetermined, and if not pending, the inquiry may well be made, Where is it, and what has become of it?

It is because of the pendency of the action that the courts issue restraining orders, appoint receivers, issue warrants of attachment, and do other things before the service of summons.

We have found only two authorities in our State bearing directly on the case under consideration: *Simmons v. Simmons,* 62 N. C., 65, decided before the adoption of the Code of Civil Procedure, of which Rev., sec. 359, is a part, in which it is said: "It seems, therefore, to be settled that a suit is not pending until the return, or at least until service of process," and *Webster v. Laws,* 86 N. C., 179, decided after the adoption of the Code.

In the last case the summons was issued by a justice on 9 August, 1879, and the cause tried on 20 August, 1879. The defense relied on was the pendency of another action, in which the summons had been issued before 9 August and was returnable on that day, but which had not been served. The judge in the Superior Court held that the first action was pending, and this ruling was reversed on appeal, the Court saying: "We do not concur in the ruling that, upon the facts found, the first action was pending when the second action was begun. The pro- (475) cess not having been served, was exhausted on the day fixed for its return, and the action was in law then discontinued.

If the action was discontinued on the return day, and not until that time, it would seem to follow that it was pending from the time of issuing the summons until the return day, although the summons had not been served.

We are therefore of opinion that the action in Vance County was pending at the time of the institution of the action in Durham, and so hold.

Reversed.

CLARK, C. J., dissenting: Under Rev., 429, a civil action is "Commenced" by issuing the summons. But it is "pending" only from service of the summons or acceptance thereof. Rev., 445, provides: "From the time of *service* of the summons in a civil action or the allowance of a provisional remedy, the court is deemed to have *acquired and to have control* of all subsequent proceedings." It would seem clear that until the court has thus acquired jurisdiction, the cause is not "pending" in said court. It is merely "commenced" by the issuing of the summons.

This is clearly held in *Simmons v. Simmons,* 62 N. C., 65, in which it is said: "It seems, therefore, to be settled that a suit is not *pending* until the return, or at least until *service* of process." That case is fully discussed by *Reade, J.,* with citation of authorities. That ruling was cited and approved, *Lynch v. Lynch,* 62 N. C., 46, and has never been overruled. While that case was decided prior to the adoption of the Code of Civil Procedure is presumed to have been with the knowledge and an adoption pending," and the use of the words thereafter in the Code of Civil

Procedure is presumed to have been with the knowledge and an adoption of the construction placed by the courts upon that phrase. This construction has not been changed by any statute, nor has it been ruled otherwise.

Webster v. Laws, 86 N. C., 179, merely holds that when a magistrate's warrant was "not served, it was exhausted on 9 August, the day fixed for its return, and the action was in law then discontinued." In that case the warrant in the second action was issued on 9 August, and as (476) the other action had been discontinued, there was no other action "pending" on 20 August, when judgment was rendered in the latter case.

It would seem that this is the recognized ruling in this State, and it is amply sustained by authorities elsewhere, some of which are: 1 Cyc., 23, which says: "It is held that an action is not pending, to be available in abatement, until after service of the writ or of other process therein," citing *Kirby v. Jackson,* 42 Vt., 552; *Morton v. Webb,* 7 Vt., 123; *Downer v. Garland,* 21 Vt., 362; *Primm v. Gray,* 10 Cal., 522; *Weaver v. Conger,* 10 Cal., 233; *Burton Co. v. Cowan,* 80 Hun. (New York), 392; *s. c.,* 30 N. Y. Supp., 317; *Warner v. Warner,* 6 Misc. (N. Y.), 249; *s. c.,* 27 N. Y. Supp., 160. 1 Cyc., 24, also cites *Webster v. Laws,* 86 N. C., 178, that "where process is not served on the day fixed for its return, the action is discontinued. Consequently such action cannot be pleaded in abatement of an action commenced on the return day of the first process."

In *Byne v. Byne,* 1 Rich. (S. C.), 438, it is held that illegal service of process does not constitute the pendency of an action which will bar the bringing of another suit. Indeed, it has been held in 1 Cyc., 24, in some cases that the summons must not only be served, but returned and entered, before it can be pleaded, citing *Perkins v. Perkins,* 7 Conn., 558; *Com. v. Churchill,* 5 Mass., 174; *Bullock v. Bolles,* 9 R. I., 501; *Reynolds v. McClure,* 13 Ala., 159; *Dean v. Massey,* 7 Ala., 601. Also 1 Enc. L. and P., 1084, citing *Burlingham v. Cooper,* 36 Neb., 73; *Trust Co. v. Atherton,* 67 Neb., 305; *Pollock v. Pollock,* 2 Ohio Cir. Ct., 140; *Clark v. Helms,* 1 Root (Conn.), 486; and numerous other cases in that State. Later cases are *Monroe v. Millizen,* 113 Ill. App., 157; *Guinn v. Elliott,* 123 Iowa, 79; *McMaham v. Hubbard,* 217 Mo., 624; *Hart v. Hart,* 83 N. Y. Supp., 897.

As to ancillary remedies under our Code, it is not required that any of them be issued after the action is pending. It is required that such orders in Arrest and Bail "may be made to accompany the summons or to issue at any time afterwards before judgment." (Rev., 731.) In Attachment, "to accompany the summons or at any time after the

commencement of the action" (Rev., 731); in Claim and (477) Delivery, "at the time of issuing the summons or at any time before answer" (Rev., 790); as to Injunctions, "at the time commencing the action or at any time afterwards, before judgment" (Rev., 810). As to receivers, the same rule applies "as is provided for injunctions" (Rev., 846).

Upon the reason of the thing, as well as upon authority, an action should not be forbidden to be brought simply because the other party has issued a summons, but this should be only after jurisdiction of the action is "acquired by service of a summons" (Rev., 445), for until then the defendant is not in court, and the case is not "pending." See *Worth v. Bank,* 121 N. C., 348, 349.

Any other construction would lead to much abuse, for a party who might wish to delay a proceeding could issue the summons to his own county and by successive aliases keep the cause in existence so that the other party, especially if living in another county, would be held up and barred from bringing an action there. When, however, the other party has been served and brought into court he can set up his counterclaim. This he cannot do if the mere issuing and reissuing of the summons, without service, is a pending action. This course would at least enable a party who wishes to put off litigation to do so always by the mere issuing of a summons at a cost of a few cents, and thus preëmpt the venue for his own county, when the defendant lives in another, and he can continue to do so.

Upon the facts in this case, the judgment of the court below should be Affirmed.

Cited: Barnett v. Mills, 167 N.C. 584 (d); *Construction Co. v. Ice Co.,* 190 N.C. 581 (f); *Morrison v. Lewis,* 197 N.C. 80 (f); *Atkinson v. Greene,* 197 N.C. 120 (g); *Thompson v. R. R.,* 216 N.C. 556 (f); *McFetters v. McFetters,* 219 N.C. 734 (g).

(478)

JOURNAL PUBLISHING COMPANY v. E. F. BARBER.

(Filed 6 May, 1914.)

1. Principal and Agent—Ratification—Acceptance of Benefits—Contracts—Repudiation in Part.

Where the agent has, with the authority of his principal, made a sale of a machine, representing it as his own, but owned by this principal, to a corporation, and has exceeded his authority, with the knowledge of the

principal, in taking shares of the corporation's stock in payment, in which transaction the principal has received and knowingly retained a substantial benefit, the principal may not repudiate the transaction in part by retaining the benefits, and repudiate that part which appears to him to be to his disadvantage, and where, under such circumstances, the parties may not be placed, by a court of equity, in *statu quo*, the transaction will not be disturbed.

2. Equity—Debtor and Creditor—Payment—Volunteer—Subrogation by Implication.

One who acts under a *bona fide* and reasonable belief that he is bound to the payment of a debt of another secured by a lien or mortgage or otherwise, is, on making payment thereof, subrogated to the rights of the creditor in the securities, for while ordinarily the payment of a debt by a stranger, a mere volunteer, without request from the debtor, extinguishes the original obligation and releases the securities, the doctrine of subrogation may arise from implication, depending upon the equities surrounding the particular transaction, which are to be administered according to their priorities.

3. Same—Principal and Agent—Husband and Wife—Parties.

A., the wife of B., purchased a Mergenthaler type machine, paid part of the purchase money, gave a chattel mortgage to secure the deferred payments, and B., her husband, acting as her agent, and with authority to sell the machine, but dealing with the plaintiff corporation as the owner, and so representing himself, contracted to sell the machine to the plaintiff, under an agreement that the plaintiff would pay with its stock the amount paid to the vendor of the machine, assume the deferred payments, and to meet some of them, the plaintiff gave its note to the agent, which the latter discounted at a bank and applied the proceeds accordingly, the plaintiff having paid this note since the institution of this action: *Held*, (1) A., the principal, was not a necessary party to the suit, as she had assigned all her rights. (2) The plaintiff was entitled to subrogation, for the partial payment, *pro tanto*. (3) The mortgage creditor, who accepted the partial payment was the only one who could object to the plaintiff's right of subrogation, and as he had been fully satisfied, it was held that A. and her assignee, the defendant, having received and knowingly retained the benefits of the transaction, would, under the circumstances, have no cause of complaint, and could not prevent subrogation.

4. Equity—Subrogation—Volunteer — Payment — Debtor and Creditor — Rights of Debtor.

One who is otherwise entitled to subrogation to the rights of the creditor in a mortgage of the principal debtor pledged for the payment of the debt will not be denied this right *pro tanto*, upon making a partial payment thereon, when the creditor does not object or his equities are not interfered with, there being no intervening prior equity.

(479) APPEAL by defendant from *Lane, J.*, at September Term, 1913, of FORSYTH.

These are the facts of the case, so far as necessary to state them: Mrs. Julia Gray Moore, wife of F. A. Moore, while they lived in Goldsboro, N. C., where Mr. Moore was connected with the *Argus*, a newspaper published in that city, purchased of the Mergenthaler Linotype Company one of its linotype machines for $3,315, paying for the same in cash down, $1,000, and giving her several notes for the balance, secured by a chattel mortgage on the machine, which was duly registered. Mrs. Moore afterwards paid $390 by taking up two of the notes for $195 each, making $1,390 paid in all. They then moved to Winston-Salem, N. C., where Mr. Moore formed a connection with the plaintiff company, as business manager and editor. As the company needed money to continue the publication of its paper, and Moore was short of funds to pay his part, it was agreed that the company should buy the machine, giving its note to Moore for $575 and assuming the indebtedness to the Mergenthaler Company remaining after discounting the said note and applying the proceeds, $550, to three of the notes held by the Mergenthaler Company of $195 each, which were then overdue, the Publishing Company agreeing to issue $1,390 of its stock to pay for the equity of (480) Mrs. Moore in the machine, that being the amount she had paid on the purchase. There was evidence that this transaction was conducted by Mr. Moore in his own name, and apparently for his own benefit, as if he was the owner of the machine, though plaintiff contended that he was acting for his wife, as her agent to sell the machine, and with her full knowledge and authority to make the sale. It appears in the record that there was evidence to support this contention. When informed of the terms of the sale, Mrs. Moore declined to be bound thereby with respect to the plaintiff's stock, and demanded that cash for the $1,390 be paid, or a good bankable note for the amount be given to her. The note of plaintiff for the $575 was discounted at bank, and the proceeds, $550, applied to the Mergenthaler notes; but before this was done, plaintiff acquired knowledge of the fact that Mrs. Moore, and not Mr. Moore, owned the machine, and that Mrs. Moore had paid the $1,390 on the purchase money of the machine; but it acted upon the assumption, when the $575 note was discounted, that Mr. Moore was acting for his wife. Mrs. Moore testified, substantially, that while she knew that her husband was acting in her behalf, and was negotiating with plaintiff for the sale of the linotype to it, and assented thereto, she did not authorize him to take any stock as part of the purchase money, and repudiated what he had done in that respect as soon as she heard of it. There was evidence that Barber, the defendant, bought with full knowledge of plaintiff's rights, and has been indemnified against any loss.

Plaintiff brought this action for the purpose of being subrogated to the rights of the Mergenthaler Company to the extent that the proceeds of the discounted note, $550, had paid off its claim, and to that end it prays that the machine may be sold and the proceeds paid out according to the interest of the parties.

The jury returned the following verdict:

1. Did the plaintiff, at the request of F. A. Moore, advance $575 to be used in taking up three notes, due respectively 14 September
(481) and December, 1909, and 4 March, 1910, which notes were secured by the deed of trust on the linotype machine described in the pleadings? Answer: Yes.

2. If so, at the time of such advancement, had the said F. A. Moore contracted to sell to the plaintiff, and had the plaintiff agreed to buy said linotype machine, as alleged in the complaint? Answer: Yes.

3. What part, if any, of the said $575 was actually used toward the payment or discharge of said notes? Answer: $550.

4. Was the said F. A. Moore acting as the agent or to the knowledge of his wife, Julia Gray Moore? Answer: Yes.

5. At or prior to the time the defendant purchased and paid for said linotype machine, did he have full knowledge of said plaintiff's claim? Answer: Yes.

6. If so, did the plaintiff, prior to the payment of the purchase money, notify defendant that it waived any claim it might have against said machine? Answer: Yes.

6½. Did the plaintiff, prior to the payment of the purchase money, renotify the defendant of its rights and equities against the machine? Answer: Yes.

7. Has the said Julia Gray Moore accepted the benefit of the money advanced by the plaintiff and applied on her mortgage indebtedness by her said husband, and ratified the same? Answer: Yes.

8. Is the plaintiff entitled to a lien on said machine to the amount paid by it on the mortgage indebtedness of the said Julia Gray Moore? Answer: .....

9. Did Julia Gray Moore, prior to the sale of the machine to the defendant, have knowledge of the advancement of $575 by the plaintiff to her husband, which had been used to discharge the notes? Answer: Yes.

10. Was Mrs. Julia Gray Moore the owner of the linotype machine at the time the said three notes were paid off by the plaintiff? Answer: Yes.

Judgment was entered on this verdict for the plaintiff, and defendant appealed.

A. H. Eller and Manly, Hendren & Womble for plaintiff. (482)
Manning, Everett & Kitchin for defendant.

WALKER, J., after stating the case: There are two questions presented in this case, one arising out of the equitable principle of subrogation and the other out of the law of agency. Defendant Mrs. Moore contends that the plaintiff has not brought itself within the protection of the doctrine of subrogation, because, first, her husband was not authorized to contract with plaintiff in respect to the sale of the Mergenthaler linotype so as to bind her; second, that the full amount of the debt owing by her to the Mergenthaler Company was not paid from the proceeds of plaintiff's discounted note, but only a part thereof, and, third, that plaintiff was a mere volunteer and under no legal obligation to pay the debt, even *pro tanto*. She also contends that plaintiff did not pay the note given to Mr. Moore until after the commencement of this action; and, lastly, that she is a necessary party to this suit to protect her interests.

We are satisfied, from Mrs. Moore's own testimony, that there was sufficient evidence of her husband's agency to be left to the jury. It appears therefrom that she knew he was assuming to act for her in the pending negotiations for the sale of the linotype to plaintiff, and being aware of this fact, if she had not consented to his doing so, it was her plain duty to disavow his act, in order that the plaintiff would not be prejudiced by his false assumption of authority. But there is additional proof that he was so acting, not only with her knowledge, but with her express consent. This being so, it is clearly established that, where an agent exceeds his authority, his principal must either wholly ratify or wholly repudiate the transaction. He cannot accept the beneficial part and reject what is left of it. 31 Cyc., 1257, 1258; *Rudasill v. Falls*, 92 N. C., 222.

In the case just cited, *Chief Justice Smith* says:

"'The principal cannot, of his own mere authority, ratify a transaction in part and repudiate it as to the rest,' is the language of *Mr. Justice Story* in section 250 of his work on Agency. 'He must either adopt the whole or none.' Another recent author lays (483) down the same doctrine thus: 'A nullification must extend to the whole of a transaction.' So well established is this principle, that if a party is treated as an agent in respect to one part of a transaction, the whole is thereby ratified. From this maxim results a rule of universal application, that where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made '*cannot take the benefit of it without bearing its burdens.* The contract must be performed in its entirety.' Ewell's Evans' Agency, 70 (Ed. of 1879, p.

95). The rule rests upon sound reason and abundant authority. *Crawford v. Barkley,* 18 Ala., 270; *Hodnett v. Tatum,* 9 Ga., 270; *Bank v. Hanner,* 14 Mich., 208; *Coleman v. Itache,* 1 Ore., 115." See, also, *Christian v. Yarborough,* 124 N. C., 72.

Mrs. Moore and her assignee, the defendant E. F. Barber, have received the benefit of the reduction in the mortgage indebtedness by the payment thereon of the proceeds of the discounted note given by plaintiff to Mr. Moore, agent of his wife, but they now insist upon retaining the same, and have made no offer to return the amount thereof to plaintiff, so that the parties can be placed in *statu quo.*

Plaintiff was not a volunteer. It acted upon the *bona fide* belief, and had the right to do so, that Moore either owned the machine himself or had authority from his wife to sell it, if she owned it. There is no evidence that plaintiff did not act honestly in the transaction. It was attempting in good faith to protect its own interests in what it believed to be a rightful sale of the property to it. The fact that it may have been mistaken in this belief does not make it a volunteer, while it is true that a mere volunteer or intermeddler who, having no interest to protect and without any legal or moral obligation, pays the debt of another, is not entitled to subrogation without an agreement to this effect, or an assignment of the debt, and that the payment by him absolutely extinguishes the debt. It always requires something more than the mere payment of a debt in order to entitle the person paying the same to be substituted (484) in the place of the original creditor. There must be the discharge of a legal obligation for another who is under a primary obligation, for no man can make another his debtor without his consent, and only a creditor or person under liability can invoke the doctrine, there being no debt, there can be no ground for subrogation. Furthermore, the payer must have acted on compulsion to save himself from loss, and it is only in cases where the person paying the debt of another stands in the relation of a surety, or is compelled to pay in order to protect his own interests or by virtue of legal process, that equity substitutes him in the place of the creditor without any agreement to that effect; in other cases the debt is absolutely extinguished. 37 Cyc., 375.

Volunteers, in the absence of some special circumstance upon which they can base their claims, can obtain the equal right to be subrogated only by virtue of an agreement, express or implied, or by request from the debtor to pay, which is in effect an implied contract, or by ratification, or by taking an assignment of the debt. But payments made in ignorance of the real state of facts cannot be said to be voluntary, and a person who has paid a debt under a colorable obligation to do so, that he may protect his own claim, or under an honest belief that he is bound,

will be subrogated; and a person who mistakenly, but in good faith, believes that he has an interest in property, to protect which he discharges a lien, is subrogated to the lien for his repayment; and subrogation is sometimes extended to cases of payment by persons not legally bound to pay, but who do so, not as volunteers, but with a well-founded expectation, justified by the conduct or the contract of the debtor, that they will be entitled to hold the securities for their indemnity which the creditor had against the debtor; and in one jurisdiction it has been held that a stranger who pays a debt without request by the debtor, when his payment is not ratified by the debtor, may bring a suit in equity, praying relief in the alternative, that if the debtor do not ratify such payment the debt may be enforced in his favor as its equitable assignee, or, if so ratified, that he be decreed repayment of the amount paid for the use of the debtor. "Payment under a moral obligation is (485) not voluntary." 37 Cyc., 376 to 379 and notes.

Mr. Sheldon, in his standard treatise on the Law of Subrogation, states the rule clearly, with apt illustrations and examples, in section 36: "The right of subrogation does not depend upon the validity of the title of the person claiming to be reimbursed for his payment in discharge of a prior encumbrance. It is merely necessary that his payment should have been made in good faith for the protection of an interest which he believed himself to have in the estate, and in discharge of a burden actually resting upon the property, so that his payment has increased the value of the estate for the benefit of those who turn out subsequently to be owners of title. The benefit of subrogation has accordingly been allowed to one who held merely an invalid or a verbal contract for the conveyance of the land which he has freed from an encumbrance; to the assignee of one who held such a contract; to one whose only title was under an invalid mortgage, or under a voidable decree; to one who claimed only under a void or a voidable sale, even after the avoidance of the sale by order of court; to an unsecured creditor who has paid off a mortgage debt in compliance with an erroneous order of court; to a devisee who has only a contingent remainder in the encumbered estate, and to one who holds merely an equitable lien upon the property. If he *bona fide* claims an interest, he is not a mere volunteer, and may be subrogated, but he must show that he had or supposed he had some interest to be protected."

And again, at section 247: "One who pays a debt at the instance of the debtor, under such circumstances that it appears to have been contemplated by the parties that he should become entitled to the benefit of the security for the debt held by the creditor from the debtor, may, as against the debtor and the debtor's estate, be subrogated to the benefit of

such security and of the debt which he has discharged. And a party who has paid a debt at the request of the debtor, under circumstances which would operate a fraud upon him if the debtor were after-
(486) wards allowed to insist that the security for the debt was discharged by his payment, may also be subrogated to the sucurity, as against the debtor." He then adds that while the right will not be enforced in favor of a mere volunteer or stranger, who was under no obligation to pay the debt, or any part of it, yet if it may be gathered from the circumstances attending the transaction that it was not intended to extinguish the debt, but the payment was made in reliance upon the security, a species of conventional subrogation arises by implication. One who had paid off a mortgage debt under the mistaken belief that the title to the land was in his wife, while it really belonged to her daughter by a previous marriage, was allowed against the daughter a charge upon the land to reimburse him for this payment. So the lender of money borrowed by a corporation *ultra vires* may be subrogated to the rights of lawful creditors of the company who have been paid out of such money, and allowed to recover from the company to the extent of the lawful liabilities so paid off.

For the prevention of fraud, a person who advances money to pay off a mortgage, believing that it was the only lien upon the land, may be subrogated to the lien of that mortgage, as against a surety who has paid a judgment which was a lien subsequent to the mortgage, and the payment of which appeared by the record to have been otherwise provided for. Sheldon on Subrogation, pp. 30, 31, sec. 19, citing *Haggerty v. McCanne,* 25 N. J. Eq., 48; *Brooks v. Blackburn Benefit Society,* 1 App. Cases (Eng.), 857; *B. B. Society v. Cunliff,* 22 Ch. Div., 61; *Wenlock v. River Dee Co.,* 19 Q. B. Div., 155.

It has been held that though a mere volunteer cannot, by paying off a mortgage, acquire an equitable lien or any right of subrogation, yet if he advances the money to redeem or pay off a mortgage at the request of one who is interested or bound to discharge it, he may be protected against such person by subrogation. Sheldon on Subrogation, p. 31; *Gans v. Thieme,* 93 N. Y., 225, and other cases cited by Sheldon in note 6, p. 31.

In the case of *Gans v. Thieme, supra,* the Court said: "It is no doubt true, however, as the learned counsel for the respondent argues,
(487) that a volunteer cannot acquire either an equitable lien or the right to subrogation (*Sanford v. McLean,* 3 Paige, 122; *Wilkes v. Harper,* 1 N. Y., 586; 2 Barb. Ch., 338); but one who, at the request of another, advances his money to redeem or even to pay off a security in which that other has an interest, or to the discharge of which he is bound,

is not of that character, and in the absence of an express agreement one would be implied, if necessary, that it shall subsist for his use, and it will be so enforced, But the doctrine of substitution may be applied although there is no contract, express or implied. It is said to rest 'on the basis of mere equity and benevolence' (*Cheeseborough v. Millard,* 1 Jons. Ch., 409; 1 Story's Equity Jurisprudence, sec. 493), and is resorted to for the purpose of doing justice between the parties. . . . It will subserve the purposes of justice and violate no rule of law to subrogate them to the lien of the mortgage as against any of the parties to this action, since their title was affected by it (*Barnes v. Mott,* 64 N. Y., 397; 21 Am. Rep., 625), and no wrong can be done to either by putting the plaintiffs in the place of the original creditor."

Bispham on Equity, at p. 454, states that where a debtor borrows money for the purpose of discharging a lien, the person thus advancing the money may be subrogated by the debtor to the creditor's rights, and is not to be deemed a volunteer. And this result may follow in certain cases even where no such express agreement for subrogation exists. No general rule, in short can be laid down. Each case must be decided on its own merits, citing *H. L. B. Association v. Fire Association,* 180 Pa., 522.

Let us consider for a moment the elementary conception of subrogation and its primary elements. It is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. The doctrine is one of equity and benevolence, and, like contribution and other similar equitable rights, was adopted from the civil law, and its basis is the doing of complete, essential, and perfect justice between all the parties without regard to form, and its object is the prevention (488) of injustice. The right does not necessarily rest on contract or privity, but upon principles of natural equity, and does not depend upon the act of the creditor, but may be independent of him and also of the debtor. While subrogation is not founded on contract, there must, in every case, where the doctrine is invoked, in addition to the inherent justice of the case, concur therewith some principle of equity jurisprudence as recognized and enforced by courts of equity. Where the right of subrogation exists, it is subject to prior equities and all the rules of equity. The subrogation just described is very generally referred to as legal subrogation to differentiate it from conventional subrogation or subrogation arising from express contract between the payer and the debtor or creditor that the payer shall be subrogated, rather than from the automatic operation of a rule of law upon a given set of circumstances. Conventional subrogation or subrogation by act of parties may take

place by the debtor's agreement that one paying a claim shall stand in the creditor's shoes, and furthermore can arise only by reason of an express or implied agreement between the payer and either the debtor or the creditor, and the agreement, like other agreements, must be supported by a consideration. It is not essential to subrogation by convention that the creditor should be a party to the agreement between the debtor and a third party, provided no intervening rights to the security have occurred; but subrogation by convention is not applicable where it would prejudice the rights of innocent parties. 37 Cyc., pp. 363 *et seq.* The nature and grounds of subrogation are very clear. The difficulties arise in its application to the innumerable complications of business. The courts incline, however, rather to extend than restrict the principle, and the doctrine has been steadily growing and expanding in importance, and is becoming more general in its application to various subjects and classes of persons, the principle being modified to meet the circumstances of the cases as they have arisen. 37 Cyc., p. 373. The doctrine has been applied much more extensively, it has been said, in the courts of this country than in English jurisprudence, under the initial guidance
(489) of *Chancellor Kent.*

Applying these principles to our case, and the right of the plaintiff to this equity clearly appears. There was good ground for it to believe that Mr. Moore was acting within his authority, either personal or representative, and the plaintiff acted in good faith, believing that it was acquiring a perfect title to the machine; it made the note for the purpose of being discounted, so that the proceeds might be applied to the payment of the notes then due, and they were so applied; it paid the notes in the protection of the interest in the property which it then believed would pass to it under the contract with Mr. Moore. It acted prudently and not rashly, in view of the facts and circumstances as they then appeared to be. Mrs. Moore has received and she and defendant now enjoy the benefit of the payment.

Sheldon almost states our case at section 19: "Where a person advances money to pay off a mortgage debt under an agreement (express or implied) with the owner of the equity of redemption or his representative that he shall hold the mortgage as security for his advance, but the mortgage, instead of being assigned to him, is discharged in whole or in part, he is yet entitled as against subsequent parties in interest to be subrogated to the rights of the mortgagee and to enforce the mortgage."

Cases in our own reports illustrate the doctrine that though the party who makes the payment may, in fact, have no real or valid legal interest to protect, he may yet be subrogated when he acts in good faith, in the belief that he had such interest. An administrator who had paid the

debts of his intestate to a larger amount than the assets in his hands was, in equity, substituted to the rights of the creditors whose claims he had thus satisfied, and recovered of the heir the sum overpaid. *Williams v. Williams,* 17 N. C., 69. The Court said his act was not officious nor the act of a mere stranger who endeavors to make one his debtor by payments on his account which were made against his will and without his request. He was not an intermeddler, if he acted in good faith, nor was it a mere act of "unauthorized forwardness" beyond his known obligations and duty. *Sanders v. Sanders,* 17 N. C., 262. And so, (490) in *Scott v. Dunn,* 21 N. C., 425, where an executor had sold lands of his testator without any authority to do so and under a mistake of his power, and applied the proceeds to the payment of the debts, and the purchaser was evicted by the devisee, the land was subjected, in equity, to indemnify the purchaser to the extent of the payment on the debts, and so far as the personal property was not sufficient to pay them. *Judge Gaston* said, at p. 427: "As between Dunn and the plaintiffs, if their money were yet in his hands, he could not retain it with a safe conscience, and would be obliged to refund it. And it seems to us clear that if he could rightfully reclaim it from his codefendants, he might be compelled to assert this right, or permit the plaintiffs to assert it in his name, in order that it might be refunded. The court would do this upon the same principle by which the surety, on making satisfaction to the creditor, becomes entitled to demand every means of enforcing payment which the creditor himself had against the principal debtor: a principle which, when traced to its origin, is founded on the plain obligations of humanity which bind every one to furnish to another those aids to escape from loss which he can part with without injury to himself. (Home's Prin. of Equity, 84.)" See, also, *Springs v. Haven,* 56 N. C., 96; Perry *v. Adams,* 98 N. C., 167; *Smith v. Brown,* 101 N. C., 349.

In *Springs v. Haven supra, Judge Pearson,* referring to an unauthorized sale by Lewis Dinkins, as executor of Thomas Kendrick, said: "To mend this difficulty, the plaintiffs must have recourse to another well established doctrine of this Court, namely, that of 'substitution.' According to this doctrine, the plaintiffs (as purchasers) are not entitled *to the land,* but have an equity to be substituted in the place of the creditors of Kendrick, whose debts were paid with the money received from Lewis Dinkins, arising from the sale of the land. That money discharged debts for which the land was liable, and as the defendants take the land, of course they take it subject to the repayment of the money by means of which the lands was exonerated. *Scott v. Dunn,* 1 Dev. and Bat. Eq., 425, is in point as to the application of the principle, and (491) also as to the mode of redress. There it is said: 'The doctrine of

substitution is not founded on contract, but on the principle of natural justice. Unquestionably the devisees cannot be injured by the mistake of the executor as to the extent of his power over the land, but that mistake should not give them *unfair gain.*' "

In our case the principles of equity require, in order to do justice, that plaintiff should be substituted *pro tanto* to the rights of the mortgagee as against the property now in the hands of the defendant, unless the other objection of defendant should be allowed to prevail.

It is contended that a payment of a part of the secured debt is not sufficient to induce the court to act in behalf of the plaintiff. But this is an erroneous view of the principle invoked, in its application to the facts. The general principle undoubtedly is that such a payment will not be sufficient, but there are exceptions to this rule.

37 Cyc., p. 409, thus states this doctrine and its limitations: "A *pro tanto* assignment or subrogation will not be allowed, and the same rule applies to an indorser. But although the rule is sometimes narrowly stated that the surety is not entitled to subrogation until he has paid the entire debt, if a surety pays part of the debt and the principal the balance, the surety will be subrogated to all the benefits which the creditor had against the principal to the extent of his payment, and in general it is sufficient if the balance of the creditor's debt has been otherwise satisfied. Nor is it essential that the surety should have paid the full amount of the debt in money, provided the creditor be satisfied; if he has discharged the burden, leaving in the creditor nothing further to demand, he will be entitled to subrogation, but only for indemnity to the extent of the money paid or value of the property applied."

It will be seen that this principle of *pro tanto* subrogation applies except where it interferes with the rights of the creditor holding the security, and a part payment is sufficient as against the debtor and mort-
gagor to raise the equity in behalf of the one who has made the
(492) partial payment. He is entitled to the benefit of the equity,
but subordinate to the creditor's prior right, and the latter must not be prejudiced by allowing it. 37 Cyc., 409 and 410. At the latter page it is said: "Only a creditor holding the securities can object to a subrogation *pro tanto* of a surety who has paid a portion of the debt, whether the surety has entirely satisfied the debt or not, and the creditor may allow the surety to be subrogated before the indebtedness is wholly satisfied." "He (the party making the payment) will not be subrogated to the benefit of the mortgage *as against the others who are secured* thereby, by his having furnished the debtor with the means to make a partial payment of the mortgage debt even though he holds the agreement of the mortgagor that he shall be protected by the mortgage The mort-

gagor's agreement cannot prejudice the mortgagees, though it would bind the mortgagor himself." (Italics ours.) Sheldon, sec. 19; *Cameron v. Tome,* 64 Md., 507; *Haven v. R. R.,* 109 Mass., 88. Sheldon, sec. 128, also states this principle with clearness: "It is the creditor who is entitled to satisfaction; and neither the debtor nor any other creditors can object to any arrangement between the surety and the creditor for the subrogation of the surety, whether the latter has or has not completely satisfied the debt. . . . If the principal debtor has himself paid part of the indebtedness, and the surety only the balance, yet, when once the creditor is wholly satisfied, the same principle of equity which substitutes the surety who has paid the whole debt to the place of the creditor will equally protect the surety paying a part thereof, to the extent of his payment. A partial payment is sufficient to establish the surety's right as against the principal, or any one standing in the place of the principal; it is only the creditor who can insist that the debt must be paid in full. Nor need the surety's payment be in money; whatever is accepted by the creditor as a payment, so as to discharge the principal debtor from his liability, will operate as a payment in favor of the surety. But until the creditor has been paid in full, the surety cannot, against the will of the creditor, in any manner interfere with the latter's rights or securities, so as to put him to an embarrassment in collecting (493) the remainder of his demand. If the surety has made partial payments upon a debt secured by a mortgage from the principal debtor, then upon foreclosure any surplus proceeds over the amount needed to pay the creditor in full must be applied to repay the surety." See, also, *Gedge v. Matson,* 25 Beav., 310; *Comins, v. Culver,* 35 N. J. Eq., 94; *Rooker v. Benson,* 83 Ind., 250.

It will be seen from these authorities that the *creditor* alone can object to subrogation under a partial payment, and only to the extent that it would impair his preferred rights. The last reference to Sheldon also answers the other objections.

Here the original creditor, the Mergenthaler Company, has been satisfied and retired from the transaction, and has no further interest in it, and before this occurred, it had accepted the proceeds of the discounted note as a payment *pro tanto,* and this satisfied the debt to its amount. The position of the defendant, that the note was not paid until after the suit was brought, and therefore there was no payment before and consequently no cause of action, is clearly untenable. It is payment to the creditor, or what he accepts as payment, and not the manner of raising the money, that brings into play the equity of subrogation, and it makes no difference that the note upon which the money was procured by discount had not been paid when the suit was commenced.

Plaintiff was liable upon it to the bank at which it was discounted. Equity does not regard the form, but the substance, of the transaction. The creditor's debt was satisfied *pro tanto* by the discount and application of the proceeds, even though plaintiff's note was not paid.

The principle stated in the authorities cited by defendant (Van Zile on Equity Pleading and Practice, secs. 446, 448, 450; 4 Pomeroy's Eq. Jur., sec. 923, and *Sanford v. McLean,* 23 Am. Dec., 773) are not at variance with those expressed herein, but in perfect harmony with them, when rightly considered and applied. In the law of subrogation, the distinction between a mere voluntary or intermeddler and one who pays in the protection of a right or interest, believed to be good, though it may
(494) turn out afterwards to be an invalid one, is well marked by the authorities, and the limitations of the principle, as to a partial payment, is also clearly defined.

Our conclusion is that plaintiff is entitled to subrogation as against Mrs. Moore, and her assignee, the defendant Barber, who had full notice of the equity. He has received a direct benefit in the reduction *pro tanto* of the debt he had to pay to the Mergenthaler Company, as a part of the price, in the purchase of the linotype, and, besides, he has been fully indemnified against all loss and therefore has no ground of complaint against the decree.

The only difficulty we have had in deciding the case is upon the last question. Mrs. Moore moved to be made a party in order to protect her interests. So far as the record shows, she has parted with all of her interest in the machine, and it does not appear that she will be answerable over to the indemnitors of the defendant. So it follows that, upon the present record, as the facts now appear, she has no interest to protect. But while this is apparently true, and while we have considered the case upon the conceded facts, and her own testimony, and it would seem to be clear, therefore, that she will not be prejudiced by the refusal of the court to make her a party, we do not see how the facts can be changed at all by her presence as a party in the case. We have held that she is bound by her husband's apparent, if not real, authority to act as her agent in making the sale, and while, perhaps, not bound by the terms of the sale to plaintiff, under which she was to receive stock instead of cash, she cannot repudiate the invalid part of the transaction without restoring what she has received in the way of benefit to herself. Equity requires this to be done in the adjustment of the matter. As to the principle of subrogation, its object is, as we have seen, to place the ultimate liability where, in equity and good conscience, it should rest, that is, upon the person who should discharge it, and that is the effect of our decision. So that, upon the real merits of the controversy, in any view of it, the

law is against the defendant. The reason for the rule of subrogation, that the burden should rest upon the person ultimately (495) liable, was strikingly illustrated in the recent case of *Barber v. Hanie,* 163 N. C., 588.

No error.

Cited: Brown v. Harding, 171 N.C. 691 (2g, 3g); *University v. Ogburn,* 174 N.C. 432 (1g); *Joyner v. Reflector Co.,* 176 N.C. 277, 278 (2g); *Caldwell v. Robinson,* 179 N.C. 524 (3g); *Kennedy v. Trust Co.,* 180 N.C. 231 (2g, 3b); *Grantham v. Nunn,* 187 N.C. 398 (2g); *Boyd v. Typewriter Co.,* 190 N.C. 800 (2d); *Everett v. Staton,* 192 N.C. 218 (2d); *Jeffreys v. Hocutt,* 195 N.C. 342 (2g); *Morris v. Y. & B. Corp.,* 198 N.C. 717 (2g); *Wallace v. Benner,* 200 N.C. 130 (2g); *Boney, Ins. Comr., v. Ins. Co.,* 213 N.C. 567, 568, 569 (2g); *Maxwell, Comr. of Revenue, v. Ins. Co.,* 217 N.C. 767 (1g); *Beam v. Wright* 224 N.C. 684 (2g).

CONLY ROBINSON v. MELVILLE MANUFACTURING COMPANY.

(Filed 6 May, 1914.)

1. Master and Servant—Negligence—Injury—Reasonable Anticipation.

Where an employer has negligently left a dangerous appliance under conditions likely to inflict an injury on his employee while engaged in his work, and consequently one of them is injured by another who has not been informed or instructed as to its dangerous character, he is held responsible in damages therefor, though he may not have anticipated that an injury of the precise nature of the one occurring would have been likely to result.

2. Same—Safe Place to Work—Dangerous Appliances—Trials.

The plaintiff cotton mill kept in its factory an air hose highly charged with compressed air and used to clean its machines by one of its employees, 15 or 16 years of age, without impressing its dangerous character upon him. This hose was left connected with the power furnishing the compressed air, upon the floor, without being guarded, when it could have been detached and locked up or more safely placed, and in the boyish spirit of fun, the employee whose duty it was to use it turned it upon his coemployee, a smaller boy, to the latter's serious injury: *Held,* it being the duty of the master to furnish his employees a safe place to work, his negligence in respect to the hose was actionable, and not the result of an accident or act not reasonably to have been anticipated. In this case the statute forbidding employment of minors under 16 years of age is inapplicable, as it was passed after the occurrence of the negligent act complained of. Laws 1913, ch. 64, sec. 63.

APPEAL by plaintiff from *Harding, J.*, at December Term, 1913, of GASTON.

Mangum & Woltz and O. Max Gardner for plaintiff.
Davis & Davis and O. F. Mason for defendant.

CLARK, C. J. The plaintiff, a boy of 14, was employed as a "doffer" in the cotton mill at Cherryville, N. C. At night, on 8 May, 1913, while engaged in doffing, he stooped over to pick up empty bobbins, whereupon Tom Carpenter, a youth of 15 or 16 years of age and a coemployee in the same mill, slipped up behind him, as he was in a stooped position, and, placing the nozzle of a rubber hose carrying compressed air at a pressure of 120 pounds to the square inch near the rectum of the plaintiff, pressed the valve on the end of the nozzle and thus released the compressed air, which entered his rectum with force sufficient to cause plaintiff to drop to the floor in great pain, with his intestines and lower extremities permanently torn, ruptured and mangled. The said compressed air was generated in defendant's mill and used by means of a rubber hose and nozzle to clean the machines in the mill.

It appeared in the evidence that the air hose, highly charged with compressed air, was used at certain intervals, but when not in use the hose was allowed to lie upon the floor, and no effort was made to guard or confine it. It was attached to a pipe in the wall, from which it could be readily unscrewed and reattached with ease.

In view of the terrible power of compressed air and the natural tendency of boys at the age of these to use a dangerous implement of this kind without taking thought of the damage which might be inflicted, the duty of the employer to give the plaintiff a safe place to work required that the hose should be detached when not in use, or at least that there should be some receptacle for it in which it could be locked up under the care of one of the bosses or other person of mature age, and not allowed to lie upon the floor, to be grasped and used by any thoughtless person on the impulse of the moment, with the terrible consequences which resulted in this case. The capacity for harm from such an implement lying ready to hand is apparent from the lasting damage and the great pain inflicted upon the plaintiff in this case.

(497) The negligence was as great certainly as that of leaving cogwheels or other gearing unboxed (*Creech v. Cotton Mills*, 135 N. C., 680), or not having nuts on revolving machinery counter sunk, both of which are now considered to be negligence. Dynamite is often used, and is harmless if not tampered with. But it would surely be negligence to leave it lying on the floor where any ignorant or thoughtless

person might cause it to explode with fatal consequences to his coemployee.

This is not the case of an accident, "which is an event from an unknown cause or an unusual or unexpected event from a known cause—chance casualty." *Crutchfield v. R. R.*, 76 N. C., 322. In *Martin v. Manufacturing Co.*, 128 N. C., 264, it is said: "Injuries resulting from events taking place without one's foresight or expectation, or an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected, must be borne by the unfortunate sufferer." In that case a fragment of steel flew from a hammer and struck the plaintiff in the eye. That was clearly a mere accident, for which the employer could not be held liable.

Here, the negligence of the defendant consisted in leaving an instrument of great power, capable of inflicting most serious injury, lying upon the floor without any supervision, or being detached from the wall, which could easily have been done until it was needed for use. It is true that Tom Carpenter, who inflicted the injury, used the apparatus for cleaning the machinery; but it does not appear that he was warned as to the great danger of using it in other ways, and if he had been, this accident would hardly have occurred. If the hose had been habitually detached and put away when not in use, this of itself would have been some notice to him of its dangerous capacity.

The defendant cannot be heard to say that the injury could not have reasonably been anticipated. In *Hudson v. R. R.*, 142 N. C., 198, *Hoke, J.*, says: "In order that a party may be liable for negligence, it is not necessary that he could have anticipated or even been able to anticipate the particular consequences which ensued or the precise injuries sustained by the plaintiff. It is sufficient if by exercise of reasonable care the defendant might have foreseen that some injury would result from this act of omission, or that consequences of such an (498) injurious nature might have been expected." The defendant might not anticipate that the plaintiff would be injured in the precise manner in which he was, but there was power in this dangerous agency of compressed air sufficient to paralyze the plaintiff's speech if the air hose had been aimed at his mouth, destroyed his eyesight if shot at his eyes, or caused deafness if propelled into his ears.

To the same purport is the discussion of *Walker, J.*, in *Drum v. Miller*, 135 N. C., 204. Indeed, the responsibility of the defendant in this case comes under the third head of the citation in that case from Pollock on Torts, 14: "An act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented."

There was evidence sufficient to go to the jury of negligence on the part of the defendant in permitting an agency of this dangerous power to lie unguarded on the floor, when it could have been so easily detached, or, if not detached, could have been stowed away, without any evidence of warning given to Tom Carpenter as to its possible effect nor of supervision exercised over him by some one of maturer age and better judgment.

Laws 1913, ch. 64, sec. 53, providing, "No child under 16 years of age shall be employed to work at night," etc., does not apply, as that act did not become operative till 1 January, 1914, and therefore the defendant was not guilty of negligence *per se* in the employment of the plaintiff (*Leathers v. Tobacco Co.*, 144 N. C., 330), but it was competent to show that the plaintiff was working in the factory without the consent of his father. *Fitzgerald v. Furniture Co.*, 131 N. C., 636.

The judgment of nonsuit must be set aside and

Reversed.

Cited: Barnett v. Mills, 167 N.C. 583 (g); *Ferrell v. R. R.*, 172 N.C. 687 (g); *Rivenbark v. Hines*, 180 N.C. 243 (d); *Ferguson v. Spinning Co.*, 196 N.C. 616 (d).

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HAYWOOD WILSON v. SOUTHERN RAILWAY COMPANY.

(Filed 6 May, 1914.)

Railroads — Crossings — Trials — Evidence — Contributory Negligence — Issues—Judgments.

Where the plaintiff sues a railroad company to recover damages for a personal injury alleged to have been received by him in a collision with the defendant's train while attempting to cross its roadway on a public street of a town, upon the ground that the defendant's employee, charged with the duty, failed to give him warning before entering onto the right of way, and there is evidence that the plaintiff did not himself exercise the ordinary care required under the circumstances, judgment may not be given adverse to the defendant upon a verdict not answered upon the issue of contributory negligence; and it is further held that evidence of the drunken condition of the plaintiff was erroneously excluded on the trial of this case.

APPEAL by defendant from *Long, J.*, at December Term, 1913, of RANDOLPH.

Civil action for damages for a personal injury alleged to have been sustained by the plaintiff while attempting to cross the defendant's road-

way, driving along the street of a city, by reason of the failure of the defendant, through its proper agent, to give the customary warning of the danger under the circumstances.

The following issues were submitted to the jury, and answered as indicated:

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: .....

3. What damage, if any, has the plaintiff sustained by reason of said injury? Answer: $750.

His Honor rendered judgment for the plaintiff. The defendant appealed.

John A. Barringer, J. A. Spence, G. A. Carver for plaintiff.

Manly, Hendren & Womble, John T. Brittain for defendant.

BROWN, J. The court below erred in rendering judgment for (500) plaintiff and ignoring the issue as to contributory negligence. Contributory negligence is pleaded in the answer, and there is abundant evidence to justify its submission to the jury. His Honor should have sent the jury back with directions to respond to that issue before receiving the verdict. If the issue is answered favorably to the defendant, it bars recovery in this case.

The court also erred in ruling out evidence tending to prove that the plaintiff was drinking, and in a drunken condition at the time of the alleged collision with the defendant's engine; and that such condition caused the injury.

The judgment of the court is reversed, and a new trial is ordered on the second issue.

For these reasons there must be a

New trial.

Cited: Tire Co. v. Motor Co., 181 N.C. 231 (g); *Gulley v. Raynor*, 185 N.C. 98 (g).

LOU SIZER ET AL. v. H. C. SEVERS.

(Filed 6 May, 1914.)

Evidence—Death—Presumptions—Seven Years Absence—Inquiry—Trials —Nonsuit.

The legal presumption of death of one who has not been heard from for seven years or more will not arise unless it is made to appear that unavailing and reasonable inquiry has been made by his near relatives or those otherwise interested; but in this action to recover lands, depending upon the presumption of death from seven years absence of one under whom the parties litigant claim, the inquiry is held sufficient, that his mother had without reply written to his last known address, as well as other likely places, and it appearing that he had bought the *locus in quo*, made partial payment thereon, and had left the management thereof, and the collection of rents, with his agent, under the instruction that he keep them until he called for them, and that the agent had paid off the mortgage given to secure the balance of the purchase price with the profits accumulated; and where such evidence is conflicting, a judgment as of nonsuit will be denied.

(501) APPEAL by defendant from *Adams, J.*, at March Term, 1914, of MECKLENBURG.

This is an action to recover land, and both parties claim under William Ingram.

The plaintiffs are sisters of Rachel Sizer, who died, according to the record of deaths, 28 November, 1910, and according to the evidence of one witness, in September, 1911.

Rachel Sizer was the mother of William Ingram, an illegitimate child.

The claim of the plaintiffs is that William Ingram died before his mother, and that she inherited the land from him, and that upon her death it descended to them.

The defendant claims under a deed from the University.

The real controversy between the parties is whether there is any evidence of the death of William Ingram before the death of his mother.

There was a motion for the judgment of nonsuit, which was overruled, and the defendant excepted.

Judgment was rendered in favor of the plaintiffs, and the defendant appealed.

J. D. McCall for plaintiff.

Maxwell & Keerans for defendant.

ALLEN, J. There is no direct evidence of the death of William Ingram, and the plaintiffs have to rely upon the presumption arising from an absence of seven years.

We have been referred to many authorities from different States as to the facts which must be proven and the conditions shown to exist before there is a presumption of death, but the doctrine is nowhere stated more clearly or accurately than by *Chief Justice Smith* in *University v. Harrison,* 90 N. C., 387, where, speaking for the Court and quoting with approval certain English authorities, he says:

"The death of a person who has removed his domicile, or has been absent from his home for seven or more years, is inferred where he has not meanwhile been heard from by those who would be expected to hear from him. The mere absence of evidence or report of his being alive is not alone sufficient to raise the presumption, but the (502) absence of such information or report must appear by inquiring of relations, and if there are none, of those among whom he formerly resided, who would be most likely to hear from him if he were not dead. *Banning v. Griffin,* note a, 15 East, 293.

"In *France v. Andrews,* 15 Adolph. and Ellis, 756, a witness 38 years of age stated that he 'had never known of the existence of his cousin, and was not aware of having any other relations now alive,' and *Patterson, J.,* said: 'The mere lapse of time does not raise a presumption of death, unless you go further and show that the person has been absent and not heard of by those who would have heard from him if he had returned.' In the same case *Coleridge, J.,* expressed his opinion thus: 'My doubt is whether there was reasonable evidence of inquiry in this case. Either the lessor of the plaintiff might have produced some person who would naturally have heard of the *cestui que vie,* if he was alive, or he might have called those who had made search for such person, and would have found him if he had existed.' For the purpose of showing that the absent person has not been heard from, those should be called as witnesses, or a reasonable inquiry made among them without success should be proved. Abb. Trial Evi., 76."

Tested by this rule, we are of opinion there is evidence fit to be submitted to a jury.

The mother, Rachael Sizer, died 28 November, 1910, or in September, 1911, probably at the first date. Ingram formerly lived in North Carolina, but removed to Indianapolis. His mother and other relatives remained in the State. He visited North Carolina in 1902 or 1903, remaining a month or more. While here he bought the land in controversy from the defendant, paying a part of the purchase price in cash, and executing a mortgage on the land to secure the balance. He placed the land in the hands of an agent for rent, the rental value being $3 per month, telling him he was going off for a while, that he did not want any one else to have the property or the handling of it, and for him to

collect the rents and keep them until he came or sent for them;
(503) and at the trial, after paying the balance of the purchase money, taxes, and other expenses, the agent held $120 uncalled for.

Ingram left North Carolina for Indianapolis, and wrote his mother, 11 November, 1903, and this is the last time any of his relatives have heard from him.

In 1907 the mother employed an attorney to make search for him, and upon information obtained from the defendant, the attorney wrote letters of inquiry to Indianapolis, Los Angeles, and San Francisco.

The defendant was also endeavoring to find Ingram, and he says: "I kept writing to find out where he was." The defendant also, according to the evidence of Jim Sizer, said in 1910, before the death of his mother, that Ingram was dead.

There was evidence to sustain these findings, and from them the plaintiffs might well insist that Ingram bought the land, intending to make this State his home, and when he left it was only for a while, as he told his agent; that he was last heard from 11 November, 1903, more than seven years before the death of his mother, and that diligent inquiry for him had been made by the mother and the defendant, without avail, at Indianapolis where he went, and at other places; that the defendant became satisfied of his death in the lifetime of his mother, and admitted that he was dead; and that, acting upon his information, after the death of the mother he had the land escheated to the University and then bought it.

There was evidence on the part of the defendant that Ingram was alive in 1904, but we are not at liberty to consider the evidence favorable to the defendant on a motion for judgment of nonsuit, and must assume that the defendant received the full benefit of this evidence before the jury, as there is no exception to the charge, and it is not in the record.

No error.

Cited: Shuford v. Ins. Co., 167 N.C. 547 (f); *Beard v. Sovereign Lodge*, 184 N.C. 156 (l); *Steele v. Ins. Co.*, 196 N.C. 411 (f).

(504)

J. C. LYTLE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 13 May, 1914.)

Telegraphs—Valid Stipulations—Sixty Days—Written Demand.

The stipulation on a telegraphic message that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days," etc., is a valid one, requiring that a written claim be presented within the time specified, identifying the message, stating the negligence complained of, and the nature and extent of the demand, so as to enable the company to investigate and ascertain its liability; and a verbal notice or a threat made by the complaining party to the company's agent that, as the company had been negligent, someone would have to pay for it, is totally insufficient.

APPEAL by plaintiff from *Justice, J.*, at May Term, 1914, of RUTHERFORD.

Action for negligent delay in delivering a telegram.

It appears from the evidence that the plaintiff's mother, who resided in Blacksburg, S. C., died on 2 June, 1911, and that at 6:16 p. m. on the same day a message was filed at Blacksburg, S. C., addressed to the plaintiff at Altapass, N. C., care of Altapass Inn, reading: "Your mother died this p. m. at 6 o'clock." This message was delivered to the plaintiff at 9:30 a. m. on 3 June, and the plaintiff left Altapass at 2:24 that afternoon and reached Blacksburg at 9 o'clock that night. There was a train leaving Altapass at 6:15 a. m., and if the plaintiff had caught the train she would have gotten to Blacksburg at 4 o'clock in the afternoon. When the plaintiff arrived at Blacksburg she found that her mother had been buried at 5:30 p. m. The plaintiff received the message through the clerk of the hotel at Altapass, to whom it had been delivered by the defendant.

As the plaintiff was leaving Altapass, she had a conversation with Mr. Sloan, the defendant's agent, who told her that he was sorry that the message had not been delivered the night before. The plaintiff returned to Altapass in a few days afterwards, and told the agent the delay of the message had caused her not to see her mother buried. The (505) agent was reticent about it, and the plaintiff then stated: "Some one will have to pay for this." This last conversation took place just a few days after the funeral. If the plaintiff had received the telegram before the 6:15 a. m. train on 3 July, she could and would have gone on that train and would have arrived in Blacksburg at 4 o'clock that afternoon. The plaintiff introduced evidence tending to show that she suffered mental anguish because she did not see her mother buried, and also on account of the fact that she knew some of her mother's wishes

were not carried out. The message introduced in evidence by the plaintiff contained the following stipulation: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." The plaintiff testified further that no written claim for damages had ever been filed and no suit brought until 19 October, 1911, the summons issued on that date having been served on the defendant 20 October.

At the close of the testimony the court gave judgment of nonsuit, and plaintiff appealed.

Pless & Winborne, York Coleman, and D. F. Morrow for plaintiff.

A. S. Barnard for defendant.

WALKER, J., after stating the case: It is stated in the briefs that the court granted the nonsuit upon the ground that the plaintiff had not complied with the stipulation between the parties that the claim for damages must be presented in writing within sixty days after the message is filed with the company for transmission. This, we have held, is a reasonable provision, and if not complied with, defeats a recovery. *Sherrill v. Telegraph Co.*, 109 N. C., 527; *Lewis v. Telegraph Co.*, 117 N. C., 436; *Sykes v. Telegraph Co.*, 150 N. C., 431; *Barnes v. Telegraph Co.*, 156 N. C., 150. It is said in Jones on Telegraph and Tele-
(506) phone Companies, sec. 393: "The presentation of the claim must be in writing. The object in requiring the claim to be in writing, further than for the reason that the stipulations expressly require this, is that the officers of the company who have the power to act on such claims may have the nature and extent of the claimant's demand directly. The claim agents would not have the opportunity to give the notices proper consideration if they were given orally through the operator; and if the nature of the claim was in dispute, in an action arising out of the claim, the written notice could, and should, be introduced to show the true nature of the demand. Another reason for holding that these claims should be in writing is that in the great amount of business of these companies an oral notice would not as likely reach the proper officers of the company, where it should have proper consideration." This reason for requiring a compliance with the stipulation was substantially approved in *Sherrill v. Telegraph Co., supra,* and *Sykes v. Telegraph Co., supra.* In the former case it was said by the present *Chief Justice:* "The plaintiff is barred by his own negligence in not presenting his claim within the specified time." It has been held that mere notice that a claim will be made is not a compliance with this stipulation. The claim

presented should identify the message, state the negligence complained of, and so clearly set forth the nature and extent of the plaintiff's demand as to enable the Telegraph Company to ascertain whether it is liable, and, if liable, that it be informed of the extent thereof. *Telegraph Co. v. Moss,* 63 S. E., 590; *Manier v. Telegraph Co.,* 29 S. W., 732; *Eaker v. Telegraph Co.,* 55 S. E., 129; *Toole v. Telegraph Co.,* 57 S. E., 117; *Telegraph Co. v. Shields,* 82 S. W., 484; 27 A. and E. Enc. of Law, 1048; *Telegraph Co. v. Nelson,* 111 S. W., 274, citing *Telegraph Co. v. Moxley,* 98 S. W., 112, which is directly in point.

In *Telegraph Co. v. Courtenay,* 82 S. W., 484, the Court thus states the rule: "The presentation of the claim must be in writing, fairly identifying the message in question and stating the negligence complained of, and the nature and extent of the damages suffered." And again; "The object and purpose of the stipulation is that the company may have notice of the claim made against it, and (507) intelligently settle with the plaintiff or prepare its defense, while the facts are known and evidence of them obtainable." Croswell on Electricity, sec. 558; *Telegraph Co. v. Brown,* 84 Texas, 54.

But when we hold that the stipulation is a reasonable and valid one, it cannot be said that the plaintiff has complied with it in this instance. A mere casual remark to the agent at Altapass that the message had been delayed, and some one would have to pay for it, was in no sense a claim or demand such as is contemplated by the contract. It was not in writing, as required by the stipulation, nor did it give any fair or adequate idea of her claim, being entirely too indefinite. The authorities we have cited, and they seem to be uniform, are clearly opposed to the contention that it is a sufficient compliance with the contract. The cases relied on by plaintiff are not applicable. The facts were not the same as those we have here.

No error.

Cited: Bennett v. Telegraph Co., 168 N.C. 499 (b); *Mason v. Telegraph Co.,* 169 N.C. 233 (j); *Phillips v. R. R.,* 172 N.C. 87, 91 (g); *Taft v. R. R.,* 174 N.C. 213 (g); *Hardie v. Telegraph Co.,* 190 N.C. 48 (g); *Newbern v. Telegraph Co.,* 195 N.C. 261 (b); *Russ v. Telegraph Co.,* 222 N.C. 509 (g).

CITY OF GASTONIA v. CITIZENS NATIONAL BANK.

(Filed 13 May, 1914.)

1. Municipal Corporations—Schools—Taxation—Necessaries.

Schools and school buildings are not necessary expenses of a municipal corporation, and bonds for that purpose are required to be submitted to the qualified voters of the municipality issuing them.

2. Municipal Corporations—Bond Issues—Necessaries—Vote of People—Constitutional Law—Statute Invalid in Part.

Waterworks, sewerage, and electric lights are, under reasonable circumstances, necessities for which a municipality, acting under the authority of a statute, may issue bonds without submitting the question to the qualified voters of the municipality; and where the statute authorizes such issue, including schools and school buildings, without provision for submitting the question to the qualified voters, leaving the matter of their necessity to the aldermen of the town, bonds issued under a proper town ordinance for such of the purposes as are regarded as necessary are valid, when the provisions of the statute are complied with.

3. Municipal Corporations—Bond Issues—Necessaries—Limitation of Levy—Interest—Sinking Fund—Constitutional Law.

Where bonds are issued by a municipality, under statutory authority, for necessary purposes, without provision for a special levy of taxes to pay the interest or create a sinking fund, and in the municipal charter there is a limit fixed to the power of levy, the city has the power to pay the interest on and create a sinking fund for the bonds from its general revenue derived under the limit fixed to its taxing power, if sufficient; and if not sufficient, the bonds will not be declared invalid, especially at the suit of one who has purchased with knowledge of the circumstances.

(508) APPEAL by defendant from *Adams, J.*, at April Term, 1914, of GASTON.

Controversy without action. The purpose of this proceeding is to determine the constitutionality of, and to construe an act of the General Assembly, chapter 180, Private Laws 1913, which reads as follows:

AN ACT TO AUTHORIZE THE BOARD OF ALDERMEN OF THE CITY OF GASTONIA TO ISSUE BONDS, IN AN AMOUNT NOT EXCEEDING $100,000, FOR STREET, SIDEWALK, AND HIGHWAY IMPROVEMENTS, GRADED SCHOOLS, WATERWORKS, SEWERAGE, AND ELECTRIC LIGHTS.

The General Assembly of North Carolina do enact:

SECTION 1. That for the purpose of grading, paving, and otherwise improving the streets, sidewalks, and highways of the city of Gastonia; for erecting new graded school buildings and making improvements and

additions to those already erected; for the extension of the system of waterworks, sewerage, and electric lights, the board of aldermen of said city is hereby authorized and empowered to issue bonds of the said city in an amount not exceeding one hundred thousand dollars ($100,000), bearing interest from the date thereof, not exceeding five (5) per centum per annum, with interest coupons attached, payable semiannually. That said bonds shall be made payable at such time and place as (509) may be determined upon by said board of aldermen, but the time of the payment of the principal of said bonds shall be fixed at not more than thirty (30) years. The bonds shall in no case be sold, hypothecated, or otherwise disposed of by the board of aldermen for less than par value, and the money arising from the sale thereof shall be used for the purposes above stated, and no other, in such proportion for each purpose or object herein named as said board may fix and determine.

SEC. 2. That the said bonds shall be issued whenever said board of aldermen of said city shall declare by an ordinance duly adopted that it is necessary for the public welfare and interest that said bonds shall be issued for the purposes set forth in section 1 thereof.

SEC. 3. That when said board of aldermen shall declare that it is necessary for the public welfare and interest that said bonds be issued, as provided in section 2 hereof, then said board of aldermen shall issue said bonds, and they shall be signed by the mayor, attested by the treasurer of the said city, and sealed with the corporate seal of the city, and said bonds and their coupons shall be exempt from city taxation until they have become due and the coupons shall be received in payment of city taxes.

SEC. 4. That this act shall be in force and effect from and after its ratification.

Ratified this the 1st day of March, A. D. 1913.

In pursuance of said act, the board of aldermen adopted this ordinance:

SECTION 1. That it is necessary for the public welfare and interest that bonds of the city of Gastonia be issued in the amounts and for the purpose hereinafter set forth.

SEC. 2. That there be issued the negotiable coupon bonds of said city in the aggregate amount of $99,000, consisting of 50 bonds of $1,000 each, numbered 1 to 50, both inclusive, and 98 bonds of $500 each, numbered 51 to 148, both inclusive, which said bonds shall bear (510) date of 1 May, 1914, shall mature 1 May, 1944, without option of prior payment, and shall carry interest at the rate of 5 per centum per annum, payable semiannually on the first days of May and November

of each year; such interest to be evidenced by coupons to be attached to said bonds, both principal and interest to be payable at the National Park Bank in the city of New York, State of New York.

SEC. 3. That $74,000 of said bonds, consisting of bonds numbered 1 to 98 shall be issued for the purpose of grading, paving, and otherwise improving the streets and sidewalks of said city, and that $25,000 of said bonds, consisting of bonds numbered 99 to 148, shall be issued for the purpose of extending the system of waterworks, sewers, and electric lights of said city.

The court rendered judgment:

This cause coming on to be heard and being heard at this term of the Superior Court of Gaston County, before his Honor, W. J. Adams, judge, and upon a controversy without action submitted to the court upon an agreed statement of facts, and the court being of the opinion that the said bonds were valid and that the defendant should be required to accept the same:

It is, therefore, ordered and adjudged that the defendant be and is hereby required to accept the bonds mentioned in said agreed statement of facts, and that the plaintiff recover its costs, to be taxed by the clerk.

(Signed) W. J. ADAMS,
Judge Presiding

The defendant appealed.

Mangum & Woltz for plaintiff.
A. L. Bulwinkle for defendant.

BROWN, J. It is well settled by the decisions of this Court that schools and school buildings are not necessary expenses of a municipal corporation. Our school system is founded in the Constitution, and is largely governed and regulated by laws applicable to the entire State. This subject is fully discussed in *Hollowell v. Borden,* 148 N. C., 256, and cases there cited.

(511) It is plain, therefore, that so much of the act as authorizes the issue of bonds for "erecting new graded school buildings" is invalid, as the act fails to require a submission to the qualified voters. But that does not necessarily make the entire act invalid.

It is equally as well settled that streets, waterworks, sewerage, and electric lights are necessary expenses of an incorporated municipality, and that a debt may be contracted to pay for them without submitting the proposition to a vote of the electorate. *Hotel Co. v. Red Springs,* 157

N. C., 137; *Jones v. New Bern,* 152 N. C., 64; *Commissioners v. Webb,* 148 N. C., 122; *Fawcett v. Mount Airy,* 134 N. C., 125.

It is true, the act does not declare what proportion of the proceeds of the bonds shall be applied to each specific purpose, but that is wisely left to the sound discretion of the city authorities, and in the exercise of such discretion they have issued $99,000 of bonds for streets, waterworks, sewerage, and electric lights, and have issued no bonds for school purposes.

We fail to see how this invalidates the bonds so issued. *Hotel Co. v. Red Springs,* 157 N. C., 137; *Tyson v. Salisbury,* 151 N. C., 468.

It is further contended that no provision is made for the levy of a special tax to pay the interest on the bonds or for the creation of a sinking fund for their ultimate redemption.

It is stated in the case agreed that the charter of Gastonia limits taxation as follows: "On all real estate and personal property situated in the city, a tax not exceeding one and forty one-hundredths dollars ($1.40) on every hundred dollars value."

It is further stated that there are no other provisions of the said charter of the city of Gastonia providing for the levy and collection of taxes to pay the interest on said proposed issue of said bonds, and to pay the principal or retire the same, and there are no other special or private act or acts of the Legislature in force providing for the levy and collection of taxes to pay the interest on said bonds or to retire the same.

In the case agreed the revenues and expenses of the city of Gastonia are set out with much detail, but it is unnecessary that we discuss that feature of the case.

The city has the undoubted right to pay the interest on these (512) bonds out of its general revenues, if they are sufficient, but its authorities could not exceed the limitations of taxation fixed in the charter without special permission of the General Assembly.

It would seem, from the facts stated in the case agreed, that the present revenues of the city of Gastonia are amply sufficient to pay the expenses of the city and interest on these bonds, and eventually to create a sinking fund; but a bond issue of a city or town for necessary municipal expenses, duly authorized by legislative enactment, is not invalid because at the present rate of taxation an insufficient revenue is obtained for a sinking fund and to pay the annual interest. *Lumberton v. Nuveen,* 144 N. C., 305; *Hotel Co. v. Red Springs, supra.*

Besides, the defendant is held to have had full notice of the terms of the special act under which the bonds are issued, as well as of the charter of the city of Gastonia, its revenues, and ability to pay. The defendant purchased the bonds with full knowledge of all these facts. *Lumberton*

v. Nuveen, supra. We see no reason why it should now be relieved from its contract.

The judgment of the Superior Court is

Affirmed.

Cited: Highway Com. v. Malone, 166 N.C. 3 (3g); *Stephens v. Charlotte,* 172 N.C. 567, 568 (1f); *Snider v. Jackson County,* 175 N.C. 592 (1f); *Cooper v. Comrs.,* 183 N.C. 233 (3g); *Spitzer v. Comrs.,* 188 N.C. 35 (3o); *Reed v. Engineering Co.,* 188 N.C. 42 (2f); *Storm v. Wrightsville Beach,* 189 N.C. 681 (2f); *Henderson v. Wilmington,* 191 N.C. 282 (2j); *Frazier v. Comrs.,* 194 N.C. 61 (1g); *Hailey v. Winston-Salem,* 196 N.C. 20 (1b).

D. McN. RAY ET AL. V. G. B. PATTERSON ET AL.

(Filed 13 May, 1914.)

Trials—Fraud—Instructions—Prejudice—Issues—Appeal and Error.

Where a deed absolute on its face is alleged to have been obtained by threats and undue influence, and the plaintiffs contend that it should have been a mortgage, it is reversible error for the trial court, in instructing the jury, to tell them that if the plaintiffs' contention be true it would stigmatize the defendants as being guilty of a "base and dirty fraud," for such would probably bias the jury in passing upon the issues; and it is further held for error that the judge refused to submit the issues tendered by the plaintiff in this case, which are approved.

(513) APPEAL by plaintiffs from *Rountree, J.,* at January Term, 1914, of HOKE.

Broadfoot & Broadfoot, Herring & Oates, V. C. Bullard, McNeill & McNeill for plaintiffs.

Sinclair & Dye and McLean, Varser & McLean for defendants.

CLARK, C. J. "The plaintiffs contend that the defendants by threats or undue influence, or both, obtained from them a deed for all the land (with certain exceptions), whereas it was intended and understood by them that the instrument was to be, not a deed, but a mortgage; that if the deed is sustained they will lose the land without opportunity of redemption, and if the land is worth more now than it was then, they will lose the difference, and indeed that they will lose its whole value."

After thus instructing the jury, the court added: "It is important to the defendants, and both of them, because if this contention be true, it is an attempt to stigmatize them as being guilty of a base and dirty fraud." To this the plaintiffs excepted, and we think this is sufficient to entitle them to a new trial.

The defendants are people of prominence and standing in the community, one of them indeed having served with credit in a high public position, and to tell the jury at the outset that if their verdict should be against the defendants it would "stigmatize them as being guilty of a base and dirty fraud" was to throw into the jury box a consideration which might well bias them in the impartial consideration of their verdict. The court in effect told them that if the verdict went against the plaintiffs, they might lose the land in controversy. But that if it went against the defendants, they would lose their character, for such verdict would stigmatize them as being guilty of a base and dirty fraud. Such would not be the necessary result, and if it would, this effect should not have been impressed on the jury. On the contrary, they should have been told, rather, that such considerations should not bias their judgment in finding the truth as to the matters submitted to them.

There are a large number of exceptions, but as the case must (514) go back, we do not deem it necessary to consider them in detail. Many of the grounds of exception may not be presented on another trial. We will note, however, the exceptions to the issues. The issues submitted were:

"1. Did the defendants, J. L. McMillan and G. B. Patterson, fraudulently procure from the plaintiffs an absolute deed (Exhibit D) by representing and agreeing that such deed should only operate as a mortgage, as alleged in the complaint?

"2. Was it understood and agreed that the deed (Exhibit D), in form an absolute deed, should only operate as a mortgage for the security of money advanced by the defendants to the plaintiffs for the purpose of taking up the previous mortgages?"

The plaintiffs excepted to these issues, and also excepted to the refusal to submit the following issues:

"1. Did the defendants procure the execution of the deed described as Exhibit D, and in form a fee-simple deed, by the promise that they would hold the land therein described as security for the sums advanced in taking up certain mortgages described in the pleadings, with the further promise that they would reconvey said lands to the plaintiffs on payment of said debt secured by the mortgage?

"2. Did the defendant Walter McMillan procure from the plaintiff D. McN. Ray the execution of the deed to his wife described as Exhibit

E, upon the consideration of services rendered him in inducing the defendants, G. B. Patterson and J. L. McMillan, to take up the mortgages described in the pleadings?

"3. What was the value of the land described in Exhibits D and E at the time of the execution of the deeds therefor set out in the pleadings?

"4. Were the defendants, J. L. McMillan and G. B. Patterson, the owners of the notes and mortgages set out in the pleadings at the date of the execution of the deed to them by W. H. Ray and D. McN. Ray, described as Exhibit D in the pleadings?"

These issues were necessary for the proper consideration of the contentions set out in the pleadings. There was error in refusing them and in submitting the issues in the record.

Error.

Cited: Speed v. Perry, 167 N.C. 128 (g); *Medlin v. Board of Education,* 167 N.C. 244 (g); *Morris v. Kramer,* 182 N.C. 90, 92 (g); *S. v. Hart,* 186 N.C. 588 (g); *S. v. Auston,* 223 N.C. 205 (g); *S. v. Owenby,* 226 N.C. 522 (g).

(515)

T. W. McKINNEY v. WESLEY STREET.

(Filed 13 May, 1914.)

Trials—Terms—Judgments Relating Back—Fiction of the Law—Deeds and Conveyances—Innocent Purchasers.

The rule of court, afterwards enacted into a statute, that all judgments entered during a term shall relate back to the beginning of the term, and be deemed to have then been entered, is to prevent advantage being taken by litigants who may have been fortunate enough to have first secured his judgment, and unseemly endeavor to get first to the ear of the court; and will not apply to a judgment obtained during a term of court subsequent by a day or a fraction of a day to the registration of a deed to lands, so as to affect the rights of an innocent and *bona fide* purchaser for value.

APPEAL by plaintiff from *Cline, J.,* at November Term, 1913, of MITCHELL.

Civil action brought to recover a tract of land. The court rendered judgment in favor of the plaintiff, and the defendant appealed.

Black & Wilson for plaintiff.

S. J. Ervin for defendant.

BROWN, J. Mollie Ledford, who owned the land in controversy, conveyed it to the defendant by deed registered 24 July, 1912. Judgment was rendered in the Superior Court of Mitchell County on 25 July, 1912, in favor of one Scinda Street and against the said Mollie Ledford and others, in an action therein pending, for $321.95, the same being for the conversion of personal property, and on this judgment an execution issued against the said Mollie Ledford on 12 December, 1912, and under this execution the land in controversy was sold as the property of the said Mollie Ledford on 7 April, 1913, and purchased by the plaintiff, to whom the sheriff executed a deed of conveyance, and who thereupon instituted this action to recover the land.

The term of court at which said judgment was rendered began on 22 July, and the plaintiff contended that the said judgment should "be held and deemed to have been rendered and docketed on the (516) first day of said term," and by relation to said day to constitute a lien upon the land prior to the rendition of the judgment and the registration of the deed under which the defendant claimed.

The so-called doctrine of relation was originated in rules of court and enacted afterwards into statute in order to place all parties obtaining judgments against a common debtor at the same term upon an equality.

In discussing the rule and the ground upon which it was adopted, this Court said in *Norwood v. Thorp,* 64 N. C., page 685: "This was nothing new, but simply an affirmance of an ancient rule of the common law adopted in furtherance of justice to give fair play, to prevent an indecent rush to get a judgment docketed first, and to cut off all chance of favoritism on the part of the clerk," and we may add, to prevent the rights of the parties from depending upon the chance as to which plaintiff should first get the ear of the court. *Norwood v. Thorpe,* 64 N. C., 685; *Johnson v. Sedberry,* 65 N. C., 4; *Bates v. Hinsdale,* 65 N. C., 423.

Rules of this Court have been adopted antedating the statute in order to secure equality among judgments obtained at the same term. 65 N. C., 705, Rules 1 and 2; 63 N. C., 668, Rule 9.

This doctrine is not permitted at this day to destroy the rights of third persons, and like other fictions of the law is administered in the interest of equity and justice. Some courts who have applied this rule of relation to the prejudice of third persons have reversed their decisions.

This Court overruled its own decision made in 1838, when it adopted Rule 9 in these words: "The only difficulty in the adoption of this rule was the case of *Farley v. Lea,* 4 Dev. and Bat., 169, for the idea of allowing a judgment in a case which in fact was not tried below until after the commencement of a term of this Court, to relate back and take effect from the first day of the term, was out of the question. We are relieved

from the difficulty by *Whitaker v. Wisbey,* 74 E. C. L. R., 48, decided in 1852, in which all the cases on the subject were fully reviewed (517) and the conclusion is, 'that a mere form or fiction of law introduced for the sake of justice shall not work a wrong contrary to the real truth and substance of the thing.' We consider *Farley v. Lea,* decided in 1838, overruled by the authority and reasoning of this case."

In the case of *Clifton v. Wynne,* 81 N. C., 160, this Court again discussed the injustice of the doctrine and declined to follow it, saying: "The action of the court is referred to its commencement, to avoid unseemly controversy for priority or advantage among suitors whose cases were acted on at different periods of the session. But a fiction adopted for convenience and to promote the ends of justice will not be allowed to defeat the substantial rights of others nor to obstruct the clear expression of the legislative will. 'The Court will not endure,' says *Lord Mansfield* in *Johnson v. Smith,* 2 Burr., 950, "that a mere form or fiction of law introduced for the sake of justice should work a wrong, contrary to the real truth and substance of the thing.' . . .

"The principle to be extracted from *Whitaker v. Wisbey* is that rights and interests, intermediately acquired, are not displaced by the fiction, and that the one on which the court in fact rendered its judgment may be inquired into in deciding upon the preferences among contesting claimants."

In Broom's Legal Maxims the case of *Whitaker v. Wisbey* is cited, and it is there said: "It has indeed been affirmed, as a broad general principle, that the truth is always to prevail against fiction, and hence, although for some purposes the whole assizes are to be considered as one legal day, the Court is bound, if required for the purpose of doing substantial justice, to take notice that such legal day consists of several natural days or even of a fraction of a day. Evidence may, therefore, be advanced to show that an assignment of his goods by a felon *bona fide* made for a good consideration after the commencement day of the assizes was in truth made before the day on which he was tried and convicted, and on proof of such fact the property will be held to have passed by the assignment." Broom's Legal Maxims, p. 128; star page 129.

(518) The general, if not the universal, rule at this day is that the doctrine of relation invoked by the plaintiff here does not apply to strangers and will not be applied to the injury or prejudice of innocent third persons.

"A judgment will not be considered to relate to the first day of the term for the purpose of giving priority over a conveyance to a purchaser for value and without notice." 12 A. and E. Enc. Law, p. 115.

"As against intervening purchasers, it may be regarded as settled that the lien of a subsequent judgment will not attach, justice forbidding that in such a case it should relate back to a time anterior to the conveyance." Black on Judgments, sec. 442.

Mr. Freeman says: "At common law all judgments were by legal fiction supposed to be entered on the first day of the term at which they were recovered. But it was a maxim of the same law that 'a legal fiction is always consistent with equity,' and therefore, whenever the purpose of justice required it, the true time of entering judgment might be averred and proved. . . . But however the fiction of law by which judgments are considered as being rendered on the first day of the term may affect one judgment lien in contest with other judgment liens of the same nature, it seems to be generally conceded that it cannot prejudice the interests of *bona fide* purchasers.

"Whenever a purchaser before the signing of judgment without notice, and without being guilty of any fraud, acquires an interest in real estate, that interest cannot be charged with the lien of any judgment subsequently entered against his grantor, though such judgment, as between itself and other judgments, rank as though entered at the beginning of the term and at some time prior to its actual rendition." Freeman on Judgments, sec. 369.

We are of opinion that his Honor erred, and that upon the facts agreed judgment should be entered for the defendant. It is so ordered.

Reversed.

Cited: Fowle v. McLean, 168 N.C. 540 (f); *Hardware Co. v. Holt,* 173 N.C. 311 (f); *Jernigan v. Jernigan,* 178 N.C. 86 (f).

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(519)

L. C. BOWMAN v. W. S. BLANKENSHIP ET AL.

(Filed 13 May, 1914.)

1. Witnesses—Evidence, Impeaching—Declarations to Third Persons.

Declarations of a witness made to third persons bearing upon testimony which he has given and which has been controverted or impeached, are admissible, but only to the extent of sustaining or corroborating the truth of his testimony, and not as substantive evidence.

2. Evidence—Admissions—Testimony at Former Trial—Substance in Full.

Testimony of a witness of admissions made by a party to the action while testifying on a former trial, and directly bearing on the issue, is competent without giving the full substance of what the party had then

testified; and where the matter in controversy involves only the question as to whether the plaintiff, in his action for damages for breach of defendant's contract made with him to cut timber from his lands, had only one or two years in which to cut, the plaintiff claiming the latter, it is competent for a witness in plaintiff's behalf to testify that on a former trial the defendant testified that it was two years, without stating substantially the full testimony of the defendant at that time.

3. Contracts — Interpretation—Cutting Timber—Damages—Diminution—Personal Supervision—Employment Elsewhere.

Where the plaintiff and defendant have entered into a contract whereby within the term of two years the plaintiff was to cut the timber from the defendant's land at a specified price per thousand feet, and the defendant, by breach of this contract, has prevented the plaintiff from continuing to cut the timber in accordance with the terms of the agreement, and where the plaintiff's damages are capable of being definitely ascertained, the defendant is not entitled to have the amount of the damages recoverable diminished by the time the plaintiff may have been absent from this work, being engaged elsewhere for profit, it appearing that the contract did not require the personal presence of the plaintiff, but only looked to the completion of the cutting in the time specified.

APPEAL by defendant from *Daniels, J.*, at May Term, 1913, of CATAWBA.

(520) Civil action to recover damages for alleged breach of contract to cut timber.

There was evidence on part of plaintiff tending to show that, in September, 1909, he made a contract to cut or have cut for defendants the timber standing on a certain tract of land of about 100 acres at a specified price per thousand feet, etc., and was to have two years to cut same; the defendants not desiring to have any of the timber cut in the warm weather; that plaintiff, having employed competent workmen, sawyers, etc., entered on the performance of the contract and cut between 400,000 and 500,000 feet, and for which he was paid, and was proceeding to cut the remainder in the Fall of 1910, when he was stopped by defendant and made to give up the job, leaving 255,000 feet of pine and poplar and 40,000 feet of oak on the tract still uncut and from which, at the contract price, plaintiff could have realized a definite profit.

Defendants admitted there was a contract for plaintiffs to have the timber cut, but alleged and claimed that the cutting was to be completed in one year's time, and claimed damage for the breach of contract on plaintiff's part, and, further, that in the portion of timber cut plaintiffs had committed unnecessary spoil and injury, to defendant's damage, which was set up by way of counterclaim, and offered evidence in support of this position.

On issues submitted, the jury rendered the following verdict:

1. Did defendant wrongfully refuse to allow plaintiff to manufacture the 307,000 feet of timber in question, in violation of the contract, as alleged in the complaint? Answer: "Yes."

2. If so, what damage, if any, has plaintiff suffered on account of such refusal? Answer: "$235."

3. Did plaintiff wrongfully fail to manufacture the 307,000 feet of timber in question in the season of 1909 and 1910? Answer: "No."

4. If so, what damages, if any, have defendants suffered on account of such failure? Answer: "None."

5. What damages, if any, have defendants suffered on account of a failure on the part of plaintiff to cut and manufacture the merchantable timber on that portion of the land from which plain- (521) tiff manufactured lumber? Answer: "None."

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

A. A. Whitener for plaintiff.

W. A. Self for defendant.

HOKE, J., after stating the case: It was urged for error on the part of defendants that certain declarations of plaintiff to third persons were admitted in corroboration of his testimony given at the trial.

While there is conflict of authority elsewhere in regard to testimony of this character, its admissibility in this jurisdiction has been too long established to permit of further question. *Allred v. Kirkman,* 160 N. C., 392; *S. v. Exum,* 138 N. C., 612-13; *Jones v. Jones,* 80 N. C., 246. Speaking to this question in *Exum's case, supra,* the Court said:

"The courts of this country are not in accord as to the admission of this character of evidence—previous consistent statements to corroborate a witness who testified at a trial. Some of them reject such evidence altogether as unsound in principle and dangerous in practice. Some of those that admit the evidence have placed restrictions upon it, which we think go rather to its force than its competency; and the decisions of our own State have gone some further, perhaps, than the others in its admission. All the courts admitting such evidence are agreed that it is only competent as affecting the credibility of the witness, and is never used as substantive or independent supporting testimony; and, further, that it is never admitted until the witness has been in some way impeached. And it is held here by repeated and well supported adjudications that whenever a witness has given evidence in a trial and his credibility is impugned, whether by proof of general bad character or

by contradictory statements by himself, or by cross-examination tending to impeach the veracity or memory of the witness, or at times by his very position in reference to the cause and its parties—'In whatever (522) way the credit of the witness may be impeached,' said *Smith, C. J.*, in *Jones v. Jones,* 80 N. C., 246, 'it may be restored or strengthened by this or any other proper evidence tending to restore confidence in his veracity and in the truthfulness of his testimony.' *S. v. Craine,* 120 N. C., 601; *S. v. Whitfield,* 92 N. C., 831. And it makes no difference, in this State at least, whether such evidence appears in a verbal or written statement, nor whether verified or not. *S. v. Craine, supra.* Nor does it signify whether the previous statements are near or more remote from the occurrence, nor *ante litem motam* or pending the controversy. *Jones v. Jones, supra.* Such circumstances only go to its force, and not to its relevancy."

The same position is in support of the evidence of Miles Teague, also objected to, that after the contract between plaintiff and defendant, which witness heard and testified to, the plaintiff engaged him to do the logging, and he was to have two years. This was received also in corroboration and was competent for the purpose, being in that aspect an act and declaration of plaintiff admissible in corroboration on the same principle.

It was further insisted for error that W. A. Holler, a witness for plaintiff, was allowed to say that defendant W. S. Blankenship, testifying in a former suit between these parties, had made the statement that plaintiff was to have two winters in which to cut the timber on the piece of land contracted for; the objection being, as we understand it, that the statement of an isolated fact of that kind should not be received in evidence unless there was some statement of the context.

The principle contended for by counsel is recognized and extended where, in proper instances, it is sought to put before the jury the evidence of a witness who has testified on a former trial and has since died or, for some valid reason, cannot attend in person; but it has no application as to admissions of a party. Whether sworn or not, these are always admissible when relevant to the issue and to the extent that they have significance in contradiction of the party who makes them or in support of his adversary. The fact involved in this exception, whether the (523) plaintiff was to have one or two years in which to do the work, was the principal question at issue between the parties, and the evidence was clearly admissible.

Again, it was contended that, on the issue as to damages, the court committed error in not allowing, in diminution, the value to him of certain work that plaintiff, in the two years period, had been enabled to do for other persons. If this had been a contract for plaintiff's services

or even for the use of a certain mill owned and run by plaintiff, the position might be made available to defendant, but the evidence tends to show that this was a definite contract for cutting the timber on a designated piece of land at a stipulated price per thousand. There is nothing in the record tending to show that plaintiff's personal services were contracted for or secured or that any particular mill was in contemplation. On the contrary, plaintiff seems to have arranged and contracted to have the work done by others.

The case, then, is one for breach of a contract that is definite and entire, affording data from which the profits could be ascertained with reasonable degree of certainty, and, on authority, plaintiff is entitled to recover the present value of such profits, undiminished by what he otherwise earned. *Wilkinson v. Dunbar,* 149 N. C., 20; *Masterdon v. Mayor,* 7 Hill, 61.

There is no error, and the judgment on the verdict is affirmed.

No error.

Cited: Perry v. Mfg. Co., 176 N.C. 71 (1g); *Bank v. Pack,* 178 N.C. 390 (1g); *Storey v. Stokes,* 178 N.C. 416 (1g); *S. v. Bethea,* 186 N.C. 24 (1g); *Dellinger v. Building Co.,* 187 N.C. 850 (1g); *Construction Co. v. Wright,* 189 N.C. 458 (3d); *Wilkins-Ricks Co. v. Dalrymple,* 207 N.C. 860 (1f); *Brown v. Loftis,* 226 N.C. 764 (1g).

T. F. PHARR v. COMMISSIONERS OF CABARRUS COUNTY.

(Filed 13 May, 1914.)

1. Counties and Towns—Public Roads—Assessments—Damages—Appeal—Notice—Resolutions.

Upon the petition of the owner of the land upon which the commissioners of Cabarrus County opened and changed a public road under the statute applicable, the damages were assessed, and the commissioners denied liability, for reasons stated in a resolution, which also instructed that an appeal be taken to the Superior Court. Upon the trial it appeared that the court admitted a copy of this resolution, but it does not appear from the record on appeal to the Supreme Court that it was admitted as evidence, or read to the jury, or that it was considered by the court except as a notice of appeal and a plea that the proceeding had not been commenced in six months, as the statute required: *Held,* the resolution was competent in this respect, and no error is found.

2. Counties and Towns—Public Roads—Damages—Appeal Bond—Court's Discretion.

Upon appeal to the Superior Court by the county commissioners of Cabarrus County from an award of damages to the owner of land for the construction of a public road thereon (ch. 201, Pub. Laws 1907), it is discretionary with the trial judge to permit the required bond to be given at the time of the trial.

3. Counties and Towns—Public Roads—Damages—Appeal, Time to Perfect—Interpretation of Statutes.

A requirement of a public road law, that the owner of lands upon which the location of such road is changed must file his petition asking for damages within six months after such change is made, must be complied with to entitle the owner to the damages claimed.

4. Appeal and Error—Record—Instructions.

Where it does not appear from the record that there was any evidence, or aspect of the controversy, which would make a prayer requested for special instruction applicable, the refusal of the trial court to so instruct will not be held for error.

(524) APPEAL by plaintiff from *Harding, J.*, at January Term, 1914, of CABARRUS.

This is a proceeding to have damages assessed under the road law of Cabarrus County, alleged to have been incurred in changing and relocating a road across the land of the plaintiff.

The petition for the assessment of damages was filed on 22 November, 1913, and thereafter the jury, duly appointed, assessed the damages at $500. The report of the jury was presented to the defendant, the board of commissioners, and the following order was made thereon, which is referred to in the record as Exhibit A:

The petition of T. F. Pharr to the clerk of the Superior Court of Cabarrus County, asking that a jury be appointed to assess the

(525) damages, if any, sustained by him by reason of the improvements of the public road over the said Pharr's land on the National Highway between Jackson Training School and Rocky River, and the report of the jury allowing and assessing said damages, together with the papers in the cause, having been laid before the board of commissioners at an adjourned meeting of the said board on Monday, 15 December, 1913, by the clerk of the Superior Court, and it appearing to the said board that the said Pharr is not entitled to any damages, for that he asked and petitioned and consented for the said improvement of the said road to be made over his land where and as it was made; and also for that certain dirt had been removed by said county in front of his house as a full satisfaction to him of any and all rights or claims for damage that he might have had, if any; and for that his right of action

is barred by the lapse of time under the statute; and it also appearing to the said board that the damages assessed, towit, $500, is excessive and unreasonable, and that the said jury did not take into consideration the benefits to the said Pharr, as required by the Cabarrus road law, in arriving at their conclusion as to the amount due the said Pharr:

It is, therefore, ordered by the board of commissioners of Cabarrus County that the said $500 assessed by the jury against the said county in favor of the said T. F. Pharr be not paid, and that an appeal be taken to the Superior Court of Cabarrus County in said case, and that the original papers pertaining to this matter, together with this order, be sent up.

J. F. HARRIS,
Clerk to Board.

Filed and docketed 24 December, 1913.

H. L. WIDENHOUSE,
Clerk Superior Court.

The defendant did not file a bond to secure the costs of the appeal until 15 January, 1914, the day before the trial in the Superior Court.

The jury found, upon an issue submitted to them, that the (526) plaintiff did not institute this proceeding within six months after the road was completed across his lands.

The plaintiff moved to dismiss the appeal for failure to file the bond before attempting to appeal, and, upon denial of the motion, excepted.

The plaintiff requested his Honor to instruct the jury "That the defendant cannot take advantage of its failure to accept the job of Foil as completed until the first day of June, 1913, and defendant cannot require plaintiff to have knowledge of the completion of the road, according to plans and specifications, until said defendant had placed its approval upon said work as completed," which was refused, and the plaintiff excepted.

There was a judgment in favor of the defendant, and the plaintiff appealed.

The following are the assignments of error discussed in plaintiff's brief:

1. In admitting the paper-writing marked "Exhibit A" as part of the record of the case.

2. In overruling plaintiff's motion to dismiss the appeal for the failure to give the bond prior to the docketing, as required by chapter 201, Public Laws 1907.

3. In refusing to make order affirming the report and award of assessors appointed by the clerk.

4. In declining to give plaintiff's prayer for instructions No. 1a.

Morrison H. Caldwell for plaintiff.

L. T. Hartsell and H. S. Williams for defendant.

ALLEN, J. (1) It does not appear from the record that the paper, Exhibit A, was introduced in evidence or read before the jury, or that it was considered by the court, except as a notice of appeal and as a plea that the proceeding had not been commenced within six months, for which purposes it was competent.

(2) The road law (ch. 201, Pub. Laws 1907) under which this proceeding has been conducted provides that either party aggrieved
(527) in the assessment of damages "shall have the right of appeal to the Superior Court, after giving good and sufficient security for costs," and the plaintiff contends this is mandatory, and that the giving of the bond being a condition precedent to the right to appeal, the court had no power to permit the bond to be filed, and that the appeal of the defendant to the Superior Court ought to have been dismissed.

The language of the statute is not more imperative or emphatic than that of section 450 of the Revisal, which says: "Before issuing the summons the clerk shall require of the plaintiff either to give an undertaking, etc.," and it has been uniformly held under the latter statute that the court may permit the undertaking to be filed after the writ is returned (see annotations in Pell's Revisal, sec. 450), and the same construction should be given to the statute under consideration.

(3) The road law also provides that the party aggrieved by the change or location of a road must file his petition asking for the assessment of damages within six months after such change, location, or relocation of the road, and as the jury has found that the plaintiff's petition was not filed within the time prescribed, the court properly refused to affirm the report and award of the assessors.

(4) We do not see the pertinency of the instruction which his Honor refused to give, as it does not appear in the record that the defendant failed to accept "the job of Foil or that it undertook to take advantage of its failure to do so."

We find no error in the trial.

No error.

Cited: Rouse v. Kinston, 188 N.C. 10 (3g); *Latham v. Highway Com.,* 191 N.C. 143 (3g).

HAROLD ALEXANDER, BY NEXT FRIEND, v. CITY OF STATESVILLE.

(Filed 13 May, 1914.)

1. Trials—Instructions — Verdict, Directing — "Believe the Evidence" — Appeal and Error.

A requested instruction directing an answer by the jury to an issue of negligence if they believe the evidence, withdraws from their consideration everything except the credibility of the evidence, and is erroneous, in depriving them of the power of determining whether the fact of negligence has been established if the evidence is believed by them.

2. Trials—Evidence—Negligence—Questions for Jury.

The question of negligence, at issue in an action to recover damages therefor, may not be declared by the court as a matter of law, when the evidence is conflicting, or where more than one inference may be drawn therefrom, or different conclusions may be reached by two fair-minded persons of equal intelligence.

3. Same—Proximate Cause—Verdict, Directing.

Where damages are sought to be recovered for a negligent act alleged, the plaintiff is not alone required to establish the fact of negligence, for he must also show that the negligent act was the proximate cause of the injury; and where different inferences may be drawn by the jury upon the evidence in the case, the court may not, as a matter of law, direct a verdict in plaintiff's favor.

4. Trials—Negligence—Burden of Proof—*Contributory Negligence*—Verdict.

Where *contributory negligence* is relied on as a defense in an action for damages, the plaintiff is required to introduce competent evidence tending to establish the issue of negligence, and when he has failed to do so, or the jury find against him upon that issue, the issue as to contributory negligence becomes immaterial.

5. Municipal Corporations — Cities and Towns — Streets — Negligence — Notice.

A municipality is not held liable as an insurer of the safe condition of its streets, for it is only required that they maintain them in a reasonably safe condition, and exercise ordinary care and due diligence to see that they are so kept and maintained, which requirement also applies to conditions existing in the widening of its streets, etc.; and in an action to recover damages for negligence in this respect, it is necessary for the plaintiff to show actual or constructive notice to the city of the defect complained of, through its proper officials.

6. Same—Trials—Questions for Jury.

In an action to recover damages of a municipality alleged to have been caused by the negligent condition in the widening and construction of its street, where the plaintiff, a boy of about 7 years of age, fell or was pushed by his companion, another boy, over a large culvert, and fell down a steep

embankment to his injury, there was conflicting evidence upon the question of whether, at this place and on that side of the street, the city had completed its work; or on the opposite side of the street there was a safe sidewalk or roadway; or whether there was, at the place of the injury, a proper and reasonably safe protection against injury to pedestrians: *Held*, the evidence was properly submitted to the jury upon the question of the defendant's actionable negligence, and the issue should not have been answered in plaintiff's favor as a matter of law.

7. Trials—Contributory Negligence—Children—Questions for Jury.

While a child of tender years is not held to the same degree of care as one of mature years in avoiding an injury arising from the negligent act of another, it is ordinarily a question of fact for the jury to determine, in his action to recover damages therefor, whether under the circumstances, and considering his age and capacity, he should have avoided the injury complained of by the exercise of ordinary care; and in this case it appearing that the plaintiff was a bright boy of about 7 years of age, it is held that the court properly left the issue of contributory negligence to the jury.

(529) APPEAL by plaintiff from *Long, J.*, at October Term, 1913, of IREDELL.

Action to recover damages for personal injuries, alleged to have been caused by defendant's negligence.

Plaintiff is a boy about 7 years old, and was, at the time he was hurt, a pupil at the graded school in Statesville. Defendant was engaged in widening Bell Street some 15 feet and constructing a culvert underneath it. Plaintiff contended that the work of widening the street had been completed and the street open for travel, the space between the head-walls of the culvert having been filled with dirt to the intended street level, and the sidewalks completed. That there were no barriers or guardrails on the head-walks, which capped ends of the culvert and from which there extended downwards to the lower land, about 15 feet, a sheer precipice. Plaintiff was going home with his playmates from the school, and stopped at the culvert. He was standing on or near the edge of the culvert or head-wall to the south, and either fell off or was pushed over it by a companion and dropped to the ground below and was injured.

(530) Defendant contended that the street work had not been finished; that there was no sidewalk on the south side of the street, but there was a concrete walk, which had been completed and was the one used by the public, including school children, on the north side, extending from Center to Mulberry streets, and that there never had been any walk on the south side. It also alleged that the head-wall on the south side was from 18 inches to 2 feet above the level of the dirt roadway, and was itself a barrier or guard. There was evidence to support these contentions. Plaintiff requested the court to instruct the jury that "if they

believed the evidence, they should answer the first issue, as to negligence 'Yes.'" This was refused, and plaintiff excepted.

The court charged the jury, in part, as follows:

"1. If the city, in opening or repairing one of its streets or sidewalks for travel, has opened a part of said street for travel and is at work on the remainder—if you so find—then it must use reasonable care to guard passers-by along said street or sidewalk from injury by conditions existing on that part of said street or sidewalk not open for travel, by placing sufficient barriers to protect persons from injury in going over such street, provided the city has manifested its purpose to open such way and dedicate the same to the use of the public; and if it fails to use reasonable care in this respect, that is, the care of a prudent man under all of the circumstances, and a pedestrian is injured whilst traveling along such street, and such injury was proximately caused by the negligence of the city, the city would be liable for such damages as might ensue.

"2. It was the duty of the defendant to keep its streets, including its sidewalks, in proper repair, that is, in such condition that children and others in passing and repassing over them might at all times, when said streets have been opened for travel, do so with reasonable safety; and proper repair means that all bridges or culverts, dangerous pits, embankments, and like perilous places very near and adjoining the streets shall be guarded against by proper railings or barriers.

"3. If you find by the greater weight of the evidence that the (531) defendant employed Mr. Lazenby to construct the culvert along Bell Street, and that it caused Mr. Allison and others to raise Bell Street, at and near the said culvert, above the level of the surrounding ground, to a height of 10 feet or more at the culvert, and you find that said street was opened by the city for travel, and you find that it failed to place guard-rails or barriers along the said sidewalk, but left said street or sidewalk at said point unprotected, and you find that such failure on the part of the city was the proximate cause of the injury to the plaintiff, then the defendant would be guilty of negligence, and under such findings, if so made by you from the evidence, you would answer the first issue 'Yes.'"

Issues as to negligence, contributory negligence, and damages were submitted. The jury having answered the first issue, as to negligence, "No," did not answer the other issues. Judgment upon the verdict, and appeal by plaintiff.

Lewis & Lewis and H. P. Grier for plaintiff.

Dorman Thompson and L. C. Caldwell for defendant.

WALKER, J., after stating the case: The plaintiff's counsel requested the court to charge the jury that the first issue should be answered affirmatively if they believed the evidence. This, if given, would of course be virtually a withdrawal of the fact involved in the main issue, as to negligence, from the finding of the jury, leaving them only to decide upon the credibility of the evidence. The form of the prayer, as we have frequently said, is not to be commended, as the jury may believe the evidence and yet not be willing to find that the fact of negligence has been established by it. *Sossamon v. Cruse,* 133 N. C., 470; *Merrell v. Dudley,* 139 N. C., 57; *S. v. Blackwell,* 162 N. C., 672. But waiving this defect for the present, we do not think the prayer was in other respects a proper one. The question of negligence was not one merely of law, to be declared by the court, as the evidence was conflicting, and, therefore, the jury should have passed upon it and found the facts. *Russell v. R. R.,* 118 N. C., 1112; *Hardison v. R. R.,* 120 N. C., 492; (532) *Spruill v. Insurance Co., ibid.,* 141; *Everitt v. Receivers,* 121 N. C., 521. The evidence was of such a kind that, upon the question of negligence, more than one inference may be drawn from it, and two fair-minded persons of equal intelligence may have differed in regard to it and formed different conclusions. *Graves v. R. R.,* 136 N. C., 3; *Ramsbottom v. R. R.,* 138 N. C., 38. "When the facts are controverted or the negligence is not so clearly shown that the court can pronounce upon it, as matter of law, the case should go to the jury with proper instructions, so that they may apply the law to any given state of facts as found by them." *Graves v. R. R., supra.*

In order to give an affirmative answer to the first issue, the jury would be required to find two facts: first, that there was negligence, and, second, that this negligence was the proximate cause of the injury. *Brewster v.* Elizabeth City, 137 N. C., 392. Passive negligence is harmless, and it is only when it is active and the direct or efficient cause of the injury that it becomes actionable. Plaintiff was required, therefore, to show, the clear burden being upon him to do so, that the negligence, if any, proximately caused the damage. It is a breach of duty owing by defendant to the plaintiff from which damage, not remotely, but directly, ensues, that gives him a cause of action. We held in *Byrd v. Express Co.,* 139 N. C., 275, that negligence of a defendant followed by an injury does not make him liable therefor, "unless the connection between cause and effect is established, and the negligent act of the defendant would not only be the cause, but the proximate cause, of the injury." Equally emphatic is the language of the Court in *Hauser v. Telegraph Co.,* 150 N. C., 557; *Hoaglin v. Telegraph Co.,* 161 N. C., 398; *Hocutt v. Telegraph Co.,* 147 N. C., 186. Plaintiff must first prove actionable negligence before the

defendant is called upon to show negligence on the part of the plaintiff which contributed to the injury.

What was the duty of the defendant to the plaintiff in this case? A city does not insure or warrant the safe condition of its streets. It must keep and maintain them in a reasonably safe condition, and exercise ordinary care and due diligence to see if they are so kept and maintained. *Smith v. Winston,* 162 N. C., 50, and cases cited (533) therein. After stating that the authorities of a city, town, or village are charged with the duty of keeping its streets in a "reasonably safe condition" only and to the extent that this can be done by the exercise of due care and supervision, *Justice Hoke* says, in *Fitzgerald v. Concord,* 140 N. C., 110: "The town is not held to warrant that the condition of its streets shall be at all times absolutely safe. It is only responsible for a negligent breach of duty, and to establish such responsibility it is not sufficient to show that a defect existed and that an injury has been caused thereby. It must be further shown that the officers of the town knew, or by ordinary diligence might have discovered, the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated."

The record shows that the judge who presided at the trial of this cause charged the jury in exact accordance with the principle thus so clearly stated in that case, and which has since been approved so often. *White v. New Bern,* 146 N. C., 447; *Revis v. Raleigh,* 150 N. C., 353; *Johnson v. Raleigh,* 156 N. C., 269. The city undoubtedly had the right, and it was its duty, if required by the public convenience, to widen, re-grade, and otherwise improve Bell Street, and is not responsible to any one for the manner of doing so, provided its authorities exercised due care in doing the work. The liability of the city to pedestrians and others using the street is based upon negligence—the absence of that care which a man of ordinary prudence would bestow upon the work under like circumstances. If the structure was defective in any particular, the city is not liable for consequent damage, unless a person of ordinary prudence, in the exercise of care, should have anticipated that injuries to travelers or others using the street would occur. We so held in *Fitzgerald's case, supra.* This was a question for the jury, upon all the facts and circumstances.

In this case it appears that the concrete walk, which was used by the public, including school children, was on the opposite side of the street; at least there was evidence of this fact, that there was no sidewalk on the south side, and that there was a clear way for all persons (534) to pass and repass between the headwalls. It further appears that the head-wall on the south side was elevated above the street level,

so that in itself it formed a barrier on that side of the street. These and other facts and circumstances were for the jury to consider upon the question of negligence and proximate cause, and the judge fully explained their bearing from a legal standpoint upon the question at issue. His charge, in some respects, was really more favorable to the plaintiff than he had the right to expect, and he gave substantially all of plaintiff's requests for instructions to which he was, in law, entitled.

Upon the question of plaintiff's contributory negligence, he properly confined his charge to the second issue, which separately and independently involved an inquiry into that matter. As to the plaintiff's age and his incapacity arising out of his tender years, it may be said that the question of contributory negligence, on his part, is not to be determined alone by the fact of his youth, except in extreme cases; but other considerations enter into the question, as, for instance, his degree of capacity or intelligence. Some boys are much brighter, smarter, and more capable than others who are much older, and better able to take care of themselves. The youth of the person must be considered, of course, but with the qualification already made, it is not the only test, and the presumption of incapacity to protect himself is not always a conclusive one. This boy was intelligent and bright, as it appears from the evidence, and the jury could have inferred that, if left alone and not pushed or shoved over the edge of the head-wall by another, he would have been able to take care of himself and have escaped injury. The rule was thus stated by *Justice Connor* in *Rolin v. Tobacco Co.*, 141 N. C., 300: "It is hardly necessary to add that contributory negligence on the part of the minor is to be measured by his age and his ability to discern and appreciate the circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess. (535) As the standard of care thus varies with the age, capacity, and experience of the child, it is usually, if not always, when the child is not wholly irresponsible, a question of fact for the jury whether a child exercised the ordinary care and prudence of a child similarly situated; and if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law exacts for determining what is ordinary care in a person of full age and capacity," citing *Am. C. and F. Co. v. Armentrodt,* 214 Ill., 509; *Plumly v. Birge,* 124 Mass., 57; 7 A. and E. Enc., 409.

Labatt on Master and Servant (Ed. 1904), sec. 348, says that "the essential and controlling conception by which a minor's right of action is determined with reference to the existence or absence of contributory

fault is that his capacity is the measure of his responsibility. If he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to that danger. For the exercise of such measure of capacity and discretion as he possesses, he is responsible."

The rule generally approved, and which has been adopted by this Court, was thus stated in *R. R. v. Gladmon,* 15 Wall. (U. S.), 401 (21 L. Ed., 114): "The rule of law in regard to the negligence of an adult and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of 3 years of age less caution would be required than of one of 7; and of a child of 7, less than of one of 12 or 15. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case," citing Sh. and Redf. on Neg., sec. 49; *Morgan v. R. R.,* 38 N. Y., 455; *R. R. v. McTighe,* 46 Pa., 316, and other authorities. *Gladmon's case* has been followed by this Court in *Manly v. R. R.,* 74 N. C., 655; (536) *Murray v. R. R.,* 93 N. C., 92; *Bottom v. R. R.,* 114 N. C., 699. In *Bottom's case* the Court refers to *Gladmon's case* and *Robinson v. Cone,* 22 Vt., 213, as stating the correct rule, and takes this passage from the *Robinson case:* "All," says *Judge Redfield,* in delivering the opinion, "that is required of an infant plaintiff in such a case (where a child was injured in a highway) being that he exercise care and prudence equal to his capacity." The passage which we have taken from *Gladmon's case* was quoted by *Chief Justice Smith,* with full approval, in *Murray v. R. R., supra,* as containing a correct statement of the rule applicable in such cases. See, also, *Serano v. R. R.,* 188 N. Y., 156; *Slattey v. Ill. Co.,* 190 Mass., 79; *Wallace v. R. R.,* 26 Oregon, 180 (25 L. R. Anno. (O. S.), 667); *Reed v. City of Madison,* 83 Wis., 176 (17 L. R. Anno. (O. S.), 736); *Westbrook v. R. R.,* 66 Miss., 560 (14 Am. St. Rep., 587); *R. R. v. Stout,* 17 Wall., 657 (21 L. Ed., 745); *Moore v. R. R.,* 99 Pa., 301; *Cosgrove v. Ogden,* 49 N. Y., 255; *Ridenhour v. R. R.,* 102 Mo., 270; *Mackey v. Vicksburg,* 64 Fed., 77; *Thurber v. R. R.,* 60 N. Y., 326.

It was said in *R. R. v. Stout, supra:* "To entitle an adult to recover damages for an injury from the fault or negligence of another, he must himself have been free from fault; but such is not the rule in regard to an infant of tender years. The care and caution required of a child is

according to his maturity and capacity only, and this is to be determined by the circumstances of each case." In that case the child was between 6 and 7 years of age, and the rule of the *Gladmon case* was applied. So it was said in *Westerfield v. Lewis, supra* (child 5 years and 7 months): "The rule which exempts a child of tender years from responsibility, while it may not operate justly in every possible case, on the whole promotes the ends of justice, and we followed the authorities which held that a child of the age of appellant is *prima facie* exempt from responsibility, but testimony is admissible to show the contrary," citing many authorities. And the same doctrine was applied in *Stone v. Dry Dock Co.*, 115 N. Y., 104, where the child was about the same age as was plain-
(537) tiff in this case, and the Court said: "In administering civil remedies the law does not fix any arbitrary period when an infant is deemed capable of exercising judgment and discretion. It has been said in one case that an infant 3 or 4 years of age could not be regarded as *sui juris*, and the same was said in another case of an infant 5 years of age. On the other hand, it was said in *Cosgrove v. Ogden* (49 N. Y., 255), that a lad 6 years of age could not be assumed to be incapable of protecting himself from danger in streets or roads, and in another case that a boy of 11 years of age was competent to be trusted in the streets of a city. From the nature of the case it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury where the inquiry is material, unless the child is of so very tender years that the court can safely decide the fact," citing cases.

It will be found that in several of the cases we have relied on, the child in question was younger than was plaintiff in this case at the time of the injury. Unless the child be extremely young, so that we can say, without doubt, that he is incapable of committing an act of negligence, the question should be submitted to the jury to decide according to his age, intelligence, and capacity, and the particular facts and circumstances of the case which may shed any light upon it. There are facts in this case from which the jury could infer that plaintiff had capacity sufficient to care for himself.

The question of proximate cause was properly submitted to the jury for their determination, and was not a pure question of law upon the facts. It was for the jury to say whether it could reasonably have been anticipated that injury would result to the plaintiff from the then critical condition of the street. The fact was not so conclusively established

against the defendant as to require its withdrawal from the jury. *Wheeler v. Gibbon,* 126 N. C., 811.

The jury, under correct instruction, have found that defend- (538) ant was not guilty of negligence, and it, therefore, was not necessary to consider the second issue, but we have discussed the question of plaintiff's capacity because of the position taken by plaintiff, on the argument, in regard to it.

The case of *Drum v. Miller,* 135 N. C., 204, is not applicable. There is only one way the boy could have been hurt, and this is by falling from the head-wall. He might have peered over the edge or brink of this small precipice and gratified his curiosity with perfect safety, had he not been shoved or pushed over by his companions.

No error.

Cited: McAtee v. Mfg. Co., 166 N.C. 456 (2g); *Christman v. Hilliard,* 167 N.C. 6 (2p); *Buchanan v. Lumber Co.,* 168 N.C. 45 (2g, 3g); *Raines v. R. R.,* 169 N.C. 192 (7g); *Lamb v. Perry,* 169 N.C. 442 (2p); *Collins v. Casualty Co.,* 172 N.C. 546 (1g); *Odom v. Lumber Co.,* 173 N.C. 136 (3g); *Mullinax v. Hord,* 174 N.C. 615 (7g); *Fry v. Utilities Co.,* 183 N.C. 290 (7g); *Fray v. Utilities Co.,* 183 N.C. 297 (7j); *Gilland v. Stone Co.,* 189 N.C. 789 (7g); *Corp. Com. v. Trust Co.,* 193 N.C. 700 (1g); *Hoggard v. R. R.,* 194 N.C. 260 (7g); *Brown v. R. R.,* 195 N.C. 701 (7j); *Swinson v. Realty Co.,* 200 N.C. 278 (5c); *Tart v. R. R.,* 202 N.C. 55 (7g); *Haney v. Lincolnton,* 207 N.C. 286 (5g); *Morris v. Sprott,* 207 N.C. 359 (7g); *Hollingsworth v. Burns,* 210 N.C. 42 (7g); *Boykin v. R. R.,* 211 N.C. 115 (7g); *Leach v. Varley,* 211 N.C. 210 (7g); *Ferguson v. Asheville,* 213 N.C. 573 (5g); *Houston v. Monroe,* 213 N.C. 791 (5g); *Manheim v. Taxi Corp.,* 214 N.C. 691 (7g); *Barnes v. Wilson,* 217 N.C. 199 (6j); *Gettys v. Marion,* 218 N. C. 269 (5g); *Wall v. Asheville,* 219 N.C. 169 (5g); *Carter v. Realty Co.,* 223 N.C. 192 (3g).

SAMUEL L. COOPER AND WIFE v. SOUTHERN EXPRESS COMPANY.

(Filed 13 May, 1914.)

1. Mental Anguish—Joint Action—Trials—Demurrer.

Where two or several plaintiffs join in their action to recover damages for mental anguish, a demurrer for misjoinder is good, for from the nature of damages of this character the causes are not severable, the parties, as well as the subject-matter, necessarily being separate and distinct.

2. Mental Anguish—Ignorance of Conditions—Trials—Damages—Questions of Law—Courts.

When it is shown that the plaintiff, in an action to recover damages for mental anguish, was not aware or conscious at the time of the facts or circumstances upon which the damages are necessarily measured, a recovery of actual damages thereon will be denied as a matter of law.

3. Mental Anguish—Express Companies—Trials—Negligence—Avoidance of Damages—Extra Expense—Measure of Damages.

The plaintiff sued an express company for damages for mental anguish alleged to have arisen from its neglect to put off a coffin which had been purchased for the interment of his child, at its destination, and, as the measure of his damages, claimed that he was thereby prevented from burying the child at his family burying-ground, where he desired to bury it, because decomposition had begun to set in upon the late arrival of the coffin, which the defendant had carried beyond its destination and returned. There was no evidence that he attempted to procure another coffin in time for his purpose, which it appears he could have done, and it is held that the mental anguish did not necessarily result from the defendant's negligence, and it being the plaintiff's duty to have avoided it, under the circumstances, his measure of damages was the additional expense he would have incurred had he otherwise acted.

(539) APPEAL by defendant from *Justice, J.*, at November Term, 1913, of HENDERSON.

Smith & Shipman for plaintiffs.

Staton & Rector and A. B. Andrews, Jr., for defendant.

CLARK, C. J. This is an action by husband and wife for mental anguish, alleging that by delay of defendant in the delivery of the coffin they were forced to bury their deceased child near the place they were living instead of conveying the remains to the family burying-ground at Pleasant Grove Church near Etowah.

In *Morton v. Telegraph Co.*, 130 N. C., 299, it was held that "One person cannot recover for mental anguish suffered by another; and therefore the husband and wife, suing severally for their own anguish, are different parties, suing upon distinct causes of action. As was said in *Cromartie v. Parker*, 121 N. C., 198, 'as in this case there is not only a misjoinder of distinct causes of action, but also a misjoinder of parties having no community of interests, the action cannot be divided under Code, 272, which permits division only where the causes alone are distinct.' The demurrer should therefore have been sustained and the action dismissed." To the same effect, *Thigpen v. Cotton Mills*, 151 N. C., 97. However, we will pass by this objection, as a demurrer does not

seem to have been interposed, and it was waived. *McMillan v. Baxley,* 112 N. C., 578; *Hocutt v. R. R.,* 124 N. C., 216.

Upon the evidence, it appears that the plaintiffs lost an infant child, who lived only half an hour or an hour, on 7 March, 1911; that J. B. Cooper, the father of the male plaintiff, went down to Hendersonville the next morning (Monday) and purchased a little coffin (540) which he sent up by express to Arden, 10 miles north of Hendersonville and some 4 miles from the home of the plaintiffs, coming up himself on the same train, which left Hendersonville at 10:30 a. m. and arrived at Arden at 11 a. m. On arriving at Arden he engaged in conversation with some one, and, not presenting the bill of lading, did not notice that the coffin had not been put off until the train had pulled out. He then found the station agent, and there is some conflict between plaintiffs' witnesses whether J. B. Cooper tried in time to get the express agent to wire to Skyland, a station 2 miles further north, to have the coffin put off there where he might have gotten it, or endeavored to get in communication with his lawyer in Hendersonville. It appears, however, that another train left Hendersonville going north at 1 p. m. and if he had wired for another coffin to be shipped by that train it would have gotten to Arden at 1:30 p. m., and could have been taken out to the residence of the plaintiffs by 2:30, which would have given time to have taken the same 4:12 p. m. train (Monday) going south, as they had intended, so as to take the body to Etowah, near which place it was the intention of the father to bury the child. But neither of these steps being taken, the coffin got back to Arden on the 4:12 p. m. train Monday, and reached the home of the plaintiffs an hour later.

The testimony of the plaintiff's father is that it was 17 miles through the country by which the body might have been taken to Pleasant Grove Church near Etowah next morning (Tuesday). But he says the body began to show signs of decomposition, though this was in March and the weather "reasonably cold," and hence they buried it at the church near the residence of the plaintiffs. It appeared further in the evidence that such burial took place at 12 o'clock Tuesday, by which time, if they had started the body the same morning, they could have reached the burial-ground near Etowah.

It is also in evidence that the mother was in such condition that she did not know of this delay nor of the fact that the burial was intended to be at Pleasant Grove Church or that the body was to be buried where it was.

Upon the plaintiff's own testimony, therefore, she could not (541) have suffered any mental anguish during the delay, or from disappointment which she did not know, and the motion for a nonsuit as to her should have been granted.

As to the father, when he found that the coffin bought by J. B. Cooper in Hendersonville was not delivered at Arden at the time he contends it should have been (at 11 a. m.), it was his duty to have taken such steps to prevent loss and damage as lay in his power; but, according to the evidence, he did not make any effort at all to procure another coffin in time from Hendersonville or take any other steps whatever to supply the failure to receive the coffin. It was error, therefore, in the court to refuse the following prayer: "The only damages the plaintiffs are entitled to recover in this action, if the jury should find that the defendant was negligent in making the delivery of said coffin, is only such an amount as plaintiff would have had to expend in procuring another coffin in time to have the remains of the said child shipped to Etowah on the same train on which it is alleged they would have shipped the little body if the coffin bought by J. B. Cooper in Hendersonville had been delivered at Arden at the time the plaintiffs contend it should have been, or such an amount as plaintiffs would have had to incur in procuring another coffin after it was ascertained that the one J. B. Cooper bought had not been delivered at the time it is contended by plaintiff that it should have been, and the expenses of having the remains of the plaintiffs' deceased infant, and their relatives who were at their home at Arden, conveyed by private conveyance from their said place of residence to the graveyard or burial-ground in which plaintiffs contend they desired to have their deceased infant buried, and no more."

The evidence is that it was half an hour by train from Hendersonville to Arden and one hour for the trip from Arden to plaintiffs' residence 4 miles away. If, therefore, the plaintiffs or J. B. Cooper as agent had wired to Hendersonville at 11 o'clock or later for another coffin, it could have left on the 1 p. m. train, reaching plaintiffs' home at 2:30, giving time for the party with the coffin to reach Arden and take the same
(542) 4:12 p.m. train for Etowah, which it is testified that they intended to have taken if the coffin had been delivered by the 11 o'clock train. The prayer, therefore, giving the plaintiffs, in the alternative after failing to wire for another coffin to come by 1 p. m. train, the expenses of the conveyances and party through the country next morning, 17 miles, was as liberal as could be claimed by the plaintiffs. That the little body was buried at the church near their residence, and not at the contemplated spot near Etowah, was the fault of the male plaintiff, since he could by taking proper steps have made the burial at Pleasant Grove, notwithstanding the failure of the defendant to deliver the coffin as it should have done by the 11 a. m. train. Mental anguish could have been avoided, for it was not the necessary consequence of defendant's negligence.

Error.

Cited: Campbell v. Power Co., 166 N.C. 489 (1g); *Godwin v. Jernigan*, 174 N.C. 76 (1b); *Lanier v. Pullman Co.*, 180 N.C. 410 (1b); *Griggs v. York-Shipley, Inc.* 229 N.C. 580 (3g).

JOHN BYERS v. SOUTHERN EXPRESS COMPANY.

(Filed 13 May, 1914.)

1. Mental Anguish—Express Companies—Trials—Negligence—Burial Caskets—Damages.

An express company is liable for mental anguish caused to a husband by its negligent delay in transporting and delivering a burial casket to be used in the interment of his wife, of which the receiving agent was informed at the time; and where by reason of such failure the husband was forced to bury his wife in a makeshift or cheap casket, the ground for such recovery is sufficiently shown.

2. Same—Contracts—Lex Loci—Federal Decisions—Interstate Commerce.

Where an express company is liable under our laws for mental anguish for its negligent failure to promptly transport and deliver a metal casket to be used in the interment of the plaintiff's wife, and the contract of shipment is made here, the question of recovery is not dependent upon the Federal decisions in relation to interstate commerce.

3. Same—Special Damages—Hepburn Act.

The Hepburn act with the Carmack amendment, authorizing a common carrier, under certain circumstances, to limit the amount of recovery in the event of its negligence in regard to interstate shipments, relates only to the damage which may thereby have been occasioned to "property," decreasing its value, and has no application to a recovery of special damages caused by the negligent delay by the carrier in its transportation and delivery, where such are otherwise recoverable; notwithstanding a contrary stipulation in the bill of lading.

4. Mental Anguish—Express Companies—Negligent Delay—Shipment Refused—Value of Shipment—Receipt—Right of Action—Estoppel.

Where an express company is liable to the plaintiff in an action to recover damages for mental anguish it has caused him in its negligent delay in the shipment or delivery of a burial casket, which consequently came too late at its destination, and was therefore refused, he is not barred of his right to recover therefor by receiving or receipting for the amount of money he had lost on that account.

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

(543) APPEAL by defendant from *Bragaw, J.*, at August Term, 1913, of BUNCOMBE.

Mark W. Brown for plaintiff.
Martin, Rollins & Wright for defendant.

CLARK, C. J. The plaintiff's wife died at Hickory Grove, S. C., while on a visit to her mother, and plaintiff, who lived in Asheville, purchased there a casket, robe, gloves, hose, and other articles suitable for her burial, and shipped them by the defendant to Hickory Grove, notifying the express agent that these articles were to be used in the burial of his wife, the following morning. The agent promised to ship the casket and other articles on the first train, and guaranteed that they would be delivered that night or early the next morning in full time for the funeral.

The distance via Spartanburg and Blacksburg to Hickory Grove was 112 miles, and if the casket had left Asheville by the first train (544) at 4:10 p. m. it would have reached its destination the same night. The casket had been delivered to the defendant early that morning. If it had been held by defendant at Spartanburg all night, and then been shipped to Blacksburg at 7:30 the following morning on train 36, which carried the express, it would have reached Blacksburg at 8:33 a. m., and would have left there at 9:05 a. m., reaching Hickory Grove at 9:37 a. m., in ample time for the funeral at 11 a. m.

The distance via Marion was 124 miles, and if the casket had been shipped on the first train over that route, it would have left Asheville at 3:25 p. m., reaching Hickory Grove at 8:06 p. m. the same day.

Instead of shipping the casket by either of these two routes, it was sent via Columbia, S. C., a distance of 300 miles, and could not have reached Hickory Grove till 5:25 p. m. the following day. As a matter of fact, the casket did not reach Hickory Grove until Wednesday, the second day after it left Asheville. The funeral was on Tuesday. The purchase and delivery to the defendant was early Monday morning.

The plaintiff left Asheville Monday night via Spartanburg, and when he reached Hickory Grove Tuesday morning he found that the casket had not arrived. The funeral, which had been fixed for 11 o'clock, was then changed to 4 p. m. The casket still did not come, and finding that the body could not be held longer, by the aid of a friend he procured a cheap casket, but without proper burial clothing for his wife, and the burial took place.

The above is condensed from the uncontradicted testimony. The defendant admits the negligence, indorsing on its voucher that the "casket was *misrouted* from Asheville, N. C., by Transfer Clerk Deweese."

The defendant put in evidence the following receipt: "Received at Asheville, on 25 May, 1912, $64.17, said amount being in full payment for one coffin delivered to the Southern Express Company at Asheville, N. C., on 1 April, 1912, by John Byers, to be shipped to Sarah Moore, Hickory Grove, S. C." On this was a memorandum that the casket had been misrouted, and was refused on that account on arriving at destination too late for the funeral, and that the defendant had (545) returned it to Asheville and sold it for $15 to the company from whom Byers had bought it.

The defendant claims that the acceptance of payment for the value of the casket should be construed as a waiver by plaintiff of his right to other damages. The receipt does not say so, but recites that it is "in full payment for one coffin." The uncontradicted evidence of the plaintiff is that the defendant "paid him for all the money he paid out on the casket and other things, but did not pay him anything for the damages." It was competent thus to explain the receipt, if necessary. Counsel for the defendant also admitted that it was fully understood by plaintiff's attorney and the agent of the defendant at the time the receipt was signed that it did not cover any claim for the damages. The record shows as follows: The court said, speaking to defendant's counsel: "You gentlemen do not claim that you settled anything that is covered by this complaint?" To which Mr. Martin replied: "No, your Honor; we do not claim that we paid anything for mental suffering."

There was evidence of mental suffering, but it would have been inferred as a matter of law upon the circumstances of this case. Under the law of this State, where the contract of shipment was made, the plaintiff is entitled to recover such damages. *Thompson v. Express Co.,* 144 N. C., 389; *Penn v. Telegraph Co.,* 159 N. C., 306. Upon all the authorities, damages for mental anguish are compensatory damages. *Carmichael v. Telephone Co.,* 157 N. C., 25, where the authorities are summed up by *Hoke, J.,* citing, among other cases, *Osborn v. Leach,* 135 N. C., 628, and *Head v. R. R.,* 79 Ga., 358, quoting *Bleckley, C. J.,* in the latter case, who says: "Wounding a man's feelings is as much actual damages as breaking his limb. The difference is that one is internal and the other external; one mental, the other physical. At common law, compensatory damages include, upon principle and upon authority, salve for wounded feelings, and our Code had no purpose to deny such damages where the common law allowed them."

It makes no difference, as this Court has always held, whether (546) the action or claim to recover damages for mental suffering is based upon breach of contract or upon tort. *Penn v. Telegraph Co.,* 159 N. C., 309, and numerous cases there quoted. In *Thompson v.*

Express Co., 144 N. C., 392, it was held, in the opinion by *Hoke, J.*, that the claim of damages for mental anguish "is not a separate cause of action at all, but only a further element of damages." It follows, therefore, that settlement as to the coffin, which was paid for by the defendant and resold to the original owner, was in nowise a settlement of "the further element of damages." Besides, as counsel frankly admitted, there has been in fact no settlement as to damages for mental anguish. The plaintiff has received no compensation for such damages, which he is now suing for.

The only other point raised is that this being an interstate shipment, under the "Hepburn Act" the defendant was authorized to limit its liability. But a reference to that statute shows that such authorization extends only to liability for damages "to such property." The compensatory damages sought by reason of the mental anguish sustained by the plaintiff from the misconduct of the defendant is *special damages*, and was not in the contemplation of, nor within the language used in, that act.

The defendant contends that it is protected by the following stipulation in the bill of lading: "Agreed that the defendant's liability in no event shall exceed the sum of $50 on account of loss or damage to said shipment, or delay in delivering the same." The expression, "delay in delivering the same," is not within the words of the act of Congress upon which the defendant relies. The Carmack amendment to the Interstate Commerce Act is construed in *Adams Express Co. v. Croninger*, 226 U. S., 491; *R. R. v. Elevator Co., ib.*, 427; *R. R. v. Carl*, 227 U. S., 639; *R. R. v. Harriman, ib.*, 657, and none of them construe the act to embrace damages accruing from delay, and still less do any of those decisions intimate that the act covers special damages, such as mental anguish, which are not damages to the property. The Carmack amendment (547) is set out in 226 U. S., 503, and provides that the carrier shall be liable to the lawful holder of any bill of lading "for any *loss, damage, or injury to such property* caused by it, or by any common carrier, etc., to which such property may be delivered or over whose lines such property may pass; and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." It would have seemed that the intent of this amendment to the act was to prevent the construction which had been put upon the Interstate Commerce Act in *Hart v. R. R.*, 112 U. S., 331, under which the carrier by stipulation could limit its liability, contrary to the common-law rule. But the United States Supreme Court is the ultimate authority in the construction of a Federal statute, and has held otherwise. We are not, however, called upon to read into the statute

an extension of it to other fields and to other matters, such as the claim now made, that the act repeals all claims for special damages which are not within the terms of the words of the statute—"loss, damage, or injury to such property." The United States Supreme Court has not gone that far, and it is very certain upon the face of the statute that Congress has not done so. Damages of this nature have no relation to the value of the property.

In *Hale v. Bonner,* 82 Texas, 33, 14 L. R. A., 336, it is held that damages for mental distress are recoverable for negligent delay in the transportation of the corpse of plaintiff's husband.

In *R. R. v. Hull* (Ky.), 57 L. R. A., where the shipment was from Asheville, N. C., to Slaughtersville, Ky., it was held: "Mental suffering may be considered in assessing the damages against a carrier for breach of its contract to transport a corpse. The question as to the negligence of a carrier in failing to forward a corpse by a certain train is for the jury."

The ground of recovery here, as already stated, is not for damages to the property shipped, and therefore the cause of action does not come within the act of Congress, but it is for the "special damage," the mental anguish, caused by the negligence of the defendant in failing to deliver the coffin as it should have done within time for the funeral. Under the circumstances, this was well calculated to cause great (548) mental anguish, and justified the verdict of $200 rendered by the jury.

No error.

HOKE, J., concurring: As at present advised, I incline to the opinion that mental anguish cannot in itself properly be made the basis of a separate and distinct cause of action, but is only an element of damages allowable in a certain class of cases. In the present instance I consider this and the other action for negligent delay in shipment of goods permit such recovery, in the discretion of the jury, and I find no plea or evidence tending to show that any sum has been paid or accepted in satisfaction of plaintiff's claim.

BROWN, J., dissenting: I think the defendant is not liable.

1. That the plaintiff, having been paid in full for his actual damages, cannot split up his cause of action, and when he accepted pay for the goods he settled all claims for damages arising out of the contract of shipment. This is expressly decided in *Eller v. R. R.,* 140 N. C., 140; *Kimball v. R. R.* (New Jersey), 77 Atl., 533.

2. That under the laws of the United States damages cannot be recovered for mental anguish by delay in the shipment of the goods.

3. That as the shipment was one in interstate commerce, plaintiff was bound by the terms of the receipt set out, and could not recover damages in excess of $50 in any event.

These two propositions appear to be conclusively settled in favor of the defendant by the Supreme Court of the United States. *Chicago, etc., R. R. v. Hardwick Elevator Co.*, 226 U. S., 427; *Adams Express Co. v. Croninger*, 226 U. S., 491; *Kansas, etc., R. R. v. Carl*, 227 U. S., 639; *M. K. T. R. R. Co. v. Harrison*, 227 U. S., 657.

MR. JUSTICE WALKER concurs in this dissent.

Cited: Reversed by Supreme Court of U.S., 240 U.S. 612; *Hodges v. Hall*, 172 N.C. 29 (4g); *Hardie v. Telegraph Co.*, 190 N.C. 47 (2o).

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M. L. HOLTON v. STEPHEN I. MOORE.

(Filed 13 May, 1914.)

1. Trials—Negligence—Contributory Negligence—Verdict—Judgment.

Where an action for damages presents for the consideration of the jury the issues of negligence and contributory negligence, and under proper instructions the second issue has been answered in the defendant's favor, the plaintiff is not entitled to recover, whatever the answer to the other issues may be, and cannot be entitled to judgment.

2. Mad Dogs—Contributory Negligence—Trials—Issues—Statutes.

An action would lie at common law in damages against the owner of a mad dog through whose negligence another person had been bitten by the dog, in favor of such other person; and where there is no indication that in his action the person thus injured was proceeding under the statute, Revisal, sec. 3305, an issue of contributory negligence, when pleaded and supported by evidence, should be submitted to the consideration of the jury. As to whether such issue could arise in proceedings under the statute, *Quære.*

3. Appeal and Error—Issues—Objections and Exceptions—Acquiescence—Procedure.

For a party to an action to take advantage on appeal of the submission of an issue claimed by him to have been improper, he should have excepted to the submission of the issue and the evidence tending to establish it on the trial; and where he has not only failed in these respects, but has had the benefit of two trials, wherein he acquiesced in or insisted upon the submission of the issues, he will be bound by his conduct in that respect, and will not be permitted to rely upon a contrary position in the Supreme Court.

HOKE, J., dissenting; CLARK, C. J., concurring in dissenting opinion.

APPEAL by plaintiffs from *Devin, J.*, at September Term, 1913, of ALAMANCE.

This is a civil action, tried before his Honor, *R. B. Peebles, J.*, and a jury, at May Term, 1913, of the Superior Court of Alamance County, and afterwards retried upon one issue before his Honor, *W. A. Devin, J.*, and a jury.

The action was brought to recover damages sustained by (550) plaintiff by reason of having been bitten by an alleged mad dog owned by the defendant, and on account of the alleged negligence of the defendant.

These issues were submitted at both trials without objection or exception by either party:

1. Was 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 the injury sustained by him? Answer: Yes.

3. What amount of damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $200.

The only exception taken on first trial is stated in the record as follows: "Both plaintiff and defendant moved for judgment upon the issues as found by the jury. Both motions overruled. Plaintiff excepts. Plaintiff's first exception. His Honor, in his discretion, set aside the verdict on the second issue, and ordered a new trial as to that issue."

On second trial, the second issue was again submitted to the jury without objection by either party, and answered "Yes."

At the second trial, notwithstanding, the jury again found the second issue in favor of the defendant, plaintiff moved the court to sign a judgment for plaintiff for the sum of $200 and for costs. Motion denied, and this constitutes plaintiff's only exception or assignment of error.

The court, upon the issues, rendered judgment for defendant, and the plaintiff appealed.

W. H. Carroll for plaintiff.
Parker & Parker for defendant.

BROWN, J. The ruling of the judge followed the well settled decisions of this Court. In the recent case of *Sasser v. Lumber Co., ante,* 242, it is said: "It is settled by the decisions of this Court that, in an action of this character, where the jury find that the plaintiff was injured by the negligence of the defendant, and further find that the plaintiff by his own negligence contributed to his own injury, and then assess dam-

ages, the plaintiff is not entitled to recover, and the defendant is
(551) entitled to judgment upon the issues. The force and effect of the establishing of contributory negligence upon the part of the plaintiff is only obviated by the further finding under a third issue that the defendant by the exercise of ordinary care could have avoided the injury notwithstanding the negligence of the plaintiff. *Baker v. R. R.*, 118 N. C., 1016; *Harvell v. Lumber Co.*, 154 N. C., 262; *Hamilton v. Lumber Co.*, 160 N. C., 51. In the last case *Justice Allen* says: 'The plaintiff cannot recover as long as the answer to the second issue (establishing contributory negligence) stands.' This case cites and approves *Baker v. R. R., supra,* and holds that the respective findings of negligence, contributory negligence, and damages are not insensible and inconsistent, and the defendant is entitled to judgment."

To the same effect is *Carter v. R. R., ante,* 244.

It is, however, contended by the plaintiff that this action is brought under Revisal, sec. 3305, and that contributory negligence is no defense to an action for damages brought under such statute, and that, therefore, he is entitled to judgment upon the issues. The statute reads as follows: "If the owner of any dog shall know, or have good reason to believe, that his dog, or any dog belonging to any person under his control, has been bitten by a mad dog, and shall neglect or refuse immediately to kill the same, he shall forfeit and pay $50 to him who will sue therefor; and the offender shall be liable to pay all damages which may be sustained by any one, in his property or person, by the bite of any such dog, and shall be guilty of a misdemeanor, and fined not more than $50 or imprisoned not more than thirty days."

There is nothing in the complaint to indicate that this action is brought under the statute. No reference is made to it in the pleadings, and the penalty provided in it is not sought to be recovered. Such an action for damages would lie at common law before the statute.

But we will assume that the action is brought under the statute, and yet we are of opinion that upon the issues the court below rendered the proper judgment.

(552) We are not prepared to hold that contributory negligence may not be properly pleaded to an action under the statute for the actual damages sustained.

Suppose the injured person, an adult in full possession of his faculties, knowing the condition of the dog, recklessly, carelessly and unnecessarily takes hold of the animal, and is bitten. Would his negligence be no bar to a recovery?

In the case of *Leathers v. Tobacco Co.*, 144 N. C., 347, this Court quoted with approval the following language from *Toby v. R. R.*, 94

Iowa, 256: "It is a general rule that the doing of a prohibited act, or the failure to perform a duty enjoined by statute or ordinance, constitutes negligence, for which the party guilty of such act or omission is liable unless excused by the contributory negligence of the one to whose person or property it is done. Contributory negligence will defeat recovery, even though the negligent act consisted in the violation of a statute or ordinance, and such violation is held to be negligence *per se.*" 29 Cyc. of Law and Procedure, page 508, and many cases cited in note.

However that may be, we do not think the point is properly before us upon this record, as the only exception taken on either trial and the only assignment of error is to the refusal of the trial judge to render judgment for the plaintiff upon the issues.

The defense of contributory negligence is set up in the answer, and on both trials evidence was introduced in support of the plea without objection or exception.

The issue of contributory negligence was framed and submitted to the jury on both trials without any objection or exception whatever by the plaintiff, and on both trials the judge charged the jury fully on that issue, and the plaintiff took no exception and has assigned no such error. He let two trials proceed to the rendition of a verdict without making any such point, and conducted each one of them upon the theory that contributory negligence is a proper defense.

It was the plaintiff's duty to except during the trial to the introduction of such evidence, to the submission of such an issue, and to the charge of the court, and to assign the rulings as error. He (553) failed to do so.

Upon the issues as answered, we think his Honor properly rendered judgment for the defendant.

Affirmed.

HOKE, J., dissenting: The statute in question, Revisal, sec. 3305, is correctly quoted in the principal opinion as follows: "If the owner of any dog shall know, or have good reason to believe, that this dog, or any dog belonging to any person under his control, has been bitten by a mad dog, and shall neglect or refuse immediately to kill the same, he shall forfeit and pay the sum of $50 to him who will sue therefor; and the offender shall be liable to pay all damages which may be sustained by any one, in his property or person, by the bite of any such dog, and shall be guilty of a misdemeanor, and fined not more than $50 or imprisoned not more than thirty days."

The complaint of plaintiff states his cause of action as follows:

"SEC. 2. That, on or about 14 January, 1911, the defendant had in his possession, on his premises, in Burlington, N. C., a certain dog,

which he claims as his own, and which he knew or had good reason to believe had been bitten by a mad dog, and was then and there afflicted with the disease known as hydrophobia; but these facts he failed to make known to this plaintiff.

"3. That the defendant, knowing full well, or having good reason to know, that his said dog was suffering with hydrophobia, and was what is usually known as a mad dog, invited plaintiff, who is engaged in the business of raising and training dogs for hunting purposes, to go on his premises and examine said dog, and assured this plaintiff that the dog would not bite and was in no way vicious.

"4. That in response to said invitation, plaintiff went upon the premises of the defendant for the purpose of examining said dog, and at once observed the uneasy appearance of said dog and also noticed froth, or foam, at his mouth, and thereupon called the attention (554) of the defendant to it, and the defendant assured plaintiff that there was no danger in the dog; that the foaming at the mouth was caused from the fact that he had treated the dog with castor oil, and told plaintiff to take hold of the dog and examine it, assuring plaintiff that the dog would not bite, and that he was perfectly harmless.

"5. That in obedience to the defendant's request, and relying upon his representations that the dog had been poisoned, and that he was perfectly harmless, plaintiff attempted to take hold of the collar on the dog's neck, when and where the dog suddenly and viciously turned upon plaintiff and did then and there bite plaintiff on his right hand, inflicting a very deep and serious wound.

"6. That the plaintiff then discovered that the dog was mad, and advised the defendant to have it killed at once, which was done, and its head sent at once to the Pasteur Institute, at Raleigh, N. C., where it was chemically examined by an expert and found diseased with hydrophobia."

There was evidence on the part of plaintiff in support of the allegations as made and tending to show that plaintiff was induced by defendant to visit the dog for the purpose of treating him, and that plaintiff was not only not informed of the circumstances going to show that the dog had been bitten by a mad dog, which were known to defendant, but that he received assurances calculated to disarm suspicion and leading plaintiff to believe that the dog, while sick, was altogether harmless.

Defendant's answers and evidence gave a different version of the occurrence, and there was allegation with evidence tending to fix plaintiff with contributory negligence.

From this I think it sufficiently appears that the action is brought upon the statute, and that, while the issues are not very aptly framed,

they are broad enough to present the questions in dispute, and the verdict on the first issue in plaintiff's favor, when construed in reference to the charge of the court and the pleading and testimony, has established that plaintiff's case comes clearly within the statutory provisions.

This being true, I am of opinion that the issue as to contribu- (555) tory negligence and the testimony tending to establish it are irrelevant to the inquiry, and should be allowed no effect upon the result.

There are many decisions, here and elsewhere, upholding the proposition that, in certain instances, an action on a statute will be defeated by contributory negligence on the part of the claimant, but this, I apprehend, will be found in reference to statutes designed to control or in some way affect individuals in their social or domestic relationship to each other, and the principle has no place where a statute, peremptory in its terms, is in strictness a police regulation, having the protection of the public chiefly in view. Shearman and Redfield on Negligence (5th Ed.), sec. 62; *Indianapolis, etc., R. R. v. Townsend,* 10 Ind., 38; *McCall v. Chamberlain,* 13 Wis., 637; *Flint and Pere Marquette R. R. v. Lull,* 28 Mich., 570. In this last case the statute required the railroads to construct fences and cattle-guards, etc., to prevent cattle from getting on the road, and contained the provision that "Until such fences and cattle-guards, etc., shall be duly made, such company, etc., shall be liable for all damages done to cattle, horses, or other animals thereon."

On recovery for such damages the defense of contributory negligence was urged on the part of the company, and, in reference to this position, *Cooley, J.,* delivering the opinion, said: "There still remains the question, however, whether the railway company could be held liable if the plaintiff himself was guilty of contributory negligence. Were this a common-law action, it is clear that such contributory negligence would be a defense. *L. S. and M. S. R. R. Co. v. Miller,* 25 Mich., 274; *Corwin v. N. Y. and Erie R. R. Co.,* 13 N. Y., 46. But this is not a common-law action. It is an action given expressly by a statute, the purpose of which is not merely to compensate the owner of property destroyed for his loss, but to enforce against the railway company an obligation they owe to the public. The statute is a police regulation, adopted as much for the security of passengers as for the protection of property. *Corwin v. N. Y. and Erie R. R. Co.,* 13 N. Y., 46; *McCall v. Chamberlain,* 13 Wis., 637; *Indianapolis, etc., R. R. Co. v. Marshall,* 27 Ind., (556) 302; *Jeffersonville, etc., R. R. Co. v. Nichols,* 30 Ind., 321; *Same v. Parkhurst,* 34 Ind., 501. And the decisions may almost be said to be uniform that in cases like the present, arising under such statutes, the mere negligence of the plaintiff in the care of his property can constitute no defense. *Corwin v. N. Y. and Erie R. R. Co.,* 13 N. Y., 42;

Indianapolis, etc., R. R. Co. v. Townsend, 10 Ind., 38; *Indiana Central R. R. Co. v. Leamon,* 18 Ind., 175; *McCall v. Chamberlain,* 13 Wis., 637; *Horn v. Atlantic, etc., R. R. Co.,* 35 N. H., 169; *Indianapolis, etc., R. R. v. Parker,* 29 Ind., 472; *Jeffersonville, etc., R. R. Co. v. Nichols,* 30 Ind., 321."

And so it is here. The Legislature, aware of the fearful nature of this disease of hydrophobia and recognizing the great danger of its communication and spread by rabid dogs, for the protection of the public have established these stringent regulations and provided in express terms that when an owner shall have reason to believe that his dog has been bitten by a mad dog, and shall neglect or refuse immediately to kill him, he shall forfeit and pay $50 to him who will sue therefor; shall be liable for all damages that anyone shall suffer in his person or property, and shall be guilty of a misdemeanor. There is nothing said here about contributory negligence. The terms of the law are clear and peremptory, "shall be liable for all damages," and to permit the defense of contributory negligence would be to substitute the conduct of the plaintiff for the will of the Legislature as expressed in the statutes, and has no support in good reason or well considered precedent.

CLARK, C. J. concurs in this dissent.

Cited: Oates v. Herrin, 197 N.C. 173 (1c); *McKoy v. Craven,* 198 N.C. 781 (1f); *Allen v. Yarborough,* 201 N.C. 569 (1g).

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(557)

DERR BOGER v. CEDAR COVE LUMBER COMPANY ET AL.

(Filed 13 May, 1914.)

1. Appeal and Error—Case Settled—Exceptions.

Where in the statement of case the trial judge finds a certain matter relative to the controversy as a fact, and no exception has been taken, it will not be considered on appeal.

2. Attachment—Undertaking—Signing—Trials — Courts — Corrections — Appeal and Error.

In issuing a warrant of attachment the officer is directed by the statute, Revisal, sec. 763, "to require a written undertaking with sufficient surety," without prescribing any rule as to its execution, and a signing and delivery would be sufficient; and objection that the undertaking was not "subscribed," but was signed by the applicant to the justification instead of to the undertaking itself, is without merit; and were the objection other-

wise tenable, upon the finding of the justice of the peace at the trial that the undertaking was intended to have been properly signed, but was signed at the wrong place by mistake or inadvertence, an order is properly made by him allowing the correction to be made.

APPEAL by defendant from *Webb, J.*, at December Term, 1913, of BURKE.

This action was commenced on 30 December, 1911, returnable on 30 January, 1912, to recover the sum of $67, due by account, with interest. At the same time a warrant of attachment was issued, returnable on the same day as the summons, and on the return day judgment was rendered by said justice, for the sum of $70.35, interests and costs.

On 1 February, 1912, a notice was issued to the Drexel Furniture Company to show cause on 3 February, 1912, why the conditional judgment rendered against it should not be made absolute, and to answer an oath what was due from it to the Cedar Cove Lumber Company, the defendant.

The furniture company appeared in answer to the notice, and at the same time the lumber company entered a special appearance, and moved the court to set aside the judgment rendered in the action and to vacate the attachment issued and to dismiss the action upon the following grounds:

(1) That no proper undertaking on the part of the plaintiff, (558) with sufficient surety, conditioned as provided by section 763 of the Revisal of 1905, was required or taken by the justice's court before issuing the warrant of attachment therein as required by said section.

(2) That there has been no proper publication of the summons and warrant of attachment herein, as required by section 776 of the said Revisal.

The said justice having found as a fact that by oversight and mistake, R. R. Boger, the surety on the attachment bond or undertaking, had signed the verification of said bond or undertaking, but had failed to sign the bond or undertaking itself, made the order denying the motion of the Cedar Cove Lumber Company to vacate the attachment and dismiss the action, and allowed the said R. R. Boger to sign as surety on said bond or undertaking, on said 8 February, 1912; and the said Cedar Cove Lumber Company, having excepted, appealed to the Superior Court.

The appeal was heard at the December Term, 1913, of the Superior Court, and the Cedar Cove Lumber Company again put in a special appearance and renewed the motion to vacate the attachment and dismiss the action made before the justice.

The court, upon appeal, found as a fact that proper advertisement of the attachment proceedings, when issued before the justice of the peace,

was made, and notice relative to same posted and given as the law directs; that the justice of the peace had the right and power under the statute to allow the said Boger to sign the bond at the time he did sign it, and that it was a mere inadvertence on the part of Boger not signing the bond in the proper place at the time the attachment proceedings were issued; that at the time the said Boger verified the said bond it was his intention to sign the bond at the proper place, and he really thought he had done so.

The motion of the defendant was denied, and it excepted.

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

(559) *S. J. Ervin for plaintiff.*
Avery & Ervin for defendant.

ALLEN, J. His Honor has found as a fact that the summons and warrant of attachment have been duly served, and there is no exception to the finding.

The only irregularity, therefore, in the proceeding is that the surety on the undertaking of the plaintiff signed his name to the justification of the undertaking instead of to the undertaking itself, and as to this his Honor finds that it was the result of a mistake, and that it was the intention of the surety to sign the undertaking, and he thought he had done so.

The statute (Rev., sec. 763) directs the officer issuing a warrant of attachment to "require a written undertaking on the part of the plaintiff, with sufficient surety," but it fails to prescribe any rule as to its execution, and a signing and delivery would be sufficient.

The authorities make a distinction between statutes requiring instruments to be signed and those requiring them to be subscribed, holding with practical unanimity in reference to the first class that it is not necessary for the name to appear on any particular part of the instrument, if written with the intent to become bound; and as to the second class, that the name must be at the end of the instrument.

In *Richards v. Lumber Co.*, 158 N. C., 56, dealing with this question, the Court said: "It is well settled in this state that when a signature is essential to the validity of an instrument it is not necessary that the signature appear at the end unless the statute uses the word "subscribe.' *Devereaux v. McMahan*, 108 N. C., 134. This has always been ruled in this State in regard to wills, as to which the signature may appear anywhere. If this is true of a 'signature,' it must also be true of the

word 'countersign.' It has been often held that the place of signing is a matter of taste. *Adams v. Field,* 21 Vt., 264; 36 Cyc., 441."

We are therefore of opinion that the surety signed the undertaking when it was first filed, and that it was then valid and binding on him.

We are further of opinion that if invalid, the court had the (560) power to permit it to be filed afterwards. *Pharr v. Commissioners, ante,* 523.

Affirmed.

Cited: Peace v. Edwards, 170 N.C. 66 (2g); *Alexander v. Johnston,* 171 N.C. 471 (2g); *Keith v. Bailey,* 185 N.C. 263 (2c); *S. v. Abernethy,* 190 N.C. 770 (2g); *Corporation Com. v. Wilkinson,* 201 N.C. 348 (2g).

CHARLES Q. DEATON v. GLOUCESTER LUMBER COMPANY.

(Filed 13 May, 1914.)

1. Master and Servant—Negligence—Res Ipsa Loquitur—Trials—Evidence—Questions for Jury—Nonsuit.

The plaintiff was engaged by the defendant lumber company at a cut-off saw arranged upon two upright pieces of timber which moved to and fro as the saw was being operated, so that when not in use the saw rested in a hood about 12 or 14 inches from the perpendicular, and was drawn forward against the lumber to be cut. It was the plaintiff's duty to guide this lumber to be cut over rollers from the main saw, and while doing this, at the time in question, it became necessary to straighten a piece of timber, and the saw, which had been placed back in the hood, and which should have remained there, unexpectedly sprang forward and inflicted the injury complained of: *Held,* the doctrine of *res ipsa loquitur* applies, under the circumstances, raising an inference of negligence which was for the defendant to explain or disprove.

2. Master and Servant—Assumption of Risks.

The servant engaged in a dangerous employment may not be held to have assumed the risk arising from the distinct and negligent act of the master causing personal injury to him while in the performance of his duties.

APPEAL by defendant from *Justice, J.,* at November Term, 1913, of HENDERSON.

This is a civil action. The following issues were submitted to the jury:

1. Was the machinery by which the plaintiff alleges he was injured constructed in a reasonably safe manner, and was the same in a reasonably safe condition at the time of the alleged injury. Answer: No.

(561) 2. Did the defendant provide a reasonably safe place for the plaintiff in which to work? Answer: No.

3. Did the plaintiff, with full knowledge of the condition of defendant's machinery and condition of the place provided in which for him to work, assume the risk of his employment? Answer: No.

4. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

5. Did the plaintiff, by his own carelessness and negligence, contribute to his own injury? Answer: No.

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

From the judgment rendered, the defendant appealed.

Smith & Shipman for plaintiff.

Welch Galloway and McD. Ray for defendant.

BROWN, J. The defendant insists that, taken in its most favorable light, the evidence of the plaintiff did not make out a case of negligence against the defendant, and that the motion to nonsuit should have been allowed. This assignment of error substantially covers the case, and we do not think that any other needs discussion.

The evidence offered for the plaintiff tended to prove that he was employed by the defendant to operate a cut-off saw, which was installed at right angles to a table on which were placed live rollers, over which slabs, sills, etc., were conveyed from the main saw, which was 30 feet from the cut-off saw; that it was the duty of the plaintiff to use the cut-off saw in cutting the slabs as they came over the rollers from the main saw, and to guide and direct the passage of the sills and other lumber over the rollers, past the cut-off saw, where it emptied into a dock several feet beyond; that this table was, at the point of the cut-off saw, just in front of the shield in which the cut-off saw rested when not in use, and timbers could not be conducted past the cut-off saw when it was out of the shield.

The saw was set in a frame of two upright pieces of timber, 14 feet in height, and which moved to and fro as the saw was operated;

(562) the saw was operated by a lever which the operator pulls to bring it forward out of the shield for use, and which he pushes to put it back into the shield; the saw frame, when the saw is at rest in the shield, is about 12 or 14 inches beyond the perpendicular, and is held by its own

weight; fastened to the top or near the top of the saw frame is a rope, which runs over a pulley and reaches downward some 8 or 10 feet, with a weight attached to the end of it; there is another rope fastened to the bottom of the mill floor, which extends down some 8 or 10 feet and is also fastened to the weight.

This arrangement is such that the weight rests on the rope fastened to the floor at all times, except when the saw is pulled forward past the perpendicular. When the saw is being pulled forward, it gets the benefit of the weight after it reaches the perpendicular, and when being pushed back into the shield has the benefit of it until it reaches the perpendicular. When the saw is at perpendicular, and before it is affected by the weight, it is some 12 or 14 inches out of the shield.

The plaintiff testified further as to the manner in which he was injured, namely, that on the morning of the injury, and just before it occurred, he had been operating this slab or cut-off saw in cutting slabs; that just before he was hurt he had pushed the saw back into the shield, until it was at complete rest, and at the time of his injury was engaged in guiding an 8 x 10 sill over the rollers; that the sill was coming at an angle on the rollers, and that he was straightening it—"pushing with his left hand and pulling with his right"; that while he was thus engaged in guiding the sill, the saw sprang forward out of the shield and injured his right hand in the manner testified to by him; that there was nothing to keep the saw from coming forward; that he had observed the manner in which the weight and ropes were arranged about two days before his injury, when he and Colburn, the foreman, were down on the dock; that he called Colburn's attention to it, and that Colburn stated to him that that was the only way to fix it, and that there was no danger; that the saw came out of the shield as far as it could without being affected by the weight when it cut his hand; that he did not see any use of the rope attached to the floor; that he had never been instructed to stop the rollers when guiding (563) sills or lumber when the saw was back in the shield.

The defendant's witness Colburn, in testifying as to the construction of the saw, stated: "The saw frame, which is about 14 feet high, made of two upright timbers, leans back about 14 inches beyond perpendicular when it is as far back as it will go, and when it goes forward it does not affect the weight until it about reaches perpendicular, and when the saw is about 12 or 14 inches out of the shield."

We think that this version of the testimony would justify the jury in drawing the inference of negligence in the manner in which the saw had been placed in its bearings.

The manner in which the saw unexpectedly sprang out of the shield and injured the plaintiff, in the way testified to by him is very conclusive evidence that there was something unusually wrong with it, and presents a case where the doctrine of *res ipsa loquitur* will carry the case to the jury.

In this case the facts and circumstances attending the injury speak for themselves, and in the absence of explanation or disproof give rise to the inference of negligence. It is evident that the accident would not have occurred if the saw had not unexpectedly sprang out of its protecting shield. Why it did so is not very clear, but the circumstance falls upon the defendant for explanation.

In respect to those assignments of error relating to the issues of assumption of risk and contributory negligence, they are immaterial and need not be considered. The plaintiff assumed no risk growing out of the negligence of his employer, and only those risks which were naturally incident to the proper conduct of the business. As to contributory negligence, we find no evidence upon which any such finding could be based.

Upon a review of the whole record, we find

No error.

Cited: Dunn v. Lumber Co., 172 N.C. 135 (1g); *Nixon v. Oil Mill*, 174 N.C. 732 (1g); *Lynch v. Dewey*, 175 N.C. 158 (1g); *Buchanan v. Furnace Co.*, 178 N.C. 650 (2g).

(564)

M. F. TEETER v. HORNER MILITARY SCHOOL.

(Filed 13 May, 1914.)

1. Schools—Rules and Regulations—Discipline—Agreement Implied.

It is necessary to the well-being of a school and the pupils attending it that a proper discipline be maintained and the parent of a pupil entering it impliedly agrees that he will submit to all reasonable rules and regulations promulgated and enforced for that purpose.

2. Same—Expulsion.

The principal of a private school has the power to enforce all reasonable rules and regulations thereof made for the maintenance of a proper discipline, by punishment or expulsion of the pupil offending when this power is not maliciously or arbitrarily exercised by him.

3. Same—Payment in Advance.

Rules of a private school requiring that payment be made in advance for the full term upon entering a pupil, and that upon expulsion of the

pupil during the term no repayment would be made for the unexpired part of the term, are reasonable and are enforcible in the proper exercise thereof; and this applies where the parent has been indulged or given credit as to part of the advance payment.

4. Same—Courts—Trials—Evidence—Verdict Set Aside.

In this case it appeared from the evidence that the plaintiff entered his boy in the defendant's school with knowledge that if the pupil violated the rules of the school relative to its discipline, he would be expelled; that the pupil was expelled for repeated misconduct and violation of the rules and for insubordination to the principal. There was no evidence that the principal acted arbitrarily or otherwise than for the best interest of the school: *Held*, no error for the trial judge to set aside a verdict by which the plaintiff recovered proportionately the money he had paid for the unexpired part of the school term.

APPEAL by plaintiff from *Harding, J.*, at January Term, 1914, of CABARRUS.

This action was brought to recover $70, money paid by the plaintiff to the defendant for the tuition and expenses of his son at the latter's school. The boy was entered 1 January, 1913, for the (565) remainder of that scholastic year, and returned for the Fall Term, 1913, the first of September. Defendant, early in September, sent a bill for the whole amount of tuition and expenses for the term, towit, $185. Plaintiff paid $90 and failed to pay the balance due. The boy was expelled for repeated misconduct and violation of the rules and regulations of the school, about 1 October, 1913. This suit was brought to recover the amount thus paid.

Defendant denied liability and set up a counterclaim for balance of the bill, less some deductions, which was $80.56, alleging, and Mr. J. C. Horner, principal of the school, testifying, that it was all payable in advance.

Plaintiff testified: "When I received the bill for a half-year's payment, I knew the money would be forfeited on expulsion."

Mr. Horner testified: "On page 11 of the catalogue, on 'Character,' I find: 'We do not want vicious or habitually insubordinate boys, and if such succeed in entering, they will be dismissed. Applicants are accepted with the express understanding that they will submit to our authority in every respect. A boy whose conduct is hurtful to the scholarship and morals of his associates will be expelled. The discipline is not severe, but firm and decided, and no boy will be retained who does not cheerfully comply with the rules and regulations, or whose influence is known to be injurious to the morals and scholarship of his fellows. The freedom of college life is not given, but the aim of our discipline is to teach a boy to be self-governed. The discipline at Horner's appeals

to a boy's sense of manliness and teaches him, first, self-control and obedience to order, and in turn to control and command others. Any cadet who shall disobey a command of the principal, or of any professor, instructor, or other superior officer, or behave himself in a refractory or disrespectful manner, shall be expelled, or otherwise punished.' In general, these rules have been required to be kept hanging in the rooms. In the conduct of our school we enforce our rules in the catalogue as to payments to be made in advance. I suppose for fifteen or twenty (566) years I have been collecting a half-year in advance. That was stated in the catalogue. About ten years ago we changed the catalogue, and since that time we enforce the rule. I consider that the strongest discipline in the school is for a boy to have his money forfeited. It is a strong discipline over him. I have enforced the rule rigidly, when a boy is expelled, that there is no deduction. We have always done that." He further testified that the boy had often committed serious offenses, when he notified him if they continued he would be expelled. "This was done at regular roll-call in the presence of the students or cadets, but I made no good impression upon him, as he repeated them afterwards and ran his demerits up from 100 to 150. When demerits ran to 100, we could either whip or expel. The boy had been whipped once." He was expelled for excessive demerits—violation of the rules. He smoked; he visited; left his room when he was required to be in it; when required in there to prepare his lessons, he would slip out; also for throwing in the assembly hall, which is a serious offense. These acts were against our rules. In ordinary practice there is no fixed amount of demerits until a student is notified. I spoke to the boy about this matter before his demerits were going up so rapidly, but he disregarded all of it. I thought his conduct was demoralizing. He wasn't preparing his lessons. I expelled him in the regular course of my school the same as I have done many times before. The bill as sent Mr. Teeter in September, 1913, was for a half-year payment for the fall term. When January came around, the bill was for the spring term." The witness also stated why the school was compelled to charge for the full term in advance, which was that "they had to make a very large outlay in the beginning for supplies and pay cash for them, the amount being about $10,000. There was much testimony to corroborate the witness.

Plaintiff testified that he did not see the catalogue. He did not say that it was not mailed to him and received at his home, but denied merely that he had seen it, although there was circumstantial evidence that it had reached him and he had the opportunity to read it. "I never (567) laid my eyes on this catalogue, to my knowledge. It might have come in the mail to my home. The family might have brought it

down and I might have looked at it and thought it was some old circular, and destroyed it. I usually do so. I never did read it. When I received the bill for a half-year's payment, I knew money would be forfeited on explusion." He also stated that he was not notified by Mr. Horner that the money would be forfeited if his son misbehaved, nor did he agree that the money should be retained if the boy was expelled.

Under the charge of the court, there was a verdict for the plaintiff, which the judge set aside upon the following grounds:

1. That he had refused the defendant's sixth prayer for instructions as follows: "If the jury believe the evidence, they should answer the first issue 'Nothing' and the second issue for the half annual charges for board, tuition, etc., less the $90 paid by the plaintiff, towit, $80.56."

2. That he erred in leaving it to the jury to determine "whether or not there was malice or viciousness on the part of defendant, and whether it was prompted by some other purpose than the enforcement of the regulations and good government of the school in expelling the boy of the plaintiff. There being no evidence as to what were the rules and regulations of the defendant and its motives for expelling the boy of the plaintiff for violation of the same, other than testified to by defendant's witnesses, and the catalogue and cadet regulations of the defendant's school introduced by defendant, the court is of the opinion, upon the undisputed facts, that said rules and regulations were reasonable, and that the defendant was actuated by no other motive, in expelling the boy of the plaintiff, than the enforcement of the regulations and good government of the school."

The verdict was set aside for error in law, as above set forth, and plaintiff appealed.

Morrison H. Caldwell and L. T. Hartsell for plaintiff.

Maxwell & Keerans and J. W. Hutchison for defendant.

Walker, J., after stating the case: This was a military (568) school, and in the "Horner Cadet Regulations" it is provided that, "Any cadet who shall disobey the command of the principal or of any professor, instructor, or other superior officer, or behave himself in a refractory or disrespectful manner, shall be expelled, or otherwise punished," and in the Horner School catalogue is the following provision: "The discipline is not severe, but firm and decided, and no boy will be retained who does not cheerfully comply with the rules and regulations, or whose influence is known to be injurious to the morals and scholarship of his fellows." There was also a rule that if a pupil received more than 100 demerits for misconduct, he would be expelled or thrashed,

at the discretion of the principal. There is ample evidence in the case to show that this boy misbehaved himself frequently, ran his demerits up rapidly to 150, after he had been duly warned that if they reached 100 he would be expelled, and that he was generally unruly and refractory. The principal seems to have exercised forbearance until it ceased to be a virtue, and the boy's conduct had become so bad that it was demoralizing in its effect upon the school. Besides his personal misbehaviors, he was backward in his lessons and receiving no benefit himself, but doing much injury to others by his example. If the principal had longer submitted to this gross breach of school discipline, amounting almost to defiant insubordination, it may have done incalculable harm to the school. The defendant had the undoubted power to adopt and enforce suitable rules and regulations for the government and management of the school. 25 A. and E. Enc. of Law (2 Ed.), 27, 28. They should be reasonable and enforced for the purpose contemplated, and not maliciously, or arbitrarily. If need be, punishment for the infraction of the rules may extend to the dismissal of the pupil who violates them. 35 Cyc., 1140, 1141. The conduct of the recreant pupil may be such that his continued presence in the school for a day, or an hour, may be disastrous to its proper discipline, and even to the morals of his fellows, and to permit him to "run the school," instead of obeying its rules and submitting himself to the authority of his superiors, would produce (569) insubordination, which in its turn would soon disorganize it. In such a case it seems imperative and essential to the welfare of the school that the power should reside in the teacher to suspend the offender at once from its privileges, and he must necessarily decide for himself whether the case requires that remedy, unless some other method is provided for that purpose. This doctrine was clearly treated and formulated by the Court in *S. ex rel. Burpee v. Burton,* 45 Wis., 150, where *Judge Lyon* said: "In the school, as in the family, there exist on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils, and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been reënacted by the district board in the form of written rules and regulations. Indeed, it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly. The teacher is responsible for the discipline of his school, and for the progress, conduct, and deportment of his pupils. It is his imperative duty to maintain good order, and to require of his pupils a faithful per-

formance of their duties. If he fails to do so, he is unfit for his position. To enable him to discharge these duties effectually, he must necessarily have the power to enforce prompt obedience to his lawful commands. For this reason the law gives him the power, in proper cases, to inflict corporal punishment upon refractory pupils. But there are cases of misconduct for which such punishment is an inadequate remedy. If the offender is incorrigible, suspension or expulsion is the only adequate remedy." The Court, after an able and learned discussion of the question, concluded that the teacher has, in a proper case, the inherent power to dismiss a pupil for misconduct and infractions of the rules and regulations of the school, especially when they are repeated and persistent, so that the pupil must finally yield or the teacher's authority over him be destroyed. "The plaintiff, by entering the (570) defendant's school, subjected himself to (its) reasonable rules of discipline. The power is vested in the faculties of all schools and colleges to suppress and punish unbecoming conduct." *Kabus v. Seftner,* 69 N. Y. Supp., 983.

It appeared in *Curry v. Lasell Seminary Co.,* 168 Mass., 7 (46 N. E., 110), that plaintiff had entered her daughter, as a pupil, at the defendant company's school, to be boarded, instructed, and cared for through the school year. The Court held that if there had been no express contract, the plaintiff, by placing her daughter as a pupil in the school, would have impliedly agreed that she should obey all reasonable rules and regulations of the school. This is the duty of every pupil who attends a public school, and a parent has no right to have his child remain in the school if he persists in willfully disregarding such reasonable rules. These important principles, so necessary to the proper regulation and to the welfare of our educational institutions, have been quite uniformly adopted by the courts. *Manson v. Culver Military School,* 141 Ill. App., 250; *Fessman v. Seely,* 30 S. W. Rep., 268; *Benedict Memorial School v. Bradford,* 36 S. E. (Ga.), 920; *Hodgins v. Inh. of Rockport,* 105 Mass., 475; *Vermillion v. S. ex rel. Englehardt,* 110 N. W. Rep. (Neb.), 736.

In the *Vermillion case* the Court said that the authorities are generally to the effect that where a pupil is guilty of such misconduct as to interfere with the discipline and government of the school, he may be suspended or expelled, citing many cases.

In the *Manson case, supra,* the Court held that the only requirement necessary, so far as concerns a review by a court of justice of the manager's action in dismissing a pupil, in that case, as here, a cadet, is that it shall be so unreasonable and oppressive as to warrant a conclusion that it was done maliciously, unfairly, or from some improper motive,

and not for the enforcement of the school's rules and regulations and the maintenance of proper discipline.

An examination of our own cases, while they do not deal with the subject in every phase presented in this record, will show that we (571) have substantially approved the doctrine as already stated. It is founded upon justice and common sense, and should prevail, as in no other way could our schools be successfully conducted. *Horner & Graves v. Baker,* 74 N. C., 65; *Horner School v. Westcott,* 124 N. C., 518. These decisions clearly recognize the principle that there is an implied promise, if it is not expressed, that the pupil who has entered the school will comply with its reasonable rules and regulations, and may be dismissed, in a proper case, for failing to do so. The school authorities, it is true, may excuse or condone the offense of the pupil, but of course are not compelled to do so, and it would often be subversive of good discipline to do so, especially in the case of an incorrigible offender. The interest of every pupil is involved in the welfare of the school, and there is no reason why its success should be imperiled by the misconduct of one of them.

Our opinion is, upon the evidence we find in the record, if believed, that plaintiff is not entitled to recover any part of the money he has paid, and that defendant is entitled to recover the balance of what would have been paid by the plaintiff, but for the former's indulgence. This, we think, is settled by *Horner School v. Westcott, supra; Bingham v. Richardson,* 60 N. C., 217, and by clear implication in *Horner & Graves v. Baker, supra,* for we have the evidence in this case, which the Court, by *Chief Justice Pearson,* held was lacking in that one. The Court said in *Horner School v. Westcott, supra:* "As it was the defendant's duty to have paid this installment when it was due, and not the plaintiff's fault that it was not paid, it seems that defendant should not complain if he has to pay now." It is apparent, upon the evidence, that plaintiff was to pay the full amount in advance, and if he had paid it, as his contract required him to do, the defendant could have retained it. This being so, and as said in *Horner School v. Westcott, supra,* he is entitled to the balance of the amount due at the beginning of the session. *Fessman v. Seeley, supra.*

We have discussed the case in the light of the evidence now before us. The boy was not called and examined, and, in the absence of his evidence, there is nothing to contradict the defendant's testimony as to (572) the rules and regulations. There is strong additional evidence that plaintiff received the catalogue containing the rules. There is no evidence that defendant acted maliciously, oppressively, or unreasonably in expelling the plaintiff's son, but, on the contrary, as it

now appears to us, the act was fully justified. The court was, therefore, right in setting aside the verdict and granting a new trial, and for the reasons given by the learned judge, which are set out in the record.

No error.

Cited: University v. Ogburn, 174 N.C. 432 (f).

TUCKER & CARTER ROPE COMPANY v. SOUTHERN ALUMINUM COMPANY.

(Filed 13 May, 1914.)

1. Injunction—Public Interests—Damages—Restraining Order.

A private enterprise to be conducted upon such large proportions as to beneficially affect the interests of the public will not be restrained to the hearing at the suit of a citizen, when it appears that a trial upon the merits of the controversy will doubtless be had before any of the damages alleged could accrue; that such damages can be adequately compensated for by the defendant, which is solvent and able to respond; or that injunctive relief may be later and timely granted should it then become apparent that it is necessary and should be afforded to protect plaintiff's rights.

2. Injunction—Restraining Order—Act Not Commenced or Contemplated.

Where an act sought to be enjoined does not appear to have been either commenced or contemplated by the defendant, there is nothing upon which a court of equity may proceed.

APPEAL by plaintiff from the refusal of *Long, J.,* to grant a restraining order to the hearing, heard at chambers, 30 March, 1914.

Edwin C. Gregory and W. H. Page for plaintiff.
John S. Henderson for defendant.

CLARK, C. J. This is in action for a perpetual injunction to (573) restrain the defendant from proceeding to construct across the Yadkin River at the "Narrows" its dam to a certain height which the plaintiff claims would pond water back on its mill and lands, and for a mandatory injunction to remove the "Whitney" dam which the defendant owns at another point on said river.

This appeal is from the refusal of the judge to grant an injunction to the hearing.

The plaintiff alleges that it owns a tract of land on said river on which it has a cordage mill, and that immediately below said tract the

defendant owns the land upon both sides of the Yadkin River for 12 miles; that in 1907 the defendant's predecessor constructed a dam across the Yadkin River at Whitney, something more than a mile below the plaintiff's lower line; that in May, 1913, the defendant commenced to construct 5 miles further down the river a dam at the Narrows which will be probably 200 feet in height when completed; that the plaintiff's land at its southern boundary on the bank of the river is 524 1/10 feet above sea level; that the crest of the Whitney dam a mile or more below has an elevation above sea level of 529 feet; and that the crest of the defendant's proposed dam at the "Narrows" 5 miles or more below the Whitney dam, will be, according to its present plans, 545 feet; that the elevation of the plaintiff's present tail-race is 536 feet. The Whitney dam is nearly 1,000 feet long, but was never completed, and has an opening 150 feet wide, sufficient at normal flow to allow the free passage of the river waters, as the plaintiff admits.

We need not consider, at present, the allegations as to the Whitney dam, as the relief asked in regard thereto is a mandatory injunction and will depend upon the findings of fact by the jury, and this is an appeal from the refusal of a restraining order to the hearing in regard to the proposed "Narrows" dam. No work is being done or alleged as being proposed as to the "Whitney" dam.

The plaintiff's land and water-power are listed for taxation at $20,000 (and $2,000 in personalty), upon which there are two mortgages (574) aggregating $35,000, and since this proceeding has begun it has made an assignment for the benefit of creditors. The defendant's enterprise is on a very great scale, and it appears from the affidavits that while it owns, it does not maintain or use, the dam at Whitney which the defendant alleges is 2 miles below the plaintiff's mill, and that 7 miles still further down the stream, at the Narrows, it is constructing three large factories for the manufacture of carbon, alumina and aluminum in enormous quantities, and a power plant for the generation of power both for its own works and to sell to the public. The defendant further alleges that the power to be thus developed by the defendant will be from 70,000 to 100,000 horse-power; that it is also building a town, known as Badin, to accommodate its employees and others, and operates two railroads; that it is expending over $10,000,000 in constructing its plant and is employing a great amount of labor in the development of its enterprise, and is a most important factor in the industrial progress and development of that section and in utilization of its natural resources.

The plaintiff claims: (1) That the old dam at Whitney so raises the level of the river *at flood times* as to damage the plaintiff's water-power

and flood some 2 acres of its land. The defendant answers that at times of excessive flood the plaintiff's mill will be put out of commission irrespective of the dam at Whitney or the new dam at the "Narrows," and that the old dam at Whitney has no adverse effect on the plaintiff's property or power, and, besides, that the plaintiff is barred in regard to the Whitney dam by the statute of limitations. But as we have already said, this being an appeal from the refusal to grant an injunction to the hearing, and there being no work in process, or alleged to be in contemplation, as to the Whitney dam, we need not consider that branch of the litigation on this appeal.

The plaintiff further claims that at all times the new dam at the "Narrows," if raised to the height proposed, will flood a few acres of plaintiff's low lying property, and at flood time will damage its water-power.

The defendant replies that the new dam at the "Narrows" will (575) not affect plaintiff's property adversely, except possibly to flood a few acres of its lowland, not its water-power or mill, said few acres being always flooded in times of high water.

The defendant also contends that equity will not prevent or interrupt a great enterprise from which the general public will largely benefit merely to protect a comparatively unimportant property right when any injury which may accrue to the latter can be compensated by an action at law for damages and the defendant is amply solvent. Certainly the courts will not by a restraining order pending the litigation stop the prosecution of a great enterprise when the allegations of the complaint are squarely denied by the answer, and when, though the complaint is found to be true, there will be ample remedy either by the recovery of damages or in requiring the defendant to abate the injury by reducing the height of its dam—in short, when the damages are neither certain nor irreparable.

Besides all this, it appears that the new dam will not be completed before 1 January, 1916. The plaintiff is, therefore, in no danger of injury, and least of all of irreparable injury, pending the suit, and there is no occasion for a temporary injunction which would injure the defendant infinitely more than could possibly benefit the plaintiff. The last consideration, of itself, is sufficient to justify the wisdom and justice of his Honor's action in refusing the injunction to the hearing. There is ample time before the expected completion of the new dam to have the disputed matters of fact determined by the jury, and the injunction to the hearing would be an useless and improvident interference with the prosecution of a great industrial enterprise.

There is no allegation in plaintiff's complaint that the construction of the new dam has advanced to a stage where it causes any present injury to the plaintiff, nor is there any evidence that it will do so before this case can be reached and tried on its merits. Equity will not interfere "when the anticipated injury is contingent and possible only." *Dorsey v. Allen,* 85 N. C., 358. "The court will not act upon speculative proof or such as furnishes ground only for a conjecture." *Berger v.* (576) *Smith,* 160 N. C., 212; *Durham v. Cotton Mills,* 144 N. C., 705; *Walton v. Mills,* 86 N. C., 280.

The defendant's dam is being constructed under express legislative authority, and is a lawful structure *per se,* and cannot be restrained as a public or private nuisance. If in the course of its lawful operation it may inflict injury upon the plaintiff, it is amply able to respond in damages. Whether the relief to which the plaintiff shall be entitled will be the recovery of damages or the abatement of the height of the dam is a matter which will arise when the facts are found; but certainly the courts will not stop the construction of the dam more than eighteen months before its completion, upon the allegation of the plaintiff, which is denied in the answer, that it will injure its property if built to the height that is proposed.

In *Eason v. Perkins,* 17 N. C., 38, the Court said, in refusing an injunction against the erection of a milldam: "Where a general convenience is involved, it constitutes the preponderating consideration, unless in itself it also produces a general mischief or no compensation is awarded for the invasion of private right. Compensation in this case is amply provided for by the inquisition of a jury upon the amount of damages."

We would not be understood as holding that a larger enterprise has a right to destroy a smaller one, but as was held in *Burnett v. Nicholson,* 72 N. C., 334; *Daughtry v. Warren,* 85 N. C., 137: "Inasmuch as private right must always yield to public convenience when compensated for so doing, the courts will never interfere when the object sought is of public benefit, unless the private injury should greatly exceed the benefits to be derived therefrom." To the same effect, *Porter v. Armstrong,* 132 N. C., 66. In the present case the benefit to the public of this great enterprise immeasurably exceeds any conceivable private injury, and it is not alleged that the defendant is insolvent and unable to respond in damages. *Wilson v. Featherstone,* 120 N. C., 449; *Land Co. v. Webb,* 117 N. C., 478.

The defendant's answer squarely denies the allegations of the complaint as to the probable damages the injury that will accrue. (577) It appears from the plaintiff's statement that its mill floor is

544.4 feet above sea level and that the elevation of its tail-race is 536 feet. It appears that the new dam, against the construction of which the present injunction is sought, lies, according to the defendant's statement, 9 miles below the plaintiff's mill. While the defendant admits that according to its present plan the crest of the new dam will be 545 feet, it avers that those plans provide for two spillways by reason of which "the elevation of the water in its tail-race will be 526 feet, and *at no time* will the maximum elevation of the defendant's pond be greater than 533 feet, which will be *more than 3 feet below* the elevation of the water in the plaintiff's tail-race, as alleged by plaintiff." As the plaintiff's mill is from 7 to 9 miles above the defendant's mill, it can hardly be possible that any damage will accrue by reason of the erection of the dam.

It appears that no damages will accrue to plaintiff from refusing the injunction to the hearing, but that serious detriment will be caused the defendant if it is granted. *R. R. v. Mining Co.*, 112 N. C., 661.

It is public policy not to interfere with the construction of works of public benefit, especially when the defendant is amply able to respond in damages and there is full time before the completion of the dam to have the disputed matters of fact passed upon by a jury. *Navigation Co. v. Emery*, 108 N. C., 130.

The action of his Honor was eminently proper in refusing the injunction to the hearing.

Affirmed.

Cited: Lumber Co. v. Conrades, 195 N.C. 628 (1g); *Greenville v. Highway Com.*, 196 N.C. 228 (1g).

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(578)

WILLIE P. COOPER, BY HIS NEXT FRIEND, L. L. CRAWFORD, v. SOUTHERN RAILWAY COMPANY AND E. FULLER.

(Filed 13 May, 1914.)

1. Trials—Malicious Prosecution—Amendments—Distinct Cause—Appeal and Error.

Unless done with the consent of the defendant in the action, it is not within the discretion of the trial judge to permit an amendment to the complaint setting forth an additional and substantially a new cause of action; and where damages are sought for malicious prosecution, with allegation that the plaintiff was arrested and convicted before a justice of the peace, and acquitted in the Superior Court on appeal, an amendment,

permitted during the argument of the civil action, alleging plaintiff was tried upon a bill presented to the grand jury by the solicitor and acquitted, is held for reversible error.

2. Trials—Malicious Prosecution—Evidence.

Where in an action for malicious prosecution it is alleged that the bill of indictment was drawn by the solicitor, sent to the grand jury, which eventuated in the plaintiff's acquittal upon the trial, it is necessary for the plaintiff to show that the defendant was in some way instrumental in causing or assisting in the criminal action, for otherwise he cannot recover in his civil action for damages.

3. Same—Questions for Jury—Principal and Agent.

One who causes the arrest, conviction, and incarceration of another before a justice of the peace, upon an insufficient warrant which he has personally sued out, upon a verdict of acquittal in the Superior Court on appeal, is liable for actual damages; and if done with malice and without probable cause, for punitive damages; and when the evidence is conflicting as to whether the warrant was sued out in the capacity of agent for another, acting within the scope of his authority, the question of the liability of the principal, as well as the agent, is for the determination of the jury, upon issues as to each of them. The warrant under which the criminal action was had is held insufficient in this case.

APPEAL by defendant from *Long, J.*, at August Term, 1913, of CABARRUS.

Civil action for wrongfully arresting and maliciously prosecuting the plaintiff, a boy at one time in the employ of the defendant railway company.

(579) A number of issues were submitted, which it is unnecessary to set out, as the case is to be tried again. There was a verdict and judgment for the plaintiff, and the defendants appealed.

H. S. Williams, J. L. Crowell for plaintiff.

L. T. Hartsell, L. C. Caldwell for defendant.

BROWN, J. A number of unnecessary issues were submitted in this case. As the action is evidently one to recover damages for wrongfully arresting and maliciously prosecuting plaintiff, the fourth and fifth issues were unnecessary, and should not have been submitted.

It appears in evidence that the plaintiff, a boy of 16 years, was in the employ of the defendant railway as night supply boy at Spencer shops. The defendant Fuller was shop superintendent, and had charge of everything around the shops.

At the instance of Fuller and a local private policeman of the railway company, the plaintiff was charged with entering a tool-house of

the railway company, and arrested and imprisoned for two days by a justice of peace for nonpayment of the fine imposed.

The following is a copy of the warrant, under which the plaintiff was arrested, tried, and convicted:

NORTH CAROLINA—Rowan County.

Justice's Court, before C. E. Fesperman, Justice of the Peace.

THE STATE
v.
WILL COOPER } *Criminal Action.*

E. Fuller, upon information and belief, being duly sworn, complains and says: That at and in said county, and in Salisbury Township, on or about the 3rd day of July, 1910, that Will Cooper did unlawfully, willfully, and feloniously trespass on the Southern Railway Company, viz., being in a private storehouse at night, contrary to the form of the statute and against the peace and dignity of the State.

Subscribed and sworn to before me, this 5th day of July, 1910. (580)

C. E. FESPERMAN,
Justice of the Peace.

The State of North Carolina,

To any lawful officer of Rowan County—Greeting:

You are hereby commanded forthwith to arrest Will Cooper and him safely keep so that you have him before me at my office in said county, immediately, to answer the above complaint, and be dealt with as the law directs.

Given under my hand and private seal, this 5th day of July, 1910.

C. E. FESPERMAN,
Justice of the Peace.

The plaintiff was convicted by the justice, and fined $10, and imprisoned for nonpayment thereof. From the judgment of the justice convicting and fining him, the plaintiff appealed. Upon trial *de novo* in Superior Court, he was acquitted. The plaintiff then brought this action for damages.

The sole cause of action set out in the complaint is the alleged unlawful arrest, imprisonment, and malicious prosecution, under the above named warrant, and upon such complaint and evidence in support thereof the issues were joined and the trial proceeded.

After all the evidence was in, and while the counsel for the plaintiff was addressing the jury, the court, over the objection of the defendants,

permitted the plaintiff to file an amendment to the complaint, as follows:

Amend section 10 of the complaint so as to make it read:

"That an appeal was taken from the judgment of the justice of the peace to the Superior Court of Rowan County, where the plaintiff, Willie Cooper, was tried upon the charge of trespass upon the original warrant before the judge and a jury, acquitted on said charge, and the case ended; and then through the influence and procurement of the defendants E. Fuller and the Southern Railway Company, or their agents and employees, a bill was sent the grand jury, charging the said Willie Cooper with unlawfully, willfully, and feloniously break-

(581) ing into the office, tool-house, or hot-house of the Southern Railway Company and stealing certain articles therefrom, or attempting so to do, and when the said Willie Cooper was placed upon trial upon the said charge and tried before the court and a jury, he was found not guilty of the said charge, and dismissed, and the said case also ended. Records of said cases are hereto attached and marked exhibits A and B."

And the court permitted the jury to consider and act upon this new cause of action without further evidence than that already in and which is set out in the record.

This was error. A new cause of action was added to the complaint at "the eleventh hour," to which defendants were debarred opportunity to make defense, and to prepare and offer evidence.

The trial judge cannot, without the consent of parties, so amend, change, or modify the pleadings in a pending action as to substantially make it a new one. *Ely v. Early,* 94 N. C., 4; *McNair v. Commissioners,* 93 N. C., 364.

Again, assuming, as contended by the plaintiff, that this amendment was germane to the original cause of action, and within the discretion of the judge, there is no evidence whatever in the record that either of the defendants or any one for them urged or instigated the finding of the bill of indictment. There is no evidence that defendants knew anything about it.

So far as this record discloses, after the plaintiff had been acquitted on the trial of the appeal, upon the justice's warrant, the solicitor sent the bill of indictment upon his own motion, without the knowledge or solicitation of the defendants.

There being no evidence to support the new cause of action embraced in the amendment, his Honor erred in submitting it to the jury. *West v. Grocery Co.,* 138 N. C., 167.

Coming now to the consideration of the defendant's motion to dismiss the action, we are of opinion that his Honor properly overruled the

motion. The original complaint, without the amendment, sets out a cause of action, and there is evidence to support it.

As we view it, the warrant is void on its face, and charges no (582) facts sufficient to constitute an indictable offense, neither larceny nor forcible trespass nor any other offense punishable by fine or imprisonment.

In any view of the evidence, the arrest and imprisonment of the plaintiff was unwarranted upon such warrant, and the defendant Fuller, who personally sued out the warrant and procured the arrest, is personally liable for actual damages, and if he did it maliciously and without probable cause, he would be liable for punitive damages.

To make the railway company liable for the acts of Fuller, it must appear and the jury must find that the prosecution was instituted and the arrest made by Fuller by authority of the company, or that it was ratified by it. We adhere to the doctrine laid down in numerous decisions of this Court, that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him, and that where the act is not clearly within the scope of the servant's employment, but there is evidence tending to establish that fact, the question may properly be submitted to the jury. *Daniels v. R. R.*, 136 N. C., 518; *Sawyer v. R. R.*, 142 N. C., 1.

In this case we think the question of the liability of the railway company for the acts of Fuller should be submitted to the jury, and that it is best that the first issue be divided so as to present the liability of each defendant under a distinct issue.

New trial.

Cited: S.c., 170 N.C. 491, 492; *Kelly v. Shoe Co.*, 190 N.C. 411 (3c); *Barbee v. Canady*, 191 N.C. 534 (1g); *Young v. Hardwood Co.*, 200 N.C. 311 (1g); *Dickerson v. Refining Co.*, 201 N.C. 100 (3g); *Cole v. R.R.*, 211 N.C. 596 (3g).

GEORGE S. SIGMON v. R. B. SHELL.

(Filed 13 May, 1914.)

1. False Arrest—Liability of Officer—Reasonable Belief—Trials—Questions for Jury.

An officer acting without warrant and on his personal observation will not be liable in damages for making an arrest when no offense has been committed, if, under the circumstances, he had reasonable grounds for

believing that it had been; the reasonableness of the belief presenting matters of fact for the determination of the jury, with the burden upon the defendant to show justification for the act when this defense is pleaded and relied upon.

2. Trials—Burden of Proof—Instructions—"Satisfy" the Jury.

In an action against an officer for unlawful arrest and false imprisonment, it is not error for the court to charge the jury that the defendant must "satisfy" them of the matters in justification relied on by him, for this does not increase the burden or quantum of proof required of him.

3. Trials—Instructions—Correct in Part—Exceptions.

Exceptions to portions of the charge of the court to the jury, in which there were correct principles of law stated applicable to the evidence in the case, will not be considered on appeal, it being required of the appellant to specify or point out the particular errors alleged.

4. Trials—Witness—General Character—Impeaching Evidence.

Evidence of the character of a witness, who has testified in an action, should be restricted to general character, and it is proper for the trial court to so restrict it.

5. Trials—Evidence—Res Gestæ—Officers—False Arrest.

In an action against an officer for false arrest and imprisonment, while acting on his own observation without a warrant, evidence of matters transpiring while the arrest was being made is competent against the prisoner, as a part of the *res gestæ*, but it is incompetent to show what had occurred at a different time or place.

APPEAL by defendant from *Cline, J.*, at November Term, 1913, of CATAWBA.

This action was brought to recover damages for the unlawful arrest and false imprisonment of the plaintiff by the defendant. The arrest was made for the violation of an ordinance of the city of Hickory forbidding drunkenness and cursing in a public place in said city. Plaintiff alleges that the defendant, a policeman of the city, arrested him, without a warrant, for cursing and being drunk on the streets, when neither charge was true, and defendant says that he was drunk and cursing on the streets near Abernathy's stables. There was much (584) evidence offered to sustain the allegations of the respective parties. Under the evidence and charge of the court, the jury returned the following verdict:

1. Did the defendant wrongfully and unlawfully arrest the plaintiff and restrain him from his liberty, as alleged? Answer: Yes.

2. Did the defendant wrongfully and unlawfully assault the plaintiff and injure his arm, as alleged in the complaint? Answer: Yes.

3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: The sum of $600.

Judgment was entered thereon, and defendant appealed.

W. A. Self and S. A. Jordan for plaintiff.

A. A. Whitener for defendant.

WALKER, J., after stating the case: An inspection of the record will show that this case was carefully tried below, and the issues, evidence, and law bearing thereon were so clearly and fully explained by the learned judge who presided at the trial, to the jury, that we do not think there could have been any misunderstanding of the questions involved. Many exceptions were taken to the charge of the court, but it appears therefrom that the court instructed the jury in strict accordance with the principles applicable to such cases as have been settled by this Court. The charge is supported by this statement of the law, by *Chief Justice Smith,* in *S. v. McNinch,* 90 N. C., 699: "In making an arrest upon personal observation and without warrant, the officer will be excused when no offense has been perpetrated, if the circumstances are such as reasonably warrant the belief that it was (*Neal v. Joyner,* 89 N. C., 287), and the jury must judge of the reasonableness of the grounds upon which the officer acted." There can be no question that the judge stated the law, in this respect, with sufficient clearness, and gave the defendant the full benefit of it. With the exceptions relating thereto settled adversely to the defendant, there is really nothing left but an issue of fact, which the jury have decided against him, unless there was error in that part of the charge where the court instructed the jury that, (585) as defendant pleaded justification of the arrest, the burden was upon him to establish the defense to the satisfaction of the jury by a preponderance of the evidence.

Defendant had no process for the arrest, and he committed an assault unless, in some way, he can excuse or justify his conduct; and, too, the question of his good faith and the reasonableness of his acts were in issue, and these called for proof from him. "The onus of justification in issue primarily rests with the defendant." 19 Cyc., 363, and cases in note: *Jackson v. Knowlton,* 173 Mass., 94; *M. C. Railway Co. v. Gehr,* 66 Ill. App., 173; *Edger v. Burke,* 96 Md., 715; *Snead v. Bonnoil,* 166 N. Y., 325; *Franklin v. Amerson,* 118 Ga., 860. In *Jackson v. Knowlton, supra,* the lower court charged that "the burden of proof, by a fair preponderance of the evidence, was upon the plaintiff to show that the defendants did not have, at the time of the arrest and imprisonment, probable cause to believe that the plaintiff was guilty of a crime," and the reviewing Court said: "We are of opinion that this instruction was wrong, and that the jury should have been instructed in accordance with

the plaintiff's contention. It was long ago said by *Lord Mansfield:* 'A gaoler, if he has a prisoner in custody, is *prima facie* guilty of an imprisonment; and therefore must justify.' *Badkin v. Powell,* Cowp., 476, 478. So in *Holroyd v. Doncaster,* 11 Moore, 440, and 3 Bing., 492, it was said by *Chief Justice Best:* 'Where a man deprives another of his liberty, the injured party is entitled to maintain an action for false imprisonment, and it is for the defendant to justify his proceeding by showing that he had legal authority for doing that which he had done.' The precise point involved in this case was decided in favor of the plaintiff's contention in *Basset v. Porter,* 10 Cush., 418, in which it was said by *Mr. Justice Metcalf,* in delivering the opinion of the Court: 'Every imprisonment of a man is *prima facie* a trespass, and in an action to recover damages therefor, if the imprisonment is proved or admitted, the burden of justifying it is on the defendant.' This case has not been overruled or questioned in this Commonwealth. The (586) same rule prevails in an action for an assault. If the assault is admitted or proved, the burden is on the defendant to prove justification," citing cases. The Court concluded that, in an action for an illegal arrest and imprisonment, the burden is on the defendant to prove justification.

The requirement in the charge of the court that the jury should be "satisfied" as to the facts of justification, did not increase the burden or the quantum of proof which should come from the defendant in order to establish a justification. It was so held in *Chaffin v. Manufacturing Co.,* 135 N. C., 95. We there said: "The use of the word 'satisfied' did not intensify the proof required to entitle the plaintiffs to the verdict. The *weight* of the evidence must be with the party who has the burden of proof, or else he cannot succeed. But surely the jury must be satisfied or, in other words, be able to reach a decision or conclusion from the evidence and in favor of the plaintiff which will be satisfactory to themselves. In order to produce this result, or to carry such conviction to the minds of the jury as is satisfactory to them, the plaintiff's proof need not be more than a bare preponderance, but it must not be less. The charge, as we construe it, required only that plaintiffs should prove their case by the greater weight of the evidence.

Most of the exceptions were taken to large portions of the charge, which were, at least, partially correct, and when this is the case the exceptions must fail. The exception must point out and specify the error; otherwise, it will be too general. *S. v. Ledford,* 133 N. C., at 722; *Bost v. Bost,* 87 N. C., 477; *Insurance Co. v. Sea,* 21 Wall. (U. S.), 158; *Buie v. Kennedy,* 164 N. C., 290.

There were several objections to evidence. It was correct in the court to restrict the evidence of reputation to general character of the party, as a witness. His character was not otherwise relevant, as it was not involved in the issue. 16 Cyc., 1270.

What transpired while the arrest was being made was competent as part of the transaction, or of the *res gestæ*. It was not competent, though, for defendant to show what had occurred at another time and place, or things done by or between third parties. There (587) were some other exceptions to evidence, but they are unimportant and require no discussion. The rulings in respect to them were manifestly correct.

We have carefully examined and reviewed the case, and find no reason for a reversal of the judgment. The cause has been fairly tried upon the evidence and under correct rulings of the court, and the result should not be disturbed.

No error.

Cited: Nance v. Telegraph Co., 177 N.C. 315 (3p); *Butler v. Mfg. Co.,* 185 N.C. 254 (5c); *Hunt v. Eure,* 189 N.C. 491 (2f); *Moss v. Knitting Mills,* 190 N.C. 646 (5c); *Rawls v. Lupton,* 193 N.C. 430 (3g).

STARR v. SOUTHERN COTTON OIL COMPANY.

(Filed 13 May, 1914.)

1. Jurors—Challenges—Trials—Prejudice—Principal and Surety—Indemnity Company—Appeal and Error.

In an action to recover damages from a corporation for a personal injury alleged to have been by it negligently inflicted upon the plaintiff, it is reversible error for the trial judge to permit the plaintiff's attorney to ask the jurors being selected for the trial of the cause, whether any of them is employed by any indemnity company that insures against liability for a personal injury, when there is no indication or evidence that the defendant was insured against such loss, for the tendency of such question is to prejudice the jury against the defendant and unduly embarrass it upon the trial.

2. Trials—Courts—Corporations—Stockholders—Evidence — Prejudice — Irrelevant Questions—Appeal and Error.

The trial court should see that the parties litigant have a fair and impartial trial before a jury when issues of fact are presented to them, and exclude irrelevant matters that would have the tendency to prejudice either side. Therefore, in this action to recover damages against a corpo-

ration for a personal injury alleged to have been negligently inflicted on the plaintiff, it is held for reversible error that the defendant's witness was permitted by the trial judge to be cross-examined on the question of whether the stockholders in defendant corporation were citizens of the community in which the action was being tried.

(588) APPEAL by defendant from *Harding, J.*, at December Term, 1913, of GASTON.

This action was brought to recover damages for injuries received in operation of a cotton-seed linter, alleged to have been caused by the negligence of the defendant. Plaintiff was employed as a sweeper and cleaner of the machines in the linter room, and was injured while attempting to clean one of the linters under the direction of Will Thompson. This machine, called a linter, removes the lint from the cotton seed, after the cotton has been ginned, and the removal is accomplished by means of brushes and saws. Plaintiff's arm was caught by the saws, and it was so lacerated that it had to be amputated. He alleges these as grounds of negligence: (1) That he was required to work and operate an inherently dangerous machine, and by a dangerous and unsafe method. (2) Defendant failed to furnish him the necessary and proper appliances for the performance of the work. (3) Plaintiff was required to perform the work in the manner aforesaid without having the necessary warning, information, and instruction beforehand, as he was inexperienced. Defendant denied that it had been negligent, and alleged that plaintiff's injury was caused by his own negligence in attempting to clean the linter in a dangerous way, when a safe method had been provided. The plaintiff was permitted to ask the following questions, against the objections of the defendant: "If any member of the jury is in the employ of or connected with any insurance indemnity company that insures against liability for personal injury, will you please make it known?"

The defendant objected to the foregoing question. The court overruled the defendant's objection and stated that such question could be asked for the purpose of obtaining information upon which counsel for plaintiff might make peremptory challenge if he desired to do so, and for no other purpose. None of the jurors responded to the question, and there was no evidence offered by either side to show that the defendant had or did not have indemnity insurance. That question was asked before the impaneling of the jury.

(589) During the course of the cross-examination of Victor L. Smith, a witness for defendant, the court permitted the plaintiff to ask the following questions: "I am working for the Victor Cotton Oil

Company now; I say I am now working for the Victor Oil Company; that is not one of the branches of the Southern Cotton Oil Company."

Q. I will ask you if there isn't just one big company in this country? A. *No, sir.*

Q. How do you know? A. Because I have worked for different companies.

Q. How many oil mills has the Southern Cotton Company got in this country—possibly fifty or one hundred? A. Possibly they have.

Q. I will ask you if you don't know that all the cotton oil business in this country is in the hands of the Southern Cotton Oil Company? A. No, sir; I don't know that. I know that the Victor Mills don't belong to it, just as I know anything else; it is a stock company.

Q. There are fifty or seventy-five companies belonging to the Southern Cotton Oil Company, isn't that true? A. There may be that many. I know the stockholders of the Victor Cotton Oil Company. I do not know that the stockholders of the Southern Cotton Oil Company are not the same as the stockholders of the Victor Company. I know all right that the people I am working for are not a part of the Southern Cotton Oil Company. I will swear that the Victor Cotton Oil Company is not a part of the Southern Cotton Oil Company. I have seen the charter granted by the State to the Victor Cotton Oil Company and have seen their stock book.

Q. Don't you know companies have a distinct charter and all belong to the same company; you know the Southern Cotton Oil Company hasn't got any stockholders in Gaston County? A. No, I do not know that.

Q. Speaking about the independent mill, is the Southern Cotton Oil Company a combination of manufacturing plants? A. I don't know, sir, and have no knowledge of that at all.

It is unnecessary to set out the case so far as the exceptions (590) relating to the question of negligence and liability therefor are concerned, as will appear from the opinion. There was a verdict in favor of the plaintiff for $2,000, and defendant appealed from the judgment thereon.

Mangum & Woltz for plaintiff.
Tillett & Guthrie for defendant.

WALKER, J., after stating the case: The court erred in permitting the questions which were asked and objected to, as above stated. They were clearly calculated to prejudice the defendant and to prevent a fair and impartial trial, which is the first and most important object in the ad-

ministration of justice. The law seeks to ascertain the truth and, upon it alone, to adjudge the rights of the parties. It was entirely irrelevant to this controversy to inquire whether any of the jurors were employed by or connected with an insurance company, without admission or proof that the defendant was indemnified by such a company. The question plainly carried with it the suggestion that defendant was so insured, when there was not the slightest proof of the fact. It was not only objectionable, as calculated to prejudice the jury by the suggestiveness of the question and its implication that defendant did carry insurance of that kind, and therefore the defendant would not have to shoulder the recovery, but in its stead, some unknown and, in this case, mythical company, which stood behind it and this without any proof to sustain the implied charge, but it placed the defendant before the jury at a great disadvantage, in that it may be that there is no such insurance, or if there is insurance, it may not be of the kind that covers this risk or liability of defendant, as in *Clark v. Bonsal,* 157 N. C., 270, or in some other respect or for some other reason it may not protect the defendant. So that the defendant is left defenseless against any such attack, which was made, not openly, but by innuendo. The fact that there was no attempt to show that there was such insurance suggests that, in this case, it did not exist, and yet the jury is permitted to act upon the hypothesis that it does exist, and will shield the defendant from any harm.

(591) The capital vice of this kind of examination, if allowed, is that it is based upon the supposition, not always ill-founded, that a juror is prone to be more just and considerate toward his friend or associate, or one whom he knows and with whom he may be thrown in daily contact, and towards whom he entertains a more friendly disposition, than towards a mere stranger. Somehow, we instinctively lean that way, it is thought; whereas a jury should be free from any such influence or bias, in order that they may execute justice and maintain the truth, and not be swerved by any such consideration from giving a fair and impartial verdict. While our juries are required by statute to be men of good moral character and of sufficient intelligence to properly discharge their important duties, they are not expected to be superhuman and always to successfully resist the appeals to the weaker side of their nature. The law provides against this contingency by excluding from the case all extraneous matter calculated, whether intended or not, to sway prejudicially the minds of the jurors and thus frustrate the very purpose of all trials. It is true that this Court held in *Featherstone v. Cotton Mills,* 159 N. C., 429, that the question was properly asked the jurors, if they were employees of a particular indemnity insurance company mentioned in that case, towit, the Maryland Casualty Company,

but it was shown, as a foundation for the question, that the defendant, in fact, had a policy of insurance in that company which indemnified and protected it to the amount of $5,000. The same question was allowed to be asked of the jurors in the case of *Norris v. Cotton Mills,* 154 N. C., 480; but in that case also the evidence showed that the defendant had indemnity insurance in the Maryland Casualty Company, and the jurors were asked the specific question if any of them were employees of that company. In *Lytton v. Manufacturing Co.,* 157 N. C., 332, a new trial was granted, in the defendant's appeal, on the ground that evidence was admitted to the effect that the defendant had employer's liability insurance. The Court said: "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 with the inquiry before the court. Evidence that the defendant in an (592) 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 numerous cases.

In the recent case of *Walters v. Lumber Co., ante,* 388, we approved a ruling by which plaintiff was permitted to ask a juror if he had any business connection with the Fidelity and Casualty Company, which had insured defendant against losses, including the one then being investigated. But it will be seen that in *Walters' case,* and in the others where a similar ruling was made, it was either proved or admitted that there was such insurance, and it thus enabled the plaintiff more wisely and discreetly to exercise his right of challenge. But how does that reason apply to this case? Not at all. So far as the record discloses, if a juror had any interest in or business connection with an indemnity company, it could not have affected his attitude towards the plaintiff or prejudiced him in any way, and it could not have done so, of course, unless it had been shown that the particular indemnity company had insured the defendant against ultimate liability for the plaintiff's claim of damages. The vital fact is missing in this case, and we are left with nothing else than something which is only calculated to bias the jury against the defendant, and perhaps to seriously prejudice it, if it should turn out that there is, in fact, no such insurance, and we must assume, in the absence of evidence to the contrary, that defendant is not so indemnified.

In *Walters v. Lumber Co., supra,* we referred to the well considered case of *Akin v. Lee,* 206 N. Y., 20, where the Court of Appeals of New York decided a question similar to the one now presented to us. It said,

by *Justice Gray:* "If we admit a doubt as to the first ruling, the error in the second is too serious to be disregarded. We have but recently held, following a rule already laid down by us, that evidence that the defendant, in an action for negligence, is insured in a casualty company is incompetent, and its admission justifies an order for a new
(593) trial of the action. (See *Simpson v. Foundation Co.,* 201 N. Y., 479, 490). Such evidence, almost always, is quite unnecessary to the plaintiff's case, and its effect cannot but be highly dangerous to the defendant's, for it conveys the insidious suggestion to the jurors that the amount of their verdict for the plaintiff is immaterial to the defendant. It was a highly improper attempt on the plaintiff's part to inject a foreign element of fact into his case, which might affect the jurors' minds, if in doubt upon the merits, by the consideration that the judgment would be paid by an insurance company. While frequently, in the exercise of the authority conferred upon this Court, we disregard technical errors, when we see that they do not affect the merits of the controversy, the error committed in this case is of too grave a nature to be put aside as merely technical. In repeated instances judgments have been reversed for its commission, and counsel must take notice that we shall adhere to our rule and that we shall order a new trial in all cases where, in such actions, a verdict may have been influenced by the consideration of such unauthorized evidence." Our case is stronger than that one, for there the defendant was actually insured, though the indemnity company was not a party to the record, and the question was not asked for the purpose of intelligently exercising the right of challenge. In this case the question was totally irrelevant, and was so injurious in its tendency to embarrass defendant that we cannot overlook it or venture to say that it caused no prejudice. If a juror had a business relation with an insurance company, that had no connection whatever with the defendant, how could his sitting in the box harm the plaintiff? But the covert suggestion that defendant was insured, without any proof of it, could have but one effect, and that is to prejudice it before the jury, for the reasons we have already stated. In *Haigh v. Edelmeyer,* 107 N. Y. Suppl. at p. 939, the Court said, when discussing a question somewhat analogous to ours, though not presenting as strong a case for defendant: "The plaintiff's counsel, repeatedly and persistently, without rebuke from the Court, brought before the jury the fact that
(594) the defense was being conducted by an insurance company. This fact was not relevant to any issue in the case, and could have been emphasized for no other purpose than to give plaintiff an unfair advantage before the jury. This practice has been repeatedly condemned by this Court and the Court of Appeals, and in the present

case was carried to an extent which would have necessitated a reversal of the judgment, even if the record had presented no other reversible error."

There is another view that should not be overlooked. If plaintiff gets any advantage before the jury by the impression made on it that defendant is insured, and thereby a verdict, as to negligence, is secured, or the damages are increased, upon the theory that an insurance company will have to pay them, and defendant is not insured, the plaintiff has profited by something which the jury supposed to be harmless to defendant, when in fact a greater wrong has been done it than if the suggestion that it was insured had not been made, for it may have to pay for a negligence which did not occur, and much larger damages than would otherwise have been recovered. It would have to respond to a verdict, obtained upon the really false assumption that it is insured, and not based solely upon its own just claim to fair consideration by the jury. This should not be. It would cast reproach upon judicial procedure, and produce untold harm in fostering the sentiment that cases are not decided upon their own real merits.

We do not, for a moment, impute any wrong motive to the plaintiff, nor is it necessary to do so. The question is not what plaintiff intended, but what condition has been created by his act. It is the effect, and not the motive, that we must regard.

Added to the serious question which we have discussed is the injury to the defendant from the cross-examination of the witness Victor L. Smith. How could it do otherwise than prejudice the defendant to inquire whether it had any stockholders in Gaston County, or whether defendant is in a combination or trust? It was not relevant to any phase of the case or any question involved in it, which concerned the defendant's liability. The implied suggestion is, that no resident of Gaston County will be harmed by a full verdict for the plaintiff, and a nonresident is entitled to less consideration than a resident. (595) This method of examination—and the other questions are virtually of the same sort—ought not to be allowed. Courts should be very careful to safeguard the rights of litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution or defense of his cause, by extraneous considerations, which militate against a fair hearing. *Hensley v. Furniture Co.*, 164 N. C., 148. The error in this case consists in the fact that the court did not forbid the examination to be so conducted, and caution the jury against its evil influence, as suggested in the *Hensley case*, but expressly permitted it, and this was clearly detrimental to defendant.

There are serious questions raised as to the rulings of the court upon the merits, the issues of negligence and contributory negligence, but in the view already taken of the case, they need not be considered.

We are of the opinion there should be another trial, for the reasons stated.

New trial.

Cited: Speed v. Perry, 167 N.C. 128 (2g); *Medlin v. Board of Education,* 167 N.C. 245 (2j); *Deligny v. Furniture Co.,* 170 N.C. 204 (1d); *Oliphant v. R. R.,* 171 N.C. 304 (1c); *Holt v. Mfg. Co.,* 177 N.C. 174 (1g); *Stanley v. Lumber Co.,* 184 N.C. 307 (1g); *Allen v. Garibaldi,* 187 N.C. 800 (1g); *Gilland v. Stone Co.,* 189 N.C. 788 (1g); *S. v. Tucker,* 190 N.C. 714 (1g); *Fulcher v. Lumber Co.,* 191 N.C. 410 (1l); *Luttrell v. Hardin,* 193 N.C. 269 (1g); *Keller v. Furniture Co.,* 199 N.C. 415 (1g); *Bell v. Panel Co.,* 210 N.C. 814 (1b).

CALDWELL LAND AND LUMBER COMPANY v. W. H. CLOYD AND D. C. COFFEE.

(Filed 13 May, 1914.)

1. Deeds and Conveyances—Color of Title—Trials—Evidence—Adverse Possession.

Where a deed to lands is put in evidence without showing paper title in the grantor or connecting this deed with any other title, it can have no legal effect except as color of title, making it necessary for the party claiming it to establish such adverse possession of the lands, and for such a period of time, as will ripen his possession into an absolute title under the statute; and while building a house on the lands and marking its boundaries are some evidence of possession, it is not conclusive.

2. Same—Leases—Admissions.

Where the plaintiff relies on adverse possession to ripen his disputed title to lands, evidence is competent as a circumstance to show adverse possession and as an admission by the defendant that, at one time, the latter had leased the lands from the former.

(596) APPEAL by plaintiff from *Webb, J.,* at November Term, 1913, of CALDWELL.

This is an action to try the title to land.

The plaintiff introduced grants from the State to G. N. Folk of date 16 December, 1874, and mesne conveyances from said Folk to the plain-

tiff. It also introduced evidence tending to prove that the grants and mesne conveyances covered the land in controversy.

The defendant introduced a deed from Jesse Coffey to William Coffey, ancestor of the defendant, of date of 1833, and evidence that it covered the land in controversy, and that the defendant and those under whom he claims had been in adverse possession of the land for more than thirty years.

The deed from Jesse Coffey to William Coffey was objected to upon the ground that it was fraudulent upon its face; and upon the objection being overruled, the defendant excepted.

In rebutal of the evidence of adverse possession by the defendant, the plaintiff offered in evidence a lease from the plaintiff to the defendant of date 11 June, 1897, covering a part of the lands in controversy. The lease was excluded, and the plaintiff excepted.

His Honor charged the jury, among other things, as follows: "If you find by the greater weight of the testimony that Silas Coffey built his house on the land in controversy in 1858 or 1859, and find by the greater weight of the testimony that he, or some one else for him, ran around this tract of land, that he laid it out, that he ran the lines of it, and that he put such lines around that tract of land in controversy that were known and visible lines, the court charges you that would put title in him and that it would be his property, and when he died it would descend to his children," and the plaintiff excepted.

There was a verdict and judgment for the defendant, and the plaintiff appealed.

Edmund Jones and W. C. Newland for plaintiff. (597)

J. W. Whisnant and Lawrence Wakefield for defendant.

ALLEN, J. The introduction of the grants from the State and the mesne conveyances to the plaintiff, with evidence tending to prove that the grants and conveyances covered the land in controversy, made out a *prima facie* title in favor of the plaintiff (*Mobley v. Griffin,* 104 N. C., 112), and to meet this case of the plaintiff the defendant relied, among other things, upon an adverse possession under color of title.

The deed of 1833, under which the defendant claims, is not, in our opinion, fraudulent upon its face, and was properly admitted in evidence, but there is no evidence of title in the grantor in that deed and nothing connecting the deed with any other title, and it could therefore have no legal effect except as color of title.

A deed which is merely color of title professes to pass the title, but does not do so (*Williams v. Scott,* 122 N. C., 550), and can only become

effective as title when there is an adverse possession under it for the period prescribed by statute, under some conditions seven years, and others twenty-one years. *Hamilton v. Icard,* 114 N. C., 536.

Applying these principles, which are too well settled to require the citation of authority in their support, the charge of his Honor is clearly erroneous, because of his failure to incorporate in the instruction the necessary element of an adverse possession.

He, in effect, charged the jury that if Silas Coffey, a son of William Coffey, built on the land in 1858 or 1859, and had the lines run and marked, that this would put the title in him, which would descend to his children; and this is not true, unless there was an adverse possession for the time required by statute.

If the house was built, and the lines marked, these would be circumstances tending to prove adverse possession, but not conclusive evidence of the fact, nor that the possession continued during the statutory period.

The whole charge of his Honor is not in the record, and we cannot see that this error was corrected, and it is upon the most material question before the jury.

(598) We are also of opinion that the lease from the plaintiff to the defendant is competent as an admission of his title, and a circumstance tending to rebut the claim of adverse possession.

New trial.

W. C. THURSTON v. SOUTHERN RAILWAY COMPANY.

(Filed 13 May, 1914.)

Interstate Commerce—Railroads—Failure to Settle Overcharges—Statutes—Constitutional Law.

A recovery from a railroad company for overcharges on a shipment of goods (Revisal, sec. 2644), and the penalty prescribed by section 2643 for failure to refund the overcharges within the time specified, is not an interference with interstate commerce when the goods have been shipped here from another State. Our statutes on the subject are constitutional and valid.

APPEAL by defendant from *Devin, J.,* at October Term, 1913, of ALAMANCE.

W. H. Carroll for plaintiff.

Parker & Parker for defendant.

CLARK, C. J. These four cases were begun before a justice of the peace to recover overcharges for freight paid on cotton shipped from points outside the State to points within the State, and the penalties prescribed by Revisal, 2644, for failure to refund such overcharge within the time prescribed by Revisal, 2643.

In each of the four cases the jury found the amount of the overcharge to be as claimed by the plaintiff, and it was not contradicted that said overcharges had not been repaid, though application had been made in the manner required by Revisal, 2643, and that if the plaintiff was entitled to recover said penalty, he was entitled to the maximum of $100 penalty in each case.

The defense relied on in all four cases, and indeed the sole defense set up in the last two cases, is that these being interstate shipments the State could not prescribe a penalty for nonpayment of (599) the overcharges, because this would be an interference with interstate commerce. As to the first two cases, there were also exceptions as to evidence and instructions, but they do not require serious consideration. The judgments on the verdicts as to the amount of these overcharges are affirmed.

As to the question of the validity of the penalty for failure to settle the amount of the overcharges within the time prescribed by Revisal, 2643, it has been fully and frequently discussed and decided in this Court. The constitutionality of the penalty was upheld by *Walker, J.*, in *Harrill v. R. R.*, 144 N. C., 540, and by *Hoke, J.*, in *Morris v. Express Co.*, 146 N. C., 167, in very thorough and elaborate discussions of the subject. Those cases have been upheld in *Efland v. R. R.*, 146 N. C., 135, and *Iron Works v. R. R.*, 148 N. C., 469. To same effect, *Cottrell v. R. R.*, 141 N. C., 383. All these have been cited and approved in a very recent case, *Jeans v. R. R.*, 164 N. C., 224. To similar purport is *Hockfield v. R. R.*, 150 N. C., 422, upon a similar statute, Revisal, 2633, in which it was held by a unanimous Court: "The penalty imposed by Revisal, 2633, has nothing to do with interstate transportation, but deals only with the neglect of duty of the defendant after the transportation was fully completed and the goods lay in its warehouse—not in the cars at Durham." In the present case the penalty has nothing to do with the transportation, but applies only when the carrier has refused for more than sixty days to refund an overcharge which it has collected for freight on goods actually delivered.

In *R. R. v. Mazursky*, 216 U. S., 122, it was held that the statute of South Carolina was valid which required that every claim for loss or damages to property while in possession of a common carrier must be adjusted and paid within 90 days from filing the claim in case of ship-

ments from without the State, and imposing a penalty for failure or refusal to so adjust and pay it. The Court said: "While it is not easy to define the exact limits of the operation of State laws as affecting interstate commerce, we have no hesitation in saying that the statute in question as it affects carriers doing business in this State, who (600) fail or refuse to adjust and pay the loss of or damage to goods while in their possession, is no unlawful interference with interstate commerce, even as applied to an interstate shipment. . . . The statute does not attempt to regulate interstate commerce, and imposes no tax or burden thereon." This has been cited and approved in *R. R. v. Reid,* 222 U. S., 436.

We feel that we cannot add anything to what has already been said in the cases cited, and it would be useless to reiterate what we have already held. If a State court has jurisdiction and is competent to pass upon the question whether the defendant has made an overcharge by collecting freights in excess of the rate allowed by the Interstate Commerce Commission, and this is not an interference with interstate commerce, then certainly it is within the scope of a State Legislature to provide a penalty for refusal to pay such indebtedness for an overcharge to the consignee for a longer time than that allowed by law for the examination of the application for the refund of the sum unjustly collected.

Affirmed.

Cited: Supply Co. v. R. R., 166 N.C. 86 (f); *Smith v. Express Co.,* 166 N.C. 159 (g).

JOHN H. KENDALL ET AL. v. HIGHWAY COMMISSION OF VALLEYTOWN TOWNSHIP.

(Filed 27 May, 1914.)

Pleadings—Highway Commission — Trespass — Demurrer — Speaking Demurrer.

In an action for damages to plaintiff's lands, the complaint alleged that the defendant highway commission unlawfully entered upon the plaintiff's land with a large force of employees, teams, etc.; without notice, and unlawfully wasted and spoiled the same by digging great ditches, etc., to the plaintiff's damage: *Held,* the cause of action alleged is trespass *quare clausum fregit,* which is admitted by demurrer; and where the demurrer relies upon a special statute, which has not been referred to in the complaint, it is a speaking demurrer, and in either event the demurrer is bad.

KENDALL *v.* HIGHWAY COMMISSION.

APPEAL by plaintiff from *Carter, J.*, at January Term, 1914, (601) of CHEROKEE.

This is a civil action, heard upon complaint and demurrer. His Honor sustained the demurrer, and the plaintiff appealed.

M. W. Bell for plaintiff.
Dillard & Hill for defendant.

BROWN, J. The facts as alleged in the complaint as a basis for the plaintiff's cause of action are substantially as follows: That Francis H. Kendall is dead, and left a last will and testament, the plaintiffs being appointed therein as executors and trustees. That the highway commission is a corporation created, organized, and existing under the laws of North Carolina. That for many years prior to his death the said Kendall was the owner of Tract No. 20, on Valley River, containing 139 acres, more or less, which, by his will, was devised to the plaintiffs, who were the owners thereof at the time of the injuries complained of. That on 1 December, 1912, and at different times before and since, the defendant, without leave or license, and *without authority of law, unlawfully* entered upon said tract, and with a large force of employees, teams and men, and without notice to plaintiffs, unlawfully wasted and spoiled said tract by digging great ditches and throwing up the earth to form into a fill entirely through the tract, which was rich bottom-land, thereby making holes of great length and depth on both sides of the fill, to the injury of the tract and damage to the plaintiffs; that by reason of the said digging of the ditches and holes and construction of the fill, the land next to the river is rendered inaccessible from other parts of the tract, which tract was valuable only as a farm before these things were done. That by reason of such unlawful acts the plaintiffs have been damaged in the sum of $1,000.

The defendant interposes a demurrer as follows:

(1) For that the plaintiffs cannot have and maintain an action for a tort such as is set forth in the complaint in this action against the highway commission of Valleytown Township unless such right of action is given by statute, and there is no statute which gives the (602) plaintiffs such right of action.

(2) For that whatever remedy the plaintiffs had was by petition for a jury to assess damages on account of the taking of the land described for a public road, as provided by chapter 161, Public-Local Laws 1911, and such remedy is exclusive, and this court has no jurisdiction of the action.

We think the judge erred in sustaining the demurrer. The important propositions of law relied upon by the defendant as a defense in this action cannot be raised by demurrer to the complaint as framed.

The demurrer admits the truth of all the facts set out in the complaint, and can be sustained only when the defect appears upon the face of the complaint.

The plaintiff alleges a trespass upon its lands and that it is unauthorized and unlawful. This is admitted by the demurrer. The alleged cause of action is a trespass *quare clausum fregit,* and this is admitted by the demurrer. If there are facts which justify the acts of the defendant, they do not appear upon the face of the complaint. *Davidson v. Gregory,* 132 N. C., 389; *Wood v. Kincaid,* 144 N. C., 394; *Merrimon v. Paving Co.,* 142 N. C., 539.

The second ground of demurrer is also untenable. It interjects an alleged act of the General Assembly, which is not referred to in the complaint. It is a speaking demurrer. *Ward* [*Wood*] *v. Kincaid,* 144 N. C., 393.

If the defendant relies upon the defenses attempted to be raised by demurrer, they should be pleaded by answer. The demurrer is overruled and the defendant is directed to answer.

Error.

Cited: Headman v. Comrs., 177 N.C. 263 (g); *Trust Co. v. Wilson,* 182 N.C. 169 (g); *Cherry v. R. R.,* 185 N.C. 91 (g); *Bolick v. Charlotte,* 191 N.C. 678 (g); *Adams v. Cleve,* 218 N.C. 304 (g).

(603)

JOHN T. SPRAGUE ET AL. v. COMMISSIONERS OF WAKE COUNTY.

(Filed 20 May, 1914.)

Municipal Corporations—Counties—Credit—Necessaries—School Purposes—Statutes—Constitutional Law.

It is prohibited by our Constitution, Art. VII, sec. 7, that a county contract any debt, etc., unless approved by the majority of the qualified voters of that county, which is not for a necessary expense, notwithstanding the provisions of a statute to the contrary; and schools being held not to be an expense of this character, an issue of bonds for such purpose is invalid, though a majority of those voting thereon have expressed themselves by ballot in their favor, if such majority be not also that of the qualified voters of the county.

APPEAL by plaintiff from *O. H. Allen, J.,* at April Term, 1914, of WAKE.

This was a civil action brought by the plaintiff on behalf of himself and all other citizens and taxpayers of Raleigh Township, Wake County, to enjoin the board of county commissioners of Wake County from preparing and issuing $50,000 of school bonds in Raleigh Township, the cause being heard in the Superior Court of Wake County, upon an agreed statement of facts, a jury trial having been waived.

Judgment was rendered in favor of the defendants, and the plaintiffs excepted and appealed.

W. B. Snow for plaintiff.

J. W. Hinsdale, Jr., for defendant.

HOKE, J. Our Constitution, Art. VII, sec. 7, contains provision that "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officer of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein," and it is the accepted interpretation of this provision that the words "majority of the qualified voters therein" mean a majority of all the persons who are duly qualified to vote in a given district or township, etc. In the present instance it has been properly made (604) to appear that the General Assembly, Special Session, 1913, passed an act authorizing a bond issue of $50,000 for the purpose of constructing, etc., one or more graded or public school buildings in Raleigh Township, provided the measure was approved by the voters of the township, and that a majority of the votes cast at the election should determine the question. On election held, a majority of the votes cast was in favor of the bonds, but the measure failed to receive a majority of the qualified voters of the township. This being true, the proposed bond issue would be in violation of the Constitution, unless the same is to be considered a "necessary expense" within the meaning of the provision.

On the question thus presented, the Court, in many cases directly construing the constitutional provision, has repeatedly held that the erection of new school buildings may not be properly considered a necessary municipal expense. *Gastonia v. Bank, ante,* 507; *Ellis v. Trustees,* 156 N. C., 10; *Hollowell v. Borden,* 148 N. C., 255; *Rodman v. Washington,* 122 N. C., 39; *Goldsboro Graded Schools v. Broadhurst,* 109 N. C., 228.

Out of the current revenues lawfully available for the purpose, the authorities may build, as their judgment dictates, but when it is proposed to incur a large indebtedness of this kind, and secure same by issuing bonds of the municipality, the Constitution provides, as stated,

that it can only be done when a majority of the qualified voters within the district shall give the measure their approval.

This being the established construction of the Constitution, required by the ordinary significance of the language used, and for other considerations appearing in the authorities cited, it may not be ignored or departed from because, in an exceptional instance, it may work a hardship to the interest more especially involved or because the Legislature may have given formal indication that the measure is desirable.

Being a part of our organic law, established as a wholesome restraint on the incurring of burdensome indebtedness, it binds both the (605) Legislature as well as municipal authorities, and must be enforced as controlling in all cases coming within its terms and meaning.

On authority, therefore, we must hold that the proposed bond issue is without warrant of law, and the defendants be enjoined from proceeding further with the measure.

Reversed.

Cited: Stephens v. Charlotte, 172 N.C. 567 (f); *Williams v. Comrs.,* 176 N.C. 557 (f); *Hammond v. McRae,* 182 N.C. 753 (g); *Armstrong v. Comrs.,* 185 N.C. 409 (g); *Henderson v. Wilmington,* 191 N.C. 278 (g); *Frazier v. Comrs.,* 194 N.C. 61 (l).

DR. J. O. HOOPER v. ERNEST V. HOOPER.

(Filed 20 May, 1914.)

1. Divorce—Adultery—Husband and Wife—Evidence—Interpretation of Statutes.

It being the purpose of our statutes to remove opportunity for collusion between the husband and wife in an action for divorce on the ground of adultery, the statutory inhibition that they will not be permitted to testify for or against each other prevails whether under the circumstances of any particular case it would seemingly appear there was no collusion or otherwise (Revisal, secs. 1564, 1630, 1636); and the inhibition extends to any and all admissions or confessions by the other, tending to establish the acts of adultery, either in the pleadings or otherwise.

2. Same—Appeal and Error—Ex Mero Motu.

In an action for divorce of the husband on the ground of adultery of his wife, it is incompetent for the husband to testify that the wife had a certain contagious venereal disease, of which he had been free, under circumstances tending necessarily to establish her improper relations with other men (Revisal, secs. 1564, 1630, 1636); and the statute expressly

forbidding testimony of this character being positive and enacted in the interest of society, it is the duty of the trial judge to exclude it, and upon his failure to have done so, the Supreme Court, on appeal, will consider its incompetency *ex mero motu.*

APPEAL by defendant from *Justice, J.,* at November Term, 1913, of HENDERSON.

Civil action for divorce on account of adultery.

There was evidence tending to show that plaintiff and defendant (606) were married in September, 1912, and some time after that, and after a visit to Savannah, defendant developed an acute case of gonorrhea, and that she had no such disease at the time of marriage.

There was evidence also to the effect that one or more physicians had made examination of plaintiff, and could discover no symptoms of disease on plaintiff, and Dr. J. O. Hooper, examined on the trial as a witness in his own behalf, testified as follows: "That he was a resident of Saluda, Polk County, N. C., and had been for five or six years; that he boarded with Mrs. H. P. Lock, who kept a boarding-house in said town; that he married defendant on 11 September, 1912; and that a final separation took place on 8 December, 1912. That they had a misunderstanding on 19th November, and that on that date the defendant went to her home in Savannah, Georgia, and returned on the 27th of said month. After her return they lived together for a few days, up to the 5th December, when things were revealed to him that he did not like; that they did not live together after the 5th, and that he notified Mrs. Lock he would not be responsible for her board after the 8th, on which date the defendant left. That he had never been unkind to the defendant, had never chloroformed her and had never mistreated her in any way. He identified letters of an amorous nature written by defendant to other men, and testified that he found same upon her person. That he had never had gonorrhea or any other venereal disease in his life; that he never had sexual intercourse with any woman other than his wife during their married life. Did not know that his wife had gonorrhea until she charged him with having given it to her in petition for alimony served upon him on 15 January, 1913."

Cross-examination: Told Mrs. Lock he would not be responsible for his wife's board after 8th December; did not think defendant had less than $10 when she left, of money he had given her before that; did not tell her he would bring charges against her if she did not get out and leave. Admitted that he swore in his answer in alimony suit that defendant had represented to him before their marriage that she lived on a prominent street in Savannah; that she was a graduate (607) of a high school there; that she received an income from her

property, and had $1,100 in the bank; that he afterwards found out that these representations were false, and that he had been deceived, but did not swear in his answer that he kicked her out on account of these things. That he had not given his wife the disease, had not treated her for it, did not know that she had it until the alimony papers were served upon him, and that she had never accused him of having given it to her. That he met the defendant about the last of May or first of June, 1912, and married her in September following.

There was verdict establishing adultery on the part of the wife.

Judgment for divorce absolute, and defendant excepted and appealed.

Smith & Shipman for plaintiff.

Lee & Ford, and Fortune & Roberts for defendant.

HOKE, J., after stating the case: Our statute on divorce contains provision as follows:

Revisal 1905, c. 31, sec. 1564: "The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts shall have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact."

And the chapter on evidence, ch. 34, sec. 1630, making parties competent and compellable to give their testimony in a cause, closes with restrictive words: "Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation." And in section 1636, referring to causes in which a husband or wife may be competent and compellable to give their evidence, the same restriction again
(608) appears as follows: "Nothing herein shall render any husband or wife competent or compellable to give evidence for or against each other, in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation."

These regulations, which have long existed in this State, express the settled purpose of our Legislature that, in actions for divorce on account of adultery, neither the husband nor the wife shall be competent or compellable to give evidence which fixes or tends to fix either with adultery

and the inhibition extends to any and all admissions or confessions by the other, of like tenor, either in the pleadings or otherwise. *Perkins v. Perkins,* 88 N. C., 41; *Hansley v. Hansley,* 32 N. C., 506.

True, in the case of *Broom v. Broom,* 130 N. C., 562, the statute was held not to apply where a wife was offered for the sole purpose of denying the statement of third persons, witnesses, as to specific acts of adultery on her part, but the restriction undoubtedly exists, and extends, as stated, to any and all testimony by either the husband or the wife which has a tendency to establish the adultery of the other.

The legislation is based upon the gravest reasons of public policy and, as stated in the authorities cited, is designed, not only to prevent collusion where the same exists, but to remove the opportunity for it.

In *Perkins' case, supra,* divorce was sought on the ground that the wife had contracted the disease of syphilis and communicated it to her husband, and declarations were offered on the part of the wife tending to show that she had contracted the disease from a third person while her husband was absent in South Carolina, accompanied by proof that the "man in the case" had the disease. There was no suggestion or claim of actual collusion, but the admissions were rejected, and *Ruffin, J.,* in delivering the opinion, on this subject, said: "Indeed, though not entirely apparent, we cannot avoid an impression, arising out (609) of the statement of the case itself, that, as it was, he succeeded in getting before the jury much testimony which properly should have been excluded. His own physical condition and exemption from secret disease at the time of his return from South Carolina were so peculiarly within his own knowledge, and so difficult of knowledge by another, that it seems impossible to doubt that he was, himself, permitted to testify directly to those matters; and if so, it was improperly done, since those facts were intended to be used, and were used, as links in a chain of circumstances to convict the defendant of the adultery alleged in the complaint—of which there seems to have been literally no direct proof.

"Be this, however, as it may, there can be no question in the minds of the Court as to the propriety of excluding the testimony with reference to the admissions of the defendant. The provision of the statute is so pointed and its language so plain—that in such trials neither the husband nor the wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either be received as evidence to prove such fact—as to leave no room for doubt or construction. This prohibition, as has been often said by the Court, proceeds out of that regard which the law always has for good morals, and that interest which society has at stake in the preservation of the marriage relations of its members, seeing that they are not only essential to social order, but that

they constitute the foundation of society itself, and it is the duty of the courts to see that neither this policy of the law nor public interest is impaired through the collusion of the parties, and in fact that it shall not even encounter the risk of being so impaired: for, as said in *Hansley v. Hansley,* 10 Ired., 506, this policy of excluding the admissions of the parties depends, not so much upon the ground that there is collusion between them, as upon the danger that there may be."

A perusal of this testimony of plaintiff will show that much of it had a direct tendency to establish adultery on the part of the wife. (610) Indeed, there is doubt if, without it, the evidence was sufficient to carry the case to the jury, and, under our authorities, the testimony should have been excluded.

It is contended that the objection referred to is not open to defendant, for the reason that the record discloses no exception made to the testimony either at the time of trial or since. But this position, while supported by rule and precedent in ordinary cases, is not allowed to prevail where it appears from a perusal of the record that material evidence, made incompetent by statute for reasons of public policy, has been admitted and allowed to affect the result. In such case it became the duty of the trial judge to exclude the testimony, and his failure to do so must be held for reversible error, whether exception has been noted or not.

Broom v. Broom, 130 N. C., 562; *S. v. Gee,* 92 N. C., pp. 756-762; *S. v. Ballard,* 79 N. C., 627.

We have no desire or purpose to intimate that there is evidence of collusion in the present case, but, as heretofore stated, this legislation is designed not only to prevent collusion, but to remove the opportunity for it; and to allow a divorce to stand which has been procured on testimony expressly made incompetent by statute, merely because the evidence was not objected to at the time and no exception has been noted of record, would be to afford every facility for collusive divorces, and, in many instances, would in effect nullify the statute.

For the error indicated, there must be a new trial, and it is so ordered.

New trial.

CLARK, C. J., concurring: It will be noted that Revisal, 1564, 1630, and 1636, do not disqualify a husband or wife from being witness in their own behalf in actions for divorce or criminal conversation or in criminal actions except when such testimony would be "for or against the other." In *Broom v. Broom,* 130 N. C., 562, the testimony of the wife denying the specific acts testified to by certain witnesses was not

"for" the husband so as to aid him in getting divorce, nor was it against him as proving anything that he had done.

But in the present case the testimony of the husband, as the (611) Court holds, "had a direct tendency to establish the ground of divorce against the wife."

Cited: Vickers v. Vickers, 188 N.C. 450 (1g); *S. v. Davis,* 229 N.C. 394 (1j); *S. v. Davis,* 229 N.C. 396 (2j).

W. H. MERONEY v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(Filed 27 May, 1914.)

1. Railroads—Backing Trains—Warning—Negligence Per Se—Trials.

It is negligence *per se* for the employees on a railroad freight train to back its train upon or cross a street crossing its track in a thickly populated portion of the town, without someone on the front boxcar to give notice of its approach and to signal the threatened danger to pedestrians, and it is actionable when injury is thereby proximately caused.

2. Same—Contributory Negligence—Issues—Harmless Error—Appeal and Error.

The plaintiff, with the knowledge of defendant railroad company's employees, had for some time been engaged at the defendant's depot in directing his team driver in removing freight which had arrived over defendant's road. At this place a public street crossed the railroad's main and side tracks, on the latter of which two empty and detached boxcars had stood for quite a while. Plaintiff was momentarily standing in the street upon this sidetrack, giving directions to his driver, when, without notice or warning, defendant's employees attempted to attach these boxcars to the engine, and the cars, being without brakes on, ran down upon the plaintiff, to his injury. The evidence held sufficient upon the issue of defendant's negligence, and the submission of the issue of contributory negligence to the jury was not error of which defendant could complain.

APPEAL by defendant from *Carter, J.,* at January Term, 1914, of CHEROKEE.

M. W. Bell and Dillard & Hill for plaintiff.

Witherspoon & Witherspoon, D. W. Blair, and E. B. Norvell for defendant.

CLARK, C. J. This is an action for personal injuries caused (612) by the negligence of the defendant. The plaintiff was unloading

a car of fertilizers on the side-track in Murphy. The street crossed the main line and the side-track of the defendant. On the day of the injury a large number of teams were using the street and crossing both tracks, of which the engineer and conductor of defendant's train had knowledge. The plaintiff in looking after the delivery of fertilizers to his customers, passed along the street. When he got to the main line, he stopped a moment on the track, but in the street, to speak to one of the wagoners. Near by were two box cars of the defendant which had been standing on the main line all day, with the end of the box car nearest to the plaintiff just on the edge of the street. At that instant the defendant's engineer, without any notice or warning, backed his train against the box cars, whose brakes were not applied, with the result that the box cars were driven into the street, striking the plaintiff, who was caught between the car and the wagon, shoving him and the wagon up a steep bank several feet, whereby the plaintiff was seriously injured.

The two box cars did not have the brakes applied, though the street was crowded that day, and the defendant's agents knew that the plaintiff and other persons were on its yard unloading the fertilizers. The defendant was negligent in moving its train backwards, striking the box cars and driving them across the public street without giving notice.

This has been held in so many cases that it is supererogation to repeat it. Among the cases directly in point are *Purnell v. R. R.*, 122 N. C., 832, where the engine was pushing backwards a train of box cars. This Court said: "As we understand the matter, there must be both a man and a light at night and a man and a flag in the day. . . . This man called a flagman is in control of this backing train. The train is moved and stopped at his discretion. This is done in the daytime by the use of a flag, and at night by the use of the light. By these means he informs the man in control of the engine when and how to move the train."

(613) Among many cases to the same purport are *Pharr v. R. R.*, 119 N. C., 756; *Bradley v. R. R.*, 126 N. C., 741; *Jeffries v. R. R.*, 129 N. C., 236; *Lassiter v. R. R.*, 133 N. C., 244.

This case showed greater negligence on the part of the defendant than *Edge v. R. R.*, 153 N. C., 213. In that case an employee of defendant was injured while crawling across the track underneath the coupling of two box cars. Just before going into this place of danger he had seen an engine standing near the car with steam up and the engineer looking towards him. The Court held that it was a question for the jury whether defendant could have avoided injuring the plaintiff by the use of ordinary care. In *Hudson v. R. R.*, 142 N. C., 198, it was held culpable negligence where the defendant cut loose a car on a spur track on a down-grade, whereby it crashed into five other cars with sufficient force

to drive them, as in this case, causing the death of the plaintiff. In *Beck v. R. R.*, 146 N. C., 458, it was held that the Court had over and over again declared that to run an engine suddenly backward without warning, or signal, or any one on the rear of the train to give notice, was culpable negligence.

The court, therefore, properly refused to nonsuit the plaintiff. Indeed, the defendant's counsel said that the case depended entirely upon the contributory negligence. We do not find any errors in the refusal to give the prayers in that aspect. It was not negligence in the plaintiff to step upon the track of the defendant where he was injured. He was going about his business; was in a public street; had stopped for only a brief period to speak to a wagoner who was engaged in unloading the car of fertilizers. The conductor and engineer knew that he was there, and the injury was caused by the sudden backing of the engine against the two box cars without warning or notice, whereby said cars were driven backwards, causing injury to the plaintiff.

The learned counsel for the defendant strenuously insists that the plaintiff was guilty of contributory negligence because he did not "stop, look, and listen." But this was not an occasion to call for the application of that maxim. He was not struck by a passing train, nor was it negligence in him to stop for a moment or two to speak (614) to the wagoner. He had no cause to think that the cars would be driven backward by the shifting engine without signal or notice. Indeed, we see no evidence of contributory negligence; but that issue was submitted to the jury and found against the defendant.

No error.

Cited: Ward v. R. R., 167 N.C. 160 (2d); *Ward v. R. R.*, 167 N.C. 163 (1j); *Hinson v. R. R.*, 172 N.C. 651 (1j, 2j); *Davis v. R. R.*, 175 N.C. 652 (1g).

JOHN H. BOYD ET AL. v. T. N. LEATHERWOOD ET AL.

(Filed 27 May, 1914.)

1. Evidence—Witnesses—Experts—Comparison of Handwriting.

Before the passage of chapter 52, Public Laws 1913, it was incompetent for a handwriting expert to testify to the genuineness, or otherwise, of the signature of a party to a writing based upon a comparison with another signature, not admitted to be genuine or requiring proof that it is so.

2. Same—Explanations—Comparison by Jury.

It is competent for handwriting experts to show and explain to the jury various signatures being compared by him, when giving his opinion on the genuineness of one of them, the subject of the inquiry; but it is not allowed that the jury make the comparisons for themselves in the absence of expert testimony.

3. Evidence—Witnesses, Expert—Findings of Trial Court—Appeal and Error.

Where the testimony required of an expert witness has been ruled out upon the trial in the Superior Court, this Court on appeal will not pass upon the exception taken to its exclusion when it does not appear of record that the trial judge had passed upon the question of whether the witness had qualified himself to give evidence of this character, and had held him to be qualified.

4. Evidence—Witnesses—Experts—Handwriting—Declarations—Trials——Evidence—Questions for Jury.

Where a bond sued on is attacked upon the ground that the signature thereto was a forgery, it is competent to show that the maker thereof had made a statement, at the time the bond was given, in accordance with the expressed tenor of the bond, as a circumstance tending to show he had executed it.

5. New Trials—Motions—Newly Discovered Evidence.

The affidavits and counter-affidavits, upon a motion for a new trial in this case because of newly discovered testimony, involving, among other things, charges and counter-charges of perjury of or unlawful influence exerted upon a witness who had testified at the trial, do not commend themselves to the favorable consideration of the Supreme Court; and it being improbable that the new trial sought would result differently, the motion is denied.

(615) APPEAL by plaintiff from *Carter, J.*, at January Term, 1914, of HAYWOOD.

This action was brought to set aside a contract or bond, alleged by defendants to have been executed by W. J. G. B. Boyd on 26 June, 1912, by which he agreed to convey to T. N. Leatherwood a certain tract of land, supposed to contain 100 acres and lying on the waters of Caldwell Fork of the Cataloochee. Plaintiffs alleged that the contract was not made by the said Boyd, but is a forgery. An issue was submitted to the jury, presenting an inquiry as to the genuineness of the paper, and a verdict was rendered for the defendant. Judgment thereon, and appeal by plaintiffs.

Ferguson & Silver for plaintiffs.

W. J. Hannah, John M. Queen, and F. E. Alley for defendants.

WALKER, J., after stating the case: The questions raised by this appeal relate principally to the admissibility of certain evidence offered by the plaintiffs and rejected by the court.

Plaintiffs introduced as a witness C. B. Atkinson, and proposed to prove by him "the alleged signatures of W. J. G. B. Boyd, as they appear on the records of the treasurer's office, for the purpose of comparing the same with the signature in the bond in dispute," which is plaintiff's exhibit No. 1. This suit was commenced before the passage of Public Laws 1913, ch. 52, which does not apply to actions pending at the date of its enactment. It is not competent thus to prove the spuriousness or genuineness of a signature or other writing by comparing it with other signatures in writings which are not admitted to be in the hand-
writing of the party in question, or otherwise shown, according to 616) some recognized rule of law, to be safe standards for making the comparison. We are not speaking now of ancient documents, but confining ourselves to the very question asked in this case. It was held in *Tunstall v. Cobb,* 109 N. C., 316, to be the settled law of this State that a comparison of the disputed writing can be made by a qualified witness with one "whose genuineness is not denied, and also with such papers as the party whose handwriting gives rise to the controversy is estopped to deny the genuineness of, or concedes to be genuine"; but no comparison is permissible where the proposed standard is itself disputed or evidence is required to establish its genuineness. In that case this Court said: "Three reasons are given for excluding as incompetent a comparison by an expert witness, of a signature or writing not admitted to be genuine or connected with the case on trial, with a signature or writing which has been offered in writing, where the genuineness of the latter is drawn in question: (1) There is danger of fraud in the selecting of writings offered as specimens for the occasion. (2) The genuineness of specimens offered may be contested, and thus numberless collateral issues may be raised to confuse the jury and divert their attention from the real issue. (3) The opposing party may be surprised by the introduction of specimens, not admitted to be genuine, and for want of notice may fail to produce and offer evidence within his reach, tending to show their spurious character. 1 Greenleaf on Ev., secs. 578 to 580; *Fuller v. Fox,* 101 N. C., 119; *Outlaw v. Hurdle,* 46 N. C., 150; *Tuttle v. Rainey,* 98 N. C., 513; *Pope v. Askew,* 23 N. C., 16." This rule was recognized in the more recent cases of *Martin v. Knight,* 147 N. C., 564, and *Nicholson v. Lumber Co.,* 156 N. C., 59.

In *Martin v. Knight, Justice Connor* says that the Court was unanimous in *Tunstall v. Cobb* as to the general rule in regard to a comparison of handwriting, and it is "the generally received doctrine

of this and other States, and was followed in *Lowe v. Dorsett,* 125 N. C., 301; *Ratliff v. Ratliff,* 131 N. C., 425."

(617) It is said in *Nicholson v. Lumber Co., supra,* citing *Fuller v. Fox,* 101 N. C., 119, and *Martin v. Knight, supra,* that the rule "excluding proof of handwriting by comparison is now so far relaxed with us as that, although a jury is not allowed to make comparisons for themselves, a witness, expert or not, who has been properly allowed to express an opinion as to the handwriting of a given paper, on being shown a writing admitted to be genuine, may show the two papers to the jury, and, by making comparisons between them, explain and point out to the jury the similarity or difference between the two"; and the same was substantially held in *Martin v. Knight, supra.* The judge properly excluded the question.

The witness of plaintiff, A. A. Hamlet, was asked if he had examined the handwriting of W. J. G. B. Boyd, and also if he could form a satisfactory opinion whether the signature to a paper is genuine, and following up the last question, he was asked if the signature to the bond was genuine or spurious. These questions, on objection by the defendant, were excluded. It is evident that the court ruled them out because the witness had not qualified himself to answer them. At any rate, there is no finding that he was so qualified. It was said by *Justice Allen,* for the Court, in *Boney v. R. R.,* 155 N. C., 95: "If the questions were asked of the witness as an expert, there is no finding or admission that the witness was an expert. As was said by *Justice Manning,* in *Lumber Co. v. R. R.,* 151 N. C., 220: 'We cannot assume that his Honor, in this view, found the witness to be an expert, and then excluded the question and answer. In order that the witness might testify when objection is made, there must be either a finding by the court or an admission or waiver by the adverse party that the witness was so qualified.' "

It is also manifest that it was expected the witness would base his opinion, if it had been given, upon a comparison of handwriting forbidden under the rule we have stated. Besides, it does not appear what the reply to the questions, as to the genuineness of the paper, would have been, even if the signature to the bond was the one referred to. It does not appear clearly that it was. He was only asked, "Is that a

(618) genuine signature?" without any indication to us of what signature was meant. But it is sufficient answer to the exception, that the court excluded the questions without having found that the witness had qualified himself to give the desired testimony. We must infer that he decided them to be incompetent on this ground and under the above authorities.

There were two admitted standards for comparison in this case, and plaintiff proposed to hand them to the jury for the purpose of having the jurors compare the disputed signature to the bond with them. This evidence was excluded, and properly so, as we have seen that "the jurors are not allowed to make comparisons for themselves" (*Nicholson v. Lumber Co., supra,* at p. 66), although a witness may, under certain circumstances already mentioned, show them the papers for the purpose of explaining his opinion as to the genuineness of the paper in question and pointing out similarities or differences, as the case may be, between the paper admittedly genuine and the one alleged to be spurious, just as a surveyor, who is a witness, may explain a map made by him.

This Court, in *Martin v. Knight, supra,* cited with approval *People v. Pinckney,* 67 Hun., 428, as follows: "It is apparent that the submission of a writing to a jury must be in connection with the testimony of witnesses in regard to the validity or authorship of the various handwritings, and that, independent of the examination of witnesses, such handwritings cannot be submitted to the jury for the purpose of arbitrary comparison by them. In other words, the handwritings can only be inspected by the jury in aid of the testimony of witnesses in reference to the authorship of the handwritings in question."

The plaintiff, therefore, did not bring his case within the well-settled rule, and the court held correctly on this question.

It was competent to prove that W. J. G. B. Boyd had said, at the time the bond was alleged to have been executed by him, that he had sold his farm on the Cataloochee to Leatherwood. It was evidence bearing upon the genuineness of the paper, not quite as strong as if he had admitted the execution of the particular bond, and yet not too weak to be received as a circumstance fit to be considered. *In re Welborn's* (619) *Will, post,* 636.

There was no error in the rulings of the court.

No error.

PER CURAM. The motion for a new trial on the ground of newly discovered testimony is denied. The plaintiff has not brought his motion within the rule governing such applications. *Johnson v. R. R.,* 163 N. C., 431. It is not probable that the alleged new evidence will be given at another trial, nor, if it should be, does it appear likely that the result, under the circumstances disclosed in the affidavits, will be changed. For these and other good reasons, it will serve no practical purpose to grant a new trial. There are very serious charges of bribery and per-

jury and of attempts to obstruct the administration of justice, and countercharges of the same nature, which, perhaps, should be the subject of a criminal investigation. One or the other, or both, of the crimes may have been committed. If either of the parties has told the truth, the other has been guilty of grave criminal offenses—subornation of perjury and bribery. Defendant's witness Charles H. Russell, in an affidavit, stated that he had been bribed to testify as he did at the trial, and afterwards he stated, under oath, that he had been plied with liquor and bribed with money to make the affidavit. The application, therefore, does not commend itself to a favorable consideration in this Court.

Motion denied.

Cited: Hilton v. Ins. Co., 195 N.C. 875 (5f).

(620)

NANNIE DITMORE ET AL. v. W. A. REXFORD ET AL.

(Filed 27 May 1914.)

1. Partition—Pleadings—Sole Seisin—Ejectment.

Where sole seisin is pleaded in proceedings for partition and the cause is transferred for trial to the Superior Court, it becomes, in effect, an action of ejectment.

2. Ejectment—Possession—Admissions—Limitations of Actions—Burden of Proof.

Where the answer in ejectment alleges defendant's possession of the disputed lands, it is unnecessary for the plaintiff to show it, but where the defendant pleads the statute of limitations, it is for the plaintiff to prove that the action is not barred.

3. Limitation of Actions—State's Lands—Entries—Recording—Notice—Equity—Stale Claims.

Where the plaintiff claims land under a quitclaim deed of B. of supposed interests he had in lands entered by another, and B. thereafter has taken out grants of these lands in his own name and had them recorded, this act of B. put him in an adverse relation to the plaintiff's ancestor, giving the latter his action for whatever rights he could have acquired under the quitclaim deed, and from that time the various statutes of limitation would begin to run; and where there has been a lapse of fifty-seven years since the registration of the grant to B., the plaintiff's claim, unexplained, would become a stale claim, and bar his rights in equity, in the absence of a statute.

APPEAL by plaintiffs from *Carter, J.*, at March Term, 1913, of SWAIN.

Allen & Leatherwood and R. L. Phillips for plaintiffs.
James H. Merrimon and Frye, Gant & Frye for defendants.

CLARK, C. J. This was a proceeding for partition of land begun before the clerk. The defendants pleaded sole seisin and the cause was transferred to the court at term. It became then in effect an action of ejectment. *Hunnicutt v. Brooks,* 116 N. C., 792; *Sipe v. Sherman,* 161 N. C., 109.

The plaintiffs introduced a quitclaim deed from George Bumgarner to Daniel D. Foute (under whom the plaintiffs claim as heirs at law) and three others, dated 3 January, 1853. This deed recites that it embraces land covered by certain entries therein named, which (621) are the land in controversy. These entries had been taken out 2 January, 1849. On 14 October, 1853, Bumgarner took out grants to himself upon aforesaid entries, which grants were recorded 3 September, 1854, in the register of deeds' office in Macon County, where the land then lay.

The defendants in their answer set up title in themselves by mesne conveyances from Bumgarner, and also pleaded the several statutes of limitations, and that the plaintiffs had not shown possession in the defendants.

Upon this evidence the court directed a nonsuit. It was not necessary to show possession in the defendants, as the answer alleged it, but the plea of the statute of limitations threw upon the plaintiffs the burden of showing that they were not barred, and hence were not entitled to judgment at the close of their evidence. *House v. Arnold,* 122 N. C., 220; *Gupton v. Hawkins,* 126 N. C., 81.

When Bumgarner took out the grants for himself, this put him in an adverse relation to the plaintiffs' ancestor, who then had a cause of action for whatever rights he could assert under the quitclaim deed, if any. He had legal notice by the registration of said grants in 1854. The plaintiffs introduced no evidence to rebut the presumption of abandonment and of the bar of the statute by the long lapse of time from the taking out of the grants and recording the same down to the institution of this action, 24 October, 1911.

The nonsuit was therefore properly granted. The plaintiffs' claim being based upon equitable title, even if there were no statute of presumption or statute of limitations, the lapse of fifty-seven years, unexplained by an evidence—for the plaintiffs have put in none—makes it a stale claim, which equity will not sustain. *Cox v. Brower,* 114 N. C., 423; 16 Cyc., 150.

The judgment of nonsuit is
Affirmed.

Cited: Cedar Works v. Lumber Co., 168 N.C. 395 (3g); *Pierce v. Faison,* 183 N. C. 180 (2g); *Higgins v. Higgins,* 212 N.C. 219 (1f); *Gibbs v. Higgins,* 215 N.C. 204 (1f); *Bailey v. Hayman,* 222 N.C. 60 (1p); *Jernigan v. Jernigan,* 226 N.C. 206 (1f).

(622)

J. M. McDONALD v. THE RANDOLPH AND CUMBERLAND RAILWAY AND THE RALEIGH, CHARLOTTE AND SOUTHERN RAILWAY COMPANY.

(Filed 27 May, 1914.)

1. Railroads—Crossings—Collisions — Trials — Negligence — Evidence — Charge of Train—Questions for Jury.

The plaintiff, in his action to recover damages for a personal injury against two railroad companies whose tracks crossed each other at a grade level, was a section foreman of one of them, and in construction work ordinarily had charge of the train of his company. While riding on his train, in front on a flat car, it came into collision, at the crossing, with the train of the other road, under circumstances fixing the employees in charge of both trains with actionable negligence. There was evidence in plaintiff's behalf that at that particular time and under the circumstances then existing he was not in charge of his employer's train, but that the engineer thereon had sole charge thereof: *Held,* the fact of collision was evidence of actionable negligence, and it was for the jury to determine, under proper instructions from the court, whether upon the evidence the plaintiff was chargeable with such negligence as would bar his recovery.

2. Railroads—Construction of Road—Operation—Fellow-servant.

Where a railroad company, constructing a line of road, regularly operates its train, for its own purposes, over a part thereof, carrying its own freight and its employees, it is, as to such part, an operating railroad within the meaning of the fellow-servant act, and is liable in damages for an injury caused thereon to one of its servants by the actionable negligent act of his fellow-servant.

3. Railroads—Collisions—Negligence—Contracts—Trials—Evidence—Primary Liability.

Where two railroad companies are jointly sued for damages for a personal injury caused by the negligent acts of the employees on the trains of each of them at a crossing, resulting in a collision which caused the injury complained of, any contract or agreement between these companies relating to their liability under such circumstances affects only the question of primary liability between themselves, and not the right of the plaintiff to recover against both of them.

APPEAL by defendant from *Shaw, J.*, at January Term, 1914, of MOORE.

There was evidence tending to show that, at Hallison Station, (623) Moore County, the two defendant roads crossed each other at grade, and that, on 29 July, 1912, in the daytime, the plaintiff, an employee as section foreman of the defendant the Randolph and Cumberland Railway, while on a flat car in front of the engine of a train of that company, going back to Hallison, was seriously injured in a collision on the crossing, between trains of the two defendants; that both trains reached the crossing at practically the same time, and both were badly damaged; that neither train stopped for the crossing, and that the engineer of either train could have seen that a collision was likely unless one or the other of the trains should stop.

Liability was denied by both companies on several grounds, and, on issues submitted, the following verdict was rendered:

1. Was the plaintiff injured by the negligence of the defendant the Randolph and Cumberland Railway Company, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to his own injury, as alleged in the defendant's answer? Answer: No.

3. Was the plaintiff injured by the negligence of the defendant the Raleigh, Charlotte and Southern Railway Company, as alleged in the complaint? Answer: Yes.

4. Did the plaintiff, by his own negligence, contribute to his own injury, as alleged in defendant's answer? Answer: No.

5. What damage, if any, is the plaintiff entitled to recover? Answer: $2,000.

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

G. W. McNeill and H. F. Seawell for plaintiff.

C. M. Muse and R. L. Burns for defendant.

HOKE, J. There was ample evidence to sustain the verdict of culpable negligence, as to both defendant companies, and, on the record and so far as plaintiff is concerned, there is very little to be said in mitigation of liability on the part of either. All the evidence tends to show that a collision occurred at a grade crossing in the daytime; that neither train came to any stop at the crossing, but entered therein at the rate of 15 miles an hour, an act of itself amounting to (624) negligence by the weight of well-considered authority (2 Thompson on Negligence, sec. 1403; 6 Cyc., p. 624; Elliott on Railroads, sec

1132); and it further appeared that, under conditions shown to exist, the engineer of either road, if properly attentive, could have seen that the other train was approaching the crossing in time to have avoided a collision, and there is direct evidence that at least one of them knew the fact.

It is urged on the part of both defendants that the recovery should not be allowed to stand, for the reason that the plaintiff had exclusive charge and control of the trains of the Randolph and Cumberland Railway, and was himself in part responsible for the collision. There was testimony to the effect that plaintiff, a section foreman, while on the construction work, had the right to control the movements of the engine, and, when so engaged, it obeyed his orders. Plaintiff, however, testified that, on this occasion and while running the train back to the station, he had no control; on the contrary, it was in charge of the engineer at the time, plaintiff, himself, being on the flat car in front, and that when he noted the approach of the other train and saw that a collision was likely, he did all he could to warn the engineer, and was unable to attract his attention. Under a comprehensive and impartial charge, the jury have accepted plaintiff's version of the matter, and the position, therefore, is not open to defendants.

Again, it was contended for both defendants that, as plaintiff was injured on a railroad in process of construction, and not one "operating in the State," the fellow-servant act, making the company responsible for injuries caused by the negligence of a coemployee, did not apply to the case, and that the injury having been caused by the negligence of plaintiff's own engineer, a fellow-servant, neither company is responsible. If this position or the conclusion from the facts suggested be conceded, it would not avail defendants. The testimony tended to show that the Randolph and Cumberland Railway had laid its track some 2 miles beyond Hallison, was running its construction train over it every (625) day, and had carried some freight beyond the station to oblige some of its customers, shipping over the road, but made no charge for the additional haul, and, on these facts, there is high authority for the position that the railway, in such case, should be considered as an operating road, within the meaning of the fellow-servant act (*Callahan v. St. Louis, etc., Terminal Co.*, 170 Mo., 473; *San Juana Perey v. San Antonio, etc., R. R.*, 28 Texas Civ. App., 255; *McKnight v. The Iowa, etc., Construction Co.*, 43 Iowa, 406); and there is nothing to the contrary in the decisions of our own Court to which we were referred by counsel, *Twiddy v. R. R.*, 154 N. C., 237; *Oneal v. R. R.*, 152 N. C., 404; *Nichols v. R. R.*, 138 N. C., 516, an examination of these cases showing that plaintiffs therein were not a part of any train crew; were

not in any way connected with the movements of any train, and were not, at the time, on any train being operated by others.

The position, however, is not presented in the record, as a perusal of the facts in evidence tends to show that, while the Randolph and Cumberland Railroad had not made any charge for hauling freight any distance beyond the crossing, it had laid a track 30 feet beyond, which it was accustomed to use in the operation of its regular trains in loading and unloading freight at Hallison Station, and his Honor held and so charged the jury, "that the railroad beyond this 30 feet was not one operating within the meaning of the law, and that defendants were not responsible for the injury unless it occurred while operating its train over a portion of the track laid and continually used in the regular operation of its traffic and passenger trains," in which case the fellow-servant act would certainly apply. *Hemphill v. Lumber Co.,* 141 N. C., 487; *Sigman v. R. R.,* 135 N. C., 184; *Mott v. R. R.,* 131 N. C., 237.

On the facts in evidence, therefore, if there was error in this ruling, it was not one that could give defendants or either of them any just ground of complaint.

It was further insisted for defendant the Raleigh, Charlotte and Southern, that it should not be held responsible by reason of a contract between the company and its codefendant by which the latter stipulated, in effect, that for and in consideration of being allowed (626) to cross the Durham and Charlotte road, now owned and operated by the Raleigh, Charlotte and Southern, it would keep said crossing free and clear of all obstacles which would stop or delay the trains of the other company and would guard against accidents by having a flagman or proper employee who will flag in daytime and lantern at night, and sufficiently protect and guard against accidents, etc. This contract is relevant, and may become important on a question of primary liability between the two companies, but it cannot be allowed to affect the right of plaintiff to recover for injuries caused by culpable negligence on the part of both.

For such an injury, and as to plaintiff, both companies are liable. *Gregg v. Wilmington,* 155 N. C., pp. 22-23; *B. and O. R. R. v. Friel,* 77 Fed., 126; *Toledo R. R. v. Hydell,* 25 Ohio Cir. Ct., 575.

There is no error and the judgment must be affirmed.

No error.

Cited: Goodman v. Power Co., 174 N.C. 664 (2f).

F. A. LANCE v. J. N. RUSSELL.

(Filed 20 May, 1914.)

1. Reference—Evidence—Court's Findings—Trusts—Interest—Appeal and Error.

Where the findings of fact of the trial judge in passing upon a report of a referee are made upon legal evidence introduced upon the referee's hearings, they are not subject to the consideration of the Supreme Court on appeal; and in this action the trial court necessarily held as a conclusion of law from the facts found, that the trustee was not chargeable with interest in favor of the trustor.

2. Trusts and Trustees—Costs—Interpretation of Statutes.

The trustee of an express trust is not personally liable in an action brought against him for the costs of court, where it is not shown and properly established that he has mismanaged the trust estate or has been guilty of bad faith. Revisal, sec. 1277.

(627) APPEAL by defendant from *Bragaw, J.*, at February Term, 1913, of BUNCOMBE.

Civil action tried upon exceptions to report of referee.

The court reviewed the findings of fact and law made by the referee, and rendered the following judgment:

This cause coming on to be heard upon motion of the plaintiff to confirm the reports of the referee filed in this cause at the January term of the Superior Court of Buncombe County, and continued by consent of all parties to the February term of said court, and it being consented by counsel, as will appear from stipulations entered into and duly signed and filed among the papers in this cause, that the undersigned judge, holding the courts of Buncombe and Madison countries by exchange, might take the record, reports, exceptions, evidence, and briefs in said cause, and pass upon the defendant's exceptions, and upon motions made, out of term and at chambers, either in or out of the Fifteenth Judicial District, with the same force and effect as if the same were duly heard within said district, and that the said undersigned judge might enter such judgment or orders in said cause out of term and out of said district and at chambers as he might in said district and in term-time, and that such judgment or orders, when rendered out of term or out of district, shall have full force and effect as judgment duly and properly entered, with leave to either party to file exceptions only to said judgment or orders as might be filed or taken if said order or judgment were entered regularly in term-time; and the said matters being con-

sidered by said court at Marshall, in the county of Madison, on this 6 March, 1913, the court makes the following

FINDINGS OF FACT

1. That on 1 April, 1902, F. A. Lance conveyed by deed to J. N. Russell certain lands in Buncombe County, said to contain 325 acres, as will appear by deed registered in Book 123, page 527, in the records of Buncombe County.

2. That contemporaneously with the execution of said deed a collateral agreement was executed by the said J. N. Russell, a copy of which is attached to the answer in the cause, marked Exhibit "A," (628) declaring the trust upon which the said land was conveyed to the said Russell.

3. That on 16 July, 1903, the defendant, J. N. Russell, pursuant to said trust, sold and conveyed to Hugh T. Brown, for the consideration of $3,500, the lands conveyed to him by said Lance as aforesaid.

4. That on 19 July, 1903, the date of the conveyance from J. N. Russell to Hugh T. Brown, there was an outstanding encumbrance upon said lands, executed by F. A. Lance to Hoffman, trustee for the British-American Mortgage Company, securing notes upon which there was due on this debt $778, including principal and interest, which indebtedness was assumed by Brown, the purchaser.

5. That on the said date 19 July, 1903, F. A. Lance was indebted to J. N. Russell, including principal and interest, $1,370.36, represented by a judgment docketed on the judgment docket of Buncombe County, No. 28, page 134:

Principal	$ 954.37	
Interest	88.50	
		$1,042.87
Note dated 1 October, 1901:		
Principal	$ 154.00	
Interest	16.64	
		$ 170.64
Note dated 20 October, 1900:		
Principal	$ 135.00	
Interest	21.65	
		$ 156.85

6. That deducting $778 assumed by H. T. Brown, representing the indebtedness to the British-American Mortgage Company, Hoffman, trustee, and also deducting the aggregate amount of the indebtedness from Lance to Russell ($1,370.36), there remained in the hands
(629) of J. N. Russell, due from him to F. A. Lance, from the proceeds of the sale of land to H. T. Brown, the sum of $1,351.64.

7. That on 3 September, 1903, J. N. Russell paid a draft drawn by Lance in favor of Locke Craig, amounting to $200, and a subsequent payment to the attorneys of Lance was made by Russell, amounting to $150; that deducting these amounts $350), there remained in the hands of J. N. Russell $1,001.64.

8. That an action was instituted by H. T. Brown against F. A. Lance, and an attachment was served on J. N. Russell, and $70 was retained by said J. N. Russell to indemnify him against any judgment which might be obtained against him as garnishee in said matter.

9. That after the deed from Russell to H. T. Brown on 19 July, 1903, F. A. Lance claimed title to the lands in controversy adversely to Brown, remaining in the actual possession of the house thereon and about 3 acres of land, and preventing the actual occupation, and interfered with the possession by the said Brown, contesting the title of the said Brown through one J. W. Ducker in 1912, thereby delaying the collection by Russell from Brown of the purchase money for said lands, and during the pendency of the said suit between Brown and Ducker, and until the final judgment in that case, Lance had possession and exercised dominion over the land sold by Russell to Brown and tortiously prevented delivery of possession by Russell to Brown.

10. That the defendant, J. N. Russell, executed his trust in good faith.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact, the court concludes:

1. That the plaintiff, F. A. Lance, is not entitled to recover interest on the sum remaining in the hands of J. N. Russell, as the proceeds realized from the sale to H. T. Brown.

2. That the plaintiff is not entitled to recover of the defendant at this time the sum of $70 retained by the said Russell pursuant to the attachment issued in the case of H. T. Brown against F. A. Lance.
(630) 3. That there is due from the defendant to the plaintiff the sum of $1,001.64, the balance remaining in the hands of the defendant as the proceeds realized by the defendant from the sale of land to Brown, after deducting the indebtedness represented by liens upon the said property; the amounts due from Lance to Russell; the amount paid by Russell to the order of Lance and to his use, as enumerated in

the foregoing findings of fact, less the $70 retained by the said Russell on account of the said attachment in the case of Brown against Lance, and less any sums paid by Russell to Lance or by orders of court and not herein enumerated.

It is, therefore, ordered, adjudged, and decreed that the plaintiff, F. A. Lance, recover of the defendant, J. N. Russell, the sum of $931.64, less one-half of the total cost of this action and less any sums paid by court not herein enumerated.

It is further ordered and decreed that the defendant, J. N. Russell, shall pay the costs of this action, one-half thereof to be deducted from the amount in his hands found to be due to the plaintiff, and the remainder to be paid by him individually; the said costs to be taxed by the clerk, and to embrace the total cost of this action.

It is further ordered, adjudged and decreed that the defendant, J. N. Russell, be permitted to retain in his hands the said sum of $70 attached in the action of Brown against Lance, to abide the final judgment in that case, and should it be ultimately adjudged that the plaintiff H. T. Brown is not entitled to recover said amount, then upon such determination, the plaintiff F. A. Lance shall recover the same of the defendant, J. N. Russell.

STEPHEN C. BRAGAW,
Judge.

The defendant excepted to said findings and judgment, and appealed to the Supreme Court.

H. B. Carter, J. D. Murphy for plaintiff.
Jones & Jones, Britt & Toms for defendant.

BROWN, J. This is an action brought by the plaintiff to recover (631) of the defendant a balance due plaintiff in hands of defendant as trustee for the plaintiff.

It appears that the plaintiff had conveyed a tract of land to the defendant in trust to sell it and pay certain debts and execute certain trusts and to account to the plaintiff for any balance remaining.

The claim for damages, alleged in the complaint, has been eliminated, and the only controversy now relates to the balance due the plaintiff under the agreement with the defendant, and set out in the record.

The cause was referred to a referee, whose report was reviewed by Judge Bragaw, evidently with painstaking care, who made his own findings of fact and conclusions of law.

With one exception, the assignments of error relate to certain small sums which defendant claimed credit for in the settlement, and which the judge refused to allow.

There is ample evidence to support his Honor's findings of fact, and such being the case, this Court has no power to reverse or review them. The conclusions of law necessarily follow from the findings of fact.

The tenth assignment of error is because the judge ordered that the defendant pay one-half of the costs of the action. In this there is error.

Under Revisal, sec. 1277, a trustee of an express trust, or an executor, or an administrator, is not liable personally for costs, unless the court shall direct that such trustee, executor, or administrator shall be personally taxed therewith, as a penalty for mismanagement or bad faith.

His Honor did not adjudge that the trustee had mismanaged the fund or trust imposed upon him by the agreement, but his Honor did find in ninth and tenth findings of fact, set forth in his judgment, that the trustees had not been negligent in the collection of the balance of the purchase money from Hugh T. Brown for the land in controversy, and that he had executed his trust in good faith.

(632) In the case of *Smith v. Smith,* 108 N. C., 369, the Court held that it was error to tax trustees of an express trust who were parties to an action with cost, unless the court had adjudged that they were guilty of mismanagement or bad faith in such action.

In *Sugg v. Bernard,* 122 N. C., 155, it is decided that where no mismanagement or bad faith on the part of a trustee is shown in an action to which he is a party, he is not individually liable for costs.

The costs of the Superior, as well as this Court, will be taxed against the plaintiff.

Modified and affirmed.

COMMISSIONERS OF YANCEY COUNTY v. ROAD COMMISSIONERS OF YANCEY COUNTY.

(Filed 27 May, 1914.)

Municipal Corporations—Road Commissioners—Bond Issues—Constitutional Law—Senatorial Courtesy.

Constitutional authority is conferred on the Legislature by Article VII, secs. 2 and 14, to create a public road commission of a county and invest these commissioners with the same powers conferred on the county commissioners with reference to pledging the faith and credit of the county for public road purposes which are conferred on the county commissioners by Article VII, sec. 7, of our Constitution; and as such purposes are held to

be for necessary expenses of the county, and an issuance of bonds therefor has been authorized by statute, it is not required for the validity of the bonds that the question of their issuance has been submitted to the qualified voters of the county and has received the approval of a majority thereof. The objection that by "senatorial courtesy" this would practically put the power in the hands of a representative of a county to pledge its faith and credit, cannot properly be addressed to the courts.

APPEAL by plaintiff from *Cline, J.*, at April Term, 1914, of YANCEY.

J. W. Pless and R. W. Wilson for plaintiff. (633)

J. Bis Ray, Johnston & Hutchins and Hudgins, Watson & Watson for defendant.

CLARK, C. J. This is an action to declare chapter 603, Public-Local Laws 1913, unconstitutional and void. That statute provides for the appointment of three commissioners, named in the act, who shall be road commissioners for Yancey County and who shall be vested with the supervision of the roads which was formerly exercised by the county commissioners, with authority to issue bonds in the sum of $150,000 to build roads. The routes for the roads and their character are expressed in the act. Under authority of the statute, the commissioners organized as the board of road commissioners for Yancey County and have sold to a firm in Ohio $125,000 of the road bonds of Yancey County, issued in pursuance of the statute, and had in their possession at the time this action was begun $83,000 of the proceeds. In pursuance of the act of the General Assembly, the defendant board has contracted for about 11½ miles of road through the center of the county, over which the defendant claims that at least 90 per cent of the citizens of the county travel, and this road is now being constructed.

The complaint prays that the act be declared unconstitutional; that the defendant be restrained from expending any further part of said money or incurring any obligation, and that the fund now in hand be delivered to the treasurer of the county, with instructions to restore the same to the holders of said bonds, which shall be taken up and canceled, and that the county commissioners of Yancey be restored to their rights as road supervisors of Yancey County.

The State Constitution, Art. VII, sec. 7, provides: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officer of the same, *except* for the *necessary expenses* thereof, unless by a vote of the majority of the qualified voters therein." Chapter 603, Laws 1913, vests the road commissioners of Yancey County with the same authority for the issuing of bonds for public roads that the

(634) county commissioners formerly had, and this Court held in *Vaughn v. Commissioners,* 117 N. C., 434, that "The building of bridges and construction of public roads are necessary expenses of the county." This decision was approved in *Burgin v. Smith,* 151 N. C., 567.

In *Vaughn v. Commissioners, supra,* the Court held that building bridges and constructing public roads is one of the necessary expenses of the county, and the courts "have no authority to control the exercise of the discretionary power vested in the commissioners," as to the nature of the work, or to determine "what would be a reasonable limit to the cost." In the same case it is said: *"Chief Justice Pearson,* speaking for the Court, says: '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. The Court has no power, and is not capable if it had the power, of controlling the exercise of power conferred by the Constitution upon the legislative department of the Government, or upon the county authorities.' "

In *Hightower v. Raleigh,* 150 N. C., 571, *Brown, J.,* says: "While it is within the province of the courts to determine what are necessary public buildings and what classes of expenditures fall within the definition of the necessary expenses of a municipal corporation, the authority of determining the kind of building that is needed, or what would be a reasonable cost of it, is not within the purview of the judicial authority. It is vested in the Legislature and in municipal authority, and not in the courts."

In *Highway Commission v. Webb,* 152 N. C., 710, the board of highway commissioners for Valleytown Township in Cherokee had been created by chapter 210, Laws 1905, with powers similar to those conferred upon the defendant in this action. The Court in that case held that such highway commissioners could not issue additional bonds in violation of the act of the General Assembly, but it recognized, tacitly at least, the authority conferred upon the board by the statute.

(635) In *Trustees v. Webb,* 155 N. C., 383, *Hoke, J.,* sustaining an act of the same purport as that under which the defendant board has acted, says: "In the exercise of the ordinary governmental functions they are simply agents of the State, constituted for the convenience of local administration in certain portions of the State's territory, and in the exercise of such function they are subject to almost unlimited legislative control except when restricted by the constitutional provision." In the same case (at p. 387) it is said: "It is no objection to this legislation that the issuing of the bonds and the control and ordering of road work are given to the local authorities, while the county commissioners are directed to levy and collect the taxes." In that case and in *Highway*

Commission v. Webb, 152 N. C., 710, the Court decided that the Legislature has the authority to create a board of road commissioners and vest them with the authority over the roads that the county commissioners had theretofore possessed.

The State Constitution, Art. VII, sec. 2, provides: "It shall be the duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes and financing the county, as *may be prescribed by law.*" It will thus be seen that the jurisdiction of the county commissioners in these matters is subject to regulation in the discretion of the Legislature. Besides, section 14 of that article of the Constitution provides: "The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article and substitute others in their place, except sections 7, 9, and 13."

The plaintiff strenuously contends that practically, owing to what is called "senatorial courtesy," this relegates to the control of one man—the member of the Legislature from the county—and of the Senator, if there happens to be one, the control of the county government, and that $150,000 for public roads is an excessive amount and oppressive in a small county like Yancey. But this is not a matter over which this coördinate department has any control. If the result is bad, the remedy is to be found in the power of public opinion either in (636) controlling the conduct of such members or in electing successors who will cause the objectionable legislation to be repealed or modified. The courts do not have supervisory power over the General Assembly, or over the county officials when acting within the authority lawfully conferred upon them by the Legislature.

If there were allegation and proof that the defendants, or any other public officials, were acting dishonestly, or so extravagantly or recklessly as to amount to an abuse of the authority conferred upon them, the courts might by injunction in such case restrain the alleged illegal acts until a jury could pass upon the issues of fact; but the courts cannot interfere with such powers as are conferred upon the defendants by the statute in this case, which, as we have held, were within the power of the General Assembly.

The court properly held that the statute was within the legislative authority, and refused to restrain the defendant board from acting within the scope of the powers conferred by chapter 603, Laws 1913.

Affirmed.

Cited: Hargrave v. Comrs., 168 N.C. 627, 628, 629 (f); *Hargrave v. Comrs.,* 168 N.C. 631 (j); *Wilson v. Holding,* 170 N.C. 356 (g); *Ed-*

wards v. Comrs., 170 N.C. 451 (g); *Cobb v. R. R.*, 172 N.C. 61 (g); *Woodall v. Highway Com.*, 176 N.C. 383, 385 (g); *Davis v. Lenoir*, 178 N.C. 670 (f); *Comrs., v. Bank*, 181 N.C. 351 (f); *Huneycutt v. Comrs.*, 182 N.C. 321 (f); *S. v. Scott*, 182 N.C. 881 (g); *S. v. Jennette*, 190 N.C. 99 (f); *Henderson v. Wilmington*, 191 N.C. 288 (g); *Ellis v. Greene*, 191 N.C. 764 (f); *Barbour v. Wake County*, 197 N.C. 317 (g); *Glenn v. Comrs. of Durham*, 201 N.C. 237 (g); *Watkins v. Board of Elections*, 210 N.C. 451 (g).

IN RE WILL OF ISAAC C. WELLBORN.

(Filed 27 May, 1914.)

Wills—Partial Cancellation—Burden of Proof.

Where a will, sought to be established as a holograph will, found among the valuable papers of the deceased, in his own handwriting with his name subscribed, has, upon its production by the propounders, the word "canceled" written in two separate items, and the signature has been torn into and through, the burden is upon the propounders to show that, notwithstanding such defacement and marks of cancellation, it was the true will of the deceased, and that he had not intended to cancel the whole instrument, and an instruction by the court to the jury that the burden had shifted to the caveators is reversible error.

(637) APPEAL by caveator from *Webb, J.*, at January Term, 1914, of WILKES.

Issue of *devisavit vel non* as to the will of Isaac C. Wellborn. The paper-writing, purporting to be a will and testament disposing of a considerable amount of real estate and some personal property, was entirely in the handwriting of Isaac C. Wellborn and subscribed by him, and there was evidence tending to show that it was found after his death among his valuable papers, etc.

There was evidence *contra*, on part of caveators, as to paper-writing having been found among the valuable papers of deceased, and also evidence of declarations on part of deceased, objected to by caveators, tending to show that the paper-writing was and continued to be his will and testament, etc. The will when produced, composed of three pages, the first two entirely and the last one-fourth filled with the contents of the alleged will, had across face of the second page, about the center, and within the terms of a devise and bequest to an old servant, Lucy Ann Denny, the words "Canceled by Isaac C. Wellborn," shown to be in the handwriting of the deceased, and, on the third page, containing the

clause designating the executors and including the date, the same entry, in same handwriting, "Canceled by Isaac C. Wellborn." In addition, the last page presented a tear beginning at the right of the page, just opposite and extending through the subscribed signature of Isaac C. Wellborn, about midway of same, and also from the C. into the last clause of the will, containing, as stated, the date and designation of executors, about 1½ inches, and there was evidence tending to show that this was the condition of the will when same was first found after the death.

There were declarations of deceased also received in evidence tending to show that he had left no will, etc.

It was admitted that the entire will and all entries thereon were in the handwriting of the deceased, and the court imposed upon propounders the burden of showing that the paper-writing was found among the valuable papers of the deceased, etc., and charged the jury, further, in effect, if they found this to be the fact, the burden would be upon the caveators to show that the words "Canceled by Isaac C. (638) Wellborn" were intended by him to extend to the whole will, and not to special clauses where they appeared, and they might consider the fact of the tear, if it was done by the deceased, as a circumstance bearing on the question whether or not, at the time Isaac C. Wellborn wrote across the will, "Canceled by Isaac C. Wellborn," he intended to cancel it entirely or only the two items across which the language was written.

Caveators excepted to the charge as to the burden of proof.

There was verdict establishing the will except as to the two items. Judgment, and caveators excepted and appealed.

Finley & Hendren from propounders.

W. W. Barber for caveators, appellants.

HOKE, J., after stating the case: Our statute on wills, Revisal, sec. 3115, and various decisions here and elsewhere dealing with the subject, are in recognition and approval of the principle that there may be a partial revocation by cancelling, tearing, etc., and as to material portions of a will, and if the words "Canceled by Isaac C. Wellborn," restricted as they are physically to certain definite clauses of the paper-writing, were all that appeared in the case, it may be that the charge of his Honor as to the burden of proof could be sustained. *Wikoff Appeal,* 15 Pa. St., 281; *Malone v. Hobbs,* 40 Va., 346; Pritchard on Wills, sec. 270. But the facts suggested do not present the entire case. All the evidence tends to show that the paper-writing can only be upheld, if at all, as a holograph will, and the name of the alleged testator only appear-

ing at the bottom, except in connection with the words "Canceled by" in the two places designated, this subscribed signature is essential to its existence as a will (Rev., sec. 3127), and, in addition to the two entries on the face of the will as described, and in the handwriting of Isaac C. Wellborn, the paper-writing when presented for probate and when offered in evidence showed that his signature subscribed to the instrument was torn entirely through, dividing all letters of the name as near in (639) half as it could well be done, and extending an inch and a quarter or a half into the last clause of the will, and there was evidence, further, tending to show that the instrument was in like condition when first found among the papers of the deceased. If this last fact should be accepted by the jury, it would, in connection with the other facts admitted or clearly established, raise a presumption that the tear in question was done with intent to revoke the will.

True, the authorities agree in the position that, in order to revoke a will by canceling or tearing, the physical act interfering with some material substance of the will and the intent to revoke must concur, and that the act of marking the will "Canceled" on its face, or of tearing some material part of the same, is an equivocal act, open to explanation by relevant testimony, and that, in the first instance, the burden is on him who alleges a revocation; but it is also very generally held, and certainly so in this jurisdiction, that when an instrument purporting to be a will when first found among the valuable papers of the testator, having previously been in his custody, appears clearly to have been canceled or torn in a material portion which is essential to its entire existence as a will, a presumption arises that this was done by the testator himself, and with intent to revoke and the burden is on the propounder to explain the act and show that, notwithstanding appearances, the instrument was intended to remain as the will of the alleged testator. *In re Shelton's Will,* 143 N. C., 218; *Cutler v. Cutler,* 130 N. C., 1; *Bethel v. Moore,* 19 N. C., 311; *In re Brown's Will,* 40 Ky., 56; Pritchard on Wills, secs. 267, 271; Theobald on Wills, p. 45; 30 A. and E. Enc. (2 Ed.), 635 cc; 14 Enc. Evidence, title Wills, p. 445.

In *Cutler's case, supra,* it was held: "Where a will had been in testator's possession, and is offered for probate with name of testator torn off or eaten off by vermin, the burden of showing that it had not been revoked is on the propounder"; and, on the burden of proof, *Chief Justice Furches,* delivering the opinion, said: "But the court instructed the jury that, 'If the jury should find that the will was properly executed by Nathan C. Cutler, then the burden of proof shifted to the caveators to show by the greater weight of the evidence that the will had been (640) revoked. This was error. If there had been no evidence of

erasure or destruction on the script itself—if the paper had been perfect—this charge would have been correct. But where the name of the testator was gone, torn off by the testator, as the caveator alleges, or destroyed by moths, as the propounder contends, the propounder did not establish it as the will of Nathan C. Cutler by proving that it was originally executed by him. This could not have been so in an action on a note or a bond, and is not in this case. And the burden of proof did not change to the caveators at this stage, and place the burden upon them to show how the testator's name came to be off the paper. The will had been in the possession of Cutler; when produced, it had upon it these marks of mutilation, the testator's name being gone. It devolved upon the propounders to account for this, and it was not Cutler's will until they did so to the satisfaction of the jury. When the will was produced without the name of Nathan C. Cutler, this was *prima facie* evidence of a revocation, and the law presumed that it had been revoked. It is true this presumption might be repelled, but the burden of doing so was on the propounder. If this was not so, it would be to require the caveator to rebut the presumption that was in his favor. *Bethel v. Moore,* 19 N. C., 311; *Steele v. Price,* 44 Ky., 58; Pritchard on Wills, sec. 267, 269; Underhill on Wills, sec. 225; Theo. Law of Wills, p. 45. There was error in this instruction."

Applying the principle: If, when the will was produced from the valuable effects of the testator, the same having previously been in his custody, it had the name of the deceased, subscribed to the instrument, torn entirely through, as it now appears, and there was also on the face of the will the words, in two prominent and material portions of the same, "Canceled by Isaac C. Wellborn," as described, this would raise a presumption calling for explanation by the propounder, and the burden should be placed on him to show that, notwithstanding appearances, the will was the last will and testament of the alleged testator.

Under our decisions the evidence offered as to the declarations (641) of Isaac C. Wellborn, deceased, where relevant as tending to show the existence or nonexistence of his will, were admissible in evidence and properly received. *In re Shelton, supra,* and authorities cited; *Reel v. Reel,* 8 N. C., 248.

For the error indicated, the caveators are entitled to have the issue tried by another jury, and it is so ordered.

New trial.

Cited: Barfield v. Carr, 169 N.C. 575, 576 (g); *In re Bailey,* 180 N.C. 31 (g); *In re Love,* 186 N.C. 716 (g).

OWENBY AND ANDERSON v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(Filed 27 May, 1914.)

1. Limitation of Actions—Former Action—Records—Evidence.

Where an action has been nonsuited for misjoinder, and the parties thereafter have brought separate actions, it is competent for the plaintiffs to introduce the record in the former action to show they are within the three-year statute of limitations, when the defendant has pleaded and relied on the statute.

2. Same—Permanent Damages—Trials—Evidence Restricted—Special Requests—Appeal and Error.

Where the three-year statute of limitations is pleaded and relied on as a defense to an action, and the record of a former action between the same parties is competent to show that the statute has not run, the exception of the defendant that the trial court did not restrict this evidence, and that it may have been considered by the jury as substantive evidence, may not be sustained on appeal, where the defendant has not aptly requested the judge to so restrict it in accordance with Supreme Court Rule 34, 164 N. C., 548. This being an action for permanent damages to lands, the five-year statute was applicable, which had not run in favor of the defendant railroad. Revisal, sec. 394 (5).

3. Trials—Instructions—Correct in Part—Measure of Damages—Exceptions—Appeal and Error.

Where the charge of the court upon the measure of damages in an action to recover them states general but correct principles of law applicable to the issue, an exception that he did not sufficiently instruct the jury will not be sustained, it being required of the appellant that he should have tendered special prayers containing the specific instructions he desired to be given.

(642) APPEAL by defendants from *Ferguson, J.*, at November Term, 1913, of CHEROKEE.

M. W. Bell and Dillard & Hill for plaintiffs.

D. W. Blair and Edmund B. Norvell for defendant.

CLARK, C. J. The plaintiffs Carrie Owenby and husband and W. H. Anderson brought an action against the defendant, 20 July, 1909, alleging that the defendant in replacing a trestle across the creek which ran through their property, in November, 1906, negligently and willfully caused several car-loads of rock to be thrown in the bed of said creek, extending entirely across the same, thus making a dam, on top of which they erected a trestle for their track, with the result that the daming up of the creek deflected the water and caused it to flow over their land,

whereby it was washed, covered with débris and drift, filling up the ditches and doing much other damage which is duly recited.

The defendant demurred and moved to dismiss for misjoinder, Rev., 474, (5), and this motion was allowed at November Term, 1909.

Thereupon Carrie Owenby and her husband brought a new action, 14 March, 1910, and W. H. Anderson on the same day also brought a new action, which by consent of parties have been consolidated.

On this trial the defendant assigns as error that the plaintiffs were permitted to introduce the record of the former action, and further, that the court did not sustain the plea of the statute of limitations.

The introduction of the proceedings in the former action was competent to show, as they did, that this action was for the same subject-matter as in the present case, and therefore was begun within three years after the injury was sustained—in November, 1906. As to the exception that the judge admitted the record of the former action without instructing the jury that it was not substantive evidence, (643) a jury of ordinary intelligence could not have mistaken the allegations in the complaint of a plaintiff to be substantive evidence in this cause. It does not appear that they could have been misled in its object, which was to affect the plea of the statute of limitations, when the presumption is in favor of the correctness of the trial below, unless error is pointed out. Moreover, Rule 27, 164 N. C., 548, provides: "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." If the appellant thought that the admission of the record could be understood by the jury as applying to other than the statute of limitations, it was the duty of the appellant then and there to have requested the judge to tell the jury, if he did not, that it was restricted and admitted only for that purpose.

But independent of that, the cause of action alleged was for permanent damages alleged to have been sustained in November, 1906, and this action, even if there had been no preceding action, was begun on 14 March, 1910, and was therefore within the five years statute of limitations. Rev., 394 (5).

Nor can we sustain the exception that the judge did not sufficiently lay down the rule as to the measure of damages. Had the defendant wished for more specific instructions, it should have asked for them. The same point was made by the defendant in *Willey v. R. R.*, 96 N. C., 411, which has been repeatedly affirmed since.

The judge in this case properly told the jury that how the damages should be apportioned between the plaintiffs was a matter which did not concern the defendant.

No error.

(644)

LEAKSVILLE-SPRAY INSTITUTE ET AL. V. B. FRANK MEBANE.

(Filed 27 May, 1914.)

1. Contracts—Consideration—Legal Rights.

Where one is induced to part with a legal right of value upon a promise by another to do a certain thing, there is a sufficient consideration to support the agreement and render it enforcible; and the mere inadequacy of the consideration may not be questioned.

2. Same—Sale of Stock—Trials—Evidence—Questions for Jury.

The plaintiff and defendant having agreed to take advantage of a legislative enactment and its provisions in establishing a technical school at S., agreed that a certain textile school at S. should properly be used there in that connection, and that it would be advantageous to also acquire, in connection with it, a certain furniture factory in which the plaintiff owned stock, the shareholders to sell their stock upon long-term notes to the textile school. There was evidence tending to show, in plaintiff's behalf, that he would only sell his stock in the factory upon condition that the defendant would give his note therefor, and so informed the defendant, who thereupon gave a note with the textile school corporation in the amount named, and the plaintiff surrendered his shares of stock. In an action by the plaintiff upon the note, the defendant pleaded as a defense the want of consideration for the note, and it was held that it was for the jury to determine whether the note was given upon the condition named, the evidence being conflicting, and if so given, the note was made for a sufficient consideration to enforce its payment.

3. Contracts—Pleadings—Consideration—Bills and Notes — Trials — Evidence—Impeachment.

In an action upon a note given in the endeavor to establish a technical school at S., in which both the plaintiff and defendant were interested, the defense was interposed that the defendant should not pay the note in the event the school was not established, and that he only obligated himself to use his best efforts to establish the school, which he had done: *Held*, evidence that the plaintiff held certain of his property at too high a value for the promotion of the enterprise is irrelevant; and the failure to vote for the school is not sufficient or competent to impeach the plaintiff's integrity in the matter.

4. Trials—Character Witnesses—Impeachment—Special Acts.

Where one witness is introduced to prove the general character of another witness, special acts tending to impeach the latter may not be

inquired into on cross-examination; and it is held, in this case, if the matter sought to be elicited were true, it would not be sufficient for impeachment.

APPEAL by defendant from *Lane, J.*, at November Term, 1913, (645) of ROCKINGHAM.

This is an action by the trustees of the Leakesville-Spray Institute to recover $1,500, alleged to be due on a certain paper-writing, not under seal, executed by the defendant on or about 1 August, 1908, by which he promised to pay the plaintiffs, sixty days after date, $1,500.

The principal defense relied on by the defendant is that there was no consideration to support the promise.

The facts leading up to the execution of the paper-writing are as follows:

"In 1907, the General Assembly of North Carolina chartered the Spray School of Technology, and designated as trustees, among others, one of the plaintiffs, D. F. King, and the defendant, B. Frank Mebane. This act provided, among other things, that a plant for actual demonstration work should be established in connection with the school. The defendant Mebane became active in his efforts to establish the school, and one of the plaintiffs, D. F. King, who was also designated as a trustee of the school, urged that the school should be established at Leaksville, and that the Leaksville-Spray Institute, in which the said King was largely interested, might be purchased and used in connection with the Spray School of Technology; and a price for this property was named by the said D. F. King, as appears from the record, which, as the defendant Mebane understood, would cost the Spray School of Technology about $18,000, most of the stockholders of the Leaksville-Spray Institute having agreed to donate their stock free of charge.

"The defendant Mebane secured twelve of the corporations at Spray to agree to give $500 each for a period of twenty years, aggregating $120,000, toward the purchase of this property and the maintenance of the school, which fund should be used to supplement the (646) appropriation of $5,000 annually, which the State had provided in the act incorporating the Spray School of Technology, to be available whenever a suitable site, buildings, etc., were procured. That the defendant also induced Mr. Andrew Carnegie to donate $50,000 for a similar purpose. The American Warehouse Company of Spray was one of the contributing corporations that entered into this arrangement."

It also became desirable to acquire the property of the Leaksville Furniture Factory in the establishment of the School of Technology, which was located about one-half mile from the Leaksville-Spray Institute, and

which was at that time leased to the American Warehouse Company at an annual rental of 6 per cent on the amount of the capital stock.

The plaintiff King owned stock in the furniture company, and also in the Leaksville-Spray Institute, and the latter company was indebted to him in the sum of about $18,000.

There is a conflict of evidence as to the agreement to buy the stock of the furniture company, the evidence of the plaintiff tending to prove that it was bought by the defendant, and the evidence of the defendant that it was bought by the American Warehouse Company.

After a part of the stock of the furniture company was bought, a question was raised as to whether the property of the furniture company, when purchased, would be used in connection with the school or for other purposes, and the plaintiff refused to sell his stock until further assurances were given.

The defendant then executed the paper-writing sued on, and the plaintiff King and others sold their stock in the furniture company.

There is also a conflict of evidence as to the agreement when the paper-writing was executed, the evidence of the plaintiff tending to prove that the defendant agreed to pay the sum of $1,500 if he did not buy the Leaksville-Spray Institute, and that of the defendant that he was to pay the amount if he did not use his best efforts to establish the School of Technology.

(647) The Leaksville-Spray Institute was not bought, and the defendant introduced evidence that he did all he could to establish the school.

The plaintiff King testified, among other things: "I received a message through Mr. J. W. Ivie from Mr. Mebane, prior to 1 August; my recollection is, only a few days. He said that Mr. Mebane had agreed to give a note for $1,500, and would pay that note if he didn't buy the Leaksville-Spray Institute property. At that time he had my proposition. I was not at the stockholders' meeting of the furniture factory when Mr. Mebane made his talk. I owned $1,500 stock in the furniture factory. I understood some of the stockholders of the furniture factory had sold their stock for these five-year notes. Some of them had declined. After I received the message from Mr. Ivie, sent by Mr. Mebane, I bought Mr. Norman's stock, $1,200; paid him $1,100, and the other $100 was to be put in the School of Technology. He was to give it. I gave him my obligation to pay the $1,100, and have paid it. I bought this stock after receiving the message from Mr. Mebane. I afterwards transferred my stock to Mr. Cabell Wall. Mr. Wall came over there and brought the notes for the transfer of the stock of the furniture factory. The notes were signed by the American Warehouse Company and B.

Frank Mebane. We sold to B. F. Mebane. I told Mr. Wall that there was a $1,500 note to be executed by Mr. Mebane in this transaction, and I said, 'You will have to go back and get it before I transfer the stock.' He went back and got the note and brought it over, and I transferred the stock. I delivered the stock to Mr. Wall and took this $1,500 note. The $1,500 note was given at the time of the transfer of the stock and the taking of the notes for the stock. We made a demand on Mr. Mebane for the payment of this money for the benefit of the Leaksville-Spray Institute. Mr. Mebane admitted last court that he got his notice. Mr. Mebane never bought the Leaksville-Spray Institute nor the indebtedness, nor my stock."

His Honor charged the jury upon the question of consideration, among other things, as follows:

"The paper-writing sued on in this case is as follows: (648)

> On sixty days demand, I will pay to the order of D. F. King, Dr. John Sweaney, and B. F. Ivey, $1,500 (one thousand five hundred dollars), said parties to dispose of this amount in connection with the Leaksville-Spray Institute in any way they may see fit.
>
> (Signed) B. FRANK MEBANE
>
> Payable at the Bank of Spray, N. C.

"Now, gentlemen of the jury, this is not such a promise to pay money as either imports or presumes a consideration, and standing alone is not collectible in law; but it may become so if the ones to whom it is made can by the greater weight of the evidence satisfy the jury that it was made for a valuable consideration; and that is the contention of the plaintiffs in this case, that it was made for a valuable consideration, which contention is denied by the defendant Mebane, and which matter is to be determined by you in your answer to the first issue submitted to you. That first issue, along with three others, is submitted to the jury. That first issue reads: 'Was the paper-writing sued on based upon a consideration?'

"The court instructs you that a valuable consideration consists either in some right, interest, benefit, or profit accruing to the party who makes the payment, or some forbearance, detriment, loss, or responsibility, act or service given, suffered, or undertaken by the other to whom it is made.

"In order to support the contract, it is not required that the consideration shall be for the full value of the sum named in the contract, or for full value of the property passed. Mere inadequacy of consideration will not avoid a contract, in the absence of fraud, where a contract is legally

sufficient on its face; and so full value was not required to support the simple promise, but it must be of some value.

"A contract is said to be an agreement by two parties entered into for consideration to do or not to do a certain thing. In order to constitute a contract, there must be a mutual understanding, a meeting of minds, a mutual agreement.

(649) "It is contended that you should find by the greater weight or the preponderance of the evidence in this case, from the evidence of Mr. Hopper and Mr. King, who, it is contended, when this paper was brought to him by Mr. Wall, only turned over the stock of the furniture factory upon the execution of this writing as a consideration for it. 'By the greater weight or preponderance of the evidence' is meant that evidence which weighs more when put in the scales, which has more convincing force, carries more conviction to your minds, whether it comes from one witness, or more, as the case may be.

"In order to constitute a valuable consideration, as I have told you, it is not necessary for the plaintiff to show that the consideration was an adequate one, but if you find from this evidence that the reason for the execution of this note by the defendant was anything of value to him or necessary to him for the accomplishment of his business purposes at that time, then that would be a sufficient consideration; or if you should find from the evidence that part or either of them were induced to sell property to the defendant which he would not otherwise have sold except for the execution of this note, and that the property was of value, that would be a sufficient consideration.

"If you should find from the evidence in this case that the defendant desired to purchase stock of D. F. King and others in the furniture factory, that King and others refused to sell this stock to the defendant unless he would execute the note sued on, and in order to accomplish the purchase of this stock the defendant was required to execute the note, and that this stock was of some value, then there was a sufficient consideration for the note.

"If you find by the greater weight of the evidence that before Mr. King or others here transferred the stock of the furniture factory to the defendant, that they required this defendant to execute and deliver to them the note in controversy, and the stock in it was of some value, then that would be a sufficient legal consideration for the execution of the note, and you will answer the first issue 'Yes.'"

(650) The defendant excepted to this charge, and also by motion to nonsuit and prayers for instruction raised the question that there was no evidence of a consideration.

There was a verdict and judgment for the plaintiffs, and the defendant excepted and appealed.

Manning & Kitchin and A. W. Dunn for plaintiffs.

A. D. Ivie, C. O. McMichael, Brooks, Sapp & Williams for defendant.

ALLEN, J., after stating the case: The authorities fully support the charge of his Honor: *Brown v. Ray,* 32 N. C., 73; *Faust v. Faust,* 144 N. C., 386; *Kirkman v. Hodgin,* 151 N. C., 591. In the first of these cases *Pearson, C. J.,* said: "To make a consideration it is not necessary that the person making the promise should receive or expect to receive any benefit. It is sufficient if the other party be subjected to loss or inconvenience. A trust or confidence reposed, by reason of an undertaking to do an act, is held to be a sufficient consideration to support an action on the promise"; and this was approved in the last case cited.

In 9 Cyc., 312, the author cites many authorities to support the position that "There is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has the right to do, whether there is any actual loss or detriment to him, or actual benefit to the promisor or not."

In *Hamer v. Sidway,* 124 N. Y., 538 (21 A. S. R., 693), the Court applied this principle to a contract to refrain from the use of tobacco and intoxicating liquors, and said:

"The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise, and insists that it follows that, unless the promisor was benefited, the contract was without consideration; a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to (651) support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in law. The Exchequer Chamber, in 1875, defined consideration as follows: 'A valuable consideration in the sense of the law may consist either in some right, interest, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. Courts 'will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as con-

sideration for the promise made to him.' Anson on Contracts, 63. 'In general, a waiver of any legal right at the request of another party is a sufficient consideration for a promise.' Parsons on Contracts, 444. 'Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise.' 2 Kent's Com. (12 Ed.), 465.

"Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted says: 'The second branch of this judicial description is really the most important one. Consideration means, not so much that one party is profiting, as that the other abandons some legal right in the present or limits his legal freedom of action in the future, as an inducement for the promise of the first.'" *Hamer v. Sidway,* 21 Am. St. Rep. (N. Y.), 693.

Applying these principles, there can be no doubt that there was evidence of a consideration sufficient to support the promise of the defendant, as the plaintiff testified that he refused to sell his stock in the furniture company except upon condition that the defendant executed the paper declared on in the complaint.

The exceptions to the evidence do not require extended discussion. The first six exceptions are to the refusal of the court to permit the defendant to prove that the furniture factory and another lot sold by the plaintiff King to the defendant were worth less than was paid for them.

(652) The evidence offered was remote, being largely the selling price at a bankruptcy sale some time after the purchase of the property; but conceding that it would furnish some evidence of value, it was not relevant to any issue involved in this controversy.

The fact that King was benefited by the sale of his stock, if shown to be true, would not destroy the consideration for the promise of the defendant, because the consideration consists in yielding the legal right to retain the stock, and to impose the conditions upon which he would sell.

Nor would the evidence excluded justify the inference that the plaintiff placed such exorbitant prices upon property owned by him, which was needed for the school, as made it impossible for the defendant to establish the school, if this defense is pleaded by the defendant; but the special plea of the defendant is not that he could not perform on account of the conduct of the plaintiff, but that he was not required to pay if he used his best efforts to establish the school.

Opinions, honestly entertained, are too diverse as to the wisdom and propriety of the establishment of schools in particular localities for us to hold that the failure to vote for such schools is impeaching, which is the subject of the seventh exception.

The letter written by the plaintiff to the defendant, suggesting that he see the sheriff before his nomination, about the deposit of county funds in the Bank of Spray, would not necessarily be impeaching; but if it would have this effect, the defendant could not impeach the witness by proof of particular acts.

We have examined the remaining exceptions and find no error.

It appears to us from the record that the defendant has not been seeking profit or advantage for himself, and that he has been actuated by high public motives; but there is evidence to support the verdict, and we cannot disturb it.

No error.

Cited: McKinney v. Matthews, 166 N.C. 580 (1g); *Spencer v. Bynum,* 169 N.C. 123 (1g); *Brown v. Taylor,* 174 N.C. 426 (1g); *Mfg. Co. v. McCormick,* 175 N.C. 279 (1g); *Dorsey v. Kirkland,* 177 N.C. 522 (1g); *Fisher v. Lumber Co.,* 183 N.C. 489 (1g); *Jones v. Winstead,* 186 N.C. 542 (1g); *Exum v. Lynch,* 188 N.C. 395 (1g); *Fawcett v. Fawcett,* 191 N.C. 681 (1g); *McInturff v. Gahagan,* 193 N.C. 149 (1b); *Fertilizer Co. v. Easom,* 194 N.C. 248 (1g); *Trust Co. v. Anagnos,* 196 N.C. 330 (1g); *R. R. v. Ziegler Bros.,* 200 N.C. 397 (1g); *Ex Parte Barefoot,* 201 N.C. 397 (1g); *Warren v. Bottling Co.,* 204 N.C. 291 (1g); *Grier v. Weldon,* 205 N.C. 579 (1g); *Grubb v. Motor Co.,* 209 N.C. 92 (1g); *Trust Co. v. Williams,* 209 N.C. 810 (1g); *Coleman v. Whisnant,* 226 N.C. 260 (1g); *Stonestreet v. Oil Co.,* 226 N.C. 263 (1g); *Boney v. Kinston Graded Schools,* 229 N.C. 142 (1g); *Cannon v. Blair,* 229 N.C. 612 (1g).

(653)

WALTER W. LANKFORD v. SOUTHERN RAILWAY COMPANY.

(Filed 27 May, 1914.)

Carriers of Passengers—Fares for Children—Expulsion from Train—Return of Ticket—Damages.

Where a conductor has taken up the ticket of a person traveling with his child for whom a half ticket is required, but has not been purchased, and who is unable to pay the fare of the child with the extra fare allowed when a ticket has not been regularly purchased, his right to put the child, being *non sui juris,* off the train is dependent upon the return of the ticket he has collected from the father, or its equivalent, and if he acts without having done this, the expulsion is unlawful, and the railroad company is responsible in damages.

APPEAL by plaintiff from *Harding, J.,* at December Term, 1913, of GASTON.

LANKFORD *v.* R. R.

Civil action to recover damages for an alleged wrongful expulsion from defendant's passenger train.

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

S. J. Durham, N. F. McMillan, and Mangum & Woltz for plaintiff.

C. B. Mason and O. F. Mason for defendant.

HOKE, J. There was evidence on the part of plaintiff tending to show that plaintiff was a resident of King's Mountain, N. C., and had a sick wife in the hospital at Gastonia, and, on 22 September, 1912, having received message that his wife was sinking, and that she wished him to come and bring their children to see her, he got on the train at King's Mountain, with his little girl 8 years of age and the boy 5 years; that he bought a full ticket for himself to Gastonia and a half ticket for the little girl, but did not have any for the little boy, under the impression that he was carried free till the age of 6, and that, after leaving King's Mountain, the conductor came through, took up the tickets of plaintiff and the little girl and demanded half fare for the little boy from
(654) King's Mountain to Gastonia, 15 cents, and also 15 cents extra for having failed to purchase a ticket, and said he would have plaintiff expelled from the train at Bessemer, the next station, unless both the fare and the extra charge were paid; that plaintiff only had 15 cents available for the regular fare, and told the conductor so, and the conductor was called, who came, spoke very roughly, telling plaintiff he would be ejected at the next station unless the fare and extra charge were paid; that, when they reached the station, the conductor again, in a rough manner, ordered plaintiff to leave the train. Plaintiff, telling him of the sick wife, got off with the child, and asked the conductor to allow him time to buy a ticket for the child through from King's Mountain to Gastonia with the 15 cents that he had, this being the half fare between the two points; that no one was at the station to sell a ticket, and while plaintiff was endeavoring to find some one the train moved forward, leaving plaintiff and the little boy at Bessemer, 7 or 8 miles from Gastonia; that plaintiff had no money to hire a team, and went to a neighbor, who took him and the child part of the distance to Gastonia and the rest he walked; that the wife was unconscious when they reached her, and died without recognizing either him or the child.

Upon these, the controlling facts as presented by plaintiff's witnesses, we are of opinion that the order of nonsuit must be set aside and the cause tried by a jury.

It has long been the recognized principle in this State that a common carrier by railroad may impose an extra charge for failure on the part of a passenger to procure a ticket, and, when proper facilities have been afforded a reasonable time before a train leaves its station, that the passenger who wrongfully refuses to pay such extra charge may be expelled from the train (*Ammons v. R. R.*, 138 N. C., 555, and cases cited), a position now directly sanctioned by our statute, Revisal, 2618; and the same section also provides, among other things, that children between the ages of 5 and 12 may be charged half fare. Authoritative decisions on this subject are to the effect that when there is a wrongful failure or refusal to pay fare on the part or in behalf of an infant passenger, who is *non sui juris*, the parent or custodian having such infant in (655) charge and who is responsible for the fare may, ordinarily, be expelled from the train with the child, unless the regular fare is paid, including the extra charge when the same has been properly imposed; but, while this right, allowed from a humane consideration for the safety of the infant, is very generally recognized, and though there may be no default on account of the adult himself in this respect, many of these cases also hold that, where the adult has paid fare to his destination and the same has been received by the company, the right to expel him from the train by reason of the failure or refusal to pay on the part of the child does not arise until the company or its agents, the conductor or other, etc., has returned or made offer to return the unearned portion of the fare or given a stop-over check or other written acknowledgment which will enable the adult to proceed on his trip at a later time. *Braun v. The Northern Pacific Ry.*, 79 Minn., 404; *Wardwell v. The Chicago, etc., Ry.*, 46 Minn., 514; *The Lake Shore and Michigan Ry., v. Orndorff*, 55 Ohio St., 589; *Hanna v. Electric Ry.*, 45 N. Y. App., 437; *Bland v. South. Pac. Ry.*, 55 Cal., 570; 6 Cyc., p. 559.

In *Braun's case, supra*, the doctrine is stated as follows: "It remains to be considered whether the failure of the defendant to return to plaintiff his ticket, or its unearned value, renders it liable to him in this action. The complaint is broad enough to sustain such recovery, and we believe the question is ruled by the case of *Wardwell v. Chicago, etc., Ry.*, 46 Minn., 514, 24 Am. St. Rep., 246, 49 N. W., 206. It is there held that such failure to return the fare actually paid by the passenger renders the company liable. We quote from the opinion in that case, at page 517: 'As precedent to the right to expel him from the train, he (the conductor) should have returned to plaintiff what he was entitled to of the money, and until he did that, he had no right to put him off. It is true, he returned it to him immediately after the expulsion. But the wrong had then already been committted, and could not be repaired by doing

what ought to have been done before the explusion.' It was not
(656) the duty of the plaintiff to demand the return of his ticket before leaving the train; but, on the contrary, it was the duty of the conductor of the train to return it, or its equivalent, as a condition precedent to his right to eject him. *Bland v. Southern Pac. R. R. Co.*, 55 Cal., 570, 36 Am. Rep., 50. Nor is it important or material to the right of action that a ticket was subsequently furnished him, with which he continued his journey. *Wardwell v. Chicago, etc., R. R. Co.*, 46 Minn., 514, 24 Am. St. Rep., 246, 49 N. W., 206. It is not disputed but that defendant's conductor or collector took up plaintiff's ticket, returning to him a conductor's check; and it is not claimed that the original ticket was returned, or offered to be returned, before the boy was ejected. If, as suggested by a member of the Court, the original ticket had been canceled by the conductor, and thereby rendered worthless and of no value as an evidence of plaintiff's right of passage on a subsequent train, then it was the duty of defendant to return in lieu thereof its unearned value, or some evidence or token which would answer every purpose of the ticket uncanceled."

The facts in evidence show that, in the present case, plaintiff, the father, had paid his own fare to Gastonia, and the ticket had been taken up by the conductor or collector, and a perusal of the record fails to disclose that there was any offer or suggestion that the unearned portion of the fare be returned to him at the time he was made to leave the train at Bessemer, and, under the cases cited, which we think express the correct principle applicable, we are of opinion, as stated, that the judgment of nonsuit must be set aside.

Reversed.

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(657)

J. L. BURRISS v. A. L. STARR.

(Filed 20 May, 1914.)

1. Statute of Frauds—Contracts to Convey—Written Promise—Bills and Notes.

It is not required by the statute of frauds that the writing necessary to enforce an agreement for the conveyance of lands should be "subscribed" by the owner; but it is necessary that it should contain a promise of some sort by the owner to make the conveyance upon the payment by the purchaser of the consideration agreed upon (Revisal, sec. 976); therefore the acceptance by the owner of a promissory note given by the purchaser, and stated to be for the amount of the purchase price of lands, will not alone be a sufficient compliance with the statute; and there being no valid contract, it follows that damages may not be recovered for a breach thereof.

2. Contracts Under Seal—Consideration Implied.

A compromise of a controverted matter is a sufficient consideration to uphold an agreement, and especially is this true when the party seeking to avoid it receives a substantial benefit thereunder, as in this case, having a cloud upon his title to lands removed; and where a note under seal has been received by him from the other party, under a compromise agreement, the seal itself imports an enforcible consideration, and the note will not be declared invalid for a want thereof.

APPEAL by defendant from *Cline, J.*, at November Term, 1913, of CATAWBA.

This action was brought by plaintiff for the specific performance of a contract, which he says was made by the defendant, to convey to him for $600 a tract of land known as the dower of Mrs. Starr. The only written evidence of the contract offered by the plaintiff was parol proof of the contents of a note, which had been lost, given in 1909 by him to the defendant for the land, and payable in annual installments, with interest from 1 January, 1910. The note was prepared by the defendant at his home and sent to the plaintiff, who signed it and returned it to defendant. Plaintiff testified that they were negotiating for a settlement of the matter, and he told defendant that, while he preferred to have the land, if defendant would give him $400 and pay back the amount, $130, which he had paid on the note, that he would let him have (658) the land. Defendant declined this proposal, and offered to pay plaintiff $200 and the $130 he had paid on the note, with interest. They parleyed about the matter and finally agreed upon a settlement, by which defendant agreed to give plaintiff his note for $200 and pay the $130 with interest in cash. The note was given for the $200, dated 11 January, 1913, and payable 1 November, 1913, with interest at 6 per cent until paid; but the $130, with interest, was not then paid. Plaintiff stated two causes of action in his complaint: one for the breach of the contract to convey and damages, and the other for specific performance of the contract. He proposed to testify, in his own behalf, that he was induced to settle with defendant by reason of the latter's statement, at the time, that he (defendant) could hold the land, defendant being a lawyer. This was excluded.

At the close of the evidence, defendant moved the court for judgment of nonsuit, under the statute, as to the first cause of action, and afterwards moved for a similar judgment as to the second cause of action.

The following entry appears in the record, with respect to these motions: "When these motions were made and ruled upon as appears above, the court intimated, or rather stated, to counsel in open court, that no issue as to specific performance would be submitted to the jury, the court being of the opinion, as a matter of law, that in any view of

the evidence the plaintiff is not entitled to a specific performance as sought for in his complaint. The court also stated that no issue would be submitted to the jury upon any question of damage arising out of the failure, as alleged, upon the part of the defendant to carry out the contract alleged in the complaint."

The court charged the jury as follows: "If you believe all the evidence in this case, plaintiff is entitled to recover $130, with interest thereon from 1910, and the further sum of $200 on the note bearing date of 11 January, 1913, with interest thereon."

The jury returned the following verdict:

(659) 1. Is the defendant indebted to the plaintiff on account of any payment made by plaintiff to defendant on the $600 note mentioned in the third paragraph of the plaintiff's complaint; and if so, in what amount? Answer: Yes; $130, with interest from 1 January, 1911.

2. Is the defendant indebted to the plaintiff on account of the $200 note referred to in the answer and the replication; and if so, in what amount? Answer: Yes; $200, with interest from date given.

Judgment was entered upon the verdict, and both parties appealed.

George McCorkle, W. A. Self, and R. R. Moose for plaintiff.

A. A. Whitener for defendant.

PLAINTIFF'S APPEAL.

WALKER, J., after stating the case: The rulings and judgment of the court were, in our opinion, clearly right. The plaintiff had no contract for the conveyance of the land to him which was binding in law upon the defendant. He had only a note of the defendant for the payment of $600, but no promise by the latter to convey the land to him. It was contended by plaintiff's counsel that defendant wrote the note, and as his name, in his own handwriting, appears in it, this is a sufficient signing of the writing within the meaning of the statute of frauds to bind him to convey the land, and in support of this proposition he cited *Hall v. Misenheimer,* 137 N. C., 183. That case did not so decide. We expressly held that the writing must contain a contract to convey the land, and when this appears, the place of signing is immaterial, if it evinces a purpose of the signer to adopt the contract as his. It was there said, it is true, that the memorandum or writing is not required by our statute to be *subscribed,* and therefore the place of the signature is not material. "In regard to the place of the signature," says Mr. Browne, "there is no restriction. It may be at the top, or in the body, of the memorandum, as well as at the foot." Browne on the Statute of Frauds (5 Ed.), sec. 357. But the name, he further says, besides being in the hand-

writing of the party to be charged, must always be inserted in (660) such a manner as to authenticate the instrument as his act, or, in other words, to show the intention of the party to admit his liability upon the contract. Browne, *supra.*

In *Hall v. Misenheimer* we discussed the question as to the proper place for the signature, because the point was raised, but it was only a preliminary to the statement of the vital question, that even if there was a sufficient signing, there was no contract to sign.

In *Boger v. Lumber Co., ante,* 557, *Justice Allen,* for the Court, says: "The authorities make a distinction between statutes requiring instruments to be signed and those requiring them to be subscribed, holding with practical unanimity, in reference to the first class, that it is not necessary for the name to appear on any particular part of the instrument, if written with the intent to become bound; and, as to the second class, that the name must be at the end of the instrument. In *Richards v. Lumber Co.,* 158 N. C., 56, dealing with this question, the Court said: 'It is well settled in this State that when a signature is essential to the validity of an instrument, it is not necessary that the signature appear at the end, unless the statute uses the word "subscribe." *Devereux v. McMahon,* 108 N. C., 134. This has always been ruled in this State in regard to wills, as to which the signature may appear anywhere. If this is true of a "signature," it must also be true of the word "countersign." It has been often held that the place of signing is a matter of taste. *Adams v. Field,* 21 Vermont, 264; 36 Cyc., 441.' "

And so we held in *Hall v. Misenheimer, supra.* It was there held that the signature had its proper place in the paper, but the contents of the letter lacked promissory or contractual words to which the signature could attach itself, so as to form a valid agreement on his (vendee's) part, under the statute, to pay the purchase money. We there said: "The name of the vendee was inserted in the paper by his own direction, and it cannot be questioned that he fully intended thereby to bind himself by the receipt as evidence of a contract to buy the land, so far as a signing of the writing was necessary for that purpose. (661) *Cherry v. Long,* 61 N. C., 466, seems to be directly in point. It was not contended that the defendant was not bound by what his agent did in writing the receipt, though the latter's authority was given by parol. *Neaves v. Mining Co.,* 90 N. C., 412, 47 Am. Rep., 529. But we think there is a serious obstacle in the way of plaintiff's recovery. The statute expressly requires a contract to sell land, or some note or memorandum thereof, to be put in writing and signed by the party to be charged therewith or by his lawfully authorized agent. The Code, sec. 1554. In order, therefore, to charge a party upon such a contract, it must ap-

pear that there is a writing containing, expressly or by implication, all the material terms of the alleged agreement, which has been signed by the party to be charged, or by his agent lawfully authorized thereto."

A signature to a paper imposes no obligation unless there is in it language sufficient for that purpose, and where there is such language, the signature of the party binds him, though it is not subscribed to the instrument, but appears in some other part of it, if the intention is that it should be his contract.

It must be remembered that the requirement of the statute is, not that the party shall sign a written memorandum merely, but that all contracts to sell or convey any lands, or any interest in or concerning them, shall be void, "unless said *contract* or some memorandum or note *thereof* be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." Revisal, sec. 976 (italics ours). It is, therefore, a contract to sell or convey the land that should be in the memorandum or writing to be signed. There is no such contract here. The note of the defendant, although written by the plaintiff, contained only a promise on his part to pay the money, but no reciprocal promise of the defendant to convey the land, that is, the dower tract. The court was, therefore, right in holding that plaintiff was not entitled to specific performance of any contract to convey land, nor to damages for a breach thereof, and for the simple reason that
(662) there was no such contract. The other exceptions of plaintiff become immaterial, and we understand that he has no objection to the judgment, if he has no cause of action upon the contract for specific performance or damages.

In this appeal, therefore, no error appears.

No error.

DEFENDANT'S APPEAL.

WALKER, J. The defendant's exceptions, save one or two of them, have been decided favorably to him in the plaintiff's appeal. He makes no objection to the judgment for the $130 and interest, but contends, and prayed the court to so instruct the jury, that the note under seal for $200, given by him to the plaintiff in settlement of their differences, was without consideration. But a bond does not require a consideration, as the seal imports one. It was so held in *Harrell v. Watson,* 63 N. C., 454, where the same defense was pleaded to an action upon a sealed note. In that case it was said by *Chief Justice Pearson:* "He (defendant) says the bond is void for want of a consideration. The reply is: A bond needs no consideration. The solemn act of sealing and delivering is a *deed, a thing* done, which, by the rule of the common law, has full force and effect without any consideration. *Nudum pactum* applies only to

simple contracts; deeds need no consideration, except such as take effect under the doctrine of uses, or such as are made void by the statutes of Elizabeth as against creditors and purchasers for valuable consideration, but are valid, as at common law, between the parties."

Besides, it appears that the parties in good faith came to a settlement of their dispute as to their rights. Plaintiff thought he had a "bond for title," but could not find it. The death of the widow had made the "dower tract," as it was called, more valuable, and defendant wished to settle the matter, and made the first offer to do so. The settlement was a distinct advantage to defendant, as it removed an apparent cloud from his title.

In *Mayo v. Gardner,* 49 N. C., 359, this Court said, by *Chief Justice Nash: "In re Lucy,* 21 Eng. Law and Eq., 199, it was decided that, to sustain a compromise, it was sufficient if the parties (663) thought, at the time of entering into it, that there was a *bona fide* (or real) question between them, though in fact there was no such question." The law favors the settlement of disputes, as was said in that case. It is stated in 9 Cyc., 345, that "the compromise of a disputed claim may uphold a promise, although the demand was unfounded," citing numerous cases in the notes to sustain the text.

The settlement between the parties was also a bar to plaintiff's recovery in this action, of which the defendant has had the benefit. He avers in his answer that it was fair and free from any fraud or mistake, and made voluntarily by the parties and for their mutual benefit, and it should be binding and conclusive as to both of them. It, therefore, formed a good consideration for the note, if it required one, being under seal. Clark on Contracts (2 Ed.), 132.

No error.

Cited: Peyton v. Shoe Co., 167 N.C. 283 (2g); *Flowe v. Hartwick,* 167 N.C. 451 (1b); *Peace v. Edwards,* 170 N.C. 66 (1p); *Woodruff v. Trust Co.,* 173 N.C. 548 (1b); *Lewis v. Murray,* 177 N.C. 21 (1b); *Kendall v. Realty Co.,* 183 N.C. 426 (1p); *Keith v. Bailey,* 185 N.C. 263 (1g); *Beck v. Wilkins-Ricks Co.,* 186 N.C. 213 (2g); *McCall v. Institute,* 187 N.C. 761 (1b); *S. v. Abernethy,* 190 N.C. 770 (1p); *Cowen v. Williams,* 197 N.C. 433 (2g); *Corp. Com. v. Wilkinson,* 201 N.C. 348 (1g); *Patterson v. Fuller,* 203 N.C. 791 (2l); *Smith v. Joyce,* 214 N.C. 605 (1g); *Paul v. Davenport,* 217 N.C. 157 (1p); *Chason v. Marley,* 223 N.C. 740 (1p); *Harvey v. Linker,* 226 N.C. 713 (1g).

G. W. FISHER v. THE TOXAWAY COMPANY ET AL.

(Filed 20 May, 1914.)

1. Reference—Confirmation by Court—Statements as to Adjudication—Appeal and Error.

The statement made of record by the trial judge in passing upon the report of the referee to whom the controversy had been referred, that he had heard the argument of counsel, examined and considered the record, the evidence, report and exceptions filed, before entering the order confirming the report, is conclusive on appeal, and not open to the exception of the appellant that he had failed to deliberate and pass upon an exception he had entered to the report.

2. Reference—Admissions—Statements—Evidence.

The proceedings before a court of a referee are judicial in their nature, and it is his duty to enter upon his report admissions of the parties or of their attorneys in the progress of the investigation or hearing pertinent to the issues involved; and entries of this character do not require that there be further evidence of such admissions than the referee's statements thereof.

3. Deeds and Conveyances—Estoppel—Void Deeds—Trials—Evidence.

A party to a controversy concerning the title to lands is estopped to deny the title of the other party under whose deed he claims, and under which he entered into possession; and the mere fact that this deed is void does not estop the grantor from showing that it was the title under which his adversary claimed.

4. Deeds and Conveyances—Tenants in Common—Lunatics—Guardian and Ward—Void Deeds—Color of Title.

Where several tenants in common make their valid deeds to the land in controversy except one of them who had been confined in a hospital for the insane, and the conveyance nowhere upon its face purports to convey his title or interest therein, but is signed by one purporting to act for him as his guardian, without making it to appear that he was lawfully such, it is *Held*, as to the interest of the ward, attempted to have been conveyed, the deed is not color of title which would ripen into an absolute title by adverse possession.

(664) APPEAL by defendant from *Adams, J.*, at Spring Term, 1913, of TRANSYLVANIA.

This is a petition for partition of twenty-six tracts of land, described in the petition. The defendants are The Toxaway Company, a corporation, and J. C. Fisher and others, who with the plaintiff are the heirs at law of John S. Fisher.

The defendant The Toxaway Company answered that it has no knowledge of the allegations contained in the first paragraph of said petition, and no information thereof sufficient to form a belief, except that it is

not true, as therein alleged, that The Toxaway Company, the defendant, is tenant in common with the plaintiff, G. W. Fisher, nor with any of the defendants in said proceeding, in the lands mentioned and described in said paragraph of said petition, nor in any part thereof; and except, further, that it is not true that the said plaintiff is the owner of any interest, either as the tenant in common or otherwise, in the second, fourth, fifth, sixth, ninth, tenth, eleventh, twelfth, fifteenth, seventeenth, twentieth, twenty-first, and twenty-sixth tracts of said lands, as set forth and numbered in said paragraph of said petition, nor in any part of any of said several tracts of land mentioned in said paragraph of said petition which are covered or embraced in that certain deed from (665) W. A. Fisher, and others, heirs at law of John Fisher, to The Toxaway Company, bearing date 3 July, 1896, and registered in Book No. 13, on page 459, of the records of deeds of Translyvania County, and also described in a deed from the said G. W. Fisher and wife, Addie F. Fisher, to The Toxaway Company, bearing date 5 June, 1902, and registered in Book No. 21, at page 130, of the records of deeds of the said county of Transylvania, which said tract of land, described in said two deeds, is bounded as follows, towit:

Here follows a description of the land claimed by The Toxaway Company, said to contain 389 acres, most of which is now covered by the waters of Lake Toxaway. The answer further says:

"And the defendant The Toxaway Company especially avers that it is the sole owner of said several tracts of land mentioned in said petition and herein particularly specified as being owned by it, and also of said tract or boundary of land described in said two deeds made to it by the said W. A. Fisher and others, heirs at law of John Fisher, and G. W. Fisher and wife, respectively, and that the said G. W. Fisher has no right, title, or interest whatever therein." The remainder of the answer is a general denial of any knowledge of the other allegations of the petition.

Upon the filing of this answer, the plaintiff filed a pleading in which he denies that he executed the deed signed by W. A. Fisher and others, dated 3 July, 1896, and recorded in Book 13, page 459, or that any one was legally authorized to execute it for him, under which deed the defendant The Toxaway Company claims, and the plaintiff avers that this deed does not contain the signature of the plaintiff, and that the said W. C. Fisher, who signed his name to the said deed as guardian of the plaintiff, had no authority so to do, the said W. C. Fisher never having been appointed his guardian by any party authorized to do so, or by any court or other properly constituted authority.

The plaintiff further avers that at the time the said deed was (666) executed, viz., 3 July, 1896, the plaintiff had then been committed

to the State Hospital at Morganton, N. C., as an insane person, by the properly constituted authorities, and was an actual inmate of the same at the time of the alleged conveyance of the said W. C. Fisher, guardian, to The Toxaway Company.

The plaintiff further avers that it is true, as alleged, that the defendant The Toxaway Company holds a certain paper-writing, dated 5 June, 1902, and recorded in Book No. 21, page 130, Records of Deeds, Transylvania County, purporting to be signed by G. W. Fisher and his wife, Addie Fisher; but plaintiff, in so far as he is concerned, declares that the said signature is a forgery, in that he never signed the said deed, nor did he afterwards acknowledge the same to be his act and deed before J. C. Fisher, a justice of the peace in Transylvania County, nor has he ever conveyed at any time, or to any person, the lands described in the said deed.

The defendant company replied to this amended pleading:

"That it has no knowledge of the allegations contained in the third paragraph of said amended complaint and no information thereof sufficient to form a belief, except as to the admission therein contained, that the defendant The Toxaway Company holds a deed from the said G. W. Fisher and wife, Addie Fisher, dated 5 June, 1902, recorded in Book No. 21 at page 130 of the records of deeds of the said county of Transylvania, for their interest in the lands therein described, which said last mentioned allegation is true; and except further, that it is not true, as the defendant is informed and believes, that the signature of the said G. W. Fisher to said deed is a forgery, and that he never signed the same or authorized the same to be signed by him, and that he did not acknowledge the same to be his act and deed before J. C. Fisher; but, on the contrary, the defendant The Toxaway Company avers that the said G. W. Fisher, and his wife Addie Fisher, signed and executed the said deed, or authorized the same to be signed and executed in their names, for a full, fair, and valuable consideration, which was paid to them or for their use and benefit by The Toxaway Company, which said deed (667) was duly acknowledged before J. C. Fisher, a justice of the peace of Polk County, N. C., and duly admitted to registration in the said county of Transylvania, as hereinbefore alleged."

After the filing of the pleadings joining issue between the plaintiff and the defendant The Toxaway Company (hereinafter called the defendant, as there is no controversy now between the plaintiff and the other defendants), a consent order was made submitting to the jury this issue:

"Did the plaintiff, G. W. Fisher, and his wife, Addie Fisher, execute the deed to The Toxaway Company, mentioned in the first paragraph of the defendant's answer, dated 5 June, 1902, and registered in Book No.

21 at page 130 of the records of the deeds of Transylvania County?" Answer: "No."

The order further provided that all other issues necessary to be settled for a final determination of the cause be referred to Bartlett Shipp, Esq.

The jury having answered the above issue in the plaintiff's favor, the court entered judgment setting the deed aside. This record presents no exceptions taken on the trial of that issue. The defendant seems to have acquiesced in that judgment.

In pursuance of the order of reference, the referee heard the cause and made his report containing his findings of fact and conclusions of law. The defendant filed numerous exceptions. These exceptions were heard by his Honor, W. J. Adams, at Spring Term, 1913, of the Superior Court of Transylvania County, and a decree entered confirming the report of the referee, which decree contains these words:

"After hearing the argument of counsel and upon examination and consideration of the record, the evidence and the report and the exceptions filed thereto, it is ordered and adjudged that all exceptions to the report of the referee be and the same are hereby overruled, and that the report of the referee be and the same is hereby in all respects confirmed."

The defendant The Toxaway Company excepted and appealed.

H. G. Ewart for plaintiff. (668)

James H. Merrimon for defendant The Toxaway Company.

BROWN, J. The first exception of defendant is directed to the following finding of fact by the referee:

1. "It was agreed by counsel that this is a controversy solely between the plaintiff and the defendant Toxaway Company, and that the plaintiff is entitled to a one-eighth undivided interest in the lands of which J. S. Fisher died seized, and which have not already been partitioned among his heirs at law or otherwise disposed of; that the lands in controversy are those described in a deed from W. A. Fisher *et al.* to The Toxaway Company, dated 3 July, 1896, recorded in Book 13, page 459, Transylvania records of deeds, and indicated on the Reid map filed in evidence as beginning at the point marked A, thence to B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, and thence to the beginning at A, respectively."

In his brief, the learned counsel for the defendant says:

"The error assigned is that the court failed to deliberate and decide, etc., upon defendant's first exception to the report of the referee. This exception, if well taken, it would seem, ought to entitle the defendant to a reversal of the judgment of the trial judge and to a new trial of his exceptions to the referee's report. There is not a syllable of evidence in

the record to sustain this finding, and no such agreement was ever made. To sustain this exception, I rely upon *Thompson v. Smith,* 156 N. C. 345, and *Overman v. Lanier,* 156 N. C., 537, and the cases cited in those cases."

We have quoted in the statement of the case the language of the judge below in confirming the report of the referee. He declares that he heard the argument of counsel and that he did examine and consider the record, the evidence, the report and the exceptions filed thereto, before he entered the decree confirming the report.

The cases cited in support of defendant's contention present a very different aspect from this. In those cases it affirmatively appeared or was admitted by counsel that the trial judge did not deliberate and (669) decide upon the several exceptions to the report, and did not draw his own conclusions from the evidence. In the *Overman case* it was admitted by counsel on the argument in this Court that "the judge below, owing to the rush of business and the anxeity of parties to get the case sent up for review, had entered a *pro forma* judgment without having really considered any of the exceptions."

It appears in this record, and also upon the proceedings in *certiorari* in this case at last term, by which it is now here for review, that "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 exceptions." After considering the argument and exceptions, the judge below, himself, prepared the draft of the judgment. See 164 N. C., 106.

It is further contended by the defendant that there is no evidence in the record to sustain such finding, and that no such agreement was ever made.

It is not essential that the record should disclose any such evidence. The proceedings before the court of a referee are judicial in their nature. He is invested with many of the powers and functions of a judge. He had the authority and it was his duty to enter upon the record of the trial such solemn agreements and admissions of counsel as are made before him and pertinent to the issues being then tried.

This admission entered of record would seem to end this controversy, but we will examine it as if no such admission had been made. The brief of the learned counsel for defendant, referring to the thirteenth assignment of error, says: "This assignment of error is based upon the appellant's exception to the referee's second conclusion of law, and involves pretty much every point in the case."

This assignment of error will, therefore, be next considered. It reads as follows:

"13. The court erred in not sustaining the defendant's exceptions to the referee's second conclusion of law, towit:

"To the second conclusion of law, for that the statement in the (670) said conclusion of law 'that the defendant claims possession of the lands in controversy *under color* of a deed from W. A. Fisher, and the other heirs at law of J. S. Fisher, to The Toxaway Company, made 3 July, 1896,' and thereby admits title in the plaintiff, as an heir at law of J. S. Fisher, is a finding of fact not justified by the evidence in the case, and, besides, is out of place in said conclusion of law, and the said conclusion of law as stated appears to be the reverse of what the referee intended it to be; but if said conclusion of law should be construed that the defendant The Toxaway Company is estopped, by anything contained in the referee's finding of fact or by anything stated by him in his conclusions of law, to deny plaintiff's title by virtue of its possession under color of said deed for seven years, the said conclusion of law is contrary to law, and should be overruled in this respect; and the further part of said conclusion of law, viz.: 'That as plaintiff did not execute said deed, nor authorize any one else to execute it for him, he became on delivery of said deed a tenant in common in the lands in controversy with The Toxaway Company, and that the possession of the defendant, under color of the said deed up to the commencement of this action, is not sufficient in law to bar the claim of the plaintiff,' is erroneous and contrary to the law of the case, and should be overruled.

"The referee should have concluded, as to the law, that the said deed conveyed to the defendant a good title to all the interests of the heirs of said John S. Fisher, except the plaintiff, and that as to the plaintiff, it was color of title, and that adverse possession under it by defendant for seven years, such as the law requires to mature title, was sufficient to mature and perfect the defendant's title to the undivided one-eighth interest of the plaintiff."

It is contended that the deed from the plaintiff to the defendant having been declared void, it cannot operate as an estoppel upon the defendant. The record shows that the defendant claimed solely under the plaintiff's deed, and the deed from the other heirs of John S. Fisher, and that the defendant was put into possession by them and under their (671) title.

In the answer of the defendant, its title purports to be set out, and it therein makes no claim or pretense to any other title than the one derived from the heirs of John S. Fisher. The answer sets up the deeds from plaintiff and the other heirs, and asserts title under them.

It is true the learned counsel for the defendant said on the argument that this averment in the answer was a "slip of the pen." Doubtless he was not responsible for it, but it is binding on the defendant, nevertheless. The defendant having undertaken to set out its title, cannot now be permitted to repudiate it.

Upon the trial before the jury, the issue involving the execution of plaintiff's deed to defendant was practically conceded to be the only issue as to title, as on that trial no other issue was suggested or tendered.

If defendant had another and paramount title with which it could connect itself, it had the opportunity and should have presented it on that trial, and thus have settled the title once and for all.

The fact that the deed was declared void as to plaintiff because he did not execute it does not preclude the plaintiff from showing that defendant claimed under it. It is held that a defendant in trespass claiming the right to cut timber under a void contract from one who afterwards deeded the land to the plaintiff is estopped to deny the title of the plaintiff. *Monds v. Lumber Co.*, 131 N. C., 21.

We are of opinion that the ruling of the court below, and referee, that the defendant The Toxaway Company had taken title to the lands in controversy from the heirs of John S. Fisher, and in the trial of the cause between the plaintiff *G. W. Fisher v. The Toxaway Company* in the Superior Court for the county of Transylvania, had based its claim for title entirely and solely upon this deed, was fully justified by the facts and evidence in the cause. Therefore, the thirteenth assignment of error cannot be sustained.

(672) Notwithstanding this ruling, the referee appears to have permitted the defendant to offer testimony for the purpose of impeaching John S. Fisher's title, and to set up a paramount title, over the objections of the plaintiff. We note, however, that an examination of the record, aided by an elaborate brief, fails to disclose that the defendant has proven an outstanding paramount title, or connected itself with it, as would be necessary. *Mobley v. Griffin*, 104 N. C., 115.

It is contended by the defendant that the deeds from W. A. Fisher and others, dated 3 July, 1896, and from the plaintiff, 5 June, 1902, are good as color of title, and that it has shown seven years adverse possession thereunder.

Assuming that defendant could show the requisite possession excluding the period when the plaintiff was in asylum, which is denied, the first named deed is not color of title as to the interest of plaintiff.

His name does not appear anywhere in the deed or among the grantors, and the instrument does not purport to convey or act upon any interest or title of G. W. Fisher in the land. The deed purports on its face to be

only the deed of the grantors named in it, and it is signed and sealed by them. At the end and after all the signatures appear these words: "W. C. Fisher, [seal], Guardian for G. W. Fisher."

There is no reference in the instrument to any such guardianship, and no pretense that W. C. Fisher was ever appointed guardian for his brother or had any authority to convey his interest in the land.

Color of title is a writing which, upon its face, professes to pass title, but which does not do it, either from a want of title in the person making it or from the defective conveyance that is used. 1 A. and E., 846.

It is apparent to one not skilled in the law that the deed aforesaid does not even pretend to be the deed of G. W. Fisher, or to pass his interest in the land. As to him it is void on its face, and could deceive no one.

The other deed, purporting to be the deed of G. W. Fisher and wife, while regular on its face, is dated 5 June, 1902, and this action was commenced 9 August, 1905. The referee, therefore, correctly (673) held that the defendant had not acquired title by adverse possession under color of title.

Upon a review of the record, we are of opinion that his Honor properly confirmed the report and judgment of the referee.

Affirmed.

Cited: Lofton v. Barber, 226 N.C. 484 (3p).

W. H. BELK v. CHARLES N. VANCE.

(Filed 20 May, 1914.)

1. Deeds and Conveyances — Natural Boundaries — Controlling Calls — Grants—Investigation by Supreme Court.

Where the beginning point in a description of a deed to lands is determinative in an action to recover them, and this point is given as a certain corner of a grant by the State to adjoining lands, which is therefore necessary to be established, and the calls of the grant relevant to the inquiry are so many poles to a stake, then on a county line to a stake, the county line admittedly being along the crest of a hill, the boundary of the county is a natural boundary and controls as a matter of law that of the given distance terminating at a stake, in the preceding call, and this interpretation is confirmed by the Court's referring to the original grant in the office of the Secretary of State.

2. Deeds and Conveyances — Natural Boundaries — "With or Along"— Words and Phrases.

The location of a certain line given in a grant of lands from the State being controlling in this action to recover lands, it is held that calls in the

grant, "thence south 416 poles on Burke County line to the beginning," the line being a natural boundary, should be interpreted as that number of poles "with or along" that line.

APPEAL by plaintiff from *Justice, J.*, at February Term, 1914, of BUNCOMBE.

J. D. Murphy for plaintiff.

Martin, Rollins & Wright for defendant.

CLARK, C. J. On 20 July, 1796, the State issued to William Cathcart a grant for 1,640 acres of land. At that time Burke and Bun-
(674) combe counties adjoined each other. That portion of Burke then adjacent to Buncombe is now embraced in McDowell County.

This grant begins "on the Burke County line on a stake and hickory." The last two calls in this grant are: "Then east by land supposed to be Cathcart's and Stedman's, 797 poles to a stake; then south 416 poles on Burke County line to the beginning." The deed under which the defendant claims recites as follows: "Beginning at a stake and pointers the northeast corner of the 1,640-acre tract of land granted to William Cathcart, patent bearing date 20 July, 1796." This makes it necessary, in locating the land in defendant's deed, to determine where the northeast corner of the Cathcart grant was located.

The construction placed by the court upon the last description in the grant, "then south 416 poles on Burke County line to the beginning," is, "south 416 poles *with or along* the Burke County line to the beginning." That line is admitted to have been along the crest of the ridge. This makes it a natural boundary and determines that the previous call, "east by the Cathcart and Stedman line, 797 poles to a stake," means "a point on the crest of the ridge in said Burke County line." This construction was a matter of law for the court, and not an issue of fact for the jury, and we think the court correctly instructed the jury.

The instruction of his Honor was as follows: "The court charged the jury that the northeast corner of the Cathcart grant is at the point where the northern boundary line of the Cathcart grant running east intersects the Buncombe line, and that the beginning corner of the defendant's deed is at the same point." The plaintiff asked the court to charge that "The northeast corner of the Cathcart grant introduced in evidence is at the end of the call in the grant east, 797 poles to a stake." This would have carried the line 321 poles beyond the crest of the ridge, which was the county line, and would require disregarding the last call, "416 poles on (*with or along*) Burke County line to the beginning." To locate the northeast corner of the Cathcart grant at the end of the 797 poles would

have required the elimination of this last description of "on the Burke County line 416 poles to the beginning," and the substitution therefor of "then south to the beginning." This would not be "on (675) (or with) the county line," except possibly for the last 28 poles, There might have been an error in measuring the distance, or in writing it down, but the county line along the crest of the ridge is certain and fixed. The last call, "east 797 poles to a stake," must stop where that line reached the county boundary on the crest of the ridge. *Smith v. Headrick,* 93 N. C., 213, citing *Gilchrist v. McLaughlin,* 29 N. C., 310; *Corn v. McCrary,* 48 N. C., 496.

In the record "it is admitted that the determination of the controversy in this action turns upon the true location of the northeast corner of the Cathcart grant." His Honor held that this corner was where the northern boundary of that grant going east intersected the "Burke County line."

The boundaries of the Cathcart grant, as set out in the record, show that it began in the Burke County line, was located west of that line, and the last call was with the Burke County line to the beginning, thus throwing the entire tract in Buncombe County. If the next to the last call of that grant, "east 797 poles to a stake," could prevail, as the plaintiff contends, it would take in land in Burke County. Upon reference to the grant as recorded in the Secretary of State's office here, which we have often done (*Higdon v. Rice,* 119 N. C., 635; *Richards v. Lumber Co.,* 158 N. C., 57, and in other cases), we find that the grant describes the 1,640 acres as "lying and being in Buncombe County." This corroborates the boundaries which place the tract entirely on the Buncombe side of the line.

No error.

(676)

E. WALLACE v. ROBERT BARLOW.

(Filed 20 May, 1914.)

1. State's Lands—Entry—Vague Description—Trusts and Trustees.

In order to declare that a second enterer upon State's lands, and who takes a grant to the lands covered by the first entry, holds the lands in trust of the latter upon completing his entry, it is necessary that the prior entry sufficiently describe the land to give notice of its location and extent; and in this action the description filed with first entry is held to be too vague and indefinite, to wit: E. W. enters 100 acres of land in said county, in B. Township, on the waters of White Creek, adjoining the lands of A. and others, beginning on a stake on A.'s line on Berry Mountain, and running various courses for complements.

2. Appeal and Error—Objections and Exceptions—Unanswered Questions.

Exceptions to unanswered questions, without indication of their relevancy or materiality, will not be considered on appeal.

APPEAL by plaintiff from *Cline, J.*, at October Term, 1913 of WILKES.

This is an action to remove a cloud from title and to declare a trust in certain land.

The plaintiff claims title from the State under Grant No. 16401, for 50 acres. Grant issued on 14 January, 1905, based upon an entry filed in the office of the entry-taker of Wilkes County, on 1 January, 1902, by plaintiff; survey made thereunder on 12 December, 1904, and application for grant filed in the office of the Secretary of Secretary of State, and purchase money therefor, paid on 31 December, 1904; warrant of survey issued 18 April, 1903. The entry of the plaintiff is as follows:

"E. Wallace enters 100 acres of land in said county, in Boomer Township, on the waters of White's Creek, adjoining the lands of Robert Barlow and others, beginning on a stake in Robert Barlow's line on Berry's Mountain, and running various courses for complements. 'E. Wallace.'"

The defendant claims title from the State under Grant No. 15814, issued on 28 March, 1903, based upon an entry filed in the office of the entry-taker for Wilkes County on 26 March, 1902, and warrant issued 7 April, 1902.

(677) It was admitted at the trial of the cause that the land in controversy was covered by both grants.

Plaintiff relies upon "priority of entry, and notice, both actual and constructive," to defendant of plaintiff's prior entry.

The defendant contends that the entry of the plaintiff is too vague and indefinite to affect him with notice.

His Honor held that the entry of the plaintiff was not sufficient to give notice, and the plaintiff excepted.

There was a verdict and judgment for the defendant, and the plaintiff appealed.

Hugh A. Cranor and Frank D. Hackett for plaintiff.

W. W. Barber for defendant.

ALLEN, J. It is not necessary to decide whether any evidence of notice, outside of a survey, is admissible to aid a vague and indefinite entry, as his Honor heard the evidence tending to prove notice, and the jury has found under proper instructions there was no notice.

The entry of the plaintiff is in all material respects like the one considered in *Call v. Robinett,* 147 N. C., 616, which was held too vague to affect a senior grantee with notice, and that case is decisive of this.

In the present case the entry is "E. Wallace enters 100 acres of land in said county in Boomer Township, on the waters of White's Creek, adjoining the lands of Robert Barlow and others, beginning on a stake in Robert Barlow's line on Berry's Mountain and running various courses for complements," and in the *Call-Robinett case,* "640 acres of land in said county, lying on the waters of Stony Fork, in Elk Township, adjoining the lands of S. G. Anderson and others, beginning on a stake in S. G. Anderson's line and running various courses for complements"; and of the latter entry the Court said:

"The defendant says, conceding that the legal title passed to plaintiff by entry, survey, and grant, he is entitled to have him declared a trustee for his benefit. It is well settled that when an entry is made, and subsequent thereto another person lays an entry and takes a grant, he acquires the title, and the grantee will be declared a trustee for the first enterer; the reason of this being that the first entry entitled the (679) enterer to a prior right or equity to call for legal title upon complying with the statute, and the second enterer took subject to this claim or equity, the entry being notice thereof. The defendant is confronted with two difficulties in this aspect of the case: First, his entry is subsequent to that under which plaintiff claims. Second, his entry is too vague and indefinite to give any notice. It is always held that to entitle the first to have the grantee declared a trustee, his entry must be sufficiently definite to put the second enterer upon notice. In *Johnson v. Shelton,* 39 N. C., 85 *Ruffin, C. J.,* says that if the first entry is too vague to put the second enterer upon notice, equity will not aid him. This is a different question from that which we first discussed. There the survey makes the vague entry certain, and the State accepts it and issues the grant. Here the question of notice of the first entry controls the rights of the parties. If the first enterer makes his entry certain by survey before the second entry, it is sufficient. So, in *Munroe v. McCormick,* 41 N. C., 85, *Pearson, J.,* says: 'When one makes an entry so vague as not to identify the land, such entry does not amount to notice and does not give any priority of right as against another individual who makes an entry, has it surveyed, and takes out a grant.' Tested by the decided cases cited in *Grayson v. English* and *Fisher v. Owens, supra,* we think defendant's entry too vague to afford notice. It is a 'floating entry,' without any definite beginning. 'A stake in S. G. Anderson's line' is about as vague as it is possible to make it. It calls for no single point from which a survey could be made, and gives no other *indicia* for that purpose."

The exception to the exclusion of the two questions asked the witness Ferguson are without merit. There is nothing in the record to indicate

what answers would have been made by the witness, and the questions relate to an entry not involved in this controversy, and which, as the witness says, the plaintiff "let run out."

The other exceptions are untenable in view of our holding as to the sufficiency of the plaintiff's entry.

No error.

Cited: Morton v. Water Co., 168 N.C. 587 (2f); *Wilson v. Scarboro*, 169 N.C. 658 (2f); *Newbern v. Hinton*, 190 N.C. 111 (2f).

(679)

G. A. RHODES AND WIFE, M. E. RHODES, v. THE CITY OF DURHAM.

(Filed 20 May, 1914.)

1. Municipal Corporations—Cities and Towns—Nuisance—Sewage—Damage to Lands—Governmental Functions.

Where a municipality is liable in damages for the improper emptying its sewage in a stream to the injury of an adjacent or adjoining owner, the damages are admeasured by the decrease in value of the lands thereby caused, though the act complained of was done by the municipality in the exercise of its governmental functions.

2. Same—Eminent Domain—Permanent Damages.

Where a city by emptying its sewage into a stream by improper methods causes injury to an abutting or adjacent owner, the damages are of a permanent character and protected by the municipality's right of eminent domain, which, in such instances, is in the nature of acquiring an easement in the lands; and as the public interest therein deprives the owner of the right to abate the nuisance, it is open to either of the parties, in the owner's action for damages, to demand that permanent damages be assessed; and the mere fact that the municipality may voluntarily abate the nuisance in the near future does not deprive the owner of his right to recover permanent damages in his present action.

3. Municipal Corporations—Sewage—Nuisance—Damages to Lands—Adjacent Owners.

The right to recover damages of a municipality caused by its improper method of emptying its sewage into a stream is not confined to adjoining lands lying thereon, for this right extends to adjacent lands injured thereby, whether the medium of pollution is through the water or through that of the air carrying objectionable and contaminating odors, etc., resulting in a serious injury to or a reduction in the value of lands.

4. Appeal and Error—Both Parties Appeal—Harmless Error.

Both parties to this action have appealed to the Supreme Court, and the ruling of the court in the appeal of one having rendered harmless any

error insisted upon in the other, the appeal of the latter party is dismissed.

BROWN, J., and CLARK, C. J., dissenting.

APPEAL by defendant from *Lyon, J.*, at January Term, 1913, (680) of DURHAM.

Civil action to recover damages for the maintenance of an actionable nuisance on part of defendant in the construction and operation of its sewerage system.

On issues submitted, the jury rendered the following verdict:

1. Are the plaintiffs the owners of the land described in the complaint? Answer: "Yes."

2. Has the plaintiffs' land been damaged by the installation and maintenance of the sewerage system, as alleged in the complaint? Answer: "Yes."

3. What permanent damages are plaintiffs entitled to recover, if any? Answer: "$200."

4. What damages, if any, are plaintiffs entitled to recover up to the beginning of this action? Answer: "5 cents."

Judgment on verdict for the permanent damages, and defendant excepted and appealed.

Manning, Everett & Kitchin for plaintiff.

Bryant & Brogden and C. S. Scarlett for defendant.

HOKE, J. We have held, in several recent cases, that damages may be recovered for a wrong of this character, and, to the extent that the value of plaintiff's property is impaired, the right is not affected because the acts complained of were done in the exercise of governmental functions. *Donnell v. Greensboro,* 164 N. C., 331, and authorities cited.

Our decisions are also in support of the proposition that where the injuries are by reason of structures or conditions permanent in their therein is of such an exigent nature that right of abatement at the in- by the power of eminent domain or because the interest of the public therein is of such an exigent nature that right of abatement at the instance of an individual is of necessity denied, it is open to either plaintiff or defendant to demand that permanent damages be awarded; the proceedings in such cases to some extent taking on the nature of condemning an easement. *Brown v. Chemical Co., ante,* 421; *same case,* 162 N. C., 83; *Harper v. Lenoir,* 152 N. C., 723; *Geer v. Water Co.,* 127 N. C., 349; *Parker v. R. R.,* 119 N. C., 677; *Redly v.* (681)

R. R., 118 N. C., 996. A principle and method now made peremptory by statute, in case of railroads. Rev., sec. 394.

Speaking to the general principle, in the case of public roads, in Elliott on Streets and Roads, the author says:

"SEC. 488. All damages are recoverable in one action. The change of grade is a permanent matter, and all resulting injury must be recovered for in one action, for the property owner cannot maintain successive actions as each fresh annoyance or injury occurs. The reason for this rule is not far to seek. What is done under color of legislative authority, and is of a permanent nature, works an injury as soon as it is done, if not done as the statute requires, and the injury which then accrues is, in legal contemplation, all that can accrue, for the complainant is not confined to a recovery for past or present damages, but may also recover prospective damages resulting from the wrong. It is evident that a different rule would lead to a multiplicity of actions and produce injustice and confusion. It is in strict harmony with the rule which prevails, and has lnog prevailed, in cases where property is seized under the right of eminent domain."

These authorities and the principles upon which they rest are in full support of his Honor's judgment for the permanent damages awarded in the verdict.

It is contended for defendant that damages of this character should not be allowed, because the property of plaintiff does not abut directly upon the stream, and there has been no physical invasion of plaintiff's rights in the same; but this position, in our opinion, cannot be sustained. The property injured extends to within 50 yards of the stream, and the evidence tends to show and the jury has established that defendant wrongfully maintains there permanent conditions amounting to a nuisance, bringing plaintiff's property directly within the harmful effects and sensibly impairing its value. In *Donnell v. Greensboro, supra,* the Court, in speaking to a similar suggestion, said: "In such case, and except as affected by the existence of certain rights peculiar to
(682) riparian ownership, a recovery does not seem to depend at all on whether the damage is carried 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." A position fully sustained by authority whenever, as in this case, the nuisance is of a permanent character and the source of injury is protected from interference by legislative sanction and the predominance of the public interests. *King v. Vicksburg, etc., Ry.*, 88 Miss, 456; *Gulf and Colorado R. R. v. Moseley,* 161 Fed., 72; *Terminal Co. v. Lellyett,* 114 *Tenn.,* 368; *Middle Camp v. Ditch Co.,* 46 Col., 102; 21 A. and E. Enc.,

pp. 732-733; 1 Lewis Eminent Domain (3 Ed.), sec. 230. In the citation to A. and E., *supra,* it is said: "The same rule (damages for permanent nuisances) is applicable where the source of injury is permanent in its nature and will continue to be productive of injury independent of any subsequent wrongful act. The nuisances coming within the latter classification consist of the annoyance, discomfort, or injury necessarily incidental to the operation or conduct of a business or erection authorized by law; and the rule is applicable only when the plaintiff elects to consider the nuisance permanent, and therefore licenses it, or when the defendant's use of his property constitutes a *pro tanto* taking of the plaintiff's property." And in the citation to Lewis on Eminent Domain, *supra,* referring to the kind of injuries which may be treated as a taking of property, the author says: "The owner of land has a right that the air which comes upon his premises shall come in its natural condition, free from artificial impurities. This right has its correlative obligation, which is that one must not use his own premises in such a manner as to discharge into the atmosphere of his neighbor dust, smoke, noxious gases, or other foreign matter which substantially affect its wholesomeness. This right is very fully treated by Mr. Wood in his work on Nuisances, and a reference thereto will suffice. The right to pure air is property, and to interfere with the right for public use is to take property. There can be no question that the erection of gas works, or the setting up of any other noxious trade, in the vicinity of my premises that emits noxious odors, which are sent over my lands in quantity and volume, (683) sufficient to essentially interfere with the use of that air for the ordinary purposes of breath and life, so as to constitute a legal nuisance, is such a taking of my property as the Legislature may not permit without compensation. What possible distinction can there be between the actual taking of my property, or a part of it, and occupying it for the erection of a railroad track or a gas house and invading it by an agency that operates as an actual abridgment of its beneficial use and possibly a complete and practical ouster? There certainly can be none. By the erection of such works a burden is imposed upon my property; the property itself is actually invaded by an invisible, yet a pernicious agency, that seriously impairs its use and enjoyment, as well as its value. The impregnation of the atmosphere with noxious mixtures that pass over my land is an invasion of a natural right, a right incident to the land itself, and essential to its beneficial enjoyment. My right to pure air is the same as my right to pure water; it is an incident of the land, annexed to and a part of it, and it is as sacred as my right to the land itself. Therefore I apprehend that the Legislature has no power to shield one from liability for all the consequences of the exercise of an occupation that

produces such results, any more than it has to authorize the flooding of my lands or the permanent diversion of a stream. Legislative authority to carry on a business does not authorize it to be carried on in such a manner or at such a place that it will be a nuisance to neighboring property. An act which authorized a particular business at a particular place which necessarily defiled the air so as to create a nuisance would be void unless it was for public use, and, if for public use, such as manufacturing gas for a city, would be subject to the constitutional limitation of making compensation."

And further in the same section: "Where a water, light, or power plant creates a nuisance by reason of gas, smoke, cinders, etc., an action will lie. And if the same is authorized by law for a public purpose, the damage is a taking."

(684) It is further urged that the award of permanent damages may work an injustice, for the reason that the conditions complained of may be modified or altogether removed, and we were referred in the argument to an act of the Legislature giving the city of Durham the power to raise money for the purpose of improvements in its sewerage system; but, so far as plaintiff is concerned, there is nothing in the record that binds the city of Durham to take the course suggested, and there is nothing from the history of the case or the facts in evidence that gives plaintiff any just ground to believe that the nuisance will be abated at any time in the near future, or that should induce a court to stay or longer interrupt the methods of redress allowed him by the law.

There is no error, and the verdict on the judgment is affirmed.

No error.

PLAINTIFF'S APPEAL.

HOKE, J. Plaintiff appealed in this case because of certain rulings of the trial judge on the issue as to recurrent damages. The judgment in his favor for permanent damages having been affirmed, on defendant's appeal, the questions raised by plaintiff are no longer material, and, plaintiff having stated in open court that he did not care to press his appeal here if the judgment in his favor should be affirmed, the same is therefore dismissed.

Appeal dismissed.

BROWN, J., dissenting: I am of opinion that the plaintiff is not entitled to recover for permanent damages to his land under the allegations and evidence in this case.

The land does not abut on the creek, and is some little distance from it. There is no allegation and no evidence that the crops have been

damaged or the rental value of the land decreased, or any evidence tending to prove any permanent injury to the land itself.

The evidence shows that the defendant is maintaining a public nuisance by discharging untreated sewage into this creek, which causes foul odors and unhealthful conditions to the plaintiff's personal injury. We have held repeatedly that cities and towns are not liable for injuries to health nor personal discomforts arising from such (685) causes. *Metz v. Asheville,* 150 N. C., 752; *Williams v. Greenville,* 130 N. C., 96; *Hines v. Rocky Mount,* 162 N. C., 409.

I do not think that any right to maintain a public nuisance by the pollution of a creek can be acquired by prescription. The judgment in this case cannot operate upon the land, and any subsequent owner or occupant of it, whether as owner or tenant, would have a right to bring his action to abate this nuisance, and to recover temporary damages for it.

I fail to find any case where permanent damages have been given by the courts where the plaintiff was not a riparian owner, and the raw sewage was discharged into a stream passing near the premises.

At common law no one could recover permanent damages arising out of the maintenance of a public nuisance. His remedy was either by injunction to abate it or by successive actions for damages as they accrued, and sometimes by both remedies. A case very much like this is *Comer v. City of Nashville,* 17 L. R. A., (O. S.), 468. In that case *Judge Lurton,* now on the Supreme Court Bench of the United States, says: "The weight of authority and the weight of reason alike condemn, as contrary to a true public policy, any rule by which a wrongdoer may thus procure a license to continue his misconduct. Such a rule would in many instances operate as a method by which private property would be condemned to private use against the will of the owner." It seems to us that the true rule deducible from the authorities is that the law will not presume the continuance of a wrong, nor allow a license to continue a wrong, where the causing the injury is of such a nature as to be abatable either by the expenditure of labor or money; and that, where the cause of the injury is one not presumed to continue, the damages recoverable from the wrongdoer are only such as have accrued before action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance.

The Massachusetts Court, in *Aldworth v. City of Lynn,* 10 (686) L. R. A., 210 (O. S.), holds that only the damages that have accrued prior to commencement of an action can be recovered in action for damages for maintenance of nuisance on premises adjoining plaintiff's property. On page 211 the Court says:

"The plaintiff excepted to the ruling that she was entitled to recover damages only to the date of her writ, and contended that the dam and

pond were permanent, and that she was entitled to damages for a permanent injury to her property.

"An erection unlawfully maintained on one's own land to the detriment of the land of a neighbor is a continuing nuisance, for the maintenance of which an action may be brought at any time, and damages recovered up to the time of bringing the suit. *Prentiss v. Wood,* 132 Mass., 486; *Wells v. New Haven and N. Co.,* 151 Mass., 46, and cases there cited.

"That it is of a permanent character, or that it has been continued for any length of time less than that what is necessary to acquire a prescriptive right, does not make it lawful, nor deprive the adjacent landowner of his right to recover damages.

"Nor can the adjacent landowner in such a case, who sues for damages to his property, compel the defendant to pay damages for the future. The defendant may prefer to change his use of his property so far as to make his conduct lawful.

"In the present case we cannot say that the defendant may not repair or reconstruct its dam and reservoir in such a way as to prevent percolation, with much less expenditure than would be required to pay damages for a permanent injury to the plaintiff's land."

We think this Court has held in the case of *Tailor v. R. R.,* 145 N. C., 407, that permanent damages cannot be recovered where the acts complained of amount to nothing more than a nuisance to individuals. In that case the Court says:

"In our view of the law, the plaintiffs cannot in any event recover permanent damage for the depreciation of their property by reason of the establishment of the railway terminal on Gilliam Street, opposite it.

(687) "If they can allege and prove unlawful and unwarranted acts and conduct by the defendant in the management of its terminal, which amount to a nuisance, they may enjoin the further commission of such acts, as well as recover such temporary damages as their property has sustained thereby."

For these reasons, I am of opinion the plaintiff is not entitled to recover the permanent damages sued for in this action.

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

Cited: Webb v. Chemical Co., 170 N.C. 665 (2d); *Mason v. Durham,* 175 N.C. 641 (2g); *Barcliff v. R. R.,* 176 N.C. 41 (2g); *Dayton v. Asheville,* 185 N.C. 14 (2g); *Sandlin v. Wilmington,* 185 N.C. 260 (2g); *Sandlin v. Wilmington,* 185 N.C. 261 (3g); *Mitchell v. Ahoskie,* 190 N.C. 238 (2d); *Cook v. Mebane,* 191 N.C. 5 (2g); *Cook v. Mebane,* 191

N. C. 10 (3g); *Black v. Bessemer City,* 197 N.C. 196 (2d); *Wagner v. Conover,* 200 N.C. 85 (2g); *Anderson v. Waynesville,* 203 N.C. 45 (2d); *Gray v. High Point,* 203 N.C. 765 (3g); *Hudson v. Morganton,* 205 N.C. 354 (3d); *Lightner v. Raleigh,* 206 N.C. 505 (2d); *Ivester v. Winston-Salem,* 215 N.C. 5 (2g); *Clinard v. Kernersville,* 215 N.C. 750 (2g); *Bruton v. Light Co.,* 217 N.C. 6 (2g); *Tate v. Power Co.,* 230 N.C. 259 (2d).

A. B. ENSLEY v. SYLVA LUMBER AND MANUFACTURING COMPANY.

(Filed 27 May, 1914.)

1. Master and Servant—Negligence—Duty of Master—Safe Appliances—Unskilled Servant—Minors—Duty to Instruct—Dangerous Machinery.

In addition to the ordinary duty of the master to furnish his servant a reasonably safe place to work and reasonably safe tools and appliances with which to do it, it is required, when he has known or should have known that he had employed an inexperienced and youthful person to work at a power-driven and dangerous machine, that he give instructions to such employee relative to the method of avoiding the dangers and operating the machine in safety, and he is liable in damages to the employee for a personal injury which has been directly and proximately caused him by the neglect of this duty.

2. Same—Trials—Evidence—Questions for Jury.

The failure of the master to instruct a youthful employee as to the safe methods of operating a power-driven and dangerous machine will not of itself necessarily fix liability on the master, for if, notwithstanding, the employee had sufficient knowledge, or if, making proper allowance for his youth or inexperience, he acted without reasonable care, and in such manner as to negligently have brought the injury upon himself, the master is not liable, the question raised being one of fact to be determined by the jury, with the burden of proof on the plaintiff.

3. Same—Contributory Negligence—Proximate Cause.

The plaintiff, 17 years of age, at the request of his father, was employed by the defendant company to work at its mill, and the officer of the defendant was informed that the plaintiff was young and inexperienced, and promised that the work intrusted to him should be done on the yard, outside the mill, where its character was less dangerous; but soon thereafter the plaintiff was ordered to work on the inside of the factory as "tailer" for a power-driven moulder machine, concerning the operation of which and its mechanical construction he had no knowledge. The next day the plank was stopped by a splinter of hard wood, and the plaintiff was told to raise the speeder bar, which he did, and then, in ignorance of the danger, and by reason of his inexperience, put his hand into the machine, and it was forced against the knives by the suction used to carry off the shavings, to his serious injury: *Held,* the employment of the plaintiff, a boy of 17

years, was not negligence *per se* of the defendant, but that the injury, even if not directly received in the course of plaintiff's employment, was so directly connected therewith, if proximately caused by the defendant's negligence in employing him, as to make the defendant liable; and the question of plaintiff's contributory negligence was properly left to the jury under correct instructions, as also the matter of proximate cause.

(688) APPEAL by defendant from *Ferguson, J.*, at October Term, 1913, of JACKSON.

Action to recover damages for injuries alleged to have been caused by defendant's negligence. Plaintiff, at the time 16 or 17 years old, was employed by defendant, with the promise of the manager that he should work outside the mill in a safe place. He was ordered to go inside the mill and tail the moulder, which appears to be a dangerous machine to one not familiar with its construction and operation, and was severely injured the next day by having his hand caught in the knives of the moulder.

Plaintiff testified: "I am the plaintiff in this action. Up to the time of the injury, I lived with my father and helped on the farm. I never had been about machinery. I reported for work to Will Oliver, defendant's foreman, on the morning of 5 July, 1906. He put me to loading lumber on a car on the yard. About 10 o'clock he instructed me to go inside the building and work at the moulding machine. I didn't know what a moulding machine was. I asked one of the men what he
(689) wanted me to do, and he said keep the lumber up and keep it graded. I said I didn't know anything about grading it, but I could keep it up. I went to work tailing the moulder. I never had seen a moulder. No one made a statement to me about the danger of the machine. Joe Davis was feeding the machine at the time. I was to receive the lumber after it came out of the machine. No one was working at the machine except Davis and myself. The machine was run by steam power. The knives where I got cut make about 3,500 revolutions a minute. They were about one-eighth inch above the surface of the machine. They were not explained to me, and I had never seen the machine stopped and it looked just like a solid piece of iron. I was hurt the next day about 2 o'clock; had been working at the machine about fourteen hours. The machine had two knives. About 2 o'clock on the second day we were cutting a piece of ceiling and I didn't know anything about how ceiling had to be dressed. I was a green man there. We let about 500 feet go through with just the top bead cut. Oliver came along about 1 o'clock and saw it and began rearing on me; cursed me because I let it run through there wrong. I asked him why he didn't show me how it was to be cut. I said he never showed me anything. About 2 o'clock there was a faulty piece of lumber coming through, and the bits

or knives took too much hold on the lumber. A big splinter got hung over the knives. I didn't know the knives were there. It stopped the board from coming through. I motioned to Davis, gave him a signal that there was something wrong. He stopped the feed and motioned to me to loose the pressure bar over the knives. I did so. He started around to where I was, but before he got to me I stuck my hand in after the splinter. There is a suction pipe that carries the shavings to the boiler room for fuel. The suction pipe jerked my hand into the knives. I didn't know the suction pipe was there. I hadn't been told it was there. Nobody had told me the knives were there, and I couldn't see them. I had never seen the knives. There was nothing over the knives to protect except the pressure bar and a board some 5 inches above the bar; no hood. I jerked my hand out and fell back in Mr. Davis's arms. I said: (690) 'My hand is all cut up; send for the doctor; don't let me bleed to death; you ought to have told me about those knives being there. I didn't know the knives were there.' "

His father, J. B. Ensley, testified: "I asked McKee to give him (my son) work on the outside of the building where there wasn't any machinery; that my son was young and awkward and didn't know anything about machinery. McKee said he would try to do so, or would do so. That is about all the contract there was to it. The company was handling and sawing logs outside of the building. McKee said he would give him work on the outside. He was injured the second day after he went to work; went to work one day and was injured about 2 o'clock the next day. His hand was torn up and two of his fingers cut off. It was bloody and looked like it was cut all to pieces."

There was testimony for the defendant tending to show that the injury was not caused by any negligence on its part, but by plaintiff's own negligence, and the conflicting evidence was submitted to the jury by the court to find the facts. The jury returned the following verdict:

1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

3. Did the plaintiff assume the risk of approaching the machinery and putting his hand in the box containing the knives, as alleged in the answer? Answer: No.

4. What damages, if any, is the plaintiff entitled to recover? Answer: Two thousand dollars ($2,000).

Judgment thereon, and appeal by defendant.

Walter E. Moore, McCall & Bennett, and S. Brown Shepherd for plaintiff.

C. C. Cowan and Manning & Kitchin for defendant.

(691) WALKER, J., after stating the case: The plaintiff alleges that he was young and inexperienced, not having worked in a mill before; that for this reason his father had requested the defendant to give him work to do outside the machinery room, which the latter promised to do, but which it failed to do, but on the contrary, he was ordered to work in the building and was required to tail at a moulding machine, which means that he had to receive the lumber from the moulder after it was dressed by being passed through it. In operating the machine and doing the work of tailing, it was proper and usual to stand about 4 feet from it; but on the day of the injury a large splinter or faulty piece of lumber caused the bits or knives to grip it too tightly; the splinter hung on the knives and stopped the lumber. At this time he called to Davis, who stopped the feed and told him to loosen the pressure bar over the knives, which he did, and then put his hand in and reached for the splinter to remove it, when the suction from the pipe that carries the shavings to the boiler drew his hand to the knives, and he was badly cut by them. He says: "I did not know the knives were there, nor did I know the suction pipe was there." There was no shield or hood over the knives.

The case has been argued before us upon the theory that there was no negligence of the defendant, and that plaintiff assumed the risk of his employment, or was guilty of contributory negligence when he undertook to stop the machine and thrust his hand into it for the purpose of doing so, and further, that he was not acting within the scope of his duties when he did so.

It is the duty of the master to exercise due care in furnishing his servant with a reasonably safe place to work and reasonably safe and proper machines, tools, and appliances with which to do the work, and, in the case of youthful or inexperienced employees, this further duty rests upon him: Where the master knows, or ought to know, the dangers of the employment, and knows, or ought to know, that the servant, by reason of his immature years or inexperience, is ignorant of or unable to appreciate such dangers, it is his duty to give him such instruction and warning of the dangerous character of the employment as (692) may reasonably enable him to understand its perils. But the mere fact of the servant's minority does not charge the master with the duty to warn and instruct him, if he in fact knows and appreciates the dangers of the employment; and generally it is for the jury to

determine whether, under all the circumstances, it was incumbent upon the master to give the minor, at the time of his employment, or at some time previous to the injury, instructions regarding the dangers of the work, and how he could safely perform it. It is the duty of a master who employs a servant in a place of danger to give him such warning and instruction as is reasonably required by his youth, inexperience, or want of capacity, and as will enable him, with the exercise of reasonable care, to perform the duties of his employment with reasonable safety to himself. 26 Cyc., 1174-1178; *Turner v. Lumber Co.*, 119 N. C., 387; *Marcus v. Loan*, 133 N. C., 54; *Walters v. Sash and Blind Co.*, 154 N. C., 323; *Fitzgerald v. Furniture Co.*, 131 N. C., 636; *Rolin v. Tobacco Co.*, 141 N. C., 300; *Leathers v. Tobacco Co.*, 144 N. C., 350. Those cases fairly illustrate the rule as it has been applied by this Court, and the *Fitzgerald case* would seem to be essentially the same in its salient facts as this one, and if not entirely so, there is a sufficient likeness between them to make it a controlling authority. The authorities elsewhere are in harmony with our decisions.

"The master may also be guilty of actionable negligence in exposing persons to perils in his service which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate, and in conseqence of which they are injured. Such cases occur most frequently in the employment of infants. The duty of the employer to take special cautions in such cases has sometimes been emphatically asserted by the courts." Cooley on Torts, p. 652.

"The law puts upon a master, when he takes an infant into his service, the duty of explaining to him fully the hazards and dangers connected with the business, and of instructing him how to avoid them. Nor is this all; the master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him, and to place him, with reference to (693) it, in substantially the same state as if he were an adult." Thompson on Negligence, 978.

"When the negligent act of the defendant naturally induced or offered opportunity for the subsequent act of a child, being of a character common to youthful indiscretion, and which, concurring with the defendant's earlier wrongful act, produced the injuries complained of, the defendant will in general be held liable. Children, wherever they go, must be expected to act upon childish instincts and impulses—a fact which all persons who are *sui juris* must consider, and take precautions accordingly. A person who places in the hands of a child an article of a dangerous character and one likely to do an injury to the child itself or to others, is

liable in damages for injury resulting which is a natural result of the original wrong, though there may be an intervening agency (of the child) between the defendant's act and the injury." Bailey on Personal Injuries, 1291.

It was said in *R. R. v. Fort,* 84 U. S., 553, in which a parent was suing for injuries to his son, who was 16 years old: "This boy occupied a very different position (from an adult). How could he be expected to know the peril of the undertaking? He was a mere youth without experience, not familiar with machinery. Not being able to judge for himself, he had a right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collett to order a boy of his age and inexperience to do a thing which, in its very nature, was perilous, and which any man of ordinary sagacity would know to be so."

It appeared in *Lynch v. Nurdin,* 41 E. C. L. Rep., 422, that the defendant's servant had left a horse and cart unhitched on the street, and plaintiff, with other children, was playing with the horse and climbing into the cart, when the horse moved away and injured him. The defendant set up the same defense as does the defendant in this case, that the minor had brought the injury upon himself by his own negligence
(694) and reckless act, but *Lord Denmam,* the Chief Justice of the King's Bench, after discussing the careless act of leaving the horse unhitched, said: "But the question remains, Can the plaintiff, then, consistently with the authorities, maintain his action, having been at least equally in fault? The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them."

The general principle is well stated and tersely applied in *Iron Co. v. Green,* 65 S. W. Rep. (Tenn.), 399, where the same defense was made, as here, that the plaintiff's wrongful employment of the child was not the proximate cause of the injury, and the Court said: "Defendant had no right to employ this minor. While in its employment on its premises and foolishly playing with panels, the property of the company, too heavy for his strength to hold, yet with boyish heedlessness disregarding

this fact, this injury is inflicted upon him. Had he not been employed by this defendant, there is no reason to suppose that he would have been on its premises when the temptation occurred to him to prank with these panels to his serious hurt. In each of the propositions presented by the respective parties to the suit we think there is causal connection between the employment and the injury."

Of course, we do not hold that the employment of the boy was negligence *per se* merely because he was under age, but the principles of those cases apply for the reason that, as the evidence shows, the father of the boy had warned the defendant, not only of his youth, but of his inexperience as well, and exacted a promise that he would not be employed in the building about dangerous machinery, and after receiving this precautionary request and agreeing to comply with it, defendant (695) violated the promise (*Hanie v. Power Co.*, 157 N. C., 503), and, besides, exposed this inexperienced youth to the dangers of the machinery without any instructions as to what they were or as to how he could avoid them. It cannot, therefore, be heard to say, if we follow established principles in the law of negligence, that the injury is to be imputed to his own fault, when his alleged negligent act was directly induced by its own negligence in failing to take proper care of him when thus exposed to danger.

Discussing the analogy between the duties of employers to youthful employees and the duty owing to those who are inexperienced, 1 Shearman and Redfield on Negligence (6 Ed.), sec. 219 and 219a, thus states the rule applicable to both of these relations: "It is the duty of one who employs young persons in his service to take notice of their apparent age and ability and use ordinary care to protect them from risks which they cannot properly appreciate, and to which they ought not to be exposed. This is a duty which cannot be delegated; and any failure to perform it leaves the master subject to the same liability, with respect to such risks, as if the child were not a servant. For this purpose, the master must instruct such young servants in their work and warn them against the dangers to which it exposes them, and he must put this warning in such plain language as to be sure that they understand it and appreciate the danger. . . . The principles governing the employment of minors are, to a large degree, also applicable to the employment of inexperienced, ignorant, feeble, or incompetent servants. A master having notice of any such defect in a servant, no matter what his age may be, is bound to use ordinary care to instruct the inexperienced or ignorant and to avoid putting the feeble to work too heavy for their strength, and generally to refrain from exposing them to risks which they are not fit to encounter. When the master has notice of such ignorance or inexperience on the

part of the servant as would make the ordinary risks of the business especially perilous to that servant, he must give the servant ex-
(696) plicit warning of the danger, and not allow him to under take the work without a full explanation of its perils."

It will be seen, therefore, that the duty of the employer in both cases is practically the same. If the particular act of removing the splinter so as to start the machine again was not strictly within the scope of the boy's duty, it was not such a departure from it as to disconnect or insulate the prior negligence of the defendant from the injury, and it was due altogether to the youth and inexperience of the boy and the lack of proper instruction as to the dangers to be anticipated and avoided in handling the moulder. "Where there is evidence tending to show that an injured employee did not have a reasonably safe place to work, or was not instructed as to the danger attending the act he was told to do, the question whether it was a reasonably safe place to work or whether the failure to warn him of the danger was the proximate cause of the injury, should be submitted to the jury. The evidence that there was a safe way to do this act did not warrant the withdrawal of the case from the jury, in view of the evidence in the case. When more than one inference can be drawn as to the negligence, or the proximate cause, it is for the jury to determine. *Dorsett v. Manufacturing Co.,* 131 N. C., 254; *Marks v. Cotton Mills,* 138 N. C., 401." *Holton v. Lumber Co.,* 152 N. C., 68.

We have carefully examined the charge of the court, and find it to be in strict accordance with the law of the case as now declared by us. The court fully instructed the jury as to the duty of the defendant toward the plaintiff, and as to the latter's measure of duty to himself, considering his age and capacity for taking care of himself and avoiding danger. The charge, in all respects, was "sound and judicious" and presented the case to the jury clearly and correctly in every conceivable phase of it. It was for the jury to find the facts and apply the law as given to them by the court, and we can see no reason for interfering with the result.

No error.

Cited: Raines v. R. R., 169 N.C. 192 (2g); *Holt v. Mfg. Co.,* 177 N.C. 175 (1f); *Sutton v. Melton,* 183 N.C. 372 (1g); *Bellamy v. Lumber Co.,* 183 N.C. 435 (1g); *Gaither v. Clement,* 183 N.C. 456 (1c); *Pettitt v. R. R.,* 186 N.C. 10, 12 (1g); *Satchell v. McNair,* 189 N.C. 474 (1p); *Boswell v. Hosiery Mills,* 191 N.C. 556 (1c); *Mehaffey v. Construction Co.,* 197 N.C. 24 (1c); *Mills v. Mfg. Co.,* 198 N.C. 146 (2g); *McLaughlin v. Black,* 215 N.C. 86 (1f); *Lee v. Roberson,* 220 N.C. 62 (1g).

(697)

DRAINAGE COMMISSIONERS OF WASHINGTON COUNTY DISTRICT, No. 4, v. EASTERN HOME AND FARM ASSOCIATION, INC.

(Filed 20 May, 1914.)

1. Drainage District—Smaller Districts in Larger Ones—Bond Issues.

Where a smaller drainage district is laid off within the boundaries of a larger one, theretofore organized, the purposes of each harmonizing with the purposes of the other, and the lateral ditches in the former being especially necessary for the proper drainage of the lands therein, an issue of bonds by the smaller district is not rendered invalid at the suit of a purchaser because of the larger district which includes it, it being provided that the bonds of the latter shall have priority of lien to those of the former, with which understanding the bonds were sold and purchased.

2. Drainage Districts—Bond Issues—Mortgages—Priority of Liens.

It has become the public policy of our State to authorize the formation of drainage districts, with statutory authority to levy assessments, under stated conditions, upon the lands situated in the district, with the object of making them of greater value; and where the statute has authorized the laying off of one of these districts, a mortgage on lands therein situate, though taken before the district is formed, is subject to the authority of the commissioners to levy the assessment, and bonds issued accordingly for the purpose of drainage have a superior lien to that of the mortgage.

3. Same—Trusts and Trustees—Parties.

Where the purchaser of bonds issued by a drainage district refuses to take the bonds upon the ground that he had purchased them upon condition that they should be the first lien upon the lands contained in the district to the extent of the assessment, and that a large portion of the lands were subject to a first lien by mortgage, or deed of trust, the mortgagee or trustee is not a necessary party in an action involving the validity of the bonds.

APPEAL by defendant from *Ferguson, J.*, at Spring Term, 1914, of WASHINGTON.

Small, McLean, Bragaw & Rodman for plaintiffs.
Frank H. Bryan for defendant.

CLARK, C. J. This is a controversy submitted without action (698) under Rev., 803. For the purpose of straightening and deepening Pungo River by cutting a canal from a point near the mouth of Indian Run to where the Norfolk Southern Railroad crosses the Pungo, the landowners on both sides of that river in 1910 organized the "Pungo River Drainage District," under chapter 442, Laws 1909. Under this proceeding a large body of lands were made possible for drainage by the canal that was constructed. But while the landowners on both sides of this

canal, which ran in a northwesterly direction, were interested in the construction of said large canal, the landowners on the southwest side of the canal were not in any wise interested in the construction of any canals leading from this main canal through the lands lying on the northeast side thereof, nor were the owners of the lands on the northeast side in any wise interested in the construction of canals leading from the said main canal through the lands lying on the southwest of said canal.

Yet the construction of these lateral canals is absolutely necessary to complete the drainage of the territory through which the main canal is being dug by the union of the landowners on both sides thereof who had formed for that purpose the "Pungo River Drainage District." On the northeast side of this Pungo River canal, and wholly within the bounds of the "Pungo River Drainage District," lies a tract of 10,000 acres owned by the John L. Roper Lumber Company and E. A. Rice. This territory was necessarily within the Pungo River Drainage District, as its waters could only be drained off by the construction of the Pungo River canal; but in addition to that, it was necessary that the lateral canals should be constructed through said 10,000-acre tract, leading into the main canal, and in the construction of these lateral canals no one was interested except the owners thereof. Thereupon they formed, in 1913, the drainage district known as Washington County Drainage District, No. 4, under chapter 442, Laws 1909, and chapter 67, Laws 1911, and the drainage commissioners of that district (the plaintiffs) contracted with this defendant, the "East Carolina Home and Farm Association," to do the construction work upon stipulated terms as to
(699) prices and conditions, and the latter agreed to accept the bonds of said Washington County Drainage District, No. 4, in payment. The defendant now refuses to do the work and accept these bonds in payment, alleging that:

1. The Washington County Drainage District, No. 4, has no lawful authority to issue said bonds, because it lies wholly within the boundaries of the Pungo River Drainage District.

2. It was a condition of the agreement that these bonds should constitute a first and permanent lien, subject only to State and county taxes and to the prior lien for the payment of the bonds and interest issued for the Pungo River Drainage District; whereas, in February, 1911, the Roper Lumber Company had executed a mortgage to the Manhattan Trust Company upon its interest in the lands lying in said Washington County Drainage District, No. 4. It is agreed that said lands are worth vary far in excess of the amount of the drainage bonds for both districts that are assessable against it, and also the said mortgage covers very much greater extent of land belonging to said Roper Company than is embraced in this last named drainage district.

Two questions are presented:

1. Does the fact that the land constituting the Washington County Drainage District, No. 4, lies wholly within the boundaries of the Pungo River Drainage District, previously created, render invalid the organization of the Washington County Drainage District, No. 4, and invalidate the bonds it proposes to issue to the defendant?

2. Does the deed in trust from the Roper Lumber Company, executed in 1911, have priority over the drainage assessment which shall be made for the payment of these bonds and interest thereon?

It is agreed that if the Court shall hold that said bonds are valid and constitute a prior lien to said deed in trust, then there shall be judgment against the defendant; but if the Court shall be of the opinion that the bonds are not valid for the reason set out by the defendant, or that the deed in trust of the Roper Lumber Company has priority over the drainage assessment for the Washington County Drainage District, No. 4, then judgment shall be rendered against the plaintiffs, the board of drainage commissioners of said drainage district. (700)

The formation of the Washington County Drainage District, No. 4, covers a part of the territory embraced in the Pungo River Drainage District, but in no wise conflicts with the purposes of the latter. The latter was for the purpose common to the entire scope of territory embraced within its limits, which was to construct the Pungo River canal. The Washington County Drainage District, No. 4, was formed subsequently, and is for the purpose of benefits to accrue solely to that part of the territory of the Pungo River Drainage District which is embraced within the Washington County Drainage District, for which most of the landowners of the larger district were not willing to issue bonds, since they would derive no benefit from the construction of the lateral canals that are indispensable for the drainage of the Washington County Drainage District, No. 4. The assessments for the principal and interest of the drainage bonds issued by the smaller and later formed district are postponed to the payment of the assessments for the principal and interest of the bonds issued by the older and larger district, and it was so understood and agreed between the plaintiffs and defendant.

There is no conflict between the two districts, and the purposes of the smaller district are ancillary to the larger district. These drainage districts are not municipal corporations, but are *quasi*-public corporations. *Sanderlin v. Lukens,* 152 N. C., 738; *Trustees v. Webb,* 155 N. C., 379; *Commissioners v. Webb,* 160 N. C., 594. But even if they were, their condition would be roughly similar to that existing between the county and the State or between a township and a county. The analogy is not perfect, but this conveys the idea. A somewhat similar

arrangement is seen in the road system of France, where they have National roads maintained by the General Government; departmental (or State) roads supported by the departments, and cantonal (or county) roads kept up at the expense of each canton. Each lesser territory thus maintains the roads of special interest to it, in which the larger divisions are not interested.

(701) A thorough system of drainage will revolutionize many sections of the State, especially in eastern North Carolina, by improving the health of communities and redeeming vast areas of the most fertile lands for cultivation; but this is practicable only by assessments laid on the areas specially benefited, each for the benefits received by it.

As to the second proposition: the mortgage by the John L. Roper Company to the Manhattan Trust Company is dated 1 February, 1911. Section 34, chapter 442, Laws 1909, under which the Washington County Drainage District, No. 4, was formed, provides that the assessments for drainage *"shall constitute the first and paramount lien,* second only to State and county taxes, upon *the lands assessed for the payment of said bonds and the interest thereon as they become due,* and shall be collected in the same manner by the same officers as the State and county taxes are collected." Chapter 67, Laws 1911, it is true, struck out section 34 of chapter 442, Laws 1909, and inserted in lieu thereof section 11, chapter 67, Laws 1911, in which the language just quoted does not appear; but the identical provision is found in section 12 of said chapter 67, Laws 1911.

The mortgage, therefore, when executed, was subject to the authority to form these drainage districts for the betterment of the lands embraced therein. The statute is based upon the idea that such drainage districts will enhance the value of the lands embraced therein to a greater extent than the burden incurred by the issuing of the bonds, and the mortgagee accepted the mortgage knowing that this was the declared public policy of the State.

Besides, by reference to an extract from the mortgage, incorporated in the facts agreed in this case, it will be found that by one of the covenants the mortgagor is required to "pay and discharge all taxes *and assessments* lawfully levied or assessed upon the property embraced within the mortgage." Moreover, assessments for public improvements required by the public policy of the State must be reasonably presumed to have been in the contemplation of the parties at the time of the execution of the mortgage. At the date of the execution of the mort-

(702) gage the law provided for the priority of these assessments over all others except State and county taxes, and the mortgagor and mortgagee are presumed to have had knowledge of the law and of the

principle that every one who acquires an interest in land takes it "subject to the right of the sovereign to levy general taxes upon it and to impose upon it the burden of paying the expenses of public improvements, which confer upon the lands a special benefit." An analogous instance is the assessment of abutting proprietors for the street improvements or upon land owners for building a county or township fence, all of which take priority over the holder of a mortgage, because the mortgagor can convey no exemption from public burdens which he does not himself possess. The principle that special assessments, as well as taxes, are superior to a prior mortgage is held, with numerous citations in the exhaustive note, in *Baldwin v. Moroney* (173 Ind., 574), 30 L. R. A. (N. S.), 761. See, also, *Seattle v. Hill* (14 Wash., 487), 35 L. R. A. 372, and notes, as to assessments for street improvements, and *Provident Institution v. Jersey City,* 113 U. S., 506, as to lien for water rents.

The fact that the trustees named in the Roper mortgage are not made parties is immaterial, as is held in *Baldwin v. Moroney, supra,* and this must be so if the mortgagee took with notice that, under the public policy of the State, as declared by the statute enacted prior to the execution of the mortgage, such assessments would be a "paramount lien to all others except for taxes."

In *Richmond v. Williams,* 102 Va., 733, the mortgage was given in 1889, while the city limits were not extended to take in the property until 1891; but it was held that the mortgagee was not entitled to notice of the assessment for the improvements.

In this case the land embraced within the boundaries of Washington County Drainage District, No. 4, constitutes only a small part of the lands covered by said mortgage. It is claimed by plaintiffs that the lands held as security for the mortgage debt are greatly in excess in value of the amount of the debt; that instead of an impairment of the security, its value is enhanced; and that the holders of the mortgage are benefited and not injured by this work, which has been adjudged (703) to be advisable and declared to be "a public benefit and conducive to the public health, convenience, utility, and welfare."

The judgment affirming the validity of the Washington County Drainage District, No. 4, and of the bonds issued by authority of the decree in that case, and holding that such bonds have a prior lien to the mortgage executed thereon prior to the formation of said district, is

Affirmed.

Cited: Griffin v. Comrs., 169 N.C. 644 (2g); *Banks v. Lane,* 170 N.C. 15 (3f); *Banks v. Lane,* 171 N.C. 505 (3c); *Leary v. Comrs.,* 172 N.C. 26 (2d); *Canal Co. v. Whitley,* 172 N.C. 101 (2g); *Taylor v. Comrs.,*

176 N.C. 220 (3c); *Farms Co. v. Comrs.*, 178 N.C. 668 (2g); *Sawyer v. Drainage District*, 179 N.C. 184 (2d); *Kinston v. R. R.*, 183 N.C. 23 (2g); *O'Neal v. Mann*, 193 N.C. 162 (2g); *Saluda v. Polk County*, 207 N.C. 187 (2p); *Nesbit v. Kafer*, 222 N.C. 54 (3p).

J. C. MYERS v. CITY OF ASHEVILLE.

(Filed 20 May, 1914.)

Municipal Corporations—Sidewalks—Negligence—Trials—Evidence—Nonsuit.

In an action for damages brought against a city for an injury alleged to have been negligently inflicted on the plaintiff arising from the improper condition of its sidewalks, it was shown that the injury complained of occurred at a point where there was a paved sidewalk 5 feet wide and an extension of the surface at same level for 4 feet into the lands of a private owner where the injury was received, and at night, but the place was sufficiently well lighted to disclose the happening of the accident to a third person some 90 or 100 feet distant, without evidence of any obstruction on the sidewalk which could have caused the injury: *Held*, the evidence disclosed nothing from which any negligence on the city's part could be inferred, and a motion to nonsuit was properly granted.

APPEAL by plaintiff from *Justice, J.*, at February Term, 1914, of BUNCOMBE.

Civil action to recover damages for injuries caused by alleged negligence on part of defendant.

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

Fortune & Roberts for plaintiff.

Bernard & Johnston for defendant.

(704) HOKE, J. The written demand, within ninety days, required by the charter of the city of Asheville, seems to have been sufficiently definite, but we do not think that the facts in evidence permit the inference of culpable negligence on the part of the authorities.

From a perusal of the testimony, it appears that, in November, 1912, plaintiff, attempting to go along Ralph Street, an established thoroughfare of the city, wandered off the sidewalk and was injured by falling from a wall 4 to 4½ feet high, on a private lot, and dislocated his knee, causing him great pain and preventing him from work for a time; that

at this point there was a concrete walk 5 feet wide and a surface on the same level extending into the lot to the edge of the wall, making a width there of something like 9 feet. True, plaintiff testifies that this was just after dark, and says also that there was a peg or some inequality above the ground over which he thinks he stumbled, but the testimony fails to show that the obstruction was on the walkway, and the evidence further shows that there was a city light not far a way and which enabled a witness for plaintiff, George Chambers, going in the same direction, to see plaintiff when he fell, a distance of 90 or 100 feet.

Under the conditions shown to exist by the evidence, we do not think that the municipal authorities could foresee that such an injury was likely to any one reasonably attentive to his movements, or that there was any departure from that standard of duty imposed by our decisions on a city in the care or supervision of the streets. *Alexander v. Statesville, ante,* 527; *Smith v. Winston,* 162 N. C., 50; *Fitzgerald v. Concord,* 140 N. C., 110.

We are of opinion that there was no error in entering the judgment of nonsuit, and same is

Affirmed

INDEX

NOTE.—The reverse index will be found to embrace the distinctive subheads of the decided points, referring by number to the places where the decisions thereon are indicated, and the cases embracing them are cited. It is hoped that in this manner, and by the embodying of the sketch words in *italics* in this index, the practitioner may more readily find whether the point he is looking up has been decided in this volume, and if so, where.

ACTIONS. See Venue.

1. *Estates—Remaindermen—Right of Action—Life Estate—Real Party in Interest—Interpretation of Statutes.*—The remaindermen have no right of possession in lands during the lifetime of the first taker, and during that time their action to recover the land will not lie, the statute requiring it to be brought by "the real party in interest." Revisal, sec. 400. *Blount v. Johnson*, 25.
2. *Trials—Courts—Remarks—Appeal and Error.*—In an action by a bank upon a note, the remarks of the trial judge that the witness may be of good character and a good banker, but that not every such one knows the law, is held not prejudicial or reversible, if erroneous. *Trust Co. v. Williams*, 74.
3. *Carriers of Goods—Connecting Lines—Joinder—Interpretation of Statutes.*—Where a carrier has accepted a shipment beyond its own line, and upon its not being delivered, agrees by parol to have it reshipped to the starting point, and delivery is made there in bad condition, a joinder of causes of action against the two defendants to recover damages to the shipment while in their possession is proper. Revisal, sec. 469. *Lyon v. R. R.*, 143.
4. *Actions—Joint Tort Feasors—Pleadings—Surplusage.*—Several defendants may be jointly sued for damages for the same tort arising from one and the same transaction, and where such a cause of action is sufficiently stated, and the complaint further alleges the same tort as to each of the defendants, separately, these further counts will be treated as surplusage. The effect of judgments obtained against joint tort feasors in separate actions discussed by WALKER, J. *Tyler v. Lumber Co.*, 163.
5. *Actions Pending—Issuance of Summons—Statement.*—Under the express provision of our statute a civil action commences upon the issuance of a summons from a court of competent jurisdiction (Revisal, sec. 359), and as the statute fixes the time of the inception of the action, it is pending from that time. Hence an action between the same parties upon the same subject-matter, returnable to a different jurisdiction, will abate, and upon motion will be dismissed, when it appears that the summons was subsequently issued, though served in priority of time. *Pettigrew v. McCoin*, 472.
6. *Mental Anguish—Joint Action—Trials—Demurrer.*—Where two or several plaintiffs join in their action to recover damages for mental anguish, a demurrer for misjoinder is good, for from the nature of damages of this character the causes are not severable, the parties, as well as the subject-matter, necessarily being separate and distinct. *Cooper v. Express Co.*, 538.
7. *Mental Anguish—Express Companies—Negligent Delay—Shipment Refused—Value of Shipment—Receipt—Right of Action—Estoppel.*—Where an express company is liable to the plaintiff in an action to

ACTIONS—*Continued.*

recover damages for mental anguish it has caused him in its negligent delay in the shipment or delivery of a burial casket, which consequently came too late at its destination, and was therefore refused, he is not barred of his right to recover therefor by receiving or receipting for the amount of money he had lost on that account. *Byers v. Express Co.*, 542.

8. *Same—Special Damages—Hepburn Act.*—The Hepburn act with the Carmack amendment, authorizing a common carrier, under certain circumstances, to limit the amount of recovery in the event of its negligence in regard to interstate shipments, relates only to the damage which may thereby have been occasioned to "property," decreasing its value, and has no application to a recovery of special damages caused by the negligent delay by the carrier in its transportation and delivery, where such are otherwise recoverable; notwithstanding a contrary stipulation in the bill of lading. *Ibid.*

ADMISSIONS. See Pleadings, 12; Reference.

ADVERSE POSSESSION. See Limitations of Actions, 1, 7, 11.

AGREEMENT FOR SUPPORT. See Contracts, 2.

AMENDMENT. See Courts; Appeal and Error, 10.

APPEAL. See Counties.

APPEAL AND ERROR. See Removal of Causes; Habeas Corpus.

1. *Appeal and Error—Prejudicial Error.*—A judgment of the Superior Court will not be reversed on appeal for error committed on the trial when it is not prejudicial to the appellant. *Brogden v. Gibson*, 16.

2. *Evidence—Questions and Answers—Objections and Exceptions—Appeal and Error.*—When exception is taken to the exclusion of a question asked a witness, it must in some way be made to appear what the answer to the question would have been, so that the Court may determine whether its exclusion was prejudicial to the appellant. *Steeley v. Lumber Co.*, 27.

3. *Evidence — Compromise—Prejudicial Error—Harmless Error—Appeal and Error.*—The admission of testimony in this case that the action was brought after the witness, an attorney in the case, had endeavored to compromise it, is not held to be reversible error, as the facts show that it could not have materially affected the result of the trial, and therefore was not prejudicial to the appellant. *Ibid.*

4. *Appeal and Error—Assignments of Error.*—Assignments of error not stated according to the rules of the Supreme Court will be disregarded. *Ibid.*

5. *Drainage Districts—Appeal and Error—Fragmentary Appeal—Exceptions to Reports—Clerk's Jurisdiction.*—Where on appeal to the Superior Court a cause in drainage proceedings has been remanded to the Clerk to resume jurisdiction and determine the question of hearing exceptions to the preliminary and final reports, and fix a time therefor, should he determine to hear them, the parties should except and appeal to the Supreme Court, should they so desire, or

APPEAL AND ERROR—*Continued.*

the order will be final; and an appeal from the order of the clerk made accordingly, fixing a time for the hearing of the exceptions, is fragmentary and will be dismissed. It is further held that the clerk had the jurisdiction to hear the exceptions and grant the parties time within which to file them. *Walker v. Reeves*, 35.

6. *Deeds and Conveyances—Location of Lands—Evidence—Appeal and Error—Harmless Error.*—Where the controversy concerning lands depends upon whether the *locus in quo* was contained within the description of plaintiff's deed, a question asked a witness, by the defendant, whether the lands were not contained in a deed made to him, is incompetent, as the deed will speak for itself, and was otherwise immaterial; and in this case the error, if any, in excluding the question was cured by the introduction of the witness's deed. *Coltrain v. Lumber Co.*, 42.

7. *Limitations of Actions—Color—Instructions—Appeal and Error—Harmless Error.*—In an action to recover lands contained in the lappage of disputed division lines between adjoining owners which one of them claims under seven years adverse possession under "color of title," his prayer is properly refused which leaves out the words "color of title," seven years without "color" being insufficient; but had the prayer been correct, its refusal by the court is rendered harmless in this case, by the location of the line by the jury in accordance with the contention of his adverse claimant. *Campbell v. Miller*, 51.

8. *Trial by Jury—Waiver—Findings by Court—Evidence—Appeal and Error.*—When a trial by jury has been waived by the parties for the judge to find the facts, his findings thereof are conclusive on appeal if there is evidence to support them; and where the burden of proof is upon the plaintiff to establish the issue, his findings for the defendant thereon is not reviewable, for the plaintiff is required to satisfy him with the evidence that the issue should be answered in his favor. *Eley v. R. R.*, 78.

9. *Appeal and Error—Instructions—Harmless Error.*—The statement made by the judge in his charge to the jury in this case, that all of the witnesses were of good character, was impartial in its application, and not held for reversible error. *Bowden v. English*, 97.

10. *Appeal and Error—Supreme Court—Pleadings—Amendments—Interpretation of Statutes.*—The Supreme Court has the power to allow amendments to pleadings (Revisal, sec. 1545); and in this action on appeal to recover damages under the Federal Employers' Liability Act, the plaintiff's motion to amend the complaint so as to allege that there are persons living who have a reasonable expectation of pecuniary benefit from the continued life of the deceased, etc., is granted, with leave to defendant to traverse these allegations. *Kenney v. R. R.*, 99.

11. *Railroads—Federal Employer's Liability Act—"Assumption of Risks" — Trials — Negligence — Instructions—Appeal and Error—Harmless Error.*—As to whether assumption of risks, under the Federal Employer's Liability Act, is a defense for a railroad company in an action to recover for the wrongful injury or death of its employee, *Quære.* But in this case, the jury having found the issue of de-

APPEAL AND ERROR—*Continued.*

fendant's negligence for the plaintiff, under correct instructions thereon, if there was any error committed by the court in relation to the doctrine of assumption of risks, it was harmless. *Ibid.*

11a. *Courts—Set Aside Verdict—Agreement—Offer of Party—Appeal and Error.*—Where a verdict has been returned by the jury, it is within the province of the trial court alone to set it aside in whole or in part, and it may not be done only upon the agreement of the parties, without the consent of the court. Hence, an offer of agreement of one party made to the unsuccessful one, that the verdict be set aside on a certain issue, is held in this case to be ineffectual on appeal to prevent the appellee having a new trial on that issue for errors of law committed in the Superior Court, or having alleged errors committed on the other issues passed upon on appeal. *Ibid.*

12. *Appeal—Brief—Exceptions Abandoned.*—Exceptions not brought forward in appellant's brief are deemed abandoned on appeal. Rule 34. *In re Will of Parker*, 130.

13. *Wills—Mental Capacity—Evidence—Appeal and Error—Harmless Error.*—In an action to caveat a will, the witness's answer to a question directed to the mental capacity of the testator, who had devised his property to one not related to him, that he did not think the testator "meant for his folks to have any of his property, from the way he talked, and that he had sense when he was around, so far as he knew," is held competent under the rules laid down in *McLeary v. Norment*, 84 N. C., 235; but if otherwise, it was not reversible error in this case. *Ibid.*

14. *Appeal and Error—Second Appeal—Former Decision.*—Upon a second appeal, the Supreme Court will not rehear and reconsider the questions determined on the former appeal. *Carson v. Insurance Co.*, 135.

15. *Appeal and Error—Harmless Error—Carriers of Goods—Connecting Lines—Judgements.*—In an action to recover damages to a shipment of goods against two connecting carriers alleged to have been caused while in their possession, an issue as to each carrier was submitted to the jury, and the issue of negligence as to one of them was answered in defendant's favor and, as to the other, in plaintiff's favor: *Held*, exceptions arising under the first of the issues are harmless as to the appealing defendant. *Lyon v. R. R.*, 143.

16. *Appeal and Error—Assignments of Error—Insufficiency.*—Assignments of error which do not inform the Court upon the error alleged will be disregarded, and in this case they are held insufficient. *Register v. Power Co.*, 234.

17. *Appeal and Error—Trial—Instructions—Verdict—Harmless Error.*—Error in the charge of the judge upon an issue answered in appellant's favor is cured by the verdict, and is hamless. *Carter v. R. R.*, 244.

18. *Instructions—Prayers Substantially Given—Appeal and Error.*—It is not error for the trial judge to give, in his own language, a requested prayer for instruction, if he substantially gives it without weakening its force. *Ibid.*

19. *Trials—Instructions—Appeal and Error—Railroads—Negligence.*—In the trial of causes in the Superior Court, when material evidence has been introduced presenting or tending to present a definite legal

APPEAL AND ERROR—*Continued.*

position or having definite legal value in reference to the issues or any of them, and a specific prayer for instruction concerning it is properly preferred which correctly states the law applicable, such prayer must be given, and unless this is substantially done either in direct response to the prayer or in the general or some other portion of the charge, the failure will constitute reversible error; and in this action to recover damages for a personal injury it was error for the judge to refuse to give a prayer for instruction predicated upon evidence of the defendant tending to show that the injury complained of did not occur as claimed by plaintiff, but while he was attempting to ride upon its train for his own purposes. *Marcom v. R. R.*, 259.

20. *Appeal and Error — Negligence—Distribution of Recovery—Harmless Error.*—In an action to recover damages of a railway company for a personal injury alleged to have been negligently inflicted on the plaintiff, where all the parties are properly before the court, the distribution of the amount of the recovery, should any be had, is of no legal interest to the defendant; nor can it complain of error alleged in the charge restricting the amount of recovery, as such is in its favor. *Ibid.*

21. *Appeal and Error—Courts—Jurisdiction—Motion to Dismiss—Supreme Court.*—A motion to dismiss for want of jurisdiction may be made for the first time in the Supreme Court on appeal. *Tillery v. Benefit Society*, 262.

22. *Appeal and Error — Exceptions — Instructions—Courts.*—The failure of the trial judge to charge upon particular phases of the controversy is not alone sufficient to be held for reversible error. The appellant should offer prayers for special instruction covering the matter, and except and appeal from the refusal of the court to give them. *Ibid.*

23. *Carriers of Goods—Cars—Trials—Nonsuit—Appeal and Error—Harmless Error.*—A carrier furnished an unsuitable car for the shipment of merchandise, and the connecting carrier received this car with its contents and forwarded it to its destination, where, upon delivery the goods were found by the consignee to be in bad condition. In an action to recover for the damage alleged thus negligently to have been caused to the shipment, it is held that a judgment as of nonsuit upon the evidence rendered in favor of the delivering carrier is only to the prejudice of the plaintiff, and if erroneous was harmless as to the initial carrier appealing therefrom. *Lucas v. R. R.*, 264.

24. *Appeal and Error—Joint Defendants—Evidence as to One—Trials—Instructions.*—Where in an action against two defendants evidence is properly admitted as to one of them, objected to by the other, and the jury properly instructed as to which defendant it should be considered, it will be presumed on appeal that the jury had sufficient intelligence and honesty to understand and apply the instruction, and no error will be found. *Ibid.*

25. *Trials—Instructions—Contentions—Appeal and Error.*—Where a part of a charge of the court to the jury, excepted to, does not purport to be a statement of the law, but only the contentions of the adversary party, it will not be held for error on appeal. *Ibid.*

APPEAL AND ERROR—*Continued.*

26. *Appeal and Error — Objections and Exceptions — Questions—Answer Irrelevant—Motions.*—Where a question asked a witness is competent, and the answer is not responsive, and incompetent, the exception should be to the answer and not to the question; the procedure being upon motion to strike out the answer, or that the jury be instructed to disregard it. *Hodges v. Wilson*, 323.

27. *Appeal and Error—Harmless Error.*—It is held in this case, involving the title to certain standing timber, that the unnecessary admission of certain records in evidence, upon the question of title to the lands, was harmless error. *Riley v. Carter*, 334.

28. *Witness, Expert—Qualifications—Appeal and Error—Assignments of Error.*—The findings of the trial judge upon the question of whether a witness had qualified as an expert, when there is evidence thereof, is conclusive on appeal; and when an assignment of error relates solely to the sufficiency of such qualification, it may not be extended so as to include objections raised otherwise to his testimony. *Rangeley v. Harris*, 358.

29. *Jurors—Selection—Prejudice—Trials—Court's Discretion—Appeal and Error.*—It is within the province of the trial judge to see that questions extraneous to the case and tending to prejudice the jury are not asked the jurors being selected for the trial, and such matters as are within his discretionary power are not reviewable on appeal in the absence of its abuse. In this case, it appearing among other things that the appellant had not exhausted his peremptory challenges, his exception is untenable. *Walters v. Lumber Co.*, 388.

30. *Appeal and Error—Assignments of Error—Exceptions Abandoned.*—Exceptions not brought forward in the assignments of error are deemed abandoned on appeal. *Brown v. R. R.*, 392.

31. *Intervenors — Judgments — Motions—Trials—Appeal and Error.*—The plaintiffs in an action to recover of the defendant damages to their lands, seized certain personal property of the defendant under attachment, which the intervenors claimed as their own. The defendant filed no answer, the cause was regularly tried, and the jury found the issues in plaintiff's favor, including that as to the intervenors' ownership of the property. At a subsequent term of the court the trial judge set aside the judgment rendered against the defendant, upon motion of the intervenors, and on appeal by the plaintiff it is held for reversible error, for that the intervenors were only interested in the issue involving their title. *Forbis v. Lumber Co.*, 403.

32. *Trials — Evidence — Corporations—Issues—Partnerships—Objections and Exceptions—Appeal and Error—Harmless Error.*—Where the right of the intervenors in an action involving the title to certain property, attached by the plaintiff, depends upon whether the defendant was a corporation or a partnership comprising the intervenors, admissions of the intervenors that the defendant was a chartered company, and had acquired and held property as such, are sufficient evidence for the jury upon the question; and if in this case there was error in admitting the evidence, it was rendered harmless by subsequent testimony to that effect of the same witness without objection. *Ibid.*

APPEAL AND ERROR—*Continued.*

33. *Railroads—Master and Servant—Appeal and Error—Trials—Instructions—Harmless Error.*—Where, in an action for damages, a railroad company is held responsible for the negligent manner in which its baggage master handled a pistol, in the course of his employment, which caused the death of another employee of the company, it is error for the trial judge to charge the jury that they must find that the baggage master was also negligent in leaving the pistol in the drawer of a desk in the baggage-room, from the evidence thereof; but the jury having found the issue of negligence in plaintiff's favor, it is not prejudicial to the defendant, the appellant. *Moore v. R. R.*, 439.

34. *Appeal and Error—Objections and Exceptions—Trial Court—Procedure—Quantum Valebat—Contracts.*—The Supreme Court will not decide a question on appeal that has not been properly presented to the consideration of the trial judge, and exceptions noted as required by the rules of procedure; and in this case, the plaintiff having only sued upon a contract for the exclusive sale of goods in violation of our statute, it is held that the question as to whether a recovery could be had upon a *quantum valebate* may not be determined. *Fashion Co. v. Grant*, 453.

35. *Trials—Fraud—Instructions—Prejudice—Issues—Appeal and Error.*—Where a deed absolute on its face is alleged to have been obtained by threats and undue influence, and the plaintiffs contend that it should have been a mortgage, it is reversible error for the trial court, in instructing the jury, to tell them that if the plaintiffs' contention be true it would stigmatize the defendants as being guilty of a "base and dirty fraud," for such would probably bias the jury in passing upon the issues; and it is further held for error that the judge refused to submit the issues tendered by the plaintiff in this case, which are approved. *Ray v. Patterson*, 512.

36. *Appeal and Error—Record—Instructions.*—Where it does not appear from the record that there was any evidence, or aspect of the controversy, which would make a prayer requested for special instruction applicable, the refusal of the trial court to so instruct will not be held for error. *Pharr v. Commissioners*, 523.

37. *Trials — Instructions — Verdict, Directing—"Believe the Evidence"—Appeal and Error.*—A requested instruction directing an answer by the jury to an issue of negligence if they believe the evidence, withdraws from their consideration everything except the credibility of the evidence, and is erroneous, in depriving them of the power of determining whether the fact of negligence has been established if the evidence is believed by them. *Alexander v. Statesville*, 527.

38. *Appeal and Error—Issues—Objections and Exceptions—Acquiescence—Procedure.*—For a party to an action to take advantage on appeal of the submission of an issue claimed by him to have been improper, he should have excepted to the submission of the issue and the evidence tending to establish it on the trial; and where he has not only failed in these respects, but has had the benefit of two trials, wherein he acquiesced in or insisted upon the submission of the issues, he will be bound by his conduct in that respect, and will not be permitted to rely upon a contrary position in the Supreme Court. *Holton v. Moore*, 549.

APPEAL AND ERROR—*Continued.*

39. *Appeal and Error—Case Settled—Exceptions.*—Where in the statement of case the trial judge finds a certain matter relative to the controversy as a fact, and no exception has been taken, it will not be considered on appeal. *Boger v. Lumber Co.*, 557.

40. *Attachment — Undertaking — Signing — Trials—Courts—Corrections — Appeal and Error.*—In issuing a warrant of attachment the officer is directed by the statute, Revisal, sec. 763, "to require a written undertaking with sufficient surety," without prescribing any rule as to its execution, and a signing and delivery would be sufficient; and objection that the undertaking was not "subscribed," but was signed by the applicant to the justification instead of to the undertaking itself, is without merit; and were the objection otherwise tenable, upon the finding of the justice of the peace at the trial that the undertaking was intended to have been properly signed, but was signed at the wrong place by mistake or inadvertence, an order is properly made by him allowing the correction to be made. *Ibid.*

41. *Trials—Malicious Prosecution—Amendments—Distinct Cause—Appeal and Error.*—Unless done with the consent of the defendant in the action, it is not within the discretion of the trial judge to permit an amendment to the complaint setting forth an additional and substantially a new cause of action; and where damages are sought for malicious prosecution, with allegation that the plaintiff was arrested and convicted before a justice of the peace, and acquitted in the Superior Court on appeal, an amendment, permitted during the argument of the civil action, alleging plaintiff was tried upon a bill presented to the grand jury by the solicitor and acquitted, is held for reversible error. *Cooper v. R. R.*, 578.

42. *Jurors—Challenges—Trials—Prejudice—Principal and Surety—Indemnity Company—Appeal and Error.*—In an action to recover damages from a corporation for a personal injury alleged to have been by it negligently inflicted upon the plaintiff, it is reversible error for the trial judge to permit the plaintiff's attorney to ask the jurors being selected for the trial of the cause, whether any of them is employed by any indemnity company that insures against liability for a personal injury, when there is no indication or evidence that the defendant was insured against such loss, for the tendency of such question is to prejudice the jury against the defendant and unduly embarrass it upon the trial. *Starr v. Oil Co.*, 587.

43. *Trials — Courts — Corporations — Stockholders—Evidence—Prejudice—Irrelevant Questions—Appeal and Error.*—The trial court should see that the parties litigant have a fair and impartial trial before a jury when issues of fact are presented to them, and exclude irrelevant matters that would have the tendency to prejudice either side. Therefore, in this action to recover damages against a corporation for a personal injury alleged to have been negligently inflicted on the plaintiff, it is held for reversible error that the defendant's witness was permitted by the trial judge to be cross-examined on the question of whether the stockholders in defendant corporation were citizens of the community in which the action was being tried. *Ibid.*

44. *Divorce—Adultery—Appeal and Error—Ex Memo Motu.*—In an action for divorce of the husband on the ground of adultery of his wife, it is incompetent for the husband to testify that the wife had a certain

APPEAL AND ERROR—*Continued.*

contagious venereal disease, of which he had been free, under circumstances tending necessarily to establish her improper relations with other men (Revisal, secs. 1564, 1630, 1636); and the statute expressly forbidding testimony of this character being positive and enacted in the interest of society, it is the duty of the trial judge to exclude it, and upon his failure to have done so, the Supreme Court, on appeal, will consider its incompetency *ex mero motu*. *Hooper v. Hooper*, 605.

45. *Railroads—Backing Trains—Contributory Negligence—Issues—Harmless Error—Appeal and Error.*—The plaintiff, with the knowledge of defendant railroad company's employees, had for some time been engaged at the defendant's depot in directing his team driver in removing freight which had arrived over defendant's road. At this place a public street crossed the railroad's main and side tracks, on the latter of which two empty and detached box cars had stood for quite a while. Plaintiff was momentarily standing in the street upon this side-track, giving directions to his driver, when, without notice or warning, defendant's employes attempted to attach these box cars to the engine, and the cars, being without brakes on, ran down upon the plaintiff, to his injury. The evidence held sufficient upon the issue of defendant's negligence, and the submission of the issue of contributory negligence to the jury was not error of which defendant could complain. *Meroney v. R. R.*, 611.

46. *Reference — Evidence — Court's Findings — Trusts — Interest—Appeal and Error.*—Where the findings of fact of the trial judge in passing upon a report of a referee are made upon legal evidence introduced upon the referee's hearings, they are not subject to the consideration of the Supreme Court on appeal; and in this action the trial court necessarily held, as a conclusion of law from the facts found, that the trustee was not chargeable with interest in favor of the trustor. *Lance v. Russell*, 626.

47. *Limitation of Actions — Permanent Damages — Trials—Evidence Restricted—Special Requests—Appeal and Error.*—Where the three-year statute of limitations is pleaded and relied on as a defense to an action, and the record of a former action between the same parties is competent to show that the statute has not run, the exception of the defendant that the trial court did not restrict this evidence, and that it may have been considered by the jury as substantive evidence, may not be sustained on appeal, where the defendant has not aptly requested the judge to so restrict it in accordance with Supreme Court Rule 34, 164 N. C., 548. This being an action for permanent damages to lands, the five-year statute was applicable, which had not run in favor of the defendant railroad. Revisal, sec. 394 (5). *Owenby v. R. R.*, 641.

48. *Trials—Instructions—Correct in Part—Measure of Damages—Exceptions—Appeal and Error.*—Where the charge of the court upon the measure of damages in an action to recover them states general but correct principles of law applicable to the issue, an exception that he did not sufficiently instruct the jury will not be sustained, it being required of the appellant that he should have tendered special prayers containing the specific instructions he desired to be given. *Ibid.*

APPEAL AND ERROR—*Continued.*

49. *Reference—Confirmation by Court—Statements as to Adjudication—Appeal and Error.*—The statement made of record by the trial judge in passing upon the report of the referee to whom the controversy had been referred, that he had heard the argument of counsel, examined and considered the record, the evidence, report and exceptions filed, before entering the order confirming the report, is conclusive on appeal, and not open to the exception of the appellant that he had failed to deliberate and pass upon an exception he had entered to the report. *Fisher v. Toxaway Co.*, 663.

50. *Appeal and Error — Objections and Exceptions — Unanswered Questions.*—Exceptions to unanswered questions, without indication of their relevancy or materiality, will not be considered on appeal. *Wallace v. Barlow*, 676.

51. *Municipal Corporations—Sewage—Nuisance—Damages to Lands—Adjacent Owners.*—The right to recover damages of a municipality caused by its improper method of emptying its sewage into a stream is not confined to adjoining lands lying thereon, for this right extends to adjacent lands injured thereby, whether the medium of pollution is through the water or through that of the air carrying objectionable and contaminating odors, etc., resulting in a serious injury to or a reduction in the value of the lands. *Rhodes v. Durham*, 679.

APPEARANCE.

Special Appearance—Process—Service—Corporation—Agent.—The trial judge should find the facts upon which he, upon special appearance of the defendant for the purpose, dismisses an action for the want of proper service of process; and when it appears on appeal that the action commenced in a magistrate's court, and service of process had been attempted upon the alleged agent of a corporation and upon the Secretary of State (Revisal, Sec. 1243), and the judgment of the magistrate was that service on the Secretary of State was a valid service and that on the agent was insufficient, which latter ruling was reversed in the Superior Court, it was error in the trial judge to refuse to hear and consider the affidavit tending to show a valid service on the agent, as that was a question also presented and involved in the appeal. *White v. Peanut Co.*, 132.

ASSESSMENT. See Counties; Municipal Corporations.

ASSIGNMENTS OF ERROR. See Appeal and Error.

ATTACHMENT.

Attachment—Undertaking—Signing—Trials—Courts—Corrections—Appeal and Error.—In issuing a warrant of attachment the officer is directed by the statute, Revisal, sec. 763, "to require a written undertaking with sufficient surety," without prescribing any rule as to its execution, and a signing and delivery would be sufficient; and objection that the undertaking was not "subscribed," but was signed by the applicant to the justification instead of to the undertaking itself, is without merit; and were the objection otherwise tenable, upon the finding of the justice of the peace at the trial that the undertaking was intended to have been properly signed, but was signed at the

ATTACHMENT—*Continued.*

wrong place by mistake or inadvertence, an order is properly made by him allowing the correction to be made. *Boger v. Lumber Co.*, 557.

ATTORNEY AND CLIENT. See Appeal and Error, 3.

BILLS AND NOTES.

1. *Bills and Notes—Fraud—Burden of Proof.*—Where fraud in the procurement of a note is pleaded as a defense to its payment, with evidence tending to establish it, the burden of proof is on the plaintiff claiming to be a holder in due course, to show that he purchased in good faith and without notice of any infirmity or defect, for value and before maturity. *Trust Co. v. Whitehead*, 74.

2. *Same — Infirmity — Default in Interest — Notice — Evidence.* — As to whether default in payment, when previously due, of interest on a negotiable note acquired before maturity is alone evidence of notice of the infirmity of the instrument, *Quære.* But in this case it is held sufficient to be submitted to the jury with the further evidence that the note was purchased at a considerable discount, and the maker was sued in another State when the indorser was solvent, lived in the same town with the plaintiff, and had not been sued on his indorsement. *Ibid.*

3. *Pleadings—Trials—Evidence—Questions for Jury—Bills and Notes—Banks and Banking—Collaterals—Fraud—Rights of Creditors.*—The plaintiffs, husband and wife, in their action against a bank, alleged that the defendant was endeavoring to apply collateral notes of the *feme* plaintiff to the security of a note held by the bank, made by her husband to its director and obtained by fraud and collusion between him and the defendant. These allegations were denied in the answer, which further alleged that the male plaintiff was the owner of the lands, securing the collateral notes, and that these notes were given for the purchase price, and that he had had the lands conveyed to his wife to defraud his creditors, one of whom was the director, its indorsee; the answer also alleged that the *feme* plaintiff was not the real owner of the collaterals, but if so, she had given full authority for the defendant to hold them as collateral to her husband's note: *Held*, the pleadings raised issues of fact to be submitted to the jury, and a judgment thereon in plaintiff's favor was erroneous. *Newsome v. Bank*, 91.

4. *Bills and Notes—Fraud—Holder in Due Course—Burden of Proof.*—Where fraud in the execution of a negotiable note has been shown, the burden of proof is on the plaintiff, an indorser thereof, and claiming as a holder in due course, to show not only that he acquired the paper for value before maturity, but also without notice of the infirmity of the instrument. Revisal, secs. 2201, 2208. *Bank v. Branson*, 344.

5. *Same—Constructive Notice.*—Where the plaintiff sues on a negotiable note, claiming to be a holder in due course, and fraud in its execution is shown, the defendant may prove actual or constructive notice of fraud in rebuttal of the plaintiff's evidence, if he has offered sufficient proof to require it, or he may rely upon the plaintiff's own evidence upon the issue as to whether he knew or should have known of it. *Ibid.*

BILLS AND NOTES—*Continued.*

6. *Same—"Without Recourse"—Trials—Evidence.*—An Indiana bank sued the maker of a note, given for a Percheron horse, in our Courts, the execution of which was shown to have been procured by the fraud of the payee. The testimony of the plaintiff's cashier, in its behalf, tended to show that the payee, a corporation, already owing the bank in a large amount, executed its note to the bank, indorsed by one of its solvent officers, and pledged the note in question with a number of like notes, all indorsed without recourse, as collateral, without any investigation of the solvency of their makers; and, at the request of the payee, agreed to have recourse against the makers of the collateral notes before suing the payee and its indorser on the principal note, and who lived in the same city with the plaintiff. His testimony was conflicting as to whether the plaintiff really accepted the collateral notes without recourse: *Held*, that while the indorsement without recourse was no evidence upon whether the plaintiff acquired the note sued on as a *bona fide* purchaser without notice of its imperfection, it was sufficient to go to the jury, taken in connection with the other circumstances of the case. *Ibid.*

7. *Bills and Notes—Fraud and Collusion—Trials—Evidence—Principal and Agent—Burden of Proof—Contracts—Consideration.*—The plaintiff sued defendant on a note of the latter given for the sales rights of a patented article in a certain territory, the contract or deed therefor being signed by the plaintiff as agent. Parol evidence of the contents of a written appointment of the plaintiff as agent of D. was received without defendant's objection. There was testimony tending to show that defendant bought the sales rights solely for A. at his request and upon his statement that the plaintiff, a partner of his, would not deal with him; and also that A., for whom the plaintiff assumed to act, was in fact the same person as D. The defendant pleaded as a defense, fraud and collusion between the plaintiff and A., and a lack of consideration for the note: *Held*, (1) the burden of proof was upon the plaintiff to establish his agency for D., the sufficiency and credibility of the testimony being for the jury; (2) the evidence of fraud and collusion between the plaintiff and A. was sufficient to sustain an affirmative verdict on that issue and to set the transaction aside for failure of consideration. *Rangeley v. Harris*, 358.

8. *Witness, Expert—Qualifications—Appeal and Error—Assignments of Error.*—The findings of the trial judge upon the question of whether a witness had qualified as an expert, when there is evidence thereof, is conclusive on appeal; and when an assignment of error relates solely to the sufficiency of such qualification, it may not be extended so as to include objections raised otherwise to his testimony. *Ibid.*

9. *Bills and Notes—Failure of Consideration—Burden of Proof.*—Where in an action upon a promissory note the plaintiff has shown its execution, the demand for payment at or after maturity and its nonpayment, the burden of proof is on the defendant, maker, to show the want of consideration, when such defense is relied on. *Piner v. Brittain*, 401.

10. *Contracts—Pleadings—Consideration—Bills and Notes—Trials—Evidence—Impeachment.*—In an action upon a note given in the en-

BILLS AND NOTES—*Continued.*

deavor to establish a technical school at S., in which both the plaintiff and defendant were interested, the defense was interposed that the defendant should not pay the note in the event the school was not established, and that he only obligated himself to use his best efforts to establish the school, which he had done: *Held*, evidence that the plaintiff held certain of his property at too high a value for the promotion of the enterprise is irrelevant; and the failure to vote for the school is not sufficient or competent to impeach the plaintiff's integrity in the matter. *Institute v. Mebane*, 644.

11. *Statute of Frauds—Contracts to Convey—Written Promise—Bills and Notes.*—It is not required by the statute of frauds that the writing necessary to enforce an agreement for the conveyance of lands should be "subscribed" by the owner; but it is necessary that it should contain a promise of some sort by the owner to make the conveyance upon the payment by the purchaser of the consideration agreed upon (Revisal, sec. 976); therefore the acceptance by the owner of a promissory note given by the purchaser, and stated to be for the amount of the purchase price of lands, will not alone be a sufficient compliance with the statute; and there being no valid contract, it follows that damages may not be recovered for a breach thereof. *Burriss v. Starr*, 657.

BOND ISSUE. See Drainage Districts, 5, 6; Municipal Corporations, 7, 8, 13.

BOUNDARIES. See Deeds and Conveyances.

BRIEFS. See Appeal and Error.

BURDEN OF PROOF. See Bills and Notes; Trials; Deeds and Conveyances; Wills, 11.

CALLS. See Deeds and Conveyances.

CANCELLATION. See Wills, 11.

CARRIERS OF GOODS.

1. *Appeal and Error—Harmless Error—Carriers of Goods—Connecting Lines—Judgments.*—In an action to recover damages to a shipment of goods against two connecting carriers alleged to have been caused while in their possession, an issue as to each carrier was submitted to the jury, and the issue of negligence as to one of them was answered in defendant's favor and, as to the other, in plaintiff's favor: *Held*, exceptions arising under the first of the issues are harmless as to the appealing defendant. *Lyon v. R. R.*, 143.

2. *Carriers of Goods—Bills of Lading—Parol Contracts.*—When a carrier has received goods for transportation over its own and a connecting line which were not delivered. and upon consignor's parol request it has them reshipped to the initial or starting point, the latter agreement for reshipment, though resting in parol, is sufficient in an action for damages to the goods occurring while in the carrier's possession. *Ibid.*

3. *Carriers of Goods—Delivery—Bad Condition—Prima Facie Case—Trials—Burden of Proof.*—Where a shipment of goods is received by the consignee from the final carrier in bad condition, and there is evi-

CARRIERS OF GOODS—*Continued.*

dence that this carrier received the goods from its connecting carrier in good condition, a *prima facie* case of negligence is made out against the delivering carrier, and presents sufficient evidence thereof to be submitted to the jury, with the burden of proof on it. *Ibid.*

4. *Carriers of Goods—Connecting Lines—Joinder—Interpretation of Statutes.*—Where a carrier has accepted a shipment beyond its own line, and upon its not being delivered, agrees by parol to have it reshipped to the starting point, and delivery is made there in bad condition, a joinder of causes of action against the two defendants to recover damages to the shipment while in their possession is proper. Revisal, sec. 469. *Ibid.*

5. *Pleadings—Liberal Construction—Connecting Lines—Carriers of Goods—Interpretation of Statutes.*—Pleadings should be liberally construed so as to present the case upon its real merits (Revisal, sec. 495), and in this case they are held sufficient to determine the negligence of either of the two connecting carriers in damaging a shipment of goods while in their possession, either in shipping to the first destination, where failure of delivery was made, or upon the return trip, agreed upon by them. *Ibid.*

6. *Carriers of Goods—Connecting Lines—Carmack Amendment.*—The Carmack amendment, exempting a carrier from liability for damages to goods caused by the negligence of a connecting carrier, has no application where the damages arise from its negligence, on its own line. *Ibid.*

7. *Carriers of Goods—Receipt in Good Condition—Trials—Evidence.*—A carrier is responsible for damages to a shipment caused by its own negligence, and a receipt by the consignee for the goods, as being in good condition, and without objection, is only evidence upon the question as to whether the carrier had damaged them. *Ibid.*

8. *Carriers of Goods—Negligence—Live Stock—Trial—Issues—Evidence.*—It appearing in this case that the question of defendant railroad company's negligence and its liability for damages to a shipment of live stock was made to depend upon an issue as to whether a stock chute, used for unloading the stock, was defective, and as a fact from the record on appeal that the "chute was of the character and construction ordinarily" used for the purpose, "was in good condition and apparently had no defects," a new trial is ordered. *Holton v. R. R.*, 155.

9. *Carriers of Goods—Unsuitable Cars—Connecting Carriers—Negligence.*—A carrier should use cars suitable for the transportation of goods delivered to it, and its failure to do so will subject it to liability for the damages the goods sustain in consequence; and the connecting carrier will also be liable for the damages to the goods thus caused while they are being transported over its own line. *Lucas v. R. R.*, 264.

10. *Same—Trials—Nonsuit—Appeal and Error—Harmless Error.*—A carrier furnished an unsuitable car for the shipment of merchandise, and the connecting carrier received this car with its contents and forwarded it to its destination, where, upon delivery the goods were found by the consignee to be in bad condition. In an action to recover for the damage alleged thus negligently to have been caused to

CARRIERS OF GOODS—*Continued.*

the shipment, it is held that a judgment as of nonsuit upon the evidence rendered in favor of the delivering carrier is only to the prejudice of the plaintiff, and if erroneous was harmless as to the initial carrier appealing therefrom. *Ibid.*

11. *Carriers of Goods—Unsuitable Cars—Trials—Negligence—Evidence.*—Where a consignor makes a shipment of potatoes to his own order, which arrives at destination in a bad or damaged condition, and there is evidence that the carrier loaded them in an unventilated car, recently used for transporting fertilizer, with some of the fertilizer remaining therein, and testimony by witnesses qualified to speak from their own experience and observation that potatoes so shipped would rot or spoil in the time required for their transportation, it is sufficient to be submitted to the jury upon the question of the liability of the defendant for the damages caused by its negligent use of an unsuitable car. *Ibid.*

12. *Mental Anguish — Express Companies — Trials — Negligence—Burial Caskets—Damages.*—An express company is liable for mental anguish caused to a husband by its negligent delay in transporting and delivering a burial casket to be used in the interment of his wife, of which the receiving agent was informed at the time; and where by reason of such failure the husband was forced to bury his wife in a makeshift or cheap casket, the ground for such recovery is sufficiently shown. *Byers v. Express Co.*, 542.

13. *Same—Contracts—Lex Loci—Federal Decisions—Interstate Commerce.*—Where an express company is liable under our laws for mental anguish for its negligent failure to promptly transport and deliver a metal casket to be used in the interment of the plaintiff's wife, and the contract of shipment is made here, the question of recovery is not dependent upon the Federal decisions in relation to interstate commerce. *Ibid.*

14. *Same—Special Damages—Hepburn Act.*—The Hepburn act with the Carmack amendment, authorizing a common carrier, under certain circumstances, to limit the amount of recovery in the event of its negligence in regard to interstate shipments, relates only to the damage which may thereby have been occasioned to "property," decreasing its value, and has no application to a recovery of special damages caused by the negligent delay by the carrier in its transportation and delivery, where such are otherwise recoverable; notwithstanding a contrary stipulation in the bill of lading. *Ibid.*

15. *Mental Anguish—Express Companies—Negligent Delay—Shipment Refused—Value of Shipment—Receipt—Right of Action—Estoppel.*—Where an express company is liable to the plaintiff in an action to recover damages for mental anguish it has caused him in its negligent delay in the shipment or delivery of a burial casket, which consequently came too late at its destination, and was therefore refused, he is not barred of his right to recover therefor by receiving or receipting for the amount of money he had lost on that account. *Ibid.*

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers—Alighting from Moving Train—Invitation—Contributory Negligence.*—A passenger upon a moving railway train

CARRIERS OF PASSENGERS—*Continued.*

is not justified in jumping therefrom to his injury by the mere fact that he is being carried away from his station; though he may recover for the consequent damages he has sustained if his act was upon the inducement or suggestion of an employee of the train, acting within the scope of his duties, when the circumstances are such that a person of ordinary care and caution would apprehend no danger in doing so, and provided he otherwise exercised due care in alighting. When the evidence is conflicting, the question is one for the jury. *Carter v. R. R.*, 244.

2. *Same—Trials—Evidence—Verdict—Judgments.*—Where a passenger on a railway train has been injured by jumping therefrom while the train is in motion, and the evidence in his action to recover damages is conflicting as to whether he did so upon the inducement or invitation of the porter thereon, or whether the train was moving at such speed that a person of ordinary prudence and caution would, notwithstanding, have not done so, and under proper instructions the jury have answered the issue of contributory negligence in the defendant's favor, it is established by the verdict that the plaintiff was negligent in either one or the other of the views presented, and a judgment denying recovery is properly rendered, though the first issue, as to defendant's negligence, has been found in plaintiff's favor. *Ibid.*

3. *Carriers of Passengers—Alighting from Moving Train—Contributory Negligence—Trials—Evidence.*—It is contributory negligence for a passenger to attempt to alight from a railway train running 10 to 15 miles an hour, notwithstanding he was told to do so by an employee in charge of the train; and in this case it is further held that the manner in which the plaintiff struck the ground and was injured was some evidence as to the speed of the train, and it was not improper for the court to so state in the charge. Ibid.

4. *Carriers of Passengers—Fares for Children—Expulsion from Train—Return of Ticket—Damages.*—Where a conductor has taken up the ticket of a person traveling with his child for whom a half ticket is required, but has not been purchased and who is unable to pay the fare of the child with the extra fare allowed when a ticket has not been regularly purchased, his right to put the child, being *non sui juris*, off the train is dependent upon the return of the ticket he has collected from the father, or its equivalent, and if he acts without having done this, the expulsion is unlawful, and the railroad company is responsible in damages. *Lankford v. R. R.*, 653.

CASE. See Appeal and Error, 39.

CERTIORARI. See Removal of Causes; Habeas Corpus.

CHILDREN. See Negligence; Master and Servant, 25.

CITIES AND TOWNS. See Municipal Corporations; Venue.

CLERKS OF COURT. See Courts.

1. *Clerks of Court—Executors and Administrators—Appointment—Incomplete Letters.*—Upon application for letters of administration, which is not required to be in writing, the clerk is authorized to ascertain the jurisdictional facts empowering him to act, by affidavit or other-

CLERKS OF COURT—*Continued.*

wise (Rev., sec. 26); and his passing upon the question of issuing the letters is a judicial act, while the making up of the record is a ministerial one, furnishing evidence of the appointment. *Dallago v. R. R.*, 269.

2. *Same—Courts—Orders Nunc Pro Tunc.*—Where the court has appointed an administrator, but has failed to fill out the blank spaces left in the printed forms of the letter, and the applicant has in all respects conformed to the law as to the matters required of him, it is proper for the court, in an action brought by such administrator, to permit the clerk to fill out the spaces as of the date of the appointment. *Ibid.*

CLOUD ON TITLE. See Equity, 3.

COLOR OF TITLE. See Evidence, 5; Deeds and Conveyances, 28, 32, 34; Limitation of Actions, 5, 7, 8.

COLLATERALS. See Bills and Notes.

COMMERCE. See Statutes, 29.

Interstate Commerce—Railroads—Failure to Settle Overcharges—Statutes—Constitutional Law.—A recovery from a railroad company for overcharges on a shipment of goods (Revisal, sec. 2644), and the penalty prescribed by section 2643 for failure to refund the overcharges within the time specified, is not an interference with interstate commerce when the goods have been shipped here from another State. Our statutes on the subject are constitutional and valid. *Thurston v. R. R.*, 598.

CONDEMNATION. See Schools and School Districts; Easements.

CONNECTING CARRIER. See Carriers of Goods.

CONSIDERATION. See Partnerships, 1; Contracts; Bills and Notes, 7, 9.

CONSTITUTION OF NORTH CAROLINA.

ART.

IV, sec. 8. *Habeas corpus* proceedings, in proper instances, may be reviewed by the Supreme Court by *certiorari*. *In the Matter of Wiggins*, 457.

VII, sec. 7. It is necessary to the validity of a bond issue that a majority of the qualified voters of the municipality favorably express themselves by their ballot. *Sprague v. Commissioners*, 603.

VII, secs. 2-14. Legislature may authorize road commission to issue bonds. *Commissioners v. Commissioners*, 632.

VII, sec. 7. Legislature may give road commissioners the same power to bonds as is given county commissioners. *Commissioners v. Commissioners*, 632.

XIV, sec. 7. The acts of one holding an "office or place of profit" after accepting another such office, are not those of an officer *de facto*, as he then acts without authority and "color" as to the first office. *Whitehead v. Pittman*, 89.

CONSTITUTIONAL LAW.

1. *Constitutional Law—Cities and Towns—Condemnation—School Purposes.*—The taking of lands for the purposes of public schools is for a public use, in contemplation of our Constitution; and an act of the Legislature empowering a town to condemn land for such purposes is constitutional. *School Trustees v. Hinton*, 12.

2. *Judicial Sales—Estates—Contingent Remainders—Interpretation of Statutes—Constitutional Law.*—Revisal, sec. 1591, rendering valid judgments authorizing the sale of lands wherein there are contingent remainders, is constitutional and valid. *Bullock v. Oil Co.*, 63.

3. *Constitutional Law—Two Officers—Acceptance.*—Where one holding an "office or place of profit" accepts another such office or position in contravention of Article XIV, sec. 7, of the Constitution, the first is vacated *eo instanti*, and any further acts done by him in connection with the first office are without color, and cannot be *de facto*. *Whitehead v. Pittman*, 89.

4. *Same—Quo Warranto—Cities and Towns—Cotton Weigher.*—In an action to oust a present incumbent from the position of cotton weigher of a town elective by its commissioners, where the complainant is dependent upon a vote in his favor by a commissioner who had accepted the position of county superintendent of public instruction, the vote relied upon is void, and the action will fail. *Ibid.*

5. *Habeas Corpus—Appeal and Error—Certiorari.*—An appeal from the determination of the judge before whom the proceedings upon a writ of *habeas corpus* is heard will not lie, except in cases concerning the care and custody of children; though an applicant in proper cases where an adverse judgment presents questions of law or legal inferences and amounts to a denial of a legal right may have the judgment reviewed on *certiorari*. Constitution, Art. IV, sec. 8. *In re Wiggins*, 457.

6. *Municipal Corporations—Bond Issues—Necessaries—Vote of People—Constitutional Law—Statute Invalid in Part.*—Waterworks, sewerage, and electric lights are, under reasonable circumstances, necessities for which a municipality, acting under the authority of a statute, may issue bonds without submitting the question to the qualified voters of the municipality; and where the statute authorizes such issue, including schools and school buildings, without provision for submitting the question to the qualified voters, leaving the matter of their necessity to the aldermen of the town, bonds issued under a proper town ordinance for such of the purposes as are regarded as necessary are valid, when the provisions of the statute are complied with. *Gastonia v. Bank*, 507.

7. *Municipal Corporations—Bond Issues—Necessaries—Limitation of Levy—Interest—Sinking Fund—Constitutional Law.*—Where bonds are issued by a municipality, under statutory authority, for necessary purposes, without provision for a special levy of taxes to pay the interest or create a sinking fund, and in the municipal charter there is a limit fixed to the power of levy, the city has the power to pay the interest on and create a sinking fund for the bonds from its general revenue derived under the limit fixed to its taxing power, if sufficient; and if not sufficient, the bonds will not be declared invalid,

CONSTITUTIONAL LAW—*Continued.*

especially at the suit of one who has purchased with knowledge of the circumstances. *Ibid.*

8. *Interstate Commerce—Railroads—Failure to Settle Overcharges—Statutes—Constitutional Law.*—A recovery from a railroad company for overcharges on a shipment of goods (Revisal, sec. 2644), and the penalty prescribed by section 2643 for failure to refund the overcharges within the time specified, is not an interference with interstate commerce when the goods have been shipped here from another State. Our statutes on the subject are constitutional and valid. *Thurston v. R. R.*, 598.

9. *Municipal Corporations—Counties—Credit—Necessaries—School Purposes—Statutes—Constitutional Law.*—It is prohibited by our Constitution, Art. VII, sec. 7, that a county contract any debt, etc., unless approved by the majority of the qualified voters of that county, which is not for a necessary expense, notwithstanding the provisions of a statute to the contrary; and schools being held not to be an expense of this character, an issue of bonds for such purpose is invalid, though a majority of those voting thereon have expressed themselves by ballot in their favor, if such majority be not also that of the qualified voters of the county. *Sprague v. Commissioners*, 603.

10. *Municipal Corporations—Road Commissioners—Bond Issues—Constitutional Law—Senatorial Courtesy.*—Constitutional authority is conferred on the Legislature by Article VII, secs. 2 and 14, to create a public road commission of a county and invest these commissioners with the same powers conferred on the county commissioners with reference to pledging the faith and credit of the county for public road purposes which are conferred on the county commissioners by Article VII, sec. 7. of our Constitution; and as such purposes are held to be for necessary expenses of the county, and an issuance of bonds therefor has been authorized by statute, it is not required for the validity of the bonds that the question of their issuance has been submitted to the qualified voters of the county and has received the approval of a majority thereof. The objection that by "senatorial courtesy" this would practically put the power in the hands of a representative of a county to pledge its faith and credit, cannot properly be addressed to the courts. *Commissioners v. Commissioners*, 632.

CONTINGENT INTEREST. See Estates, 4.

CONTRACTS. See Carriers of Goods, 2; Insurance; Reformation of Instruments, 2; Tenants in Common, 1; Frauds, Statute of, 3, 4; Criminal Law, 1; Liens; Easements; Corporation Commission; Railroads, 12, 13; Bills and Notes; Vendor and Purchaser; Negligence, 29.

1. *Contracts—Breach—Damages—Negligence.*—Where A. enters into a contract with B. for the renting of a boat, wherein it is agreed that A. will keep it in good repair and return it in good condition, and the boat is returned in a damaged condition, A. is liable to B. for the damages arising from the breach of contract, irrespective of the question of negligence. *Robertson v. Lumber Co.*, 4.

CONTRACTS—*Continued.*

2. *Contracts—Agreement for Support of Intestate—Executors and Administrators—Evidence—Paper-writing—Corroboration.*—In an action on account against an administrator for the support and maintenance of his intestate, there was evidence tending to show that plaintiff, who had married a daughter of the intestate, moved upon the lands of the latter, cleared and cultivated same, and built a house thereon, wherein they all then lived, and that plaintiff supported the intestate in accordance with an agreement that it should be in consideration of his having the title to the land at her death. A paper-writing purporting to contain the agreement, signed by the mark of the intestate and witnessed, was found among the valuable papers of the witness, after his death, in an envelope stating it belonged to the plaintiff and was to be given to no other person. The handwriting on the paper and envelope was that of the deceased witness thereto: *Held,* (1) a motion to nonsuit was improperly granted; (2) the paper-writing was competent in corroboration of the parol contract. *Rooker v. Rodwell,* 80.

3. *Contracts—Options—Deeds and Conveyances—Statute of Frauds—Registration—Statutes.*—An option on lands is a conditional contract for a short period of time on the part of the owner that upon the payment of the contract price and the performance of the conditions named he will convey the same to the holder of the option; and while an agreement of this character is not a completed contract to convey the lands, it comes within the statute of frauds and our registration laws. *Ward v. Albertson,* 218.

4. *Contracts—Options—Consideration — Deeds and Conveyances.* — The agreed price for lands upon which an option of purchase has been obtained and the opportunity afforded the owner to sell, form the actual consideration upon which such contracts rest; and a further cash consideration of $5 is adjudged sufficient to bind the contracting parties. *Ibid.*

5. *Contracts—Options—Deeds and Conveyances—Equity—Specific Performance.*—The holder of a valid and binding option for the purchase of lands is entitled to specific performance of his contract. *Ibid.*

6. *Contracts—Options—Deeds and Conveyances—Tender.*—Where a valid and binding option for the sale of lands has been registered, and the owner has since then and contrary to its terms sold and conveyed them to another, it is required of the holder of the option, having notice of the conveyance, to make a lawful tender to the vendee, in accordance with the terms of his option; but where the vendor and his vendee are both parties to the action brought to enforce specific performance of the option, and the latter denies any rights of the plaintiff to recover, the tender of the agreed purchase price becomes unnecessary. *Ibid.*

6a. *Contracts—Reformation—Matters of Law.*—For a written instrument to reform itself, without the intervention of a jury, the intent of the parties that it should be so regarded must be clear and should appear from the writing itself, and evidence *dehors* will not be considered. *Torrey v. McFadyen,* 237.

CONTRACTS—*Continued.*

7. *Contracts—Options—Contracts to Convey—Time of the Essence.*—A. executed and delivered to B. a paper-writing in which he acknowledged the receipt of $322.75 and agreed to "sell and convey" to him "the exclusive right and option to purchase on or before 1 December, 1911," a certain tract of land, fully described, for the price of $1,783.88, payment to be made at stated times: *Held*, the form of the writing is that of an option, though called in its premises or preamble and indenture, and requires payment in strict accordance with its terms, and is not a contract to convey the lands, wherein time is not of the essence of the contract in respect to such payment, and where damages for its breach may be recovered. *Ibid.*

8. *Contracts—Reformation—Fraud—Mistake—Money Received—Trials—Preponderance of the Evidence.*—Where an unregistered option on lands has been given, which is sought to be reformed into a contract to convey them, and the lands have come into the hands of an innocent purchaser for value, so as to defeat the equity, the optionee, in his action to recover the money paid upon the allegation of false and fraudulent representations, is only required to establish his case by the preponderance of the evidence; and it is *Held* that the case may be tried upon one of two aspects: whether the parties mutually intended a contract instead of an option, and if so, whether the parties failed to express their real agreement by mutual mistake, or by the fraud of the one inducing the mistake of the other; or whether one of them was induced to part with his money by the fraud and deceit of the other. *Ibid.*

9. *Illegal Contracts—Statutes—Exclusive Sales—Courts.*—A recovery may not be had in the courts of this State upon a contract made in violation of an express prohibition of our statutes, as in this case, for goods sold and delivered under a contract in consideration that the purchaser should not sell the same commodity in his store manufactured by other parties, for such provision is in violation of chapter 167, sec. 1 (a), Public Laws 1911. *Fashion Co. v. Grant*, 453.

10. *Appeal and Error—Objections and Exceptions—Trial Court—Procedure—Quantum Valebat—Contracts.*—The Supreme Court will not decide a question on appeal that has not been properly presented to the consideration of the trial judge, and exceptions noted as required by the rules of procedure, and in this case, the plaintiff having only sued upon a contract for the exclusive sale of goods in violation of our statute, it is held that the question as to whether a recovery could be had upon a *quantum valebat* may not be determined. *Ibid.*

11. *Principal and Agent—Ratification—Acceptance of Benefits—Contracts—Repudiation in Part.*—Where the agent has, with the authority of his principal, made a sale of a machine, representing it as his own, but owned by his principal, to a corporation, and has exceeded his authority, with the knowledge of the principal, in taking shares of the corporation's stock in payment, in which transaction the principal has received and knowingly retained a substantial benefit, the principal may not take advantage of the transaction in part by retaining the benefits, and repudiate that part which appears to him to be to his disadvantage; and where, under such circumstances, the parties may not be placed, by a court of equity, *in statu quo*, the transaction will not be disturbed. *Publishing Co. v. Barber*, 478.

CONTRACTS—*Continued.*

12. *Contracts—Interpretation—Cutting Timber — Damages — Diminution—Personal Supervision—Employment Elsewhere.*—Where the plaintiff and defendant have entered into a contract whereby within the the term of two years the plaintiff was to cut the timber from the defendant's land at a specified price per thousand feet, and the defendant, by breach of this contract, has prevented the plaintiff from continuing to cut the timber in accordance with the terms of the agreement and where the plaintiff's damages are capable of being definitely ascertained, the defendant is not entitled to have the amount of the damages recoverable diminished by the time the plaintiff may have been absent from this work, being engaged elsewhere for profit, it appearing that the contract did not require the personal presence of the plaintiff, but only looked to the completion of the cutting in the time specified. *Bowman v. Blankenship*, 519.

13. *Contracts—Consideration—Legal Rights.*—Where one is induced to part with a legal right of value upon a promise by another to do a certain thing, there is a sufficient consideration to support the agreement and render it enforcible; and the mere inadequacy of the consideration may not be questioned. *Institute v. Mebane*, 644.

13a. *Same—Sale of Stock—Trials—Evidence—Questions for Jury.*—The plaintiff and defendant having agreed to take advantage of a legislative enactment and its provisions in establishing a technical school at S., agreed that a certain textile school at S. should properly be used there in that connection, and that it would be advantageous to also acquire, in connection with it, a certain furniture factory in which the plaintiff owned stock, the shareholders to sell their stock upon long-term notes to the textile school. There was evidence tending to show, in plaintiff's behalf, that he would only sell his stock in the factory upon condititon that the defendant would give his note therefor, and so informed the defendant, who thereupon gave a note with the textile school corporation in the amount named, and the plaintiff surrendered his shares of stock. In an action by the plaintiff upon the note, the defendant pleaded as a defense the want of consideration for the note, and it was held that it was for the jury to determine whether the note was given upon the condition named, the evidence being conflicting, and if so given, the note was made for a sufficient consideration to enforce its payment. *Ibid.*

14. *Contracts—Pleadings—Consideration—Bills and Notes—Trials—Evidence—Impeachment.*—In an action upon a note given in the endeavor to establish a technical school at S., in which both the plaintiff and defendant were interested, the defense was interposed that the defendant should not pay the note in the event the school was not established, and that he only obligated himself to use his best efforts to establish the school, which he had done: *Held*, evidence that the plaintiff held certain of his property at too high a value for the promotion of the enterprise is irrelevant; and the failure to vote for the school is not sufficient or competent to impeach the plaintiff's integrity in the matter. *Ibid.*

15. *Statute of Frauds—Contracts to Convey—Written Promise—Bills and Notes.*—It is not required by the statute of frauds that the writing necessary to enforce an agreement for the conveyance of lands should

CONTRACTS—*Continued.*

be "subscribed" by the owner; but it is necessary that it should contain a promise of some sort by the owner to make the conveyance upon the payment by the purchaser of the consideration agreed upon (Revisal, sec. 976); therefore the acceptance by the owner of a promissory note given by the purchaser, and stated to be for the amount of the purchase price of lands, will not alone be a sufficient compliance with the statute; and there being no valid contract, it follows that damages may not be recovered for a breach thereof. *Burris v. Starr*, 657.

16. *Contracts Under Seal—Consideration Implied.*—A compromise of a controverted matter is a sufficient consideration to uphold an agreement, and especially is this true when the party seeking to avoid it receives a substantial benefit thereunder, as in this case, having a cloud upon his title to lands removed; and where a note under seal has been received by him from the other party, under a compromise, the seal itself imports an enforcible consideration, and the note will not be declared invalid for a want thereof. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See Negligence; Trials.

CONVERSION. See Tenants in Common, 2.

CORPORATIONS. See Estoppel; Process, 1; Evidence, 8; Appeal and Error, 43.

1. *Corporations—Insolvency—Parties Defendant—Demurrer—Interpretation of Statutes.*—For one to be made a proper party defendant under Revisal, sec. 410, in an action to appoint a receiver for an insolvent corporation and administer its assets, he must claim an adverse interest to the plaintiff in the action and necessary to the complete determination or settlement of the questions therein involved; and his demurrer is good to a complaint which alleges that he wrongfully claims that the plaintiff is liable to him for some shares of stock he had sold him upon authority of the corporation, under an agreement to take back the stock and repay the purchase price in the event of dissatisfaction on the defendant's part; for such allegations negative the idea that the defendant has a cause of action either against the plaintiff or the corporation, and states no cause of action against the defendant. *Dailey v. Fertilizer Works*, 60.

2. *Corporations — Defective Organization — Legislative Amendments. — Semble*, the place for recording articles of incorporation taken out before the clerk were properly filed and recorded in the office of register of deeds of the county under Laws of 1871-'72, ch. 199, sec. 8; but were it otherwise, a corporation thus formed having all the attributes of a corporation *de facto*, towit, a *bona fide* attempted organization under a statute, and the consequent actual user of the incidental powers, can make a valid deed to lands it has thus acquired; and its powers to thus act can only be drawn in question by the State, on suit regularly entered. *College v. Riddle*, 211.

3. *Same—Curative Acts.*—A defective organizataion of a corporation under a general law authorizing it is cured by a legislative amendment to its original charter, and especially when the amendment

CORPORATIONS—*Continued.*

distinctly recognizes its corporate existence, is the State thereafter concluded from setting up the original defects. *Ibid.*

4. *Corporations—Deeds and Conveyances—Restrictive Powers—Conditions Subsequent.*—The original charter of a corporation provided, among other things, that the purpose of the corporation was to establish a female college, with authority to take, receive, and hold property, real and personal, which may be conveyed to the corporation, or its trustees and their successors for its use and benefit, etc.: *Held,* a habendum in a deed to land made to the corporation, its successors in office, for the only proper use and benefit of the corporation, does not so restrict the use of the lands to school purposes, under condition subsequent, as to invalidate a conveyance of the lands to a third person. *Church v. Ange,* 161 N. C., 314, cited and distinguished. *Ibid.*

5. *Same—Statutes—Intent.*—A deed to lands to be held for school purposes reserves in the grantor a possibility of reverter, which may be removed by a subsequent and unconditional deed from him; and the deed in question bearing date in 1880, it was made subject to the statute of 1879, now Revisal, sec. 946, and is to be construed in fee, it not appearing by construction that it was the intent of the grantor to pass an estate of less dignity. *Ibid.*

6. *Corporation—Deeds and Conveyances—Restrictive Powers—Parties—Tender of Deed—Judgment—Estoppel.*—A conveyance of lands was made to Claremont Female College, which by legislative amendment was changed to Claremont College and a conveyance of the land made from the trustees of the college under its former name to that under the amendment. The amendment placed the control and management of the college under the "Classis of North Carolina Reformed Church of the United States," providing for a governing body of trustees to take and hold the property of the college. The objection that the Reformed Church of the United States should be made a party to an action involving the validity of a conveyance of the lands by the corporation to another, to be used for other than school purposes, is untenable, the local part of that organization, especially charged with looking after its interest there, through its accredited representatives, having been made parties plaintiff and joined in the tender of the deed. *Ibid.*

7. *Corporations—Charter Provisions—Management—Deeds and Conveyances—Purchaser.*—Where an educational corporation has agreed to convey certain of its lands, the purchaser may not refuse the deed upon the ground that it would render the corporation unable to conduct a school in accordance with its charter, as such matter affects the internal management of the corporation and does not concern the purchaser. *Ibid.*

CORPORATION COMMISSION

1. *Railroads—Easements—Flag Stations—Contracts—Specific Performance—Decree—Corporation Commission—Damages.*—In this suit by the owner to enforce specific performance of a contract made with a railroad to stop its trains at a flag station on plaintiff's lands, in consideration of which the plaintiff had granted a right of way thereon, it is *Held,* that should the issue as to public policy be found

CORPORATION COMMISSION—*Continued.*

against the company, the decree for specific performance should contain a provision that the defendant shall not be estopped thereby to institute proceedings at any future time, should conditions materially change, under Revisal, 1098, before the Corporation Commission, subject to appeal, etc. As to whether the plaintiff may recover damages for breach of contract when specific performance thereof is denied him, *Quœre. Parrott v. R. R.*, 296.

2. *Corporation Commission—Stations—Contracts.*—Revisal, 1097 (1), providing that a railroad company may not be required by the Corporation Commission to establish a flag station within 5 miles of one already existing, has no application to the facts of this case, in which a valid agreement to maintain the station on the part of the railroad had been made in 1859, and had since been continuously complied with and the right of way enjoyed by it. *Ibid.*

COSTS. See Trusts and Trustees, 4.

COUNTIES.

Municipal Corporations — Counties — Credit — Necessaries—School Purposes—Statutes—Constitutional Law.—It is prohibited by our Constitution, Art. VII, sec. 7, that a county contract any debt, etc., unless approved by the majority of the qualified voters of that county, which is not for a necessary expense notwithstanding the provisions of a statute to the contrary; and schools being held not to be an expense of this character, an issue of bonds for such purpose is invalid, though a majority of those voting thereon have expressed themselves by ballot in their favor, if such majority be not also that of the qualified voters of the county. *Sprague v. Commissioners*, 603.

COURTS. See Appeal and Error, 8, 10; Verdict; Clerks of Courts, Removal of Causes; Easements, 4.

1. *Pleadings—Amendments—Courts.*—An amendment to a complaint allowed by the court before proceeding with the trial, which merely perfects the allegations therein made, is not objectionable as stating a new cause of action. *Simpson v. Lumber Co.*, 133 N. C., 95, cited and applied. *Steeley v. Lumber Co.*, 27.

2. *Drainage Districts—Appeal and Error—Fragmentary Appeal—Exceptions to Reports—Clerk's Jurisdiction.*—Where on appeal to the Superior Court a cause in drainage proceedings has been remanded to the clerk to resume jurisdiction and determine the question of hearing exceptions to the preliminary and final reports, and fix a time therefor, should he determine to hear them, the parties should except and appeal to the Supreme Court, should they so desire, or the order will be final; and an appeal from the order of the clerk made accordingly, fixing a time for the hearing of the exceptions, is fragmentary and will be dismissed. It is further held that the clerk had the jurisdiction to hear the exceptions and grant the parties time within which to file them. *Walker v. Reeves*, 35.

3. *Courts, Justice of the Peace—Appeal—Trial de Novo—Scope.*—An appeal from a court of a justice of the peace comprehends in its scope a

COURTS—*Continued.*

new trial of the whole subject-matter of the action (Revisal, secs. 607, 608, and 609), and any determination by the magistrate of an incidental question involved therein, though not directly appealed from, is, when relevant and necessary, to be considered and determined by the appellate court. *White v. Peanut Co.*, 132.

4. *Same—Special Appearance—Process—Service—Corporation—Agent.*—The trial judge should find the facts upon which he, upon special appearance of the defendant for the purpose, dismisses an action for the want of proper service of process; and when it appears on appeal that the action commenced in a magistrate's court, and service of process had been attempted upon the alleged agent of a corporation and upon the Secretary of State (Revisal, sec. 1243), and the judgment of the magistrate was that service on the Secretary of State was a valid service and that on the agent was insufficient, which latter ruling was reversed in the Superior Court, it was error in the trial judge to refuse to hear and consider the affidavit tending to show a valid service on the agent, as that was a question also presented and involved in the appeal. *Ibid.*

5. *Insurance, Life—Policies—Contracts—Equity—Reformation—Questions of Law—Trials—Courts.*—A policy of life insurance may be reformed on the ground of mistake so as to express the true agreement of the parties, but the mistake must be mutual on the part of the insured as well as the insurer; and it is a matter of law as to whether the pleadings and evidence are sufficient to establish it. *Britton v. Insurance Co.*, 149.

6. *Judgments—Court's Jurisdiction—Parties—Motion in Cause—Laches.*—When a judgment rendered against a plaintiff is sought to be set aside by him on the ground that the action had been brought by one assuming to act for him without authority, and objection is raised to the jurisdiction of the court, relief may be obtained by motion in the cause at the same or a subsequent term of the court, provided there has been no laches or other interfering principle; and where the plaintiff has made such motion upon the ground stated, and offers affidavits to that effect in support of his motion, with allegations tending to show that he has received no benefits from the action and has not in any manner waived his rights to the relief sought, it is error for the judge to refuse to consider the evidence in support of the motion and hold that the remedy was by independent suit. *Massie v. Hainey*, 174.

7. *Same—Excusable Neglect—Interpretation of Statutes.*—The statute requiring that proceedings to set aside a judgment obtained by reason of surprise, excusable neglect, etc., be instituted within one year from the time of judgment entered, applies when the judgment is otherwise in all respects regular, the court having jurisdiction of the parties, and does not extend to cases where no jurisdiction has been acquired over the party moving in the cause to have it set aside. *Ibid.*

8. *Courts—Jurisdiction—Pleading—Good Faith.*—The amount of recovery demanded in good faith in the complaint determines the jurisdiction of the court. *Faircloth v. Kenlaw*, 228.

COURTS—*Continued.*

9. *Courts—Jurisdiction—Pleadings—Good Faith.*—The amount demanded in the complaint in good faith determines the jurisdiction of the trial court, and when this is sufficient, a recovery of a less amount will not defeat the jurisdiction. *Tillery v. Benefit Society*, 262.

10. *Courts—Jurisdiction—Pleadings—Good Faith.*—The amount demanded in the complaint in good faith determines the jurisdiction of the trial court, and when this is sufficient, a recovery of a less amount will not defeat the jurisdiction. *Ibid.*

11. *Trials—Courts—Evidence—Verdict, Directing.*—Where there is no conflict in the evidence in a civil action, or the facts are virtually admitted, the court may direct a verdict as a matter of law. *Riley v. Carter*, 334.

12. *Statutes—Evidence—Motions to Inspect and Copy—Court's Discretion.* It is within the discretion of the trial judge to refuse an application to inspect and photograph a note, the subject of the controversy, under the statute; but the denial of such motion is without prejudice for an affirmative order may nevertheless be rendered under conditions appearing to the trial court to call for it. *Bank v. Newton*, 363.

13. *Intoxicating Liquors—Actions to Recover—Public Policy—Courts.*—An action to recover upon an account for spirituous liquors sold and delivered here for the purposes of sale cannot be maintained in the courts of this State, for such transactions are against our public policy; and the fact that the contract was made in a State recognizing its validity does not alter the matter. *Bluthenthal v. Kennedy*, 372.

14. *Statutes—Evidence—Motions to Inspect and Copy—Court's Discretion.* Where a note sued on is alleged to be a forgery, the judge of the Superior Court wherein the action is pending may, in his discretion, allow, upon due notice, the defendant to inspect the note and take a photographic copy thereof. Revisal, sec. 1656. *Bank v. McArthur*, 374.

15. *Jurors—Selection—Prejudice—Trials—Court's Discretion—Appeal and Error.*—It is within the province of the trial judge to see that questions extraneous to the case and tending to prejudice the jury are not asked the jurors being selected for the trial, and such matters as are within his discretionary power are not reviewable on appeal in the absence of its abuse. In this case, it appearing among other things that the appellant had not exhausted his peremptory challenges, his exception is untenable. *Walters v. Lumber Co.*, 388.

16. *Intervenors — Judgments — Motions—Trials—Appeal and Error.*—The plaintiffs in an action to recover of the defendant damages to their lands, seized certain personal property of the defendant under attachment, which the intervenors claimed as their own. The defendant filed no answer, the cause was regularly tried, and the jury found the issues in plaintiff's favor, including that as to the intervenors' ownership of the property. At a subsequent term of the court the trial judge set aside the judgment rendered against the defendant, upon motion of the intervenors, and on appeal by the plaintiff it is held for reversible error, for that the intervenors were only interested in the issue involving their title. *Forbes v. Lumber Co.*, 404.

COURTS—*Continued.*

17. *Municipal Corporations—Cities and Towns—Street Improvements—Excessive Levy—Statutes—Court's Jurisdiction.*—It is not required of the abutting owner of lands upon a street of a city to comply with the prescribed procedure of objecting, etc., to an excessive special levy upon his property for street improvements, when the excess is void under the statute, for such assessment is jurisdictional and can be taken advantage of by the owner, in respect to such excess, at any time it is sought to be enforced in the courts. *Charlotte v. Brown*, 435.

18. *Illegal Contracts—Statutes—Exclusive Sales—Courts.*—A recovery may not be had in the courts of this State upon a contract made in violation of an express prohibition of our statutes, as in this case, for goods sold and delivered under a contract in consideration that the purchaser should not sell the same commodity in his store manufactured by other parties, for such provision is in violation of chapter 167, sec. 1 (a), Public Laws 1911. *Fashion Co. v. Grant*, 453.

19. *Counties and Towns—Public Roads—Damages—Appeal Bond—Court's Discretion.*—Upon appeal to the Superior Court by the county commissioners of Cabarrus County from an award of damages to the owner of land for the construction of a public road thereon (ch. 201, Pub. Laws 1907), it is discretionary with the trial judge to permit the required bond to be given at the time of the trial. *Pharr v. Commissioners*, 523.

20. *Mental Anguish—Ignorance of Conditions—Trials—Damages—Questions of Law—Courts.*—When it is shown that the plaintiff, in an action to recover damages for mental anguish, was not aware or conscious at the time of the facts or circumstances upon which the damages are necessarily measured, a recovery of actual damages thereon will be denied as a matter of law. *Cooper v. Express Co.*, 538.

21. *Attachment — Undertaking — Signing — Trials —Courts—Corrections——Appeal and Error.*—In issuing a warrant of attachment the officer is directed by the statute, Revisal, sec. 763, "to require a written undertaking with sufficient surety," without prescribing any rule as to its execution, and a signing and delivery would be sufficient; and objection that the undertaking was not "subscribed," but was signed by the applicant to the justification instead of to the undertaking itself, is without merit; and were the objection otherwise tenable, upon the finding of the justice of the peace at the trial that the undertaking was intended to have been properly signed, but was signed at the wrong place by mistake or inadvertence, an order is properly made by him allowing the correction to be made. *Boger v. Lumber Co.*, 557.

22. *Schools — Discipline — Explusion — Courts—Trials—Evidence—Verdict Set Aside.*—In this case it appeared from the evidence that the plaintiff entered his boy in the defendant's school with knowledge that if the pupil violated the rules of the school relative to its discipline, he would be expelled; that the pupil was expelled for repeated misconduct and violation of the rules and for insubordination to the principal. There was no evidence that the principal acted arbitrarily or otherwise than for the best interest of the school: *Held*, no error for

COURTS—*Continued.*

the trial judge to set aside a verdict by which the plaintiff recovered proportionately the money he had paid for the unexpired part of the school term. *Teeter v. Military School*, 564.

23. *Divorce—Evidence—Appeal and Error—Ex Mero Motu.*—In an action for divorce of the husband on the ground of adultery of his wife, it is incompetent for the husband to testify that the wife had a certain contagious venereal disease, of which he had been free, under circumstances tending necessarily to establish her improper relations with other men (Revisal, secs. 1564, 1630, 1636); and the statute expressly forbidding testimony of this character being positive and enacted in the interest of society, it is the duty of the trial judge to exclude it, and upon his failure to have done so, the Supreme Court, on appeal, will consider its incompetency *ex mero motu*. *Hooper v. Hooper*, 605.

24. *Deeds and Conveyances—Natural Boundaries—Controlling Calls—Grants—Investigation by Supreme Court.*—Where the beginning point in a description of a deed to lands is determinative in an action to recover them, and this point is given as a certain corner of a grant by the State to adjoining lands, which is therefore necessary to be established, and the calls of the grant relevant to the inquiry are so many poles to a stake, then on a county line to a stake, the county line admittedly being along the crest of a hill, the boundary of the county is a natural boundary and controls as a matter of law that of the given distance terminating at a stake, in the preceding call, and this interpretation is confirmed by the Court's referring to the original grant in the office of the Secretary of State. *Belk v. Vance*, 673.

COURTS, FINDINGS BY. See Jury.

COVENANTS. See Easements, 6.

CRIMINAL LAW.

Deeds and Conveyances—Contracts—Consideration—Criminal Prosecution—Trials—Question for Jury.—While the court will declare null and void notes or conveyances made upon the sole consideration of suppressing or stifling a criminal prosecution, they will not do so as a matter of law upon the pleadings to set aside alleged transactions of this character when the facts are not admitted; and whatever inferences may be drawn from the pleadings are questions of fact for the determination of the jury. *Alston v. Hill*, 255.

CRIMINAL PROSECUTION. See Criminal Law, 1.

CROSSINGS. See Easements, 4; Railroads.

DAMAGES. See Trials; Negligence; Water and Water-courses; Vendor and Purchaser; Equity, 9.

1. *Railroads—Federal Employer's Liability Act—Measure of Damages.*—In an action to recover damages of a railroad company for the wrongful killing of its employee, under the Federal Employer's Liability Act, the measure of damages, where recovery is permitted, is not the present value of the net earnings of the deceased based upon

DAMAGES—*Continued.*

his expectancy. The correct rule is laid down in *Dooley v. R. R.*, 163 N C., 454; *Irvin v. R. R.*, 164 N. C., 5. *Kenney v. R. R.*, 99.

2. *Railroads—Federal Employer's Liability Act—Negligence—Measure of Damages*—Under the Federal Employer's Liability Act contributory negligence is not a complete defense, but material only in reduction of damages. *Ibid.*

3. *Trials—Instructions—Meaure of Damages.*—The charge of the court is held to be correct upon the measure of damages in this action for a personal injury alleged to have been negligently inflicted upon a servant while engaged in the discharge of his duties. *Johnson v. R. R.*, 163 N. C., 451, cited and applied. *Walters v. Lumber Co.*, 388.

4. *Contracts — Interpretation—Cutting Timber—Damages—Diminution—Personal Supervision—Employment Elsewhere.*—Where the plaintiff and defendant have entered into a contract whereby within the term of two years the plaintiff was to cut the timber from the defendant's land at a specified price per thousand feet, and the defendant, by breach of this contract, has prevented the plaintiff from continuing to cut the timber in accordance with the terms of the agreement, and where the plaintiff's damages are capable of being definitely ascertained, the defendant is not entitled to have the amount of the damages recoverable diminished by the time the plaintiff may have been absent from this work, being engaged elsewhere for profit, it appearing that the contract did not require the personal presence of the plaintiff, but only looked to the completion of the cutting in the time specified. *Bowman v. Blankenship*, 519.

5. *Mental Anguish—Ignorance of Conditions—Trials—Damages—Questions of Law—Courts.*—When it is shown that the plaintiff, in an action to recover damages for mental anguish, was not aware or conscious at the time of the facts or circumstances upon which the damages are necessarily measured, a recovery of actual damages thereon will be denied as a matter of law. *Cooper v. Express Co.*, 538.

6. *Mental Anguish—Express Companies—Trials—Negligence—Avoidance of Damages—Extra Expense—Measure of Damages.*—The plaintiff sued an express company for damages for mental anguish alleged to have arisen from its neglect to put off a coffin which had been purchased for the interment of his child, at its destination, and, as the measure of his damages, claimed that he was thereby prevented from burying the child at his family burying-ground, where he desired to bury it, because decomposition had begun to set in upon the late arrival of the coffin, which the defendant had carried beyond its destination and returned. There was no evidence that he attempted to procure another coffin in time for his purpose, which it appears he could have done, and it is held that the mental anguish did not necessarily result from the defendant's negligence, and it being the plaintiff's duty to have avoided it, under the circumstances, his measure of damages was the additional expense he would have incurred had he otherwise acted. *Cooper v. Express Co.*, 538.

7. *Mental Anguish—Express Companies—Trials—Negligence—Burial Caskets—Damages.*—An express company is liable for mental anguish caused to a husband by its negligent delay in transporting and

DAMAGES—*Continued.*

delivering a burial casket to be used in the interment of his wife, of which the receiving agent was informed at the time; and where by reason of such failure the husband was forced to bury his wife in a makeshift or cheap casket, the ground for such recovery is sufficiently shown. *Byers v. Express Co.*, 542.

8. *Trials—Instructions—Correct in Part—Measure of Damages—Exceptions—Appeal and Error.*—Where the charge of the court upon the measure of damages in an action to recover them states general but correct principles of law applicable to the issue, an exception that he did not sufficiently instruct the jury will not be sustained, it being required of the appellant that he should have tendered special prayers containing the specific instructions he desired to be given. *Owenby v. R. R.*, 641.

9. *Municipal Corporations—Cities and Towns—Nuisance—Sewage—Damage to Lands—Governmental Functions.*—Where a municipality is liable in damages for the improper emptying its sewage in a stream to the injury of an adjacent or adjoining owner, the damages are admeasured by the decrease in value of the lands thereby caused, though the act complained of was done by the municipality in the exercise of its governmental functions. *Rhodes v. Durham*, 679.

10. *Same—Eminent Domain—Permanent Damages.*—Where a city by emptying its sewage into a stream by improper methods causes injury to an abutting or adjacent owner, the damages are of a permanent character and protected by the municipality's right of eminent domain, which, in such instances, is in the nature of acquiring an easement in the lands; and as the public interest therein deprives the owner of the right to abate the nuisance, it is open to either of the parties, in the owner's action for damages, to demand that permanent damages be assessed; and the mere fact that the municipality may voluntarily abate the nuisance in the near future does not deprive the owner of his right to recover permanent damages in his present action. *Ibid.*

11. *Municipal Corporations—Sewage—Nuisance—Damages to Lands—Adjacent Owners.*—The right to recover damages of a municipality caused by its improper method of emptying its sewage into a stream is not confined to adjoining lands lying thereon, for this right extends to adjacent lands injured thereby, whether the medium of pollution is through the water or through that of the air carrying objectionable and contaminating odors, etc., resulting in a serious injury to or a reduction in the value of lands. *Ibid.*

DANGEROUS MACHINERY. See Master and Servant, 25.

DEBTOR AND CREDITOR. See Bills and Notes; Equity, 1, 6, 8.

DECLARATIONS. See Deeds and Conveyances, 1; Evidence, 9, 10; Witnesses, 4.

DEEDS AND CONVEYANCES. See Limitation of Actions; Estoppel; Corporations, 4, 6, 7; Contracts; Criminal Law, 1; Evidence, 9; State's Lands.

1. *Deeds and Conveyances—Boundaries—Evidence—Declarations.*—Declarations are competent as tending to show the lines and corners stated

DEEDS AND CONVEYANCES—*Continued.*

in a deed, when the declarant is dead at the time they were offered in evidence, when made by him before a controversy had arisen as to the boundary, and when he was disinterested at the time he made them. *Sullivan v. Blount*, 7.

2. *Same—Adjoining Owner—Interest.*—Declarations made by an adjoining owner of lands to the *locus in quo* of corners and boundaries are not incompetent when not made in his own interest, and otherwise competent. *Ibid.*
3. *Deeds and Conveyances—Boundaries—General Reputation—Remoteness—Evidence.*—Evidence of general reputation is competent in the location of private boundaries if the reputation had its origin at a time comparatively remote, had existed before the controversy, and attached to some monument of boundary or natural object, in this case a holly tree; and a period of forty years is held to be too remote within the meaning of the law. *Ibid.*
4. *Same—Corroborative Evidence.*—Where declarations of the location of a corner or boundary stated in a deed is sufficiently remote and otherwise competent, evidence of a declaration subsequently made is competent in corroboration. *Ibid.*
5. *Deeds and Conveyances—Boundaries—General Reputation—Ownership of Lands—Evidence.*—While evidence of reputation may be competent to locate a corner or boundary given in a deed, it cannot be admissible to prove ownership of the land. *Ibid.*
6. *Deeds and Conveyances—Location of Lands—Evidence—Appeal and Error—Harmless Error.*—Where the controversy concerning lands depends upon whether the *locus in quo* was contained within the description of plaintiff's deed, a question asked a witness, by the defendant, whether the lands were not contained in a deed made to him, is incompetent, as the deed will speak for itself, and was otherwise immaterial; and in this case the error, if any, in excluding the question was cured by the introduction of the witness's deed. *Coltrain v. Lumber Co.*, 42.
7. *Deeds and Conveyances—Location of Lands—Adverse Possession—Instructions.*—Where the plaintiff claims the land in dispute upon the sole ground that it was contained in the description of her deed, which was the only controverted matter, it is not error for the court to refuse defendant's prayer for special instruction upon the sufficiency of the plaintiff's evidence of adverse possession to ripen title. *Ibid.*
8. *Deeds and Conveyances—Descriptions—Boundaries.*—In this action to recover lands and for trespass the failure of the *locus in quo* to bound on the other lands described in the deed is not held to be a fatal defect, under *Austin v. Austin*, 160 N. C., 369. *Ibid.*
9. *Deeds and Conveyances—Standing Timber—Future Growth—Vested Interests.*—A conveyance of standing timber of a certain diameter and such as may attain that size during the period allowed for cutting, vests in the grantee a present estate in the timber, both that which at the date of the deed is of the specified size and that which within the period will attain it, postponing the grantee's right to cut, as to the latter, to the time when it reaches the size called for in the conveyance. *Veneer Co. v. Ange*, 54.

DEEDS AND CONVEYANCES—*Continued.*

10. *Same—Undergrowth—Equity—Injunction.*—Where standing timber of a certain size is conveyed and that which may attain that size during the period of cutting, and the right is also given to cut smaller growth for car standards, railroad ties for the logging road of the grantee, etc., the grantor may be enjoined, within the stated period, from cutting or removing the undersized timber, where it appears from the evidence that some of the trees will reach by natural growth, within the stated period, the size stated in the deed. *Ibid.*

11. *Deeds and Conveyances—Standing Timber—Future Growth— "May" —Words and Phrases.*—Where timber of a certain size is conveyed, together with that which "may" attain that size within the period of time allowed for cutting, the word "may" will be interpreted as meaning such timber as *can* by natural growth reach that size within the period stated. *Ibid.*

12. *Expert Evidence—Deeds and Conveyances—Timber—Future Growth.*—When it is relevant to the inquiry as to what timber of a certain size or that may attain that size during the period of cutting, has passed by a deed, testimony of experts is competent to show the probable increase in the diameter of the smaller trees to the specified size within the time and according to the law of nature. *Ibid.*

13. *Deeds and Conveyances—Descriptions—Parol Evidence—Trespass.*—In an action for trespass upon land, the defendant denies the trespass upon plaintiff's land and alleges the acts complained of were done upon its own land which had been conveyed to another in its own title and reserved from the plaintiff's deed; to sustain this contention the defendant tendered in evidence a deed to "50 acres adjoining P. R. bounded on White Oak road and adjoining A. S. R. and P. S." *Held*, the description was sufficiently definite to permit of identification of the lands by parol evidence, the ambiguity being latent, for with the three boundaries given, the third could readily be established by running a line a sufficient distance from the road to include the 50 acres conveyed. *Johnson v. Manufacturing Co.*, 105.

14. *Deeds and Conveyances—Title of Plaintiff—Trials—Burden of Proof.*—In an action to recover lands the plaintiff must depend upon the strength of his own title, and a defect in that of a defendant who does not claim thereunder will not avail him. *Brock v. Wells*, 170.

15. *Deeds and Conveyances—Possession of Tenant—Trials—Evidence.*—Where it is contended by a plaintiff, in an action to recover lands, that the defendant entered into the possession of the *locus in quo* under a grantor in his chain of title, and was therefore estopped to deny plaintiff's title, the testimony of a witness to that effect is incompetent, it appearing that it was from hearsay, or that the witness only knew of this fact, that the defendant merely entered into possession of the *locus in quo* after the abandonment of the plaintiff's grantor, and not how he entered, and was qualified to speak to this fact alone. *Ibid.*

16. *Deeds and Conveyances—Parol Evidence—Partnership Lands.*—Where each member of a partnership conveys all of his right, title, and interest in and to all assets and lands of the partnership, or to all the assets and property of the firm, it is sufficient, under the doctrine of "*id certum est quod certum reddi potest*," to admit of parol

DEEDS AND CONVEYANCES—*Continued.*

evidence, in an action involving title to lands, to show that the *locus in quo* was owned by the partnership, and to pass the title to the grantee in the deed when it is so established. *Pate v. Lumber Co.*, 184.

17. *Reformation—Deeds and Conveyances—Pleadings—Evidence.*—In order to reform a deed to lands upon the ground of mutual mistake or fraud, the proper allegations should be made in the pleading, or evidence thereof is inadmissible. *Ibid.*

18. *Statute of Frauds—Deeds and Conveyances—Parol Evidence—Trials—Questions for Court.*—Where a deed, expressed in unambiguous language, purports to convey the whole of certain lands, parol evidence that it was the grantor's intention to only convey a part thereof is inadmissible, the construction of the deed as to its meaning and purport being a question of law for the court. *Ibid.*

19. *Deeds and Conveyances—Fraud on Creditor—Equity.*—Where a conveyance of lands is made by a grantor with the intent and purpose of defrauding his creditors, which intent is participated in by the grantee, the transaction will be set aside at the suit of a creditor, irrespective of whether his debt accrued before or after the date of the deed, or whether a valuable consideration passed. The principles relating to conveyances in fraud of creditors' rights discussed by ALLEN, J. *Aman v. Walker*, 224.

20. *Same—Reconveyance—Parties.*—Where a deed is sought to be set aside, as in fraud of the grantor's creditors, with allegation that the fraudulent intent was participated in by the grantee, and the latter has conveyed the lands to a third person, it is necessary to the determination of the controversy that such person be made a party thereto. *Ibid.*

21. *Deeds and Conveyances—Mental Capacity—Fraud—Trials—Evidence.* In this action to set aside a deed for alleged mental incapacity of the grantor, and for fraud and undue influence on the part of the grantee in obtaining it, it was competent for a witness to testify that the grantor did not have sufficient mind to make the conveyance, in reply to matter brought out on his cross-examination; and it is further *Held*, if the testimony was erroneously admitted, it was harmless under the circumstances, and in view of the findings upon the issues. *Hodges v. Wilson*, 323.

22. *Deeds and Conveyances—Fraud and Mistake—Time of Discovery—Trials—Evidence.*—In an action to correct or set aside a deed for fraud and mistake, it is competent to show when the mistake was discovered, as bearing upon the plaintiff's promptness and diligence, after the discovery thereof was made by him, in enforcing his remedy. *Ibid.*

23. *Deeds and Conveyances—Mental Incapacity—Trials—Evidence—Nonexpert Witnesses.*—It is competent to show by nonexpert testimony that the maker, at the time of executing a deed to lands, was mentally incapacitated, when that question is involved in the controversy. *Ibid.*

24. *Deeds and Conveyances—Fraud—Trials—Burden of Proof.*—Where a contract is sought to be set aside for fraud, the fraud must be

DEEDS AND CONVEYANCES—*Continued.*

alleged and established by distinct proof, though it is only required to preponderate in the plaintiff's favor. *Ibid.*

25. *Deeds and Conveyances—Fraud—Trials—Evidence.*—While mere weakness of mind, physical infirmity, or inadequacy of price are not alone or separately sufficient to set aside a contract, courts of equity will consider them in connection with other circumstances of the case tending to show that the contract was obtained by fraud, as where the contract was made by an illiterate, old, and feeble man, who executed it relying upon the good faith of the other party to the contract, who represented that it was a conveyance of 10 acres of land, whereas it conveyed 76 acres; recited a consideration of $300, when $75 only was paid, etc. *Ibid.*

26. *Deeds and Conveyances—Recited Considerations—Fraud—Trials—Evidence.*—The consideration recited in a deed attacked for fraud and undue influence may be shown to be incorrectly stated, and evidence of the real consideration and its inadequacy is competent, where there are circumstances tending to show that the transaction was fraudulent. *Ibid.*

27. *Husband and Wife—Joint Estate—Issues—Uses and Trusts—Trials—Deeds and Conveyances—Registration.*—Where from the pleadings and evidence in an action to recover lands, brought by the heirs at law of the husband against the heirs at law of the wife, the rights of the parties depend upon the question of whether the lands were bought solely by the husband, to whom the conveyance was made, or partly with the moneys of the wife with the mutual intention that it should belong to them both jointly for a home, an issue is held sufficient and determinative: "Was the land in question purchased and paid for jointly by W. and N. as a home for both of them as alleged in the answer?" And this issue being answered in defendant's behalf, the effect of the judgment accordingly rendered would be that after the death of the husband the principle of *jus accrescendi* would apply, the husband holding the title in trust for them both jointly, and it would become immaterial between the parties, being the heirs at law, whether the deed to the husband was permitted to be recorded pending the trial; and held further, that the failure to submit an issue raised by the answer asking for affirmative relief would not be prejudicial to the plaintiffs. *Murchison v. Fogleman*, 397.

28. *Deeds and Conveyances — Fraud—Color of Title—Limitation of Actions.*—Except as to the creditors of the grantor, a deed obtained by fraud is color of title from its date, until set aside by a court of competent jurisdiction; and when not thus set aside, the *bona fide* adverse possession of the grantee for seven years under a claim of title will ripen into an absolute title under the statute of limitations. *Pickett v. Pickett*, 14 N. C., 6, relating to the rights of creditors in such a case, cited and applied. *Seals v. Seals*, 409.

29. *Deeds and Conveyances — Interpretation—Intent.*—A deed must be interpreted as a whole, with the view of ascertaining the true intent of the parties, regarding the circumstances attending the transaction, the situation of the parties, and the status of the thing granted, when such are necessary and relevant. *R. R. v. Carpenter*, 465.

DEEDS AND CONVEYANCES—*Continued.*

30. *Same—Railroads—Easements—Forfeiture—Covenant—Breach—Equity.*—In construing a deed to lands—in this case a grant of an easemen to a railroad company—conditions subsequent to the vesting of the title, which would work a foreclosure, should be strictly construed and taken most strongly against the grantor; and the courts of equity will relieve against a forfeiture for breach of covenants in the conveyance when a just compensation can be made in money or other things of value. *Ibid.*

31. *Same—Conditions Subsequent.*—The plaintiff granted a right of way over and upon his lands to the defendant railroad company in consideration of $1 and the benefits to accrue to his lands, with provision also that the defendant should locate on its road, within a specified time, a side-track and flag station and other conveniences usually given to mill companies; and after the habendum and tenendum clause, the conveyance expressly sets forth certain conditions the failure to observe which would work a forfeiture, such as the failure to operate the railroad, etc., through and upon said lands, etc.: *Held*, the deed should be construed as a whole, and it appearing therefrom that the construction of the road was necessarily of a permanent character and for the public use, and the conditions unperformed, the subject of the controversy, not appearing in that part of the deed containing the conditions subsequent, the latter will be considered as covenants running with the land, which, by the acceptance of the company, it will be obliged to perform, and upon its failure to do so, the grantor's right of action will either be for specific performance or sound in damages. *Ibid.*

32. *Deeds and Conveyances—Color of Title—Trials—Evidence—Adverse Possession.*—Where a deed to lands is put in evidence without showing paper title in the grantor or connecting this deed with any other title, it can have no legal effect except as color of title, making it necessary for the party claiming it to establish such adverse possession of the lands, and for such a period of time, as will ripen his possession into an absolute title under the statute; and while building a house of the lands and marking its boundaries are some evidence of possession, it is not conclusive. *Land Co. v. Cloyd*, 595.

33. *Deeds and Conveyances — Estoppel—Void Deeds—Trials—Evidence.*—A party to a controversy concerning the title to lands is estopped to deny the title of the other party under whose deed he claims, and under which he entered into possession; and the mere fact that this deed is void does not estop the grantor from showing that it was the title under which his adversary claimed. *Fisher v. Toxaway Co.*, 663.

34. *Deeds and Conveyances — Tenants in Common—Lunatics—Guardian and Ward—Void Deeds—Color of Title.*—Where several tenants in common make their valid deeds to the land in controversy except one of them who had been confined in a hospital for the insane, and the conveyance nowhere upon its face purports to convey his title or interest therein, but is signed by one purporting to act for him as his guardian, without making it to appear that he was lawfully such, it is *Held*, as to the interest of the ward, attempted to have been conveyed, the deed is not color of title which would ripen into an absolute title by adverse possession. *Ibid.*

DEEDS AND CONVEYANCES—*Continued.*

35. *Deeds and Conveyances — Natural Boundaries — Controlling Calls — Grants—Investigation by Supreme Court.*—Where the beginning point in a description of a deed to lands is determinative in an action to recover them, and this point is given as a certain corner of a grant by the State to adjoining lands, which is therefore necessary to be established, and the calls of the grant relevant to the inquiry are so many poles to a stake, then on a county line to a stake, the county line admittedly being along the crest of a hill, the boundary of the county is a natural boundary and controls as a matter of law that of the given distance terminating at a stake, in the preceding call, and this interpretation is confirmed by the Court's referring to the original grant in the office of the Secretary of State. *Belk v. Vance*, 673.

36. *Deeds and Conveyances — Natural Boundaries — "With or Along"— Words and Phrases.*—The location of a certain line given in a grant of lands from the State being controlling in this action to recover lands, it is held that calls in the grant, "thence south 416 poles on Burke County line to the beginning," the line being a natural boundary, should be interpreted as that number of poles "with or along" that line. *Ibid.*

DEEDS OF TRUST.

1. *Mortgages—Deeds of Trust—After Acquired Property.*—A purchaser at a foreclosure sale under a deed of trust made by a lumber company required by the terms of the instrument to be kept in operation and embracing after acquired property for the period of three years, whether the trustees were in possession or not, gets a good title to timber which had been purchased by the trustor within the period prescribed. *Riley v. Carter*, 334.

2. *Deeds and Conveyances—Mortgages—Deeds in Trust—Recitations— Decrees—Evidence—Registration—Notice.*—Commissioners appointed by the court to sell lands under a deed of trust are officers of the court, and their recitation in the deed of conveyances of decrees of the court respecting the sale are *prima facie* evidence of the correctness of such statements, and affect subsequent purchasers with notice, though the decrees may not be registered. It is otherwise when the order or judgment of the court creates the lien. *Ibid.*

DEMURRER. See Parties, 1; Pleadings, 6, 10; Actions, 6.

DISCIPLINE. See Schools.

DIVORCE. See Trials, 5.

1. *Divorce—Adultery—Husband and Wife—Evidence—Interpretation of Statutes.*—It being the purpose of our statutes to remove opportunity for collusion between the husband and wife in an action for divorce on the ground of adultery, the statutory inhibition that they will not be permitted to testify for or against each other prevails whether under the circumstances of any particular case it would seemingly appear there was no collusion or otherwise (Revisal, secs. 1564, 1630, 1636); and the inhibition extends to any and all admissions or confessions by the other, tending to establish the acts of adultery, either in the pleadings or otherwise. *Hooper v. Hooper*, 604.

DIVORCE—*Continued.*

2. *Same—Appeal and Error—Ex Mero Motu.*—In an action for divorce of the husband on the ground of adultery of his wife, it is incompetent for the husband to testify that the wife had a certain contagious venereal disease, of which he had been free, under circumstances tending necessarily to establish her improper relations with other men (Revisal, secs. 1564, 1630, 1636); and the statute expressly forbidding testimony of this character being positive and enacted in the interest of society, it is the duty of the trial judge to exclude it, and upon his failure to have done so, the Supreme Court, on appeal, will consider its incompetency *ex mero motu. Ibid.*

DRAINAGE DISTRICTS.

1. *Drainage Districts—Appeal and Error—Fragmentary Appeal—Exceptions to Reports—Clerk's Jurisdiction.*—Where on appeal to the Superior Court a cause in drainage proceedings has been remanded to the clerk to resume jurisdiction and determine the question of hearing exceptions to the preliminary and final reports, and fix a time therefor, should he determine to hear them, the parties should except and appeal to the Supreme Court, should they so desire, or the order will be final; and an appeal from the order of the clerk made accordingly, fixing a time for the hearing of the exceptions, is fragmentary and will be dismissed. It is further held that the clerk had the jurisdiction to hear the exceptions and grant the parties time within which to file them. *Walker v. Reeves.* 35.

2. *Drainage District—Bond Issues—Time of Objections—Actual Notice—Publication in Newspaper—Interpretation of Statutes.*—It is not necessary to the validity of bonds issued by a drainage district under the provisions of chapter 442, Public Laws 1909, amended by chapter 67, Public Laws 1911, that the notice of the time of hearing objections to the final report of the engineer and viewers was not published in some newspaper of general circulation in the county, when it appears that no newspaper was published therein, or elsewhere, which has a general circulation in the county, and that the landowners affected had actual and ample notice of such time and raised no objection. *Commissioners v. Engineering Co.*, 37.

3. *Drainage District—Liberal Construction—Interpretation of Statutes.*—The drainage laws apply to the whole State, and by the express provision of section 37, chapter 442, Public Laws 1909, they should be liberally construed to promote the leveeing, ditching, draining, and reclamation of wet and overflowed lands. *Ibid.*

4. *Drainage Districts—Objection—Publication in Newspaper—Waiver—Consent—Interpretation of Statutes.*—Where the purchaser of bonds issued under Public Laws 1909, ch. 442, amended by the Public Laws 1911, ch. 67, protest their validity on the ground that no notice of the time of hearing of objections had been published in a newspaper, and it appearing that the landowners affected had full and ample actual notice thereof, and publication could not be made because no newspaper was published in the county or had a general circulation therein, the failure of such owners to pay to the county treasurer the full amount for which their lands are liable, publication being made in accordance with the amendatory act, sections 9 and 10, will operate as a waiver of their rights to contest the validity of the

DRAINAGE DISTRICTS—*Continued.*

bonds, and the purchaser of the bonds is in no better condition to resist their validity, and all parties to the proceedings are held to have consented to the issuance. *Ibid.*

5. *Drainage District—Smaller Districts in Larger Ones—Bond Issues.*—Where a smaller drainage district is laid off within the boundaries of a larger one, theretofore organized, the purposes of each harmonizing with the purposes of the other, and the lateral ditches in the former being especially necessary for the proper drainage of the lands therein, an issue of bonds by the smaller district is not rendered invalid at the suit of the purchaser because of the larger district which includes it, it being provided that the bonds of the latter shall have priority of lien to those of the former, with which understanding the bonds were sold and purchased. *Drainage Commissioners v. Farm Assn.*, 697.

6. *Drainage Districts—Bond Issues—Mortgages—Priority of Liens.*—It has become the public policy of our State to authorize the formation of drainage districts, with statutory authority to levy assessments, under stated conditions, upon the lands situated in the district, with the object of making them of greater value; and where the statute has authorized the laying off of one of these districts, a mortgage on lands therein situate, though taken before the district is formed, is subject to the authority of the commissioners to levy the assessment, and bonds issued accordingly for the purpose of drainage have a superior lien to that of the mortgage. *Ibid.*

7. *Same—Trusts and Trustees—Parties.*—Where the purchaser of bonds issued by a drainage district refuses to take the bonds upon the ground that he had purchased them upon condition that they should be the first lien upon the lands contained in the district to the extent of the assessment, and that a large portion of the lands were subject to a first lien by mortgage, or deed of trust, the mortgagee or trustee is not a necessary party in an action involving the validity of the bonds. *Ibid.*

DUE COURSE. See Bills and Notes, 4.

EASEMENTS.

1. *Constitutional Law—Cities and Towns—Condemnation—School Purposes.*—The taking of lands for the purposes of public schools is for a public use, in contemplation of our Constitution; and an act of the Legislature empowering a town to condemn land for such purposes is constitutional. *School Trustees v. Hinton*, 12.

2. *Railroads — Contracts—Easements—Flag Stations—Specific Performance—Public Policy—Issues—Limitation of Actions—Abandonment Trials—Evidence.*—In 1859 the defendant railroad company acquired a right of way over the lands of the plaintiff's ancestor in consideration of stopping its trains upon being signaled, at a flag station thereon, which in two years was entered upon and continuously used by the company and its lessee road, under a sealed and registered instrument of writing, to within a short time previous to the commencement of the action, when the lessee road refused to continue the arrangement upon the ground that it interfered with its duties to the public: *Held*, (1) the right acquired by the owner ran with

EASEMENTS—*Continued.*

the land, and the lessee road was bound to the performance of the contract, unless public policy had intervened; (2) whether the interests of the public now require the discontinuance of the flag station is for the determination of the jury, with the burden of proof on defendant; (3) except where the rights of the public intervene, specific performance of the contract by the company will be decreed; (4) the consideration for the right of way continued with its use, and the contract was not of uncertain duration; (5) in this case the statute of limitations had not run, and there is no evidence of abandonment by the owner. *Parrott v. R. R.*, 295.

3. *Railroads—Easements—Flag Stations—Contracts—Specific Performance—Decree—Corporation Commission—Damages.*—In this suit by the owner to enforce specific performance of a contract made with a railroad to stop its trains at a flag station on plaintiff's lands, in consideration of which the plaintiff had granted a right of way thereon, it is *Held*, that should the issue as to public policy be found against the company, the decree for specific performance should contain a provision that the defendant shall not be estopped thereby to institute proceedings at any future time, should conditions materially change, under Revisal, 1098, before the Corporation Commission, subject to appeal, etc. As to whether the plaintiff may recover damages for breach of contract when specific performance thereof is denied him, *Quœre*. *Ibid.*

4. *Railroads—Condemnation—Railroads Crossing Rrailroads—Statutes—Court.*—Revisal, sec. 2556 (5) and (6), give the right to a railroad company "to condemn and acquire a right of way across the road of another company to construct a spur track to manufacturing plants," etc., which is also given to the plaintiff in this action of condemnation by its charter; and the courts cannot restrict this statutory right to be exercised by a railroad to cases in which the courts may approve its reasonableness or expediency. *R. R. v. R. R.*, 425.

5. *Same—Yard Limits—Former Appeal.*—The question involved on this appeal by the defendant railroad from a judgment permitting the plaintiff railroad company to cross its roadway, within its yard limits, by condemnation, in order to put in a spur at an industrial plant, was decided adversely to the defendant on a former appeal of this case, with suggestion of location and method of procedure, under which the defendant may now act, if so advised. 161 N. C., 531. *Ibid.*

6. *Deeds and Conveyances—Interpretation—Railroads—Easements—Forfeiture—Covenant—Breach—Equity.*—In construing a deed to lands —in this case a grant of an easement to a railroad company—conditions subsequent to the vesting of the title, which would work a foreclosure, should be strictly construed and taken most strongly against the grantor; and courts of equity will relieve against a forfeiture for breach of covenants in the conveyance when a just compensation can be made in money or other things of value. *R. R. v. Carpenter*, 465.

7. *Same—Conditions Subsequent.*—The plaintiff granted a right of way over and upon his lands to the defendant railroad company in consideration of $1 and the benefits to accrue to his lands, with provision also that the defendant should locate on its road, within a specified

EASEMENTS—*Continued.*

time, a side-track and flag station and other conveniences usually given to mill companies; and after the habendum and tenendum clause, the conveyance expressly sets forth certain conditions the failure to observe which would work a forfeiture, such as the failure to operate the railroad, etc., through and upon said lands, etc.: *Held*, the deed should be construed as a whole, and it appearing therefrom that the construction of the road was necessarily of a permanent character and for the public use, and the conditions unperformed, the subject of the controversy, not appearing in that part of the deed containing the conditions subsequent, the latter will be considered as covenants running with the land, which, by the acceptance of the company, it will be obligated to perform, and upon its failure to do so, the grantor's right of action will either be for specific performance or sound in damages. *Ibid.*

8. *Municipal Corporations — Nuisance — Eminent Domain — Permanent Damages.*—Where a city by emptying its sewage into a stream by improper methods causes injury to an abutting or adjacent owner, the damages are of a permanent character and protected by the municipality's right of eminent domain, which, in such instances, is in the nature of acquiring an easement in the lands; and as the public interest therein deprives the owner of the right to abate the nuisance, it is open to either of the parties, in the owner's action for damages, to demand that permanent damages be assessed: and the mere fact that the municipality may voluntarily abate the nuisance in the near future does not deprive the owner of his right to recover permanent damages in his present action. *Rhodes v. Durham*, 679.

EJECTMENT. See Pleadings, 4.

1. *Partition—Pleadings—Sole Seisin—Ejectment.*—Where sole seisin is pleaded in proceedings for partition and the cause is transferred for trial to the Superior Court, it becomes, in effect, an action of ejectment. *Ditmore v. Rexford*, 620.

2. *Ejectment—Possession—Admissions—Limitations of Actions—Burden of Proof.*—Where the answer in ejectment alleges defendant's possession of the disputed lands, it is unnecessary for the plaintiff to show it, but where the defendant pleads the statute of limitations, it is for the plaintiff to prove that the action is not barred. *Ibid.*

ELECTRICITY.

1. *Electricity—Trials—Negligence—Evidence.*—In an action to recover damages for an injury caused the plaintiff by the shock from a live electric wire alleged negligently to have been left hanging upon the street of a town, evidence of negligence in regard to another wire, about a block away, whereby another person was injured, is irrelevant and incompetent, and its admission is reversible error. *Forbes v. Rocky Mount*, 14.

2. *Same—Subsequent Conditions.*—Evidence of negligence in regard to electric wires of a defendant company, operating a light and power plant, existing a long time subsequent to the date of the injury complained of, in this case for more than two years, is irrelevant and incompetent, and its admission constitutes reversible error. *Ibid.*

ELECTRICITY—*Continued.*

3. *Electric Company—Master and Servant—Incidental Dangers—Trials—Negligence—Nonsuit.*—The plaintiff sues an electric power, etc., company for the killing of her intestate, alleging negligence on the part of the defendant in not shutting off its current while the intestate, an employee, was engaged in his employment of working upon the wires of the company: *Held*, the intestate assumed the risks of all danger necessarily incident to the employment he was engaged in, and it appearing from the testimony of his own witnesses that the injury would not have occurred had he used the rubber gloves furnished him, and that he was an experienced person and should have known the danger in thus acting, a judgment as of nonsuit upon the evidence was properly rendered. The effect of the Fellow-Servant Act in its application to common carriers discussed by CLARK, C. J. *Register v. Power Co.*, 234.

4. *Electricity—Wires Through Trees—Boys—Trials—Negligence—Contributory Negligence—Trespass.*—An electric company is presumed to know the likelihood that boys will climb trees with low hanging branches on populous streets of a city, through which its highly charged wires run, and is held to exercise that high degree of care required of those who engage in a business of such dangerous character; and where an immature boy is killed by coming in contact with such wires, where the insulation has been rubbed off, of which the company had had previous actual notice, or notice implied from the length of time such condition had been permitted to exist, contributory negligence is not imputable to the intestate, in an action for damages brought by his administrator, nor was the intestate in any respect a trespasser, and the company is responsible for the negligent killing. *Benton v. Public-Service Corporation*, 354.

EMINENT DOMAIN. See Easements.

EMPLOYER AND EMPLOYEE. See Master and Servant; Pleadings, 6.

EQUITY. See Partnerships, 2; Reformation of Instruments; Injunction; Insurance; Specific Performance.

1. *Deeds and Conveyances—Fraud on Creditor—Equity.*—Where a conveyance of lands is made by a grantor with the intent and purpose of defrauding his creditors, which intent is participated in by the grantee, the transaction will be set aside at the suit of a creditor, irrespective of whether his debt accrued before or after the date of the deed, or whether a valuable consideration passed. The principles relating to conveyances in fraud of creditors' rights discussed by ALLEN, J. *Aman v. Walker*, 224.

2. *Same—Reconveyance—Parties.*—Where a deed is sought to be set aside as in fraud of the grantor's creditors, with allegation that the fraudulent intent was participated in by the grantee, and the latter has conveyed the lands to a third person, it is necessary to the determination of the controversy that such person be made a party thereto. *Ibid.*

3. *Homestead—Metes and Bounds—Tenants in Common—Equity—Judgments—Cloud on Title.*—The homestead laws should be liberally construed in favor of the one claiming the homestead, and may be

EQUITY—*Continued.*

allotted in the undivided interest in lands of a tenant in common when such interest does not exceed $1,000 in value, subject only to the rights of enjoyment of the lands by the other tenants in common, who alone may complain; and when the land is sufficiently identified the allotment is not open to objection that the homestead should have been "fixed and described by metes and bounds." Rev., sec. 688. Hence, where a judgment debtor has accepted and enjoyed a homestead allotted to him in his undivided interest in lands of a less value than $1,000 for a long period of time, he may not sustain his suit in the equitable jurisdiction of the court to set aside as void the proceedings under which the homestead had been laid off, and plead the statute of limitations as to the judgment lien, upon the ground that they were a cloud upon his title. *Kelly v. McLeod*, 382.

4. *Municipal Corporation—Cities and Towns—Taxation—Street Improvements — Excessive Levy — Statutes — Equity—Injunction.*—Where a municipality levies a special tax for street improvements upon the land of an abutting owner in excess of that allowed by a statute applicable, the excess is a nullity and may be enjoined; and where the limitation prescribed is a certain percent of the taxable value of the property, that valuation must control, whether the property lies upon one of several streets. *Charlotte v. Brown*, 435.

5. *Railroads — Easements — Forfeitures—Covenant—Breach—Equity.*—In construing a deed to lands—in this case a grant of an easement to a railroad company—conditions subsequent to the vesting of the title, which would work a foreclosure, should be strictly construed and taken most strongly against the grantor; and courts of equity will relieve against a forfeiture for breach of covenants in the conveyance when a just compensation can be made in money or other things of value. *R. R. v. Carpenter*, 465.

6. *Equity—Debtor and Creditor—Payment—Volunteer—Subrogation by Implication.*—One who acts under a *bona fide* and reasonable belief that he is bound to the payment of a debt of another secured by a lien or mortgage or otherwise, is, on making payment thereof, subrogated to the rights of the creditor in the securities, for while ordinarily the payment of a debt by a stranger, a mere volunteer, without request from the debtor, extinguishes the original obligation and releases the securities, the doctrine of subrogation may arise from implication, depending upon the equities surrounding the particular transaction, which are to be administered according to their priorities. *Publishing Co. v. Barber*, 478.

7. *Same—Principal and Agent—Husband and Wife—Parties.*—A., the wife of B., purchased a Merganthaler type machine, paid part of the purchase money, gave a chattel mortgage to secure the deferred payments, and B., her husband, acting as her agent, and with authority to sell the machine, but dealing with the plaintiff corporation as the owner, and so representing himself, contracted to sell the machine to the plaintiff, under an agreement that the plaintiff would pay with its stock the amount paid to the vendor of the machine, assume the deferred payments, and to meet some of them, the plaintiff gave its note to the agent, which the latter discounted at a bank and applied the proceeds accordingly, the plaintiff having paid this note since

EQUITY—*Continued.*

the institution of this action: *Held*, (1) A., the principal, was not a necessary party to the suit, as she had assigned all her rights. (2) The plaintiff was entitled to subrogation, for the partial payment, *pro tanto*. (3) The mortgage creditor, who accepted the partial payment was the only one who could object to the plaintiff's right of subrogation, and as he had been fully satisfied, it was held that A. and her assignee, the defendant, having received and knowingly retained the benefits of the transaction, would, under the circumstances, have no cause of complaint, and could not prevent subrogation. *Ibid.*

8. *Equity—Subrogation—Volunteer—Payment—Debtor and Creditor—Rights of Debtor.*—One who is otherwise entitled to subrogation to the rights of the creditor in a mortgage of the principal debtor pledged for the payment of the debt will not be denied this right *pro tanto*, upon making a partial payment thereon, when the creditor does not object or his equities are not interfered with, there being no intervening prior equity. *Ibid.*

9. *Injunction—Public Interests—Damages—Restraining Order.*—A private enterprise to be conducted upon such large proportions as to beneficially affect the interests of the public will not be restrained to the hearing at the suit of a citizen, when it appears that a trial upon the merits of the controversy will doubtless be had before any of the damages alleged could accrue; that such damages can be adequately compensated for by the defendant, which is solvent and able to respond; or that injunctive relief may be later and timely granted should it then become apparent that it is necessary and should be afforded to protect plaintiff's rights. *Rope Co. v. Aluminum Co.*, 572.

10. *Injunction—Restraining Order—Act Not Commenced or Contemplated.* Where an act sought to be enjoined does not appear to have been either commenced or contemplated by the defendant, there is nothing upon which a court of equity may proceed. *Ibid.*

11. *Limitation of Actions—State's Lands—Entries—Recording—Notice—Equity—Stale Claims.*—Where the plaintiff claims land under a quitclaim deed of B. of supposed interests he had in lands entered by another, and B. thereafter has taken out grants of these lands in his own name and had them recorded, this act of B. put him in an adverse relation to the plaintiff's ancestor, giving the latter his action for whatever rights he could have acquired under the quitclaim deed, and from that time the various statutes of limitation would begin to run; and where there has been a lapse of fifty-seven years since the registration of the grant to B., the plaintiff's claim, unexplained, would become a stale claim, and bar his rights in equity, in the absence of a statute. *Ditmore v. Rexford*, 620.

ESTATES. See Husband and Wife, 1.

1. *Estates—Remaindermen—Right of Action—Life Estate—Real Party in Interest—Interpretation of Statutes.*—The remaindermen have no right of possession in lands during the lifetime of the first taker, and during that time their action to recover the land will not lie, the statute requiring it to be brought by "the real party in interest." Revisal, sec. 400. *Blount v. Johnson*, 25.

ESTATES—*Continued.*

2. *Same—Tax Title.*—The plaintiffs, being remaindermen, may not recover the lands during the continuance of the life estate, and the court will not consider whether the defendants' tax deed for the lands sold would bar the plaintiffs' right to recover, should they have had a cause of action. *Ibid.*

3. *Judicial Sales — Estates — Contingent Remainders — Interpretation of Statutes—Constitutional Law.*—Revisal, sec. 1591, rendering valid judgments authorizing the sale of lands wherein there are contingent remainders, is constitutional and valid. *Bullock v. Oil Co.*, 63.

4. *Judicial Sales—Estates—Contingent Interests—Interpretation of Statutes—Parties—Representation—Application of Funds.*—A testator devised certain lands to his wife during her widowhood or life, which, at her death, were to be equally divided between the children or "their heirs." The lands were sold in partition in 1904, during the lifetime of the widow, and the children were made parties. One of these children died in 1906, before the death of her mother (in 1909) and her children, the grandchildren of the testator, brought suit to recover their interests in the land devised, claiming they had a vested interest therein in 1904, and not being parties to the proceedings, were not estopped by the judgment in partition: *Held*, the plaintiff had a contingent interest in the lands at the time of the sale, and were concluded from claiming the lands under the validating act of 1905 (Revisal, sec. 1591). *Semble*, even under the comcon law the representation of the mother was sufficient to bind the plaintiffs, and the purchaser was not required to see to the application of the proceeds of sale. *Springs v. Scott*, 564, cited and applied. *Ibid.*

5. *Wills—Estates—Debts—Limitations—Executors and Administrators.*—A devise and bequest in the first item of a will of all the testator's real and personal property to his wife, and in item 4 thereof "that after the death of the widow . . . all of the property then left after having paid her burial expenses shall be equally divided between all of my children," and it appearing that the widow died intestate without having disposed of any of the property: *Held*, items 1 and 4 of the will are consistent and should be construed together, and the intent of the testator gathered therefrom was to provide for the widow for life, and an equal distribution of the property among the testator's children at her death, not subject to the debts of the first taker, except her funeral expenses, specifically provided for. As to whether the widow took a life estate or determinable fee, *quœre*. *Taylor v. Brown*, 157.

6. *Wills—Interpretation—Intent—Defeasible Estates—Statutes.*—The intent of the testator as gathered from the entire will controls its interpretation; and this rule applies to the construction of Revisal, sec. 3138, when it appears that the testator devised certain lands without the words of inheritance, and that his intent, gathered from a separate item of the will, was to create a defeasible estate in the first taker, contingent upon his dying at any time, whether before or after the death of the testator, leaving issue surviving him. *Rees v. Williams*, 201.

ESTATES—*Continued.*

7. *Wills—Intent—Contingent Remainders—Die Without Issue—Statutes.* A devise of lands to J., with limitation that if she should die without leaving issue, then over, refers the contingency upon which the estate shall vest to the death of J., and not to that of the testator, since the act of 1827, now Revisal, sec. 1581. *Ibid.*

8. *Wills—Intent—Contingent Remainders—Die Without Issue.*—A testator devised certain of his lands to his daughter J., without words of inheritance, by one item of his will, and by the next item of the will provided that in case J. died leaving issue, then to such issue and their heirs; but should J. die without issue surviving her, then to another daughter and a son of the testator, or their heirs, share and share alike: *Held*, the two items of the will are not repugnant to each other, the intent of the testator, as gathered from the entire will being that J. should take an estate in the lands defeasible upon the contingency of her dying at any time without leaving issue surviving her; and that at the death of J. the estate would vest in accordance with the happening of either one or the other contingency specified in the will. *Ibid.*

ESTOPPEL. See Judgments.

1. *Deeds and Conveyances—Lines and Boundaries—Estoppel.*—For an adjoining owner to be estopped from claiming the true divisional line of his lands, it is necessary for the party setting up the estoppel to show that he purchased the lands from him, and that there was a contemporaneous running and marking of the line; and it is insufficient that he only pointed out the wrong line at the time of purchase from another. *Campbell v. Miller*, 51.

2. *Estoppel—Subclaimants—Possession.*—One claiming possession of the *locus in quo* under the title of another cannot dispute the title of such other person until the possession so obtained is fully surrendered, and this applies to leases, licenses, contracts of purchase, or any other transaction by which possession of property is acquired from another upon an acknowledgment, express or implied, that he is the owner; and where a defendant corporation claims the *locus in quo* and its possession as successor to a corporation of which the plaintiff was an officer, and the jury has found upon a controlling issue as to title that the property had been bought and paid for by the plaintiff in his own right, and not that of his corporation, the defendant will not be permitted to dispute the plaintiff's title, for whatever right of possession it may have was derived thereunder. *LeRoy v. Steamboat Co.*, 109.

3. *Estoppel — Judgments — Parties — Privies—Corporations—Officers.*—To constitute an estoppel by judgment, there must be an identity of parties as well as of the subject-matter, or the person sought to be estopped must be in privity with the parties, and where a corporation is a party to an action wherein a judgment has been rendered, an officer thereof is not as such alone in privity with the corporation so as to be estopped by the judgment therein rendered, for the action as to him is *res inter alios acta*. *Ibid.*

4. *Estoppel in Pais—Officers of Corporations—Affidavits—Constructive Notice—Misled to Prejudice.*—The plaintiff bought and paid for a

ESTOPPEL—*Continued.*

steamboat landing which is claimed by the defendant as successor to a corporation of which the plaintiff was an officer at the time and which continued in possession of the *locus in quo*. The plaintiff had charge, as such officer, of an action brought by his company, claiming the ownership of the wharf, against a third party, who claimed the wharf to be a public one, and, therefore, that he had a right to its use. The plaintiff inadvertently filed a complaint alleging ownership in his corporation, and thereafter, and before the defendant had acquired any rights, filed an affidavit in the cause correcting the mistake and alleging ownership in himself: *Held*, that even if the defendant did not have constructive notice of the last affidavit filed in the former action, it having been found by the jury that the defendant was not misled to its prejudice by plaintiff's alleged conduct, the doctrine of equitable estoppel does not apply as against the plaintiff. The elements of estoppel *in pais* discussed and applied by WALKER, J. *Ibid.*

5. *Deeds and Conveyances—Possession of Tenant—Trials—Evidence.*—Where it is contended by a plaintiff, in an action to recover lands, that the defendant entered into the possession of the *locus in quo* under a grantor in his chain of title, and was therefore estopped to deny plaintiff's title, the testimony of a witness to that effect is incompetent, it appearing that it was from hearsay, or that the witness only knew of this fact, that the defendant merely entered into possession of the *locus in quo* after the abandonment of the plaintiff's grantor, and not how he entered, and was qualified to speak to this fact alone. *Brock v. Wells*, 170.

6. *Mental Anguish—Express Companies—Negligent Delay—Shipment Refused—Value of Shipment—Receipt—Right of Action—Estoppel.* Where an express company is liable to the plaintiff in an action to recover damages for mental anguish it has caused him in its negligent delay in the shipment or delivery of a burial casket, which consequently came too late at its destination, and was therefore refused, he is not barred of his right to recover therefor by receiving or receipting for the amount of money he had lost on that account. *Byers v. Express Co.*, 542.

7. *Deeds and Conveyances—Estoppel—Void Deeds—Trials—Evidence.*—A party to a controversy concerning the title to lands is estopped to deny the title of the other party under whose deed he claims, and under which he entered into possession; and the mere fact that this deed is void does not estop the grantor from showing that it was the title under which his adversary claimed. *Fisher v. Toxaway Co.*, 663.

EVIDENCE. See Negligence; Trials; Principal and Agent, 1, 2; Appeal and Error, 2, 3; Deeds and Conveyances; Issues; Limitation of Actions, 4; Bills and Notes; Contracts, 2; Wills, 4, 5, 11; New Trials; Insurance; Carriers of Goods, 1; Easements, 1; Witnesses; Courts, 1, 2; Statutes, 15; Malicious Prosecution; Divorce; Reference.

1. *Evidence—Communications—Insane Persons—Interpretation of Statutes.*—When the wife of an insane person sues under his deed and title to lands in dispute, testimony of a witness of conversation he had with the husband as to his claim to the lands is incompetent. Revisal, sec. 1631. *Coltrain v. Lumber Co.*, 42.

EVIDENCE—*Continued.*

2. *Same—Hearsay.*—In an action by the wife to recover lands under a conveyance made to her by her husband, since insane, testimony of a son as to the claim of his father to the lands, prior to his deed, in a conversation between them, is incompetent as hearsay, and forbidden by statute. Revisal, sec. 1631. *Ibid.*

3. *Expert Evidence—Deeds and Conveyances—Timber—Future Growth.*—When it is relevant to the inquiry as to what timber of a certain size, or that may attain that size during the period of cutting, has passed by a deed, testimony of experts is competent to show the probable increase in the diameter of the smaller trees to the specified size within the time and according to the law of nature. *Veneer Co. v. Ange*, 54.

4. *Trials—Evidence—Records—Certified Copies—Originals.*—Original records are admissible in evidence, though, in certain instances, certified copies thereof are also admissible; and in this case it is held that the admission of the original was competent to show that a commissioner therein named had knowledge of his conveyance of certain timber to another when he later attempted to acquire title thereto for himself. *Riley v. Carter*, 335.

5. *Trials—Evidence—Void Deeds—Color of Title—Common Sense.*—A void deed is color of title for the purpose of showing that the parties litigant in an action involving ownership of timber claimed it from a common source. *Ibid.*

6. *Deeds and Conveyances—Mortgages—Deeds in Trust—Recitations—Decrees—Evidence—Registration—Notice.*—Commissioners appointed by the court to sell lands under a deed of trust are officers of the court, and their recitation in the deed of conveyances of decrees of the court respecting the sale are *prima facie* evidence of the correctness of such statements, and affect subsequent purchasers with notice, though the decrees may not be registered. It is otherwise when the order or judgment of the court creates the lien. *Riley v. Carter*, 336.

7. *Master and Servant—Safe Appliances—Notice Implied—Natural Evidence.*—A master is held to the duty of inspecting dangerous power-driven machines at which his employees work in the discharge of their duties; and notice to the master will be implied from natural evidence of a long existing defect in the machine which caused an injury to the employee, such as, in this case, the worn and gapped condition of the knives in a jointer machine, showing that, by proper inspection, the defendant should have been aware of the defect. *Cozzins v. Chair Co.*, 364.

8. *Trials—Evidence—Corporations—Issues—Partnerships—Objections and Exceptions—Appeal and Error—Harmless Error.*—Where the right of the intervenors in an action involving the title to certain property, attached by the plaintiff, depends upon whether the defendant was a corporation or a partnership comprising the intervenors, admission of the intervenors that the defendant was a chartered company, and had acquired and held property as such, are sufficient evidence for the jury upon the question; and if in this case there was error in admitting the evidence, it was rendered harmless by subsequent testimony to that effect of the same witness without objection. *Forbes v. Lumber Co.*, 403.

EVIDENCE—*Continued.*

9. *Evidence—Declarations—Deeds and Conveyances—Interests—Trials.*—Where the title to lands is in dispute, a deed in the chain of title of the party offering it is incompetent as the declarations of a deceased grantor, it being in the interest of such party. *Ibid.*

10. *Trials — Evidence—Declarations—Adverse Interests—Statutes.*—Testimony of a witness as to declarations of a deceased person is competent when relevant to the inquiry and against the interests therein of the witness testifying, and it is not prohibited by Revisal, sec. 1631. *Seals v. Seals*, 409.

11. *Evidence—Admissions—Testimony at Former Trial—Substance in Full.* Testimony of a witness of admissions made by a party to the action while testifying on a former trial, and directly bearing on the issue, is competent without giving the full substance of what the party had then testified; and where the matter in controversy involves only the question as to whether the plaintiff, in his action for damages for breach of defendant's contract made with him to cut timber from his lands, had only one or two years in which to cut, the plaintiff claiming the latter, it is competent for a witness in plaintiff's behalf to testify that on a former trial the defendant testified that it was two years, without stating substantially the full testimony of the defendant at that time. *Bowman v. Blankenship*, 519.

12. *Trials—Evidence—Res Gestæ—Officers—False Arrest.*— In an action against an officer for false arrest and imprisonment, while acting on his own observation without a warrant, evidence of matters transpiring while the arrest was being made is competent against the prisoner, as a part of the *res gestæ*, but it is incompetent to show what had occurred at a different time or place. *Sigmon v. Shell*, 582.

13. *Evidence—Witnesses—Experts—Comparison of Handwriting.*—Before the passage of chapter 52, Public Laws 1913, it was incompetent for a handwriting expert to testify to the genuineness, or otherwise, of the signature of a party to a writing based upon a comparison with another signature, not admitted to be genuine or requiring proof that it is so. *Boyd v. Leatherwood*, 614.

14. *Same—Explanations—Comparison by Jury.*—It is competent for handwriting experts to show and explain to the jury various signatures being compared by him, when giving his opinion on the genuineness of one of them, the subject of the inquiry; but it is not allowed that the jury make the comparisons for themselves in the absence of expert testimony. *Ibid.*

15. *Evidence—Witnesses, Expert—Findings of Trial Court—Appeal and Error.*—Where the testimony required of an expert witness has been ruled out upon the trial in the Superior Court, this Court on appeal will not pass upon the exception taken to its exclusion when it does not appear of record that the trial judge had passed upon the question of whether the witness had qualified himself to give evidence of this character, and had held him to be qualified. *Ibid.*

16. *Evidence — Witnesses—Experts—Handwriting—Declarations—Trials—Evidence—Questions for Jury.*—Where a bond sued on is attacked upon the ground that the signature thereto was a forgery, it is competent to show that the maker thereof had made a statement, at the

EVIDENCE—*Continued.*

time the bond was given, in accordance with the expressed tenor of the bond, as a circumstance tending to show he had executed it. *Ibid.*

17. *Limitation of actions—Former Action—Records—Evidence.*—Where an action has been nonsuited for misjoinder, and the parties thereafter have brought separate actions, it is competent for the plaintiffs to introduce the record in the former action to show they are within the three-year statute of limitations, when the defendant has pleaded and relied on the statute. *Owenby v. R. R.*, 641.

EVIDENCE, PAROL. See Deeds and Conveyances, 13.

EXCEPTIONS. See Appeal and Error.

EXCLUSIVE SALE. See Statutes, 23.

EXCUSABLE NEGLECT. See Motions, 2.

EXECUTORS AND ADMINISTRATORS. See Contracts, 2; Clerks of Court, 1, 2.

EXEMPTION. See Homestead.

EX MERO MOTU. See Courts, 23.

EXPERT EVIDENCE. See Evidence, 3; Trials, 36; Witnesses.

EXPULSION. See Schools.

EXPULSION FROM TRAIN. See Carrier of Passengers, 4.

FALSE IMPRISONMENT.

1. *False Arrest—Liability of Officer—Reasonable Belief—Trials—Questions for Jury.*—An officer acting without warrant and on his personal observation will not be liable in damages for making an arrest when no offense has been committed, if under the circumstances, he had reasonable grounds for believing that it had been; the reasonableness of the belief presenting matters of fact for the determination of the jury, with the burden upon the defendant to show justification for the act when this defense is pleaded and relied upon. *Sigmon v. Shell*, 582.

2. *Trials—Evidence—Res Gestæ—Officers—False Arrest.*—In an action against an officer for false arrest and imprisonment, while acting on his own observation without a warrant, evidence of matters transpiring while the arrest was being made is competent against the prisoner, as a part of the *res gestæ*, but it is incompetent to show what had occurred at a different time or place. *Ibid.*

FEDERAL COURT. See Removal of Causes.

FEDERAL EMPLOYERS' LIABILITY ACT. See Railroads, 18, 19.

FEDERAL STATUTES. See Statutes, 29.

FELLOW-SERVANT. See Master and Servant, 11, 12, 13, 14, 24.

FRAUD. See Bills and Notes; Insurance; Trials; Equity, 1; Reformation of Instruments, 3, 4; Deeds and Conveyances, 21, 22, 24, 25, 26, 28.

FRAUDS, STATUTE OF. See Insurance, 3.

1. *Trusts and Trustees—Partnership—Money Advanced—Equity—Procedure.*—Where A. and B. have entered into a parol agreement for the purchase and sale of certain lands for joint profit, A. to transact the business in that behalf and attend to the selling, and B. to furnish the purchase money, and this is accordingly done, but B. has wrongfully taken the title in his own name and refused to sell the lands and divide the clear profits in accordance with his agreement, the statute of frauds has no application, and the courts will decree a sale of the lands, payment of the purchase price into court, and a division of the clear profits after repaying B. the purchase money he has advanced. *Brogden v. Gibson*, 16.
2. *Statute of Frauds—Deeds and Conveyances—Parol Evidence—Trials—Questions for Court.*—Where a deed, expressed in unambiguous language, purports to convey the whole of certain lands, parol evidence that it was the grantor's intention to only convey a part thereof is inadmissible, the construction of the deed as to its meaning and purport being a question of law for the court. *Pate v. Lumber Co.*, 184.
3. *Contracts—Options—Deeds and Conveyances—Statute of Frauds—Registration—Statutes.*—An option on lands is a conditional contract for a short period of time on the part of the owner that upon the payment of the contract price and the performance of the conditions named he will convey the same to the holder of the option; and while an agreement of this character is not a completed contract to convey the lands, it comes within the statute of frauds and our registration laws. *Ward v. Albertson*, 218.
4. *Contracts—Principal and Agent—Parol Agreement—Statute of Frauds Value of Services—Implied Promise—Measure of Damages.*—A parol agreement made by the owner of land with an agent for the sale thereof, that the agent shall receive a certain number of acres of the land in consideration of his services, should he effect a sale, is void under the statute of frauds and will not be enforced when the statute is insisted upon; but the law will imply an agreement upon the part of the owner to pay a reasonable price for the services rendered by the agent when the sale has been consummated, and while the value of the land is not controlling upon the measure of damages, it is competent evidence to be considered by the jury in ascertaining the reasonable value of the services rendered by the agent. *Faircloth v. Kenlaw*, 228.
5. *Statute of Frauds—Contracts to Convey—Written Promise—Bills and Notes.*—It is not required by the statute of frauds that the writing necessary to enforce an agreement for the conveyance of lands should be "subscribed" by the owner; but it is necessary that it should contain a promise of some sort by the owner to make the conveyance upon the payment by the purchaser of the consideration agreed upon (Revisal, sec. 976); therefore the acceptance by the owner of a promissory note given by the purchaser, and stated to be for the amount of the purchase price of lands, will not alone be a sufficient compliance with the statute; and there being no valid contract, it follows that damages may not be recovered for a breach thereof. *Burriss v. Starr*, 657.

GRANTS. See Deeds and Conveyances.

GUARDIAN AND WARD. See Deeds and Conveyances, 34.

HABEAS CORPUS.

Habeas Corpus—Appeal and Error—Certiorari.—An appeal from the determination of the judge before whom the proceedings upon a writ of *habeas corpus* is heard will not lie, except in cases concerning the care and custody of children; though an applicant in proper cases where an adverse judgment presents questions of law or legal inferences and amounts to a denial of a legal right may have the judgment reviewed on *certiorari*. Constitution, Art. IV, sec. 8. *In the Matter of Wiggins*, 457.

HANDWRITING. See Evidence, 16.

HARMLESS ERROR. See Appeal and Error.

HIGHWAYS. See Pleadings, 10; Municipal Corporations.

HOMESTEAD.

Homestead—Metes and Bounds—Tenants in Common—Equity—Judgments—Cloud on Title.—The homestead laws should be liberally construed in favor of the one claiming the homestead, and may be allotted in the undivided interest in lands of a tenant in common when such interest does not exceed $1,000 in value, subject only to the rights of enjoyment of the lands by the other tenants in common, who alone may complain; and when the land is sufficiently identified the allotment is not open to objection that the homestead should have been "fixed and described by metes and bounds." Rev., sec. 688. Hence, where a judgment debtor has accepted and enjoyed a homestead allotted to him in his undivided interest in lands of a less value than $1,000 for a long period of time, he may not sustain his suit in the equitable jurisdiction of the court to set aside as void the proceedings under which the homestead had been laid off, and plead the statute of limitations as to the judgment lien, upon the ground that they were a cloud upon his title. *Kelly v. McLeod*, 382.

HUSBAND AND WIFE. See Equity, 7; Divorce; Trials, 7.

1. *Husband and Wife—Joint Estate—Jus Accrescendi.*—The right of survivorship applies to estates in land conveyed jointly to husband and wife, and vests in the heirs of the one surviving the other. *Murchison v. Fogleman*, 397.

2. *Same—Issues—Uses and Trusts—Trials—Deeds and Conveyances—Registration.*—Where from the pleadings and evidence in an action to recover lands, brought by the heirs at law of the husband against the heirs at law of the wife, the rights of the parties depend upon the question of whether the lands were bought solely by the husband, to whom the conveyance was made, or partly with the moneys of the wife with the mutual intention that it should belong to them both jointly for a home, an issue is held sufficient and determinative: "Was the land in question purchased and paid for jointly by W. and N. as a home for both of them, as alleged in the answer?" And this issue being answered in defendant's behalf, the effect of the judgment accordingly rendered would be that after the death of the husband the principle of *jus accrescendi* would apply, the husband holding the

HUSBAND AND WIFE—*Continued.*

title in trust for them both jointly, and it would become immaterial between the parties, being the heirs at law, whether the deed to the husband was permitted to be recorded pending the trial; and held further, that the failure to submit an issue raised by the answer asking for affirmative relief would not be prejudicial to the plaintiffs. *Ibid.*

ILLEGAL CONTRACTS. See Contracts, 9.

IMPEACHMENT. See Witnesses.

INJUNCTION. See Equity.

Timber—Undergrowth—Equity—Injunction.—Where standing timber of a certain size is conveyed and that which may attain that size during the period of cutting, and the right is also given to cut smaller growth for car standards, railroad ties for the logging road of the grantee, etc., the grantor may be enjoined, within the stated period, from cutting or removing the undersized timber, where it appears from the evidence that some of the the trees will reach by natural growth, within the stated period, the size stated in the deed. *Veneer Co. v. Ange*, 54.

INSANE PERSONS. See Evidence, 1.

INSOLVENCY. See Corporations, 1.

INSTRUCTIONS. See Trials; Appeal and Error, 7.

INSURANCE.

1. *Insurance, Fire—Wrongdoer—Subrogation—Equity—Limitation of Actions.*—There is no privity of contract between an insurer and one who negligently destroys the property covered by a policy of insurance, the right of the insurer to recover of the wrongdoer being in subrogation of the rights of the insured, both under the relevant provisions of the statutory or standard form of policy and under the equitable principle of subrogation; and where the statute of limitations has run against the right of recovery of the insured in his action against such wrongdoer, the insurer cannot acquire any further right, upon making payment under the terms of its policy, and its right of action will also be barred. *Insurance Co. v. R. R.*, 136.

2. *Insurance, Fire—Wrongdoer—Payments for Damages—Payment by Insurer — Fraud — Judgments — Evidence — Trusts and Trustees.*—Where one who has negligently destroyed property covered by an insurance policy has been forced by judgment to pay to the insured the amount of his loss, with knowledge that the insurer has paid, under its policy, for the same loss, such payment cannot be evidence of fraud against the insurer. *Semble:* The insured would be deemed a trustee for the benefit of the insurer for such moneys as he may have thus received. *Ibid.*

3. *Insurance, Life—Policies—Contracts—Expressed Consideration—Parol Evidence.*—The consideration expressed in a policy of life insurance may not be contradicted or varied by parol when the effect will be to invalidate the policy contrary to its express terms. *Brittain v. Insurance Co.*, 149.

INSURANCE—*Continued.*

4. *Insurance, Life—Policies—Contracts—Equity—Reformation—Questions of Law—Trials—Courts.*—A policy of life insurance may be reformed on the ground of mistake so as to express the true agreement of the parties, but the mistake must be mutual on the part of the insured as well as the insurer; and it is a matter of law as to whether the pleadings and evidence are sufficient to establish it. *Ibid.*

INTEREST. See Jurors, 1.

INTERPRETATION OF STATUTES. See Statutes.

INTERSTATE COMMERCE. See Commerce.

INTERVENORS. See Judgments, 5.

INTOXICATING LIQUORS.

Intoxicating Liquors—Actions to Recover—Public Policy—Courts.—An action to recover upon an account for spirituous liquors sold and delivered here for the purposes of sale cannot be maintained in the courts of this State, for such transactions are against our public policy; and the fact that the contract was made in a State recognizing its validity does not alter the matter. *Bluthenthal v. Kennedy*, 372.

ISSUES. See Trials.

Evidence—Questions at Issue.—When the issue in an action to recover damages for a personal injury alleged to have been negligently inflicted involves the safety of working at an alleged defective machine, which the plaintiff was operating, a question asked a witness as to the safety of working at the machine is directed to the very question submitted to the determination of the jury, and was properly excluded. *Steeley v. Lumber Co.*, 27.

JAILS. See Municipal Corporations, 2.

JOINDER. See Actions, 3, 4.

JOINT ACTIONS. See Actions, 6.

JUDGMENTS. See Motions, 1; Estoppel; Evidence, 6; Equity, 3.

1. *Estoppel — Judgments — Parties — Privies—Corporations—Officers.*—To constitute an estoppel by judgment, there must be an identity of parties as well as of the subject-matter, or the person sought to be estopped must be in privity with the parties, and where a corporation is a party to an action wherein a judgment has been rendered, an officer thereof is not as such alone in privity with the corporation so as to be estopped by the judgment therein rendered, for the action as to him is *res inter alios acta*. *LeRoy v. Steamboat Co.*, 109.

2. *Insurance, Fire—Wrongdoer—Payments for Damages—Payment by Insurer — Fraud — Judgments — Evidence — Trusts and Trustees.*—Where one who has negligently destroyed property covered by an insurance policy has been forced by judgment to pay to the insured the amount of his loss, with knowledge that the insurer has paid, under its policy, for the same loss, such payment cannot be evidence

JUDGMENTS—*Continued.*

of fraud against the insurer. *Semble:* The insured would be deemed a trustee for the benefit of the insurer for such moneys as he may have thus received. *Insurance Co. v. R. R.*, 137.

3. *Appeal and Error—Harmless Error—Carriers of Goods—Connecting Lines—Judgments.*—In an action to recover damages to a shipment of goods against two connecting carriers alleged to have been caused while in their possession, an issue as to each carrier was submitted to the jury, and the issue of negligence as to one of them was answered in defendant's favor and, as to the other, in plaintiff's favor: *Held*, exceptions arising under the first of the issues are harmless as to the appealing defendant. *Lyon v. R. R.*, 143.

4. *Corporation—Deeds and Conveyances—Restrictive Powers—Parties—Tender of Deed—Judgment—Estoppel.*—A conveyance of lands was made to Claremont Female College, which by legislative amendment was changed to Claremont College and a conveyance of the land made from the trustees of the college under its former name to that under the amendment. The amendment placed the control and management of the college under the "Classis of North Carolina Reformed Church of the United States," providing for a governing body of trustees to take and hold the property of the college. The objection that the Reformed Church of the United States should be made a party to an action involving the validity of a conveyance of the lands by the corporation to another, to be used for other than school purposes, is untenable, the local part of that organization, especially charged with looking after its interest there, through its accredited representatives, having been made parties plaintiff and joined in the tender of the deed. *College v. Riddle*, 211.

5. *Intervenors — Judgments — Motions — Trials—Appeal and Error.*—The plaintiffs in an action to recover of the defendant damages to their lands, seized certain personal property of the defendant under attachment, which the intervenors claimed as their own. The defendant filed no answer, the cause was regularly tried, and the jury found the issues in plaintiff's favor, including that as to the intervenors' ownership of the property. At a subsequent term of the court the trial judge set aside the judgment rendered against the defendant, upon motion of the intervenors, and on appeal by the plaintiff it is held for reversible error, for that the intervenors were only interested in the issue involving their title. *Forbis v. Lumber Co.*, 403.

6. *Railroads — Crossings — Trials —Evidence—Contributory Negligence—Issues—Judgments.*—Where the plaintiff sues a railroad company to recover damages for a personal injury alleged to have been received by him in a collision with the defendant's train while attempting to cross its roadway on a public street of a town, upon the ground that the defendant's employee, charged with the duty, failed to give him warning before entering on the right of way, and there is evidence that the plaintiff did not himself exercise the ordinary care required under the circumstances, judgment may not be given adverse to the defendant upon a verdict not answered upon the issue of contributory negligence; and it is further held that evidence of the drunken condition of the plaintiff was erroneously excluded on the trial of this case. *Wilson v. R. R.*, 499.

JUDGMENTS—*Continued.*

7. *Trials—Terms—Judgments Relating Back—Fiction of the Law—Deeds and Conveyances—Innocent Purchasers.*—The rule of court, afterwards enacted into a statute, that all judgments entered during a term shall relate back to the beginning of the term, and be deemed to have then been entered, is to prevent advantage being taken by litigants who may have been fortunate enough to have first secured their judgment, and unseemly endeavor to get first to the ear of the court; and will not apply to a judgment obtained during a term of court subsequent by a day or a fraction of a day to the registration of a deed to lands, so as to affect the rights of an innocent and *bona fide* purchaser for value. *McKinney v. Street*, 515.

8. *Trials — Negligence — Contributory Negligence —Verdict—Judgment.*— Where an action for damages presents for the consideration of the jury the issues of negligence and contributory negligence, and under proper instructions the second issue has been answered in the defendant's favor, the plaintiff is not entitled to recover, whatever the answer to the other issues may be, and cannot be entitled to judgement. *Holton v. Moore*, 549.

JUDICIAL SALES.

1. *Judicial Sales — Estates — Contingent Remainders — Interpretation of Statutes—Constitutional Law.*—Revisal, sec. 1591, rendering valid judgments authorizing the sale of lands wherein there are contingent remainders, is constitutional and valid. *Bullock v. Oil Co.*, 63.

2. *Judicial Sales—Estates—Contingent Interests—Interpretation of Statutes—Parties—Representation—Application of Funds.*—A testator devised certain lands to his wife during her widowhood or life, which, at her death, were to be equally divided between the children or "their heirs." The lands were sold in partition in 1904, during the lifetime of the widow, and the children were made parties. One of these children died in 1906, before the death of her mother (in 1906) and her children, the grandchildren of the testator, brought suit to recover their interests in the land devised, claiming they had a vested interest therein in 1904, and not being parties to the proceedings, were not estopped by the judgment in partition: *Held*, the plaintiffs had a contingent interest in the lands at the time of the sale, and were concluded from claiming the lands under the validating act of 1905 (Revisal, sec. 1591). *Semble*, even under the common law the representation of the mother was sufficient to bind the plaintiffs, and the purchaser was not required to see to the application of the proceeds of sale. *Springs v. Scott*, 132 N. C., 564, cited and applied. *Ibid.*

JURISDICTION. See Courts, 2; Removal of Causes.

JURORS.

1. *Jurors — Selection — Improper Questions — Prejudice — Principal and Surety—Parties—Interest.*—When it appears that a defendant is sued for damages for a personal injury alleged to have arisen in tort, which are covered by an indemnifying bond of another corporation, it is competent for the plaintiff, in selecting the jurors in the case, to ask them if any of them were interested as agent or otherwise in

JURORS—*Continued.*

the indemnity company, for while that company was not made a party defendant, it was directly interested in the result of the trial. *Walters v. Lumber Co.*, 388.

2. *Jurors—Selection—Prejudice—Trials—Court's Discretion—Appeal and Error.*—It is within the province of the trial judge to see that questions extraneous to the case and tending to prejudice the jury are not asked the jurors being selected for the trial, and such matters as are within his discretionary power are not reviewable on appeal in the absence of its abuse. In this case, it appearing among other things that the appellant had not exhausted his peremptory challenges, his exception is untenable. *Ibid.*

3. *Jurors—Challenges—Trials—Prejudice—Principal and Surety—Indemnity Company—Appeal and Error.*—In an action to recover damages from a corporation for a personal injury alleged to have been by it negligently inflicted upon the plaintiff, it is reversible error for the trial judge to permit the plaintiff's attorney to ask the jurors being selected for the trial of the cause, whether any of them is employed by any indemnity company that insures against liability for a personal injury, when there is no indication or evidence that the defendant was insured against such loss, for the tendency of such question is to prejudice the jury against the defendant and unduly embarrass it upon the trial. *Starr v. Oil Co.*, 587.

JURY.

1. *Trial by Jury—Waiver—Findings by Court—Evidence—Appeal and Error.*—When a trial by jury has been waived by the parties for the judge to find the facts, his findings thereof are conclusive on appeal if there is evidence to support them; and where the burden of proof is upon the plaintiff to establish the issue, his finding for the defendant thereon is not reviewable, for the plaintiff is required to satisfy him with the evidence that the issue should be answered in his favor. *Eley v. R. R.*, 78.

2. *Trial by Jury—Waiver—Findings in Writing—Conclusions of Law—Interpretation of Statutes.*—Where a jury trial has been waived by the parties, and the record discloses that the decision of the judge was given in writing, and his finding of fact and conclusions of law are separately stated, it is sufficient under Revisal, sec. 541. *Ibid.*

JUS ACCRESCENDI. See Husband and Wife, 1.

JUSTICES OF THE PEACE. See Courts, 3.

LACHES. See Motions, 1.

LANDLORD AND TENANT. See Estoppel; Deeds and Conveyances, 15.

LEASES. See Railroads, 12; Trials, 97.

LIENS. See Drainage Districts, 6.

1. *Liens—Material Men—Contract—Principal and Surety—Bond—Interpretation.*—Where the material man sues the owner of the building, claiming a lien thereon for material furnished, and seeks to hold the surety liable under a bond indemnifying the owner against loss, if

LIENS—*Continued.*

any, arising to him under the contract, the bond of indemnity and the agreement with the contractor should be construed together. *Mfg. Co. v. Andrews*, 285.

2. *Same — Contracts Expressed—Payment Under Contract—Liability of Surety.*—Where the owner of a building erected under an agreement with the contractor that the latter should build the house specified for a sum certain and turn it over to the owner completed, stipulations in the contracts that the contractor furnish the materials add nothing to the agreement of the contractor already expressed; and when the bond expressly states that it was solely an indemnity against personal loss to the owner, there can be no liability of the surety implied contrary to the terms of the writing, and the owner not being liable to the lienor who has failed to notify him of his lien when there was money due by him to the contractor, there can be no liability on the part of the surety thereon. *Supply Co. v. Lumber Co.*, 160 N. C., 428, etc., cited and distinguished. *Ibid.*

3. *Liens—Statutes—Interpretation—Material Men—Funds Due—Moneys Prorated.*—Where the owner of a building erected under contract has not sufficient funds in his hands to pay all the lienors thereon for material furnished. the amount due the contractor, subject to the liens, shall be distributed by the owner among the several claimants under the provisions of section 2023 of the Revisal; and construing this section with other relevant sections of the Revisal, it is held that it does not conflict with section 2035, requiring "that liens created and established by this chapter (48) shall be paid and settled according to priority of the notice of the lien filed with the justices or the clerk," for this latter section relates to liens filed with the proper officers, and does not affect the provisions as to subcontractors who acquire a lien by notice to the owner. *Ibid.*

LIFE ESTATES. See Estates, 1.

LIMITATIONS OF ACTIONS. See Easements, 1.

1. *Deeds and Conveyances—Location of Lands—Adverse Possession—Instructions.*—Where the plaintiff claims the land in dispute upon the sole ground that it was contained in the description of her deed, which was the only controverted matter, it is not error for the court to refuse defendant's prayer for special instruction upon the sufficiency of the plaintiff's evidence of adverse possession to ripen title. *Coltrain v. Lumber Co.*, 42.

2. *Deeds and Conveyances—Reformation—Limitation of Actions—Interpretation of Statutes.*—To reform a deed for mutual mistake, the cause of action accrues when the mistake is discovered or should have been in the exercise of ordinary care, and is barred three years thereafter. Hence, in an action to reform a timber deed for an alleged mutual mistake of the parties, so as to incorporate therein an agreement of the grantee that the land was only to be once cut over, and that the right to cut should cease when he moved away from the land, the statute of limitations will run three years after the plaintiff had knowledge of the mistake alleged. Revisal, sec. 395, subsec. 9. *Jefferson v. Lumber Co.*, 46.

LIMITATIONS OF ACTIONS—*Continued.*

3. *Deeds and Conveyances—Timber—Adverse Possession—Consistent Occupancy.*—The statute of limitations will only run against a title to or an interest in lands when the occupation of the property or the enjoyment of the right is hostile to the right of the adverse claimant or in some way antagonistic to it; and such adverse use or occupation is not shown when the owner of lands reserves the timber of a certain dimension standing thereon and conveys the land itself, and the grantee enters upon the lands and uses the same for farming or other like purposes consistent with the right of the grantor to the timber reserved. As to whether the plaintiff's evidence in this case is sufficient to show mutual mistake, or to aid him were it established, *Quœre. Ibid.*

4. *Limitation of Actions—Adverse Possession—Evidence—Occasional Trespass.*—In this case the grantor of a large tract of more than 200 acres reserved the right to the timber of a certain dimension growing thereon, and the grantee entered thereon and used the same for farming or like purposes. There was evidence tending to show that the grantee at one time entered upon the lands and cleared some 15 or 20 acres, and that he or his assignee cut down several trees that were merchantable timber; also, that upon another occasion he cleared about 4 or 5 acres more of the land. Upon the plea of the statute of limitations by the grantor, it is *Held*, that the grantee has not established such an invasion of the grantor's rights, or such possession or enjoyment opposing his interest, as would stay the effect and operation of the statute. *Ibid.*

5. *Limitations of Actions—Adverse Possession—Color of Title.*—One who cuts wood upon the lands in dispute at several separate times, without title, is a trespasser upon the lands, and evidence of this character is insufficient to ripen title as adverse possession without "color." *Campbell v. Miller*, 51.

6. *Same—Instructions—Appeal and Error—Harmless Error.*—In an action to recover lands contained in the lappage of disputed division lines between adjoining owners which one of them claims under seven years adverse possession under "color of title," his prayer is properly refused which leaves out the words "color of title," seven years without "color" being insufficient; but had the prayer been correct, its refusal by the court is rendered harmless in this case, by the location of the line by the jury in accordance with the contention of his adverse claimant. *Ibid.*

7. *Limitations of Actions—Tenants in Common—Partition—Color of Title Adverse Possession.*—An allotment of lands to a tenant in common under a judgment in proceedings to partition them among all of the tenants, purporting to allot to each tenant his share of the entire estate in severalty, is color of title as to the share allotted or purparty, and seven years adverse possession of such tenant thereunder, or those claiming under him by deeds, will ripen the title thereto. *Lumber Co. v. Cedar Works*, 83.

8. *Limitations of Actions—Foreign Wills—Defective Probate—Color of Title.*—A will purporting to devise certain lands, sufficiently describing them, is color of title, though made in another State and defective as to the probate here. *Ibid.*

LIMITATIONS OF ACTIONS—*Continued.*

9. *Insurance, Fire—Wrongdoer—Subrogation—Equity—Limitation of Actions.*—There is no privity of contract between an insurer and one who negligently destroys the property covered by a policy of insurance, the right of the insurer to recover of the wrongdoer being in subrogation of the rights of the insured, both under the relevant provisions of the statutory or standard form of policy and under the equitable principles of subrogation; and where the statute of limitations has run against the right of recovery of the insured in his action against such wrongdoer, the insurer cannot acquire any further right, upon making payment under the terms of its policy, and its right of action will also be barred. *Insurance Co. v. R. R.*, 136.

10. *Deeds and Conveyances—Fraud—Color of Title—Limitation of Actions.* Except as to the creditors of the grantor, a deed obtained by fraud is color of title from its date, until set aside by a court of competent jurisdiction; and when not thus set aside, the *bona fide* adverse possession of the grantee for seven years under a claim of title will ripen into an absolute title under the statute of limitations. *Pickett v. Pickett*, 14 N. C., 6, relating to the rights of creditors in such a case, cited and applied. *Seals v. Seals*, 409.

11. *Deeds and Conveyances—Color of Title—Trials—Evidence—Adverse Possession.*—Where a deed to lands is put in evidence without showing paper title in the grantor or connecting this deed with any other title, it can have no legal effect except as color of title, making it necessary for the party claiming it to establish such adverse possession of the lands, and for such a period of time, as will ripen his possession into an absolute title under the statute; and while building a house on the lands and marking its boundaries are some evidence of possession, it is not conclusive. *Land Co. v. Cloyd*, 595.

12. *Same—Leases—Admissions.*—Where the plaintiff relies on adverse possession to ripen his disputed title to lands, evidence is competent as a circumstance to show adverse possession and as an admission by the defendant that, at one time, the latter had leased the lands from the former. *Ibid.*

13. *Ejectment — Possession—Admissions—Limitations of Actions—Burden of Proof.*—Where the answer in ejectment alleges defendant's possession of the disputed lands, it is unnecessary for the plaintiff to show it, but where the defendant pleads the statute of limitations, it is for the plaintiff to prove that the action is not barred. *Dilmore v. Rexford*, 620.

14. *Limitation of Actions—State's Lands—Entries—Recording—Notice—Equity—Stale Claims.*—Where the plaintiff claims land under a quitclaim deed of B. of supposed interests he had in lands entered by another, and B. thereafter has taken out grants of these lands in his own name and had them recorded, this act of B. put him in an adverse relation to the plaintiff's ancestor, giving the latter his action for whatever rights he could have acquired under the quitclaim deed, and from that time the various statutes of limitation would begin to run; and where there has been a lapse of fifty-seven years since the registration of the grant to B., the plaintiff's claim, unexplained, would become a stale claim, and bar his rights in equity, in the absence of a statute. *Ibid.*

LIMITATIONS OF ACTIONS—*Continued.*

15. *Limitation of Actions—Former Action—Records—Evidence.*—Where an action has been nonsuited for misjoinder, and the parties thereafter have brought separate actions, it is competent for the plaintiffs to introduce the record in the former action to show they are within the three-year statute of limitations, when the defendant has pleaded and relied on the statute. *Owenby v. R. R.*, 641.

16. *Same—Permanent Damages—Trials—Evidence Restricted—Special Requests—Appeal and Error.*—Where the three-year statute of limitations is pleaded and relied on as a defense to an action, and the record of a former action between the same parties is competent to show that the statute has not run, the exception of the defendant that the trial court did not restrict this evidence, and that it may have been considered by the jury as substantive evidence, may not be sustained on appeal, where the defendant has not aptly requested the judge to so restrict it in accordance with Supreme Court Rule 34, 164 N. C., 548. This being an action for permanent damages to lands, the five-year statute was applicable, which had not run in favor of the defendant railroad. Revisal, sec. 394 (5). *Ibid.*

LUNATIC. See Deeds and Conveyances, 34.

MAD DOG. See Negligence, 26.

MALICIOUS PROSECUTION.

1. *Trials—Malicious Prosecution—Amendments—Distinct Cause—Appeal and Error.*—Unless done with the consent of the defendant in the action, it is not within the discretion of the trial judge to permit an amendment to the complaint setting forth an additional and substantially a new cause of action; and where damages are sought for malicious prosecution, with allegation that the plaintiff was arrested and convicted before a justice of the peace, and acquitted in the Superior Court on appeal, and amendment, permitted during the argument of the civil action, alleging plaintiff was tried upon a bill presented to the grand jury by the solicitor and acquitted, is held for reversible error. *Cooper v. R. R.*, 578.

2. *Trials—Malicious Prosecution—Evidence.*—Where in an action for malicious prosecution it is alleged that the bill of indictment was drawn by the solicitor, sent to the grand jury, which eventuated in the plaintiff's acquittal upon the trial, it is necessary for the plaintiff to show that the defendant was in some way instrumental in causing or assisting in the criminal action, for otherwise he cannot recover in his civil action for damages. *Ibid.*

3. *Same—Questions for Jury—Principal and Agent.*—One who causes the arrest, conviction, and incarceration of another before a justice of the peace, upon an insufficient warrant which he has personally sued out, upon a verdict of acquittal in the Superior Court on appeal, is liable for actual damages; and if done with malice and without probable cause, for punitive damages; and when the evidence is conflicting as to whether the warrant was sued out in the capacity of agent for another, acting within the scope of his authority, the question of the liability of the principal, as well as the agent, is for the determination of the jury, upon issues as to each of them. The

MALICIOUS PROSECUTION—*Continued.*

warrant under which the criminal action was had is held insufficient in this case. *Ibid.*

MARRIAGE AND DIVORCE. See Trials, 5.

MARRIAGE. See Divorce.

MASTER AND SERVANT.

1. *Master and Servant—Negligence—Duty of Master— Safe Appliances—Inspection—Instruction to Servant.*—The plaintiff was injured while operating, as an employee of the defendant, a machine for making shingles, and there was evidence tending to show that the machine was defective, that the plaintiff was inexperienced and had not been properly instructed in its operation or warned of its dangerous character, and evidence *per contra.* While the assignments of error were not made in accordance with the rules of this Court, the principles relative to the duty of the master to provide a safe place to work and approved appliances for the employee, and to inspect them at reasonable intervals, and to warn and instruct the employee, are discussed by WALKER, J. *Steeley v. Lumber Co.*, 27.

2. *Master and Servant—Safe Appliances—"Known, Approved," etc.—Further Duty of Master.*—An employer owes it as duty to his employee working at machines driven by mechanical power and more or less dangerous and intricate, to supply him with appliances, etc., which are reasonably safe and suitable, and to exercise the care of a prudent man in looking after his safety; and this duty may not always be fully discharged by furnishing him such implements and appliances as are "known, approved, and in general use." *Ainsley v. Lumber Co.*, 122.

3. *Same—Trials—Evidence—Negligence—Knowledge Implied—Questions for Jury.*—While engaged in his duties in operating a power-driven lathing machine, the plaintiff's intestate was killed by a piece of timber flying back from the machine and striking him. The verdict established the fact that the machine causing the injury was "known, approved, and in general use," but there was further evidence tending to show that a large hood, a part of the machine, was placed over the saws for the purpose of preventing the timbers from thus flying back, and because of a large opening therein some of the timbers would oftentimes fly back, the danger from which could practically have been removed in a certain manner at a comparatively small expense and without lessening the efficiency of the machine: *Held*, this further evidence was sufficient upon the question of defendant's actionable negligence to be submitted to the jury; and, further, that the dents in the wall caused by the flying timbers before the injury, the length of time the machine had thus been used there, etc., were evidence sufficient upon the question of defendant's implied knowledge of the danger to the employee in thus working. The charge in this case is approved. *Ibid.*

4. *Electric Company—Master and Servant—Incidental Dangers—Trials—Negligence—Nonsuit.*—The plaintiff sues an electric power, etc., company for the killing of her intestate, alleging negligence on the part of the defendant in not shutting off its current while the intes-

MASTER AND SERVANT—*Continued.*

tate, an employee, was engaged in his employment of working upon the wires of the company: *Held,* the intestate assumed the risks of all danger necessarily incident to the employment he was engaged in, and it appearing from the testimony of his own witnesses that the injury would not have occurred had he used the rubber gloves furnished him, and that he was an experienced person and should have known the danger in thus acting, a judgment as of nonsuit upon the evidence was properly rendered. The effect of the Fellow-Servant Act in its application to common carriers discussed by CLARK, C. J. *Register v. Power Co.*, 234.

5. *Master and Servant—Negligence—Safe Appliances—Known, Approved, etc.—Rule of the Prudent Man.*—While the employee assumes the risk of dangers incident to his employment in operating a machine which is run by electrical power, it is nevertheless the duty of the employer to use reasonable care, under the rule of the prudent man, in providing him with safe tools and appliances and a safe place in which to do his work; and while it is competent, upon this question to show that the appliances furnished were known, approved, and in general use, this does not fill the full measure of the employer's duty, though it may be evidence upon the question of whether or not he has performed it. *Tate v. Mirror Co.*, 273.

6. *Master and Servant—Negligence—Safe Appliances—Known, Approved, etc.—Comparisons—Evidence—Trials.*—Where an employee has brought his action to recover damages from his employer for a personal injury alleged to have been negligently inflicted on him, and the question has arisen as to whether the tools and appliances furnished for doing the work were known, approved, and in general use, it is substantial similarity and not entire sameness that is required for the test in making comparisons between those furnished and those elsewhere used. *Helms v. Waste Co.*, 151 N. C., 370, cited and applied. *Ibid.*

7. *Master and Servant—Negligence—Proximate Cause—Dangerous Conditions—Unsafe Appliances—Continuing to Work—Obvious Danger—Trials—Questions for Jury.*—In an action to recover damages for a personal injury alleged to have been inflicted upon an employee by the negligence of the employer in not furnishing proper tools and appliances for doing work at a machine driven by electrical power, the plaintiff is not barred of his right of recovery merely because he continued to perform the work under the circumstances, for it must be shown that, in the exercise of due care for his own safety, he should have known or appreciated his own danger, and had continued in the performance of the work in the presence of the obvious peril. *Ibid.*

8. *Master and Servant—Safe Appliances—Negligence—Trials—Expert Evidence—Questions for Jury.*—The plaintiff, an employee of the defendant, had his foot caught and injured by its catching in a belt running a machine, driven by electrical power, at which he was at work, and there was evidence tending to show that the belt was imperfectly laced, and there was a certain defect in the machine, which proximately caused the injury; that in accordance with a custom, known to the defendant, the plaintiff attempted to shift the belt with his

MASTER AND SERVANT—*Continued.*

foot, when the injury occurred, and there was no appliance furnished for this purpose, which should have been done, and there was further evidence, in defendant's behalf, that it had furnished an iron pipe, which should have been used on this occasion, and had the plaintiff used it the injury would not have occurred: *Held*, under the evidence, it was for the jury to determine as a matter of fact whether the defendant or plaintiff was guilty of negligence, and if such negligence proximately caused the injury; and *Held further*, that it was competent for a witness, expert and qualified to speak in such matters, to testify as to the tensile strength of the belt and as to whether it was properly or improperly fastened together at its ends. *Ibid.*

9. *Master and Servant—Safe Appliances—Trials—Negligence—Evidence.* In an action to recover damages for a personal injury inflicted upon an inexperienced employee while engaged under the direction of his superior, at work at a power-driven jointer machine in defendant's chair factory, it was admitted that the use of a guard over the revolving knives of the machine would have prevented the injury, and there was evidence that the machine was constructed for the guard; also, that in some factories guards of this character were used, in some they were not, and that an unused guard was then hanging up in the factory: *Held*, sufficient to be submitted to the jury upon the question of defendant's negligence in not properly equipping the machine with a guard, necessary for the protection of the employee, and as to whether such appliance was approved and in general use. *Cozzins v. Chair Co.*, 364.

10. *Same—Notice Implied—Natural Evidence.*—A master is held to the duty of inspecting dangerous power-driven machines at which his employees work in the discharge of their duties; and notice to the master will be implied from natural evidence of a long existing defect in the machine which caused an injury to the employee, such as, in this case, the worn and gapped condition of the knives in a jointer machine, showing that, by proper inspection, the defendant should have been aware of the defect. *Ibid.*

11. *Master and Servant—Incompetency of Fellow-servant—Negligence.*—The master is responsible for damages for a personal injury caused by one fellow-servant to another arising from the incompetency of the former which was previously known to the master. *Walters v. Lumber Co.*, 163 N. C., 541. *Walters v. Lumber Co.*, 388.

12. *Master and Servant—Assumption of Risks—Master's Negligence—Fellow-servant.*—A servant assumes the risk of injury incident to a dangerous employment engaged in by him, but does not assume those resulting from the negligent selection of an incompetent fellow-servant by the master. *Ibid.*

13. *Master and Servant—Incompetency of Fellow-servant—General Character—Witness.*—In an action to recover damages of the master arising from his alleged negligent employment of an incompetent fellow-servant, evidence of the general character of such fellow-servant is properly excluded when he has not testified as a witness. *Ibid.*

14. *Railroads—Master and Servant—Fellow-servant—Baggage Master—Negligence with Firearms—Trials—Damages—Statutes.*—Where a

MASTER AND SERVANT—*Continued.*

baggage agent of a railroad company, in the course of his employment in getting some baggage checks from a drawer to a desk in the baggage room, removes a pistol which he knew to be loaded, takes it in his hand, and in a careless manner opens another drawer to the desk, and in doing so causes the pistol to fire, by pressing the trigger with his finger, and kills his assistant, and this is done without the exercise of ordinary care and without due regard to the direction in which the pistol was pointing at the time, his negligent acts in causing the death of the deceased are attributable to the company employing him, and it is held liable for the consequent damages, in an action by the administrator of the deceased. Revisal, sec. 2646. The distinction between this case and instances not within the terms of the statute, pointed out, CLARK, C. J. *Moore v. R. R.*, 439.

15. *Same—Appeal and Error—Trials—Instructions—Harmless Error.*—Where, in an action for damages, a railroad company is held responsible for the negligent manner in which its baggage master handled a pistol, in the course of his employment, which caused the death of another employee of the company, it is error for the trial judge to charge the jury that they must find that the baggage master was also negligent in leaving the pistol in the drawer of a desk in the baggage-room, from the evidence thereof; but the jury having found the issue of negligence in plaintiff's favor, it is not prejudicial to the defendant, the appellant. *Ibid.*

16. *Railroads—Master and Servant—Joint Employment—Trials—Evidence Nonsuit.*—Where a baggage master is employed at a union station to handle the baggage of two or several railroad companies, is paid his salary by one of these companies, and in the course of his employment negligently kills his assistant, and the administrator of the deceased enters a suit for damages against the company by whom his salary was paid, the defendant may not avoid liability upon the ground that at the time of the negligent act the baggage master happened to be performing a duty for another of these companies; and where the evidence is conflicting, a motion for nonsuit should be denied, the evidence being construed in a light most favorable to the plaintiff, and taken as true. *Ibid.*

17. *Master and Servant—Fellow-servant—Concurring Negligence.*—While the master, unless otherwise provided by statute, is not answerable in damages caused to his servant by the negligent acts of his fellow-servant, the exemption from such liability is when the negligence of the fellow-servant is the sole cause of the injury complained of; and where the failure of the master to provide a safe place to work and safe appliances for its prosecution concurs with the negligent act of the servant in producing the injury, the master is held responsible for the consequent injury. *Ammons v. Mfg. Co.*, 449.

18. *Trials—Master and Servant—Negligence—Evidence—Nonsuit—Questions for Jury—Contributory Negligence.*—The plaintiff, a servant of the defendant, was engaged with a fellow-servant in unloading a heavy machine from a railroad car. The method of unloading was to jack up the object 7 or 9 inches from the car floor and fasten around it a heavy chain hitched to a traveling crane, and in moving the machine the employees walked along with it to hold it in position.

MASTER AND SERVANT—*Continued.*

The plaintiff's fellow-servant had fastened the chain around the machine while the plaintiff was temporarily absent, and as they moved off, in the manner described, the machine suddenly dropped upon the plaintiff's foot, causing the injury complained of. There was evidence tending to show that the hooks of the chain were defective from long service, of which the defendant had actual or constructive notice, which prevented them from being securely fastened, and that if they had not been defective, the injury would not have occurred: *Held*, it was for the jury to determine upon the evidence whether the injury was attributable to the employer's negligence in not providing a proper chain, if so found, or whether such negligence concurring with that of the fellow-servant in fastening the chain produced the injury; and further held, the issue as to contributory negligence was properly submitted to the jury; and that a motion as of nonsuit should have been denied. *Ibid.*

19. *Master and Servant—Disobedience of Orders—Negligence—Trials—Instructions.*—An employee who acts in disobedience of the known rules and positive and direct instructions of his employer and leaves his place of duty and places himself in a dangerous position on his employer's premises, with which he was familiar, and consequently receives the injury, the subject of his alleged cause of action for damages, is knowingly and without excuse at a place he has no right to be, and an instruction upon the issue of contributory negligence is held for reversible error which is made to depend upon the findings of the jury upon the question of whether he exercised ordinary prudence and could have gotten to a place of safety after becoming aware of his danger. *Buchanan v. Lumber Co.*, 470.

20. *Master and Servant—Negligence—Injury—Reasonable Anticipation.*—Where an employer has negligently left a dangerous appliance under conditions likely to inflict an injury on his employee while engaged in his work, and consequently one of them is injured by another who has not been informed or instructed as to its dangerous character, he is held responsible in damages therefor, though he may not have anticipated that an injury of the precise nature of the one occurring would have been likely to result. *Robinson v. Mfg. Co.*, 495.

21. *Same—Safe Place to Work—Dangerous Appliances—Trials.*—The plaintiff cotton mill kept in its factory an air hose highly charged with compressed air and used to clean its machines by one of its employees, 15 or 16 years of age, without impressing its dangerous character upon him. This hose was left connected with the power furnishing the compressed air, upon the floor, without being guarded, when it could have been detached and locked up or more safely placed, and in the boyish spirit of fun, the employee whose duty it was to use it turned it upon his coemployee, a smaller boy, to the latter's serious injury: *Held*, it being the duty of the master to furnish his employees a safe place to work, his negligence in respect to the hose was actionable, and not the result on an accident or act not reasonably to have been anticipated. In this case the statute forbidding employment of minors under 16 years of age is inapplicable, as it was passed after the occurrence of the negligent act complained of. Laws 1913, ch. 64, sec. 63. *Ibid.*

MASTER AND SERVANT—*Continued.*

22. *Master and Servant—Negligence—Res Ipsa Loquitur—Trials—Evidence —Questions for Jury—Nonsuit.*—The plaintiff was engaged by the defendant lumber company at a cut-off saw arranged upon two upright pieces of timber which moved to and fro as the saw was being operated, so that when not in use the saw rested in a hood about 12 or 14 inches from the perpendicular, and was drawn forward against the lumber to be cut. It was the plaintiff's duty to guide this lumber to be cut over rollers from the main saw, and while doing this, at the time in question, it became necessary to straighten a piece of timber, and the saw, which had been placed back in the hood, and which should have remained there, unexpectedly sprang forward and inflicted the injury complained of: *Held*, the doctrine of *res ipsa loquitur* applies, under the circumstances, raising an inference of negligence which was for the defendant to explain or disprove. *Deaton v. Lumber Co.*, 560.

23. *Master and Servant—Assumption of Risks.*—The servant engaged in a dangerous employment may not be held to have assumed the risk arising from the distinct and negligent act of the master causing personal injury to him while in the performance of his duties. *Ibid.*

24. *Railroads—Construction of Road—Operation—Fellow-servant.*—Where a railroad company, constructing a line of road, regularly operates its train, for its own purposes, over a part thereof, carrying its own freight and its employees, it is, as to such part, an operating railroad within the meaning of the fellow-servant act, and is liable in damages for an injury caused thereon to one of its servants by the actionable negligent act of his fellow-servant. *McDonald v. R. R.*, 622.

25. *Master and Servant—Negligence—Duty of Master—Safe Appliances—Unskilled Servant—Minors—Duty to Instruct—Dangerous Machinery.* In addition to the ordinary duty of the master to furnish his servant a reasonably safe place to work and reasonably safe tools and appliances with which to do it, it is required, when he has known or should have known that he had employed an inexperienced and youthful person to work at a power-driven and dangerous machine, that he give instructions to such employee relative to the method of avoiding the dangers and operating the machine in safety, and he is liable in damages to the employee for a personal injury which has been directly and proximately caused him by the neglect of this duty. *Ensley v. Lumber Co.*, 687.

26. *Same—Trials—Evidence—Questions for Jury.*—The failure of the master to instruct a youthful employee as to the safe methods of operating a power-driven and dangerous machine will not of itself necessarily fix liability on the master, for if, notwithstanding, the employee had sufficient knowledge, or if, making proper allowance for his youth or inexperience, he acted without reasonable care, and in such manner as to negligently have brought the injury upon himself, the master is not liable, the question raised being one of fact to be determined by the jury, with the burden of proof on the plaintiff. *Ibid.*

27. *Same—Contributory Negligence—Proximate Cause.*—The plaintiff, 17 years of age, at the request of his father, was employed by the

MASTER AND SERVANT—*Continued.*

defendant company to work at its mill, and the officer of the defendant was informed that the plaintiff was young and inexperienced, and promised that the work intrusted to him should be done on the yard, outside the mill, where its character was less dangerous; but soon thereafter the plaintiff was ordered to work on the inside of the factory as "tailer" for a power-driven moulder machine, concerning the operation of which and its mechanical construction he had no knowledge. The next day the plank was stopped by a splinter of hard wood, and the plaintiff was told to raise the speeder bar, which he did, and then, in ignorance of the danger, and by reason of his inexperience, put his hand into the machine, and it was forced against the knives by the suction used to carry off the shavings, to his serious injury: *Held*, the employment of the plaintiff, a boy of 17 years, was not negligence *per se* of the defendant, but that the injury, even if not directly received in the course of plaintiff's employment, was so directly connected therewith, if proximately caused by the defendant's negligence in employing him, as to make the defendant liable, and the question of plaintiff's contributory negligence was properly left to the jury under correct instructions, as also the matter of proximate cause. *Ibid.*

MATERIAL MEN. See Liens, 3.

MEASURE OF DAMAGES. See Damages; Frauds, Statute of, 4.

MENTAL ANGUISH. See Telegraph; Actions; Damages; Trials, 79, 80, 81; Statutes, 28; Negligence, 21, 24; Carriers of Goods.

MENTAL CAPACITY. See Wills, 4; Deeds and Conveyances, 21, 25.

MISTAKE. See Reformation of Instruments.

MORTGAGES. See Deeds of Trust; Drainage Districts, 6.

MOTIONS. See New Trials, 1; Judgments, 5.

1. *Judgments—Court's Jurisdiction—Parties—Motion in Cause—Laches.*—When a judgment rendered against a plaintiff is sought to be set aside by him on the ground that the action had been brought by one assuming to act for him without authority, and objection is raised to the jurisdiction of the court, relief may be obtained by motion in the cause at the same or a subsequent term of the court, provided there has been no laches or other interfering principle; and where the plaintiff has made such motion upon the ground stated, and offers affidavits to that effect in support of his motion, with allegations tending to show that he has received no benefits from the action and has not in any manner waived his rights to the relief sought, it is error for the judge to refuse to consider the evidence in support of the motion and hold that the remedy was by independent suit. *Massie v. Hainey*, 174.
2. *Same—Excusable Neglect—Interpretation of Statutes.*—The statute requiring that proceedings to set aside a judgment obtained by reason of surprise, excusable neglect, etc., be instituted within one year from the time of judgment entered, applies when the judgment is otherwise in all respects regular, the court having jurisdiction of

MOTIONS—*Continued.*

the parties, and does not extend to cases where no jurisdiction has been acquired over the party moving in the cause to have it set aside. *Ibid.*

3. *Appeal and Error—Objections and Exceptions—Questions—Answer Irrelevant—Motions.*—Where a question asked a witness is competent and the answer is not responsive, and incompetent, the exception should be to the answer and not to the question; the procedure being upon motion to strike out the answer, or that the jury be instructed to disregard it. *Hodges v. Wilson*, 323.

MOTION TO DISMISS. See Appeal and Error, 16.

MOTION TO INSPECT. See Courts, 12.

MUNICIPAL CORPORATIONS. See Venue; Counties.

1. *Cities and Towns—Governmental Duties—Liability.*—A municipal corporation is not liable for torts of its officers done in performance of purely governmental powers for the benefit of the public at large. *Nichols v. Town of Fountain*, 166.

2. *Same—Jails—Destruction by Fire—Wrongful Death.*—A town has performed its imperative duties to its prisoners when it has properly constructed and furnished its jail or prison, and is then not responsible for the death of a prisoner caused by the destruction of the jail by fire at night, who had been incarcerated in a helpless condition and left without some one to look out for him; and it is held that a lock-up of a village of 150 inhabitants, upstairs in a two-story wooden building, with no building nearer than 50 feet, the lower floor used for the town market, sufficiently meets the requirements. *Ibid.*

3. *Municipal Corporations—Cities and Towns—Judicial Powers—Street Grading—Abutting Owner—Procurement of Ordinance.*—Unless the Constitution or some statutory regulation otherwise provides, an abutting owner may not recover damages to his property caused by changing the grading of an established street, when such change is made pursuant to proper municipal authority and there is no negligence in the method or manner of doing the work; nor can an action for damages be maintained by one abutting owner on the street against another, upon the ground that the defendant procured the municipality to change the grade when such change was done in a manner to relieve the municipality from liability. *Brown v. Electric Co.*, 138 N. C., 535, cited and distinguished. *Wood v. Land Co.*, 367.

4. *Municipal Corporation—Cities and Towns—Taxation—Street Improvements—Excessive Levy—Statutes—Equity—Injunction.*—Where a municipality levies a special tax for street improvement upon the land of an abutting owner in excess of that allowed by a statute applicable, the excess is a nullity and may be enjoined; and where the limitation prescribed is a certain per cent of the taxable value of the property, that valuation must control, whether the property lies upon one or several streets. *Charlotte v. Brown*, 435.

5. *Municipal Corporations—Cities and Towns—Street Improvements—Excessive Levy—Statutes—Court's Jurisdiction.*—It is not required of the abutting owner of lands upon a street of a city to comply with the prescribed procedure of objecting, etc., to an excessive special

MUNICIPAL CORPORATIONS—*Continued.*

levy upon his property for street improvements, when the excess is void under the statute, for such assessment is jurisdictional and can be taken advantage of by the owner, in respect to such excess, at any time it is sought to be enforced in the courts. *Ibid.*

6. *Municipal Corporations — Schools — Taxation — Necessaries.* — Schools and school buildings are not necessary expenses of a municipal corporation, and bonds for that purpose are required to be submitted to the qualified voters of the municipality issuing them. *Gastonia v. Bank*, 507.

7. *Municipal Corporations—Bond Issues—Necessaries—Vote of People—Constitutional Law—Statute Invalid in Part.*—Waterworks, sewerage, and electric lights are, under reasonable circumstances, necessities for which a municipality, acting under the authority of a statute, may issue bonds without submitting the question to the qualified voters of the municipality; and where the statute authorizes such issue, including schools and school buildings, without provision for submitting the question to the qualified voters, leaving the matter of their necessity to the aldermen of the town, bonds issued under a proper town ordinance for such of the purposes as are regarded as necessary are valid, when the provisions of the statute are complied with. *Ibid.*

8. *Municipal Corporations—Bond Issues—Necessaries—Limitation of Levy —Interest—Sinking Fund—Constitutional Law.*—Where bonds are issued by a municipality, under statutory authority, for necessary purposes, without provision for a special levy of taxes to pay the interest or create a sinking fund, and in the municipal charter there is a limit fixed to the power of levy, the city has the power to pay the interest on and create a sinking fund for the bonds from its general revenue derived under the limit fixed to its taxing power, if sufficient; and if not sufficient, the bonds will not be declared invalid, especially at the suit of one who has purchased with knowledge of the circumstances. *Ibid.*

9. *Counties and Towns—Public Roads—Assessments—Damages—Appeal—Notice—Resolutions.*—Upon the petition of the owner of the land upon which the commissioners of Cabarrus County opened and changed a public road under the statute applicable, the damages were assessed, and the commissioners denied liability, for reasons stated in a resolution, which also instructed that an appeal be taken to the Superior Court. Upon the trial it appeared that the court admitted a copy of this resolution, but it does not appear from the record on appeal to the Supreme Court that it was admitted as evidence, or read to the jury, or that it was considered by the court except as a notice of appeal and a plea that the proceeding had not been commenced in six months, as the statute required: *Held*, the resolution was competent in this respect, and no error is found. *Pharr v. Commissioners*, 524.

10. *Counties and Towns—Public Roads—Damages—Appeal Bond—Court's Discretion.*—Upon appeal to the Superior Court by the county commissioners of Cabarrus County from an award of damages to the owner of land for the construction of a public road thereon (ch. 201,

MUNICIPAL CORPORATIONS—*Continued.*

Pub. Laws 1907), it is discretionary with the trial judge to permit the required bond to be given at the time of the trial. *Ibid.*

11. *Counties and Towns—Public Roads—Damages—Appeal, Time to Perfect —Interpretation of Statutes.*—A requirement of a public road law, that the owner of lands upon which the location of such road is changed must file his petition asking for damages within six months after such change is made, must be complied with to entitle the owner to the damages claimed. *Ibid.*

12. *Municipal Corporations — Cities and Towns — Streets — Negligence— Notice.*—A municipality is not held liable as an insurer of the safe condition of its streets, for it is only required that they maintain them in a reasonably safe condition, and exercise ordinary care and due diligence to see that they are so kept and maintained, which requirement also applies to conditions existing in the widening of its streets, etc.; and in an action to recover damages for negligence in this respect, it is necessary for the plaintiff to show actual or constructive notice to the city of the defect complained of, through its proper officials. *Alexander v. Statesville*, 527.

13. *Municipal Corporations—Road Commissioners—Bond Issues—Constitutional Law—Senatorial Courtesy.*—Constitutional authority is conferred on the Legislature by Article VII, secs. 2 and 14, to create a public road commission of a county and invest these commissioners with the same powers conferred on the county commissioners with reference to pledging the faith and credit of the county for public road purposes which are conferred on the county commissioners by Article VII, sec. 7, of our Constitution; and as such purposes are held to be for necessary expenses of the county, and an issuance of bonds therefor has been authorized by statute, it is not required for the validity of the bonds that the question of their issuance has been submitted to the qualified voters of the county and has received the approval of a majority thereof. The objection that by "senatorial courtesy" this would practically put the power in the hands of a representative of a county to pledge its faith and credit, cannot properly be addressed to the courts. *Commissioners v. Commissioners*, 632.

14. *Municipal Corporations—Cities and Towns—Nuisance—Sewage—Damage to Lands—Governmental Functions.*—Where a municipality is liable in damages for the improper emptying its sewage in a stream to the injury of an adjacent or adjoining owner, the damages are admeasured by the decrease in value of the lands thereby caused, though the act complained of was done by the municipality in the exercise of its governmental functions. *Rhodes v. Durham*, 679.

15. *Same—Eminent Domain—Permanent Damages.*—Where a city by emptying its sewage into a stream by improper methods causes injury to an abutting or adjacent owner, the damages are of a permanent character and protected by the municipality's right of eminent domain, which, in such instances, is in the nature of acquiring an easement in the lands; and as the public interest therein deprives the owner of the right to abate the nuisance, it is open to either of the parties, in the owner's action for damages, to demand that permanent damages be assessed; and the mere fact that the

MUNICIPAL CORPORATIONS—*Continued.*

municipality may voluntarily abate the nuisance in the near future does not deprive the owner of his right to recover permanent damages in his present action. *Ibid.*

16. *Municipal Corporations—Sewage—Nuisance—Damages to Lands—Adjacent Owners.*—The right to recover damages of a municipality caused by its improper method of emptying its sewage into a stream is not confined to adjoining lands lying thereon, for this right extends to adjacent lands injured thereby, whether the medium of pollution is through the water or through that of the air carrying objectionable and contaminating odors, etc., resulting in a serious injury to or a reduction in the value of lands. *Ibid.*

17. *Municipal Corporations — Sidewalks — Negligence—Trials—Evidence—Nonsuit.*—In an action for damages brought against a city for an injury alleged to have been negligently inflicted on the plaintiff, arising from the improper condition of its sidewalks, it was shown that the injury complained of occurred at a point where there was a paved sidewalk 5 feet wide and an extension of the surface at same level for 4 feet into the lands of a private owner where the injury was received, and at night, but the place was sufficiently well lighted to disclose the happening of the accident to a third person some 90 or 100 feet distant, without evidence of any obstruction on the sidewalk which could have caused the injury: *Held*, the evidence disclosed nothing from which any negligence on the city's part could be inferred, and a motion to nonsuit was properly granted. *Myers v. Asheville*, 703.

NECESSARIES. See Municipal Corporations, 6, 7, 8; Schools.

NEGLIGENCE. See Trials; Master and Servant; Water and Watercourses.

1. *Railroads—Duty of Trespasser—Frightened Child—Contributory Negligence—Evidence.*—The doctrine that an engineer of a moving train has the right to expect a trespasser on the track ahead to step from the track to a place of safety when he is apparently in possession of his faculties, and the conditions will allow, has no application to a child 10 years of age upon the track, apparently so frightened as to be incapable of exercising this degree of care for its own safety. *Towe v. R. R.*, 1.

2. *Same — Negligence — Trials — Nonsuit—Instructions.*—Where there is evidence tending to show that an engineer on a train consisting of an engine and two cars, running 7 or 8 miles an hour, has failed to keep a lookout ahead, and through this neglect he has failed to see a 10-year-old child on the track ahead, in time to have stopped the train to avoid killing it, the child apparently so frightened as to have lost the degree of care which should have caused him to leave the track; and also failed to see the signals for him to stop the train, given by another person ahead, near the track; the contributory negligence of the child will not bar the right of his intestate to recover for his negligent killing thus caused; and the question of defendant's negligence is one for the jury under proper instructions from the court. The charge in this case is approved. *Ibid.*

3. *Contracts—Breach—Damages—Negligence.*—Where A. enters into a contract with B. for the renting of a boat, wherein it is agreed that

NEGLIGENCE—*Continued.*

A. will keep it in good repair and return it in good condition, and the boat is returned in a damaged condition, A. is liable to B. for the damages arising from the breach of contract, irrespective of the question of negligence. *Robertson v. R. R.*, 4.

4. *Carriers of Passengers—Alighting from Moving Train—Invitation—Contributory Negligence.*—A passenger upon a moving railway train is not justified in jumping therefrom to his injury by the mere fact that he is being carried away from his station; though he may recover for the consequent damages he has sustained if his act was upon the inducement or suggestion of an employee of the train, acting within the scope of his duties, when the circumstances are such that a person of ordinary care and caution would apprehend no danger in doing so, and provided he otherwise exercised due care in alighting. When the evidence is conflicting, the question is one for the jury. *Carter v. R. R.*, 244.

4a. *Carriers of Passengers—Alighting from Moving Train—Contributory Negligence—Trials—Evidence.*—It is contributory negligence for a passenger to attempt to alight from a railway train running 10 to 15 miles an hour, notwithstanding he was told to do so by an employee in charge of the train; and in this case it is further held that the manner in which the plaintiff struck the ground and was injured was some evidence as to the speed of the train, and it was not improper for the court to so state in the charge. *Ibid.*

5. *Trials — Instructions—Appeal and Error—Railroads—Negligence.*—In the trial of causes in the Superior Court, when material evidence has been introduced presenting or tending to present a definite legal position or having definite legal value in reference to the issues or any of them, and a specific prayer for instruction concerning it is properly preferred which correctly states the law applicable, such prayer must be given, and unless this is substantially done either in direct response to the prayer or in the general or some other portion of the charge, the failure will constitute reversible error; and in this action to recover damages for a personal injury it was error for the judge to refuse to give a prayer for instruction predicated upon evidence of the defendant ending to show that the injury complained of did not occur as claimed by plaintiff, but while he was attempting to ride upon its train for his own purposes. *Marcom v. R. R.*, 259.

6. *Appeal and Error.—Negligence—Distribution of Recovery—Harmless Error.*—In an action to recover damages of a railway company for a personal injury alleged to have been negligently inflicted on the plaintiff, where all the parties are properly before the court, the distribution of the amount of the recovery, should any be had, is of no legal interest to the defendant; nor can it complain of error alleged in the charge restricting the amount of recovery, as such is in its favor. *Ibid.*

7. *Railroads—Leases—Negligence—Limitation of Liability—Public Policy—Public Duties.*—In making a lease of its lands to private shippers and placing thereon a switch or siding for their use, a railroad company is not performing a public duty such as will invalidate a stipulation in the lease, whereby the lessee agrees not to hold the company

NEGLIGENCE—*Continued*.

liable for fires occurring on the leased premises through its negligent acts. *Slocumb v. R. R.*, 338.

8. *Electricity—Wires Through Trees—Boys—Trials—Negligence—Contributory Negligence—Trespass.*—An electric company is presumed to know the likelihood that boys will climb trees with low hanging branches on populous streets of a city, through which its highly charged wires run, and is held to exercise that high degree of care required of those who engage in a business of such dangerous character; and where an immature boy is killed by coming in contact with such wires, where the insulation has been rubbed off, of which the company had had previous actual notice, or notice implied from the lenth of time such conditions had been permitted to exist, contributory negligence is not imputable to the intestate, in an action for damages brought by his administrator, nor was the intestate in any respect a trespasser, and the company is responsible for the negligent killing. *Benton v. Public-Service Corporation*, 354.

9. *Railroads—Torts—Negligence—Damage by Fire—Timber Rights—Damages Remote.*—There can be no recovery of damages occasioned unintentionally and indirectly to one from the tort of another; and recovery of damages will be denied to one who had a contract for cutting timber on the lands of another, alleged merely to have been caused by the negligence of a railroad company in setting fire to the timber growing thereon, and thus preventing the plaintiff from making the profits he would otherwise have made under his contract. *Thompson v. R. R.*, 377.

10. *Railroads—Torts—Negligence—Damages by Fire—Proximate Damages.* A railroad company negligently set fire to the lands of the owner, and was sued to recover damages, by one having a contract to cut the timber therefrom, arising from the loss of a certain of his groceries, and the reconstruction of certain shack-houses he was permitted by the owner to use, occasioned by the defendant's tort: *Held*, these damages are not too remote for recovery. *Ibid.*

11. *Master and Servant—Fellow-servant—Concurring Negligence.*—While the master, unless otherwise provided by statute, is not answerable in damages caused to his servant by the negligent acts of his fellow-servant, the exemption from such liability is when the negligence of the fellow-servant is the sole cause of the injury complained of; and where the failure of the master to provide a safe place to work and safe appliances for its prosecution concurs with the negligent act of the servant in producing the injury, the master is held responsible for the consequent injury. *Ammons v. Mfg. Co.*, 449.

12. *Trials — Master and Servant — Negligence—Evidence—Nonsuit—Questions for Jury—Contributory Negligence.*—The plaintiff, a servant of the defendant, was engaged with a fellow-servant in unloading a heavy machine from a railroad car. The method of unloading was to jack up the object 7 or 9 inches from the car floor and fasten around it a heavy chain hitched to a traveling crane, and in moving the machine the employees walked along with it to hold it in position. The plaintiff's fellow-servant had fastened the chain around the machine while the plaintiff was temporarily absent, and as they moved off, in the manner described, the machine suddenly dropped

NEGLIGENCE—*Continued.*

upon the plaintiff's foot, causing the injury complained of. There was evidence tending to show that the hooks of the chain were defective from long service, of which the defendant had actual or constructive notice, which prevented them from being securely fastened, and that if they had not been defective, the injury would not have occurred: *Held*, it was for the jury to determine upon the evidence whether the injury was attributable to the employer's negligence in not providing a proper chain, if so found, or whether such negligence concurring with that of the fellow-servant in fastening the chain produced the injury; and further held, the issue as to contributory negligence was properly submitted to the jury; and that a motion as of nonsuit should have been denied. *Ibid.*

13. *Railroads — Crossings — Trials — Evidence—Contributory Negligence—Issues—Judgments.*—Where the plaintiff sues a railroad company to recover damages for a personal injury alleged to have been received by him in a collision with the defendant's train while attempting to cross its roadway on a public street of a town, upon the ground that the defendant's employee, charged with the duty, failed to give him warning before entering onto the right of way, and there is evidence that the plaintiff did not himself exercise the ordinary care required under the circumstances, judgment may not be given adverse to the defendant upon a verdict not answered upon the issue of contributory negligence; and it is further held that evidence of the drunken condition of the plaintiff was erroneously excluded on the trial of this case. *Wilson v. R. R.*, 499.

14. *Trials—Evidence—Negligence—Questions for Jury.*—The question of negligence, at issue in an action to recover damages therefor, may not be declared by the court as a matter of law, when the evidence is conflicting, or where more than one inference may be drawn therefrom, or different conclusions may be reached by two fair-minded persons of equal intelligence. *Alexander v. Statesville*, 527.

15. *Same—Proximate Cause—Verdict, Directing.*—Where damages are sought to be recovered for a negligent act alleged, the plaintiff is not alone required to establish the fact of negligence, for he must also show that the negligent act was the proximate cause of the injury; and where different inferences may be drawn by the jury upon the evidence in the case, the court may not, as a matter of law, direct a verdict in plaintiff's favor. *Ibid.*

16. *Trials—Negligence—Burden of Proof—Contributory Negligence—Verdict.*—Where contributory negligence is relied on as a defense in an action for damages, the plaintiff is required to introduce competent evidence tending to establish the issue of negligence, and when he has failed to do so, or the jury find against him upon that issue, the issue as to contributory negligence becomes immaterial. *Ibid.*

17. *Municipal Corporations—Cities and Towns—Streets—Negligence—Notice.*—A municipality is not held liable as an insurer of the safe condition of its streets, for it is only required that they maintain them in a reasonably safe condition, and exercise ordinary care and due diligence to see that they are so kept and maintained, which requirement also applies to conditions existing in the widening of its streets, etc.; and in an action to recover damages for negligence in

NEGLIGENCE—*Continued.*

this respect, it is necessary for the plaintiff to show actual or constructive notice to the city of the defect complained of, through its proper officials. *Ibid.*

18. *Same—Trials—Questions for Jury.*—In an action to recover damages of a municipality alleged to have been caused by the negligent condition in the widening and construction of its street, where the plaintiff, a boy of about 7 years of age, fell or was pushed by his companion, another boy, over a large culvert, and fell down a steep embankment to his injury, there was conflicting evidence upon the question of whether, at this place and on that side of the street, the city had completed its work; or on the opposite side of the street there was a safe sidewalk or roadway; or whether there was, at the place of the injury, a proper and reasonably safe protection against injury to pedestrians: *Held*, the evidence was properly submitted to the jury upon the question of the defendant's actionable negligence, and the issue should not have been answered in plaintiff's favor as a matter of law. *Ibid.*

19. *Trials—Contributory Negligence—Children—Questions for Jury.*—While a child of tender years is not held to the same degree of care as one of mature years in avoiding an injury arising from the negligent act of another, it is ordinarily a question of fact for the jury to determine, in his action to recover damages therefor, whether under the circumstances, and considering his age and capacity, he should have avoided the injury complained of by the exercise of ordinary care; and in this case it appearing that the plaintiff was a bright boy about 7 years of age, it is held that the court properly left the issue of contributory negligence to the jury. *Ibid.*

20. *Mental Anguish—Express Companies—Trials—Negligence—Avoidance of Damages—Extra Expense—Measure of Damages.*—The plaintiff sued an express company for damages for mental anguish alleged to have arisen from its neglect to put off a coffin which had been purchased for the interment of his child, at its destination, and, as the measure of his damages, claimed that he was thereby prevented from burying the child at his family burying-ground, where he desired to bury it, because decomposition had begun to set in upon the late arrival of the coffin, which the defendant had carried beyond its destination and returned. There was no evidence that he attempted to procure another coffin in time for his purpose, which it appears he could have done, and it is held that the mental anguish did not necessarily result from the defendant's negligence, and it being the plaintiff's duty to have avoided it, under the circumstances, his measure of damages was the additional expense he would have incurred had he otherwise acted. *Cooper v. Express Co.*, 538.

21. *Mental Anguish—Express Companies—Trials—Negligence—Burial Caskets—Damages.*—An express company is liable for mental anguish caused to a husband by its negligent delay in transporting and delivering a burial casket to be used in the interment of his wife, of which the receiving agent was informed at the time; and where by reason of such failure the husband was forced to bury his wife in a makeshift or cheap casket, the ground for such recovery is sufficiently shown. *Byers v. Express Co.*, 542.

NEGLIGENCE—*Continued.*

22. *Same—Contracts—Lex Loci—Federal Decisions—Interstate Commerce.* Where an express company is liable under our laws for mental anguish for its negligent failure to promptly transport and deliver a metal casket to be used in the interment of the plaintiff's wife, and the contract of shipment is made here, the question of recovery is not dependent upon the Federal decisions in relation to interstate commerce. *Ibid.*

23. *Same—Special Damages—Hepburn Act.*—The Hepburn act with the Carmack amendment, authorizing a common carrier, under certain circumstances, to limit the amount of recovery in the event of its negligence in regard to interstate shipments, relates only to the damage which may thereby have been occasioned to "property," decreasing its value, and has no application to a recovery of special damages caused by the negligent delay by the carrier in its transportation and delivery, where such are otherwise recoverable; notwithstanding a contrary stipulation in the bill of lading. *Ibid.*

24. *Mental Anguish—Express Companies—Negligent Delay—Shipment Refused—Value of Shipment—Receipt—Right of Action—Estoppel.*—Where an express company is liable to the plaintiff in an action to recover damages for mental anguish it has caused him in its negligent delay in the shipment or delivery of a burial casket, which consequently came too late at its destination, and was therefore refused, he is not barred of his right to recover therefor by receiving or receipting for the amount of money he had lost on that account. *Ibid.*

25. *Trials — Negligence — Contributory Negligence —Verdict—Judgment.*—Where an action for damages presents for the consideration of the jury the issues of negligence and contributory negligence, and under proper instructions the second issue has been answered in the defendant's favor, the plaintiff is not entitled to recover, whatever the answer to the other issues may be, and cannot be entitled to judgment. *Holton v. Moore.* 549.

26. *Mad Dogs — Contributory Negligence — Trials—Issues—Statutes.*—An action would lie at common law in damages against the owner of a mad dog through whose negligence another person had been bitten by the dog, in favor of such other person; and where there is no indication that in his action the person thus injured was proceeding under the statute, Revisal, sec. 3305, an issue of contributory negligence, when pleaded and supported by evidence, should be submitted to the consideration of the jury. As to whether such issue could arise in proceedings under the statute, *Quære. Ibid.*

27. *Railroads—Backing Trains—Warning—Negligence Per Se—Trials.*—It is negligence *per se* for the employees on a railroad freight train to back its train upon or cross a street crossing its track in a thickly populated portion of the town, without some one on the front box car to give notice of its approach and to signal the threatened danger to pedestrians, and it is actionable when injury is thereby proximately caused. *Meroney v. R. R.*, 611.

28. *Same—Contributory Negligence—Issues—Harmless Error—Appeal and Error.*—The plaintiff, with the knowledge of defendant railroad company's employees, had for some time been engaged at the defendant's depot in directing his team driver in removing freight which had

NEGLIGENCE—*Continued.*

arrived over defendant's road. At this place a public street crossed the railroad's main and side tracks, on the latter of which two empty and detached box cars had stood for quite a while. Plaintiff was momentarily standing in the street upon this side-track, giving directions to his driver, when, without notice or warning, defendant's employees attempted to attach these box cars to the engine, and the cars, being without brakes on, ran down upon the plaintiff, to his injury. The evidence held sufficient upon the issue of defendant's negligence, and the submission of the issue of contributory negligence to the jury was not error of which defendant could complain. *Ibid.*

29. *Railroads — Crossings — Collisions — Trials — Negligence — Evidence— Charge of Train—Questions for Jury.*—The plaintiff, in his action to recover damages for a personal injury against two railroad companies whose tracks crossed each other at a grade level, was a section foreman of one of them, and in construction work ordinarily had charge of the train of his company. While riding on his train, in front on a flat car, it came into collision, at the crossing, with the train of the other road, under circumstances fixing the employees in charge of both trains with actionable negligence. There was evidence in plaintiff's behalf that at that particular time and under the circumstances then existing he was not in charge of his employer's train, but that the engineer thereon had sole charge thereof. *Held*, the fact of collision was evidence of actionable negligence, and it was for the jury to determine, under proper instructions from the court, whether upon the evidence the plaintiff was chargeable with such negligence as would bar his recovery. *McDonald v. R. R.*, 622.

30. *Railroads — Collisions—Negligence—Contracts—Trials—Evidence—Primary Liability.*—Where two railroad companies are jointly sued for damages for a personal injury caused by the negligent acts of the employees on the trains of each of them at a crossing, resulting in a collision which caused the injury complained of, any contract or agreement between these companies relating to their liability under such circumstances affects only the question of primary liability between themselves, and not the right of the plaintiff to recover against both of them. *Ibid.*

31. *Master and Servant—Children—Contributory Negligence—Proximate Cause.*—The plaintiff, 17 years of age, at the request of his father, was employed by the defendant company to work at its mill, and the officer of the defendant was informed that the plaintiff was young and inexperienced, and promised that the work intrusted to him should be done on the yard, outside the mill, where its character was less dangerous; but soon thereafter the plaintiff was ordered to work on the inside of the factory as "tailer" for a power-driven moulder machine, concerning the operation of which and its mechanical construction he had no knowledge. The next day the plank was stopped by a splinter of hard wood, and the plaintiff was told to raise the speeder bar, which he did, and then, in ignorance of the danger, and by reason of his inexperience, put his hand into the machine, and it was forced against the knives by the suction used to carry off the shavings, to his serious injury: *Held*, the employment of the plaintiff, a boy of 17 years, was not negligence *per se* of the defendant, but

NEGLIGENCE—*Continued.*

that the injury, even if not directly received in the course of plaintiff's employment, was so directly connected therewith, if proximately caused by the defendant's negligence in employing him, as to make the defendant liable; and the question of the plaintiff's contributory negligence was properly left to the jury under correct instructions, as also the matter of proximate cause. *Ensley v. Lumber Co.*, 687.

32. *Municipal Corporation — Sidewalks — Negligence—Trials—Evidence—Nonsuit.*—In an action for damages brought against a city for an injury alleged to have been negligently inflicted on the plaintiff, arising from the improper condition of its sidewalks, it was shown that the injury complained of occurred at a point where there was a paved sidewalk 5 feet wide and an extension of the surface at same level for 4 feet into the lands of a private owner where the injury was received, and at night, but the place was sufficiently well lighted to disclose the happening of the accident to a third person some 90 or 100 feet distant, without evidence of any obstruction on the sidewalk which could have caused the injury: *Held*, the evidence disclosed nothing from which any negligence on the city's part could be inferred, and a motion to nonsuit was properly granted. *Myers v. Asheville*, 703.

NEGOTIABLE INSTRUMENTS. See Bills and Notes.

NEW TRIALS. See Courts, 3.

1. *New Trials—Motions—Newly Discovered Evidence.*—Motions made in this Court for a new trial, based upon the ground of newly discovered evidence, are not debatable. The motion in this case is denied, the evidence being largely cumulative, and it being improbable that a new trial will result differently; it also appearing that the movant had not exercised due diligence to secure the evidence at the proper time. *Warwick v. Taylor*, 163 N. C., 68, cited and applied. *Steeley v. Lumber Co.*, 27.

2. *New Trial—Newly Discovered Evidence—Requisites.*—A motion for a new trial for newly discovered evidence will not be granted when it appears that it was accessible at the trial to the appellant by the exercise of proper diligence; that it was cumulative, and that a new trial would not probably produce a different result. *Carson v. Insurance Co.*, 135.

3. *New Trials—Motions—Newly Discovered Evidence.*—The affidavits and counter-affidavits, upon a motion for a new trial in this case because of newly discovered testimony, involving, among other things, charges and counter-charges of perjury of or unlawful influence exerted upon a witness who had testified at the trial, do not commend themselves to the favorable consideration of the Supreme Court; and it being improbable that the new trial sought would result differently, the motion is denied. *Boyd v. Leatherwood*, 615.

NEWLY DISCOVERED EVIDENCE. See New Trials.

NONSUIT. See Trials.

NOTICE. See Drainage Districts, 2; Bills and Notes; Estoppel; Bills and Notes; Counties.

NUISANCE. See Municipal Corporations, 4, 6.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error.

OFFICERS. See Estoppel.

OPINION EVIDENCE. See Witnesses; Evidence.

OPTIONS. See Contracts 3, 4, 5, 6, 7.

ORDINANCES. See Municipal Corporations.

PARTIES. See Statutes, 1; Judicial Sales, 2; Motions, 1; Equity; Jurors, 1.

1. *Corporations—Insolvency—Parties Defendant—Demurrer—Interpretation of Statutes.*—For one to be made a proper party defendant under Revisal, sec. 410, in an action to appoint a receiver for an insolvent corporation and administer its assets, he must claim an adverse interest to the plaintiff in the action and necessary to the complete determination or settlement of the question therein involved; and his demurrer is good to a complaint which alleges that he wrongfully claims that the plaintiff is liable to him for some shares of stock he had sold him upon authority of the corporation, under an agreement to take back the stock and repay the purchase price in the event of dissatisfaction on the defendant's part; for such allegations negative the idea that the defendant has a cause of action either against the plaintiff or the corporation, and states no cause of action against the defendant. *Daily v. Fertilizer Works*, 60.

2. *Judicial Sales—Estates—Contingent Interests—Interpretation of Statutes—Parties—Representation—Application of Funds.*—A testator devised certain lands to his wife during her widowhood or life, which, at her death, were to be equally divided between the children or "their heirs." The lands were sold in partition in 1904, during the lifetime of the widow, and the children were made parties. One of these children died in 1906, before the death of her mother (in 1909), and her children, the grandchildren of the testator, brought suit to recover their interests in the land devised, claiming they had a vested interest therein in 1904, and not being parties to the proceedings, were not estopped by the judgment in partition: *Held*, the plaintiffs had a contingent interest in the lands at the time of the sale, and were concluded from claiming the lands under the validating act of 1905 (Revisal, sec. 1591). *Semble*, even under the common law the representation of the mother was sufficient to bind the plaintiffs, and the purchaser was not required to see to the application of the proceeds of sale. *Springs v. Scott*, 132 N. C., 564, cited and applied. *Bullock v. Oil Co.*, 63.

3. *Appeal and Error—Joint Defendants—Evidence as to One—Trials—Instructions.*—Where in an action against two defendants evidence is properly admitted as to one of them, objected to by the other, and the jury properly instructed as to which defendant it should be considered, it will be presumed on appeal that the jury had sufficient intelligence and honesty to understand and apply the instruction, and no error will be found. *Lucas v. R. R.*, 265.

4. *Drainage Districts—Bond Issues—Trusts and Trustees—Parties.*—Where the purchaser of bonds issued by a drainage district refuses to take the bonds upon the ground that he had purchased them

PARTIES—*Continued.*

upon condition that they should be the first lien upon the lands contained in the district to the extent of the assessment, and that a large portion of the lands were subject to a first lien by mortgage, or deed of trust, the mortgagee or trustee is not a necessary party in an action involving the validity of the bonds. *Drainage Commissioners v. Farm Assn.*, 697.

PARTITION. See Ejectment.

PARTNERSHIPS. See Evidence, 8.

1. *Trusts and Trustees—Partnership—Parol Trusts—Purchase of Lands—Consideration—Division of Profits.*—A parol trust is enforcible in this State; and where in pursuance of a verbal agreement A. has secured certain lands for the purpose of a resale by him and a division of the clear profits, and B., who advanced the purchase money and by reason of the agreement has procured the title to be made to himself, and refuses to comply with the agreement, the services of A. are a sufficient consideration to support the contract, and B. will be declared to hold the title as trustee, subject to the uses declared in the agreement. *Brogden v. Gibson*, 16.

2. *Same—Money Advanced—Equity—Procedure.*—Where A. and B. have entered into a parol agreement for the purchase and sale of certain lands for joint profit, A. to transact the business in that behalf and attend to the selling, and B. to furnish the purchase money, and this is accordingly done, but B. has wrongfully taken the title in his own name and refused to sell the lands and divide the clear profits in accordance with his agreement, the statute of frauds has no application, and the courts will decree a sale of the lands, payment of the purchase price into court, and a division of the clear profits after repaying B. the purchase money he has advanced. *Ibid.*

3. *Deeds and Conveyances—Parol Evidence—Partnership Lands.*—Where each member of a partnership conveys all of his right, title, and interest in and to all assets and lands of the partnership, or to all the assets and property of the firm, it is sufficient, under the doctrine of "*id certum est quod certum reddi potest*," to admit of parol evidence, in an action involving title to lands, to show that the *locus in quo* was owned by the partnership, and to pass the title to the grantee in the deed when it is so established. *Pate v. Lumber Co.*, 184.

PAYMENTS. See Insurance, 2.

PENALTY STATUTES. See Constitutional Law, 8.

PLEADINGS. See Appeal and Error, 10; Carriers of Goods, 5, Removal of Causes.

1. *Pleadings—Amendments—Courts.*—An amendment to a complaint allowed by the court before proceeding with the trial, which merely perfects the allegations therein made, is not objectionable as stating a new cause of action. *Simpson v. Lumber Co.*, 133 N. C., 95, cited and applied. *Steeley v. Lumber Co.*, 27.

2. *Pleadings—Trials—Evidence—Questions for Jury—Bills and Notes—Banks and Banking—Collaterals—Fraud—Rights of Creditors.*—The

PLEADINGS—*Continued.*

plaintiffs, husband and wife, in their action against a bank, alleged that the defendant was endeavoring to apply collateral notes of the *feme* plaintiff to the security of a note held by the bank, made by her husband to its director and obtained by fraud and collusion between him and the defendant. These allegations were denied in the answer, which further alleged that the male plaintiff was the owner of the lands, securing the collateral notes, and that these notes were given for the purchase price, and that he had had the lands conveyed to his wife to defraud his creditors, one of whom was the director, its indorsee; the answer also alleged that the *feme* plaintiff was not the real owner of the collaterals, but if so, she had given full authority for the defendant to hold them as collateral to her husband's note: *Held*, the pleadings raised issues of fact to be submitted to the jury, and a judgment thereon in plaintiff's favor was erroneous. *Newsome v. Bank*, 91.

3. *Actions—Joint Tort Feasors—Pleadings—Surplusage.*—Several defendants may be jointly sued for damages for the same tort arising from one and the same transaction, and where such a cause of action is sufficiently stated, and the complaint further alleges the same tort as to each of the defendants, separately, these further counts will be treated as surplusage. The effect of judgments obtained against joint tort feasors in separate actions discussed by WALKER, J. *Tyler v. Lumber Co.*, 163.

4. *Pleadings—Allegations—Ownership and Possession—Special Property Rights.*—Allegations in the complaint that the plaintiff was the owner of certain lands and had possession thereof, and that the defendant wrongfully and forcibly took possession thereof to his damage, are comprehensive enough to include a special property right therein with a present right of possession. *Harper v. Rivenbark*, 180.

5. *Reformation—Deeds and Conveyances—Pleadings—Evidence.*—In order to reform a deed to lands upon the ground of mutual mistake or fraud, the proper allegations should be made in the pleading, or evidence thereof is inadmissible. *Pate v. Lumber Co.*, 185.

6. *Pleadings—Demurrer—Employer and Employee—Wages Due—Injunction—Garnishment—Supplementary Proceedings—Employer.*—A demurrer by an employer to a complaint which alleges that he discharged his employee, knowing that the latter owed the plaintiff, amount not stated, and which seeks to restrain him from paying his employee, is good. *Aman v. Walker*, 224.

7. *Courts—Jurisdiction—Pleading—Good Faith.*—The amount of recovery demanded in good faith in the complaint determines the jurisdiction of the court. *Faircloth v. Kenlaw*, 228.

8. *Courts—Jurisdiction—Pleadings—Good Faith.*—The amount demanded in the complaint in good faith determines the jurisdiction of the trial court, and when this is sufficient, a recovery of a less amount will not defeat the jurisdiction. *Tillery v. Benefit Society*, 262.

9. *Trials—Malicious Prosecution—Amendments—Distinct Cause—Appeal and Error.*—Unless done with the consent of the defendant in the action, it is not within the discretion of the trial judge to permit an amendment to the complaint setting forth an additional and substantially a new cause of action; and where damages are sought for

PLEADINGS—*Continued.*

malicious prosecution, with allegation that the plaintiff was arrested and convicted before a justice of the peace, and acquitted in the Superior Court on appeal, an amendment permitted during the argument of the civil action, alleging plaintiff was tried upon a bill presented to the grand jury by the solicitor and acquitted, is held for reversible error. *Cooper v. R. R.*, 578.

10. *Pleadings—Highway Commission—Trespass—Demurrer—Speaking Demurrer.*—In an action for damages to plaintiff's lands, the complaint alleged that the defendant highway commission unlawfully entered upon the plaintiff's land with a large force of employees, teams, etc., without notice, and unlawfully wasted and spoiled the same by digging great ditches, etc., to the plaintiff's damage: *Held*, the cause of action alleged is trespass *quare clausum fregit*, which is admitted by demurrer; and where the demurrer relies upon a special statute, which has not been referred to in the complaint, it is a speaking demurrer, and in either event the demurrer is bad. *Kendall v. Highway Commission*, 600.

11. *Partition—Pleadings—Sole Seisin—Ejectment.*—Where sole seisin is pleaded in proceedings for partition and the cause is transferred for trial to the Superior Court, it becomes, in effect, an action of ejectment. *Ditmore v. Rexford*, 620.

12. *Ejectment — Possession—Admissions—Limitations of Actions—Burden of Proof.*—Where the answer in ejectment alleges defendant's possession of the disputed lands, it is unnecessary for the plaintiff to show it, but where the defendant pleads the statute of limitations, it is for the plaintiff to prove that the action is not barred. *Ibid.*

POSSESSION. See Estopppel.

PREJUDICE. See Trials.

PRINCIPAL AND AGENT. See Process, 1; Frauds, Statute of, 4; Bills and Notes, 7; Malicious Prosecution.

1. *Principal and Agent—Evidence—Declarations of Agent.*—Where an agent of the defendant has been negotiating as such agent, for the rental of plaintiff's boat, evidence in plaintiff's behalf that the agent told the witness to tell plaintiff the defendant had decided to take the boat at a certain rental, keep it in good repair, and return it in good condition, constitutes the contract itself which the agent had general authority to make in behalf of the principal, and is not the narration of a past transaction; and is competent in the plaintiff's action to recover damages under the contract. *Robertson v. Lumber Co.*, 4.

2. *Principal and Agent—Ratification—Evidence.*—Where the defendant has used a boat in the conduct of its business rented by its general agent for the purpose of transporting its laborers to and from their work and for other purposes, furnished the gasoline and oil, and there is evidence that the laborers were required to pay certain transportation charges which the defendant deducted from their wages, the evidence is sufficient upon the question of the defendant's ratification of the acts of its agent; and evidence in defendant's behalf that the transaction was a personal one to the agent, that he was

PRINCIPAL AND AGENT—*Continued.*

paid the transportation fares and charges, raises a question for the jury. *Ibid.*

3. *Principal and Agent—Ratification—Acceptance of Benefits—Contracts—Repudiation in Part.*—Where the agent has, with the authority of his principal, made a sale of a machine, representing it as his own, but owned by his principal, to a corporation, and has exceeded his authority, with the knowledge of the principal, in taking shares of the corporation's stock in payment, in which transaction the principal has received and knowingly retained a substantial benefit, the principal may not take advantage of the transaction in part by retaining the benefits, and repudiate that part which appears to him to be to his disadvantage, and where, under such circumstances, the parties may not be placed, by a court of equity, *in statu quo*, the transaction will not be disturbed. *Publishing Co. v. Barber*, 478.

4. *Debtor and Creditor—Subrogation—Principal and Agent—Husband and Wife—Parties.*—A., the wife of B., purchased a Merganthaler type machine, paid part of the purchase money, gave a chattel mortgage to secure the deferred payments, and B., her husband, acting as her agent, and with authority to sell the machine, but dealing with the plaintiff corporation as the owner, and so representing himself, contracted to sell the machine to the plaintiff, under an agreement that the plaintiff would pay with its stock the amount paid to the vendor of the machine, assume the deferred payments, and to meet some of them, the plaintiff gave its note to the agent, which the latter discounted at a bank and applied the proceeds accordingly, the plaintiff having paid this note since the institution of this action: *Held*, (1) A., the principal, was not a necessary party to the suit, as she had assigned all her rights. (2) The plaintiff was entitled to subrogation, for the partial payment, *pro tanto*. (3) The mortgage creditor, who accepted the partial payment, was the only one who could object to the plaintiff's right of subrogation, and as he had been fully satisfied, it was held that A. and her assignee, the defendant, having received and knowingly retained the benefits of the transaction, would, under the circumstances, have no cause of complaint, and could not prevent subrogation. *Ibid.*

PRINCIPAL AND SURETY. See Liens, 1; Jurors.

PRIVY. See Estoppel.

PROBATE. See Wills, 3.

PROCESS.

1. *Special Appearance—Process—Service—Corporation—Agent.*—The trial judge should find the facts upon which he, upon special appearance of the defendant for the purpose, dismisses an action for the want of proper service of process; and when it appears on appeal that the action commenced in a magistrate's court, and service of process had been attempted upon the alleged agent of a corporation and upon the Secretary of the State (Revisal, sec. 1243), and the judgment of the magistrate was that service on the Secretary of State was a valid service and that on the agent was insufficient, which latter ruling was reversed in the Superior Court, it was error in the trial

PROCESS—*Continued.*

judge to refuse to hear and consider the affidavit tending to show a valid service on the agent, as that was a question also presented and involved in the appeal. *White v. Peanut Co.*, 132.

2. *Actions Pending—Issuance of Summons—Statement.*—Under the express provision of our statute, a civil action commences upon the issuance of a summons from a court of competent jurisdiction (Revisal, sec. 359), and as the statute fixes the time of the inception of the action, it is pending from that time. Hence an action between the same parties upon the same subject-matter, returnable to a different jurisdiction, will abate, and upon motion will be dismissed, when it appears that the summons was subsequently issued, though served in priority of time. *Pettigrew v. McCoin*, 472.

PROXIMATE CAUSE. See Negligence, 15.

PUBLIC INTEREST. See Equity, 9.

PUBLIC OFFICERS. See Constitutional Law, 3, 4.

PUBLIC POLICY. See Railroads, 13; Intoxicating Liquors, 1; Statutes.

PUBLIC ROADS. See Counties, 9, 10, 11.

PUBLICATIONS. See Drainage Districts, 2, 4.

QUO WARRANTO. See Constitutional Law, 4.

RAILROADS. See Easements; Commerce.

1. *Railroads—Duty of Trespasser—Frightened Child—Contributory Negligence—Evidence.*—The doctrine that an engineer of a moving train has the right to expect a trespasser on the track ahead to step from the track to a place of safety when he is apparently in possession of his faculties, and the conditions will allow, has no application to a child 10 years of age upon the track, apparently so frightened as to be incapable of exercising this degree of care for its own safety. *Towe v. R. R.*, 1.

2. *Same—Negligence—Trials—Nonsuit—Instructions.*—Where there is evidence tending to show that an engineer on a train consisting of an engine and two cars, running 7 or 8 miles an hour, has failed to keep a lookout ahead, and through this neglect he has failed to see a 10-year-old child on the track ahead, in time to have stopped the train to avoid killing it, the child apparently so frightened as to have lost the degree of care which should have caused him to leave the track; and also failed to see the signals for him to stop the train, given by another person ahead, near the track; the contributory negligence of the child will not bar the right of his intestate to recover for his negligent killing thus caused; and the question of defendant's negligence is one for the jury under proper instructions from the court. The charge in this case is approved. *Ibid.*

3. *Railroads—"Kicking Cars"—Flying Switch—Trials—Negligence—Evidence.*—In railroad parlance, "kicking" a car is equivalent to making a "flying switch," and where there is evidence that the death of a brakeman was caused in this manner which he was engaged in his duties to the defendant railroad company, the violent contact of the

RAILROADS—*Continued.*

car "kicked" with the one whereon he was employed throwing him down to his death, it is sufficient upon the question of actionable negligence, and should be submitted to the jury. *Kenney v. R. R.*, 99.

4. *Railroads—Federal Employer's Liability Act—"Assumption of Risks" Trials — Negligence — Instructions — Appeal and Error — Harmless Error.*—As to whether assumption of risks, under the Federal Employer's Liability Act, is a defense for a railroad company in an action to recover for the wrongful injury or death of its employee, *Quœre.* But in this case, the jury having found the issue of defendant's negligence for the plaintiff, under correct instructions thereon, if there was any error committed by the court in relation to the doctrine of assumption of risks, it was harmless. *Ibid.*

5. *Railroads—Federal Employer's Liability Act—Measure of Damages.*—In an action to recover damages of a railroad company for the wrongful killing of its employee, under the Federal Employer's Liability Act, the measure of damages, where recovery is permitted, is not the present value of the net earnings of the deceased based upon his expectancy. The correct rule is laid down in *Dooley v. R. R.*, 163 N. C., 454; *Irvin v. R. R.*, 164 N. C., 5. *Ibid.*

6. *Railroads—Federal Employer's Liability Act—Negligence—Measure of Damages.*—Under the Federal Employer's Liability Act contributory negligence is not a complete defense, but material only in reduction of damages. *Ibid.*

7. *Railroads—Sick Benefit Departments—False Representations—Fraud—Trials—Burden of Proof.*—In an action to recover the sick benefits alleged to have been due the plaintiff by reason of his membership in the relief department of a railroad company, defendant resisted recovery upon the ground that the plaintiff, in his application for membership, had made a material and false representation in answer to a question asking if he had had a certain venereal disease, which had resulted in the acceptance by it of the application. It appeared from the application that these questions were prefaced by certificate of the applicant, in effect, that his habits were temperate, "so far as I am aware"; that he had no disease except as is shown in the "accompanying statement," etc., and to avoid the contract it is *Held*, that the defendant must show that the representations were knowingly false or made with a fraudulent purpose to mislead the defendant. Revisal, sec. 4808, has no application to this case. *Daughtridge v. R. R.*, 188.

8. *Railroads—Sick Benefit Departments—Fraud—Trials—Evidence Sufficient—Questions for Jury.*—Where resistance to recovery is made by a defendant railroad company in a suit by an employee, a member of its relief department, for sick benefits, on the ground of false and material representations made in his application for membership, and it is required that the intent to misrepresent is necessary to defeat recovery, evidence is held sufficient upon the question of defendant's liability which tended to show that the plaintiff had been required by the company to join this department, was examined and passed by the defendant's physician at the time when the disease, alleged to have been misrepresented, should have been existent and observable; that the company had for a number of months deducted the member-

RAILROADS—*Continued.*

ship dues from the plaintiff's pay, and where the plaintiff denies ever having had the disease, and there is evidence tending to show that his sickness resulted from being overworked in the defendant's service. *Ibid.*

9. *Railroads—Trials—Negligence—Evidence—Nonsuit.*—In an action by an administrator to recover of a railroad damages for the negligent killing of his intestate, a child two or three years of age, and there was evidence tending to show that the intestate was upon the defendant's track, on a clear day, where the track was straight, and the employees on the train were not keeping a lookout along the track, a judgment as of nonsuit upon the evidence will be denied, for it was for the jury to determine whether the defendant's employees were negligent in not seeing the danger to the child and stopping the train in time to have avoided the killing. *Dallago v. R. R.*, 269.

10. *Railroads — Contracts — Easements — Flag Stations—Specific Performance—Public Policy—Issues—Limitation of Actions—Abandonment—Trials—Evidence.*—In 1859 the defendant railroad company acquired a right of way over the lands of the plaintiff's ancestor in consideration of stopping its trains upon being signaled, at a flag station thereon, which in two years was entered upon and continuously used by the company and its lessee road, under a sealed and registered instrument of writing, to within a short time previous to the commencement of the action, when the lessee road refused to continue the arrangement upon the ground that it interfered with its duties to the public: *Held*, (1) the right acquired by the owner ran with the land, and the lessee road was bound to the performance of the contract, unless public policy had intervened; (2) whether the interests of the public now require the discontinuance of the flag station is for the determination of the jury, with the burden of proof on defendant; (3) except where the rights of the public intervene, specific performance of the contract by the company will be decreed; (4) the consideration for the right of way continued with its use, and the contract was not of uncertain duration; (5) in this case the statute of limitations had not run, and there is no evidence of abandonment by the owner. *Parrott v. R. R.*, 295.

11. *Railroads — Easements — Flag Stations — Contracts—Specific Performance—Decree—Corporation Commission—Damages.*—In this suit by the owner to enforce specific performance of a contract made with a railroad to stop its trains at a flag station on plaintiff's lands, in consideration of which the plaintiff had granted a right of way thereon, it is *Held*, that should the issue as to public policy be found against the company, the decree for specific performance should contain a provision that the defendant shall not be estopped thereby to institute proceedings at any future time, should conditions materially change, under Revisal, 1098, before the Corporation Commission, subject to appeal, etc. As to whether the plaintiff may recover damages for breach of contract when specific performance thereof is denied him, *Quære. Ibid.*

12. *Railroads — Contracts — Leases — Interpretation—Damages by Fire—Location of Cause—Words and Phrases.*—Contracts will be construed to effectuate the intention of the parties, and in some instances

RAILROADS—*Continued.*

the conditions surrounding the contracting parties may be considered as well as the nature of the instrument; and where the lessee of a railroad company of lands upon which to operate a turpentine distillery, and upon which the company is to lay for the benefit of the plaintiff a switch or siding sufficient to accommodate two cars, agrees in the lease, "that any fires originating within the boundaries hereby leased shall not be chargeable to the company," and that the company should not be held responsible therefor, it is *Held*, the defendant is not responsible in damages for the destruction of the distillery caused by a spark from its train negligently operated off the leased premises, and which flew thereon and ignited the plaintiff's property. *Slocumb v. R. R.*, 388.

13. *Railroads—Leases—Negligence—Limitation of Liability—Public Policy—Public Duties.*—In making a lease of its lands to private shippers and placing thereon a switch or siding for their use, a railroad company is not performing a public duty such as will invalidate a stipulation in the lease, whereby the lessee agrees not to hold the company liable for fires occurring on the leased premises through its negligent acts. *Ibid.*

14. *Railroads—Torts—Negligence—Damage by Fire—Timber Rights—Damages Remote.*—There can be no recovery of damages occasioned unintentionally and indirectly to one from the tort of another; and recovery of damages will be denied to one who had a contract for cutting timber on the lands of another, alleged merely to have been caused by the negligence of a railroad company in setting fire to the timber growing thereon, and thus preventing the plaintiffs from making the profits he would otherwise have made under his contract. *Thompson v. R. R.*, 377.

15. *Railroads—Torts—Negligence—Damages by Fire—Proximate Damages.* A railroad company negligently set fire to the lands of the owner, and was sued to recover damages, by one having a contract to cut the timber therefrom, arising from the loss of certain of his groceries, and the reconstruction of certain shack-houses he was permitted by the owner to use, occasioned by the defendant's tort: *Held*, these damages are not too remote for recovery. *Ibid.*

16. *Railroads — Condemnation — Railroads Crossing Railroads—Statutes—Court.*—Revisal, sec. 2556 (5) and (6), give the right to a railroad company "to condemn and acquire a right of way across the road of another company to construct a spur track to manufacturing plants," etc., which is also given to the plaintiff in this action of condemnation by its charter; and the courts cannot restrict this statutory right to be exercised by a railroad to cases in which the courts may approve its reasonableness or expediency. *R. R. v. R. R.*, 425.

17. *Same—Yard Limits—Former Appeal.*—The question involved on this appeal by the defendant railroad from a judgment permitting the plaintiff railroad company to cross its roadway, within its yard limits, by condemnation, in order to put in a spur at an industrial plant, was decided adversely to the defendant on a former appeal of this case, with suggestion of location and method of procedure, under which the defendant may now act, if so advised. 161 N. C., 531. *Ibid.*

RAILROADS—*Continued.*

18. *Railroads—Master and Servant—Fellow-servant—Baggage Master—Negligence with Firearms—Trials—Damages—Statutes.*—Where a baggage agent of a railroad company, in the course of his employment in getting some baggage checks from a drawer to a desk in the baggage-room, removes a pistol which he knew to be loaded, takes it in his hand, and in a careless manner opens another drawer to the desk, and in doing so causes the pistol to fire, by pressing the trigger with his finger, and kills his assistant, and this is done without the exercise of ordinary care and without due regard to the direction in which the pistol was pointing at the time, his negligent acts in causing the death of the deceased are attributable to the company employing him, and it is held liable for the consequent damages, in an action by the administrator of the deceased. Revisal, sec. 2646. The distinction between this case and instances not within the terms of the statute, pointed out by CLARK, C. J. *Moore v. R. R.*, 439.

19. *Same — Appeal and Error — Trials — Instructions — Harmless Error.*—Where, in an action for damages, a railroad company is held responsible for the negligent manner in which its baggage master handled a pistol, in the course of his employment, which caused the death of another employee of the company, it is error for the trial judge to charge the jury that they must find that the baggage master was also negligent in leaving the pistol in the drawer of a desk in the baggage-room, from the evidence thereof; but the jury having found the issue of negligence in plaintiff's favor, it is not prejudicial to the defendant, the appellant. *Ibid.*

20. *Railroads—Master and Servant—Joint Employment—Trials—Evidence—Nonsuit.*—Where a baggage master is employed at a union station to handle the baggage of two or several railroad companies, is paid his salary by one of these companies, and in the course of his employment negligently kills his assistant, and the administrator of the deceased enters a suit for damages against the company by whom his salary was paid, the defendant may not avoid liability upon the ground that at the time of the negligent act the baggage master happened to be performing a duty for another of these companies; and where the evidence is conflicting, a motion for nonsuit should be denied, the evidence being construed in a light most favorable to the plaintiff, and taken as true. *Ibid.*

21. *Railroads — Crossings — Trials — Evidence—Contributory Negligence—Issues—Judgments.*—Where the plaintiff sues a railroad company to recover damages for a personal injury alleged to have been received by him in a collision with the defendant's train while attempting to cross its roadway on a public street of a town, upon the ground that the defendant's employee, charged with the duty, failed to give him warning before entering onto the right of way, and there is evidence that the plaintiff did not himself exercise the ordinary care required under the circumstances, judgment may not be given adverse to the defendant upon a verdict not answered upon the issue of contributory negligence; and it is further held that evidence of the drunken condition of the plaintiff was erroneously excluded on the trial of this case. *Wilson v. R. R.*, 499.

22. *Railroads—Backing Trains—Warning—Negligence Per Se—Trials.*—It is negligence *per se* for the employees on a railroad freight train to

RAILROADS—*Continued.*

back its train upon or cross a street crossing its track in a thickly populated portion of the town without some one on the front box car to give notice of its aproach and to signal the threatened danger to pedestrians, and it is actionable when injury is thereby proximately caused. *Meroney v. R. R.*, 611.

23. *Same—Contributory Negligence—Issues—Harmless Error—Appeal and Error.*—The plaintiff, with the knowledge of defendant railroad company's employees, had for some time been engaged at the defendant's depot in directing his team driver in removing freight which had arrived over defendant's road. At this place a public street crossed the railroad's main and side tracks, on the latter of which two empty and detached box cars had stood for quite a while Plaintiff was momentarily standing in the street upon this side-track, giving directions to his driver, when, without notice or warning, defendant's employees attempted to attach these box cars to the engine, and the cars, being without brakes on, ran down upon the plaintiff, to his injury. The evidence held sufficient upon the issue of defendant's negligence, and the submission of the issue of contributory negligence to the jury was not error of which defendant could complain. *Ibid.*

24. *Railroads — Crossings — Collisions — Trials — Negligence —Evidence—Charge of Train—Questions for Jury.*—The plaintiff, in his action to recover damages for a personal injury against two railroad companies whose tracks crossed each other at a grade level, was a section foreman of one of them, and in construction work ordinarily had charge of the train of his company. While riding on his train, in front on a flat car, it came into collision, at the crossing, with the train of the other road, under circumstances fixing the employees in charge of both trains with actionable negligence. There was evidence in plaintiff's behalf that at that particular time and under the circumstances then existing he was not in charge of his employer's train, but that the engineer thereon had sole charge thereof: *Held*, the fact of collision was evidence of actionable negligence, and it was for the jury to determine, under proper instructions from the court, whether upon the evidence the plaintiff was chargeable with such negligence as would bar his recovery. *McDonald v. R. R.*, 622.

25. *Railroads—Construction of Road—Operation—Fellow-servant.*—Where a railroad company, constructing a line of road, regularly operates its train, for its own purposes, over a part thereof, carrying its own freight and its employees, it is, as to such part, an operating railroad within the meaning of the fellow-servant act, and is liable in damages for an injury caused thereon to one of its servants by the actionable negligent act of his fellow-servant. *Ibid.*

26. *Railroads — Collisions—Negligence—Contracts—Trials—Evidence—Primary Liability.*—Where two railroad companies are jointly sued for damages for a personal injury caused by the negligent acts of the employees on the trains of each of them at a crossing, resulting in a collision which caused the injury complained of, any contract or agreement between these companies relating to their liability under such circumstances affects only the question of primary liability between themselves, and not the right of the plaintiff to recover against both of them. *Ibid.*

RECEIPTS. See Carriers of Goods, 7.

RECORDS. See Evidence, 4; Appeal and Error.

REFERENCE.

1. *Reference—Evidence—Court's Findings—Trusts—Interest—Appeal and Error.*—Where the findings of fact of the trial judge in passing upon a report of a referee are made upon legal evidence introduced upon the referee's hearings, they are not subject to the consideration of the Supreme Court on appeal; and in this action the trial court necessarily held as a conclusion of law from the facts found, that the trustee was not chargeable with interest in favor of the trustor. *Lance v. Russell*, 626.

2. *Reference—Confirmation by Court—Statements as to Adjudication—Appeal and Error.*—The statement made of record by the trial judge in passing upon the report of the referee to whom the controversy had been referred, that he had heard the argument of counsel, examined and considered the record, the evidence, report and exceptions filed, before entering the order confirming the report, is conclusive on appeal, and not open to the exception of the appellant that he had failed to deliberate and pass upon an exception he had entered to the report. *Fisher v. Toxaway Co.*, 663.

3. *Reference—Admissions—Statements—Evidence.*—The proceedings before a court of a referee are judicial in their nature, and it is his duty to enter upon his report admissions of the parties or of their attorneys in the progress of the investigation or hearing pertinent to the issues involved; and entries of this character do not require that there be further evidence of such admissions than the referee's statements thereof. *Ibid.*

REFORMATION OF INSTRUMENTS. See Pleadings, 5.

1. *Deeds and Conveyances—Reformation—Limitation of Actions—Interpretation of Statutes.*—To reform a deed for mutual mistake, the cause of action accrues when the mistake is discovered or should have been in the exercise of ordinary care, and is barred three years thereafter. Hence, in an action to reform a timber deed for an alleged mutual mistake of the parties, so as to incorporate therein an agreement of the grantee that the land was only to be once cut over, and that the right to cut should cease when he moved away from the land, the statute of limitations will run three years after the plaintiff had knowledge of the mistake alleged. Revisal, sec. 395, subsec. 9. *Jefferson v. Lumber Co.*, 46.

2. *Insurance, Life—Policies—Contracts—Equity—Reformation—Questions of Law—Trials—Courts.*—A policy of life insurance may be reformed on the ground of mistake so as to express the true agreement of the parties, but the mistake must be mutual on the part of the insured as well as the insurer; and it is a matter of law as to whether the pleadings and evidence are sufficient to establish it. *Britton v. Insurance Co.*, 149.

3. *Contracts—Reformation—Matters of Law.*—For a written instrument to reform itself, without the intervention of a jury, the intent of the parties that it should be so regarded must be clear and should

REFORMATION OF INSTRUMENTS—*Continued.*

appear from the writing itself, and evidence *dehors* will not be considered. *Torrey v. McFadyen*, 237.

4. *Contracts — Reformation—Fraud—Mistake—Money Received—Trials—Preponderance of the Evidence.*—Where an unregistered option on lands has been given, which is sought to be reformed into a contract to convey them, and the lands have come into the hands of an innocent purchaser for value, so as to defeat the equity, the optionee, in his action to recover the money paid upon the allegation of false and fraudulent representations, is only required to establish his case by the preponderance of the evidence; and it is *Held* that the case may be tried upon one of two aspects: whether the parties mutually intended a contract instead of an option, and if so, whether parties failed to express their real agreement by mutual mistake, or by the fraud of the one inducing the mistake of the other; or whether one of them was induced to part with his money by the fraud and deceit of the other. *Ibid.*

REGISTRATION. See Frauds, Statute of; Deeds of Trust; Deeds and Conveyances.

RELIEF DEPARTMENT. See Railroads.

REMAINDER, CONTINGENT. See Judicial Sales; Estates.

REMAINDERMEN. See Estates, 1, 7, 8.

REMARKS OF COUNCIL. See Trials, 42.

REMOVAL OF CAUSES.

1. *Removal of Causes—Federal Courts—Petition and Bond—Time for Filing—Answer—Statutes.*—The filing of the petition and bond by a foreign defendant for the removal of a cause from the State to the Federal court for diversity of citizenship comes too late after the expiration of the statutory time allowed for answer. *Pruitt v. Power Co.*, 416.

2. *Removal of Causes—Federal Courts—Jurisdiction—Waiver—Time to Plead.*—An agreement between the parties, approved by the court, allowing a nonresident defendant time in which to answer the complaint, is a waiver by the defendant of his right to remove the cause to the jurisdiction of the Federal court, though the subject-matter is within the jurisdiction of that court; and especially so, on appeal to our Supreme Court, where it is found by the lower court that the order allowing time to answer was filed before the filing of the petition for removal. *Ibid.*

3. *Removal of Causes—Federal Courts—Pleadings—Joint Tort—Fraudulent Joinder — Allegations — Jurisdiction — Certiorari—Appeal and Error—U. S. Supreme Court.*—Where several defendants are sued for the same tort, the allegations of the complaint are determinative as to whether they are sued jointly or severally; and where a joint tort is alleged against a resident and nonresident defendant, and in proceedings to remove to the Federal court the nonresident alleges that the joinder was made in fraud of the jurisdiction of that court, general or broadside allegations of that character are insufficient to

REMOVAL OF CAUSES—*Continued.*

stop *eo instanti* the proceedings in the State court and leave the determination of the question of the fraudulent joinder exclusively to the courts of Federal jurisdiction. But in such instances a *certiorari* for the transcript of the record may issue out of the Federal court, which the clerk of the State court is bound to obey, and the cause may proceed through these two separate channels to the Supreme Court of the United States. *Ibid.*

RES GESTÆ. See Evidence, 12.

RES IPSA LOQUITUR. See Master and Servant, 22.

RESTRAINING ORDER. See Equity.

RIGHT OF ACTION. See Actions.

ROADS. See Pleadings, 10; Municipal Corporations, 13.

REVISAL. (For greater accuracy, refer to the various subjects in this index.)

SEC.

26. Application for letters of administration need not be in writing, and thereon the clerk should find jurisdictional facts. *Dallago v. R. R.*, 269.

359. An action is pending from the time of the issuance of the summons. *Pettigrew v. McCoin*, 472.

394. (5). The five-year statute is applicable to an action for permanent damages to lands. *Owenby v. R. R.*, 641.

395. (9). The statute of limitations bars the right to reform a deed three years after the discovery of the mistake. *Jefferson v. Lumber Co.*, 46.

400. Remainderman has no right of action to recover land in lifetime of first taker. *Blount v. Johnson*, 25.

419. Venue of action against municipality for damage to lands is regulated by section 420. *Cecil v. High Point*, 431.

420. Action against municipality for damages to land on account of improper sewerage is regulated in its venue by this section, and not by section 419. *Cecil v. High Point*, 431.

469. Action against two connecting carriers for shipment delivered in damaged condition, upon a parol contract of shipment, is held properly joined in this case. *Lyon v. R. R.*, 143.

495. Pleadings are construed to present real merits of the controversy, and held in this case sufficient against connecting carriers to present the issues of recovery for damage to shipment. *Lyon v. R. R.*, 143.

541. In this case a jury trial was waived, and the findings of fact and conclusions of law by the trial judge, being separately stated, are sufficient. *Eley v. R. R.*, 78.

607. On appeal from justice's court, incidental questions, not directly appealed from, may be determined in the trial *de novo*. *White v. Peanut Co.*, 132.

608. On appeal from a justice's court, incidental questions, not directly appealed from, may be determined in the trial *de novo*. *White v. Peanut Co.*, 132.

REVISAL—*Continued.*

SEC.

609. On appeal from a justice's court, incidental questions, not directly appealed from, may be determined on the trial *de novo*. *White v. Peanut Co.*, 132.

688. It is unnecessary that homestead should be "fixed and described by metes and bounds" when sufficiently identified. *Kelly v. McLeod*, 382.

763. It is unnecessary that a warrant of attachment be "subscribed." *Boger v. Lumber Co.*, 557.

808. Title to standing timber being shown from common source, a nonsuit is not allowable, the statute protecting the rights of parties to final determination, and prohibiting the cutting of the timber. *Riley v. Carter*, 334.

946. The deed in this case, made in 1880, is construed in fee, there being nothing to show a contrary intent. *College v. Riddle*, 211.

976. A writing which does not promise to convey lands upon receipt of a consideration, falls within the statute, and a promissory note to pay the purchase price is insufficient. *Burriss v. Starr*, 657.

1097 (1). A railroad having agreed for a consideration in 1859 to establish and maintain a flag station on plaintiff's land, the agreement is not affected by this section. *Parrott v. R. R.*, 295.

1243. Valid service on agent of corporation may be shown on appeal from justice's court, when that court erroneously held that service provided in this section on Secretary of State was sufficient, without passing upon the other question of sufficient service. *White v. Peanut Co.*, 132.

1277. Trustee of an express trust is not liable for costs in an action, when mismanagement and bad faith are not shown. *Lance v. Russell*, 626.

1545. The Supreme Court has the power to allow amendments to pleadings. *Kenney v. R. R.*, 99.

1564. Husband and wife may not testify against each other as to adultery in an action of divorce, irrespective of the question of collusion. *Hooper v. Hooper*, 605.

1581. A devise with limitation over upon the contingency of leaving issue refers to the death of testator. *Rees v. Williams*, 201.

1591. This section is constitutional, and in this case the plaintiff's contingent interest in lands was concluded. *Bullock v. Oil Co.*, 63.

1630. Husband and wife may not testify against each other, as to adultery, in an action of divorce, irrespective of the question of collusion. *Hooper v. Hooper*, 605.

1631. When against interest, testimony of declarations of deceased are competent. *Seals v. Seals*, 409.

1631. Declarations of the husband are inadmissible in an action brought to recover land by his wife under his title when he has become insane. *Coltrain v. Lumber Co.*, 42.

1633. Husband and wife may not testify against each other as to adultery, in an action of divorce, irrespective of the question of collusion. *Hooper v. Hooper*, 605.

REVISAL—*Continued.*

SEC.

1656. Inspection and photograph of note alleged to be a forgery may be allowed by judge. *Bank v. McArthur*, 374.

1690. This section does not apply to an uninterested witness having transactions or communications with deceased respecting title to lands. *Hodges v. Wilson*, 323.

2023. Amount due contractors, distributed *pro rata* among lienors on building. *Mfg. Co. v. Andrews*, 286.

2035. Amount due contractors distributed *pro rata* among lienors on building. Rev. 2023. *Mfg. Co. v. Andrews*, 286.

2201. Fraud in the execution of a negotiable instrument being shown, the burden is on one claiming in due course to show he acquired without notice of infirmity. *Bank v. Branson*, 344.

2208. Fraud in the execution of a negotiable instrument being shown, burden is on one claiming in due course to show he acquired without notice of infirmity. *Bank v. Branson*, 344.

2556. (5), (6). A railroad company may condemn a right of way across another railroad for purposes of a spur track. *R. R. v. R. R.*, 425.

2643. The recovery of a penalty of a carrier for failure to refund overcharge is not an interference with interstate commerce. *Thurston v. R. R.*, 598.

2644. Recovery from a carrier for overcharge is not an interference with interstate commerce. *Thurston v. R. R.*, 598.

2646. A railroad company cannot escape liability for the negligence of its baggage man on the ground that he was also at times engaged in similar duties to another road which jointly used his services. *Moore v. R. R.*, 439.

3138. The intent of the testator prevails in the construction of a will. *Rees v. Williams*, 201.

SAFE APPLIANCES. See Master and Servant.

SALES. See Judicial Sales, 1, 2.

SCHOOLS. See Municipal Corporations, 6.

SCHOOLS AND SCHOOL DISTRICTS.

1. *Constitutional Law—Cities and Towns—Condemnation—School Purposes.* The taking of lands for the purposes of public schools is for a public use, in contemplation of our Constitution; and an act of the Legislature empowering a town to condemn land for such purposes is constitutional. *School Trustees v. Hinton*, 12.

2. *Schools—Rules and Regulations—Discipline—Agreement Implied.*—It is necessary to the well-being of a school and the pupils attending it that a proper discipline be maintained, and the parent of a pupil entering it impliedly agrees that he will submit to all reasonable rules and regulations promulgated and enforced for that purpose. *Teeter v. Military School*, 564.

3. *Same—Expulsion.*—The principal of a private school has the power to enforce all reasonable rules and regulations thereof made for the

SCHOOLS AND SCHOOL DISTRICTS—*Continued.*

maintenance of a proper discipline, by punishment or explusion of the pupil offending when this power is not maliciously or arbitrarily exercised by him. *Ibid.*

4. *Same—Payment in Advance.*—Rules of a private school requiring that payment be made in advance for the full term upon entering a pupil, and that upon expulsion of the pupil during the term no repayment would be made for the unexpired part of the term, are reasonable and are enforcible in the proper exercise thereof; and this applies where the parent has been indulged or given credit as to part of the advance payment. *Ibid.*

5. *Same—Courts—Trials—Evidence—Verdict Set Aside.*—In this case it appeared from the evidence that the plaintiff entered his boy in the defendant's school with knowledge that if the pupil violated the rules of the school relative to its discipline, he would be expelled; that the pupil was expelled for repeated misconduct and violation of the rules and for insubordination to the principal. There was no evidence that the principal acted arbitrarily or otherwise than for the best interest of the school: *Held*, no error for the trial judge to set aside a verdict by which the plaintiff recovered proportionately the money he had paid for the unexpired part of the school term. *Ibid.*

6. *Municipal Corporations—Counties—Credit—Necessaries—Schools Purposes—Statutes—Constitutional Law.*—It is prohibited by our Constitution, Art. VII, sec. 7, that a county contract any debt, etc., unless approved by the majority of the qualified voters of that county, which is not for a necessary expense, notwithstanding the provisions of a statute to the contrary; and schools being held not to be an expense of this character, an issue of bonds for such purpose is invalid, though a majority of those voting thereon have expressed themselves by ballot in their favor, if such majority be not also that of the qualified voters of the county. *Sprague v. Commissioners*, 603.

SEAL. See Contracts, 16.

SERVICE. See Process, 1.

SEWAGE. *See Municipal Corporations*, 14, 16.

SICK BENEFITS. See Railroads.

SPECIFIC PERFORMANCE. See Easements, 2.

Contracts—Options—Deeds and Conveyances—Equity—Specific Performance.—The holder of a valid and binding option for the purchase of lands is entitled to specific performance of his contract. *Ward v. Albertson*, 218.

STALE CLAIMS. See Equity, 11.

STATE'S LANDS. See Limitations of Actions, 14; Deeds and Conveyances, 35.

State's Lands—Entry—Vague Description—Trusts and Trustees.—In order to declare that a second enterer upon State's lands, and who takes a grant to the lands covered by the first entry, holds the lands in trust of the latter upon completing his entry, it is necessary that the

STATE'S LANDS—*Continued.*

prior entry sufficiently describe the land to give notice of its location and extent; and in this action the description filed with first entry is held to be too vague and indefinite, towit: E. W. enters 100 acres of land in said county, in B. Township, on the waters of White Creek, adjoining the lands of A. and others, beginning on a stake on A.'s line on Berry Mountain, and running various courses for complements. *Wallace v. Barlow*, 676.

STATUTES. See Limitation of Actions; Appeal and Error, 10; Railroads; Carriers of Goods, 4, 5; Corporations; Bills and Notes; Courts, 12; Removal of Causes; Constitutional Law.

1. *Estates—Remaindermen—Right of Action—Life Estate—Real Party in Interest—Interpretation of Statutes.*—The remaindermen have no right of possession in lands during the lifetime of the first taker, and during that time their action to recover the land will not lie, the statute requiring it to be brought by "the real party in interest." Revisal, sec. 400. *Blount v. Johnson*, 25.

2. *Drainage District—Bond Issues—Time of Objections—Actual Notice—Publication in Newspaper—Interpretation of Statutes.*—It is not necessary to the validity of bonds issued by a drainage district under the provisions of chapter 442, Public Laws 1909, amended by chapter 67, Public Laws 1911, that the notice of the time of hearing objections to the final report of the engineer and viewers was not published in some newspaper of general circulation in the county, when it appears that no newspaper was published therein, or elsewhere, which has a general circulation in the county, and that the landowners affected had actual and ample notice of such time, and raised no objection. *Commissioners v. Engineering Co.*, 37.

3. *Drainage District—Liberal Construction—Interpretation of Statutes.*—The drainage laws apply to the whole State, and by the express provision of section 37, chapter 442, Public Laws 1909, they should be liberally construed to promote the leveeing, ditching, draining, and reclamation of wet and overflowed lands. *Ibid.*

4. *Drainage, Districts—Objection—Publication in Newspaper—Waiver—Consent—Interpretation of Statutes.*—Where the purchaser of bonds issued under Public Laws 1909, ch. 442, amended by the Public Laws 1911, ch. 67, protest their validity on the ground that no notice of the time of hearing of objections had been published in a newspaper, and it appearing that the landowners affected had full and ample actual notice thereof, and publication could not be made because no newspaper was published in the county or had a general circulation therein, the failure of such owners to pay to the county treasurer the full amount for which their lands are liable, publication being made in accordance with the amendatory act, sections 9 and 10, will operate as a waiver of their rights to contest the validity of the bonds, and the purchaser of the bonds is in no better condition to resist their validity, and all parties to the proceedings are held to have consented to the issuance. *Ibid.*

5. *Evidence—Communications—Insane Persons—Interpretation of Statutes.*—When the wife of an insane person sues under his deed and title to lands in dispute, testimony of a witness of conversation he

had with the husband as to his claim to the lands is incompetent. Revisal, sec. 1631. *Coltrain v. Lumber Co.*, 42.

6. *Corporations—Insolvency—Parties Defendant—Demurrer—Interpretation of Statutes.*—For one to be made a proper party defendant under Revisal, sec. 410, in an action to appoint a receiver for an insolvent corporation and administer its assets, he must claim an adverse interest to the plaintiff in the action and necessary to the complete determination or settlement of the questions therein involved; and his demurrer is good to a complaint which alleges that he wrongfully claims that the plaintiff is liable to him for some shares of stock he had sold him upon authority of the corporation, under an agreement to take back the stock and repay the purchase price in the event of dissatisfaction on the defendant's part; for such allegations negative the idea that the defendant has a cause of action either against the plaintiff or the corporation, and states no cause of action against the defendant. *Dailey v. Fertilizer Co.*, 60.

7. *Judicial Sales—Estates—Contingent Remainders—Interpretation of Statutes—Constitutional Law.*—Revisal, sec. 1591, rendering valid judgments authorizing the sale of lands wherein there are contingent remainders, is constitutional and valid. *Bullock v. Oil Co.*, 63.

8. *Judicial Sales—Estates—Contingent Interests—Interpretation of Statutes—Parties—Representation—Application of Funds.*—A testator devised certain lands to his wife during her widowhood or life, which, at her death, were to be equally divided between the children or "their heirs." The lands were sold in partition in 1904, during the lifetime of the widow, and the children were made parties. One of these children died in 1906, before the death of her mother (in 1909), and her children, the grandchildren of the testator, brought suit to recover their interests in the land devised, claiming they had a vested interest therein in 1904, and not being parties to the proceedings, were not estopped by the judgment in partition: *Held*, the plaintiffs had a contingent interest in the lands at the time of the sale, and were concluded from claiming the lands under the validating act of 1905 (Revisal, sec. 1591). *Semble*, even under the common law the representation of the mother was sufficient to bind the plaintiffs, and the purchaser was not required to see to the application of the proceeds of sale. *Springs v. Scott*, 132 N. C., 564, cited and applied. *Ibid.*

9. *Trial by Jury—Waiver—Findings in Writing—Conclusions of Law—Interpretation of Statutes.*—Where a jury trial has been waived by the parties, and the record discloses that the decision of the judge was given in writing, and his finding of fact and conclusions of law are separately stated, it is sufficient under Revisal, sec. 541. *Eley v. R. R.*, 78.

10. *Motions—Laces—Excusable Neglect—Interpretation of Statutes.*—The statute requiring that proceedings to set aside a judgment obtained by reason of surprise, excusable neglect, etc., be instituted within one year from the time of judgment entered, applies when the judgment is otherwise in all respects regular, the court having jurisdiction of the parties, and does not extend to cases where no jurisdiction

STATUTES—*Continued.*

has been acquired over the party moving in the cause to have it set aside. *Massie v. Hainey*, 174.

11. *Wills—Interpretation—Intent—Defeasible Estates—Statutes.*—The intent of the testator as gathered from the entire will controls its interpretation; and this rule applies to the construction of Revisal, sec. 3138, when it appears that the testator devised certain lands without the words of inheritance, and that his intent, gathered from a separate item of the will, was to create a defeasible estate in the first taker, contingent upon his dying at any time, whether before or after the death of the testator, leaving issue surviving him. *Rees v. Williams*, 201.

12. *Wills—Intent—Contingent Remainders—Die Without Issue—Statutes.*—A devise of lands to J., with limitation that if she should die without leaving issue, then over, refers the contingency upon which the estate shall vest to the death of J., and not to that of the testator, since the act of 1827, now Revisal, sec. 1581. *Ibid.*

13. *Statutes—Codification—Interpretation—Meaning Reconciled.*—Statutes enacted upon the same subject-matter should be construed together and their meaning reconciled when possible, and where various enactments have been codified by the Legislature, it is permissible, in their construction, for the courts to regard the original statutes and their history in the light of former decisions. *Mfg. Co. v. Andrews*, 285.

14. *Liens—Statutes—Interpretation—Material Men—Funds Due—Moneys Prorated.*—Where the owner of a building erected under contract has not sufficient funds in his hands to pay all the lienors thereon for material furnished, the amount due the contractor, subject to the liens, shall be distributed by the owner among the several claimants under the provisions of section 2023 of the Revisal; and construing this section with other relevant sections of the Revisal, it is held that it does not conflict with section 2035, requiring "that liens created and established by this chapter (48) shall be paid and settled according to priority of the notice of the lien filed with the justices or the clerk," for this latter section relates to liens filed with the proper officers, and does not affect the provisions as to subcontractors who acquire a lien by notice to the owner. *Ibid.*

15. *Statutes—Evidence—Motions to Inspect and Copy—Court's Discretion.* Where a note sued on is alleged to be a forgery, the judge of the Superior Court wherein the action is pending may, in his discretion, allow, upon due notice, the defendant to inspect the note and take a photographic copy thereof. Revisal, sec. 1656. *Bank v. McArthur*, 374.

16. *Railroads—Condemnation—Railroads Crossing Railroads—Statutes—Court.*—Revisal, sec. 2556 (5) and (6), gives the right to a railroad company "to condemn and acquire a right of way across the road of another company to construct a spur track to manufacturing plants," etc., which is also given to the plaintiff in this action of condemnation by its charter; and the courts cannot restrict this statutory right to be exercised by a railroad to cases in which the courts may approve its reasonableness or expediency. *R. R. v. R. R.*, 425.

STATUTES—*Continued.*

17. *Same—Yard Limits—Former Appeal.*—The question involved on this appeal by the defendant railroad from a judgment permitting the plaintiff railroad company to cross its road-way, within its yard limits, by condemnation, in order to put in a spur at an industrial plant, was decided adversely to the defendant on a former appeal of this case, with suggestion of location and method of procedure, under which the defendant may now act, if so advised. 161 N. C., 531. *Ibid.*

18. *Statutes—Interpretation.*—Statutes upon the same subject-matter should be construed together so as to harmonize different portions apparently in conflict, and to give to each and every part some significance, if this can be done by fair and reasonable interpretation. *Cecil v. High Point*, 431.

19. *Actions — Venue—Damages—Lands—Official Acts—Statutes—Interpretation.*—The venue of an action to recover from an incorporated town damages to the lands of an owner situated in an adjoining or different county, caused by the improper method of emptying its sewage into an insufficient stream of water, is properly in the county wherein the town is situated, for such arise by reason of the official conduct of municipal officers and is regulated by Revisal, sec. 420, and this interpretation of the statute is not irreconcilable with the provisions of section 419, requiring, among other things, that an action to recover damages to lands shall be brought in the county where the lands or some portion thereof is situated, for the first named section being in general terms, the latter should be construed as an exception to its provisions. *Ibid.*

20. *Municipal Corporations—Cities and Towns—Taxation—Street Improvements — Excessive Levy — Statutes—Equity—Injunction.*—Where a municipality levies a special tax for street improvements upon the land of an abutting owner in excess of that allowed by a statute applicable, the excess is a nullity and may be enjoined; and where the limitation prescribed is a certain per cent of the taxable value of the property, that valuation must control, whether the property lies upon one or several streets. *Charlotte v. Brown*, 435.

21. *Municipal Corporations—Cities and Towns—Street Improvements—Excessive Levy—Statutes—Court's Jurisdiction.*—It is not required of the abutting owner of lands upon a street of a city to comply with the prescribed procedure of objecting, etc., to an excessive special levy upon his property for street improvements, when the excess is void under the statute, for such assessment is jurisdictional and can be taken advantage of by the owner, in respect to such excess, at any time it is sought to be enforced in the courts. *Ibid.*

22. *Railroads—Master and Servant—Fellow-servant—Baggage Master—Negligence with Firearms—Trials—Damages—Statutes.*—Where a baggage agent of a railroad company, in the course of his employment in getting some baggage checks from a drawer to a desk in the baggage-room, removes a pistol which he knew to be loaded, takes it in his hand, and in a careless manner opens another drawer to the desk, and in doing so causes the pistol to fire, by pressing the trigger with his finger, and kills his assistant, and this is done without the exercise of ordinary care and without due regard to

STATUTES—*Continued.*

the direction in which the pistol was pointing at the time, his negligent acts in causing the death of the deceased are attributable to the company employing him, and it is held liable for the consequent damages, in an action by the administrator of the deceased. Revisal, sec. 2646. The distinction between this case and instances not within the terms of the statute, pointed out, CLARK, C. J. *Moore v. R. R.*, 439.

23. *Illegal Contracts—Statutes—Exclusive Sales—Courts.*—A recovery may not be had in the courts of this State upon a contract made in violation of an express prohibition of our statutes, as in this case, for goods sold and delivered under a contract in consideration that the purchaser should not sell the same commodity in his store manufactured by other parties, for such provision is in violation of chapter 167, sec. 1 (a), Public Laws 1911. *Fashion Co. v. Grant*, 453.

24. *Appeal and Error—Objections and Exceptions—Trial Court—Procedure Quantum Valebat—Contracts.*—The Supreme Court will not decide a question on appeal that has not been properly presented to the consideration of the trial judge, and exceptions noted as required by the rules of procedure, and in this case, the plaintiff having only sued upon a contract for the exclusive sale of goods in violation of our statute, it is held that the question as to whether a recovery could be had upon a *quantum valebat* may not be determined. *Ibid.*

25. *Actions Pending—Issuance of Summons—Statement.*—Under the express provision of our statute a civil action commences upon the issuance of a summons from a court of competent jurisdiction (Revisal sec. 359), and as the statute fixes the time of the inception of the action, it is pending from that time. Hence an action between the same parties upon the same subject-matter, returnable to a different jurisdiction, will abate, and upon motion will be dismissed, when it appears that the summons was subsequently issued, though served in priority of time. *Pettigrew v. McCoin*, 472.

26. *Counties and Towns—Public Roads—Damages—Appeal Bond—Court's Discretion.*—Upon appeal to the Superior Court by the county commissioners of Cabarrus County from an award of damages to the owner of land for the construction of a public road thereon (ch. 201, Pub. Laws 1907), it is discretionary with the trial judge to permit the required bond to be given at the time of the trial. *Pharr v. Commissioners*, 523.

27. *Counties and Towns—Public Roads—Damages—Appeal, Time to Perfect—Interpretation of Statutes.*—A requirement of a public road law, that the owner of lands upon which the location of such road is changed must file his petition asking for damages within six months after such change is made, must be complied with to entitle the owner to the damages claimed. *Ibid.*

28. *Mental Anguish—Express Companies—Trials—Negligence—Burial Caskets—Damages.*—An express company is liable for mental anguish caused to a husband by its negligent delay in transporting and delivering a burial casket to be used in the interment of his wife, of which the receiving agent was informed at the time; and where by reason of such failure the husband was forced to bury his wife in a

STATUTES—*Continued.*

makeshift or cheap casket, the ground for such recovery is sufficiently shown. *Byers v. Express Co.*, 542.

29. *Same—Contracts—Lex Loci—Federal Decisions—Interstate Commerce.* Where an express company is liable under our laws for mental anguish for its negligent failure to promptly transport and deliver a metal casket to be used in the interment of the plaintiff's wife, and the contract of shipment is made here, the question of recovery is not dependent upon the Federal decisions in relation to interstate commerce. *Ibid.*

30. *Same—Special Damages—Hepburn Act.*—The Hepburn act with the Carmack amendment, authorizing a common carrier, under certain circumstances, to limit the amount of recovery in the event of its negligence in regard to interstate shipments, relates only to the damage which may thereby have been occasioned to "property," decreasing its value, and has no application to a recovery of special damages caused by the negligent delay by the carrier in its transportation and delivery, where such are otherwise recoverable; notwithstanding a contrary stipulation in the bill of lading. *Ibid.*

31. *Mad Dogs—Contributory Negligence—Trials—Issues—Statutes.*—An action would lie at common law in damages against the owner of a mad dog through whose negligence another person had been bitten by the dog, in favor of such other person; and where there is no indication that in his action the person thus injured was proceeding under the statute, Revisal, sec. 3305, an issue of contributory negligence, when pleaded and supported by evidence, should be submitted to the consideration of the jury. As to whether such issue could arise in proceedings under the statute. *Quœre. Holton v. Moore*, 549.

32. *Divorce—Adultery—Husband and Wife—Evidence—Interpretation of Statutes.*—It being the purpose of our statutes to remove opportunity for collusion between the husband and wife in an action for divorce on the ground of adultery, the statutory inhibition that they will not be permitted to testify for or against each other prevails, whether under the circumstances of any particular case it would seemingly appear there was no collusion or otherwise (Revisal, secs. 1564, 1630, 1636); and the inhibition extends to any and all admissions or confessions by the other, tending to establish the acts of adultery, either in the pleadings or otherwise. *Hooper v. Hooper*, 605.

33. *Same—Appeal and Error—Ex Mero Motu.*—In an action for divorce of the husband on the ground of adultery of his wife, it is incompetent for the husband to testify that the wife had a certain contagious venereal disease, of which he had been free, under circumstances tending necessarily to establish her improper relations with other men (Revisal, secs. 1564, 1630, 1636); and the statute expressly forbidding testimony of this character being positive and enacted in the interest of society, it is the duty of the trial judge to exclude it, and upon his failure to have done so, the Supreme Court, on appeal, will consider its incompetency *ex mero motu. Ibid.*

34. *Trusts and Trustees—Costs—Interpretation of Statutes.*—The trustee of an express trust is not personally liable in an action brought against him for the costs of court, where it is not shown and properly

STATUTES—*Continued.*

established that he has mismanaged the trust estate or has been guilty of bad faith. Revisal, sec. 1277. *Lance v. Russell.* 626.

35. *Statute of Frauds—Contracts to Convey—Written Promise—Bills and Notes.*—It is not required by the statute of frauds that the writing necessary to enforce an agreement for the conveyance of lands should be "subscribed" by the owner; but it is necessary that it should contain a promise of some sort by the owner to make the conveyance upon the payment by the purchaser of the consideration agreed upon (Revisal, sec. 976); therefore the acceptance by the owner of a promissory note given by the purchaser, and stated to be for the amount of the purchase price of lands, will not alone be a sufficient compliance with the statute; and there being no valid contract, it follows that damages may not be recovered for a breach thereof. *Burriss v. Starr,* 657.

STATUTES, FEDERAL. See Carriers of Goods, 6.

STATUTE OF FRAUDS. See Frauds, Statute of.

STREETS AND SIDEWALKS. See Municipal Corporations, 3, 17.

SUBROGATION. See Equity, 6, 7, 8; Insurance, 1.

SUMMONS. See Process, 2.

SUPERIOR COURT. See Courts.

SUPREME COURT. See Courts.

SURFACE WATER. See Water and Water-courses.

TAX DEEDS. See Estates, 2.

TAXATION. See Municipal Corporations, 4.

TELEGRAPH.

Telegraphs—Valid Stipulations—Sixty Days—Written Demand.—The stipulation on a telegraphic message that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days," etc., is a valid one, requiring that a written claim be presented within the time specified, identifying the message, stating the negligence complained of, and the nature and extent of the demand, so as to enable the company to investigate and ascertain its liability; and a verbal notice or a threat made by the complaining party to the company's agent that, as the company had been negligent, some one would have to pay for it, is totally insufficient. *Lytle v. Telegraph Co.,* 504.

TENANTS IN COMMON. See Limitations of Actions, 7; Deeds and Conveyances, 34.

1. *Tenants in Common—Contracts or Agreements for Possession.*—An agreement made by tenants in common, that one of them shall have sole or exclusive possession of the common property, is valid and enforcible. *Harper v. Rivenbark,* 180.

2. *Same — Conversion — Trials — Damages — Negligence.*—A. having purchased from a partnership, B. & C., a sawmill under an agreement

TENANTS IN COMMON—*Continued.*

to take possession of the property and pay the partnership debts, thereafter agreed with B., for a further consideration, that the latter should have a one-half interest after the debts were paid. C., claiming by a subsequent purchase from B. of the latter's interest, took forcible possession of the property, and while operating it, it was destroyed by fire: *Held*, C.'s right to the property was subject to the agreement between A. and B. that the former should retain possession, etc., and A., having a special property right of possession, was entitled to recover his damages in his action against C. for the latter's wrongful conversion, without proof of negligence. *Ibid.*

3. *Homestead—Metes and Bounds—Tenants in Common—Equity—Judgments—Cloud on Title.*—The homestead laws should be liberally construed in favor of the one claiming the homestead and may be allotted in the undivided interest in lands of a tenant in common when such interest does not exceed $1,000 in value, subject only to the rights of enjoyment of the lands by the other tenants in common, who alone may complain, and when the land is sufficiently identified the allotment is not open to objection that the homestead should have been "fixed and described by metes and bounds." Rev., sec. 688. Hence, where a judgment debtor has accepted and enjoyed a homestead allotted to him in his undivided interest in lands of a less value than $1,000 for a long period of time, he may not sustain his suit in the equitable jurisdiction of the court to set aside as void the proceedings under which the homestead had been laid off, and plead the statute of limitations as to the judgment lien, upon the ground that they were a cloud upon his title. *Kelly v. McLeod*, 382.

TERMS. See Judgments, 7.

TIMBER. See Deeds and Conveyances, 9, 11, 12; Contracts, 12.

TIMBER DEED. See Limitations of Actions, 3.

TIMBER RIGHTS. See Negligence, 9.

TORTS. See Negligence, 9, 10; Removal of Causes.

TRESPASS. See Limitations of Actions, 4; Deeds and Conveyances, 13; Negligence, 8; Pleadings, 10.

TRIALS. See New Trials; Verdict; Jurors; Evidence.

1. *Same—Negligence—Trials—Nonsuit—Instructions.*—Where there is evidence tending to show that an engineer on a train consisting of an engine and two cars, running 7 or 8 miles an hour, has failed to keep a lookout ahead, and through this neglect he has failed to see a 10-year-old child on the track ahead, in time to have stopped the train to avoid killing it, the child apparently so frightened as to have lost the degree of care which should have caused him to leave the track; and also failed to see the signals for him to stop the train, given by another person ahead, near the track; the contributory negligence of the child will not bar the right of his intestate to recover for his negligent killing thus caused; and the question of defendant's negligence is one for the jury under proper instructions from the court. The charge in this case is approved. *Towe v. R. R.*, 1.

TRIALS—*Continued.*

2. *Electricity—Trials—Negligence—Evidence.*—In an action to recover damages for an injury caused the plaintiff by a shock from a live electric wire alleged negligently to have been left hanging upon the street of a town, evidence of negligence in regard to another wire about a block away whereby another person was injured is irrelevant and incompetent, and its admission is reversible error. *Forbes v. Rocky Mount*, 14.

3. *Same—Subsequent Conditions.*—Evidence of negligence in regard to electric wires of a defendant company, operating a light and power plant, existing a long time subsequent to the date of the injury complained of, in this case for more than two years, is irrelevant and incompetent, and its admission constitutes reversible error. *Ibid.*

4. *Deeds and Conveyances—Location of Lands—Adverse Possession—Instructions.*—Where the plaintiff claims the land in dispute upon the sole ground that it was contained in the description of her deed, which was the only controverted matter, it is not error for the court to refuse defendant's prayer for special instruction upon the sufficiency of the plaintiff's evidence of adverse possession to ripen title. *Coltrain v. Lumber Co.*, 42.

5. *Divorce a Mensa—Trials—Evidence—Nonsuit.*—The evidence in this action for divorce *a mensa* is held insufficient, and a motion of nonsuit was properly allowed. *Martin v. Martin*, 130 N. C., 28, and other cases cited by the Court. *Alexander v. Alexander*, 45.

6. *Trials—Courts—Remarks—Appeal and Error.*—In an action by a bank upon a note, the remarks of the trial judge that the witness may be of good character and a good banker, but that not every such one knows the law, is held not prejudicial or reversible, if erroneous. *Trust Co. v. Whitehead*, 74.

7. *Pleadings—Trials—Evidence—Questions for Jury—Bills and Notes—Banks and Banking—Collaterals—Fraud—Rights of Creditors.*—The plaintiffs, husband and wife, in their action against a bank, alleged that the defendant was endeavoring to apply collateral notes of the *feme* plaintiff to the security of a note held by the bank, made by her husband to its director and obtained by fraud and collusion between him and the defendant. These allegations were denied in the answer, which further alleged that the male plaintiff was the owner of the lands, securing the collateral notes, and that these notes were given for the purchase price, and that he had had the lands conveyed to his wife to defraud his creditors, one of whom was the director, its indorsee; the answer also alleged that the *feme* plaintiff was not the real owner of the collaterals, but if so, she had been given full authority for the defendant to hold them as collateral to her husband's note: *Held*, the pleadings raised issues of fact to be submitted to the jury, and a judgment thereon in plaintiff's favor was erroneous. *Newsome v. Bank*, 91.

8. *Trials—Evidence—Questions for Jury—Cotton Seed—Weights.*—In an action to recover the difference in money between the actual weight of a car-load of cotton seed sold and delivered to the defendants, and the weight paid for by them, the plaintiff's evidence tended to show that after the delivery of the seed he weighed three loads of other seed upon the same wagon, of the same quality and condition, loaded

TRIALS—*Continued.*

by the same men and in the same manner, and that it showed an average of 58½ bushels to the load of 30 pounds to the bushel, making the total weight of the twenty-one wagon loads of seed delivered 37,000 pounds to the car. There was evidence of a variation of the weights of wagon loads of seed from 50 to 150 pounds to the load; and on behalf of the defendants, that by actual car-load weight, there were 25,700 pounds of seed for which they admittedly paid: *Held,* the evidence was sufficient to go to the jury upon the plaintiff's contention, and a motion to nonsuit was properly overruled. *Bowden v. English,* 97.

9. *Appeal and Error—Instructions—Harmless Error.*—The statement made by the judge in his charge to the jury in this case, that all of the witnesses were of good character, was impartial in its application, and not held for reversible error. *Ibid.*

10. *Railroads—"Kicking Cars"—Flying Switch—Trials—Negligence—Evidence.*—In railroad parlance, "kicking" a car is equivalent to making a "flying switch," and where there is evidence that the death of a brakeman was caused in this manner while he was engaged in his duties to the defendant railroad company, the violent contact of the car "kicked" with the one whereon he was employed throwing him down to his death, it is sufficient upon the question of actionable negligence and should be submitted to the jury. *Kenney v. R. R.,* 99.

11. *Railroads—Federal Employer's Liability Act—"Assumption of Risks"—Trials—Negligence—Instructions—Appeal and Error—Harmless Error.*—As to whether assumption of risks, under the Federal Employer's Liability Act, is a defense for a railroad company in an action to recover for the wrongful injury or death of its employee, *Quære.* But in this case, the jury having found the issue of defendant's negligence for the plaintiff, under correct instructions thereon, if there was any error committed by the court in relation to the doctrine of assumption of risks, it was harmless. *Ibid.*

12. *Master and Servant—Trials—Evidence—Negligence—Knowledge Implied—Questions for Jury.*—While engaged in his duties in operating a power-driven lathing machine, the plaintiff's intestate was killed by a piece of timber flying back from the machine and striking him. The verdict established the fact that the machine causing the injury was "known, approved, and in general use," but there was further evidence tending to show that a large hood, a part of the machine, was placed over the saws for the purpose of preventing the timbers from thus flying back, and because of a large opening therein some of the timbers would oftentimes fly back, the danger from which could practically have been removed in a certain manner at a comparatively small expense and without lessening the efficiency of the machine: *Held,* this further evidence was sufficient upon the question of defendant's actionable negligence to be submitted to the jury; and, further, that the dents in the wall caused by the flying timbers before the injury, the length of time the machine had thus been used there, etc., were evidence sufficient upon the question of defendant's implied knowledge of the danger to the employee in thus working. The charge in this case is approved. *Ainsley v. Lumber Co.,* 122.

13. *Carriers of Goods—Delivery—Bad Condition—Prima Facie Case—Trials—Burden of Proof.*—Where a shipment of goods is received by the

TRIALS—*Continued.*

consignee from the final carrier in bad condition, and there is evidence that this carrier received the goods from its connecting carrier in good condition, a *prima facie* case of negligence is made out against the delivering carrier, and presents sufficient evidence thereof to be submitted to the jury, with the burden of proof on it. *Lyon v. R. R.*, 143.

14. *Insurance, Life — Policies — Contracts — Equity — Reformation—Questions of Law—Trials—Courts.*—A policy of life insurance may be reformed on the ground of mistake so as to express the true agreement of the parties, but the mistake must be mutual on the part of the insured as well as the insurer; and it is a matter of law as to whether the pleadings and evidence are sufficient to establish it. *Britton v. Insurance Co.*, 149.

15. *Carriers of Goods—Negligence—Live Stock—Trial—Issues—Evidence.*—It appearing in this case that the question of defendant railroad company's negligence and its ability for damages to a shipment of live stock was made to depend upon an issue as to whether a stock chute, used for unloading the stock, was defective, and as a fact from the record on appeal that the "chute was of the character and construction ordinarily" used for the purpose, "was in good condition and apparently had no defects," a new trial is ordered. *Holton v. R. R.*, 155.

16. *Tenants in Common—Conversion—Trials—Damages—Negligence.*—A. having purchased from a partnership, B. & C., a sawmill under an agreement to take possession of the property and pay the partnership debts, thereafter agreed with B., for a further consideration, that the latter should have a one-half interest after the debts were paid. C., claiming by a subsequent purchase from B. of the latter's interest, took forcible possession of the property, and while operating it, it was destroyed by fire: *Held*, C.'s right to the property was subject to the agreement between A. and B. that the former should retain possession, etc., and A., having a special property right of possession, was entitled to recover his damages in his action against C. for the latter's wrongful conversion, without proof of negligence. *Harper v. Rivenbark*, 180.

17. *Statute of Frauds—Deeds and Conveyances—Parol Evidence—Trials—Questions for Court.*—Where a deed, expressed in unambiguous language, purports to convey the whole of certain lands, parol evidence that it was the grantor's intention to only convey a part thereof is inadmissible, the construction of the deed as to its meaning and purport being a question of law for the court. *Pate v. Lumber Co.*, 184.

18. *Railroads—Sick Benefit Departments—False Representations—Frauds Trials—Burden of Proof.*—In an action to recover the sick benefits alleged to have been due the plaintiff by reason of his membership in the relief department of a railroad company, defendant resisted recovery upon the ground that the plaintiff, in his application for membership, had made a material and false representation in answer to a question asking if he had had a certain venereal disease, which had resulted in the acceptance by it of the application. It appeared from the application that these questions were prefaced by certificate of the applicant, in effect, that his habits were temperate, "so far as

I am aware"; that he had no disease except as is shown in the "accompanying statement," etc., and to avoid the contract it is *Held*, that the defendant must show that the representations were knowingly false or made with a fraudulent purpose to mislead the defendant. Revisal, sec. 4808, has no application to this case. *Daughtridge v. R. R.*, 188.

19. *Railroads—Sick Benefit Departments—Fraud—Trials—Evidence Sufficient—Questions for Jury.*—Where resistance to recovery is made by a defendant railroad company in a suit by an employee, a member of its relief department, for sick benefits, on the ground of false and material representations made in his application for membership, and it is required that the intent to misrepresent is necessary to defeat recovery, evidence is held sufficient upon the question of defendant's liability which tended to show that the plaintiff had been required by the company to join this department, was examined and passed by the defendant's physician at the time when the disease, alleged to have been misrepresented, should have been existent and observable; that the company had for a number of months deducted the membership dues from the plaintiff's pay, and where the plaintiff denies ever having had the disease, and there is evidence tending to show that his sickness resulted from being overworked in the defendant's service. *Ibid.*

20. *Electric Company—Master and Servant—Incidental Dangers—Trials—Negligence—Nonsuit.*—The plaintiff sues an electric power, etc., company for the killing of her intestate, alleging negligence on the part of the defendant in not shutting off its current while the intestate, an employee, was engaged in his employment of working upon the wires of the company: *Held*, the intestate assumed the risks of all danger necessarily incident to the employment he was engaged in, and it appearing from the testimony of his own witnesses that the injury would not have occurred had he used the rubber gloves furnished him, and that he was an experienced person and should have known the danger in thus acting, a judgment as of nonsuit upon the evidence was properly rendered. The effect of the Fellow-Servant Act in its application to common carriers discussed by CLARK, C. J. *Register v. Power Co.*, 234.

21. *Contracts — Reformation—Fraud—Mistake—Money Received—Trials—Preponderance of the Evidence.*—Where an unregistered option on lands has been given, which is sought to be reformed into a contract to convey them, and the lands have come into the hands of an innocent purchaser for value, so as to defeat the equity, the optionee, in his action to recover the money paid upon the allegation of false and fraudulent representations, is only required to establish his case by the preponderance of the evidence; and it is *Held* that the case may be tried upon one of two aspects: whether the parties mutually intended a contract instead of an option, and if so, whether the parties failed to express their real agreement by mutual mistake, or by the fraud of the one inducing the mistake of the other; or whether one of them was induced to part with his money by the fraud and deceit of the other. *Torrey v. McFadyen*, 237.

22. *Trials — Verdicts Consistent — Contributory Negligence — Negligence—Assumption of Risks—Damages.*—In an action to recover damages

TRIALS—*Continued.*

for a personal injury alleged to have been negligently inflicted on the plaintiff, the jury, by their verdict, found the defendant guilty of negligence, the plaintiff of contributory negligence, that there was no assumption of risks, and assessed the damages: *Held*, the jury having found the issue as to contributory negligence against the plaintiff, judgment for defendant was properly rendered, the findings upon the issues of negligence, contributory negligence, and damages not being insensible and inconsistent, and the finding as to assumption of risk not relieving the plaintiff of the consequences of his contributory negligence. *Sasser v. Lumber Co.*, 242.

23. *Appeal and Error—Trial—Instructions—Verdict—Harmless Error.*—Error in the charge of the judge upon an issue answered in appellant's favor is cured by the verdict, and is harmless. *Carter v. R. R.*, 244.

24. *Carriers of Passengers — Trials — Evidence — Verdict — Judgments.* — Where a passenger on a railway train has been injured by jumping therefrom while the train is in motion, and the evidence in his action to recover damages is conflicting as to whether he did so upon the inducement or invitation of the porter thereon, or whether the train was moving at such speed that a person of ordinary prudence and caution would, notwithstanding, have not done so, and under proper instructions the jury have answered the issue of contributory negligence in the defendant's favor, it is established by the verdict that the plaintiff was negligent in either one or the other of the views presented, and a judgment denying recovery is properly rendered, though the first issue, as to defendant's negligence, has been found in plaintiff's favor. *Ibid.*

25. *Instructions—Prayers Substantially Given—Appeal and Error.*—It is not error for the trial judge to give, in his own language, a requested prayer for instruction, if he substantially gives it without weakening its force. *Ibid.*

26. *Carriers of Passengers—Alighting from Moving Train—Contributory Negligence—Trials—Evidence.*—It is contributory negligence for a passenger to attempt to alight from a railway train running 10 to 15 miles an hour, notwithstanding he was told to do so by an employee in charge of the train; and in this case it is further held that the manner in which the plaintiff struck the ground and was injured was some evidence as to the speed of the train, and it was not improper for the court to so state in the charge. *Ibid.*

27. *Deeds and Conveyances—Contracts—Consideration—Criminal Prosecution—Trials—Questions for Jury.*—While the court will declare null and void notes or conveyances made upon the sole consideration of suppressing or stifling a criminal prosecution, they will not do so as a matter of law upon the pleadings to set aside alleged transactions of this character when the facts are not admitted; and whatever inferences may be drawn from the pleadings are questions of fact for the determination of the jury. *Alston v. Hill*, 255.

28. *Trials — Instructions — Appeal and Error—Railroads—Negligence.*—In the trial of causes in the Superior Court, when material evidence has been introduced presenting or tending to present a definite legal position or having definite legal value in reference to the issues or

TRIALS—*Continued.*

any of them, and a specific prayer for instruction concerning it is properly preferred which correctly states the law applicable, such prayer must be given, and unless this is substantially done either in direct response to the prayer or in the general or some other portion of the charge, the failure will constitute reversible error; and in this action to recover damages for a personal injury it was error for the judge to refuse to give a prayer for instruction predicated upon evidence of the defendant tending to show that the injury complained of did not occur as claimed by plaintiff, but while he was attempting to ride upon its train for his own purposes. *Marcom v. R. R.*, 259.

29. *Appeal and Error—Exceptions—Instructions—Courts.*—The failure of the trial judge to charge upon particular phases of the controversy is not alone sufficient to be held for reversible error. The appellant should offer prayers for special instructions covering the matter, and except and appeal from the refusal of the court to give them. *Tillery v. Benefit Society*, 262.

30. *Carriers of Goods—Cars—Trials—Nonsuit—Appeal and Error—Harmless Error.*—A carrier furnished an unsuitable car for the shipment of merchandise, and the connecting carrier received this car with its contents and forwarded it to its destination, where, upon delivery, the goods were found by the consignee to be in bad condition. In an action to recover for the damage alleged thus negligently to have been caused to the shipment, it is held that a judgment as of nonsuit upon the evidence rendered in favor of the delivering carrier is only to the prejudice of the plaintiff, and if erroneous was harmless as to the initial carrier appealing therefrom. *Lucas v. R. R.*, 264.

31. *Carriers of Goods—Unsuitable Cars—Trials—Negligence—Evidence.*—Where a consignor makes a shipment of potatoes to his own order, which arrives at destination in a bad or damaged condition, and there is evidence that the carrier loaded them in an unventilated car, recently used for transporting fertilizer, with some of the fertilizer remaining therein, and testimony by witnesses qualified to speak from their own experience and observation that potatoes so shipped would rot or spoil in the time required for their transportation, it is sufficient to be submitted to the jury upon the question of the liability of the defendant for the damages caused by its negligent use of an unsuitable car. *Ibid.*

32. *Trials—Instructions—Contentions—Appeal and Error.*—Where a part of a charge of the court to the jury, excepted to, does not purport to be a statement of the law, but only the contentions of the adversary party, it will not be held for error on appeal. *Ibid.*

33. *Railroads—Trials—Negligence—Evidence—Nonsuit.*—In an action by an administrator to recover of a railroad damages for the negligent killing of his intestate, a child two or three years of age, and there was evidence tending to show that the intestate was upon the defendants track, on a clear day, where the track was straight, and the employees on the train were not keeping a lookout along the track, a judgment as of nonsuit upon the evidence will be denied, for it was for the jury to determine whether the defendant's employees were negligent in not seeing the danger to the child and stopping the train in time to have avoided the killing. *Dallago v. R. R.*, 269.

TRIALS—*Continued.*

34. *Master and Servant—Negligence—Safe Appliances—Known, Approved, etc. — Comparisons — Evidence—Trials.*—Where an employee has brought his action to recover damages from his employer for a personal injury alleged to have been negligently inflicted on him, and the question has arisen as to whether the tools and appliances furnished for doing the work were known, approved, and in general use, it is substantial similarity and not entire sameness that is required for the test in making comparisons between those furnished and those elsewhere used. *Helms v. Waste Co.*, 151 N. C., 370, cited and applied. *Tate v. Mirror Co.*, 273.

35. *Master and Servant—Negligence—Proximate Cause—Dangerous Conditions—Unsafe Appliances—Continuing to Work—Obvious Danger—Trials—Questions for Jury.*— In an action to recover damages for a personal injury alleged to have been inflicted upon an employee by the negligence of the employer in not furnishing proper tools and appliances for doing work at a machine driven by electrical power, the plaintiff is not barred of his right of recovery merely because he continued to perform the work under the circumstances, for it must be shown that, in the exercise of due care for his own safety, he should have known or appreciated his own danger, and had continued in the performance of the work in the presence of the obvious peril. *Ibid.*

36. *Master and Servant—Safe Appliances—Negligence—Trials—Expert Evidence—Questions for Jury.*—The plaintiff, an employee of the defendant, had his foot caught and injured by its catching in a belt running a machine, driven by electrical power, at which he was at work, and there was evidence tending to show that the belt was imperfectly laced, and there was a certain defect in the machine, which proximately caused the injury; that in accordance with a custom, known to the defendant, the plaintiff attempted to shift the belt with his foot, when the injury occurred, and there was no appliance furnished for this purpose, which should have been done, and there was further evidence, in defendant's behalf, that it had furnished an iron pipe, which should have been used on this occasion, and had the plaintiff used it the injury would not have occurred. *Held*, under the evidence, it was for the jury to determine as a matter of fact whether the defendant or plaintiff was guilty of negligence, and if such negligence proximately caused the injury; and *Held further*, that it was competent for a witness, expert and qualified to speak in such matters, to testify as to the tensile strength of the belt and as to whether it was properly or improperly fastened together at its ends. *Ibid.*

37. *Deeds and Conveyances—Mental Capacity—Fraud—Trials—Evidence.*— In this action to set aside a deed for alleged mental incapacity of the grantor, and for fraud and undue influence on the part of the grantee in obtaining it, it was competent for a witness to testify that the grantor did not have sufficient mind to make the conveyance, in reply to matter brought out on his cross-examination: and it is further *Held*, if the testimony was erroneously admitted, it was harmless under the circumstances, and in view of the findings upon the issues. *Hodges v. Wilson*, 323.

TRIALS—*Continued.*

38. *Deeds and Conveyances—Fraud and Mistake—Time of Discovery—Trials—Evidence.*—In an action to correct or set aside a deed for fraud and mistake, it is competent to show when the mistake was discovered, as bearing upon the plaintiff's promptness and diligence, after the discovery thereof was made by him, in enforcing his remedy. *Ibid.*

39. *Deeds and Conveyances—Mental Incapacity—Trials—Evidence—Nonexpert Witnesses.*—It is competent to show by nonexpert testimony that the maker, at the time of executing a deed to lands, was mentally incapacitated, when that question is involved in the controversy. *Ibid.*

40. *Trials—Evidence—Nonsuit.*—When there is sufficient evidence, viewed in the light most favorable to the plaintiff, to sustain a verdict in his favor, a motion as of nonsuit will not be granted. *Ibid.*

41. *Trials—Issues—Evidential.*—When the issues submitted to the jury by the court are sufficient to present the case in all its essential aspects, the refusal of the court to submit the issues tendered by the appellant will not be held as error. The issue tendered in this case was merely evidential and improper. *Ibid.*

42. *Trials—Remarks of Counsel.*—The remarks of plaintiff's counsel to the jury, made in reply to the defendant's counsel, who preceded him, are not held as error in this case. *Ibid.*

43. *Trials—Instructions—Incorrect in Part—Construed as a Whole—Appeal and Error.*—Where the charge of the judge to the jury, construed as a whole, is correct, and the part thereof objected to, when considered with the context, is not erroneous or misleading, it will not be held as reversible error. *Ibid.*

44. *Trials—Issues—Answers—Harmless Error.*—Where the answer to an issue by the jury is sufficient to sustain a judgment against appellant rendered in the lower court, instructions on another issue, even if erroneous, are harmless. *Ibid.*

45. *Deeds and Conveyances — Recited Considerations — Fraud — Trials—Evidence.*—The consideration recited in a deed attacked for fraud and undue influence may be shown to be incorrectly stated, and evidence of the real consideration and its inadequacy is competent, where there are circumstances tending to show that the transaction was fraudulent. *Ibid.*

46. *Deeds and Conveyances—Fraud—Trials—Burden of Proof.*—Where a contract is sought to be set aside for fraud, the fraud must be alleged and established by distinct proof, though it is only required to preponderate in the plaintiff's favor. *Ibid.*

47. *Trials—Evidence—Records—Certified Copies—Originals.*—Original records are admissible in evidence, though, in certain instances, certified copies thereof are also admissible; and in this case it is held that the admission of the original was competent to show that a commissioner therein named had knowledge of his conveyance of certain timber to another when he later attempted to acquire title thereto for himself. *Riley v. Carter*, 335.

48. *Trials—Evidence—Void Deeds—Color of Title—Common Sense.*—A void deed is color of title for the purpose of showing that the parties

TRIALS—*Continued.*

litigant in an action involving ownership of timber claimed it from a common source. *Ibid.*

49. *Deeds and Conveyances—Timber Deeds—Trials—Evidence—Nonsuit—Statutes—Contracts.*—Where the plaintiff in an action involving the title to standing timber has introduced evidence to show title from a common source with the defendant, a motion for judgment as of nonsuit upon the evidence cannot be allowed; and the statute protects the rights of both parties until the final termination of the action, and prohibits the cutting of the trees by either of them until then. Revisal, sec. 808. *Ibid.*

50. *Trials—Courts—Evidence—Verdict, Directing.*—Where there is no conflict in the evidence in a civil action, or the facts are virtually admitted, the court may direct a verdict as a matter of law. *Ibid.*

51. *Master and Servant—Safe Appliances—Trials—Negligence—Evidence.* In an action to recover damages for a personal injury inflicted upon an inexperienced employee while engaged under the direction of his superior, at work at a power-driven jointer machine in defendant's chair factory, it was admitted that the use of a guard over the revolving knives of the machine would have prevented the injury, and there was evidence that the machine was constructed for the guard; also, that in some factories guards of this character were used, in some they were not, and that an unused guard was then hanging up in the factory: *Held*, sufficient to be submitted to the jury upon the question of defendant's negligence in not properly equipping the machine with a guard, necessary for the protection of the employee, and as to whether such appliance was approved and in general use. *Cozzins v. Chair Co.*, 364.

52. *Trials—Instructions—Measure of Damgaes.*—The charge of the court is held to be correct upon the measure of damages in this action for a personal injury alleged to have been negligently inflicted upon a servant while engaged in the discharge of his duties. *Johnson v. R. R.*, 163 N. C., 451, cited and applied. *Walters v. Lumber Co.*, 388.

53. *Trials—Evidence—Nonsuit.*—Defendant's motion for a nonsuit upon the evidence will be denied when there is any legal evidence to support plaintiff's cause of action, as it will be construed, upon such a motion, most strongly in plaintiff's favor, its weight and credibility being for the jury to determine. *Ibid.*

54. *Surface Water—Diversion of Flow—Drain Pipes—Request of Lower Proprietor—Trials—Evidence.*—In an action against an upper owner of lands to recover damages for diverting the surface flow of water onto the plaintiff's land under allegation that certain drain pipes were improperly provided for the purpose by the defendant on its own land, it is competent to show that the drains were put in in compliance with the plaintiff's request, and that he could not therefore complain. *Brown v. R. R.*, 392.

55. *Surface Waters—Diversion of Flow—Artificial Increase—Trials—Instructions—Special Request.*—It is only for damages for a diversion of the surface flow of water for which the upper proprietor may be held liable to the lower proprietor, and when the court has thus correctly charged the law, it will not be held for error that he failed

TRIALS—*Continued.*

further to charge that the upper proprietor cannot increase the discharge of the water, at any given point, in the absence of appellant's special request so to charge, for exceptions of this character must be to the refusal of the court to give such special requests. *Ibid.*

56. *Husband and Wife — Joint Estates — Issues — Uses and Trusts—Trials—Deeds and Conveyances—Registration.*—Where from the pleadings and evidence in an action to recover lands, brought by the heirs at law of the husband against the heirs at law of the wife, the rights of the parties depend upon the question of whether the lands were bought solely by the husband, to whom the conveyance was made, or partly with the moneys of the wife with the mutual intention that it should belong to them both jointly for a home, an issue is held sufficient and determinative: "Was the land in question purchased and paid for jointly by W. and N. as a home for both of them, as alleged in the answer?" And this issue being answered in defendant's behalf, the effect of the judgment accordingly rendered would be that after the death of the husband the principle of *jus accrescendi* would apply, the husband holding the title in trust for them both jointly, and it would become immaterial between the parties, being the heirs at law, whether the deed to the husband was permitted to be recorded pending the trial; and held further, that the failure to submit an issue raised by the answer asking for affirmative relief would not be prejudicial to the plaintiffs. *Murchison v. Fogleman*, 397.

57. *Intervenors — Judgments — Motions — Trials—Appeal and Error.*—The plaintiffs in an action to recover of the defendant damages to their lands, seized certain personal property of the defendant under attachment, which the intervenors claimed as their own. The defendant filed no answer, the cause was regularly tried, and the jury found the issues in plaintiff's favor, including that as to the intervenors' ownership of the property. At a subsequent term of the court the trial judge set aside the judgment rendered against the defendant, upon motion of the intervenors, and on appeal by the plaintiff it is held for reversible error, for that the interviewers were only interested in the issue involving their title. *Forbis v. Lumber Co.*, 403.

58. *Trials—Evidence—Corporations—Issues—Partnerships—Objections and Exceptions—Appeal and Error—Harmless Error.*—Where the right of the intervenors in an action involving the title to certain property, attached by the plaintiff, depends upon whether the defendant was a corporation or a partnership comprising the intervenors, admissions of the intervenors that the defendant was a chartered company, and had acquired and held property as such, are sufficient evidence for the jury upon the question; and if in this case there was error in admitting the evidence, it was rendered harmless by subsequent testimony to that effect of the same witness without objection. *Ibid.*

59. *Evidence—Declarations—Deeds and Conveyances—Interests—Trials.*—Where the title to lands is in dispute, a deed in the chain of title of the party offering it is incompetent as the declarations of a deceased grantor, it being in the interest of such party. *Ibid.*

60. *Trials—Acquiescence—Implied Consent—Appeal and Error—Objections and Exceptions.*—As to whether permanent damages to the plaintiff's

TRIALS—*Continued.*

land should have been assessed in this action, *quœre.* But it appearing that no exception to this issue was taken upon the trial, or in the assignments of error, and that upon a former appeal the defendant concurred in or insisted upon the correctness of the position that they should be so assessed, and a new trial on that issue alone was granted, it is held that the defendant is concluded on this appeal by his conduct or acquiescence from contending that such an issue was improperly submitted or passed upon on the second trial. *Brown v. Chemical Co.*, 421.

61. *Railroads—Master and Servant—Appeal and Error—Trials—Instructions—Harmless Error.*—Where, in an action for damages, a railroad company is held responsible for the negligent manner in which its baggage master handled a pistol, in the course of his employment, which caused the death of another employee of the company, it is error for the trial judge to charge the jury that they must find that the baggage master was also negligent in leaving the pistol in the drawer of a desk in the baggage-room, from the evidence thereof; but the jury having found the issue of negligence in plaintiff's favor, it is not prejudicial to the defendant, the appellant. *Moore v. R. R.*, 439.

62. *Railroads—Master and Servant—Joint Employment—Trials—Evidence—Nonsuit.*—Where a baggage master is employed at a union station to handle the baggage of two or several railroad companies, is paid his salary by one of these companies, and in the course of his employment negligently kills his assistant, and the administrator of the deceased enters a suit for damages against the company by whom his salary was paid, the defendant may not avoid liability upon the ground that at the time of the negligent act the baggage master happened to be performing a duty for another of these companies; and where the evidence is conflicting, a motion for nonsuit should be denied, the evidence being construed in a light most favorable to the plaintiff, and taken as true. *Ibid.*

63. *Trials — Master and Servant — Negligence—Evidence—Nonsuit—Questions for Jury—Contributory Negligence.*—The plaintiff, a servant of the defendant, was engaged with a fellow-servant in unloading a heavy machine from a railroad car. The method of unloading was to jack up the object 7 or 9 inches from the car floor and fasten around it a heavy chain hitched to a traveling crane, and in moving the machine the employees walked along with it to hold it in position. The plaintiff's fellow-servant had fastened the chain around the machine while the plaintiff was temporarily absent, and as they moved off, in the manner described, the machine suddenly dropped upon the plaintiff's foot, causing the injury complained of. There was evidence tending to show that the hooks of the chain were defective from long service, of which the defendant had actual or constructive notice, which prevented them from being securely fastened, and that if they had not been defective, the injury would not have occurred: *Held*, it was for the jury to determine upon the evidence whether the injury was attributable to the employer's negligence in not providing a proper chain, if so found, or whether such negligence concurring with that of the fellow-servant in fastening the chain pro-

TRIALS—*Continued.*

duced the injury; and further held, the issue as to contributory negligence was properly submitted to the jury; and that a motion as of nonsuit should have been denied. *Ammons v. Mfg. Co.*, 449.

64. *Vendor and Purchaser—Contracts—Warranty—Trials—Instructions—Conflicting Evidence.*—The plaintiff and defendant exchanged mules, and the evidence was conflicting, on the plaintiff's part, as to whether the defendant warranted the mules he gave in exchange as being sound, and if not as warranted, to be returned within a reasonable time, and on the defendant's part, whether, if the mules were not as warranted, they should be returned within a week, which was not done. A charge of the court is held for reversible error, that if the defendant warranted the mules to be sound when they were not, to answer the issue in the plaintiff's favor, for it disregarded the defendant's evidence, that as a condition annexed to the warranty, the mules were to be returned within a week, which admittedly was not done, and withdrew that phase of the evidence from the consideration of the jury. *Robinson v. Huffstetler*, 459.

65. *Vendor and Purchaser—Contracts—Warranty—Return of Goods—Reasonable Time—Trials—Questions for Jury.*—Where a warranty in a sale of goods only provides for the return of the goods to the vendor, if not as warranted, they should be returned by the purchaser within a reasonable time for him to get redress under the terms of the contract, it being for the jury to determine what length of time is reasonable under the surrounding circumstances. *Ibid.*

66. *Master and Servant—Disobedience of Orders—Negligence—Trials—Instructions.*—An employee who acts in disobedience of the known rules and positive and direct instructions of his employer and leaves his place of duty and places himself in a dangerous position on his employer's premises, with which he was familiar, and consequently receives the injury, the subject of his alleged cause of action for damages, is knowingly and without excuse at a place he has no right to be, and an instruction upon the issue of contributory negligence is held for reversible error which is made to depend upon the findings of the jury upon the question of whether he exercised ordinary prudence and could have gotten to a place of safety after becoming aware of his danger. *Buchanan v. R. R.*, 470.

67 *Master and Servant—Negligence—Safe Place to Work—Dangerous Appliances—Trials.*—The defendant cotton mill kept in its factory an air hose highly charged with compressed air and used to clean its machines by one of its employees, 15 or 16 years of age, without impressing its dangerous character upon him. This hose was left connected with the power furnishing the compressed air, upon the floor, without being guarded, when it could have been detached and locked up or more safely placed, and in the boyish spirit of fun, the employee whose duty it was to use it turned it upon his coemployee, a smaller boy, to the latter's serious injury: *Held*, it being the duty of the master to furnish his employees a safe place to work, his negligence in respect to the hose was actionable, and not the result of an accident or act not reasonably to have been anticipated. In this case the statute forbidding employment of minors under 16 years of age is inapplicable, as it was passed after the occurrence of the

TRIALS—*Continued.*

negligent act complained of. Laws 1913, ch. 64, sec. 63. *Robinson v. Mfg. Co.*, 495.

68. *Railroads — Crossings — Trials — Evidence—Contributory Negligence—Issues—Judgments.*—Where the plaintiff sues a railroad company to recover damages for a personal injury alleged to have been received by him in a collision with the defendant's train while attempting to cross its roadway on a public street of a town, upon the ground that the defendant's employee, charged with the duty, failed to give him warning before entering onto the right of way, and there is evidence that the plaintiff did not himself exercise the ordinary care required under the circumstances, judgment may not be given adverse to the defendant upon a verdict not answered upon the issue of contributory negligence; and it is further held that evidence of the drunken condition of the plaintiff was erroneously excluded on the trial of this case. *Wilson v. R. R.*, 499.

69. *Trials—Fraud—Instructions—Prejudice—Issues—Appeal and Error.*—Where a deed absolute on its face is alleged to have been obtained by threats and undue influence, and the plaintiffs contend that it should have been a mortgage, it is reversible error for the trial court, in instructing the jury, to tell them that if the plaintiff's contention be true it would stigmatize the defendants as being guilty of a "base and dirty fraud," for such would probably bias the jury in passing upon the issues; and it is further held for error that the judge refused to submit the issues tendered by the plaintiff in this case, which are approved. *Ray v. Patterson*, 512.

70. *Trials — Terms — Judgments — Relating Back — Fiction of the Law—Deeds and Conveyances—Innocent Purchasers.*—The rule of court, afterwards enacted into a statute, that all judgments entered during a term shall relate back to the beginning of the term, and be deemed to have then been entered, is to prevent advantage being taken by litigants who may have been fortunate enough to have first secured his judgment, and unseemly endeavor to get first to the ear of the court; and will not apply to a judgment obtained during a term of court subsequent by a day or a fraction of a day to the registration of a deed to lands, so as to affect the rights of an innocent and *bona fide* purchaser for value. *McKinney v. Street*, 515.

71. *Appeal and Error—Record—Instructions.*—Where it does not appear from the record that there was any evidence, or aspect of the controversy, which would make a prayer requested for special instruction applicable, the refusal of the trial court to so instruct will not be held for error. *Pharr v. Commissioners*, 523.

72. *Trials—Instructions—Verdict, Directing—"Believe the Evidence"—Appeal and Error.*—A requested instruction directing an answer by the jury to an issue of negligence if they believe the evidence, withdraws from their consideration everything except the credibility of the evidence, and is erroneous, in depriving them of the power of determining whether the fact of negligence has been established if the evidence is believed by them. *Alexander v. Statesville*, 528.

73. *Trials—Evidence—Negligence—Questions for Jury.*—The question of negligence, at issue in an action to recover damages therefor, may not be declared by the court as a matter of law, when the evidence is con-

TRIALS—*Continued.*

flicting, or where more than one inference may be drawn therefrom, or different conclusions may be reached by two fair-minded persons of equal intelligence. *Ibid.*

74. *Same—Proximate Cause—Verdict, Directing.*—Where damages are sought to be recovered for a negligent act alleged, the plaintiff is not alone required to establish the fact of negligence, for he must also show that the negligent act was the proximate cause of the injury; and where different inferences may be drawn by the jury upon the evidence in the case, the court may not, as a matter of law, direct a verdict in plaintiff's favor. *Ibid.*

75. *Trials—Negligence—Burden of Proof—Contributory Negligence—Verdict.*—Where contributory negligence is relied on as a defense in an action for damages, the plaintiff is required to introduce competent evidence tending to establish the issue of negligence, and when he has failed to do so, or the jury find against him upon that issue, the issue as to contributory negligence becomes immaterial. *Ibid.*

76. *Municipal Corporations—Cities and Towns—Streets—Negligence—Notice.*—A municipality is not held liable as an insurer of the safe condition of its streets, for it is only required that they maintain them in a reasonably safe condition, and exercise ordinary care and due diligence to see that they are so kept and maintained, which requirement also applies to conditions existing in the widening of its streets, etc.; and in an action to recover damages for negligence in this respect, it is necessary for the plaintiff to show actual or constructive notice to the city of the defect complained of, through its proper officials. *Ibid.*

77. *Same—Trials—Questions for Jury.*—In an action to recover damages of a municipality alleged to have been caused by the negligent condition in the widening and construction of its street, where the plaintiff, a boy of about 7 years of age, fell or was pushed by his companion, another boy, over a large culvert, and fell down a steep embankment to his injury, there was conflicting evidence upon the question of whether, at this place and on that side of the street, the city had completed its work; or on the opposite side of the street there was a safe sidewalk or roadway; or whether there was, at the place of the injury, a proper and reasonably safe protection against injury to pedestrians: *Held*, the evidence was properly submitted to the jury upon the question of the defendant's actionable negligence, and the issue should not have been answered in plaintiff's favor as a matter of law. *Ibid.*

78. *Trials—Contributory Negligence—Children—Questions for Jury.*—While a child of tender years is not held to the same degree of care as one of mature years in avoiding an injury arising from the negligent act of another, it is ordinarily a question of fact for the jury to determine, in his action to recover damages therefor, whether under the circumstances, and considering his age and capacity, he should have avoided the injury complained of by the exercise of ordinary care; and in this case it appearing that the plaintiff was a bright boy of about 7 years of age, it is held that the court properly left the issue of contributory negligence to the jury. *Ibid.*

TRIALS—*Continued.*

79. *Mental Anguish—Joint Action—Trials—Demurrer.*—Where two or several plaintiffs join in their action to recover damages for mental anguish, a demurrer for misjoinder is good, for from the nature of damages of this character the causes are not severable, the parties, as well as the subject-matter, necessarily being separate and distinct. *Cooper v. Express Co.*, 538.

80. *Mental Anguish — Ignorance of Conditions — Trials—Damages—Questions of Law—Courts.*—When it is shown that the plaintiff, in an action to recover damages for mental anguish, was not aware or conscious at the time of the facts or circumstances upon which the damages are necessarily measured, a recovery of actual damages thereon will be denied as a matter of law. *Ibid.*

81. *Mental Anguish—Express Companies—Trials—Negligence—Avoidance of Damages—Extra Expense—Measure of Damages.*—The plaintiff sued an express company for damages for mental anguish alleged to have arisen from its neglect to put off a coffin which had been purchased for the interment of his child, at its destination, and, as the measure of his damages, claimed that he was thereby prevented from burying the child at his family burying-ground, where he desired to bury it, because decomposition had begun to set in upon the late arrival of the coffin, which the defendant had carried beyond its destination and returned. There was no evidence that he attempted to procure another coffin in time for his purpose, which it appears he could have done, and it is held that the mental anguish did not necessarily result from the defendant's negligence, and it being the plaintiff's duty to have avoided it, under the circumstances, his measure of damages was the additional expense he would have incurred had he otherwise acted. *Ibid.*

82. *Trials — Negligence — Contributory Negligence — Verdict—Judgment.*—Where an action for damages presents for the consideration of the jury the issues of negligence and contributory negligence, and under proper instructions the second issue has been answered in the defendant's favor, the plaintiff is not entitled to recover, whatever the answer to the other issues may be, and cannot be entitled to judgment. *Holton v. Moore*, 549.

83. *Mad Dogs — Contributory Negligence — Trials — Issues—Statutes.*—An action would lie at common law in damages against the owner of a mad dog through whose negligence another person had been bitten by the dog, in favor of such other person; and where there is no indication that in his action the person thus injured was proceeding under the statute, Revisal, sec. 3305, an issue of contributory negligence, when pleaded and supported by evidence, should be submitted to the consideration of the jury. As to whether such issue could arise in proceedings under the statute, *Quære. Ibid.*

84. *Appeal and Error—Issues—Objections and Exceptions—Acquiescence—Procedure.*—For a party to an action to take advantage on appeal of the submission of an issue claimed by him to have been improper, he should have excepted to the submission of the issue and the evidence tending to establish it on the trial; and where he has not only failed in these respects, but has had the benefit of two trials, wherein he acquiesced in or insisted upon the submission of the issues, he will be

TRIALS—*Continued.*

bound by his conduct in that respect, and will not be permitted to rely upon a contrary position in the Supreme Court. *Ibid.*

85. *Master and Servant—Negligence—Res Ipsa Loquitur—Trials—Evidence Questions for Jury—Nonsuit.*—The plaintiff was engaged by the defendant lumber company at a cut-off saw arranged upon two upright pieces of timber which moved to and fro as the saw was being operated, so that when not in use the saw rested in a hood about 12 or 14 inches from the perpendicular, and was drawn forward against the lumber to be cut. It was the plaintiff's duty to guide this lumber to be cut over rollers from the main saw, and while doing this, at the time in question, it became necessary to straighten a piece of timber, and the saw, which had been placed back in the hood, and which should have remained there, unexpectedly sprang forward and inflicted the injury complained of: *Held*, the doctrine of *res ipsa loquitur* applies, under the circumstances, raising an inference of negligence which was for the defendant to explain or disprove. *Deaton v. Lumber Co.*, 560.

86. *Schools — Expulsion—Courts—Trials—Evidence—Verdict Set Aside.*— In this case it appeared from the evidence that the plaintiff entered his boy in the defendant's school with knowledge that if the pupil violated the rules of the school relative to its discipline, he would be expelled; that the pupil was expelled for repeated misconduct and violation of the rules and for insubordination to the principal. There was no evidence that the principal acted arbitrarily or otherwise than for the best interest of the school: *Held*, no error for the trial judge to set aside a verdict by which the plaintiff recovered proportionately the money he had paid for the unexpired part of the school term. *Teeter v. Military School*, 564.

87. *Trials—Malicious Prosecution—Amendments—Distinct Cause—Appeal and Error.*—Unless done with the consent of the defendant in the action, it is not within the discretion of the trial judge to permit an amendment to the complaint setting forth an additional and substantially a new cause of action; and where damages are sought for malicious prosecution, with allegation that the plaintiff was arrested and convicted before a justice of the peace, and acquitted in the Superior Court on appeal, an amendment, permitted during the argument of the civil action, alleging plaintiff was tried upon a bill presented to the grand jury by the solicitor and acquitted, is held for reversible error. *Cooper v. R. R.*, 578.

88. *Trials—Malicious Prosecution—Evidence.*—Where in an action for malicious prosecution it is alleged that the bill of indictment was drawn by the solicitor, sent to the grand jury, which eventuated in the plaintiff's acquittal upon the trial, it is necessary for the plaintiff to show that the defendant was in some way instrumental in causing or assisting in the criminal action, for otherwise he cannot recover in his civil action for damages. *Ibid.*

89. *Same—Questions for Jury—Principal and Agent.*—One who causes the arrest, conviction, and incarceration of another before a justice of the peace, upon an insufficient warrant which he has personally sued out, upon a verdict of acquittal in the Superior Court on appeal, is liable for actual damages; and if done with malice and without

TRIALS—*Continued.*

probable cause, for punitive damages; and when the evidence is conflicting as to whether the warrant was sued out in the capacity of agent for another, acting within the scope of his authority, the question of the liability of the principal, as well as the agent, is for the determination of the jury, upon issues as to each of them. The warrant under which the criminal action was had is held insufficient in this case. *Ibid.*

90. *Trials—Burden of Proof—Instructions—"Satisfy" the Jury.*—In an action against an officer for unlawful arrest and false imprisonment, it is not error for the court to charge the jury that the defendant must "satisfy" them of the matters in justification relied on by him, for this does not increase the burden or quantum of proof required of him. *Sigmon v. Shell*, 584.

91. *Trials—Instructions—Correct in Part—Exceptions.*—Exceptions to portions of the charge of the court to the jury, in which there were correct principles of law stated applicable to the evidence in the case, will not be considered on appeal, it being required of the appellant to specify or point out the particular errors alleged. *Ibid.*

92. *Trials—Witness—General Character—Impeaching Evidence.*—Evidence of the character of a witness, who has testified in an action, should be restricted to general character, and it is proper for the trial court to so restrict it. *Ibid.*

93. *Trials—Evidence—Res Gestæ—Officers—False Arrest.*—In an action against an officer for false arrest and imprisonment, while acting on his own observation without a warrant, evidence of matters transpiring while the arrest was being made is competent against the prisoner, as a part of the *res gestæ*, but it is incompetent to show what had occurred at a different time or place. *Ibid.*

94. *Jurors — Challenges — Trials — Prejudice—Principal and Surety—Indemnity Company—Appeal and Error.*—In an action to recover damages from a corporation for a personal injury alleged to have been by it negligently inflicted upon the plaintiff, it is reversible error for the trial judge to permit the plaintiff's attorney to ask the jurors being selected for the trial of the cause, whether any of them is employed by any indemnity company that insures against liability for a personal injury, when there is no indication or evidence that the defendant was insured against such loss, for the tendency of such question is to prejudice the jury against the defendant and unduly embarrass it upon the trial. *Starr v. Oil Co.*, 587.

95. *Trials — Courts — Corporations — Stockholders—Evidence—Prejudice—Irrelevant Questions—Appeal and Error.*—The trial court should see that the parties litigant have a fair and impartial trial before a jury when issues of fact are presented to them, and exclude irrelevant matters that would have the tendency to prejudice either side. Therefore, in this action to recover damages against a corporation for a personal injury alleged to have been negligently inflicted on the plaintiff, it is held for reversible error that the defendant's witness was permitted by the trial judge to be cross-examined on the question of whether the stockholders in defendant corporation were citizens of the community in which the action was being tried. *Ibid.*

TRIALS—*Continued.*

96. *Deeds and Conveyances—Color of Title—Trials—Evidence—Adverse Possession.*—Where a deed to lands is put in evidence without showing paper title in the grantor or connecting this deed with any other title, it can have no legal effect except as color of title, making it necessary for the party claiming it to establish such adverse possession of the lands, and for such a period of time, as will ripen his possession into an absolute title under the statute; and while building a house on the lands and marking its boundaries are some evidence of possession, it is not conclusive. *Land Co. v. Cloyd*, 595.

97. *Same—Leases—Admissions.*—Where the plaintiff relies on adverse possession to ripen his disputed title to lands, evidence is competent as a circumstance to show adverse possession and as an admission by the defendant that, at one time, the latter had leased the lands from the former. *Ibid.*

98. *Ejectment—Possession—Admissions—Limitations of Actions—Burden of Proof.*—Where the answer in ejectment alleges defendant's possession of the disputed lands, it is unnecessary for the plaintiff to show it, but where the defendant pleads the statute of limitations, it is for the plaintiff to prove that the action is not barred. *Ditmore v. Rexford*, 620.

99. *Railroads — Crossings — Collisions — Trials — Negligence — Evidence—Charge of Train—Questions for Jury.*—The plaintiff, in this action to recover damages for a personal injury against two railroad companies whose tracks crossed each other at a grade level, was a section foreman of one of them, and in construction work ordinarily had charge of the train of his company. While riding on his train, in front on a flat car, it came into collision, at the crossing, with the train of the other road, under circumstances fixing the employees in charge of both trains with actionable negligence. There was evidence in plaintiff's behalf that at that particular time and under the circumstances then existing he was not in charge of his employer's train, but that the engineer thereon had sole charge thereof: *Held*, the fact of collision was evidence of actionable negligence, and it was for the jury to determine, under proper instructions from the court, whether upon the evidence the plaintiff was chargeable with such negligence as would bar his recovery. *McDonald v. R. R.*, 622.

100. *Railroads — Collisions —Negligence—Contracts—Trials—Evidence—Primary Liability.*—Where two railroad companies are jointly sued for damages for a personal injury caused by the negligent acts of the employees on the trains of each of them at a crossing, resulting in a collision which caused the injury complained of, any contract or agreement between these companies relating to their liability under such circumstances affects only the question of primary liability between themselves, and not the right of the plaintiff to recover against both of them. *Ibid.*

101. *Limitation of Actions — Permanent Damages — Trials — Evidence Restricted—Special Requests—Appeal and Error.*—Where the three-year statute of limitations is pleaded and relied on as a defense to an action, and the record of a former action between the same parties is competent to show that the statute has not run, the exception of the defendant that the trial court did not restrict this evidence, and

TRIALS—*Continued.*

that it may have been considered by the jury as substantive evidence, may not be sustained on appeal, where the defendant has not aptly requested the judge to so restrict it in accordance with Supreme Court Rule 34, 164 N. C., 548. This being an action for permanent damages to lands, the five-year statute was applicable, which had not run in favor of the defendant railroad. Revisal, sec. 394 (5). *Owenby v. R. R.*, 641.

102. *Trials—Instructions—Correct in Part—Measure of Damages—Exceptions—Appeal and Error.*—Where the charge of the court upon the measure of damages in an action to recover them states general but correct principles of law applicable to the issue, an exception that he did not sufficiently instruct the jury will not be sustained, it being required of the appellant that he should have tendered special prayers containing the specific instructions he desired to be given. *Ibid.*

103. *Contracts—Sale of Stock—Trials—Evidence—Questions for Jury.*—The plaintiff and defendant having agreed to take advantage of a legislative enactment and its provisions in establishing a technical school at S., agreed that a certain textile school at S. should properly be used there in that connection, and that it would be advantageous to also acquire, in connection with it, a certain furniture factory in which the plaintiff owned stock, the shareholders to sell their stock upon long-term notes to the textile school. There was evidence tending to show, in plaintiff's behalf, that he would only sell his stock in the factory upon condition that the defendant would give his note therefor, and so informed the defendant, who thereupon gave a note with the textile school corporation in the amount named, and the plaintiff surrendered his shares of stock. In an action by the plaintiff upon the note, the defendant pleaded as a defense the want of consideration for the note, and it was held that it was for the jury to determine whether the note was given upon the condition named, the evidence being conflicting, and if so given, the note was made for a sufficient consideration to enforce its payment. *Institute v. Mebane*, 644.

104. *Contracts — Pleadings — Consideration—Bills and Notes—Trials—Evidence—Impeachment.*—In an action upon a note given in the endeavor to establish a technical school at S., in which both the plaintiff and defendant were interested, the defense was interposed that the defendant should not pay the note in the event the school was not established, and that he only obligated himself to use his best efforts to establish the school, which he had done: *Held*, evidence that the plaintiff held certain of his property at too high a value for the promotion of the enterprise is irrelevant; and the failure to vote for the school is not sufficient or competent to impeach the plaintiff's integrity in the matter. *Ibid.*

105. *Trials—Character Witnesses—Impeachment—Special Acts.*—Where one witness is introduced to prove the general character of another witness, special acts tending to impeach the latter may not be inquired into on cross-examination; and it is held, in this case, if the matter sought to be elicited were true, it would not be sufficient for impeachment. *Ibid.*

TRIALS—*Continued.*

106. *Carriers of Passengers—Fares for Children—Expulsion from Train—Return of Ticket—Damages.*—Where a conductor has taken up the ticket of a person traveling with his child for whom a half ticket is required, but has not been purchased, and who is unable to pay the fare of the child with the extra fare allowed when a ticket has not been regularly purchased, his right to put the child, being *non sui juris*, off the train is dependent upon the return of the ticket he has collected from the father, or its equivalent, and if he acts without having done this, the expulsion is unlawful, and the railroad company is responsible in damages. *Lankford v. R. R.*, 653.

107. *Deeds and Conveyances—Estoppel—Void Deeds—Trials—Evidence.*—A party to a controversy concerning the title to lands is estopped to deny the title of the other party under whose deed he claims, and under which he entered into possession; and the mere fact that this deed is void does not estop the grantor from showing that it was the title under which his adversary claimed. *Fisher v. Toxaway Co.*, 663.

108. *Master and Servant — Negligence — Trials — Evidence—Questions for Jury.*—The failure of the master to instruct a youthful employee as to the safe methods of operating a power-driven and dangerous machine will not of itself necessarily fix liability on the master, for if, notwithstanding, the employee had sufficient knowledge, or if, making proper allowance for his youth or inexperience, he acted without reasonable care, and in such manner as to negligently have brought the injury upon himself, the master is not liable, the question raised being one of fact to be determined by the jury, with the burden of proof on the plaintiff. *Ensley v. Lumber Co.*, 687.

109. *Same—Contributory Negligence—Proximate Cause.*—The plaintiff, 17 years of age, at the request of his father, was employed by the defendant company to work at its mill, and the officer of the defendant was informed that the plaintiff was young and inexperienced, and promised that the work intrusted to him should be done on the yard, outside the mill, where its character was less dangerous; but soon thereafter the plaintiff was ordered to work on the inside of the factory as "tailer" for a power-driven moulder machine, concerning the operation of which and its mechanical construction he had no knowledge. The next day the plank was stopped by a splinter of hard wood, and the plaintiff was told to raise the speeder bar, which he did, and then, in ignorance of the danger, and by reason of his inexperience, put his hand into the machine, and it was forced against the knives by the suction used to carry off the shavings, to his serious injury. *Held*, the employment of the plaintiff, a boy of 17 years, was not negligence *per se* of the defendant, but that the injury, even if not directly received in the course of plaintiff's employment, was so directly connected therewith, if proximately caused by the defendant's negligence in employing him, as to make the defendant liable; and the question of plaintiff's contributory negligence was properly left to the jury under correct instructions, as also the matter of proximate cause. *Ibid.*

110. *Municipal Corporations — Sidewalks—Negligence—Trials—Evidence—Nonsuit.*—In an action for damages brought against a city for an injury alleged to have been negligently inflicted on the plaintiff, aris-

TRIALS—*Continued.*

ing from the improper condition of its sidewalks, it was shown that the injury complained of occurred at a point where there was a paved sidewalk 5 feet wide and an extension of the surface at same level for 4 feet into the lands of a private owner where the injury was received, and at night, but the place was sufficiently well lighted to disclose the happening of the accident to a third person some 90 or 100 feet distant, without evidence of any obstruction on the sidewalk which could have caused the injury: *Held*, the evidence disclosed nothing from which any negligence on the city's part could be inferred, and a motion to nonsuit was properly granted. *Myers v. Asheville*, 703.

TRIAL BY JURY. See Jury.

TRUSTS AND TRUSTEES. See Wills, 1; Insurance, 2; Parties.

1. *Trusts and Trustees—Partnership—Parol Trusts—Purchase of Lands—Consideration—Division of Profits.*—A parol trust is enforcible in this State; and where in pursuance of a verbal agreement A. has secured certain lands for the purpose of a resale by him and a division of the clear profits, and B., who advanced the purchase money and by reason of the agreement has procured the title to be made to himself, and refuses to comply with the agreement, the services of A. are a sufficient consideration to support the contract, and B. will be declared to hold the title as trustee, subject to the uses declared in the agreement. *Brogden v. Gibson*, 16.

2. *Same—Money Advanced—Equity—Procedure.*—Where A. and B. have entered into a parol agreement for the purchase and sale of certain lands for joint profit, A. to transact the business in that behalf and attend to the selling, and B. to furnish the purchase money, and this is accordingly done, but B. has wrongfully taken the title in his own name and refused to sell the lands and divide the clear profits in accordance with his agreement, the statute of frauds has no application, and the courts will decree a sale of the lands, payment of the purchase price into court, and a division of the clear profits after repaying B. the purchase money he has advanced. *Ibid.*

3. *Reference—Evidence—Court's Findings—Trusts—Interest—Appeal and Error.*—Where the findings of fact of the trial judge in passing upon a report of a referee are made upon legal evidence introduced upon the referee's hearings, they are not subject to the consideration of the Supreme Court on appeal; and in this action the trial court necessarily held as a conclusion of law from the facts found, that the trustee was not chargeable with interest in favor of the trustor. *Lance v. Russell*, 626.

4. *Trusts and Trustees—Costs—Interpretation of Statutes.*—The trustee of an express trust is not personally liable in an action brought against him for the costs of court, where it is not shown and properly established that he has mismanaged the trust estate or has been guilty of bad faith. Revisal, Sec. 1277. *Ibid.*

5. *State's Lands—Entry—Vague Description—Trusts and Trustees.*—In order to declare that a second enterer upon State's lands, and who takes a grant to the lands covered by the first entry, holds the lands in trust for the latter upon completing his entry, it is necessary that

TRUSTS AND TRUSTEES—*Continued.*

the prior entry sufficiently describe the land to give notice of its location and extent; and in this action the description filed with first entry is held to be too vague and indefinite, towit: E. W. enters 100 acres of land in said county, in B. Township, on the waters of White Creek, adjoining the lands of A. and others, beginning on a stake on A.'s line on Berry Mountain, and running various courses for complements. *Wallace v. Barlow*, 676.

UNDERTAKING. See Attachment.

UNDUE INFLUENCE. See Wills, 5.

VENDOR AND PURCHASER.

1. *Corporations — Charter Provisions — Management—Deeds and Conveyances—Purchaser.*—Where an educational corporation has agreed to convey certain of its lands, the purchaser may not refuse the deed upon the ground that it would render the corporation unable to conduct a school in accordance with its charter, as such matter affects the internal management of the corporation and does not concern the purchaser. *College v. Riddle*, 211.
2. *Vendor and Purchaser—Contracts—Conditions of Warranty—Return of Goods.*—Where there is a warranty of personal property, with express provision that the property shall be returned if not found to be as warranted, within a certain fixed time, this provision is a condition annexed to the contract, precluding the vendee from any redress under the terms of the warranty unless the property is returned within the time specified. *Robinson v. Huffstetler*, 459.
3. *Same—Trials—Instructions—Conflicting Evidence.*—The plaintiff and defendant exchanged mules, and the evidence was conflicting, on the plaintiff's part, as to whether the defendant warranted the mules he gave in exchange as being sound, and if not as warranted, to be returned within a reasonable time, and on the defendant's part, whether, if the mules were not as warranted, they should be returned within a week, which was not done. A charge of the court is held for reversible error, that if the defendant warranted the mules to be sound when they were not, to answer the issue in the plaintiff's favor, for it disregarded the defendant's evidence, that as a condition annexed to the warranty, the mules were to be returned within a week, which admittedly was not done, and withdrew that phase of the evidence from the consideration of the jury. *Ibid.*
4. *Vendor and Purchaser—Contracts—Warranty—Return of Goods—Reasonable Time—Trials—Questions for Jury.*—Where a warranty in a sale of goods only provides for the return of the goods to the vendor, if not as warranted, they should be returned by the purchaser within a reasonable time for him to get redress under the terms of the contract, it being for the jury to determine what length of time is reasonable under the surrounding circumstances. *Ibid.*
5. *Vendor and Purchaser — Contracts — Warranty — Breach—Return of Goods—Damages.*—Upon the vendor's breach of his warranty in an executed agreement for the sale of goods, the purchaser may return the goods in a reasonable time, and recover the consideration he has paid for them; or he may retain the goods and recover such damage

VENDOR AND PURCHASER—*Continued.*

as he may have sustained arising from the breach of the vendor's warranty. *Ibid.*

VENUE.

Actions — Venue — Damages—Lands—Official Acts—Statutes—Interpretation.—The venue of an action to recover from an incorporated town damages to the lands of an owner situated in an adjoining or different county, caused by the improper method of emptying its sewage into an insufficient stream of water, is properly in the county wherein the town is situated, for such arise by reason of the official conduct of municipal officers and are regulated by Revisal, sec. 420, and this interpretation of the statute is not irreconcilable with the provisions of section 419, requiring, among other things, that an action to recover damages to lands shall be brought in the county where the lands or some portion thereof is siutated, for the first named section being in general terms, the latter should be construed as an exception to its provisions. *Cecil v. High Point*, 431.

VERDICT. See Appeal and Error, 10; Trials, 22, 23, 24, 82.

Courts—Set Aside Verdict—Agreement—Offer of Party—Appeal and Error. Where a verdict has been returned by the jury, it is within the province of the trial court alone to set it aside in whole or in part, and it may not be done only upon the agreement of the parties, without the consent of the court. Hence, an offer of agreement of one party made to the unsuccessful one, that the verdict be set aside on a certain issue, is held in this case to be ineffectual on appeal to prevent the appellee having a new trial on that issue for errors of law committed in the Superior Court, or having alleged errors committed on the other issues passed upon on appeal. *Kenney v. R. R.*, 99.

VERDICT, DIRECTING. See Trials, 50, 72, 74.

VESTED INTERESTS. See Deeds and Conveyances, 9.

WAIVER. See Drainage Districts, 4; Jury.

WARRANTY. See Vendor and Purchaser.

WATER AND WATER-COURSES.

1. *Surface Water—Diversion of Flow—Negligence—Cause of Damages—Duty of Lower Proprietor.*—Where damages are sought against a railroad for diverting the surface flow of water onto the plaintiff's land in the construction of a spur track, testimony is competent to show that the plaintiff did not keep the ditches on his own land open, when there is evidence that this neglect on the plaintiff's part was the sole cause of the injury alleged. *Brown v. R. R.*, 392.

2. *Surface Waters—Diversion of Flow—Artificial Increase—Trials—Instructions—Special Request.*—It is only for damages for a diversion of the surface flow of water for which the upper proprietor may be held liable to the lower proprietor, and when the court has thus correctly charged the law, it will not be held for error that he failed further to charge that the upper proprietor cannot increase the discharge of the water, at any given point, in the absence of appellant's

WATER AND WATER-COURSES—*Continued.*

special request so to charge, for exceptions of this character must be to the refusal of the court to give such special requests. *Ibid.*

3. *Surface Water—Diversion of Flow—Drain Pipes—Request of Lower Proprietor—Trials—Evidence.*—In an action against an upper owner of lands to recover damages for diverting the surface flow of water onto the plaintiff's land under allegation that certain drain pipes were improperly provided for the purpose by the defendant on its own land, it is competent to show that the drains were put in in compliance with the plaintiff's request, and that he could not therefore complain. *Ibid.*

WILLS.

1. *Wills—Intent—Precatory Words—Trusts and Trustees.*—A will should be construed to effectuate the intent of the testator as gathered from the terms used by him therein; and precatory words will be given their ordinary and usual significance, unless from the terms and disposition of the will and the circumstances relevant to its proper construction it clearly appears that they are to be considered as imperative, and that the testator intended to create a trust. *Carter v. Strickland*, 69.

2. *Same.*—A devise of certain lands to the testator's niece, by name, with "request" that she shall devise it to her daughter M. at her death, and it appears from other parts of the will that the testator knew apt words to create a trust, and in a subsequent clause of the will referred to the lands devised to the niece: *Held*, the niece, being nearer to the testator in blood, is evidently the primary object of his bounty, and under the terms of the will it was the testator's intent and purpose to devise the lands in fee to his niece, not raising a trust in favor of M., but referring the matter to the affectionate discretion of the mother. The position is not affected by an admission on the part of the devisee, the niece, that the testator was very fond of M., her daughter, had her to visit him frequently, and had contributed largely to her education. *Ibid.*

3. *Limitations of Actions—Foreign Wills—Defective Probate—Color of Title.*—A will purporting to devise certain lands, sufficiently describing them, is color of title, though made in another State and defective as to the probate here. *Lumber Co. v. Cedar Works*, 83.

4. *Wills—Mental Capacity—Evidence—Appeal and Error—Harmless Error.* In an action to caveat a will, the witness's answer to a question directed to the mental capacity of the testator, who had devised his property to one not related to him, that he did not think the testator "meant for his folks to have any of his property, from the way he talked, and that he had sense when he was around, so far as he knew," is held competent under the rules laid down in *McLeary v. Norment*, 84 N. C., 235; but if otherwise, it was not reversible error in this case. *In re Will of Parker*, 130.

5. *Wills—Undue Influence—Evidence.*—Where the beneficiary and the testator are not related, and the evidence discloses that the latter sent for the former when the will was written, who at his request sent for the attorney who drew the will and for the witnesses thereto; that there was no relationship of confidence or trust except that

WILLS—*Continued.*

the testator looked to him in time of need, and that he lived alone, neglected by his kinsmen, it is not sufficient to be submitted to the jury upon the question of undue influence. *Ibid.*

6. *Wills—Intent—Construed as a Whole.*—In construing a will, the primary purpose is to ascertain the intention of the testator, from the will as a whole, giving effect to every part thereof when it is possible. *Taylor v. Brown*, 157.

7. *Same—Estates—Debts—Limitations—Executors and Administrators.*—A devise and bequest in the first item of a will of all the testator's real and personal property to his wife, and in item 4 thereof "that after the death of the widow . . . all of the property then left after having paid her burial expenses shall be equally divided between all of my children," and it appearing that the widow died intestate without having disposed of any of the property. *Held*, items 1 and 4 of the will are consistent and should be construed together, and the intent of the testator gathered therefrom was to provide for the widow for life, and an equal distribution of the property among the testator's children at her death, not subject to the debts of the first taker, except her funeral expenses, specifically provided for. As to whether the widow took a life estate or determinable fee, *quœre*. *Ibid.*

8. *Wills—Interpretation—Intent—Defeasible Estates—Statutes.*—The intent of the testator as gathered from the entire will controls its interpretation; and this rule applies to the construction of Revisal, sec. 3138, when it appears that the testator devised certain lands without the words of inheritance, and that his intent, gathered from a separate item of the will, was to create a defeasible estate in the first taker, contingent upon his dying at any time, whether before or after the death of the testator, leaving issue surviving him. *Rees v. Williams*, 201.

9. *Wills—Intent—Contingent Remainders—Die Without Issue—Statutes.*—A devise of lands to J., with limitation that if she should die without leaving issue, then over, refers the contingency upon which the estate shall vest to the death of J., and not to that of the testator, since the act of 1827, now Revisal, sec. 1581. *Ibid.*

10. *Wills—Intent—Contingent Remainders—Die Without Issue.*—A testator devised certain of his lands to his daughter J., without words of inheritance, by one item of his will, and by the next item of the will provided that in case J. died leaving issue, then to such issue and their heirs; but should J. die without issue surviving her, then to another daughter and a son of the testator, or their heirs, share and share alike: *Held*, the two items of the will are not repugnant to each other, the intent of the testator, as gathered from the entire will, being that J. should take an estate in the lands defeasible upon the contingency of her dying at any time without leaving issue surviving her; and that at the death of J. the estate would vest in accordance with the happening of either one or the other contingency specified in the will. *Ibid.*

11. *Wills—Partial Cancellation—Burden of Proof.*—Where a will, sought to be established as a holograph will, found among the valuable papers of the deceased, in his own handwriting with his name subscribed,

WILLS—*Continued.*

has, upon its production by the propounders, the word "canceled" written in two separate items, and the signature has been torn into and through, the burden is upon the propounders to show that, notwithstanding such defacement and marks of cancellation, it was the true will of the deceased, and that he had not intende dto cancel the whole instrument, and an instruction by the court to the jury that the burden had shifted to the caveators is reversible error. *In re Wellborn's Will*, 636.

WITNESSES. See Trials; Evidence.

1. *Witness, Expert—Qualifications—Appeal and Error—Assignments of Error*—The findings of the trial judge upon the question of whether a witness had qualified as an expert, when there is evidence thereof, is conclusive on appeal; and when an assignment of error relates solely to the sufficiency of such qualification, it may not be extended so as to include objections raised otherwise to his testimony. *Rangeley v. Harris*, 358.

2. *Master and Servant—Incompetency of Fellow-servant—General Character—Witness.*—In an action to recover damages of the master arising from his alleged negligent employment of an incompetent fellow-servant, evidence of the general character of such fellow-servant is properly excluded when he has not testified as a witness. *Walters v. Lumber Co.*, 388.

3. *Witnesses—Evidence, Impeaching—Declarations to Third Persons.*—Declarations of a witness made to third persons bearing upon testimony which he has given and which has been controverted or impeached, are admissible, but only to the extent of sustaining or corroborating the truth of his testimony, and not as substantive evidence. *Bowman v. Blankenship*, 519.

4. *Trials—Witness—General Character—Impeaching Evidence.*—Evidence of the character of a witness, who has testified in an action, should be restricted to general character, and it is proper for the trial court to so restrict it. *Sigmon v. Shell*, 582.

5. *Evidence—Witnesses—Experts—Comparison of Handwriting.*—Before the passage of chapter 52, Public Laws 1913, it was incompetent for a handwriting expert to testify to the genuineness, or otherwise, of the signature of a party to a writing based upon a comparison with another signature, not admitted to be genuine or requiring proof that it is so. *Boyd v. Leatherwood*, 614.

6. *Same—Explanations—Comparison by Jury.*—It is competent for handwriting experts to show and explain to the jury various signatures being compared by him, when giving his opinion on the genuineness of one of them, the subject of the inquiry; but it is not allowed that the jury make the comparisons for themselves in the absence of expert testimony. *Ibid.*

7. *Evidence—Witnesses, Expert—Findings of Trial Court—Appeal and Error.*—Where the testimony required of an expert witness has been ruled out upon the trial in the Superior Court, this Court on appeal will not pass upon the exception taken to its exclusion when it does not appear of record that the trial judge had passed upon the ques-

WITNESSES—*Continued.*

tion of whether the witness had qualified himself to give evidence of this character, and had held him to be qualified. *Ibid.*

8. *Evidence — Witnesses — Experts —Handwriting—Declarations—Trials—Evidence—Questions for Jury.*—Where a bond sued on is attacked upon the ground that the signature thereto was a forgery, it is competent to show that the maker thereof had made a statement, at the time the bond was given, in accordance with the expressed tenor of the bond, as a circumstance tending to show he had executed it. *Ibid.*

9. *Trials—Character Witnesses—Impeachment—Special Acts.*—Where one witness is introduced to prove the general character of another witness, special acts tending to impeach the latter may not be inquired into on cross-examination; and it is held, in this case, if the matter sought to be elicited were true, it would not be sufficient for impeachment. *Institute v. Mebane*, 644.

WORDS AND PHRASES. See Deeds and Conveyances, 11.

WRONGFUL DEATH. See Municipal Corporations, 2.

YARD LIMITS. See Railroads, 17.