NORTH CAROLINA REPORTS

VOL. 166

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1914
(IN PART)

FALL TERM, 1914
(IN PART)

BY

ROBERT C. STRONG,
STATE REPORTER

Annotated through Vol. 236

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1954

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1914.

HIGHWAY COMMISSION OF FRANKLIN TOWNSHIP v. MALONE & CO.

(Filed 27 May, 1914.)

1. Municipal Corporations—Township Bonds—General Authority—Limit Prescribed.

An act providing for the issuance of township bonds for road purposes authorizing an issuance not to exceed at any one time an amount equal to 10 per cent of the taxable value of the property of the township, is a general and valid authority for an issuance of any amount of bonds, at various times for the purpose, within the limit prescribed, which may vary from year to year in accordance with the value of the taxable property therein.

2. Municipal Corporations—Township Bonds—Interest—Sinking Fund—Purchaser with Notice—Contracts.

A purchaser of municipal bonds is fixed with notice of the provisions of the act under which they are issued, and may not repudiate the terms of his agreement to purchase them on the ground that the payment of interest and the creation of a sinking fund had not therein been provided for. In this case, however, it is held that the act provides for the interest and for a sinking fund from the moneys to be collected for that purpose.

3. Municipal Corporations—Township Bonds—Statutes — Amendments — Authority Suspended—Interpretation of Statutes.

The Legislature passed an act authorizing the issuance by a township of bonds for road purposes, and passed an amendment thereto, at a subsequent session, that the former act should not be effective until the bonds shall have been issued and placed on the market at a fixed future date: *Held*, the power to negotiate the bonds was not suspended by the amendment, which carried with it the power to sell and deliver, at which time the provisions of the former act becomes effective, if the bonds have been issued and placed on the market within the time fixed therefor.

(2) APPEAL by defendant from *Carter, J.*, at Spring Term, 1914, of MACON.

This is a controversy without action, submitted under section 803 of the Revisal of 1905, to determine the validity of $30,000 thirty-year 6 per cent road bonds by Franklin Township, Macon County.

Chapter 197, Public-Local Laws 1913, created the highway commission of Franklin Township, and authorized it to issue bonds generally, and not to a specific amount, after a favorable election, provided that the amount of bonds outstanding should at no time exceed 10 per cent of the value of the taxable property in the township. The amount of bonds to be issued is thus left indefinite, with merely an outside limit varying from year to year, as the assessed valuation might vary.

The highway commission attempted to issue $30,000 of the bonds, and entered into a contract with the defendants for the sale thereof. The defendants now decline to accept and pay for said bonds, contending that, when the same are issued, they would not constitute the valid and binding obligations of Franklin Township, for three reasons, towit:

(1) That chapter 197, Public-Local Laws 1913, contains no provision for the levying of taxes to create a sinking fund or pay for the bonds at maturity.

(2) That sections 2 and 3 of chapter 6, Public-Local Laws, Extra Session, 1913, imposed such limitations and restrictions upon the highway commission as to render the attempted issue invalid.

(3) That said sections 2 and 3 of said chapter 6 deprive the highway commission of all its powers and duties conferred upon it by chapter 197, Public-Local Laws 1913, except the mere naked right to negotiate a sale of the bonds, and strip it absolutely of any authority to (3) execute and deliver the bonds.

Upon the failure of the defendants to accept and pay for the bonds, this proceeding was instituted in the Superior Court of Macon County. The matter was heard before his Honor, Judge Carter, and from a judgment in favor of the plaintiff, the defendants appealed.

T. J. Johnston for plaintiffs.
Charles N. Malone for defendants.

BROWN, J. The first contention of the defendants cannot be sustained. The statute authorizing the issue of the bonds especially provides that for the purpose of paying the interest thereon as it falls due, the commissioners of the county are directed to levy an annual tax sufficient in amount for the purpose of paying the said interest, and that said funds shall be kept separate and distinct for the purpose aforesaid, and no other.

Another section, 31, provides that so much of the taxation levied each year as may not be required to pay the interest on the bonds shall constitute a sinking fund for the payment at maturity of the principal of the bonds.

It is well to say in respect to this contention, as has heretofore been said by us, that where bonds are sold and purchased under a contract, as in this case, it is the purchaser's duty to look to the provisions of the act securing the payment of the interest on the principal of the bonds. The purchaser has been fixed with that knowledge of the provision of the act, and buys accordingly. *Gastonia v. Bank,* 165 N. C., 507.

The other questions raised by the defendant are as to the effect of chapter 6, Public-Local Laws, Extra Session, 1913, secs. 2 and 3 providing as follows:

"SEC. 2. That unless and until the bonds provided for by chapter 197 of the Public-Local Laws of 1913 shall have been issued and placed on the market, said chapter shall not in any respect be in force in Franklin Township. That the duties of the members of the highway commission of Franklin Township, together with all remuneration, shall
(4) cease and determine upon the passage of this act, except they may negotiate for the issue and sale of the bonds therein provided for. When the said bonds are sold, then chapter 197 of the Public-Local Laws of 1913 shall be in force and shall apply only to the roads in Franklin Township to be macadamized, etc., by the highway commission.

"SEC. 3. That unless the bonds provided for by said chapter 197 of the Public-Local Laws of 1913 shall have been issued and placed on the market on or before 1 September, 1914, all rights and powers under said chapter to issue bonds shall cease and determine."

We fail to see how this act can in any respect affect the validity of the bonds in question. The object and meaning of this statute is quite plain. Its purpose is to suspend the operation of the statute until the bonds are sold, and when they are sold the original act under which they are issued shall be in full force and effect.

The power to negotiate the bonds is not suspended, but continues in the highway commission, and that power carries with it the power to sell and deliver. 23 A. and E. Enc., 285.

When the bonds have been sold, all the powers conferred by the original statute are in full force. All rights and liabilities under it are preserved.

We do not think there is any merit in the contention that the highway commission can issue nothing less than bonds equal to the full 10 per cent of the assessed valuation of the taxable property of the town-

ship, in view of the explicit language of the statute, that the amount to be issued shall not exceed 10 per cent of all said valuation.

Under this act, we are of opinion that the commission has full power to issue any part of the bonds provided by it, not exceeding the limitation of 10 per cent of the assessed tax valuation. It is not contended that the contemplated issue of $30,000 in bonds exceeded that limitation. Section 3 of the special session's act can have no effect whatever, because the bonds have already been issued prior to 1 September, 1914.

The question of necessary expense, as constitutional authority (4) for issuing the bonds, does not arise in this case, as an election was held and the qualified voters almost unanimously voted for the issue.

The judgment of the Superior Court is

Affirmed.

Cited: Hargrave v. Comrs., 168 N.C. 628; *Highway Com. v. Construction Co.*, 170 N.C. 514.

R. L. CAUSEY, ADMINISTRATOR, v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 20 May, 1914.)

1. Negligence—Master and Servant—Release—Trials—Circumstantial Evidence—Fraud—Evidence—Questions for Jury.

In this action brought by an administrator to recover damages of a railroad company for the wrongful death of an employee, there was evidence tending to show that the defendant obtained a release from the intestate for all damages arising from the injury, which eventually resulted in his death, for an inadequate consideration, when he was in pain and suffering from the result of the injury, but desired to keep his situation in the defendant's service; that the defendant's claim agent, who procured the release, made conflicting statements, as a witness in defendant's behalf, as to the time and place it was executed, and as to whether the intestate had sent for him; that the payment made to the intestate was only intended to cover the time he had lost from his employment, which it did not do, and not physical or mental pain or suffering caused by the injury; that the agent of defendant was the only one with the intestate when the release was obtained: *Held*, the evidence, though circumstantial in its character, was sufficient to sustain a finding of the jury in plaintiff's favor, upon the issue as to the fraud of the defendant's agent in procuring the release set up as a defense.

2. Limitation of Actions—Wrongful Death—Executors and Administrators Interpretation of Statutes.

The right of action given for the wrongful death of the intestate is given by statute to his administrator, and did not exist at common law. Hence

the statute of limitations does not begin to run against such cause of action until the death of the intestate, caused by the personal injury, has resulted.

(6) APPEAL by defendant from *Long, J.*, at December Term, 1913, of RANDOLPH.

This is an action to recover damages for the wrongful death of the plaintiff's intestate, caused, as alleged, by the negligence of the defendant.

The intestate was injured on 1 December, 1903, and died on 7 June, 1912. On 27 December, 1903, the intestate executed the following conditional release:

SEABOARD AIR LINE RAILWAY.

Conditional Release Agreement.

If, before the expiration of thirty days from this date, the Seaboard Air Line Railway shall pay to me, H. O. Causey, the sum of $75, I hereby agree to release the said railway of and from all claims whatsoever for damages for or on account of personal injury sustained by No. 1 freight running into A. C. L. freight at Hilton Bridge, throwing me against stove, cutting my head, on 1 December, 1903.

Witness my hand and seal, this 27 December, 1903.

(Signed) H. O. CAUSEY. [SEAL]

Witness:

(Signed) R. M. BALDWIN.

The foregoing conditional release agreement has the following indorsements stamped on it: "Voucher made for 5 January, 1904, amount shown," and "Voucher sent to Auditor Disbursements, 8 February, 1904."

On 17 February, 1904, the intestate executed the following release:

SEABOARD AIR LINE RAILWAY.

Release.

For and in consideration of the sum of seventy-five and no/100 dollars ($75) to me paid, the receipt of which is hereby acknowledged, I, H. O. Causey, do hereby release and forever discharge the Seaboard Air Line Railway, and any and all railroads owned, leased, operated,
(7) or controlled by it, and its successors, from all injuries received by me in collision of trains S. A. L. No. 1, and A. C. L. No. 80, on or about 1 December, 1903, at or near Wilmington, N. C., while a conductor in the employ of the Seaboard Air Line Railway; the consideration hereinbefore referred to being in full compromise, satisfaction, and discharge of all claims and causes of action arising out of the

injuries, and in exoneration of the railway from all liability by reason thereof.

In witness whereof I have hereunto set my hand and seal, this 17 February, A. D. 1904.

(Signed) H. O. CAUSEY. [SEAL]

Signed, sealed, and delivered in the presence of:

(Signed) R. M. BALDWIN.

The defendant pleaded the release as a defense, and also the statute barring a recovery for personal injury within three years.

The plaintiff replied, alleging that the release was procured by undue influence and fraud.

The jury returned the following verdict:

1. Was H. O. Causey, the intestate of the plaintiff, killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did H. O. Causey, the intestate of plaintiff, execute the release as alleged by the defendant, the Seaboard Air Line, in its answer? Answer: Yes.

3. If plaintiff's intestate did execute and deliver the said release, did he at the time of the execution thereof have sufficient mental capacity to understand the nature and effect of the said release? Answer: Yes.

4. If the deceased, H. O. Causey, did not have such mental capacity, did the defendant have notice thereof? Answer: No.

5. If said release was executed and delivered as alleged in the answer, was the same procured by fraud and undue influence of the defendant, the Seaboard Air Line, as alleged by the plaintiff? Answer: Yes.

6. Is the plaintiff's cause of action barred by the statute of (8) limitations? Answer: No.

7. What damage, if any, is the plaintiff entitled to recover? Answer: $6,075.

Hammer & Kelly for plaintiff.

W. H. Neal for defendant.

ALLEN, J. There was evidence to support the finding by the jury that the injury in 1903 caused the death of the intestate, and this is practically conceded by the defendant.

It is, however, earnestly insisted that there was no evidence of fraud or undue influence in procuring the execution of the release set up as a defense.

No presumption of fraud arises from the relation of employer and employee, "but it is recognized by the courts that the employer has great

influence in determining the conduct of the employee, and may use it to his injury." *King v. R. R.*, 157 N. C., 63. And "Where there is no coercion amounting to duress, but a transaction is the result of a moral, social, or domestic force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances undue influence naturally has a field to work upon in the condition or circumstances of the person influenced which render him peculiarly susceptible and yielding—his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessity, his ignorance, lack of advice, and the like." Pom. Eq. Jur., vol. 2, sec. 851.

The plaintiff relies upon circumstantial evidence to prove fraud and undue influence, and as was said by *Justice Brown* in the matter of *Everett's Will,* 153 N. C., 85: "Experience has shown that direct proof of undue or fraudulent influence is rarely attainable, but inference from circumstances must determine it.

(9) "Undue influence is generally proved by a number of facts, each of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence."

Let us, then, examine the circumstances connected with the execution of the release. The intestate was in the employment of the defendant when the release was executed, and wished to continue the employment. He was injured on 1 December, 1903, by a blow on the back of the head, and while the jury finds that he had sufficient mental capacity to execute a release, it was in evidence that he had trouble with his head continuously after the injury. He accepted $75 in settlement for an injury which finally resulted in death.

The settlement was made under an agreement to pay him for his lost time (the claim agent of the defendant testifies to this), and he was at that time earning from $90 to $95 a month, and according to the evidence of the plaintiff, lost two and one-half months.

The evidence does not disclose that any one was present when the release was executed, except the claim agent of the defendant, and he made conflicting statements as to his meeting with the intestate, saying: "I met him by appointment. He sent word that he wanted to see me. I did not meet him by appointment. I did not send for him to come and see me. I met him on the hotel porch at Hamlet by accident."

The conditional release was executed on 27 December, 1903, conditioned to accept $75, if paid within thirty days, under an agreement to pay for lost time, when there was due him then, computing at the rate

of $90 per month, $81, and the time he would lose could not then be ascertained, as he had not resumed work.

The sum of $75 was not paid within the thirty days, but the intestate stood by the agreement, and at the end of two months and seventeen days, while still unable to work, executed a full release for $75, under the same agreement, the defendant says, to pay for lost time, when his wages alone would, at that time, have amounted to $231, not considering damages for mental and physical suffering and for reduced capacity, for which the defendant was liable, if for anything.

We have, then, a full release executed upon the payment of less (10) than one-third of the amount agreed to be paid, and when the most important element of damages was not then taken into consideration—mental and physical suffering and reduced capacity.

It was executed by an employee who was, at the time, suffering mentally and physically from his injury, and who wished to retain his place with the defendant, and when no one was with him except the claim agent of the defendant, who made contradictory statements about his meeting with the intestate.

It would seem that one of two conclusions must follow, if the jury accepted this evidence: that the intestate did not have sufficient mind to execute a release, or that he was improperly influenced.

The jury has adopted the latter solution, and in our opinion there was evidence to support it.

In *King v. R. R.,* 157 N. C., 65, quoting from our own reports and from the Supreme Court of the United States, as to the effect of inadequacy of consideration upon an issue of fraud and undue influence, we said: "In *Byers v. Surget,* 19 How., 311, the Supreme Court of the United States says: 'To meet the objection made to the sale in this case, founded on the inadequacy of the price at which the land was sold, it is insisted that inadequacy of consideration, singly, cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualification annexed to it by the courts, namely, unless such inadequacy be so gross as to shock the conscience, for this qualification implies necessarily the affirmation that, if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud.' And again, in *Hume v. U. S.,* 132 U. S., 411, 10 Sup. Ct., 136 (33 L. Ed., 393): 'It (fraud) may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make, on the one hand, and as no honest and fair man would accept, on the other.' Our Court, speaking through *Justice Brown,* so declares the law in reference to awards and other transactions. In *Perry v. Insurance Co.,* 137 N. C., 406, 49 S. E., 890, he says: 'Where

(11) there is a charge of fraud or partiality made against an award, the fact that it is plainly and palpably wrong would be evidence in support of the charge, entitled to greater or less weight according to the extent or effect of the error and the other circumstances of the case. There might be a case of error in an award so plain and gross that a court or jury could arrive only at the conclusion that it was not the result of an impartial exercise of their judgment by the arbitrators. *Goddard v. King,* 40 Minn., 164, 41 N. W., 659. The settled rule, which is applicable not only to awards, but to other transactions, is that mere inadequacy alone is not sufficient to set aside the award; but if the inadequacy be so gross and palpable as to shock the moral sense, it is sufficient evidence to be submitted to the jury on the issues relating to fraud and corruption, or partiality and bias.' Where there is inadequacy of consideration, but it is not gross, it may be considered in connection with other evidence upon the issue of fraud, but will not, standing alone, justify setting aside a contract or other paper-writing on the ground of fraud."

The finding of the jury that the release was procured by fraud and undue influence, rendered upon competent evidence, makes it unnecessary to consider the effect of a valid release executed by the intestate on the plaintiff's right of action.

The remaining question presented by the appeal is the effect of the lapse of time between the injury to and the death of the intestate.

The right of action in favor of the intestate to recover damages for personal injury was barred by the statute of limitations of three years at the time of his death, and the question is presented, whether this can avail the defendant in an action by the administrator to recover damages for death, the result of the same injury.

Ordinarily, the bar of the statute is a good defense against the administrator, if available against the intestate, but this is because the administrator succeeds to the rights of the intestate, derives his title from him, and is endeavoring to enforce a right which belonged
(12) to him, and if no such relation exists in a given case, there would seem to be no good reason for admitting the defense.

The right to recover damages for personal injury belonged to the intestate, and terminated at his death, while the right to recover damages for wrongful death never belonged to him, and did not exist until death. A recovery in an action for personal injury belongs to the estate of the intestate, but a recovery for death is no part of the assets of the intestate.

The two rights of action have no common source, one being under the principles of the common law and the other the creature of statute. The

administrator sues, not because of any privity between him and the intestate, but for the reason that the statute designates him as the party plaintiff, and he is substantially a statutory trustee.

This Court said, in *Hood v. Telegraph Co.*, 162 N. C., 94, in considering the statute conferring the right of action for death (Rev., sec. 59): "Prior to the statute, which was first enacted in 1854, there was no right of action to recover damages for wrongful death (*Killian v. R. R.*, 128 N. C., 261), and as the right of action is conferred by the statute, it may designate who may sue. In 8 A. and E. Enc. Law, 887, the author says: 'The right of action for the death of any person caused by the wrongful act of a defendant is, with the isolated exceptions mentioned, purely statutory, and in all cases the statute must be looked to in determining to whom such right belongs.' When we turn to our statute, we find that the right of action is given to the executor, administrator, or collector; and there being an executor in this case, the plaintiff cannot sue. The statute designates the person to bring the action and determines the disposition of the recovery. As was well said by *Justice Walker* in *Hartness v. Pharr*, 133 N. C., 570: "It must be borne in mind that whatever the varying forms of the statute may be, the cause of action given by them, and also by the original English statute, was in no sense one which belonged to the deceased person or in which he ever had any interest, and the beneficiaries under the law do not claim by, through, or under him; and this is so, although the personal representative may be designated as the person to bring the action. (13) *Baker v. R. R.*, 91 N. C., 308. The latter does not derive any right, title, or authority from his intestate, but he sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it when recovered actually in that capacity, though in his name as executor or administrator, and though in his capacity as personal representative he may perhaps be liable on his bond for its proper administration. *Baker v. R. R., supra.*"

If there is no privity between the administrator and the intestate as to this cause of action, and the former succeeds to no rights of the other, it is illogical, as it appears to us, to hold that the failure of the intestate to sue for personal injury will bar the right of the administrator to recover damages for death, when the first right of action could not pass to the administrator and the second did not exist until death.

It would be, in effect, an adjudication that the second cause of action was barred before it came into existence.

The weight of authority elsewhere is, we think, in support of the position that the action is not barred.

In *Robinson v. R. R.,* Appeal Cases (1892), p. 481, it was held by the Privy Council, on appeal from the Supreme Court of Canada, "that the Civil Code of Lower Canada does not make it a condition precedent to the right of action given by section 1056 to the widow of a person dying as therein mentioned, that the deceased's right of action should not have been extinguished in his lifetime by prescription under section 2262 (2). The death is the foundation of the right given by the former section, which is governed by the rule of prescription contained therein and is exempt from the rule of prescription which barred the claim of the deceased."

In *Hoover v. R. R.,* 46 W. Va., 268 (the statute of limitations in West Virginia being one year), the Court said: "It is claimed that, the injured having lost his right to sue by reason of the bar of the statute of limitations at the time of his death, the cause of action is thereby destroyed, both as to himself and his administratrix; that death must find
(14) him with a cause of action legally enforcible, or she has none. This is undoubtedly true where the cause of action never existed, or is defeated by contributory negligence, or it has been compromised or released; for in such cases there is a complete want of or destruction by satisfaction of the cause, not merely of the right of action or remedy. *Dibble v. R. R.,* 25 Barb., 183; *Whitford v. R. R.,* 23 N. Y., 484; *Littlewood v. Mayor,* 89 N. Y., 24; *Fowlkes v. R. R.,* 5 Baxt., 663. In a certain class of cases the bar of the statute not only takes away the remedy, but destroys the cause of action. When the liability and the limitation is created by the same statute, the latter operates on the former, or liability, and not on the remedy alone. *The Harrisburg,* 119 U. S., 199 (7 Sup. Ct., 140). Generally speaking, however, the statute of limitations acts on the remedy, and takes away the right of action, and while it prevents relief, it does not destroy the cause of action, or the moral obligation on the negligent party to make good the injury caused by his default or neglect. . . . The first clause of the section, 'Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof,' plainly relates to the character of the injury, without regard to the question of time of suit or death. In other words, if the character of injury is such that the injured party could have at any time maintained a suit in relation thereto, his administrator could sue after his death. His cause of action is the negligent injury, but the administrator can have no cause of action until such negligent injury results in death. If such were not the case, why not provide merely that the decedent's cause of action survive to his

personal representative, without making the death, coupled with the negligence that occasioned it, a new cause of action? And why not give the damages recovered to his estate, instead of exempting them from his debts and liabilities? . . . It is possible for learned and able counsel to give the statute a different construction, but the Court adopts what appears to be the more reasonable view, and this is, that an action lies, notwithstanding the death of the injured person did not (15) occur until more than a year after the negligence which caused the injury occurred."

In *German Am. Trust Co. v. LaFayette Box Co.,* 98 N. E. Rep., 874, the appellate court of Indiana held that, "The foundation of the right given by Burns' Ann. St., 1908, sec. 285, providing that if one's death is caused by the wrongful act of another, his personal representative may sue therefor, if he, had he lived, might have sued for an injury for the same act, and the action shall be commenced in two years, is death; and the limitation for the action thereon is two years from the death, unaffected by decedent's action for his injuries being barred before his death."

In *L. and N. R. R. Co. v. Simrall's admr.,* 104 S. W. Rep., 1012, the Supreme Court of Kentucky said of this question: "It is strongly insisted for appellant that the court erred in sustaining appellee's demurrer to its pleas of the statute of limitations; it being the contention of counsel that no right of action exists for causing the death of a person where no right of action for the injury causing the death exists at the time the death occurs, and, further, that neither section 241 of the Constitution of Kentucky nor section 6 of the Kentucky Statutes of 1903 was intended to give a right of action for causing the death of a person, unless a right of action for the injury existed at the time of the death. The argument advanced by learned counsel for appellant is that, as section 2516, Ky. St. 1903, which provides, 'An action for an injury to the person of the plaintiff, or his wife, child, ward, apprentice, or servant, or for injuries to person, cattle or stock, by railroads or any company or corporation . . . shall be commenced within one year next after the cause of action accrued, and not thereafter,' applies to actions for injuries resulting in death, as well as those which do not result in death, the statute runs in each case from the time the injury was inflicted. It is further argued that the starting point is the same in each case, and that if, in the case of an injury subsequently resulting in the loss of a leg, the statute runs from the date of the original injury, and not from the loss (16) of the leg, so, in the case of any injury subsequently resulting in death, the statute runs from the date of the original injury, and not from the death. It is also urged that any other construction of the

statute than that contended for by appellant would lead to injustice and oppression, for the reason that if an administrator may maintain an action for causing the death of his intestate, where the death did not result until the lapse of ten or fifteen years from the time the injury was inflicted, then he may recover, although his intestate could not do so, if living, for the injuries received, and that, too, very probably after many of the witnesses have died or disappeared, and after the circumstances surrounding the infliction of the injury have faded from the memories of those by whom it was witnessed. Though plausible, the foregoing argument is unsound. Hardships may result in exceptional cases from the application of any statute or legal principle, however salutary the operation of either in general. . . . In the first case, the cause of action is asserted by the person injured, or his administrator, and it arises out of and is for the injury received. It therefore accrues from and at the time of the infliction of the injury; hence the statute then begins to run. In the second case, the cause of action does not accrue until the death of the person injured occurs, because the action is not for the injury sustained by the intestate, but for the death resulting from the injury, which is an independent and distinct grievance, created by statute, for which the personal representative alone may sue. This being true, the statute of limitation begins to run at the death and with the accrual of the cause of action. It is an indisputable rule that the statute of limitation can never begin to run until the cause of action accrues."

In *Nestelle v. Nor. Pac. R. R.*, 56 F. R., 261, the plea of the statute was denied, the Court holding: "The statute of limitations begins to run against the statutory right of action for an injury resulting in death only at the time the death occurs, although that event takes place long after the time of receiving the injury."

(17) In *W. and A. R. R. v. Bass,* 104 Ga., 390, the date of the injury was 21 February, 1891, and death ensued five years thereafter, and the Court says upon the question now before us: "Was the plaintiff's right of action barred by the statute of limitations because her suit was not filed within two years from the date her husband was injured? 'Actions for injuries done to the person shall be brought within two years after the right of action accrues.' Civil Code, sec. 3900. If the plaintiff's husband had sued for the injuries to his person, he must have brought his action within two years from the date such injuries were inflicted. The plaintiff's action, however, was not for injuries done to the person of her husband. She had no right under the law to sue for such injuries; no one except the husband himself could maintain an action for them. If, however, such injuries resulted in his death, then,

under section 3828 of the Civil Code, a right of action accrued to her. That section provides that a widow may recover for the homicide of her husband, and plaintiff's suit is based upon the cause of action therein given her. This statute does not profess to revive the cause of action for the injury to the deceased in favor of his widow, nor is such its legal effect, but it creates a new cause of action, in favor of the widow, unknown to the common law. The right of action given by the statute is for the *homicide* of the husband in all cases where the death results from a crime, or from criminal or other negligence, and is founded on a new grievance, namely, his homicide, and is for the injury thereby sustained by the widow and children, to whose exclusive benefit the damages must ensue, as, under section 3829 of the Civil Code, 'in the event of a recovery by the widow, she shall hold the amount recovered subject to the law of descents, as if it had been personal property descending to the widow and children from the deceased, and no recovery had shall be subject to any debt or liability of any character of the deceased husband.' The widow's right of action for the wrongful homicide of her husband cannot exist at all until he is actually dead, and she cannot, as a matter of course, bring suit before her cause of action comes into life. The statute of limitation begins to run from the time the right of action accrues, that is, as soon as the party is entitled to apply to (18) the proper tribuntal. Angell on Lim. (6 Ed.), sec. 42. It is clear, therefore, that the statute of limitations which began to run against the husband from the date his right of action accrued, namely, the time the injuries were inflicted, could not be pleaded against the plaintiff in a suit for his homicide, alleged to have been caused by the same injuries; because she had no right of action until her husband died, and the statute could not run against a right of action before it came into existence."

In *R. R. v. Clarke,* 152 U. S., 230, which was an action to recover damages for death, the railroad relied upon the rule of the common law, obtaining in prosecutions for murder, that death must ensue within a year and a day. The Court repudiated the defense, and the reasoning based upon a construction of the statute giving a right of action for death, strongly supports our view. The Court says: "The statute, in express words, gives the personal representative two years within which to sue. He cannot sue until the cause of action accrues, and the cause of action given by the statute for the exclusive benefit of the widow and children or next of kin cannot accrue until the person injured dies. Until the death of the person injured, the 'new grievance' upon which the action is founded does not exist. To say, therefore, that where the person injured dies within one year and *two days* after being injured, no action can be maintained by the personal representative, is to go in the

face of the statute, which makes no distinction between cases where death occurs within less than a year and a day from the injury, and where it does not occur until after the expiration of one year and a day. Although the evidence may show, beyond all dispute, that the death was caused by the wrongful act or omission of the defendant, and although the action by the personal representative was brought within two years after the death, yet, according to the argument of learned counsel, the action cannot be maintained if the deceased happened to survive his injuries for a year and a day. We cannot assent to this view. Was the death, in fact, caused by the wrongful act or omission of the
(19) defendant? That is the vital inquiry in each case. The statute imposes no other condition upon the right to sue. The court has no authority to impose an additional or different one. If death was so caused, then the personal representative may sue at any time within two years from such death."

The diligent and learned counsel for the defendant has collected all of the cases holding to the contrary.

Robinson v. R. R., 54 A. and E. R. R. Cases, 49, by the Supreme Court of Canada, was, as we have seen, reversed on appeal.

The two Alabama cases, *Williams v. R. R.*, 158 Ala., 398, and *Suell v. Derricott*, 161 Ala., 259; and *R. R. v. Allen*, 192 F. R., 480, by the Circuit Court of Appeals, are based upon the construction of the Alabama statute conferring a right of action for death, which is different from ours in that the right there is not new and independent, but is a survival of the right of action of the intestate.

In the first of these cases the Court says: "The object of the statute (section 1751, Code 1896), as we understand it, was to continue the cause of action which the person injured had—and which he had not enforced, but might have enforced had not death intervened—for the benefit of the legal distributees of his estate; and to enable the distributees to obtain their damages, resulting from the same primary cause, and not to create an entirely new and additional right of action, although the mode of estimating the damages might be entirely different from that employed had the action been brought by the employee. 'In the view we take of the statute, the right to be enforced is not an original one, springing into existence from the death of the intestate, but is one having a previous existence, with the incident of survivorship, derived from the statute itself.' "

The Circuit Court of Appeals adopts this construction, the injury causing death in that case having occurred in Alabama.

Kelliher v. R. R., 138 N. Y. Supp. 894, is in point, but it is
(20) now pending on appeal in the Court of Appeals of New York.

We are, therefore, of opinion, on reason and authority, that the cause of action is not barred by the statute of limitations.

No error.

Cited: Edwards v. Chemical Co., 170 N.C. 555, 558; *Knight v. Bridge Co.,* 172 N.C. 398; *Plemmons v. Murphey,* 176 N.C. 677; *McMahan v. Spruce Co.,* 180 N.C. 643; *Mitchell v. Talley,* 182 N.C. 687; *Butler v. Fertilizer Works,* 193 N.C. 639; *Hill v. Ins. Co.,* 200 N.C. 510.

A. Y. BOND ET AL. v. THE PICKETT COTTON MILLS, INC.

(Filed 20 May, 1914.)

1. Contracts—Interest—Interpretation of Statutes—Unliquidated Damages.

The rule that all moneys due by contract except due on penal bonds shall bear interest (Revisal, sec. 1954) applies whenever a recovery is had for breach of contract and the amount is ascertained from the terms of the contract itself or from evidence relative to the inquiry, and due by one party to the contract to another; and it does not obtain as a matter of law where the interest sought does not come within the provisions of the statute and is by way of unliquidated damages, and there has been no adequate default on the part of the debtor in reference to withholding the principal sum, or a part of it.

2. Same—Statutory Liens—Material Men—Trusts and Trustees—"Ready, Able, and Willing"—Payment Into Court—Tender.

The relationship of the owner of a building to material men, etc., claiming a balance due to his contractor after receiving from them notice of their liens, is not that of debtor and creditor, in the ordinary sense, for he holds such balance in the nature of a trust to their use; and where the material men, etc., have entered suit in the nature of a creditor's bill to recover, pro rata, the funds so held, the owner is not chargeable with interest on the claims or held to the duty of paying the funds into court pending the action, unless so ordered, in order to avoid the payment of the interest; and the amounts of the respective claims necessarily being uncertain, it is sufficient that he has always been ready, able, and willing to pay them upon their being finally passed upon and adjudicated.

3. Costs—Court's Discretion—Interpretation of Statutes—Trusts and Trustees.

It is within the discretion of the trial court to tax the costs accruing upon either of the parties litigant, in an action in the nature of a creditor's bill, brought by material men, claiming under the statutory lien, the unpaid balance due by the owner of a dwelling, etc., to his contractor for its erection (Rev., sec. 1267); and the action of the judge in taxing the trust funds in the owner's hands with the cost is commended in this suit.

(21) APPEAL by plaintiffs from *Lane, J.*, at March Term, 1914, of GUILFORD.

Civil action heard on exceptions to report of referee.

The action was one in the nature of a creditor's bill, instituted to April Term, 1912, Superior Court of Guilford County, by A. Y. Bond, The Odell Hardware Company, *et al.*, subcontractors and material men, in behalf of themselves and all others in like case, to establish a lien and subject to payment of their claims the amount due the contractor for a house built for defendant The Pickett Cotton Mills.

It appeared that the Central Carolina Construction Company had built for The Pickett Cotton Mills, on the latter's property, a cotton mills building, and that a balance of the contract price was due thereon. The principal contractor having become insolvent and adjudicated bankrupt, the present action in the nature of a creditor's bill was instituted, with approval of the bankrupt authorities, to determine the amount and status of the claims of certain subcontractors and material men who sought to establish liens and subject to payment of these claims the balance due the contractor.

Some of the claims being questioned, both as to the amount and right of lien, at August Term, 1913, the cause was referred to Mr. A. W. Cook to hear evidence and make report thereon.

On 17 September, 1913, on application by the referee, an order was entered permitting parties plaintiff to file amended complaints, and many or all of them did so, demanding payment of the entire amount of their claims from The Pickett Cotton Mills, under and by virtue of a public-local statute which purported to impose upon the owner the duty of looking after the interest and securing the claims of subcontractors and material men. Chapter 761, Public-Local Laws, Session 1911, a statute recently held void by the Supreme Court by reason of contradictory provisions therein which rendered the same inoperative.

(22) In the full, careful, and intelligent report of the referee, filed to January Term, 1914, the amount of plaintiffs' claims is established, aggregating over $8,500, and the same are declared to be valid liens against the realty in question, entitling them to share pro rata in the balance due the contractor.

This balance is fixed at $6,941.06, with interest thereon from 31 November, 1911, this being the date when the sum would have been due and payable by the terms of the contract. In reference to the debt, the referee finds, among other things: "That The Pickett Cotton Mills has at all times been ready and willing to pay over to respective claimants the amount it holds in its hands as a balance due the contractor, but has never actually made a legal tender thereof."

On the hearing, the court sustained an exception to the conclusion of law charging defendant company with interest, and gave judgment that the principal sum be distributed pro rata after deducting costs, etc.

Plaintiff creditors having excepted to the judgment denying their right to recover interests and deducting costs from the principal sum before distribution, appealed.

F. P. Hobgood, Jr., and T. C. Hoyle for plaintiffs.

W. P. Bynum and Roberson & Bernhardt for defendant.

HOKE, J., after stating the case: The decisions of this State recognize the position, and some of the distinctions growing out of it, that interest may be a charge for the use of money expressly stipulated for by the contract, or it may be imposed by way of damages for its wrongful detention. *King v. Philips,* 95 N. C., 245.

When considered in the nature of damages, and unless otherwise provided by statute, it is very generally held that there must be some kind of default established on the part of a debtor before interest can be collected. Thus, in case of agency and except in case of fraudulent conversion, etc., the liability will not arise until demand made. *Porter v. Grimsley,* 98 N. C., 550; *Neal v. Freeman,* 85 N. C., 441. And in case of unliquidated demands generally, interest is not allowed except when collectible by the usage of trade or by reason of vexatious or unreasonable resistance or delay in regard to the principal sum. (23)

This last position, and some of our former decisions applying it, have been very much modified with us by a statute in the Revisal of 1905, sec. 1954, to the effect, "That all sums of money due by contract of any kind whatsoever, except money due on penal bonds, shall bear interest," etc. From this it would seem to follow in this State that whenever a recovery is had for breach of contract and the amount is ascertained from the terms of the contract itself or from evidence relevant to the inquiry, that interest should be added (*Kester v. Miller Bros.,* 119 N. C., 475); a requirement that does not seem to have been sufficiently recognized on that point in *Lewis v. Rountree,* 79 N. C., 122.

In cases, however, not coming within this statutory provision, the principle, as stated, prevails here and elsewhere, that interest by way of damages is not allowed as a conclusion of law unless there has been some adequate default on the part of a debtor in reference to withholding the principal sum or part of it. *Smith v. Smith,* 101 N. C., 461; *United States v. Denver,* 106 U. S., 536; *Thornedyke v. Wells Memorial Association,* 146 Mass., 699; *Ledyard v. Ball,* 119 N. Y., pp. 62-74; *Shipman v. The State of Wisconsin,* 458; 22 Cyc., 1496.

In the present case the contract contains no express stipulation for the payment of interest. The amount involved is not a debt due from the defendant company, in the ordinary sense, bringing plaintiffs' claims within the meaning of the statutory provision as to interest. On the contrary, it is considered as a trust fund, to be distributed, under the statute, among the creditors who shall make the proper proof as to the amount and status of their claims. It has been so decided in *Manufacturing Co. v. Anderson,* 165 N. C., 285, in which the position is made the basis or reason for upholding a pro rata distribution instead of one by priorities according to the date of the respective claims. Until ascertained and declared by the referee, the number and amount of the claims entitled to share in the distribution could not be known, and, after amendments allowed and made under the public-local law referred
(24) to, and until same was declared invalid by decision of this Court, the amount to be paid by defendant was necessarily uncertain. The defendant company, therefore, was not in a position to make a valid tender to any of the claimants, and, on the facts in evidence, unless ordered to do so, it should not be penalized for not paying the money into court. In addition, it is found by the referee, as stated, "That The Pickett Cotton Mills, Incorporated, has at all times been ready and willing to pay over to respective claimants the *amount it holds* in its hands as a balance due the contractor, but has never actually made a legal tender thereof." From these considerations, we concur with his Honor's view, that no default is attributable to defendant company, and that, on the facts presented by the record, it is not properly chargeable with interest.

On the ruling as to costs, the question, under our decisions and in actions of this character, is referred to the discretion of the court (Revisal, sec. 1267), and we concur, also, in his Honor's view, that the costs in this case should be paid out of the fund held for distribution. *Partin v. Boyd,* 104 N. C., 422; *Smith v. Smith, supra; Gully v. Macy,* 89 N. C., 1343.

There is no error, and the judgment of the lower court is

Affirmed.

Cited: Yates v. Yates, 170 N.C. 535; *Hannah v. Hyatt,* 170 N.C. 640; *Foundry Co. v. Aluminum Co.,* 172 N.C. 706; *Chatham v. Realty Co.,* 174 N.C. 675; *Cook v. Mfg. Co.,* 182 N.C. 223; *Pinnix v. Smithdeal,* 182 N.C. 414; *Perry v. Norton,* 182 N.C. 589; *Bell v. Danzer,* 187 N.C. 232; *Mfg. Co. v. McQueen,* 189 N.C. 315; *Sears, Roebuck & Co. v. Banking Co.,* 191 N.C. 506; *Thomas v. Watkins,* 193 N.C. 632; *Briggs & Sons v. Allen,* 207 N.C. 13; *Bank v. Ins. Co.,* 209 N.C. 19; *Pasquotank County*

v. Hood, Comr. of Banks, 209 N.C. 555; *Yancey v. Highway Com.,* 221 N.C. 188.

W. L. LLOYD v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 20 May, 1914.)

1. Removal of Causes—Appeal and Error—Exceptions—Plea to Jurisdiction.

Where the Superior Court has ordered a cause removed to the Federal court upon the petition and bond of a nonresident defendant, to which the plaintiff excepted and appealed, resulting in a reversal of this judgment upon the ground of the insufficiency of the petition, the defendant may not enter a plea to the jurisdiction of the State courts to entertain the cause and have the matter determined again.

2. Federal Employers' Liability Act—Damages—Contributory Negligence—Trials—Issues.

Damages for a personal injury inflicted on the employee by the master under the Federal Employers' Liability Act are considered upon the issue of damages alone, rendering unnecessary a separate issue as to contributory negligence and the amount to be consequently deducted; and the refusal of the trial court to submit such an issue to the jury was proper.

3. Master and Servant—Assumption of Risks—Duty to Inspect and Report—Duty of Master—Negligence.

Where it is the duty of a locomotive engineer to inspect his engine before taking it upon his run in the company's service, and to report any defects to the repair department, and, preparatory to making his run, he is injured while inspecting the engine, just received from the repair shop, by reason of a defect in its machinery unknown to him, the question of assumption of risks is not presented, it not being the duty of the engineer to repair the engine; and the company is responsible in damages for the injury if directly and proximately caused by the defective condition of the engine, it being its duty, by the exercise of proper care, to furnish its employee with a reasonably safe place to work and reasonably safe appliances with which to do it.

4. Master and Servant—Safe Appliances—Duty of Master—Inspection—Negligence—Trials—Burden of Proof.

The plaintiff, an engineer on defendant's railroad, was injured while inspecting his locomotive or in operating a defective lever thereon, while making the inspection, and in his action to recover damages for personal injuries inflicted on him, a charge by the court to the jury is held correct which requires the plaintiff to show by the preponderance of the evidence that the defendant knew of the defect, or should have known thereof by exercising a reasonable inspection thereof.

5. Appeal and Error—Brief—Exceptions Abandoned.

Exceptions appearing in the record of the case on appeal, and not set out in the brief, or in support of which no reason or argument is stated or cited, are deemed abandoned on appeal. Rule 34.

6. Master and Servant—Federal Employers' Liability Act—Trials—Instructions—Issues—Damages.

Where an action for damages for a personal injury is brought under the Federal Employers' Liability Act, which does not bar the plaintiff's right to recover if he has been guilty of contributory negligence, but permits it to be considered only in diminution of damages, an instruction upon the question of contributory negligence should be addressed to the issue of damages, or it will not be considered.

7. Master and Servant—Federal Employers' Liability Act—Interstate Commerce.

Where an injury is received by an engineer of a railroad company while examining his engine preparatory to taking an interstate train upon its usual run, an action for damages for the injury alleged thus negligently to have been inflicted comes within the meaning of the Federal Employers' Liability Act; for it is not required that the engine be coupled with a train actually employed at the time in carrying interstate commerce.

8. Master and Servant—Federal Employers' Liability Act—Railroads—Lessor Roads—Interstate Commerce—Liability of Lessor Roads.

In this case it is held that the North Carolina Railroad Company, having leased its roadway to the Southern Railway Company necessarily in contemplation of its lessee road engaging in interstate commerce, and providing the necessary spur or lateral tracks for the purpose, is liable for an injury negligently inflicted by the lessee company on its employee, under the Federal Employers' Liability Act, while he was engaged in its interstate commerce, and the lessor road is a proper party to the action.

9. Pleadings—Assumption of Risks—Issues—Trials—Courts.

In order for a defendant to avail itself of the defense of assumption of risk, it must, under our practice, be specially pleaded in the answer, and an issue should be tendered thereon unless it is submitted by the court on its own motion.

10. Removal of Causes — Petition — Fraudulent Joinder — Allegations — Jurisdiction—Questions for State Courts.

The complaint in an action against joint tort feasors determines, upon allegations made in good faith, whether the action shall be joint or several; and where one of the defendants is a nonresident of the State and files a petition and bond for the removal of the cause to the Federal court for diversity of citizenship, upon the ground of fraudulent joinder of the resident defendant, he should allege such facts as to raise the issue of fraud to be tried in the Federal jurisdiction, or the jurisdiction will be retained by the State court, which will determine for itself whether the allegations of the petition are sufficient in law to raise the issue of fraudulent joinder before surrendering its jurisdiction of the cause.

APPEAL by defendand from *Shaw, J.*, at September Term, 1913, (27) of GUILFORD.

This is an action to recover damages for injuries alleged to have been caused by defendant's negligence. The case was before us at a former term, and is reported in 162 N. C., 485. Several of the questions now presented were then decided adversely to the defendants, and we will not consider them again upon a second appeal. *Latham v. Fields, post.* We held before, that the cause was not removable to the Federal court. Defendant, when the case was called for trial, entered a plea to the jurisdiction, based upon the ground that at the former trial the lower court had ordered the case removed, and that in compliance with said order a true transcript of the record in the case, properly certified and accompanied by a sufficient bond, had been filed and the case docketed for trial in the Federal court. But it appears that when the court ordered the removal an exception to the order was reserved by the plaintiff, who brought the matter to this Court for review by appeal, and we reversed the order of removal, and remanded the case for trial in the court below. The case accordingly proceeded to trial and resulted in the following verdict:

1. Was the plaintiff injured by the negligence of the defendant, the Southern Railway Company, as alleged in the complaint? Answer: Yes.

2. Was the plaintiff, at the time of receiving such injury, engaged as an employee of the Southern Railway Company in interstate commerce? Answer: Yes.

3. Was the North Carolina Railroad Company, at the time of the alleged injury of plaintiff, engaged in interstate commerce? Answer: No.

4. What damage, if any, is plaintiff entitled to recover of the Southern Railway Company? Answer: $12,500.

5. What damage, if any, is plaintiff entitled to recover of the North Carolina Railroad Company? Answer: Nothing.

Judgment was entered thereon for the plaintiff, and the defendant excepted and appealed.

Brooks, Sapp & Williams for plaintiff. (28)
Wilson & Ferguson for defendant.

WALKER, J., after stating the case: As to the plea of the defendant to the jurisdiction, it may be said that the mere filing of a transcript in the Federal court and docketing the case there did not prevent the State court from proceeding with the cause by trial and final determination in the exercise of its jurisdiction, as the order of removal was held by this Court to be erroneous and was accordingly reversed, with directions to

retain the case. The plea, therefore, was properly overruled. Our decision could not be questioned or collaterally attacked in that way, but only by a writ of error to the final judgment. *Herrick v. R. R.*, 158 N. C., 307, and cases cited; *Crehore v. Railway Co.*, 131 U. S., 244 (33 L. Ed., 144). This Court had the right to decide for itself whether the papers presented a removable case (*R. R. v. Dunn*, 122 U. S., 513; *Stone v. South Carolina*, 117 U. S., 432; *Herrick's case, supra*). And having held that they did not, the ruling stands until reversed in some regular and proper way.

Other questions remain for consideration: (1) Refusal of the court to submit certain issues tendered by the defendants, and the adoption of others in their stead. (2) Denial of motion to nonsuit, under the Hinsdale Act, Revisal 1905, sec. 539. (3) Refusal to instruct the jury, as requested by defendants. (4) Error in the instruction given, as specified in the exception thereto.

The issues tendered by the defendant, the Southern Railway Company, were as follows:

1. Did the plaintiff contribute by his negligence to his own injury, as alleged in the answer?

2. How much is the whole amount of damages sustained by the plaintiff by reason of the injuries received by him?

3. What sum should be deducted from the damages sustained by the plaintiff as the proportion or just share thereof attributable to the negligence of the plaintiff?

(29) The court properly refused to submit these issues, as contributory negligence was not a defense or bar to the action under the Federal Employers' Liability Act, but could be considered only on the inquiry as to the damages. No separate issue was necessary for this purpose. The act expressly provides: "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." The entire question of contributory negligence is to be considered by the jury in assessing the damages. Thornton on Employers' Liability Act, p. 101, and secs. 68 and 69. There would be no advantage in a separate issue as to contributory negligence, as an answer to it, one way or another, would not enable us to determine whether the jury had correctly estimated the damages. It is not at all usual to allow a specific issue as to each distinct element of damage, but they are all considered under only one issue. If the court instructs erroneously as to any particular element, it may be reviewed upon proper exception.

There was no error in overruling the motion to nonsuit the plaintiff. The evidence tended to show negligence on the part of the defendant in assigning the plaintiff, as engineer, to operate a defective engine, which he did not know was out of order. Upon a motion of this kind, the evidence is construed most favorably for the plaintiff, and he is entitled to have considered every reasonable inference therefrom. *Brittain v. Westhall,* 135 N. C., 492; *Freeman v. Brown,* 151 N. C., 111. If the evidence is thus treated, and having regard to what the plaintiff himself testified, we find that he said: "The proper way to handle the lever of an ash-pan, and the safe way, is to go to the side of the engine, on the left side; go to the side of the engine with your face the way the engine was fronting, and stoop down and catch hold of the lever and pull it; that would be the natural way, and that would be the proper way. When you pull the lever up in that way, your body would go with it. I can't say that there was no danger in handling these that way to the person operating it; there is danger to them any way you handle it; there is danger to the person operating it, no matter how you handle it, (30) if you take one improperly adjusted; they are universally known to be dangerous if they are not properly adjusted—anybody can tell you that. If properly adjusted, you can handle them any way you want to and not hurt you." He further testified that the defect was in the mechanism of the lever extending from the shaft to the damper, and was due to the tightening of the nut on the rod, which caused it to form a spring, and that, when he was examining the ash-pan, it flew out and struck him on the forehead, knocking him senseless. The engine had just come from the repair shop, and was presumed to be in good order, though it was his duty, as engineer, to inspect it and ascertain if it was in serviceable condition for its regular run from Spencer, N. C., to Monroe, Va. He was not aware of any defect in the lever or its attachments, and was only "looking between the ash-pan and fire-box to see if the grates were intact." If the engine was defective, it was his duty to report it, so that it could be returned to the shop for repairs. He testified: "A part of my duty on that day would have been to inspect and examine this engine before returning it to the shop. I had to make an inspection before carrying it out, to see that it was in condition to carry out; that was the purpose of the trip—to see if it was in proper condition, and make it so. . . . I knew from reputation beforehand, if the lever was not properly adjusted, that it was dangerous; I had never handled one in my life. I had handled engines of that character with levers, from June until January; I know I had some engines equipped that way; I don't know whether all of them were, because it was not in my line of business to have anything to do with the damper; that came

in the fireman's line and hostler's; I never had to clean fire or assist in doing it; it was my duty to inspect the engine—the machinery of it. It was my duty, and I say in my complaint, to ascertain whether or not that engine was in serviceable condition to go out on that trip; that was the very purpose of taking the engine out at all, was to take it out to see whether it was in serviceable condition. Anything that would be wrong or unserviceable, of course, I would be expected to report,
(31) and if I had not gotten hurt with that damper and had investigated it, it would have been my duty to report it to the foreman to be properly adjusted, which I would have done if I had not been hurt."

It is evident from this statement of his, that he did not intend to say that he was to readjust or repair the engine, if found to be out of condition, but merely to inspect and, if any defect was discovered there, to report it.

There was ample evidence of the defective condition of the engine in respect to its damper and the lever that controlled it. The plaintiff was not ordered to repair a known defect in the engine, in which case he would, of course, assume the risk. The case, therefore, does not fall within the rule laid down by us in *Lane v. R. R.*, 154 N. C., 9, where it was the employee's duty to repair a broken door, and in *White v. Power Co.*, 151 N. C., 356, where he was sent to repair a wire that fed a lamp with an electric current which had failed in some way. We there referred to *Spinning Co. v. Achord*, 94 Ga., 14 and 16, in which *Chief Justice Bleckley* gave the homely but apt illustration that the physician might as well insist on having a well patient to be treated and cured by him as the machinist to have sound and safe machinery for him to repair; and he added: "The plaintiff was called to this machinery as infirm, not as whole." But it was not so in this case.

Plaintiff was not assigned to repair any break in this engine. It had just come from the repair shop, and was supposed to be in good order and free from any defect. His duty was to inspect merely and try out the engine—shake it down, so to speak, to see if it was ready and fit for its run that day or the next from Spencer to Monroe. It is true that he was searching for defects, but if he found any, his duty was to report, as he says. We do not think that in this respect he assumed the risk.

It was the duty of this company to exercise ordinary care in providing a reasonably safe place for him to work and reasonably safe tools and appliances with which to perform it. *Marks v. Cotton Mills*, 135 N. C., 287, where we said: "The employer does not *guarantee* the safety of his employees. He is not bound to furnish them an absolutely safe
(32) 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 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. . . . The rule which calls for the care of the prudent man is in such cases the best and safest one for adoption. It is perfectly just to the employee and not unfair to his employer, and is but the outgrowth of the elementary principle that the employee, with certain statutory exceptions, assumes the ordinary risks and perils of the service in which he is engaged, but not the risk of his employer's negligence. When 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 proximately caused by his negligence."

Our latest expression on the subject is in *Lynch v. R. R.,* 164 N. C., 249: "We have said in numerous decisions that the master owes the duty to his servant, which he cannot safely neglect, to furnish him with proper tools and appliances for the performance of his work, and he does not meet fully the requirement of the law in the selection of them, unless he uses the degree of care which a person of ordinary prudence would exercise, having regard for his own safety, if he were supplying them for his own use. *Marks v. Cotton Mills,* 135 N. C., 287; *Avery v. Lumber Co.,* 146 N. C., 595; *Mercer v. R. R.,* 154 N. C., 399. The master should, in the exercise of such care, provide reasonably safe tools, appliances, and surroundings for his servant while (33) doing the work. *Dorsett v. Manufacturing Co.,* 131 N. C., 254; *Witsell v. R. R.,* 120 N. C., 557; *Orr v. Telephone Co.,* 132 N. C., 691." And to these citations may be added, *Pigford v. R. R.,* 160 N. C., 93; *Mincey v. R. R.,* 161 N. C., 467; *Kiger v. Scales Co.,* 162 N. C., 133.

In the *Mincey case* we said: "The duty of the master to provide reasonably safe tools, machinery, and place to work does not go to the extent of a guarantee of safety to the employee, but does require that reasonable care and precaution be taken to secure safety; and this obligation, which is positive and primary, cannot be avoided by a delegation of it to others for its performance. The master's duty, though, is dis-

charged if he does exercise reasonable care in furnishing suitable and adequate machinery and apparatus to the servant, with a reasonably safe place and structures in and about which to perform the work, and in keeping and maintaining them in such condition as to afford reasonable protection to the servant against injury. *R. R. v. Herbert,* 116 U. S., 642; *Gardner v. R. R.,* 150 U. S., 349; *R. R. v. Baugh,* 149 U. S., 368; *Steamship Co. v. Merchant,* 133 U. S., 375. This undertaking on the part of the master is implied from the contract of hiring (*Hough v. R. R.,* 100 U. S., 213), and if he fails in the duty of precaution and care, he is responsible for an injury caused by a defect which is known to him and is unknown to the servant. *R. R. v. McDade,* 135 U. S., 554."

The Federal Employers' Liability Act has adopted the same rule, as it provides that the employer shall be liable for injury or death of the employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Whether the defendant knew of the defective adjustment of this lever with the ash-pan damper, or in the due exercise of care should have known of it, before it left the repair shop, which, in law, is the
(34) same thing, was a question for the jury upon the evidence, and it was so submitted by the court.

There was sufficient evidence of negligence in causing or permitting the defect to exist. If the least degree of care had been used in the shop, it could have been removed and the consequent injury prevented. The presiding judge, in his charge, required a finding of such negligence by the jury before giving an affirmative answer to the first issue. He instructed the jury, on this point, as follows: "This is not a case in which you can infer negligence from the simple fact that the plaintiff was injured, as contended by him; but the burden is upon the plaintiff to show by the greater weight of the evidence that the defendant company was negligent, as alleged. The negligence alleged is that the machinery used upon Engine 579 for controlling the ash-pan damper was defective, in that it was adjusted so tightly that it made it unsafe to operate the lever in raising and lowering said ash-pan upon this occasion." He also properly left the acts and conduct of the plaintiff in handling the lever, if he did so, to be considered by the jury on the issue as to damages, his negligence, if any, being contributory, and his charge, in this respect, was a compliance with the act of Congress, which provides: "The fact that the employee may have been guilty of contributory negligence shall

not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employee."

Before leaving the question of negligence, we should remark that defendant has assigned error in the charge and refusals to charge, it being its fifth, sixth, and tenth assignments, but nowhere in the brief are they discussed, as is required by the rule of this Court, 164 N. C., 551, Rule 34: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." The fifth, sixth, and tenth assignments are not considered or discussed separately in the brief, as they should be, if relied on, but only as parts of a group of assignments, viz.: "The second, third, fifth, sixth, and tenth assignments of error present practically the same question to the Court, Whether, under the facts in this case . . . he can recover for an injury caused by (35) the fact that the engine was not properly adjusted in the shops." The assignments, as thus presented, are faulty, in that it is assumed, as will appear from them when read in full, that plaintiff's duty was not only to "inspect," but to repair or "adjust" the engine, if defective; whereas he testified that his duty was to "inspect" and "report." But the assignments, as stated, embracing five of them, relate only to the right to recover *at all,* and this question has been fully considered under the assignment to the refusal of a nonsuit. Under the rule, they cannot be otherwise considered here.

The seventh assignment, to the refusal of the court to give an instruction, cannot be sustained, as the facts recited therein would not, if found by the jury, defeat plaintiff's recovery, but are properly referable to the question of damages.

The eighth and ninth assignments raise the question whether plaintiff, at the time of the injury, was engaged in interstate commerce. He was put in charge of this engine, and his duty, as engineer, required him to inspect it for the purpose of ascertaining whether it was in proper condition for its run from Spencer, N. C., to Monroe, Va. It was in commission for the purpose of moving interstate traffic between those two points. It was not necessary to constitute it an instrument of interstate commerce that it should have started on its journey. This engine was to be employed wholly in interstate commerce, and has been so used since the day of the injury. The work of reparation had been finished in the shops and the engine was run out on the track, preparatory to her next interstate journey. She had been thus used before, and her runs were merely suspended temporarily for the purpose of repairing her, after which the interstate runs would be resumed. Plaintiff was overlooking his engine, expecting to take it out that day or the next, to

Monroe, Va. His work was done only in a preparatory stage of interstate commerce, but was none the less a part of it. The case, in this respect, is governed by *N. C. R. R. v. Zachary,* 232 U. S., 248, where the Court says:

(36) "It is argued that because, so far as appears, deceased had not previously participated in any movement of interstate freight, and the through cars had not as yet been attached to his engine, his employment in interstate commerce was still *in futuro.* It seems to us, however, that his acts in inspecting, oiling, firing and preparing his engine for the trip to Selma were acts performed as a part of interstate commerce, and the circumstance that the interstate freight cars had not as yet been coupled up is legally insignificant," citing *Pedersen v. D. L. and W. R. Co.,* 229 U. S., 146; *St. L. S. F. and T. R. Co. v. Seale,* 229 U. S., 156.

In this connection, the testimony of the defendant's witness, H. J. Heilig, becomes pertinent: "Engine 579 is now running between Spencer, N. C., and Monroe, Va.; has been since the injury in regular service; may have been off for a few days at the time for local repairs; it was running between those points before the injury; one of the train engines operating between Spencer and Monroe; it was hauling commerce between the two States, between Spencer, N. C., and Monroe, Va."

The trip to Salisbury or to Barber's Junction was for the purpose of testing the sufficiency of the engine to make the run, and was but a part of the work of inspection and preparation.

Illinois Central R. Co. v. Behrends, 233 U. S. (34 Sup. Ct. Rep., 646), was a case where the carrier and the employee were both, at the time of the injury, engaged in intrastate commerce, and although the engine in question was soon to be coupled to interstate cars, it was then hauling intrastate freight, and the Employers' Liability Act was held not to apply.

For the reasons stated, we hold that the defendant Southern Railway Company, at the time of the injury, was engaged in interstate commerce, and plaintiff was employed by it in such commerce, so as to make the Federal Employers' Liability Act applicable to the case. The same reasoning applies to the North Carolina Railroad Company, lessor of its codefendant, as it authorized and is responsible for the latter's acts under its lease, and is, therefore, engaged in commerce between the States, being itself a common carrier. The case of *N. C. R. R. Co. v. Zachary,*

(37) *supra,* also disposes of this point, for it was there held that the North Carolina Railroad Company was liable under said act as an interstate carrier, under facts and circumstances similar to those shown in the record.

The defendant did not plead assumption of risk, nor was any issue relating thereto tendered by it, or submitted by the court. This is necessary, under our practice and procedure, in order to raise that question, as we regard it as a distinct defense, which must be pleaded and an issue thereon tendered by the defendant or submitted by the court of its own motion. *Dorsett v. Manufacturing Co.*, 131 N. C., 254; *Eplee v. R. R.*, 155 N. C., 293; *Bolding v. R. R.*, 123 N. C., 614; *West v. Tanning Co.*, 154 N. C., 44.

It may be well to refer to one other matter. The petition to remove the case to the Federal court, because of the diversity of citizenship, as between the plaintiff and the defendant Southern Railway, and the alleged fraudulent joinder of the North Carolina Railroad Company, a domestic corporation, was rightly denied, as a general allegation of fraud is not sufficient. There are no facts alleged which, if found to exist, would constitute a case of fraudulent joinder. The petition, on its face, must be sufficient in this respect to raise the issue; and if it is, then the issue would be tried in the Federal court. But the State court must first pass upon the sufficiency of the petition and decide for itself if it states a case for removal, before it is required to surrender its jurisdiction. *Lloyd v. R. R.*, 162 N. C., 485, and authorities cited; *Herrick v. R. R.*, 158 N. C., 307; *Hough v. R. R.*, 144 N. C., 692; *Rea v. Mirror Co.*, 158 N. C., 24.

If we hold that the North Carolina Railroad Company is liable as a joint tort feasor, by reason of the use of its main tracks, with the siding, in interstate traffic, there could be no fraudulent joinder, as a plaintiff is entitled to join all who are liable to him for a joint tort, or to select among them whom he will sue. *Hough v. R. R., supra.* It was said in that case: "The plaintiff, or party aggrieved by the wrong, may make it joint or several, at his election, and it is not open to the wrongdoer to complain of the election so made or to dictate how he (38) shall make his choice. If the injured party chooses to sue the wrongdoer jointly, he thereby declares that the tort shall be joint, and the law so regards it, without listening to or even hearing from the wrongdoer. And so it is when he sues them separately. His election finally determines what shall be the character of the tort, whether joint or several. This principle has controlled the courts in deciding upon applications for the removal of causes from the State to the Federal courts whenever it becomes necessary to inquire whether a separable controversy is presented as between the plaintiff and the non-resident defendant, or opposite party, of diverse citizenship." A strong authority is *Torrence v. Shedd*, 144 U. S., 527, in which *Justice Gray* thus tersely stated the rule: "A defendant has no right to say that an action shall be

several which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleading." The domestic corporation cannot lease its railway and permit its physical connection at both ends with other tracks laid by its lessee, for the more convenient and practical use of the latter's main line acquired from the lessor, without being responsible for torts committed in the use of such lateral or side tracks. The construction of such tracks was manifestly contemplated by the parties to the lease, and what is authorized, expressly or by necessary implication, makes him who gave the authority responsible for any illegal exercise of it. *Qui facit per alium, facit per se.*

We have discussed some of the questions not strictly before us on this appeal, because it was said, in the former opinion by this Court, that they were not *finally* settled, and as the facts have since been more fully developed, our opinion upon them should be more definitely and conclusively stated. The intimation in its former opinion is now the final decision of the Court.

There was no error in the several rulings of the court at the last trial. No error.

Cited: Shaw v. Public-Service Corp., 168 N.C. 615; *Horton v. R.R.*, 169 N.C. 116; *Sears v. R.R.*, 169 N.C. 453; *Deligny v. Furniture Co.*, 170 N.C. 201; *Hinson v. R.R.*, 172 N.C. 647, 648; *Meadows v. Telegraph Co.*, 173 N.C. 243; *Moore v. R.R.*, 179 N.C. 643; *Cobia v. R.R.*, 188 N.C. 491; *Hurt v. Mfg. Co.*, 198 N.C. 4; *Hubbard v. R.R.*, 203 N.C. 681; *Nichols v. Trust Co.*, 231 N.C. 160.

JAMES O. WYNN v. ANNA M. GRANT, ADMINISTRATRIX.

(Filed 20 May, 1914.)

1. Principal and Agent—Limited Authority—Inquiry—Knowledge—Ratification.

Where a special agent acts beyond his authority as such or a general agent acts beyond his ostensible powers, or there is a limitation put thereon of which the person dealing with him is put upon inquiry which would reasonably lead to knowledge that his powers were limited and that he was not authorized to act in the contemplated capacity as representing his

principal, the principal would not be bound unless he afterwards ratified the transaction by knowingly receiving and retaining benefits thereunder, or otherwise.

2. Same—Deeds and Conveyances—Registration—Cancellation of Record—Innocent Purchaser.

One dealing with a trustee in a deed of trust to secure borrowed money is fixed with notice of the terms expressed in the registered deed, and when it appears therein that one of the notes it secures has not reached maturity, the *cestui que trust* is not bound by any transaction made in his behalf by the trustee as his agent by which he agrees to take before maturity less than the amount specified in the note for its satisfaction and the cancellation of the deed of record; and his failure to produce the note when requested is evidence of his want of authority to thus act, sufficient to put the one dealing with him upon inquiry from which knowledge will be imputed. Hence, when under such circumstances a purchaser of lands has the trust deed thus canceled of record he is not an innocent purchaser for value without notice of the mortgagee's right, and the latter is not bound by the act of the trustee when he has not knowingly received a benefit therefrom, or has not otherwise ratified it.

3. Principal and Agent—Ratification—Knowledge.

In order to bind a principal to the unauthorized acts of his agent by ratification, the act of ratification by the principal must have been done with knowledge of the material facts.

4. Same—Repudiation in Part.

Where the principal has received no benefits from the unauthorized acts of his agent except those that he was otherwise entitled to receive, his retaining these benefits does not alone amount to an act of ratification; and it is further held, under the circumstances of this case, that the doctrine forbidding the principal to ratify the acts of his agent to the extent of the benefits he has received, and repudiate it as to its disadvantages, has no application.

5. Appeal and Error—Trials—Instructions—Verdict, Directing—Procedure—Rules of Court.

It is not required that an exception to the direction of a verdict by the court upon the evidence should conform to the particulars of Rules 19 and 34 of the Supreme Court regulating appeals, for it is analogous to instances of nonsuit, which require that the court examine into the pertinent evidence in the record.

APPEAL by defendants from *Carter, J.*, at October Term, 1913, (40) of BUNCOMBE.

Action to recover the amount of a note for $1,750, secured by a deed of trust, to cancel the satisfaction of the deed of trust on the record, which was wrongfully entered by the trustee, F. Rogers Grant, and to foreclose the deed of trust by sale of the land described therein, under the order of the court. The salient facts of the case are these:

In the early part of the year 1912 the defendants Mrs. Foraham and Mrs. Coachman, desiring to purchase a lot in the city of Asheville, N. C., where they intended to reside in the future, authorized Rev. M. Dickey to act for them in that behalf, and he in turn solicited the aid and assistance of Mr. Robert U. Garrett in making and completing the purchase. The place selected was the Pearson Cottage, on Victoria Road, in the city of Asheville, owned by Mrs. Bertha C. Welfley, at the price of $5,750, being a house and lot which had been sold by the plaintiff, James O. Wynn, who lived in Atlanta, Georgia, but did a realty business in Asheville, on 22 April, 1911, to the said Mrs. Bertha C. Welfley, for the sum of $4,500, she paying $1,000 cash, and giving her two notes of $1,750 each, dated 22 April, 1911, the first to be paid on 22 April, 1912, and the second on 22 April, 1913, and bearing interest at the rate of 6 per cent per annum, payable semiannually, on the first days of January and July. Mrs. Bertha C. Welfley and her husband, M. L. Welfley, made a deed of trust to F. Rogers Grant of Asheville,
(41) president of the H. F. Grant Realty Company, who was the plaintiff's realty agent in Asheville, to secure the balance due for the property.

The purchase money for the house and lot sold to Mrs. Linnie Coachman Foraham and Mrs. Jeannette Dunlap Coachman by Mrs. Bertha C. Welfley and her husband, M. L. Welfley, was paid by them out of their own funds, by two checks for the sum of $2,875 each, sent to their brother-in-law, Rev. M. Dickey, and turned over to Robert U. Garrett, who in turn placed the same to the credit of his own account in the Battery Park Bank of Asheville, N. C., and against which he, on 22 March, 1912, drew a check, payable to the H. F. Grant Realty Company, for $5,709, the balance due the plaintiff, James O. Wynn, by defendant Bertha C. Welfley and her husband, including the balance of the purchase money due Mrs. Bertha C. Welfley by Mrs. Foraham and Mrs. Coachman, after deducting some items of taxes and adding a small amount for furniture, and on that date delivered the said check to F. Rogers Grant, trustee, a part of the same to be paid over to the plaintiff, James O. Wynn, in full of the balance of principal and interest due him by Mrs. Bertha C. Welfley and her husband as purchase money on said house and lot, and the remainder to be delivered to Mrs. Bertha C. Welfley in payment of the balance of purchase money coming to her from the said Linnie Coachman Foraham and Jeannette Dunlap Coachman, purchasers of said property, which payment was accepted for said purpose by the said F. Rogers Grant, trustee.

On 22 March, 1912, at the time of the making of the payment to F. Rogers Grant, trustee, by Robert U. Garrett, F. Rogers Grant went to the

office of the register of deeds of Buncombe County, where the deed of trust was recorded, and in the presence of the register of deeds made the following entry: "I acknowledge the full satisfaction of this deed of trust, this 22 March, 1912. F. Rogers Grant, Trustee. [Seal]" On the same day, 22 March, 1912, F. Rogers Grant, trustee, in the name of the H. F. Grant Realty Company, remitted to plaintiff, James O. Wynn, at Atlanta, Georgia, by check on the American National Bank of Asheville, N. C., the sum of $1,944.74, in full payment of the outstanding (42) purchase-money note of Bertha C. Welfley and M. L. Welfley for $1,750, due 22 April, 1912, together with the accrued interest thereon, and also the interest accrued to that date on the remaining outstanding purchase-money note of Bertha C. Welfley and M. L. Welfley for $1,750, due 22 April, 1913, neither of said notes being due at said time, and only a part of the interest having accrued on each, the interest which had accrued since 1 January, 1913, not being due on either of said notes. But the outstanding Welfley purchase-money note of $1,750, due 22 April, 1913, although paid to Grant by Garrett for payment to Wynn, was not remitted to Wynn, except the accrued interest up to 22 March, 1912, nor was the receipt thereof from Garrett acknowledged by Grant in making the partial remittance to Wynn, but instead thereof, in his letter of transmittal, he asked whether Wynn would discount said note, implying thereby that it had not yet been paid to him, but that Welfley might pay it at any time if a discount were allowed. To this Wynn replied, under date of 28 March, 1912, that he did not care to discount the said note of $1,750, due 22 April, 1913, until he could find a way to use the money, but would probably like to do so during the following summer, provided he could discount it on good terms. The balance of the payment by Garrett to Grant, trustee, for plaintiff, James O. Wynn, was never turned over to him, either by Grant or by the H. F. Grant Realty Company, Grant dying soon thereafter, and his wife, Mrs. Anna M. Grant, qualifying as his administratrix.

The plaintiff, James O. Wynn, did not know that the amount of the note of the Welfleys, due 22 April, 1913, had been paid to F. Rogers Grant, or the Grant Realty Company, until after the death of Grant, and then discovered it accidentally. There was no evidence that any express authority was given by plaintiff to Grant or the Realty Company to collect the note. F. Rogers Grant died insolvent, and the Realty Company is insolvent. The defendants are Anna M. Grant, administratrix of F. Rogers Grant, Mr. and Mrs. Welfley, Mrs. Coachman, and Mrs. Foraham.

The judge directed the jury that, if they believed the evidence, (43) to answer all the issues in the negative, and accordingly the returned the following verdict:

1. Was F. Rogers Grant, by virtue of his office as trustee in the deed of trust, authorized to receive the money thereby secured and to release the same of record in advance of the maturity of the notes thereby secured? Answer: No.

2. Was the said F. Rogers Grant and the H. F. Grant Realty Company, or either of them, the agents of the plaintiff, James O. Wynn, and authorized as such to receive the money in payment of the notes secured by said deed of trust due and payable on 22 April, 1913? Answer: No.

3. Were the defendants Jeannette Dunlap Coachman and Linnie Coachman Foraham innocent purchasers for value without any knowledge of any lack of authority or power or any alleged lack of power or authority in F. Rogers Grant, the trustee in said deed of trust, to release said deed of trust of record? Answer: No.

4. Are the defendants M. L. Welfley and Bertha C. Welfley indebted to the plaintiff on the note due 22 April, 1913, and if so, in what amount? Answer: $1,750, with interest from 22 March, 1912.

Judgment was entered upon the verdict, and defendants appealed.

Merrimon, Armfield & Adams for plaintiff.

George A. Shuford, Britt & Toms, Manning & Kitchin and Thomas W. Varnon for defendant.

WALKER, J., after stating the case: The defendants contend that the plaintiff is not entitled to recover upon the remaining note for $1,750, and assign, substantially, five reasons in support of their position, as follows:

1. Mrs. Coachman and Mrs. Foraham were purchasers for value and without notice.

2. F. Rogers Grant and the Grant Realty Company were general agents of the plaintiffs, or special agents, with full and ample authority to accept payment of the notes.

(44) 3. That the trustee was authorized and empowered to release the deed of trust.

4. That the plaintiff ratified the action of Grant by accepting the payment of the first note.

5. That the defendants were fully protected by the record of cancellation.

None of these grounds, in our opinion, is tenable.

The defendants Mrs. Coachman and Mrs. Foraham could not, in any possible view, be *bona fide* purchasers for value and without notice, and we do not clearly perceive upon what real ground this suggestion can be based. If the trustee, F. Rogers Grant, had entered satisfaction of the

debt and deed of trust upon the margin of the record before they bought from the Welfleys, they might be in a position to plead a *bona fide* purchase, in their protection, if they bought for value and without notice of the unauthorized and wrongful satisfaction of the deed of trust by the trustee, though we do not decide that the plea could even then be available, as the question is not now before us, the fact being that they paid the money to Grant by their agent, Garrett, who saw him satisfy the deed, and who knew, at the time, that at least one of the notes secured by it was not then due, and if he had taken the slightest pains to examine the deed, he would have discovered, at once, that neither of the notes was due, and one of them would not mature for more than a year. Garrett, the agent, did not demand the production of the notes, so as to ascertain if Grant had the requisite authority to collect them and satisfy the deed of trust, but he injudiciously paid the money to him without the slightest inquiry into the facts, when it was so very easy to have made one. It should have occurred to any man of ordinary business judgment and prudence to make such an inquiry, and why it was not done does not appear, except that he relied implicitly upon Grant's virtual representation that he had the authority, and his blind trustfulness has caused the whole trouble, and an unmerited injury and loss to his principals. But they must bear it, and not the plaintiff, who in no way contributed to it, and who, so far as the case shows, was without fault. If Garrett did not have actual notice of sufficient facts to put him on his (45) guard, he had what is equivalent to it, the means of knowledge, or constructive notice. Information of all the facts was easily within his reach, but he made no effort to acquire it, and his principals must suffer for his neglect. *Qui facit per alium, facit per se.* "Constructive notice from the possession of the means of knowledge will have the effect of notice, although the party was actually ignorant, merely because he would not investigate. It is well settled that if *anything appears* to a party calculated to attract attention or stimulate inquiry, the person is affected *with knowledge* of all the inquiry would have disclosed." *Bunting v. Ricks,* 22 N. C., 130; *Le Neve v. Le Neve,* 2 White and Tudor's Leading Cases in Equity, 144; *Wittkowsky v. Gidney,* 124 N. C., 437; *Blackwood v. Jones,* 57 N. C., 54; *May v. Hanks,* 62 N. C., 310; *McIver v. Hardware Co.,* 144 N. C., 478. The rule is thus put in *Wilson v. Taylor,* 154 N. C., 211: "A party who may be affected by notice must exercise ordinary care to ascertain the facts; and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired if he had made the necessary effort to discover the truth," citing *Hulbert v. Douglass,* 94 N. C., 122; *Bryan v. Hodges,* 107 N. C., 492, and other cases *supra.*

Garrett knew that one note was not due, and could have ascertained all the other material facts—want of possession of the notes by Grant, etc., but he was not at all diligent. As said in *McIver v. Hardware Co., supra,* at p. 489: "The very circumstances of the case imply full notice to it of all the facts necessary to charge it with liability"; and so it is here as to Garrett.

It has been held by this Court that where a mortgage (or deed of trust) is registered upon a proper probate, it is notice to all the world of the existence of the mortgage, of its contents, and of the nature and extent of the charge created by it. When a party is put upon inquiry, he is presumed to have notice of every fact and circumstance which a proper examination would enable him to find out. *Ijames v. Gaither,* 93
(46) N. C., 358. See, also, *Loan Association v. Merritt,* 112 N. C., 243; *Collins v. Davis,* 132 N. C., 112; *Kernochan v. Durham,* 12 L. R. A., 41.

The agency of the trustee named in a deed of trust is restricted to the specific duties and powers given by the terms of the deed, unless enlarged by express grant or by inference from special facts and circumstances. *Woodcock v. Merrimon,* 122 N. C., 731.

The very circumstances of the case imply full notice to Garrett of the essential facts which would have caused a reasonably prudent man to require a production of the note or satisfactory reasons for its nonproduction. If he had only made his check payable to the plaintiff, it would have prevented the consummation of the fraud upon his principals by Grant. But there was not the least precaution taken by him. He took Grant too much at haphazard and upon trust that he was clothed with due authority. It was what Sir William Blackstone calls "happy-go-lucky carelessness." Unfortunately, he found too late that his excessive confidence had been betrayed. But the consequences of all this failure to exercise care must not be visited upon the plaintiff.

The second proposition of defendants is equally untenable. Grant was not the general or special agent of the plaintiff to accept payment of the notes and satisfy the deed of trust on the record. He had no express authority, but, on the contrary, it had been denied to him, when plaintiff, in reply to the request that he discount the last note, refused to do so, but told him that he might consent to it the next summer. So he had no express authority, and there is no evidence of any implied authority.

There is a general principle that when one deals with an agent, it behooves him to ascertain correctly the scope and extent of his authority to contract for and in behalf of his alleged principal, for under any other rule, it is said, every principal would be at the mercy of his agent, however carefully he might limit his authority.

The power of an agent is not unlimited unless in some way it either expressly or impliedly appears to be so, and the person who proposes to contract with him as agent for his principal should first (47) inform himself where his authority stops or how far his commission goes, before he closes the bargain with him. *Biggs v. Insurance Co.*, 88 N. C., 141; *Ferguson v. Manufacturing Co.*, 118 N. C., 946.

The principal is held to be liable upon a contract duly made by his agent with a third person: (1) When the agent acts within the scope of his actual authority. (2) When the contract, although unauthorized, has been ratified. (3) When the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his authority, the term "apparent authority" including the power to do whatever is usually done and necessary to be done in order to carry into effect the principal power conferred upon the agent and to transact the business or to execute the commission which has been intrusted to him; and the principal cannot restrict his own liability for acts of his agent which are within the scope of his apparent authority by limitations thereon, of which the person dealing with his agent has no notice. The principal may also, in certain cases, be estopped to deny that a person is his agent and clothed with competent authority, or that his agent has acted within the scope of this authority which the nature of the particular transaction makes it necessary for him to have. Tiffany on Agency, 180 *et seq.; Biggs v. Insurance Co., supra; Bank v. Hay,* 143 N. C., 326; *Brittain v. Westhall,* 135 N. C., 495; *Swindell v. Latham,* 145 N. C., 144.

We said more recently in *Latham v. Fields,* 163 N. C., 356: "The principal is bound by all the acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions, unknown to the persons dealing with him; and this is founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and as having authority in the matter, shall be bound by it. *Carmichael v. Buck,* 10 Rich. Law, 332 (70 Am. Dec., 226); Story on Agency, sec. 127. 'Where a person, by words or conduct, represents or permits it to be represented (48) that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact.' *Trollinger v. Fleer,* 157 N. C., 81; *Metzger v. Whitehurst,* 147 N. C., 171. These cases fairly illustrate this doctrine and define its limits."

But there is no evidence to bring the case within any of these principles. Grant was not expressly authorized to act for plaintiff in collecting the

money and canceling the deed of trust, nor did the latter hold him out, by any act or conduct of his, as possessing any such authority, and there was nothing that should reasonably have induced the defendants to have supposed that he was clothed with such a power. That Grant had sold real estate for him, or collected rents, was not sufficient for the purpose.

The facts, as they appear in the record, are governed absolutely by the leading case of *Smith v. Kidd,* 68 N. Y., 130 (23 Am. Rep., 157). These propositions established therein are taken from the headnote, which states them with accuracy:

1. Payment of money due on written security, to an agent who has not either possession of the security or express authority to receive such money, is not good, and the principal may compel the debtor to pay it again.

2. The facts that a loan is made through the agent, and that he has collected the interest, and that he has, in special cases, been authorized to collect the principal of particular mortgages, are not evidence of general authority to collect moneys due his principal, and one who pays to him the amount of a mortgage, without his having the mortgage in his possession, does so at his own risk.

3. Even though an agent has authority to receive payment of an obligation, this does not authorize him to receive payment before it is due.

The Court said more particularly, and with closer application to facts like ours: "If money be due on a written security, it is the duty of
(49) the debtor, if he pay to an agent, to see that the person to whom he pays it is in possession of the security. For though the money may have been advanced through the medium of the agent, yet, if the security do not remain in his possession, a payment to him will not discharge the debtor. *Henn v. Conisby,* 1 Ch. Cas., 93, note. And even the agent being usually employed in the receipt of money does not *in this instance* constitute such authority as will serve the debtor. It has been so held in respect to money paid upon a bond to one who usually received money for the obligee, but who had not the custody of the bond in question (*Gerard v. Baker,* 1 Ch. Cas., 94), and even where the obligor had for several years paid the interest and part of the principal to an agent of the lender through whom the money had been borrowed, who had not the possession of the bond, but had regularly paid the money over to the obligee except the last payment, the obligor was adjudged to pay the last sum over again. For it was held, notwithstanding the hardship of the case, that the circumstances of the agent's having before received the interest and part of the principal did not imply that he had any authority to receive it; but as long as he had paid it over, all was well, and any other might have carried it to the creditor as well as he. *Wolstenholm v.*

Davies, 1 Freem. Ch., 289. In this case the master of the rolls said that it was the constant rule of that court that if the party to whom the security was made trusted the security in the hands of the scrivener, payment to the scrivener was good payment; but if he took the security into his own keeping, payment to the scrivener would not be good payment, unless it could be proved that the scrivener had authority from the party to receive it, and that such authority could not be implied from the fact that the scrivener had previously received principal which he had paid over to the obligor," citing Story on Agency, secs. 98 and 104; *Curtis v. Drought,* 1 Molloy, 487; *Williams v. Walker,* 2 Sandf. Ch., 325; *Doubleday v. Kress,* 50 N. Y., 410. And in *Tappan v. Morseman,* 18 Iowa, 500, the doctrine is thus stated by *Judge Dillon:* "So that it may be laid down as a general rule that if a debtor owing money on a written security pays to or settles with another as an agent, it is his duty, at his (50) peril, to see that the person thus paid or settled with is in possession of the security. If not thus in possession, the debtor must show that the person to whom he pays or with whom he settles has special authority, although for some reason not in possession of the security." That case was cited with approval in *Security Co. v. Graybeal,* 85 Iowa, 543 (39 Am. Rep., 311), which is a very instructive case, and closely resembles this one. See *Crane Co. v. Gruenewald,* 120 N. Y., 274 (17 Am. St. Rep., 643); *Dixon v. Wright,* 24 Am. Rep. (Miss.), 677; *Knife Co. v. Bank,* 19 Am. Rep. (Conn.), 517; *Doubleday v. Kress,* 10 Am. Rep. (N. Y.), 502; *Jummel v. Mann,* 56 N. E. Rep., 161; *Lenoir v. DuHoe,* 41 N. W. Rep., 962; *Insurance Co. v. Eldridge,* 102 U. S., 545; 2 Jones on Mortgages, 957.

To make the application of these authorities to our case plain, we recite a part of the evidence.

M. L. Welfley testified: "I authorized Mr. Garrett to witness the release of the deed in trust, and I notified Mr. Grant to pay to my wife the purchase money, less, of course, the deed of trust and the taxes, whatever taxes were due on the property. I asked at the time for the notes. I asked Mr. Grant. I saw him the day the deal was to be closed; at least, he told me that Mr. Garrett would pay him, and I said, 'How about the notes? Have you the notes?' And he read me a letter purporting to be from Mr. Wynn (the letter incorporated in Mr. Wynn's deposition). He said he could not deliver the notes, as Mr. Wynn was in California, and that he, Mr. Wynn, could not return the notes to me until he returned to Atlanta, as no one had access to his safety-deposit box." The letter referred to is that of the plaintiff to Grant, dated 28 March, 1912, in which Grant is informed that Wynn will not discount the last note for $1,750, and certainly not until the next summer. And after all this,

Garrett handed the check to Grant "as the agent of Welfley, believing that he was the agent of Wynn," and so he testified. Not only did they fail to *require* the production of the notes, or written authority from Wynn, or to make the check payable to him, but one of them was actually notified that he did not have the notes in his possession, and if
(51) Grant read the letter correctly to Welfley, the latter was fully notified that Wynn had refused to accept payment and surrender the note. If he misread the letter to him, it was not Wynn's fault, but the result of his misplaced confidence in Grant. It will be observed that plaintiff, instead of holding out Grant as having the requisite authority, was withholding it by refusing to accept the proposal for the discount and present payment of the note. As said in a similar case: "He had in his own hands the means of absolute protection. He had only to see to it that he received his note when he paid his money. If he neglected this simple requirement, demanded not more by the law than by common prudence, he paid at his peril, and if loss occurs, he must bear it. One party or the other must suffer, and he, being the party in fault, must bear the burden." *Hollingshead v. Globe Investment Co.*, 42 L. R. A. at p. 664, and the well-considered opinion in that case (on rehearing) is an authority strongly supporting the view of the law that should control our decision upon the uncontroverted facts of this case. See, also, a cogent statement of the principle in Dunlap's Paley on Agency, p. 274; *Smith v. Bank*, 29 L. R. A. (N. S.), 576; *Swift v. Bank*, 114 Fed. Rep. (C. C. A.), 643; *Scott v. Taylor*, 58 So. Rep., 30; *Krons v. Medelkafen*, 62 N. E. Rep., 239; *Fortune v. Stockton*, 65 N. E. Rep., 367; *Miller v. Mitchell*, 52 S. E. Rep., 478.

In *Smith v. Bank, supra,* the Court, in stating a case in material respects like this, says: "If the defendant desired to have the cattle released from the lien of the mortgage, he should have required the production and cancellation of the note the mortgage was given to secure. Instead of doing this, he remitted the money to pay the mortgage debt to McAllister & Co., in the confidence that they would apply it to that purpose. His confidence was misplaced. They had before that sold and transferred the note to the plaintiff. They did not apply the money to its payment, but, instead, applied it to their own use, and wrongfully executed a release of the mortgage that is of no value against the plaintiff."

(52) The Court held in *Hughes v. Clifton*, 41 So. Rep. (Ala.), 998, that it was gross negligence for a debtor to pay to a supposed agent to collect, without calling for the notes and mortgage and having them produced, citing *Smith v. Kidd, supra,* and also *Haines v. Pohlman*, 25 N. J. Eq., 183, where it was held: "The inference in such case is founded

on the custody of the securities, and it ceases whenever they are withdrawn by the creditor; and it is incumbent upon the debtor who makes payment to the attorney or agent, relying upon such inference, to show that the securities were in his possession on each occasion when the payments were made."

The Court held in *Dibble v. Low,* 80 S. E. (Ga.), 998, that when the maker of a note pleads that he has paid the amount due thereon to one authorized to collect it for the payee, he assumes the burden of showing, not only that he has paid the money, but that it was paid to the person authorized to receive it, or that it actually reached the holder's hands. Tiffany on Agency, pp. 212, 213; *Hollingshead v. Investment Co., supra,* and cases cited; *Ward v. Smith,* 7 Wall. (U. S.), 447 (19 L. Ed., 207); *Pease v. Warren,* 29 Mich., 9; *Murphy v. Barnard,* 162 Mass., 72.

We think the principle which we have stated, and as settled by the authorities cited, is fully sustained by this Court in the case of *Loan Association v. Merritt,* 112 N. C., 243, where it appeared that the purchasers of the equity of redemption from the mortgagor paid the amount of the bonds secured by the mortgage to the mortgagee or original holder of them, who had assigned the same to a third party, without any inquiry by the purchaser of the equity as to the ownership or possession of the bonds at the time of the payment and without requiring their production or sufficient excuse or reason for not producing them. The payment was held not to be good against the real holder.

The trustee could not enter satisfaction until the money was paid, and his act was void as to the plaintiff, who held the unpaid note, as he acted without his authority and exceeded his powers, as defined in the deed. *Woodcock v. Merrimon,* 122 N. C., 731; 27 Cyc., 1417; Pingrey on Mortgages, 1225; Devlin on Deeds, sec. 710a. The following cases (53) are similar to the one at bar, in this respect: *Weldon v. Tallman,* 67 Fed. Rep. (C. C. A.), 986; *McPherson v. Rollins,* 107 N. Y., 316; *Hirsch v. Tozier,* 143 N. Y., 390 (42 Am. St. Rep., 729). This principle, as to the invalidity of the cancellation, applies in this case, at least, as there is no one who can claim to be a *bona fide* purchaser for value and without notice, as we have shown.

There was no ratification of Grant's acts by the plaintiff. He had no knowledge of the facts and circumstances, which is an essential element of a binding ratification. *Johnson v. Royster,* 88 N. C., 194; Story on Agency, sec. 243; *Owings v. Hall,* 9 Peters (U. S.), 607; Tiffany on Agency, pp. 61 and 72, where he says: "Since ratification rests upon assent, to be binding it must, as a rule, be made with full knowledge of all the facts necessary to an intelligent exercise of the right of election. 'No doctrine is better settled on principle or authority than this, that the

ratification of the act of an agent previously unauthorized must, in order to bind the principal, be with full knowledge of the material facts. If the material facts are either suppressed or unknown, the ratification is invalid, because founded on mistake or fraud.' Hence, if the principal has ratified upon insufficient knowledge, he may, as a rule, after he is informed of the facts, disaffirm. Knowledge of the facts, however, is sufficient; knowledge of their legal effect is not requisite."

Plaintiff did not know that Grant had received the money for the last note until after the latter's death, and, besides, he had refused expressly to discount the note.

The rule that the principal must ratify all or none of what his pretended agent has done, and that he cannot ratify that part which is beneficial and reject that which is not, does not apply, for one reason, at least, and that is, because Grant and the Realty Company had become insolvent, and he could not be placed in *statu quo,* and, further, because when he acquired knowledge, the first note had matured and he was entitled to have it paid, and consequently had the right to retain what he had received in payment of it.

(54) It is a general and just rule that when a loss has occurred which must fall on one of two innocent persons, it shall be borne by him who occasioned it, even without any moral wrong or positive fault chargeable to him, and more especially so, if there is bad faith or even a lack of due care on his part, which caused the misfortune.

This is a case of great and peculiar hardship, and one which we would gladly relieve against in behalf of the defendants, were it possible, consistent with the maintenance of sound and important principles of law and rules of equity, and with dispensing justice to the equally innocent creditor, who has as just and meritorious a claim upon our favorable consideration. The case is not one where, if one of two innocent persons must suffer from the wrongful act of a third, the defendants should be relieved from the consequences of their payment to the wrong party, as the plaintiff, who is the owner of the note, was not the cause of their making the payment and did not induce them to make it, but they acted solely upon their own supposition, without due inquiry and care, that Grant had the authority to collect the money. It would be grievous hardship and injustice to the plaintiff, and establish a new and oppressive rule of liability in the law, should we decide otherwise. The charge of the court was correct.

No error.

PER CURIAM. Plaintiff in *Wynn v. Grant* moved to dismiss or affirm. The motion is based upon two grounds: (1) Failure to comply with

Rule 19 as to assignments of error. (2) Failure to file briefs in accordance with Rule 34. The exceptions relied on are to the charge of the judge on the several issues directing the jury to answer the issues in a certain way, if they believe the evidence. This presents substantially the same question raised by allowing a motion to nonsuit, as it requires a review of the evidence, and we have uniformly held that it is sufficient to except and assign error when a nonsuit is allowed.

In analogy to this ruling, the motion to dismiss upon this ground must be denied. The penalty for failure of brief when filed to comply with the new rules is that the Court will not consider exceptions (55) not discussed according to the rules. The case of *Porter v. Cigar Box Co.*, 164 N. C., 396 (80 S. E., 443), has no application to this record.

Motion denied.

Cited: Powell v. Lumber Co., 168 N.C. 638; *Robinson v. B. of L. F. & E.*, 170 N.C. 549; *Furniture Co. v. Bussell*, 171 N.C. 485; *Brimmer v. Brimmer*, 174 N.C. 440; *Mfg. Co. v. McPhail*, 179 N.C. 386; *R. R. v. Comrs.*, 188 N.C. 267; *Cunningham v. Long*, 188 N.C. 614; *McCall v. Institute*, 189 N.C. 781; *Hooper v. Trust Co.*, 190 N.C. 426; *Mills v. Kemp*, 196 N.C. 314; *Bank v. Liles*, 197 N.C. 418; *West v. Jackson*, 198 N.C. 694; *Morris v. Y & B Corp.*, 198 N.C. 718; *Bank v. Trust Co.*, 199 N.C. 585; *Austin v. George*, 201 N.C. 381; *Hargett v. Lee*, 206 N.C. 539; *Ins. Co. v. Dial*, 209 N.C. 350; *Dorman v. Goodman*, 213 N.C. 410; *Barrow v. Barrow*, 220 N.C. 72; *Ins. Co. v. Knox*, 220 N.C. 732; *Blankenship v. English*, 222 N.C. 92; *McLain v. Ins. Co.*, 224 N.C. 840; *Tuttle v. Building Co.*, 228 N.C. 511.

FANNIE SCHAS v. EQUITABLE LIFE INSURANCE COMPANY.

(Filed 20 May, 1914.)

1. Insurance, Life—Application—Questions Answered—Interpretation.

The application of the insured and the policy of life insurance issued thereon should be construed together; and every question in the application specifically bearing upon the insurable condition of the applicant should be fairly, and at least substantially, answered by him, so that the insurer may obtain the desired information upon which to decide whether or not to accept the risk and issue the policy.

2. Same—Material Representations—Fraudulent Intent.

Every fact which is untruly stated or wrongfully suppressed in the application for a policy of life insurance must be regarded as material, if

the knowledge of it in the one case or ignorance of it in the other would naturally or reasonably influence the judgment of the insurer in issuing the policy, or in estimating the degree or character of the risk, or in fixing the rate of premium, irrespective of the question of a fraudulent intent on the part of the applicant, the correctness of the statement, when called in question, being for the determination of the jury. Revisal, sec. 4808. *Bryant v. Insurance Co.*, 147 N. C., 181, cited as controlling.

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

In his application for a policy of life insurance the deceased represented he had not been under the care of a physician within two years; that he was at that time in good health; and there was evidence tending to show that both these answers were false, and that the insured had, within that period, and up to the time of his application, been suffering from a serious ailment, attended with nervous derangement and indigestion, the result of his own evil habits and self-abuse, and which, increasing in intensity, resulted in his suicide: *Held*, it was for the jury to determine, upon the evidence, whether the representations were false in the manner stated; and if so, the policy would be avoided as a matter of law, without reference to a fraudulent intent of the insured in making them.

(56) APPEAL by defendant from *Carter, J.*, at September Term, 1913, of BUNCOMBE.

This is an action upon a policy of insurance issued 8 January, 1912, by defendant to Lewis Schas, for the benefit of his mother, the plaintiff, Fannie Schas. Lewis Schas died about 3 September, 1912. Defendant alleged that he committed suicide, and that he obtained the said policy by falsely representing to the defendant that, at the time of its delivery, he was then in good health, whereas he was suffering from a serious ailment, attended with nervous derangement and indigestion, which was the result of his own evil habits, practices, and abuse of himself; and, further, that he falsely represented that for two years immediately preceding the time of his medical examination he had not consulted a physician, or been under a physician's care, whereas he had consulted a physician and been under his care for serious ailments and disturbances of his health. That by these false representations defendant was induced to issue the policy, and that by reason thereof it was and is void, and plaintiff is, therefore, not entitled to recover thereon.

There was evidence that the insured had been afflicted with a nervous disease resulting from self-abuse, which increased in its intensity until he died. We need not consider the issue as to suicide, but only the one as to the false representation.

In respect to that issue, the court charged the jury, in part, as follows:

"1. A fraud or deception may be perpetrated as well by intentional concealing as by an active, affirmative deception. In this case it would not be sufficient to establish fraud for the defendant to show that the

facts were not as stated in the application for insurance, nor yet would it be sufficient if the defendant went further and showed that the applicant knew that the facts were different; they would have to go still further and show that the facts that were not stated were material, and that they were known to the applicant to be material, (57) and that he purposely withheld them from the company with knowledge of the materiality, for the purpose of deceiving and misleading the company.

"2. Although you may find from the evidence in the case, wherever it comes from, that the defendant was addicted to a practice that had seriously undermined his health, and that that fact was not disclosed to the company, in order to constitute a fraud, it would be necessary that the applicant, Lewis Schas, should have known that the matter was a serious matter, and that he intentionally withheld the fact from the company with the intention of misleading and deceiving the company.

"3. In other words, he must have practiced an intentional deception upon the company, either by making statements to the company which he knew to be false or by intentionally withholding from the company facts which he knew to be material. If he did either of these things, and the company relied upon the information furnished by him and was thereby induced to enter into this contract, why it would be a fraud."

There was a verdict for the plaintiff, and defendant appealed from the judgment thereon.

Mark W. Brown for plaintiff.

Bourne, Parker & Morrison and Theo. F. Davidson for defendant.

WALKER, J., after stating the case: This case has been tried upon the wrong theory. It is a mistake to suppose that a false representation of a material fact will not vitiate the policy unless it involves actual fraud or moral turpitude. This is not the rule we have adopted in such cases. We need not inquire whether there was a moral or intentional wrong, for if the representation made in the application was false and material, and the jury so find, and the company was ignorant of its falsity, and it is such representation as would have influenced the action of the company upon the application, in regard to whether or not it will grant the insurance, it will vitiate the policy, unless the company has in some way waived the benefit of it by its conduct and with knowl- (58) edge of the facts. "A false representation avoids a contract of insurance when material, and wholly without reference to the intent with which it is made, unless it is otherwise provided by statute." Vance on Insurance, p. 269. We need not inquire whether this rule is too

broadly stated by Mr. Vance, as it applies, with the meaning intended by him, to the facts of this case, and it has been stated by this Court substantially in the same terms. Every fact which is untruly stated or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally and reasonably influence the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium. 16 A. and E. Enc. of Law (2 Ed.), 933; Vance on Insurance, 284. This definition was adopted by us in *Fishblate v. Fidelity Co.*, 140 N. C., 589, and has since been approved several times, and is also the definition of other courts. *Bryant v. Insurance Co.*, 147 N. C., 181; *Alexander v. Insurance Co.*, 150 N. C., 536; *Annuity Co. v. Forrest*, 152 N. C., 621; *A. L. Insurance Co. v. Conway*, 75 S. E. (Ga.), 915; *Maddox v. Insurance Co.*, 65 S. E., 789; *Tally v. Insurance Co.*, 111 Va., 778; *Penn. M. Life Insurance Co. v. N. S. and Trust Co.*, 38 L. R. A. (N. S.), 33; 3 Cooley's Briefs on Insurance, p. 1953; Vance on Insurance, pp. 267, 269.

It may be stated as a general rule that where, in an application for insurance, a fact is specifically inquired about, or the question is so framed as to call for a true statement of the fact, or to elicit the information desired, reason and justice alike demand that there should be a full and fair disclosure of the fact, or at least a substantial one. 3 Cooley's Briefs on Insurance, p. 2009 (d). Our case is not essentially different from *Alexander v. Insurance Co., supra,* in which the Court 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 the highest court that, 'Assuming that both parties acted in good faith, justice would require that the contract be canceled and premiums returned.' *Insurance Co. v.*
(59) *Fletcher*, 117 U. S., 519, citing *Bryant v. Insurance Co., supra,* as decisive of the question. Our statute, Revisal 1905, sec. 4808, affirms this view, for while it declares that all statements in an application for insurance shall be construed as representations merely, and not as warranties, it further provides that no representation, unless material or fraudulent, shall prevent a recovery, the meaning of which plainly is that a material representation shall avoid the policy if it is also false and calculated to influence the company, without notice of its falsity, in making the contract at all, or in estimating the degree and character of the risk, or in fixing the premium. *Bryant v. Insurance Co., supra.* Our case is well within this rule.

It is not necessary, as said in *Fishblate's case,* that the act or conduct of the insured, which was represented by him in the application, should have contributed in some way or degree to the loss or damage for which

the indemnity is claimed. Whether it was material depends upon how, if at all, it would have influenced the company in the respect we have just stated. The determining factor, therefore, in such case is whether the answer would have influenced the company in deciding for itself, and in its own interest, the important question of accepting the risk, and what rate of premium should be charged. The questions generally are framed with a view to estimating upon the longevity of the applicant, and any answer calculated to mislead the company in regard thereto should be considered as material. There are some contingencies that cannot be provided against, but the company is entitled to have a fair and honest answer to every question which will enable it to exercise its judgment intelligently and to have the necessary information as a basis upon which to make its calculations, although its best deduction therefrom may only approximate the actual result in the particular case. 3 Cooley's Briefs on Law of Insurance, pp. 1952, 1953; *Insurance Co. v. Conway,* 11 Ga. App., 557. The applicant is required to act in the utmost good faith in giving the information. *Insurance Co. v. Conway, supra.*

In life insurance it is important for the company to know the (60) individual history and characteristics of the applicant, his idiosyncrasies, or the peculiarities of his mental and physical constitution or temperament, and his environment at the time of his application. In no other way could the risk or hazard be well determined or the premium fixed. Is he weak in body or in mind? and if so, to what extent and in what particular way, and what are his inherited traits or the mental and physical characteristics of his progenitors? The inquiry must be not only individual, but ancestral, and the investigation searching as to his past life and future intentions, as experience has shown, in order to make anything like a reliable estimate of the risk incurred. And his habits and surroundings are also to be known, considered, and weighed. Has he been exposed to any contagious, infectious, or transmissible disease, is a perfectly legitimate inquiry. Does he propose to change his residence, so that his exposure to climatic or other diseases will be greater and the hazard correspondingly increased? These and many other questions of like kind any prudent man engaged in the business of life insurance would be more than likely to ask, and the answers to them would surely tend to shape the judgment of the underwriter and influence his decision in regard to the risk. Any insurance company that would issue a policy or contract for insurance upon any other basis and without proper inquiry would be so reckless as to forfeit the confidence of the public.

The foregoing was the language we used in *Gardner v. Insurance Co.,* 163 N. C., 367, and as it is closely applicable to this case, we repeat it

here. We need only add what was decided by this Court in *Bryant v. Insurance Co.*, 147 N. C., 181, as follows:

1. Under Revisal, sec. 4808, providing that statements or descriptions in applications for policies of life insurance, or in the policy itself, are to be construed as representations and not as warranties, and shall not prevent a recovery unless material, it is not necessary to defeat a recovery that a material misrepresentation by the applicant should contribute in some way to the loss for which indemnity is claimed.

(61) 2. In an application for a policy of life insurance, every fact stated will be deemed material, under Revisal, sec. 4808, which would materially influence the judgment of the insurance company either in accepting the risk or in fixing the premium rate.

3. When it appeared that the insured, in his application for a policy of life insurance, made a statement that he had not been under the care of a physician within twelve months next preceding its date, it was not necessary that he should have been bedridden to constitute the relationship; for, if he was apprehensive as to his condition, though "up and around," within the time named, consulted a physician and intrusted his case to him, it would be a material representation, and, if false, would relieve the defendant from the obligation of the contract by reason of the death of the insured.

4. It was error in the court below not to submit a determinative issue to the jury for their finding as to the truth of a statement made by the applicant, that he had not been under the care of a physician within two years next preceding the date of the application, when there was evidence proper for the consideration of the jury upon that question.

5. When there was evidence that the insured made a misrepresentation, in his application for a policy of life insurance, that he had not been under the care of a physician within two years, such conditions and relevant facts and circumstances relating to the truth or falsehood of the statement should be determined by the jury upon a proper issue.

In this case it appears that the insured was under the care of a physician, Dr. Sevier, a very short while before the application was made for the policy, and also under the treatment of other physicians, a half dozen of them, in the years 1911 and 1912; and there is room for the inference that he was under the care of a doctor almost immediately before he made the representation. In either of the events mentioned, and if the evidence is true, he could hardly have failed to know that his representation was false, nor could he well have forgotten the fact of treatment so soon after it occurred. That it was material for the company to know the state of his health and his physical and mental

(62) condition in order to decide whether it would issue the policy,

and, if issued, to determine the amount of the premiums, will hardly be questioned. Whether the representation was made by him, and if made, whether it was false, are, of course, questions for the jury. The first issue and the charge of the court thereon were entirely too narrow to present the real question in the case. They not only involved, but made prominent, the fact of fraud, deceit, or moral obliquity, as being a necessary one to be found by the jury before they could make an affirmative answer to the issue. This was going beyond what we have repeatedly decided, and the issue and charge of the court should, therefore, be changed so as to conform thereto. There are other exceptions to the rulings of the court, but it is not necessary to discuss them, as they may not be presented again.

We will add, though, that the application and policy should be construed together, as parts of one contract. It was said in *Cuthbertson v. Insurance Co.*, 96 N. C., 480, "That the application forms a part of the contract, is clearly established by authority," citing *Bobbitt v. Insurance Co.*, 66 N. C., 70.

The verdict and judgment will be set aside and with directions for further proceedings in the court below consistent with this opinion.

New trial.

Cited: Hardy v. Ins. Co., 167 N.C. 23; *Cottingham v. Ins. Co.*, 168 N.C. 259, 265; *Hines v. Casualty Co.*, 172 N.C. 230; *Ins. Co. v. Woolen Mills*, 172 N.C. 539; *Ins. Co. v. Box Co.*, 185 N.C. 546, 547; *Howell v. Ins. Co.*, 189 N.C. 216; *McCain v. Ins. Co.*, 190 N.C. 551; *Wells v. Ins. Co.*, 211 N.C. 429; *Petty v. Ins. Co.*, 212 N.C. 160; *Assurance Society v. Ashby*, 115 N.C. 286; *Carroll v. Ins. Co.*, 227 N.C. 458; *Tolbert v. Ins. Co.*, 236 N.C. 418.

VIRGINIA-CAROLINA PEANUT COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 30 May, 1914.)

1. Interstate Commerce — Carriers of Goods — Rate Established — Rates Charged.

The schedule of rates of freight filed by the carrier with the Interstate Commerce Commission and published and promulgated as the Federal statutes require, are controlling in interstate shipments of goods unless and until changed in accordance with the methods the statute directs; and are enforcible notwithstanding the agent of the carrier and the shipper may have agreed or contracted that a different rate should be charged.

2. Interstate Commerce—Carriers of Goods—Rates Established—Posting of Rates.

It is not necessary to the effectiveness of the schedules of rates that the copies of the same be posted in two public and conspicuous places in every depot or station of the carrier, that being a provision merely for the convenience of the public.

3. Interstate Commerce—Carriers of Goods—Rates Established—Filing with Commission—Publication—Inspection.

The mere filing of a new or changed schedule of rates with the Interstate Commerce Commission is only the initial step in effecting a change of rates previously established, as it is necessary under the Federal statute that they shall be likewise "printed and kept open to public inspection," with further provision that they "shall not be effective until after thirty days notice to the public, published as aforesaid," the publication required being as stated, that these schedules must be "printed and kept open to public inspection"; it being further required, though not as a part of the publication, that they be posted at the various stations of the carrier for the greater convenience of the public.

4. Interstate Commerce—Carriers of Goods—Rates Established—Changes—Requisites—Former Rates—Overcharges—Recovery.

Where the agent of a carrier has agreed to accept interstate shipments of merchandise in accordance with the schedule of rates filed with the Interstate Commerce Commission and "published" as required by the Federal statutes, these rates are not affected by the fact that the carrier has filed a different schedule of rates to effect a change in the rate so established, but which at the time of the shipment had not been "published" in accordance with the statutory requirement; and where the shipper has accordingly been required to pay a higher rate for the shipment, he may recover it back from the carrier, as an illegal overcharge involuntarily paid by him, and as money received by the carrier to his use, it having been wrongfully exacted from him.

5. Interstate Commerce—Carriers of Goods—Overcharge—Recovery—Courts—Commission—Concurrent Jurisdiction.

It seems that the courts have concurrent jurisdiction with the Interstate Commerce Commission of proceedings by the shipper to recover the amount he has been required by the carrier to pay in excess of the lawful rates established for the interstate transportation of a commodity, and the shipper may have immediate recourse to a State court. The difference between "publication" of schedules, as essential to the effectiveness of rates, and "posting" of them, as not essential thereto, pointed out and discussed by WALKER, J.

(64) APPEAL by plaintiff from *Lyon, J.*, at December Term, 1913, of MARTIN.

This action was brought to recover the difference between the amount charged by defendant and that collected on shipments of peanuts during the period beginning with 1 January, 1908, and ending with 11 April, 1909, and heard on a case agreed. The shipments moved in interstate

commerce from Williamston, N. C., to Philadelphia, Pa., and New York City. Defendant's agent at Williamston, on 1 January, 1908, quoted a class rate of 26 cents per 100 pounds, and afterwards refused to deliver certain of the goods to the consignees unless a commodity rate of 36 cents per hundred was paid. This was done and the goods released. The amount of the difference, estimated upon the basis of the number of pounds shipped by plaintiff, is $925.74. The following provisions are made in the Interstate Commerce Act:

"SECTION 6. Every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water, when a through route and joint rate have been established. . . . Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act. . . . No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the require- (65) ments of this section, except after thirty days notice to the Commission and to the public, published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, and charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided,* that the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirement of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions."

The Interstate Commerce Commission modified section 6 as to time of notice, publication, and posting of rates, as follows: "Every carrier subject to the provisions of the act to regulate commerce (excepting those to which special and specific modifications have heretofore been granted) shall place in the hands and custody of its agent or other representative at every station, warehouse, or office at which passengers

or freight are received for transportation, and at which a station agent or a freight agent or a ticket agent is employed, all of the rate and fare schedules which contain rates and fares applying from that station or terminal, or other charges applicable at that station, including the schedules issued by that carrier or by its authorized agent and those in which it has concurred. Such agent or representative shall also be provided with all changes in, cancellations of, additions to, and reissues of such publications in ample time to thus give to the public, in every case, the thirty days notice required by the act. . . . Each of such carriers shall also provide and cause to be posted and kept posted in two conspicuous places in every station waiting-room, warehouse, or office at which schedules are so placed in custody of agent or other representative, notices (of schedules or tariffs) printed in large type, according to form given in order."

(66) The defendant had established a class rate of 26 cents on peanuts prior to 1 February, 1908, and on the latter day it filed with the Interstate Commerce Commission a new tariff, changing the former class rate to commodity rates of 36 cents on peanuts; but it did not file these schedules with its agents or in its offices at the different stations on its line of railway for the purpose of being kept open for the inspection and information of the public, nor did it post the same at said stations, and the agent at Williamston had no such schedule, nor had he been notified of the same when the shipments were made.

The court gave judgment on the case agreed in favor of defendant, and plaintiff appealed.

A. R. Dunning for plaintiff.

F. S. Spruill and W. A. Townes for defendant.

WALKER, J., after stating the case: This case involves the construction of section 6 of the Interstate Commerce Act. We have set out in the above statement so much of this act as relates to the matters in controversy. It is admitted in the case agreed that the rate of 26 cents per hundred pounds to Philadelphia, Pa., which was known as a class rate, was the lawful rate at the time the first shipment was made in January, 1908, and, as we will show, the tariff from which this quotation of the rate was taken remained in force throughout the period of the entire shipment of peanuts by interstate traffic moving from Williamston, N. C., and was in no way affected or changed, nor was it suspended by the supposed tariff of 1 February, 1908, so as to authorize the defendant to charge a greater rate for the shipment of the peanuts than was allowable under the tariff or schedule of rates which had been filed and published

and was in force on and prior to 1 January, 1908, and this grows out of the fact that there is nothing in the case agreed to show that the tariff or schedule of "1 February, 1908, effective 2 March, 1908," was ever filed and published as required by the act. On the contrary, it is admitted "That said tariff was designated as No. 555, I. C. C. 6114, and that at no time prior to said date (25 March, 1909) had said tariff been filed with the agent of the Atlantic Coast Line Railroad Company (67) at Williamston, N. C., nor had he any notice thereof, nor had the Virginia-Carolina Peanut Company or its officers had any notice thereof until advised by the agent of the A. C. L. Railroad Company at Williamston, N. C., on 11 April, 1909."

If the later tariff was in force, the defendant had not only the right, but it was its duty, to charge according to its rates, and it would have been illegal to have charged less. It had this right, and this duty was imposed, notwithstanding it had quoted a different and lower rate to the plaintiff, and he had actually made all the shipments of his peanuts believing the lower rate to be the true and lawful rate. And this is so, because to charge a rate, even a lower rate, than the one fixed by its published schedule, would be in direct violation of the provision of section 6 of the act prohibiting a carrier "to charge, demand, or collect or receive a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, between the points named in its tariffs, than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs"; and the carrier is forbidden to engage or participate in the transportation of passengers or property unless the rates, fares, and charges for the same have been filed and published in accordance with the provisions of the act. Hamlin on Interstate Commerce Acts, pages 11 and 12.

It has been held under this section that a carrier must require payment of the lawful or published rate, even though its agent had misrepresented the rate and it had agreed to take the goods for shipment at a lower rate, the published rate being the only lawful one. *Railway Co. v. Hefley,* 158 U. S., 98; *Railway Co. v. Mugg,* 202 U. S., 242; *Railway Co. v. Abilene Cotton Oil Co.,* 204 U. S., 426; *Railway Co. v. Elevator Co.,* 226 U. S., 441.

In the last case cited it was held that "the rate fixed in the sched- (68) ule filed pursuant to the act to regulate commerce is controlling, and it is beyond the power of the carrier to depart from such rates in

favor of any shipper, and that the erroneous quotation of rates made by the agent of the railroad did not justify recovery, since to do so would be in effect enabling the shipper, whose duty it was to ascertain the published rate, to secure a preference over other shippers contrary to the act to regulate commerce." And in *Railway v. Mugg, supra,* it was held that a common carrier may exact the regular rate for an interstate shipment, as shown by its printed and published schedules on file with the Interstate Commerce Commission, and posted in the stations of such carrier, as required by the Interstate Commerce Act, although a lower rate was quoted by the carrier to the shipper who shipped under the lower rate so quoted. There are other cases in that court and many decisions by the Interstate Commerce Commission to the same effect, the latter being collected in Lust and Merriam's Digest of Decisions under the Interstate Commerce Act, pages 802 to 813.

The right of the plaintiff to recover the difference between the amount he was charged and that which he afterwards was required to pay in order to get his goods will depend upon whether the last schedule of rates was lawfully filed and published, and had become effective.

Much of the argument was spent upon the question whether compliance with the requirement that copies of the schedule of rates shall be kept posted in two public and conspicuous places in every depot or station so that they shall be accessible to the public and can be conveniently inspected, was necessary to the operation and effectiveness of the schedule. But it has been held not to be so in several cases: *Railway Co. v. Cisco Oil Mill,* 204 U. S., 449; *Railway v. Albus Commission Co.,* 223 U. S., 573; *U. S. v. Miller,* 223 U. S., 599. In the first case *Justice Van Devanter* said: "Although it was shown that the schedules embodying this rate were regularly printed, duly filed with the Interstate Commerce Commission, and kept open to public inspection at the freight offices of the garnishee at Kansas City and other points, it was not shown
(69) that copies were posted in public and conspicuous places in those offices, as required by paragraph 6 of the Interstate Commerce Act. Posting, however, was not essential to make rates legally operative, and was required only as a means of affording special facilities to the public for ascertaining the rates *actually in force.*" And in the second case *Justice White* said: "The requirement that schedules should be 'posted in two public and conspicuous places in every depot,' etc., was not made a condition precedent to the establishment and putting in force of the tariff of rates, but was a provision based upon the existence of an established rate, and plainly had for its object the affording of special facilities to the public for ascertaining the rates *actually in force.* To hold that the clause had the far-reaching effect claimed would be to say that it was

the intention of Congress that the negligent posting by an employee of but one instead of two copies of the schedule, or the neglect to post either, would operate to cancel the previously established schedule, a conclusion impossible of acceptance." This construction of the act was confirmed in *Miller's case.* That proposition may, therefore, be taken as settled against the contention of the plaintiff.

But the serious question, and the pivotal one, still remains to be considered, and that is, Was the second of the schedules upon which defendant relies duly filed, published, and in force, so as to be applicable to the shipments? And upon this question we are with the plaintiff.

It is not sufficient, for the purpose of changing a schedule of rates or superseding an existing one, merely to file the new or changed schedule with the Interstate Commerce Commission. This, by itself, does not make it effective, but is only the initial step in that direction. The act provides that, in order to establish a lawful schedule of rates, it must not only be thus "filed with the Commission," but also "printed and kept open to public inspection"; and the provision, further on, in regard to changes in the schedule of rates, is that they "shall not be made except after thirty days notice to the public, *published* as aforesaid." (Italics ours.) What, then, is meant by the expression, "published as aforesaid"? It is apparent that these words imply that in making an original sched- (70) ule, "publication" of some kind was essential to its validity and effectiveness. If we refer again to the first clause of section 6, we find that the schedule must first be filed with the Commission, and then it must be "printed and kept open to public inspection." This requires distribution to and among the different stations or depots at which the schedule of rates must have effect, and this is the construction the highest court has placed upon it. The act, in this respect, is obscurely worded, as no precise definition is given of the words "published as aforesaid," or of the word "published," so that we can know with perfect certainty what kind of publication was intended; and therefore we must resort to interpretation. It evidently meant something more than mere "filing" with the Commission, and the only other thing to which it can fairly and reasonably be referred is the additional requirement that the schedules shall be "printed and kept open for public inspection," and this is "promulgation and publication," as authoritatively declared in *United States v. Miller,* 223 U. S., 599, in which the Court said: "It is the contention of the defendants that a tariff is not published in the sense in which the act uses that term unless printed copies are 'kept posted in two public and conspicuous places in every depot,' etc., and it was this contention that prevailed in the Circuit Court. But, in our opinion, it is not sound. Publication and posting in the sense of the act are essentially distinct. This

is the import of the provision that the requirement relating to 'publishing, posting, and filing' may be modified by the Commission in special circumstances, for if publishing included posting, mention of the latter was unnecessary. And from all the provisions on the subject it is evident that the publication intended consists in promulgating and distributing the tariff in printed form preparatory to putting it into effect, while the posting is a continuing act enjoined upon the carrier, while the tariff remains operative, as a means of affording special facilities to the public for ascertaining the rates in force thereunder. In other words, publication is a step in establishing rates, while posting is a duty arising
(71) out of the fact that they have been established. Obviously, therefore, posting is not a condition to making a tariff legally operative. Neither is it a condition to the continued existence of a tariff once legally established. If it were, the inadvertent or mischievous destruction or removal of one of the posted copies from a depot would disestablish or suspend the rates, a result which evidently is not intended by the act, for it provides that rates once lawfully established shall not be changed otherwise than in the mode prescribed." It appears, then, that "publication" means "promulgation and distribution," and is not confined to the mere filing of the schedule with the Commission, it being something besides that or in addition to it. The Court manifestly had this view of the act in mind when, through *Justice White,* in *Railway Co. v. Abilene Oil Co., supra,* it said, at page 434 of 204 U. S.: "Although it is conceded that the evidence showed that the schedule of rates was established and filed with the Interstate Commerce Commission and was kept at the station of the railway company for public inspection, and that the oil company had knowledge of the fact, it is insisted that the facts found do not justify the conclusion that there was a compliance with the requirements of the act to regulate commerce as to the posting of the established schedule." And also in the case of *Parsons v. Railway Co.*, 167 U. S., at 459, where *Justice Brown* said: "The allegation is that this joint tariff was not filed with the Commission, and not published at the Iowa station from which plaintiff made his shipment, and that, in consequence thereof, he was ignorant of its rates." It was said in *Railway Co. v. United States,* 212 U. S., at 504, that the "legal and published rate" is the only one the shipper is obliged to pay, and no other can be exacted of him. This view is rendered plainer by reference to the very terms of section 6 and the amendment of the Interstate Commerce Commission. There must be "thirty days notice to the Commission and to the public as aforesaid (stating the changes), and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time *and kept open to public inspection.*" (Italics ours.)

The words "kept open to public inspection," it has been held, do not refer to the "posting of the schedules," and this is clear upon (72) the face of the act, as separate provision is made for posting them, so that they will be accessible to the public. They can only refer, therefore, to publication. But the amendment of the Interstate Commerce Commission, authorized by the act, makes perfectly clear what is meant. It provides that the carrier shall place in the hands and custody of its agent at every station, warehouse, or office at which passengers or freight are received for transportation the schedules of all rates and fares "applying from the station or terminal, or other charges applicable at that station, and the same provision is made in regard to any and all changes in the schedules, and this is required to be done thirty days before the schedule or any change therein can become effective. Provision is then made for posting the schedules. Careful and minute provision is then made by the Commission to secure the polite and courteous attention of agents to the requests of shippers for an inspection of schedules filed in their offices. The publication intended by the act, therefore, is filing with the agents at the several stations the schedules, for public inspection, and this is what has been defined by the Court in *Miller's case* as "promulgation and distribution." Compliance with this requirement is made a condition precedent to the effectiveness of the schedules and the lawfulness of the rate charged thereunder. But the construction of the Court in *U. S. v. Miller* is unmistakable, and as defendant could not change the existing schedule, in which the rate was 26 cents, without a filing *and* publication of the change, and as this means "promulgation and distribution" among the several offices and stations of the carrier, where they are to be kept open for public inspection, *and also posted,* it has not complied with the law so as to make the later schedule effective, and therefore the charge should have been made according to the first schedule, that is, 26 cents per hundred pounds, car-load lots.

We entertain no doubt upon the other question in the case. Plaintiff has shown that the first tariff has continued in force because there has been no valid change made in it. The Commission itself has held that the lawfully established rate remains in force until specifi- (73) cally and legally altered or rescinded. *Ohio Foundry Co. v. Railway Co.,* 19 I. C. C. Rep., 65, 67. This being so, plaintiff has paid to the defendant $925.74 more than it was entitled to receive at 26 cents per one hundred pounds, and this amount is recoverable in this action, as money received to plaintiff's use, it being an illegal overcharge.

Defendant's counsel argued that plaintiff had alleged and shown no damage sustained by him under section 8 of the act, providing that any common carrier violating the provisions of the act shall be liable to the

person injured thereby in the full amount of damages sustained in consequence of any such violation. But this is an overcharge and not an unreasonable rate, which has been legally established, and for which another remedy is provided. It was said in *Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S., at p. 436: "Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of the goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent Com., 599, and Note a; 2 Smith Lead. Cas., pt. 1, 8 Ed., Hare & Wallace notes, p. 547." And in *R. R. v. Int. Coal Mining Co.*, 230 U. S., 184 (33 Supreme Ct. Rep., at p. 898): "The English courts make a clear distinction between overcharge and damages, and the same is true under the commerce act. For if the plaintiff here had been required to pay more than the tariff rate, it could have recovered the excess, not as damages,

but as overcharge, and while one count of the complaint asserted a
(74) claim of this nature, the proof did not justify a verdict thereon,

for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion." In the case of *Robertson v. Frank Brothers Co.*, 132 U. S., 17, excessive charges were demanded of an importer at the custom house, and he paid them in order to get possession of his goods. The Court held that the payment was not a voluntary one, but made under moral and illegal duress, and he was entitled to recover the amount of the excess over the lawful charge. *Justice Bradley*, delivering the opinion, and referring to *Maxwell v. Griswold*, 10 How., 242, said: "In that case, it is true, the fact that the importer was not able to get possession of his goods without making the payment complained of was referred to by the Court as an important circumstance. The ultimate fact, of which that was an ingredient in the particular case, was the moral duress not justified by law. When such duress is exerted under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. But the circumstances of the case are always to be taken into consideration.

When the duress has been exerted by one clothed with official authority, or exercising a public employment, less evidence of compulsion or pressure is required—as where an officer exacts illegal fees, or a common carrier excessive charges. But the principle is applicable in all cases according to the nature and exigency of each." He also made reference to *Swift Co. v. United States,* 111 U. S., 22, where the Court, by *Justice Matthews,* stated that, in making a similar payment, the payer was under a moral duress, which prevented payment from being a voluntary one. The learned justice said, and this is quoted in *Robertson v. Frank Brothers Co., supra:* "The question is, whether the receipts, agreements, accounts, and settlements made in pursuance of that demand of necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right. We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit (75) to an illegal exaction or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid, or rather value parted with, under such pressure has never been regarded as a voluntary act within the meaning of the maxim *volenti non fit injuria.*"

The Commission has held that "one of the leading prohibitions of the act is that against the exaction of an 'unreasonable' rate, and it is well settled that the Commission has authority to award reparation in case of the exaction of an 'unreasonable' rate. As against the carrier, its published tariff rate is conclusive of the fact that any higher rate is unreasonable. It seems fairly certain that in cases of the exaction of a rate higher than the published tariff, the shipper may bring his suit in court in the first instance; but the act also appears to give the Commission and the courts concurrent jurisdiction in this respect. An order will therefore be entered requiring defendant to pay to complainant the amount of the admitted overcharge."

We therefore conclude that the judgment against the plaintiff upon the case agreed was erroneous, and it is reversed, because it should have been for the plaintiff.

Reversed.

Cited: Hardware Co. v. R. R., 170 N.C. 397; *Cotton Mills v. R. R.,* 178 N.C. 215; *Aman v. R. R.,* 179 N.C. 313; *Davis v. Cotton Co.,* 185 N.C. 393, 394.

SOUTHERN ASSEMBLY v. W. A. PALMER, SHERIFF, ETC.

(Filed 30 May, 1914.)

1. Constitutional Law—Corporations—Municipal Corporations—Taxation —Exemptions—Religious Corporations—Business Purposes.

A municipal corporation is one designed to create within a prescribed territory a local government of the people therein, as a part of that exercised by the State, with certain and defined restrictions, and our State Constitution, Art. V, sec. 5, exempting municipal corporations from taxation, does not include within its meaning or intent a corporation composed of shareholders which in its form and controlling features is a business enterprise upon which municipal powers have been incidentally conferred in promotion of its primary purpose; and in this case it is held that the property of the Southern Assembly, chartered by special legislative act to establish a municipality for the benefit of the Methodist Episcopal Church, for the purposes of assemblies, conventions, public worship, and the like, may not be exempted from taxation, under our Constitution, it appearing that the ultimate control is in a body of stockholders and that the management shall be in commissioners elected by such stockholders, and that certain business enterprises may be carried on in furtherance of the general scheme.

2. Taxation—Special Exemptions—Repeal—Statutes, Interpretation of— Religious Corporations.

The Southern Assembly was created a municipality for certain church work of the Methodist Episcopal Church by chapter 419, Laws 1909, with the primary purpose of engaging in certain business enterprises, and section 9 of the act exempted its property from taxation in express terms. *Held*, this special exemption was repealed by chapter 46, Public Laws 1911, construed in connection with the machinery act of 1911, ch. 50, sec. 71 (*Davis v. Salisbury*, 161 N. C., cited and applied). The revenue and machinery acts of 1913 should receive the same interpretation.

(76) APPEAL by plaintiff from *Ferguson, J.*, from HAYWOOD, at chambers, 1 September, 1913.

Civil action, heard on return to preliminary restraining order.

The action was instituted to enjoin the defendant, the sheriff and tax collector of Haywood County, from collecting the tax assessed against plaintiff and appearing on the regular tax lists of the county of Haywood for the fiscal year 1911-1912, to the amount of $156.53, and which defendant was proceeding to collect by levy and sale.

Plaintiff alleged and claimed that plaintiff's property, situate in Haywood County, was exempt by Article V, section 5, of the Constitution of the State, and by chapter 419, Laws 1909, incorporating plaintiff, particularly section 9 of said act, which in express terms exempts plaintiff from taxation.

(77) On the hearing, the restraining order was dissolved, and plaintiff excepted and appealed.

Alley & Gilmer for plaintiffs.
Ferguson & Silver for defendants.

HOKE, J. On the hearing it was properly made to appear that, in 1909, the General Assembly of North Carolina incorporated plaintiff company (Laws 1909, ch. 419), the charter authorizing a capital stock of $250,000, in shares of $100 each, par value, raised to $500,000 by Laws 1911, ch. 394, and conferring on plaintiff all the powers granted to corporations by section 1128 of the Revisal, including the powers in subsection 4, "to hold, purchase, and convey real estate in or out of the State and to mortgage the same and its franchises," and in subsection 6, "to conduct business in this State, in other States, the District of Columbia, the territories, dependencies, and colonies of the United States, and in foreign countries, and have one or more offices in and out of this State," etc.

Among other provisions of this act of incorporation, it is provided in section 2: "That the purpose of said corporation is to establish and maintain, in Haywood County, North Carolina, a municipality of the Methodist Episcopal Church, South, assemblies, conventions, conferences, public worship, missionary and school work, orphan homes, manual trades, training and other operations auxiliary and incidental thereto; also a religious resort, with permanent and temporary dwellings for health, rest, recreation, Christian work and fellowship."

Section 3 grants powers to acquire and deal in real estate, install waterworks, sewerage, and the power to issue and secure bonds.

Section 4 grants the corporation power to license occupations.

Section 5, to establish cemeteries.

Section 6, that "the board of commissioners of the corporation may levy taxes for municipal purposes and levy privilege taxes."

Section 7: "The board of commissioners of the corporation may enact ordinances for the government of the municipality."

Section 8 deals with prohibition of liquors.

Section 9: "The property of said corporation shall be exempt (78) from taxation: *Provided,* this section shall not be so construed as to exempt the poll tax of any resident or the property owned by any resident or lot holder in said corporation and taxable by law."

Section 10: That the said corporation shall have power to purchase, build, construct, operate, and maintain hotels, auditoriums, and such buildings as the said board of commissioners of the said corporation may deem advisable for the purposes of carrying on the business of the corporation.

Section 11: The total authorized capital stock of the said corporation shall be $250,000, divided into 2,500 shares of a par value of $100 each,

and at least three-fourths of the capital stock of the said corporation shall be held by members of the Methodist Episcopal Church, South.

Section 12 provides that the corporate powers can be exercised only by a board of commissioners, to consist of not less than six nor more than nine members, and this board shall be elected by the stockholders, at their annual meeting, etc.; and subsequent sections confer upon the corporation well-nigh all the powers contained in chapter 73, Revisal 1905, relating to cities and towns, in an extended plat or boundary of land owned by plaintiff in and adjacent to the town of Waynesville, and withdrawing all the territory embraced in said corporation, and included in the corporation of Waynesville, from the jurisdiction and corporate limits of the town, etc.

That taxes, as stated, were duly assessed on the general property of the corporation situate within the county, to the amount of $156.53, for the fiscal year 1911, appearing upon the regular tax list for that year, and same were due and owing, provided said property was liable to taxation.

Upon these, the facts chiefly relevant, it is contended for plaintiff that its property is exempt from taxation:

1. Because it is a municipal corporation, and as such exempt from taxation by Article V, sec. 5, of the Constitution.

2. Because of the express exemption contained in section 9 of the charter.

(79) But, in our opinion, neither position can be sustained. True, our Constitution provides, Article V, sec. 5: "That property belonging to the State or municipal corporations shall be exempt from taxation," and, further: "That the General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable, or religious purposes," and some further minor exemptions are then allowed, these last "not to exceed the sum of $300 in value. But if it be conceded that the Legislature could confer these extensive municipal powers on a corporation of this character, having its ultimate control not in the inhabitants of the locality, as such, but in a body of stockholders who may or may not be resident in the community or even in the State, we are well assured that the plaintiff is no such municipal corporation as is described and contemplated in this constitutional provision.

The term, as used in our Constitution, from the context and its primary significance, evidently refers to municipal corporations proper, as cities and towns, etc., and to those public *quasi* corporations, such as counties, townships, etc., in which the inhabitants of designated portions of the State's territory are incorporated for the purpose of exercising certain governmental powers for the public benefit. This may be for the benefit of the general public as for the State at large, and also for the public benefit of the particular locality, but it is as a governmental agency and

when established as exclusively such, and for that reason, that this exemption is allowed, and it was never intended to embrace a corporation like the present plaintiff, which, however high its aim and purpose, is, in its form and controlling features, a business enterprise, and on which municipal powers have been incidentally conferred in promotion of the primary purpose.

This concept of a municipal corporation, as embodying the elements, (*a*) designated territory, (*b*) the inhabitants within the same, and (*c*) the existence of governmental powers conferred and to be exercised for the public benefit, both general and local, is recognized in many decisions here and elsewhere and in authoritative text-books treating of the subject. Dillon on Municipal Corporations, Ed. 5, secs. 31 and (80) 32; Smith's Modern Law Municipal Corporations, secs. 7 and 8; McQuillan on Municipal Corporations, secs. 116, 117, 118; also section 107, where, in notes 24 and 25, a great many decisions of our highest courts, defining these corporations, are given. Thus, in *Memphis Trust Co. v. Levee District,* 69 Ark., pp. 284-86, a municipality is defined as "a corporation created for governmental purposes and having, to a certain extent, local powers of legislation and self-government." In *Waller v. Osborne,* 60 Fla., 52 to 70: "Municipalities are legal entities, established for local governmental purposes."

In *Langley v. Augusta,* 118 Ga., 594: "A municipal corporation is a governmental institution designed to create a local government over a limited territory," and, in Note 25, *Lexington v. Thomas,* 113 Ky., 540: "A municipality is a State agency for governmental purposes, etc.," and like definitions appear in our decisions, as in *Jones v. Comrs.,* 137 N. C., pp. 579-596; *Mills v. Williams,* 33 N. C., 561.

Speaking to the principle, in *The Hartford Bridge case,* 51 U. S., pp. 511-523, a citation appearing in the learned and well considered brief of counsel for appellee, *Associate Justice Woodbury,* delivering the opinion, said: "Municipal bodies are incorporated for public and not private purposes. They are allowed to hold privileges of property only for public purposes. The members are not shareholders in any corporate estate which they can sell or devise otherwise," etc.

So far as the precise question presented in this appeal is concerned, we regard the principle as settled in this jurisdiction and adversely to plaintiff by the recent decision of *Comrs. v. Webb,* 160 N. C., 594, to the effect that the bonds of a drainage district could not be exempt from taxation on the ground that such a district was not endowed with governmental powers for the public benefit, but was more in the nature of a private business enterprise. And, on the second position, that plaintiff's property was expressly exempt by the provisions of the charter, granted in 1909,

we have held, in *Davis v. Salisbury,* 161 N. C., 56, that this and all
(81) other previous special exemptions were repealed by the revenue act, chapter 46, Public Laws of 1911.

Further construing this section in connection with the machinery act of 1911, ch. 50, sec. 71, in this same case, it was held, for reasons therein stated, that the revenue and machinery acts of the Legislature of that session should be construed together, and that the revenue act, ch. 46, sec. 5, was not designed or intended to establish or provide for any specified exemption, but was passed with a view of repealing all former exemptions and as a general declaration of the policy of the Legislature in carrying out the second clause, the permissive feature of our Constitution, Art. V, sec. 5, and that the property actually exempt was designated and provided for in chapter 50, section 71, the machinery act of the same Legislature.

Speaking to this position in *Davis's case,* the Court, among other things, said: "In the present case, this section 5 of the revenue act, relied upon by plaintiffs, is not, in our opinion, designed or intended to establish or provide for any specific exemption. It was drawn more especially with the view of repealing former exemptions and as a general declaration of the policy of the Legislature in carrying out the permissive features of our Constitution, Art. V, sec. 5, in which the General Assembly is allowed, if it see proper, to exempt this kind of property from taxation, and, in our view, it does not establish any exemption; whereas the machinery act, sec. 7, is clearly drawn for the express purpose of establishing and defining the exemptions which shall be allowed, making minute regulations as to the different subjects and specific kinds of property which shall be exempt; and if there were conflict in these two statutes, as plaintiff contends, the latter, expressing the particular intent of the Legislature, should prevail. *School Comrs. v. Board of Aldermen,* 158 N. C., pp. 191-198, citing 1 Lewis Sutherland (2 Ed.), sec. 268; *Rodgers v. U. S.,* 185 U. S., 83, and other authorities."

It may be well to note that a like clause of repeal appears in the general revenue acts of 1913, ch. 201, sec. 5, and that the machinery act of that Legislature, substantially the same as that of 1911, should receive like interpretation.

(82) In *Comrs. v. Webb, supra; Corporation Commission v. Construction Co.,* 160 N. C., 582; *United Brethren v. Comrs.,* 115 N. C., 489; *Loan Assn. v. Comrs.,* 115 N. C., 413, and other cases of like purport, it is shown to be the public policy of the State, as expressed both in the Constitution and statutes, that, except in certain specified and very restricted instances, the property of private persons, both individual and corporate, shall all bear its pro rata share of the general taxations im-

posed for the public benefit, and that, under the permissive clause of Article V, sec. 5, no exemptions should be made or upheld unless clearly coming within the constitutional provision and plainly so expressed as the legislative will. Accordingly, a careful perusal of section 71 of the revenue act of 1911, the law which, as we have seen, is controlling in the matter, will disclose that even in cases of property held for "educational, scientific, literary, charitable, and religious purposes," no exemption is permitted except in specified instances and where such property is *exclusively* devoted to these purposes, and that, on the facts as now presented, the statute in question affords no protection to plaintiff in the matter of taxation, either as to real or personal property.

There is no error in the record, and the judgment dissolving the restraining order is

Affirmed.

Cited: Leary v. Comrs., 172 N.C. 27; *Price v. Trustees,* 172 N.C. 85; *Sawyer v. Drainage District,* 179 N.C. 183; *Watts v. Turnpike Co.,* 181 N.C. 135; *Trustees v. Avery,* 184 N.C. 471; *Person v. Watts,* 184 N.C. 541; *O'Neal v. Mann,* 193 N.C. 163; *Parks-Belk Co. v. Concord,* 194 N.C. 136; *Latta v. Jenkins,* 200 N.C. 258; *Forsyth County v. Joyce,* 204 N.C. 739; *Hospital v. Rowan County,* 205 N.C. 11; *Benson v. Johnston County,* 209 N.C. 757; *Wells v. Housing Authority,* 213 N.C. 750; *Warrenton v. Warren County,* 215 N.C. 345, 347, 368; *Odd Fellows v. Swain,* 217 N.C. 637, 638; *Rockingham County v. Elon College,* 219 N.C. 345; *Lee v. Poston,* 233 N.C. 548.

MACON COUNTY SUPPLY COMPANY v. TALLULAH FALLS RAILROAD COMPANY.

(Filed 30 May, 1914.)

1. Carriers of Goods—Overcharge — Penalty Statutes — Interstate Commerce—Constitutional Law.

Revisal, sec. 2644, imposing a penalty upon a public carrier of goods for failure to pay an overcharge of freight upon the conditions therein named is not an interference with interstate commerce, or void under the commerce clause of the Federal Constitution; for its provisions are constitutional and valid.

2. Same—Amount Recovered—Excessive Demand—Carrier's Knowledge—Misinformation.

The provision of Revisal, sec. 2644, that the shipper must recover the amount of overcharges claimed in his notice to the carrier in order to

penalize the carrier for its nonpayment is to protect the carrier from payment of excessive demands when the amount of the claim is not ascertainable by it; and does not apply when the amount of the overcharge is readily ascertainable from its own records, as in case of *excessive* rates alone; and especially is this not required when the carrier's agent has misled the shipper by giving him an erroneous rate, upon which he has made his calculation and accordingly demanded more than the exact amount.

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

(83) APPEAL by defendant from *Ferguson, J.*, at Fall Term, 1913, of MACON.

This is an action to recover an overcharge on an interstate shipment of freight, and the penalty prescribed in section 2644.

After the freight had been paid, the plaintiff applied to the defendant for its rate, and correctly made up its claim of $3.75, based on the rate given.

The defendant refused to pay the claim, and the plaintiff sued to recover the sum of $3.75 and the penalty.

The defendant offered to pay $2.39, and the jury found that the overcharge was $3.56. The discrepancy between the amount claimed and the amount recovered is explained by the evidence, as follows:

Gus Leach, a witness for the plaintiff, testified that he was secretary, treasurer, and general manager of and did the ordering for the plaintiff; a corporation, and that he looked after the shipments received; that he ordered a shipment of ranges from Piqua, Ohio, which was shipped on 29 November, 1912; that the plaintiff received a bill of lading of said shipment bearing said date, and also a freight bill, which plaintiff paid, and that plaintiff filed the said bill of lading and paid freight bill with the defendant railway company, together with plaintiff's bill for
(84) overcharge. Here the bill of lading was shown the witness, who testified that it was the exact copy, if not the original, and the freight bill was paid; that he filed these papers with his claim; that the shipment amounted to 1,020 pounds, and that he paid $18.03 freight; that from previous shipments he thought the freight was excessive, and he asked the railroad company to give him the rate from Piqua, Ohio, to Franklin, N. C.; that he first asked the local agent, Mr. Hames, and he could not give it, and the witness then wrote to the management of the road; that the shipment was received 12 December, 1912; and he asked for the rate on 13 December, 1912, and received answer 27 February, 1913; that Mr. Hames, the local agent, called him up over the phone and told him that the rate was $1.40 per 100 pounds, and he thereupon filed his claim for the overcharge of $3.75, which he testifies was the difference between the rate at $1.40 and what he had paid; that the claim for over-

charge had not been paid; that lacking two or three days, seven months had intervened between the date of filing the claim and institution of the suit; that by the Interstate Commerce Commission's schedule of rates, ranges were shipped as third class, and that the given rate of third class from Piqua, Ohio, to Cincinnati, Ohio, was 17 cents, and from Cincinnati, Ohio, to Franklin, N. C., via Tallulah Falls Railway, it was $1.23, making a total of $1.40; that before the institution of this suit the Tallulah Falls Railway Company had offered him the sum of $2.39 in settlement of the claim for overcharge; that the shipment consisted of two ranges and contents, two high closets crated, one box advertising matter, and one boxed toy range; that the advertising matter and the toy range came at a higher classification and freight rate than the ordinary range; that deducting the weight of the advertising matter and the toy range, 90 pounds, from the total weight of the shipment, 1,020 pounds, left 925 pounds on which the freight was chargeable at third-class rate, the 90 pounds being chargeable at first- or second-class rate, making the total overcharge on the basis of classification furnished by the Interstate Commerce Commission $3.56 instead of $3.75, the amount sued for; that the weight of the advertising matter and the toy range was not distinguished on the bill of lading issued by the initial carrier, but (85) that merely the gross or total weight of the shipment was given, towit, 1,020 pounds, and this also appeared from the original bill of lading which was introduced in evidence, and which bore date 29 November, 1912.

There is no controversy as to the amount of the penalty, if entitled to recover any.

There was a judgment in favor of the plaintiff for $3.56 overcharge and $100 penalty, and the defendant appealed.

The assignments of error are as follows:

First. That the court erred in allowing witness Leach, over defendant's objection, to testify that Hames, local agent of defendant, called him up over the telephone and told him the rate was $1.40 per hundred pounds, as pointed out in defendant's first exception.

Second. That the court erred in allowing the plaintiff to introduce in evidence the file of rates from the Interstate Commerce Commission certified by its secretary under the seal of the commission, as pointed out in defendant's second exception.

Third. That the court erred in allowing plaintiff to introduce the bill of lading and freight bill without introducing the balance of defendant's file, as pointed out in defendant's third exception.

Fourth. That the court erred in charging the jury that the plaintiff was entitled to recover of the defendant a penalty of $25 for the first

day and $5 for each succeeding day after demand made, until the sum reached the amount of $100, as pointed out in defendant's fourth exception.

Fifth. That the court erred in refusing to set aside the verdict and granting the defendant a new trial, as pointed out in defendant's fifth exception.

Sixth. That the court erred in awarding the plaintiff judgment against the defendant for the sum of $100, penalty for failure to refund overcharge, as pointed out in defendant's sixth exception, and rendering judgment for $3.56 when plaintiff sued for $3.75.

(86) *T. J. Johnston for plaintiff.*

Johnston & Horn, Hamilton McWhorter, and Lamar Rucker for defendant.

ALLEN, J. The only assignment of error relied on in the brief of the appellant is the fourth, and as to this it is contended: (1) That the act (Rev., sec. 2644) imposing a penalty for non-payment of an overcharge of freight is invalid, because it is an interference with interstate commerce. (2) That to permit a recovery of the penalty when the plaintiff has failed to sustain his claim in full would be a taking of the property of the defendant without due process.

The first exception of the defendant is disposed of by the decision in *Thurston v. R. R.*, 165 N. C., 598, and it is not necessary to consider it further.

The second presents more difficulty, but when the nature of the demand and the facts connected with the filing of the claim by the plaintiff are considered, we are of opinion the penalty can be legally enforced.

Section 2634 of the Revisal imposes a penalty for failure to pay a claim for loss or damage to property while in the possession of a common carrier, but provides that no penalty shall be recovered unless the full amount of the claim is recovered.

In proceedings under this section, the amount is uncertain and unascertained, and as the defendant has no means of determining the exact amount due, the burden is upon the plaintiff to make good his claim, before he can recover the penalty, as otherwise the carrier could be penalized for refusing to pay an unjust and excessive demand.

It was upon this ground the judgment of the Supreme Court of Arkansas was reversed in *R. R. v. Wynne,* 224 U. S., 354, in which the owner of property damaged filed a claim against the carrier for $500, and only demanded in his complaint and recovered $400, the Court saying: "It will be perceived that while, before the suit, the owner de-

manded $500 as damages, which the company refused to pay, he did not in his suit either claim or establish that he was entitled to that amount. On the contrary, by the allegations in his complaint (87) he confessed, and by the verdict of the jury it was found, that his damages were but $400. Evidently, therefore, the prior demand was excessive and the company rightfully refused to pay it. And yet the statute was construed as penalizing that refusal and requiring a judgment for double damages and an attorney's fee. In other words, the application made of the statute was such that the company was subjected to this extraordinary liability for refusing to pay the excessive demand made before the suit."

These objections do not exist when the demand is for an overcharge of freight which consists, under section 2642 of the Revisal, in collecting more than the rates appearing in the printed tariff of the carrier.

The carrier knows the amount collected, and has in its own possession its tariff, fixing the legal rate, and can ascertain with exactness the amount of overcharge. It can, therefore, protect itself against an unjust demand by tender of the amount due, and thereby escape liability for the penalty.

It appears in this record that the plaintiff did not intentionally claim more than it was entitled to, and that its error in stating the amount was brought about by the conduct of the defendant in misinforming him as to its rates, and that the tender by the defendant was less than was due on any computation.

The defendant ought not to be permitted to mislead the plaintiff and induce it to file a claim for more than it can recover, and then escape liability upon the ground that the claim is excessive.

The defendant is, in our opinion, liable for the penalty. Statutes of similar import have been upheld. *R. R. v. Vinegar Co.,* 226 U. S., 219.

No error.

BROWN, J., dissenting: It is an admitted fact that the amount of the plaintiff's demand on the defendant was for $3.75, and the defendant refused to pay it. In this suit the just and legal claim of the plaintiff is established to be $3.56. For its refusal to pay an unjust and illegal demand, the defendant is penalized $100.

The finding of the jury was based on the evidence of the plain- (88) tiff's own witness, Gus Leach, who was secretary, treasurer, and general manager of the plaintiff, and from the file rates of Interstate Commerce Commission, offered in evidence by the plaintiff.

The same witness further testified that before suit was brought, the defendant railway company had offered the sum of $2.39 in settlement

of the claim of overcharge. So that in the absence of the knowledge on the part of either party of the real amount due as overcharge, the defendant offered $2.39 and the plaintiff demanded $3.75 in settlement; the true amount, according to the verdict of the jury, being $3.56.

In my opinion, the judgment of this Court in sustaining such a penalty is squarely opposed to three decisions of the Supreme Court of the United States. *R. R. v. Wynne,* 224 U. S., 354.

Also, in *Chicago, Milwaukee and St. Paul Railway Co. v. Polt,* decided by the United States Supreme Court on 26 January, 1914, published in the Supreme Court Reporter for 1 March, 1914, Vol. 30, No. 7, on page 301 it appears that by a statute of South Dakota a railroad company is made absolutely responsible for double the amount of damages actually sustained for loss of property destroyed by fire, communicated from its locomotive engine, unless it pays the full amount within sixty days from notice, with a proviso that if the railroad shall "offer in writing to pay a fixed sum, being the full amount of the damages sustained, and the owner shall refuse to accept the same, then in any action thereafter brought for such damages, where such owner recovers a less sum as damages than the amount so offered, then such owner shall recover only his damages and the railway company shall recover its costs."

Polt demanded $838.20. The railroad company offered in writing to pay $500. Then Polt recovered a verdict for $780. A judgment for double damages was affirmed by the Supreme Court of the State, 26 South Dakota, 378, 128 N. W., 472. This judgment was reversed by the Supreme Court of the United States, the Court holding:

(89) "The rudiments of fair play required by the Fourteenth Amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand. This case is covered by *St. Louis, I. N. and S. R. Co. v. Wynne,* 224 U. S., 354, 56 Law Ed., 799, 42 L. R. A., N. S., 102, 32 Sup. Court Rep., 493. It is not like those in which a moderate penalty is imposed for failure to settle a demand found to be just. *Yazoo and M. Valley R. Co. v. Jackson Vinegar Co.,* 226 U. S., 217, 57 Law Ed., 193, 33 Sup. Court Rep., 40."

See, also, *Chicago, Milwaukee and St. Paul Railway Co. v. Kennedy,* Vol. 34, No. 10, page 463, of Supreme Court Reporter, dated 15 April, 1914.

In *R. R. Co. v. Wynne, Mr. Justice Van Devanter* says: "Evidently the prior demand was excessive, and the company rightfully refused to pay it. And yet the statute was construed as penalizing that refusal

and requiring a judgment for double damage and an attorney's fee. In other words, the application made of the statute was such that the company was subjected to this extraordinary liability for refusing to pay the excessive demand made before suit. We think the conclusion is unavoidable that the statute, as so construed and applied, is an arbitrary exercise of the powers of government and violative of the fundamental rights embraced within the conception of due process of law."

The excess demanded in this case is small, but the principle involved is the same.

MR. JUSTICE WALKER concurs in this dissent.

Cited: Tilley v. R.R., 172 N.C. 365.

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(90)

TERESA E. PAGE v. JOSEPH B. PAGE.

(Filed 30 May, 1914.)

Habeas Corpus—Supreme Court—Supervisory Powers—Supersedeas—Custody of Child—Retention in State—Writ of Prohibition—Procedure—Motion in the Cause.

Pending an appeal in an action for divorce, the Supreme Court, in the exercise of its constitutional power to issue any remedial writ of supervision and control to inferior courts (Const., Art. IV, sec. 8, and under its general supervisory powers conferred by the Constitution, may issue a writ of supersedeas (Rev., secs. 590, 598) to a Superior Court judge before whom, in *habeas corpus* proceedings, the mother, living in another State, contends for the custody of a minor child, *pendente lite*, to the effect that the child be retained within the jurisdiction of the courts of this State. The writ of prohibition will not lie, for the judge with notice of the order will adjudge that the child is "legally detained," and dismiss the proceedings, and, in the absence of a supersedeas bond, award the custody of the child to some reliable person living in this State with sufficient surety for the safe keeping and proper care of the child, making such order in regard to its mother seeing the child as will appear to him to be proper. *Held*, in this case, the writ of *habeas corpus* was not the proper remedy, and the mother should have proceeded by motion in the cause.

No record filed.

Motion in the Supreme Court for a supersedeas and also for writ of Prohibition.

Fred D. Hamrick and J. C. Little for plaintiff.
Spainhour & Mull for defendant.

CLARK, C. J. This is an action for divorce from bed and board, and on an appeal from an order granting alimony in favor of the plaintiff *pendente lite,* this Court found error, 161 N. C., 170. At Spring Term, 1914, of the court below, the judge made an interlocutory order modifying the previous order of the former judge by granting the custody of one of the children to the mother, who resides in South Carolina. From this judgment an appeal was duly taken and the appeal bond and
(91) supersedeas were filed. The parties having disagreed on a settlement of the case, it is before the judge to be settled. In the meantime the mother has sued out a writ of *habeas corpus,* and asked that the custody of such child be awarded her pending the appeal.

The defendant has docketed in this Court the record proper on the appeal and has asked that a supersedeas issue from this Court to the end that the child may be kept in the State pending the appeal, upon the ground, as held in *Harris v. Harris,* 115 N. C., 587, that the court will not award such custody, pending an appeal, to a parent who lives out of the State, because, while the bond might possibly secure the payment of damages, it could not secure the production of the child, and therefore the appellant might find his appeal futile. This case is cited with approval in *In re Turner,* 151 N. C., 478, and *Moore v. Moore,* 130 N. C., 335.

We think the defendant, who is appellant, is entitled to have the court retain jurisdiction of the child until the hearing of his appeal, so that the final determination of this Court, if in his favor, may be effective.

The Constitution of North Carolina, Art. IV, sec. 8, provides that this Court "shall have the power to issue *any* remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." On appeal, the judgment to transfer the custody of the child to the mother is suspended on giving the bonds required for appeal and supersedeas by virtue of Rev., 590, 598, and if there is any doubt of the application of those sections to a case like this, it is eminently proper that the Court under its supervisory powers, conferred by the Constitution, should require the lower court to refrain from changing the custody of the child, pending an appeal, or permit it to be carried out of the State. *Harris v. Harris, supra.*

We are not assuming that the judge would make such order, but by reason of the issuance of the writ of *habeas corpus* the defendant has reason to fear that such order might be made in the court below, and he had a right to ask such action by the appellate court, in this or
(92) any other case, that may be necessary to assure him the execution of the judgment of this Court on appeal, should it be in his favor.

The defendant also asked that the writ of Prohibition should issue against the judge from proceeding with the writ of *habeas corpus*. We do not think that this is a case where such prohibition should issue. But the judge with notice of this order of the Court cannot adjudge that the child is "illegally detained" or that the mother is entitled to its custody pending the appeal, but will dismiss the proceeding. If no supersedeas bond is given, the custody pending the appeal should be given to some reliable person living in this State, with sufficient surety for the safe keeping and proper care of the child.

Indeed, if the plaintiff had been entitled to an order, for any reason, to the custody of the child, pending the appeal, and had been living in this State, she should have proceeded by a motion in the cause before the court below, and a writ of *habeas corpus* did not properly lie in any event.

There is nothing in this order that prohibits, or that can be considered as prohibiting, the judge below to make an order in this cause that the mother may see the child as often as his Honor thinks proper, pending the appeal, and under such circumstances and safeguards as appeal to his judgment, consistent with the retention of the child in this State and the certainty of its production to await the judgment of this Court in this appeal.

The motion for a supersedeas is allowed. A copy of this judgment will issue at once to the Superior Court of Polk and copies will be sent by the clerk of the Court to the judge holding the courts of that district, that he may take action in pursuance to this judgment.

Motion allowed.

Cited: Page v. Page, 167 N.C. 349, 350; *In re Means,* 176 N.C. 312; *In re Blake,* 184 N.C. 281; *Clegg v. Clegg,* 186 N.C. 35; *In re DeFord,* 226 N.C. 192; *Gafford v. Phelps,* 235 N.C. 224.

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(93)

J. H. LEROY v. ELIZABETH CITY.

(Filed 30 May, 1914.)

1. Municipal Corporations—Cities and Towns—Bond Issues—Market House—Necessaries—Constitutional Law.

Bonds issued by a municipality to build a market house are for a necessary expense, and when authorized by statute do not require, for their validity, that they be submitted to the qualified voters of the municipality.

2. Municipal Corporations—Cities and Towns — Bond Issues — Statutory Directions—Market House—Location.

Where the statute requires that a market house authorized to be built by a municipality from a bond issue be located on a certain parcel of its lands, the validity of the bonds is not affected by its location elsewhere, the remedy of the taxpayer being to compel the city to use the proceeds of the lands as required by the statute.

3. Municipal Corporations—Cities and Towns—Bond Issues—Improper Use of Funds—Incidents.

An improper use of the proceeds from the sale of municipal bonds for a market house does not affect the validity of the bonds; and in this case it is held that a reasonable expense incurred in attorney's fees, etc., or in paving an esplanade adjacent to the market house, is not an improper expenditure of the funds.

4. Municipal Corporations—Cities and Towns—Bond Issues—Aldermen—Majority Vote.

Where a bond issue of a municipality is authorized by statute, and there is no charter or other statutory provision to the contrary, the exercise of the power by the municipality to issue the bonds is sufficient if by a majority of its aldermen.

APPEAL by plaintiff from *Ferguson, J.*, at chambers, 18 April, 1914; from PASQUOTANK.

This is an appeal, in an action brought by a taxpayer, from an order dissolving an injunction which restrained the defendants from issuing and selling certain bonds.

The Legislature of 1907 passed an act known as chapter 117, Private Laws 1907, which act was amended first by chapter 319, Private Laws 1909, and again by chapter 487, Private Laws 1913.

(94) Said original act reads as follows:

The General Assembly of North Carolina do enact:

SECTION 1. That the board of aldermen of the corporation of Elizabeth City is hereby authorized and empowered to establish and erect a market house, town hall, auditorium, and mayor's office, and shall equip said building in such manner as to meet the needs and necessities of the people and the corporation of Elizabeth City, and shall also establish and erect suitable buildings for the fire department and apparatus.

SEC. 2. That the board of aldermen of Elizabeth City is hereby authorized and empowered and shall issue bonds in the name of the corporation of Elizabeth City, in the denomination of $500 each, with coupons and in such form as may be determined by the said board, to an amount not exceeding $40,000, payable in twenty years from the issuing thereof, and at such a time and place as the board of aldermen may prescribe. The said bonds shall bear interest at a rate of not

exceeding 5 per cent per annum, payable semiannually. The said bonds shall mature as follows: $1,000 per annum for the first five years; $2,000 per annum for the next ten years, and $3,000 per annum for the next five years.

SEC. 3. The said building as set out above is to be placed on the property now owned by the town of Elizabeth City, on the northeast corner of Matthews and Pool streets.

SEC. 4. That the said bonds shall not be sold for less than par, and the proceeds arising therefrom shall be held by the treasurer of the corporation of Elizabeth City for the purpose set out above.

SEC. 5. That the said building shall be erected by contract with the board of aldermen of Elizabeth City and the board of permanent improvements, and no contract for the erection of said building shall be made by the board of aldermen of Elizabeth City without first having the approval of the board of permanent improvements.

The amendment by the act of 1909 provides that if the sum of $40,000 shall be insufficient to carry out the purposes of the act of 1907, that additional bonds in the sum of $10,000 may be issued, after (95) submitting to a vote of the people the question of issuing such additional bonds, and authorizes the defendant to buy additional property adjacent to the lot referred to in section 3 of the act of 1907, if necessary.

The act of 1913 eliminates all of the buildings in section 1 of the act of 1907 except the market house, and repeals section 3 of the original act.

The act of 1913 was not passed in accordance with the formalities required by Article II, sec. 14, of the Constitution.

Acting under the authority of these acts, the board of aldermen of Elizabeth City, by a majority vote, with the approval of the board of permanent improvements, has contracted to sell bonds in the sum of $30,000 at par for the purpose of building a market house.

The plaintiff contends:

That said proposed issue of said bonds is wrongful and unlawful, and said proposed bonds illegal and void:

(*a*) For that the proceeds of said bonds are not for the necessary expenses of said town, and there has been no ratification by a majority of the qualified voters.

(*b*) For that chapter 487, Private Laws 1913, which materially amended chapter 117, Private Laws 1907, was not passed as required by Article II, sec. 14, of the Constitution of North Carolina.

(*c*) For that the board is expressly prohibited by the Legislature from building said market house on any property except the lot on the corner of Pool and Matthews streets.

(*d*) For that the sale which has been negotiated is in express violation of section 4, chapter 117, Laws 1907, in that the board has contracted to sell said bonds at an amount of $250 less than par, which amount is an expense for printing and attorney's fees, which the town has agreed to pay.

(*e*) For that the board is not authorized by the charter of said town to issue said bonds.

(*f*) For that the ordinances authorizing the issuance were not adopted by the unanimous board, but only by a majority vote of five (5) to three (3).

(96) (*g*) For that the board of aldermen propose to spend a portion of the proceeds in paving the esplanade adjacent to said market house.

His Honor dissolved the restraining order, and the plaintiff appealed.

Ward & Thompson for plaintiff.

W. L. Small for defendant.

ALLEN, J. The General Assembly has the power to authorize a municipal corporation to create a debt and issue bonds for necessary expenses without a vote of the people, and the debt created for a market house is a necessary expense. *Swinson v. Mount Olive,* 147 N. C., 611.

(2) The act of 1913 imposes no additional burden on the citizens and taxpayers of Elizabeth City, and it was not, therefore, necessary for the ayes and noes to be entered on the journals at the time of its enactment. The case of *Gregg v. Comrs.,* 162 N. C., 484, is directly in point.

(3) The third objection of the plaintiff is met by the fact that the act of 1913 repeals the section of the act of 1907 requiring the market house to be built on the property of the city; but if this was not so, it would not affect the validity of the bonds, and the remedy of the plaintiff would be to compel the defendant to use the proceeds of the lands as required by the statute.

(4) It appears that the defendant has agreed to sell the bonds at par, and as we have before said, the use of the proceeds improperly would not render the bonds invalid. We are of opinion, however, that reasonable expenses incurred in issuing the bonds are incident to the purposes of the act, and would not be a misappropriation of the funds; and what is here said is also applicable to the expenses for the esplanade. It would also seem that the esplanade is substantially a part of the market house. *Raleigh v. Durfey,* 163 N. C., 155.

(5) The bonds are authorized by the General Assembly, and it was not necessary for the vote of the members of the board of aldermen to be unanimous.

"In the absence of charter or statutory provision to the con- (97) trary, the rule is well established that a majority of a quorum is all that is required for the adoption or passage of any ordinance, resolution, or order properly arising for the action of the municipal council or other municipal body." 28 Cyc., 335; *Rushville Gas Co. v. Rushville,* 6 L. R. A., 315, and cases cited.

We are of opinion the bonds are valid and that there is no error.

Affirmed.

Cited: Storm v. Wrightsville Beach, 189 N.C. 681; *Henderson v. Wilmington,* 191 N.C. 282; *Angelo v. Winston-Salem,* 193 N.C. 213; *Walker v. Faison,* 202 N.C. 696.

W. R. HOPKINS ET AL. v. HARVEY CRISP.

(Filed 30 May, 1914.)

1. Deeds and Conveyances—Color of Title—Nonsuit—Limitation of Actions.

Defendant's possession under color is insufficient to ripen his title to lands, where it is shown that plaintiffs' prēdecessor in title brought suit for the lands before the defendant had been in possession seven years, which action was nonsuited and another action was again instituted by the plaintiffs within a year.

2. Judgments—Collateral Attack—Nonsuit—Independent Action—Motion in the Cause.

A judgment may not be set aside for irregularities in an independent action, the proper procedure being in the original cause; and where the original action has been nonsuited, and another action has been brought upon the same subject-matter, between the same parties in interest, a defendant may not introduce evidence tending to show that he had not authorized an answer to be filed for him, to repel the bar of the statute of limitations, when the complaint therein was against all of the defendants who ostensibly had answered and proceeded with the trial of the cause to judgment, which appears to be regular on its face.

APPEAL by defendant from *Carter, J.,* at Spring Term, 1914, of GRAHAM.

This is an action in the nature of an ejectment, tried upon these issues:

1. Are the plaintiffs named in the complaint the owners of the (98) land described in the complaint, and entitled to the possession of the same?

2. Is the defendant, Harvey Crisp, in the unlawful possession of that part of the land described in his answer?

At the close of all the evidence the court instructed the jury that if they believed the evidence, they would answer both issues "Yes." To these instructions the defendant excepted.

The jury answered both issues "Yes," and the defendant moved for a new trial. Motion denied. Exception by the defendant. The court rendered the judgment appearing in the record, and the defendant excepted and appealed to the Supreme Court.

M. W. Bell and Zeb Weaver for plaintiff.

R. L. Phillips for defendant.

BROWN, J. It is admitted that the plaintiffs have shown title in themselves, unless the defendant, Harvey Crisp, has shown title by color and adverse possession. We think the evidence of adverse possession is insufficient. The evidence of the appellant tended to show he had been in possession since 1898.

The plaintiffs offered in evidence the record of an action for the recovery of these lands, brought against John M. Crisp, Harvey Crisp, and Allen Crisp, by summons issued 17 March, 1903. This cause was tried two or three times in Graham, and was removed to Jackson and nonsuited in 1909, and the summons in the present case was issued in 1909.

From the time he entered in 1898 until the summons was issued, 17 March, 1903, in the case of *Archer et al. v. John M. Crisp and Harvey Crisp,* was less than seven years. The plaintiffs in that suit were the predecessors in title of Hopkins. The defendant claims he was not served with summons, but the complaint is against the defendant, Harvey Crisp, and all the defendants answered.

The defendant, Harvey Crisp, proposed to prove that he did not authorize an answer to be filed for him. His Honor properly excluded such evidence. A record of this kind cannot be thus collaterally attacked.

(99) It is well settled that where it appears upon the face of the record that the court had acquired jurisdiction of the parties and of the subject-matter of the action, the judgment therein is valid, however irregular it may be, and it must stand until set aside in a proper proceeding by competent authority. *England v. Garner,* 90 N. C., 197; *Harrison v. Hargrove,* 120 N. C., 106.

No error.

Cited: S. v. Norris, 206 N.C. 196.

FIRST NATIONAL BANK v. WARSAW DRUG COMPANY.

(Filed 30 May, 1914.)

1. Bills and Notes—Fraud and Deceit—Innocent Purchaser—Trials—Burden of Proof.

Where it is proved or admitted that a negotiable note sued on has been obtained from the maker by fraud, or deceit, the transferee, the plaintiff in the action, must show by the preponderance of the evidence that he was a *bona fide* purchaser or derived his title from such purchaser, and it is insufficient that he acquired the note for value, before maturity.

2. Same—Impeaching Evidence.

The burden of proof being on the plaintiff, in his action to recover on a negotiable note, to show that he was a *bona fide* purchaser for value, where it is shown that the note was procured from the maker by fraud or deceit, it is not required that the defendant negatively prove that the plaintiff was not such purchaser, and the plaintiff's testimony is subject to attack and to be discredited on cross-examination.

APPEAL by plaintiff from *O. H. Allen, J.*, at November Term, 1913, of DUPLIN.

This is a civil action tried upon these issues:

1. Is the plaintiff a corporation, as alleged in the complaint? Answer: Yes (by consent).

2. Was the note sued on procured by fraud and deceit of the Equitable Manufacturing Company? Answer: Yes.

3. Is the plaintiff the *bona fide* holder of said note in due course? Answer: No.

4. Is the defendant indebted to the plaintiff, and if so, what (100) amount? Answer: Nothing.

From the judgment rendered, the plaintiff appealed.

H. D. Williams for plaintiff.

Stevens & Beasley for defendant.

BROWN, J. The principles of law presented on this appeal have been so frequently adjudicated that a further discussion of them would seem to be useless.

Where the maker of a negotiable paper establishes that it has been obtained from him by fraud or deceit, a subsequent transferee must, before he is entitled to recover thereon, show that he is the *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, but he must show that he had no knowledge or notice of the

fraud. *Bank v. Fountain,* 148 N. C., 590; *Bank v. Branson,* 165 N. C., 344.

The defendant in his answer alleges fraud in obtaining the note sued on, and false and fraudulent misrepresentation in regard to the quality of the articles of jewelry and other things for which the note was given. There is abundant evidence in the record to justify the finding of the jury upon that issue.

We also think that there is sufficient evidence in the record to show that the plaintiff is not a *bona fide* holder of the note in due course. The burden of proof rests upon the plaintiff after fraud is established to show that the plaintiff was such *bona fide* purchaser, and not upon the defendant to negative that position. *Bank v. Exum,* 163 N. C., 199; *Myers v. Petty,* 153 N. C., 462; *Bank v. Fountain, supra; Trust Co. v. Ellen,* 163 N. C., 45.

The burden of proof being thus placed upon the plaintiff to show that it was a *bona fide* holder in due course, the credibility of the testimony of Krouth, assistant cashier, upon whose evidence the plaintiff relies, was necessarily subject to attack before the jury and also to be discredited upon cross-examination.

There are some circumstances which have cropped out in the testimony from which the jury might well infer that the plaintiff was not the *bona fide* owner of the note sued on, but had taken it for
(101) collection for the benefit of the payee, the Equitable Manufacturing Company. These circumstances and indicia of fraud it is useless to recount.

Upon a review of the whole record, we are of opinion that the judge below tried it in accordance with the well settled decisions of this Court.

No error.

Cited: Moon v. Simpson, 170 N.C. 337; *Bank v. Sherron,* 186 N.C. 299; *Bank v. Wester,* 188 N.C. 376; *Clark v. Laurel Park Estates,* 196 N.C. 638.

R. W. HAWES ET AL. v. HILTON LUMBER COMPANY.

(Filed 30 May, 1914.)

Deeds and Conveyances—Description—Parol Evidence — Trials — Negligence—Evidence.

In an action to recover damages of the defendant for negligently setting fire to and burning the timber lands of the plaintiff, it is held that the following general description is sufficient to admit of parol evidence of the

identification of the lands, to wit: "A certain tract or parcel of land in Rose Hill Township, Duplin County, adjoining the lands of this grantor, S. W., and others, and being on the south side of Maxwell and Beaver Dam creeks"; and it is further held that the evidence is sufficient of the defendant's negligence, under *Williams v. R. R.*, 140 N. C., 624.

APPEAL by defendant from *O. H. Allen, J.*, at December Term, 1913, of DUPLIN.

This is an action to recover damages for negligently setting fire to and burning the timber lands of the plaintiffs.

The description in the deeds under which the plaintiffs claim is as follows:

"A certain tract or parcel of land in Rose Hill Township, Duplin County, State of North Carolina, adjoining the lands of this grantor, Stokes Wells, and others, and being on the south side of Maxwell and Beaver Dam creeks, bounded as follows:

"Beginning at a stake on the run of Beaver Dam Creek, S. 4 W. 363 poles to a stake on Stoak Wells' line; thence S. 89 E. 122 poles to a stake; thence N. 4 E. 400 poles to a stake on the run of Maxwell; thence up said run to the mouth of Beaver Dam; thence up the (102) run of Beaver Dam to the beginning, containing 272 acres, more or less.

"Subject to a timber lease we have given to the Hilton Lumber Company of Wilmington, N. C., expiring on 14 February, 1910."

The defendant objected to the introduction of the deed, upon the ground that it was void for vagueness of description.

W. B. Hawes testified: "I am the grantor in the deed to the plaintiffs, S. C. Murray, W. B. Hawes, and R. W. Hawes, and they are my children. I know the tracts of land read to me in the above deeds. These lands are bounded by William B. Wells, Maxwell and Beaver Dam creeks, and by the lands of Mrs. Sudie Carr and Stokes Wells, and I know the lines and boundaries of the plaintiffs' tract. Was present when it was surveyed. Maxwell and Beaver Dam is on one side, and on the other side there is a well-defined line of marked trees all the way around between the land of Mrs. Sudie Carr on the west and on the lands of Stokes Wells, and on the east by the lands of W. B. Wells, and on the north by Maxwell and Beaver Dam creeks. The lines were well marked spruce pines and trees all around it to the edge of the bay. I have known these lines and marked trees to the boundaries of this land since 1878. I have worked on it and chipped turpentine and got lightwood off of it ever since the year 1878, and I cleared a part of the tract and worked it nineteen years, except when I rented it out."

Rufus Carr testified: "At the time of the fire, I lived about 300 yards from where the fire started. The Hilton railroad passed right near our house. I was in the field at work when the engine passed going towards the skidder, and it passed on by the point where the fire was afterwards found to be, and I went on to the skidder. In about 15 minutes I heard the engine go back towards the smoke and blow three long blows, and I saw the fire and started. When I got there it was burning right close up to the railroad track. There were only two or three fellows there when I first arrived—the engineer and two colored men who (103) worked on the engine. The engineer and his help were dipping water out of the tank of his engine and pouring it on the fire. They did not succeed in putting it out. The fire caught on the lands of Mrs. Sudie Carr and went southeast onto the lands of the plaintiffs. The right of way had straw on it and some pine tops right near the railroad where the fire caught, and the pine straw and pine tops were burning when I got there. It was dry and the wind was blowing from the northwest. The railroad at this point runs east. There was no fire or smoke in the woods before the engine went up there."

Stevens & Beasley for plaintiff.
H. D. Williams and E. K. Bryan for defendant.

ALLEN, J. The defendant relies upon two exceptions: (1) That the deeds under which the plaintiffs claim are void for insufficiency of description. (2) That there is no evidence of negligence.

The location of the land by the particular description contained in the deed is difficult, if not impossible, because the only fixed and defined corner is the mouth of Beaver Dam, and if you undertake to reverse the lines from that corner down the run of Maxwell, you do not know where to stop, as the length of the line on Maxwell is not given and the terminus is a stake.

We can, however, discard this part of the deed, and the general description of "a certain tract or parcel of land in Rose Hill Township, Duplin County, adjoining the lands of this grantor, Stokes Wells, and others, and being on the south side of Maxwell and Beaver Dam creeks," is sufficient to sustain the deed. *Farmer v. Batts,* 83 N. C., 387; *Perry v. Scott,* 109 N. C., 374.

In the last case it was held that "A description of land in a deed as 'lying and being in the county of Jones and bounded as follows, towit: On the south side of Trent River, adjoining the lands of Colgrove, McDaniel and others, containing 360 acres, more or less,' is not so vague and indefinite as to render the conveyance void, but may be aided by parol evidence."

The evidence as to the origin of the fire, and as to the foul condition of the right of way, was fully as strong as in *Williams v. R. R.*, 140 N. C., 624, in which it was held sufficient to sustain a verdict (104) against the defendant establishing negligence and liability. We find

No error.

Cited: Speed v. Perry, 167 N.C. 126.

FRED S. JOHNSON, TRUSTEE, R. W. BURNETTE AND JACOB BURNETTE, HEIRS AT LAW OF JACOB B. BURNETTE, v. H. B. WHILDEN.

(Filed 30 May, 1914.)

1. Process—Personal Service—Court's Jurisdiction.

An action of debt is one personal to the debtor, and requires that personal service be made on the defendant within the territorial jurisdiction of the court issuing the process, or that he has in some recognized manner, by his acts or conduct, acknowledged the jurisdiction of the court so as to become bound by its judgment, where the defendant has no property in the jurisdiction invoked.

2. Same—Proceedings in Rem—Levy—Void Judgments.

Where personal service cannot be obtained upon a debtor in an action upon a money demand, who has property within the jurisdiction of the court, which is sought to be subjected to the payment of the debt, the proceedings are *quasi in rem* against the property subject to execution and levy; and where the interest of the debtor in the property sought to be attached is incapable of levy and sale under execution, and the defendant has not personally been served with process, or recognized the jurisdiction of the court, the judgment rendered against him in the proceeding is a nullity. Revisal, secs. 767, 784.

3. Same—Trusts and Trustees—Property Subject to Levy.

A certain land company obtained a decree against its agent, who had bought certain lands with the company's money and had taken title in himself, that he be declared a trustee for his company for the said lands, sell the same and distribute the proceeds among the shareholders of the company. Thereafter a creditor of the land company obtained a judgment for services rendered by publication of summons in attachment against the lands, and under a judgment obtained by default sold the lands under execution and became the purchaser at the sale. The defendant land company being beyond the jurisdiction of the court, had not been served with personal process, nor had it in any manner recognized the jurisdiction of the court. *Held*, the interest of the defendant in the lands was incapable of levy and sale under the execution, and the judgment rendered against it was a nullity.

4. Verdicts—Judgments—Modification—Appeal and Error.

In this action the verdict of the jury established certain interests in defendant's favor in the lands in controversy which were not adjudicated in the judgment rendered; and as the plaintiff did not appeal, the judgment is accordingly modified and affirmed.

5. Tax Deeds—Statutory Requirements—Notice—Publication.

The requirements of the statute relating to the sale of lands for taxes must be strictly complied with to give a good title to the purchaser; and it appearing in this case that the purchaser had not notified the trustee holding the legal title, and there being nothing to show that the publication was made either on the dates or for the number of times required by the statute, it is held that the tax deed is void and carries no title to the purchaser.

(105) APPEAL by defendant from *Carter, J.*, at March Term, 1914, of GRAHAM.

Civil action to remove cloud from title to certain lands situate in Graham County, N. C.

On the hearing, it was properly made to appear that grants for the land in question were taken out by one D. F. Goodhue, in his own name, and he having died, the legal title thereto descended to his son, Willie F.; that the Tuckaseegee Mining Company *et al.* instituted suit in Superior Court of Graham County, alleging that the lands had been paid for with company's money and same taken and held for the company's benefit, and, on the facts in evidence, it was, at Fall Term, 1900, among other things, decreed that Willie F. Goodhue held the lands in trust for the Tuckaseegee Mining Company, and same should be conveyed by him to one Jacob S. Burnette, as trustee for said company, in terms as follows: "It is further considered, ordered, adjudged, and decreed by the court,

(106) that Jacob S. Burnette be and he is hereby appointed a trustee with full power and whose duty it is to hold the legal title to said tracts of land herein described, with full power to sell said tracts of land at private sale upon such terms as he may think best and to convey the title to the same to the purchasers of the same by deeds in fee simple, and out of the proceeds of such sales to first pay off and discharge indebtedness of the Tuckaseegee Mining Company incurred both before and since the bringing of this action, and to pay over to the stockholders any surplus which may remain in his hands after discharging said indebtedness of the Tuckaseegee Mining Company, according to the respective holdings." And it was adjudged that the decree in question should operate as a conveyance of title on the trusts above stated.

Jacob S. Burnette having died, this present plaintiff, by decree of Superior Court, February, 1911, was duly appointed his successor in office, "to carry out and discharge the trust imposed upon the lands

therein mentioned and to execute and perform any and all duties devolving upon the original trustee by said judgment of 1900."

In this decree it was found as one of the pertinent facts that the trustee, Burnette, had made a valid contract to sell the land to one M. E. Cozad, and that the same was outstanding and existent in favor of said bargainee, and reference was made to the claim of defendant in said land and to the proceedings by which same had been acquired, but no decision was made on the validity of the claim.

On the part of the defendant, it was shown that A. M. Frye, having a claim for services against the Tuckaseegee Company for legal services rendered to said company in 1903, instituted an action against it and J. S. Burnette, trustee, under and by virtue of the decree aforesaid, to Superior Court of Swain County, and not being able to obtain personal service of process on the company within the jurisdiction of the court or on the trustee, who was a nonresident, sued out an attachment in the cause and had same levied on the lands in controversy as the lands of the defendants, the Tuckaseegee Company and Burnette, trustee, and having also caused publication of the summons and warrant of attachment to be made and filed his complaint alleging that the com- (107) pany was indebted to him for legal services in the sum of $2,500 and that he had caused attachment to be issued and levied in the cause.

At July term, Swain Superior Court, no answer having been filed or appearance made, the issue of indebtedness was submitted to the jury and the following verdict rendered: "Are defendants indebted to plaintiffs for legal service? If so, what amount? Answer: $1,500, with interest from 7 August, 1903." And, on the verdict, after reciting the recovery, the levy of attachment, etc., it was adjudged, the present writer presiding, that defendants had been duly served with process, and, further, as follows:

"It is further considered, ordered, and adjudged by the court that the defendants, the Tuckaseegee Mining Company and J. S. Burnette, trustee, are indebted to the plaintiffs in the sum of $1,500, with interest on the same from 7 August, 1903, for legal services.

"It is further considered, ordered, and adjudged by the court that the several tracts of land above described, which were levied on by the sheriff of Graham County under the warrant of attachment, be condemned and sold for the payment of this judgment, or so much thereof as may be necessary to pay the same, with costs, and that execution issue on this judgment to the sheriff of Graham County, N. C., commanding such sale."

On execution issued, said lands were sold and purchased by A. M. Frye and deed taken from the sheriff in ordinary form, etc., referring

to attachment proceedings, judgments, etc., bearing date May, 1905, and A. M. Frye and wife, by deed, with special warranty, bearing date 7 May, 1906, conveyed to defendant, H. B. Whilden, all the right, title, interest, and estate of said A. M. Frye, etc.

Defendant further offered in evidence a deed from J. A. Ammons, sheriff and tax collector, reciting a sale of lands for taxes, same having been listed in the name of the Tuckaseegee Mining Company, and failure to redeem, etc., conveyed the land to defendant, the deed dated 13 June, 1907; also an affidavit by defendant to the effect that the land having been listed for taxes in the name of the Tuckaseegee Company,
(108) and failure to pay, same had been sold and purchased by defendant for $89.74, amount of taxes due, etc., and not being able upon diligent inquiry to find either the Tuckaseegee Mining Company or J. S. Burnette, the trustee, in Graham County, and there being no tenant or agent of the company residing on the lands, etc., defendant had caused a notice to be published in the *Cherokee Scout,* a newspaper in an adjoining county, there being none published in the county of Graham, in form as follows:

To the Tuckaseegee Mining Company:

Take notice that at a sale of real estate for nonpayment of taxes, held on 7 May, 1906, in the town of Robbinsville, the following real estate was sold by J. A. Ammons, sheriff and tax collector of said county, towit: 4,130 acres, more or less, listed in the name of the Tuckaseegee Mining Company, said lands lying in Yellow Creek Township, Graham County, being the lands embraced in State Grants Nos. 3529, 3530, 3543, 3425, 3521, 3528, 3519, 3518, 3530, 3526, 3527, 3532, 3531, 3533, 3522, 3534, 3535, and 3520, which said lands were sold for the taxes due for the year 1905, amounting to $89.74, including the cost of sale, at which sale the undersigned became the purchaser of said land.

The owner of said land will take notice that the time of redemption of said lands will expire on 7 May, 1907.

This 8 January, 1907. H. B. WHILDEN,
Purchaser.

The court charged the jury, if they believed the evidence, to answer the issues as shown, and the following verdict was rendered:

1. Is the plaintiff, Fred S. Johnston, the owner of the lands described in the complaint, as trustee for the purpose set out in the decree of Spring Term, 1900, of Graham County Superior Court, in the case of Tuckaseegee Mining Company v. Willis F. Goodhue *et al.?* Answer: Yes.

2. Has the defendant, H. B. Whilden, any interest in said lands? Answer: No, except as to the equitable interest of the Tuckaseegee Mining Company under the decree aforesaid.

Judgment on the verdict for plaintiff, and defendant excepted (109) and appealed.

Zebulon Weaver and T. A. Morphew for plaintiff.

Beyson & Black for defendant.

HOKE, J., after stating the case: It is now the well settled principle that no valid judgment *in personam* can be obtained against a nonresident or *other* for an ordinary money demand except on personal service of process within the territorial jurisdiction of the court or unless there has been proper acceptance of service or a general appearance, actual or constructive, by which the party submits his cause to the court's jurisdiction. The position is modified, or, rather, a different rule obtains, where in such an action, duly instituted and on attachment issued, there has been a valid levy of property of defendant in the jurisdiction, bringing the same within the custody of the court, in which case the question of indebtedness may be considered and determined in so far only as the value of the property may be made available in satisfaction of the claim by sale under final process or further decree in the cause; beyond this value, no judgment *in personam* may be entered or enforced. *Pennoyer v. Neff,* 95 U. S., 714, and 9 Rose's notes thereon, pp. 338-39 *et seq.; Warlick v. Reynolds,* 151 N. C., 606; *Bernhardt v. Brown,* 118 N. C., 701.

These and other authoritative decisions are to the effect that a court may acquire jurisdiction by publication of the summons to hear and decide suits to fix the status of property situate within its territorial jurisdiction or to determine the rights or interest of parties therein, when the action is brought and prosecuted directly for that purpose.

An interesting and instructive case of this kind appears in 134 U. S., 316, *Arndt v. Griggs,* that being an action to quiet title to realty, and the principle has been frequently recognized and applied in this jurisdiction, as in *Bernhardt v. Brown, supra; Vick v. Flournoy,* 147 N. C., 209, an action to redeem land under a mortgage, and *Lawrence v. Hardy,* 151 N. C., 123, a suit for partition, etc.

It will be noted that when the action is one *in personam* and (110) the jurisdiction is dependent solely on the attachment, there must be a valid levy on the property, and where, as in this State, this writ is only regarded as process ancillary to the main or ultimate relief sought, unless the statutes regulating the matter otherwise provide, there can be

no valid levy except on property which can be made available by sale under final process, and while the North Carolina statutes have very much extended the scope and vigor of the writ in reference to real estate, there has been no change as to the character of the property liable to levy and sale, made by the statute, but, on perusal of sections 767 and 784, it appears that the writ, both in reference to the species of property and as to the levy and ultimate sale, is to be regarded as in the nature of an execution. This being true, it is the recognized position here and in other States having statutes of like purport, and both before and since the existence of our present civil procedure, that an attachment can only be levied on property which could be levied on and sold under execution, as the final process in the cause. *Electric Co. v. Engineering Co.*, 128 N. C., 199; *Davis v. Garrett*, 25 N. C., 459; *Gillis v. McKay*, 15 N. C., 17; *Courtney v. Carr*, 6 Iowa, 238; *Burns v. Lewis*, 86 Ga., 591; *Hillman Bros. v. Werner*, 56 Tenn., 586; *Lane v. Marshall*, 48 Tenn., 30; and see note in 11 A. and E. Annotated Cases, p. 689, on case of *Pelzer Manufacturing Co. v. Pitt*, 76 S. C., 349, at page 669; Drake on Attachments, sec. 235; Shinn on Attachment, p. 415.

In the case before us it appears that the suit of A. M. Frye against the Tuckaseegee Mining Company and its trustee was one strictly *in personam* to recover a sum for legal services rendered the company. No personal service was obtained upon either defendant, and the only basis of jurisdiction is the levy of an attachment on real property held by J. S. Burnette, one of the defendants in trust, to "sell, make title to purchasers by deeds in fee, and out of the proceeds to pay, first, the indebtedness of the Tuckaseegee Mining Company incurred both before and since the bringing this action, and to pay over to the stockholders any surplus, etc., etc."

(111) Under our statutes, and decisions construing same, such an interest is not the subject of levy and sale under execution. *Mayo v. Staton*, 137 N. C., 670; *Tally v. Reid*, 72 N. C., 336; *McKeithan v. Walker*, 66 N. C., 95. Nor could there be any valid levy made thereon under the ancillary process of attachment, and according to the authorities heretofore cited, and the principles they uphold and illustrate, the judgment in case of *Frye v. Manufacturing Co.* was a nullity, and no title passed to the purchaser at the sale under final process in the cause.

It is urged for defendant that plaintiff and those under whom he claims are concluded by the judgment entered in the cause, which establishes the indebtedness, declares the land levied on subject to same, and adjudges that the interest of defendants be sold and applied to payment of the judgment. The position would be undoubtedly correct if the court had jurisdiction of the parties and had acquired any right to con-

sider and pass upon the interest of the defendants in that suit; but the action was not one *quasi in rem* and in which plaintiff sought to establish his debt and enforce his right against the property as a *cestui que trust,* or one of them, under the terms of the deeds. It was, as we have seen, a suit strictly *in personam,* and there having been no personal service of process on either defendant within the jurisdiction, and the levy on the attachment being of no effect, the property not being liable to service under that process, the court was entirely without jurisdiction to establish any debt in favor of plaintiff or to determine in any way the rights or interests of the nominal defendants. And the claim under and by virtue of the alleged tax title is without merit.

The affidavit filed by the purchaser shows that he was fully aware that the property was owned by J. S. Burnette, the trustee, and the notice, made an exhibit in the record, not only does not purport to give notice to the trustee, the owner, but there is nothing in the record to show that the publication was made either on the dates or the number of times required by section 2903 of the Revisal. In several recent decisions of the Court it has been held that the requirements imposed by this and cognate sections of the statute must be strictly complied with, and that a failure on the part of the purchaser to give the proper (112) notices to the owner would avoid the deed. *Rexford v. Phillips,* 159 N. C., 213; *King v. Cooper,* 128 N. C., 347; *Thomas v. Nichols,* 127 N. C., 319.

Under the principle established by these and other decisions of like kind, we must hold, therefore, that the tax deed is void, and carries no title to the purchaser. It may be well to note that the verdict on the second issue seems to establish by correct interpretation that defendant is owner of the beneficial interest of the Tuckaseegee Mining Company, under the decree establishing the trust, and plaintiff, not having appealed, is concluded by such finding, and the judgment below will be so far reformed as to declare and adjudge that such interest is had and owned by defendant. The costs of appeal will be paid by appellant.

Modified and affirmed.

Cited: S.c., 171 N.C. 153, 156; *Sanders v. Covington,* 176 N. C. 455; *Tisdale v. Eubanks,* 180 N.C. 156; *Mitchell v. Talley,* 182 N.C. 688; *Sexton v. Farrington,* 185 N.C. 342; *Stevens v. Turlington,* 186 N.C. 194; *Bridger v. Mitchell,* 187 N.C. 375; *Hambley v. White,* 192 N.C. 34; *Saliba v. Mother Agnes,* 193 N.C. 252; *Smith v. Gordon,* 204 N.C. 697; *Building & Loan v. Burwell,* 206 N.C. 361; *Chinnis v. Cobb,* 210 N.C. 109; *Voehringer v. Pollock,* 224 N.C. 412.

THE STANDARD TRUST COMPANY OF NEW YORK ET AL.
v. THE COMMERCIAL NATIONAL BANK.

(Filed 30 May, 1914.)

1. Trials—Banking—Nonsuit—Due Course of Mail—Presumptions—Evidence Conflicting—Questions for Jury.

Where the evidence discloses that a letter containing a check on a bank would have been received by the bank in due course of the mail and of its business on a certain day, at which time there were sufficient funds of the maker on deposit with the bank to meet it, and the plaintiff, suing the bank for the amount of the check, introduced a part of the defendant's answer in which it was alleged that the defendant "found the check in its mail" two days later, upon a motion to nonsuit, taking the evidence in the light most favorable to the plaintiff, the first date will be taken as the one on which the defendant received the check, the implied allegation of a later date in the answer which was introduced by plaintiff, not being conclusive upon him, but making a conflict in testimony which is for the jury to settle.

2. Trials—Evidence—Mailing Letter—Presumptions.

Evidence that a letter has been properly posted *prima facie* establishes the fact that it was received by the addressee in the usual course of the mails.

3. Banks—Deposits—Checking Arrangements—Parties.

It appeared that the plaintiff bank had an arrangement with its depositor that it would receive for deposit and as cash items, checks, payable to himself, and permit him to draw against them, and that the depositor had drawn out the full amount of the check in question. *Held*, sufficient evidence under the circumstances that the bank is the owner of the check so deposited and entitled to maintain an action thereon.

4. Banks—Rights of Check-holder—Bank as Agent and Drawee—Negligence of Bank and Constructive Acceptance of Check.

Where a bank has received for collection from another bank at a different place a check drawn on itself by one of the depositors, and assumes the agency to present and collect the same, it is bound to good faith and due diligence in the performance of its duty as such agent, and the fact that the bank presents the check for payment and causes it to be protested for insufficiency of funds to the credit of the drawee is some evidence of the agency to be considered by the jury. The court examines the evidence in this case and finds that there is sufficient to be submitted to the jury upon the question whether the defendant bank failed in its duty as agent, and whether its conduct showed a constructive acceptance of the check within the principle of *Bank v. Kenan*, 75 N. C., 340, and other authorities cited. The rights of a holder of a check against the drawee, and the bank upon which it is drawn, discussed incidentally by WALKER, J.

(113) APPEAL by plaintiff from *Shaw, J.*, at October Term, 1913, of GUILFORD.

This action was brought to recover the amount of a check drawn by Sol N. Cone, at Greensboro, N. C., on 4 October, 1910, in favor of Latham, Alexander & Co. of the city of New York, for $5,000. The check was received in due time by the payee, indorsed to and deposited with the plaintiff Standard Trust Company to the credit of said payee, who immediately drew it out by checks against the amount so placed to its credit as a cash item, this being in accordance with an understanding previously existing between Latham, Alexander & Co. and the plaintiff. Latham, Alexander & Co. did business with the (114) Standard Trust Company under such circumstances as that all checks deposited by them were treated as cash items, *i. e.*, they could immediately draw against them. The check was, on the same day, 5 October, after having been indorsed "Pay to the order of Girard Trust Company, Philadelphia," by the Standard Trust Company of New York, mailed to the Girard Trust Company for "collection and credit." On 6 October the Girard Trust Company received this check, and after indorsing on it "Pay to the Central National Bank. Prior indorsements guaranteed. 6 October, 1910," sent it by hand to the Central National Bank of Philadelphia, which bank received it on 6 October, between the hours of 9 and 3, and after indorsing it "Pay to the order of any bank, banker, or trust company. Prior indorsements guaranteed. 6 October, 1910," it was mailed on 6 October to the defendant bank at Greensboro for "collection and remittance," the hour of mailing being about 5 p. m. The indorsements were all regular and in proper form. According to the due course of the mails, a letter mailed in Philadelphia at or about 5 p. m., 6 October, 1910, would leave Philadelphia on the Pennsylvania Railroad train No. 55, arriving at Washington, D. C., at 3:40 a. m., the 7th, and would come out of Washington to Greensboro on the Southern Railway train No. 35, leaving Washington at 9 a. m., and arriving at Greensboro at about 6 p. m., the 7th. On the dates in question, the regular mail connections were made, Southern 35 reaching Greensboro on the 7th at 6:24 p. m. So, according to the due course of the mails and the business of the defendant bank, this check arrived in Greensboro on the evening of 7 October and should have been in the bank to be handled by its cashier shortly after 8 o'clock on the morning of 8 October. At the opening of the bank on that morning, Sol N. Cone, the drawer of the check, had to his credit $19,432.52. The 8th was Saturday. Some time between 7 and 9 o'clock on the 8th, Cone attempted to commit suicide. He was then owing the defendant bank a note of $10,000; his attempt at suicide led to inquiry, which disclosed his insolvency. On 10 October (Monday), after having ascertained Cone's financial condition, the defendant charged against (115)

his account the note of $10,000 due it. His deposit, at the opening of the bank on the 10th, was the same as it was on Saturday, towit, $19,432.52. After charging this $10,000 against his account, the defendant bank, through its cashier, Boyles, presented the check to itself and duly protested it for nonpayment, because of an alleged insufficiency of funds, and returned it to the Central National Bank of Philadelphia by mail, where it was received on 11 October.

The defendant denied the receipt of the check on the 8th, but admits it was found in its mail and was in its possession on the 10th, which admission, taken in the light of the surrounding circumstances, put it in its hands, to its knowledge, before the opening of the bank.

There appears a second series of indorsements upon the check, which are thus accounted for: Upon its return to plaintiff, in New York, on the 13th, it was immediately sent back to Greensboro, through the Philadelphia banks, it being sent this last time, however, to the American Exchange Bank, instead of direct to defendant, upon which it was drawn. The facts in connection with this second series of indorsements are not now pertinent, further than they tend to corroborate and sustain plaintiff's contention as to the usual course of the mails, and the receipt of the check, on its first trip, the morning of the 8th, rather than the 10th, according to the contention of the defendant.

The court, at the close of the plaintiff's testimony, entered judgment of nonsuit, and the latter appealed.

Manly, Hendren & Womble and T. S. Beall for plaintiff.

Brooks, Sapp & Williams for defendant.

WALKER, J., after stating the case: It is now very common learning that where judgment of nonsuit is given upon the evidence the plaintiff is entitled to have the same construed most favorably for him (*Brittain v. Westall,* 135 N. C., 492; *Morton v. Lumber Co.,* 152 N. C., 54; *Johnston v. R. R.,* 163 N. C., 431); and we will so consider it throughout the discussion of the case.

(116) We find this statement in the brief of plaintiff's counsel: "In the course of the debate upon the motion to nonsuit, the trial judge stated that but for the introduction by the plaintiff of a portion of defendant's answer, towit, 'Sec. 5. In answer to the allegations of article 5 of the complaint, the defendant avers that the check therein referred to was found by the defendant in its mail on the morning of 10 October,' he would have submitted to the jury for their determination the question whether the check arrived on the 8th or later, his view being that by introducing the above quoted declaration of the defendant, the

presumption of receipt in due course of mails was met and rebutted as a matter of law. In other words, that the plaintiff offered, as a part of its evidence, testimony which disclosed, as a fact, the date of its receipt. With respect to the contention that, even if the check was not in hand until the 10th, the plaintiff was entitled to recover, because it had brought itself into such relationship with the defendant, by mailing it the check for collection, as to place the defendant under a duty to look after the interests of the plaintiff, and that duty was such as to prevent it from preferring itself, the judge made no affirmative statement as to his reasons for the nonsuit."

If the presiding judge was of the opinion that the statement in the fifth section of defendant's answer, even though it was introduced as evidence by the plaintiff, conclusively rebutted the *prima facie* presumption raised by the law, that the check had been received by the defendant on Saturday, 8 October, 1910, it was an erroneous view to take of the legal effect of that evidence. When it is shown that a letter has been "mailed," this establishes *prima facie* that it was received by the addressee in the usual course of the mails and his business, and when the latter introduces evidence that it was not in fact received, or not received at the time alleged, such testimony simply raises a conflict of evidence, on which it is the exclusive province of the jury to pass. In other words, the presumption of fact arising from the proof that the letter was mailed, together with the proof as to the schedule of the mails, and the course of the business of the addressee, are circumstances, when met by a denial of its receipt in due course, to be weighed (117) by the jury with *all* the other evidence in determining the question whether the letter was actually received and as to the time of its receipt; and the fact that plaintiff introduced the rebutting evidence does not alter the case. He is not concluded thereby, but may show that the fact is otherwise, as a party is not always bound by the statement of his own witness. We said in *Model Mill Co. v. Webb,* 164 N. C., 87: "The City National Bank, it appears, mailed the letter with the draft and bill of lading to the defendant bank. This was evidence of its receipt by the latter, and raised a rebuttable presumption of the fact to be submitted to the jury, along with any evidence in the case tending to show that it was or was not in fact received. This is said to be founded upon another presumption that officers of the Postoffice Department will do their duty, or upon the better reason, the regularity and certainty with which, according to common experience, the mail is carried. It is, at least, evidence from which the jury may reasonably infer the fact that the mail matter was received in due course of transmission and delivery," citing 16 Cyc., 1065; *Bragaw v. Supreme Lodge,* 124 N. C., 154; *Coile*

v. Order of Commercial Travelers, 161 N. C., 104, and other cases. While the reason given by counsel may have been the one upon which the nonsuit was based, we are not, of course, restricted to it, but may consider any other valid reason for the ruling. We infer from the record and the briefs that counsel are correct as to the ground upon which the judge placed his decision. But the *prima facie* presumption as to the time when the check was received was not rebutted by the introduction of the answer, and the question should have gone to the jury. *S. v. Wilkerson,* 164 N. C., 437, where the cases on this subject are cited; *Stewart v. Carpet Co.,* 138 N. C., 60; *Furniture Co. v. Express Co.,* 144 N. C., 644.

Plaintiff asserts ownership of the check by reason of its dealings with Latham, Alexander & Co., and without discussing this phase of the case, we merely state that the facts, as now presented, sustain the (118) contention. This being so, it claims the right to recover upon the check on either one of two grounds, which are thus set forth in the brief of its counsel: "If, as a fact, the check was in defendant bank on the morning of the 8th, then plaintiff would be entitled to a verdict upon these grounds: (1) Because it was held without action by the defendant for more than twenty-four hours, as it was not protested until after banking hours on the 10th, the effect of which would be to work an acceptance of the check by the defendant, so as to make it liable on the check for its face; and (2) the defendant failed in its duty as collecting agent to promptly present for payment and pay the check or to promptly return it, as a result of which it became liable in tort for damages, which, under the facts of this particular case, would be the face of the check, it appearing that Latham, Alexander & Co., the payee in the check, and the person who deposited it with the plaintiff, received cash on it, and went into bankruptcy soon thereafter, never having had on deposit at any time after 5 October, with the plaintiffs, any funds out of which the check could be realized, so that plaintiff has lost the amount of the check, as Sol N. Cone is insolvent."

A check is a bill of exchange, and may more particularly be defined as a written order on a bank or banker, purporting to be drawn against a deposit of funds, for the payment, at all events, of a sum of money to a certain person therein named, or to him or his order, or to bearer, and payable on demand. Norton on Bills and Notes, 404; Revisal, sec. 2335. It will be convenient here, without further discussion of the nature and qualities of a check, to note the sections of our Negotiable Instrument Act which may have application to the questions raised in the record, and which are contained in Revisal, ch. 54:

"Sec. 2237. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon."

"Sec. 2276. A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand (119) or at a fixed or determinable future time a sum certain in money to order or to bearer."

"Sec. 2277. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same."

"Sec. 2286. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation."

"Sec. 2287. Where a drawee to whom a bill is delivered for acceptance destroys the same or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same."

"Sec. 2335. A check is a bill of exchange drawn on a bank, payable on demand. Except as herein otherwise provided, the provisions of this chapter that are applicable to a bill of exchange payable on demand apply to a check."

"Sec. 2336. A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

"Sec. 2339. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."

Having these sections of the act before us, we can better understand the positions of the plaintiff as to the liability of the defendant upon this check. We have held that where a bank has refused to pay a check, the holder has no cause of action thereon against the bank, but must seek his remedy against the drawer, the bank being liable only to the drawer for its breach of promise to pay the check, there being an implied promise by the bank, arising from the deposit of his funds with it, that it will pay his checks when and as they are presented. If the bank fails to perform this promise, it becomes liable to the drawer for the dam- (120) ages sustained by him on account of its refusal or failure to pay his check. But the holder of the check can only sue the drawer, and cannot sue the bank. The reason why the holder of the check is not permitted to sue the bank has been stated by the authorities to be, that there is no penalty between the holder and the bank until by certification of the check or the acceptance thereof, express or implied, or by any other act or con-

duct it has made itself directly liable to the holder. *Bank of Republic v. Millard,* 10 Wall. (U. S.), 152; *Bank v. Whitman,* 94 U. S., 343; *Bank v. Bank,* 118 N.C. 783; *Hawes v. Blackwell,* 107 N.C. 196.

Notwithstanding these principles have been recognized, there are courts which hold, in well considered opinions, that the bank should be held liable directly to the holder if it is notified that he has the check, or demand for its payment is made upon it, and it then has sufficient clear and unincumbered funds to the credit of the drawer with which to pay the check without any risk or embarrassment to itself. 2 Morse on Banks and Banking (4 Ed.), secs. 496, 497, 499 *et seq.;* Norton on Bills and Notes, p. 418 and note 50, and cases cited; 2 Daniel Neg. Instr. (6 Ed. by Calvert), secs. 1637, 1638, 1643, and notes.

At section 1638 and note 50, Daniel quotes from Morse on Banks and Banking, as follows: "It is true—and it is all that the cited cases decide —that before demand for payment no assignment exists, no obligation has been created, no privity has grown up, and the very right of the bank to pay may be taken away by any one of a great number of occurrences. But the act of presentment and demand, made before any one of these occurrences has taken place, is the act which creates at once, by usage of business and understanding of all concerned, the obligation, the privity, and the appropriation, or, at least, the right to claim an appropriation."

There is also strong and persuasive, if not convincing, authority for the position (*Wisner v. Bank, infra*) that under sections similar to 2286 and 2335 of our Negotiable Instrument Act, as above set out by us, if a bank retains a check more than twenty-four hours after it has (121) been presented for payment, it thereby impliedly accepts it, and becomes liable, on this acceptance, to the holder of the check. The argument is that, by section 2335, a check is defined to be a bill of exchange drawn on a bank and payable on demand; and, except as in said act otherwise provided, the provisions of the act applicable to bills of exchange payable on demand shall apply also to a check, and that it being nowhere in said act otherwise provided, the deduction is made that section 2286 applies to a check, and, therefore, if the latter is held more than the twenty-four hours after presentment to the bank for payment, it will constitute an implied acceptance, and that, so far as the liability of the bank to the holder is concerned, an implied acceptance of the check is as good as one expressed by a writing thereon.

The further contention is made, in aid of this reasoning, that by section 2339 of the act it recognized that a check may be the subject of acceptance, just like an ordinary bill of exchange, as well as of certification, for that section provides that "a check of itself does not operate

as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it *accepts* or certifies the check." (Italics ours.) This view is ably considered and held to be sound, in *Wisner v. First National Bank of Gallitzin,* 220 Pa., 21. We need not accept either of these views, or consider the legal effect of the mere presentment of the check, for we think that, in this case, there is evidence for the jury tending to show a constructive or implied acceptance of the check or bill by the bank, within the rule laid down by this Court in *Bank v. Kenan,* 76 N. C., 340. It is true that the facts of the two cases are not, in all respects, alike, but are sufficiently so to authorize a jury, as the evidence now appears, to draw an inference, in regard to acceptance, adverse to the defendant.

We have said that the facts in this case are not precisely like those in *Bank v. Kenan,* but they are alike in all essential particulars. There is one respect in which those in this case are more favorable to the plaintiff, and that is the conceded fact that Sol. N. Cone was in a hopelessly insolvent condition, and this should have aroused the bank to a (122) greater sense of its duty and responsibility to the plaintiff. It should, therefore, have acted with promptness. It had undertaken to act as agent to present and collect the check, and this increased its obligation to the holder of the check, as it thus occupied a fiduciary relation, being also drawee. It is not frank in averring the time when it actually received the check, but is content with the bare statement that it was "found in its mail" on Monday, 10 October, 1910, when the presumption is that it was in the hands of its officers on the Saturday before, or on 8 October, 1910. The fact that it was *found* in the mail on the 10th does not prove conclusively that it did not arrive on the Saturday before. It was a fact within its knowledge when it was received, but it preferred to leave it in doubt, instead of candidly stating whether it arrived on Saturday or on Monday. It may have thought that if it came on Saturday, it might more surely fix its liability, and for this reason preferred to leave the matter in doubt or to avail itself of the implied suggestion that, as it was found in the mail on Monday, it was received on that day. It was within its ability to make this matter clear, and it should have done so. The fact was peculiarly within its knowledge, and its failure to make the truth in regard to it clearly appear is a circumstance against it. *Powell v. Strickland,* 163 N. C., at pp. 402, 403.

The defendant denies the agency in its answer, but there is evidence of it in the fact that it acted as such on Monday by presenting the check for payment, and, upon its own refusal to pay it, having it protested. Now, this was done—holding the check over from Saturday, as the jury may have found—when it had to the credit of the drawer a fund far in

excess of the amount named in the check. Speaking in round numbers, there was to his credit on Saturday morning, at the opening of the bank, $19,400, and the same amount on Monday. When it received the check and assumed to act as agent in collecting it, the first step it took was to take care of its own interests by charging a note of $10,000 it held against Cone to his account, still leaving a balance of $9,400 to
(123) his credit, which was far more than sufficient to pay the check.

It avers in its answer that out of the said balance of $9,400 it paid other checks of Cone drawn on it, which were presented before the check in suit, and upon the principle of "first come, first served," it was entitled to do so; but of this there was no evidence, and if there were any, it would be for the jury and not for the court to pass upon. But even this averment seems to be based upon its statement in the answer, put in evidence by the plaintiff, that the check was "found" in its mail on Monday, whereas we must proceed upon the assumption of the *fact* that it was received on Saturday, as we are dealing with a nonsuit, and all evidence is to be regarded favorably for the plaintiff, and every fact which it reasonably tends to prove must be taken to be established. It may be that other checks of Cone came into the bank on Monday before the check in suit was found, and for that reason were paid first; but if the $5,000 check was received Saturday and the other checks Monday, the miller's rule set up by the defendant would not apply. Was the defendant, therefore, as agent and drawee, acting in good faith with the plaintiff in handling its check? As the evidence is now to be considered by us, the jury might well have found, if the case had been submitted to them, that it was not, and if the facts are not, as the jury could find them to be upon this evidence, it is defendant's misfortune that the case stopped short of full proof on both sides.

In *Bank v. Kenan, supra,* the Court, by *Justice Bynum,* said: "The bank is presented to us in another unfavorable attitude. It voluntarily assumed the agency to collect this check, when itself was a large creditor of Moffitt; had secured most of his effects; was aware of his embarrassment, and was making exertions to save itself from loss. The undertaking, therefore, to collect this debt was antagonistic to the duties and purposes of the bank, to save itself by seizing the only plank in the shipwreck. The natural if not the intentional result was that the interests of the defendant were pretermitted and he became the victim of censurable neglect. When the interests of the plaintiff and defendant conflict, and the plaintiff voluntarily assumes the agency and trust to
(124) manage the interests of the other, the rule of good faith, which is equity, will not allow the agent to sacrifice the interests of his principal to his own. . . . Here the bank was the creditor, and the check

was drawn on and was payable by the bank, the agent. The undertaking of the bank was to collect a check on itself. Of necessity it must be assumed that it was presented for payment, that is, acted upon, at the time it was payable by the bank. . . . Upon the plainest principles of justice these peculiar circumstances of willful neglect of a known duty constitute a case of constructive acceptance of the check and fix the bank for the full amount of it. The negligence of the bank has made the check its own, and the case is taken out of the general rule as to the measure of damages. *Allen v. Suydam,* 20 Wend., 321; 2 Danl. Neg. Instr., sec. 1619 and notes." The doctrine of this case is somewhat more broadly stated in 2 Morse on Banks and Banking (4 Ed.), ch. 34, especially secs. 499 to 511.

It may be, when the evidence is fully developed, that it will present a very different aspect from that now in the record, and we may not be required to give it the same kind of construction as we are bound to do upon a nonsuit. The plaintiff, in that event, will have to take and carry the burden of the issue and prove its case by a preponderance of the evidence, and the jury will find the facts and apply the law under instructions from the court. The defendant may be able to show clearly, or, at least, to have the jury find, that it has fully discharged its duty to the plaintiff; that it received the check on Monday, retained enough out of the funds of Cone then in the bank to pay his $10,000 note held by it, applied the balance *pro tanto* to other checks presented before the plaintiffs, and when the latter was received, there were not sufficient funds in hand to pay it, which would assuredly present a much stronger case for it.

As to plaintiff's being the owner of the check, we are of the opinion that, as the evidence is now stated, there is sufficient to warrant a finding by the jury on that question in favor of the plaintiff; but it may be presented in a stronger light hereafter.

We have not gone fully into a discussion of the evidence, as to either question, lest we might, thereby, prejudice one or the (125) other party at the next trial. When all the facts are before us, we may then more clearly define the rights of the parties and declare for or against the liability of the defendant on the check.

The nonsuit will be set aside, and a new trial given.

New trial.

Cited: Nelson v. R.R., 167 N.C. 187; *Bank v. Roberts,* 168 N.C. 476; *Horton v. R.R.,* 169 N.C. 116; *Lamb v. Perry,* 169 N.C. 442; *Holloman v. R.R.,* 172 N.C. 375; *Bank v. Hall,* 174 N.C. 480; *Green v. Ruffin,* 179 N.C. 349; *In re Hinton,* 180 N.C. 213; *Eagles v. R.R.,* 184 N.C. 69;

S. v. Yarboro, 194 N.C. 507, 511; *Woody v. Bank,* 194 N.C. 552; *Dawson v. Bank,* 196 N.C. 136; *S.c.,* 197 N.C. 500; *S. v. Crawford,* 198 N.C. 524; *Ledwell v. Milling Co.,* 215 N.C. 376; *Ins. Co. v. Stadiem,* 223 N.C. 52; *White v. Ins. Co.,* 226 N.C. 124; *Cuthrell v. Greene,* 229 N.C. 481.

GEORGE W. LEDBETTER v. J. L. ENGLISH.

(Filed 30 May, 1914.)

1. Municipal Corporations—Cities and Towns—Ordinances—Violation—Trials—Negligence—Proximate Cause—Instructions.

The plaintiff sued the defendant for damages to his automobile, alleging that the defendant was negligently running his own automobile at the time on the left-hand side of a city street, forbidden by an ordinance, and thus caused a collision, resulting in the damages claimed in his action. There was conflicting evidence as to whether the plaintiff was on the wrong side of the street and caused the collision by turning his automobile as the defendant turned to the left side of the street to avoid the collision, when imminent, and whether the consequent damages resulted from the plaintiff's negligence. The ordinance made it lawful to cross over to the left-hand side of the street for certain purposes, and it is held for reversible error that the court charged the jury that the defendant was negligent if, at the time of the collision, he was on the left-hand side of the street, as such withdrew from the consideration of the jury that the defendant had a right under the provisions of the ordinance to drive on the left-hand side of the street for lawful purposes, and also the question of proximate cause.

2. Municipal Corporations—Cities and Towns—Ordinances—Trials—Negligence Per Se—Proximate Cause.

While the violation of a city ordinance relating to the running of automobiles on the streets of a city is negligence *per se,* it is necessary, to recover damages alleged to have been caused thereby, that the plaintiff show that this negligence was the proximate cause of the injury complained of.

(126) APPEAL by defendant from *Justice, J.,* at February Term, 1913, of BUNCOMBE.

This is a civil action to recover damages to an automobile, alleged to have been sustained in a collision by reason of the negligence of the defendant while driving another automobile.

There was evidence on behalf of the plaintiff tending to prove the allegations in the complaint. There was evidence on the part of the defendant tending to prove the allegations in the answer.

The defendant himself testified that he was driving his automobile at from 8 to 12 miles an hour, as he was turning from Riverside Drive into Lyman Street, and that he did not recall whether he sounded his horn or not. There was evidence tending to show the defendant was on the wrong side of the road, and evidence tending to show that the plaintiff was on the wrong side of the road. The collision occurred at the intersection of Lyman Street and Riverside Drive.

There were no objections or exceptions taken to any of the testimony.

An ordinance was introduced in evidence relating to driving on the streets of the city. It provides that "It shall be the duty of all persons driving upon the streets . . . to go and travel upon the right-hand side . . . unless the crowded condition of that side . . . or other unavoidable circumstances shall make it necessary to drive upon the left-hand side: . . . *Provided,* that nothing herein contained shall prohibit persons from driving across the street to the left side for any lawful and proper purpose," etc.

Among other things, the judge charged the jury:

1. "If you find, gentlemen of the jury, that the defendant, English, was driving at a rate of 8 or 10 or 12 miles an hour, as he said he was, he was guilty of negligence." The defendant excepted.

2. "Or if he failed to sound his horn as he turned that corner, then he would be guilty of negligence." The defendant excepted.

3. "If you find that the defendant was on the wrong side of the road in making that turn, he was guilty of negligence, because the law says he must stay on the right, and that he must not go over to (127) the left side of the road. That is applicable to English." The defendant excepted.

4. "Now, if Mr. English was driving as fast as he said he was, that is negligence." The defendant excepted.

There was a verdict for the plaintiff. Judgment was then rendered upon the verdict, and the defendant appealed.

Mark W. Brown for plaintiff.

Merrimon, Adams & Adams for defendant.

ALLEN, J. It was erroneous to charge the jury that if the defendant was on the wrong side of the road he was guilty of negligence.

The defendant alleges in his answer: "That the plaintiff, Ledbetter, was driving a car on the wrong side of the street and in the direction of the defendant, and showing no inclination to turn out; the defendant, in order to avoid a collision, turned to the left side of the street, and almost immediately thereafter the plaintiff turned the car he was driving, and

there was a collision of the two cars; that if any one were to blame for the accident, it was the plaintiff in this cause, in violating the city ordinance requiring him to keep on the right side of the street, and in turning his car after he saw, or could have seen, that the defendant was turning in order to avoid any accident; and the plaintiff contributed to the injury to the said car by his own negligence and want of care, as herein alleged."

And the case on appeal states that there was evidence tending to prove the allegations of the answer.

If so, and this evidence of the defendant should be accepted by the jury, the defendant was on the left side of the street because of the wrongful conduct of the plaintiff, and to avoid a collision with him, and this would not be a violation of the ordinance introduced in evidence, which expressly permits one to travel on the left-hand side of the street if the right side of the street is crowded or when unavoidable circumstances make it necessary. If the evidence of the defendant is true, it was necessary for him to turn to the left side, and the necessity (128) existed by reason of the unlawful act of the plaintiff, and this would be neither a violation of the ordinance nor negligence, as the ordinance expressly permits driving on the left side for a lawful purpose.

This view of the evidence was excluded from the jury by the instruction given, the negligence of the defendant in this particular being made to depend on whether he was on the left-hand side of the street, and not whether he was wrongfully there.

This disposes of the appeal, but another question is presented by the exceptions, which we will consider, as it will necessarily arise on another trial, and that is, whether the violation of a statute or ordinance is negligence *per se,* or merely evidence of negligence.

A reference to the text-writers and the decided cases upon the question will serve no useful purpose, as we can find as many expressions in favor of one position as the other, and in our own reports, in *Edwards v. R. R.,* 129 N. C., 82; *Henderson v. Traction Co.,* 132 N. C., 784, and *Duval v. R. R.,* 134 N. C., 331, it is said that the violation of a statute or ordinance is evidence of negligence, while in *Leathers v. Tobacco Co.,* 144 N. C., 330, and *Starnes v. Mfg. Co.,* 147 N. C., 556, it is declared that it is negligence *per se.*

Much of this apparent conflict of authority arises from a failure to distinguish between negligence, which is a failure to perform a duty imposed by law and from which no injury may follow, and actionable negligence, in which there must not only be a failure of duty, but also an injury as the proximate result.

In other words, the courts have sometimes lost sight of the principle that the violation of an ordinance or statute may be negligence *per se,* or as a matter of law to be declared by the court, and at the same time only evidence of the right to recover, which requires proof of two facts: (1) negligence; (2) that the negligence is the proximate cause of the injury.

In the *Henderson case,* which contains the strongest expression in favor of the position that it is evidence, the Court clearly had in mind the effect upon the right to recover, as appears from the context. The Court says:

"After a careful examination of a number of authorities, we (129) are of the opinion that the sound doctrine is, that a violation of a public statute or a city ordinance is evidence of negligence, to be submitted to the jury. It is generally held, and this we regard as the true doctrine, that the element of proximate cause must be established, and it will not necessarily be presumed from the fact that a city ordinance or statute has been violated. Negligence, no matter in what it may consist, cannot result in a right of action unless it is the proximate cause of the injury complained of by the plaintiff."

This is further illustrated by *Rich v. Electric Co.,* 152 N. C., 694, in which the Court, having in mind the necessity of proving proximate cause, quotes the statement from the *Henderson case* that the violation of a statute or ordinance is evidence of negligence, and from the *Leathers case,* that it is negligence *per se,* in connection with what is said in both opinions as to proximate cause, and concludes: "It seems to us that the principle is clearly settled by this Court in the cases cited, that, while the violation of a statute is negligence, yet to entitle the plaintiff seeking to recover damages for an injury sustained, he must show a causal connection between the injury received and the disregard of the statutory prohibition or mandate—that the injury was the proximate cause; and this requirement is fundamental in the law of negligence."

This last expression of the Court is, in our opinion, a correct statement of the law, and it accords with what is said on the subject in Shearman and Redfield on Neg. (6 Ed.), sec. 4, where the author, after defining negligence, says: "It will be advantageous to carry the analysis a little further. The foregoing definition attempts to define the negligence which affords the ground of a civil action. But this includes two distinct elements—negligence and damage—both of which must concur in order to form the ground of an action, just as fraud and damage must concur to sustain an action on fraud. The two elements are, however, distinct; and the result of mingling them too closely has been to introduce that confusion of ideas under which the same courts at one

(130) time hold that a clear violation of law is negligence *per se,* and at another time that it is only 'evidence,' or even only 'some evidence,' of negligence; the truth being that every breach of duty to observe the degree of care required by law is negligence, and not merely evidence of it, but that damage caused to the plaintiff being an indispensable element in his cause of action, the clearest proof of negligence, standing by itself, is only 'some evidence' of his right to recover."

When it is remembered that negligence is the failure to perform a duty imposed by law, it necessarily follows that the failure, without legal excuse, to obey the provisions of a statute or ordinance imposing a public duty is negligence, and not merely evidence of negligence, and that when this is proven the plaintiff has furnished some evidence of a right to recover, which can, however, avail him nothing unless he goes further, and proves that this failure of duty was the real or proximate cause of his injury.

For the error pointed out a new trial is ordered.

New trial.

Paul v. R.R., 170 N.C. 231; *Zageir v. Express Co.,* 171 N.C. 694; *Taylor v. Stewart,* 172 N.C. 204; *Hinton v. R.R.,* 172 N.C. 589; *Ingle v. Power Co.,* 172 N.C. 753; *Dunn v. R.R.,* 174 N.C. 259; *Ridge v. High Point,* 176 N.C. 424; *Goodrich v. Matthews,* 177 N.C. 199; *Mfg. Co. v. Hester,* 177 N.C. 613; *Newton v. Texas Co.,* 180 N.C. 565; *Graham v. Charlotte,* 186 N.C. 666; *David v. Long,* 189 N.C. 134; *Albritton v. Hill,* 190 N.C. 430; *Campbell v. Laundry,* 190 N.C. 654; *Gillis v. Transit Corp.,* 193 N.C. 348; *Peters v. Tea Co.,* 194 N.C. 180; *Covington v. Wyatt,* 196 N.C. 371; *Whitaker v. Car Co.,* 197 N.C. 84; *Burke v. Coach Co.,* 198 N.C. 13; *Lancaster v. Coach Line,* 198 N.C. 109; *Bailey v. McKay,* 198 N.C. 640; *S. v. Satterfield,* 198 N.C. 685; *Godfrey v. Coach Co.,* 201 N.C. 267; *S. v. Durham,* 201 N.C. 732; *King v. Pope,* 202 N.C. 558; *Minnis v. Sharpe,* 203 N.C. 112; *S. v. Cope,* 204 N.C. 31; *Norfleet v. Hall,* 204 N.C. 577; *Ham v. Fuel Co.,* 204 N.C. 617; *Johnson v. R.R.,* 205 N.C. 132; *Sherwood v. Express Co.,* 206 N.C. 246; *James v. Coach Co.,* 207 N.C. 746; *Farfour v. Fahad,* 214 N.C. 287; *Holland v. Strader,* 216 N.C. 438; *Miller v. R.R.,* 220 N.C. 566; *Leary v. Bus Corp.,* 220 N.C. 757; *S. v. Lowery,* 223 N.C. 603.

J. D. SHEPHERD AND W. D. COPE v. THE W. T. MASON LUMBER COMPANY.

(Filed 30 May, 1914.)

Appeal and Error—Trials—Evidence Prejudicial—Fraud.

In an action brought by individuals against a lumber corporation to recover damages for fraudulent representations as to the quantity and quality of timber owned by the defendant and purchased by the plaintiffs in certain localities, it is reversible error on the defendant's appeal for the court to admit evidence of a separate and different transaction whereby the plaintiffs had mortgaged their homes to the defendant, and had lost them under foreclosure of the mortgage; for such evidence could only be used for the purpose of unduly influencing the jury against the defendant in determining the issues of fraud, and would likely have that result. *Jones v. Pullen*, 115 N. C., 465, and that line of cases, cited and distinguished.

APPEAL by defendant from *Ferguson, J.*, at October Term, (131) 1913, of SWAIN.

This action was brought to recover damages for the false and fraudulent representations of defendant as to the quantity and quality of felled timber on the waters of Bunches Creek, and on the yard situated on Mingo Creek, the amount of timber on Bunches Creek having been represented to be 2,000,000 feet, and that on Mingo Creek, in the yard, as 500,000 feet. Issues were submitted to the jury, and the following verdict rendered:

1. Did the defendant, W. T. Mason Lumber Company, through its legally authorized agent, falsely represent to the plaintiff the quantity and quality of felled timber on the waters of Bunches Creek, referred to in the contract of 14 October, 1911? Answer: Yes.

2. Were such representations, if made, known to the defendant, at the time said contract was entered into, to be false, or were they made without the knowledge of the truth, as a positive assertion? Answer: Yes.

3. Were such false representations, if any, made with the intent to deceive the plaintiffs to their injury? Answer: Yes.

4. Were the plaintiffs induced to enter into said contract solely because of said representations? Answer: Yes.

5. Did the plaintiffs have ample opportunity, prior to the entering into said contract, to have examined the quantity and quality of said timber? Answer: No.

6. Were they, by any trick or artifice on the part of the defendant, prevented or kept from making such examination? Answer: Yes.

7. What damage, if any, have the plaintiffs sustained by reason of such representations? Answer: $700.

8. Did the defendant, W. T. Mason Lumber Company, through its legally authorized agent, falsely represent to the plaintiff the quantity and quality of the logs to be sawed into lumber on the yard on Mingo Creek, as alleged in the complaint? Answer: Yes.

9. Were such representations, if made, known to the defendant to be false at the time they were made? Answer: Yes.

(132) 10. Were such false representations, if any, made with the intention on the part of the defendant to deceive the plaintiffs to their injury? Answer: Yes.

11. Were the plaintiffs induced to enter into the agreement to saw said logs on Mingo Creek solely by reason of said representations? Answer: Yes.

12. Did the plaintiffs have ample opportunity, prior to entering into said agreement and prior to moving their mill to Mingo Creek, to have examined the quantity and quality of logs and the character of roads leading thereto? Answer: No.

13. Were the plaintiffs, by any trick or artifice on part of defendant, prevented or kept from making such examination? Answer: Yes.

14. What damage, if any, are the plaintiffs entitled to recover on account of false representations as to quantity of logs on Mingo Creek? Answer: $800.

15. Did the plaintiffs wrongfully abandon the performance on their part of the contract of 14 October, 1911, and fail and refuse to perform the same? Answer: No.

16. If so, what damages has the defendant sustained on account of said abandonment of said contract? Answer: None.

Judgment was entered thereon, and defendant appealed.

No counsel for plaintiff.
Zebulon Weaver and Frye, Gantt & Frye for defendant.

WALKER, J., after stating the case: There was much evidence taken as to the false representation, but we do not deem it necessary to consider the exceptions to it or to the charge, as we think error was committed in the admission of certain testimony. The plaintiffs' witness, W. D. Cope, was permitted to testify, after objection by the defendant, that the plaintiffs had given a deed of trust on their home place to the defendant to secure a loan of $500. We have examined the case critically with a view of ascertaining what possible relevancy this testimony had to the matter in dispute, and find it has none; yet it was admitted and allowed to be used before the jury as a material fact in the case.

It is readily seen how it was prejudicial to the defendant, if we (133) consider the nature of the case, and of the other testimony, the

direct question involved, and how little would be required to turn the scales against the defendant. The minds of the jurors should not be diverted from the precise questions in issue by the introduction into the case of collateral and irrelevant matters, especially such as are calculated to prejudice one of the parties and prevent a fair and impartial trial; and especially is this so where, as in this case, the defendant is charged with the commission of a fraud. It was competent for plaintiffs to show what their damages were and what outlay they had made in consequence of the fraud, if any was practiced; but it was not relevant to this controversy that they should be allowed to inquire as to the kind of mortgage they had made to the defendants for the purpose of borrowing money, with the view of showing that it rested upon their home place, and thus appeal to the sympathy of the jury. The evidence was improper and should have been excluded.

The case is not like that of *Lea v. Pearce,* 68 N. C., 76; *Whitehead v. Hellen,* 76 N. C., 99; *McLeod v. Bullard,* 84 N. C., 516; *Jones v. Pullen,* 115 N. C., 465, and others of a like kind, where as between trustor and trustee, mortgagor and mortgagee, and persons occupying other fiduciary relations towards each other, the law raises a presumption of fraud or undue influence because of the power and influence which the one is supposed to have over the other, and requires the former to rebut the presumption and show the fairness and good faith of the transaction, and that the result was attained without the use of any such power or influence. In those cases the mortgagee had dealt directly with the mortgagor in purchasing the equity of redemption. But not so here, for there was no dealing between these parties with reference to the purchase of the plaintiffs' home, which had been mortgaged by the defendant. The evidence had no bearing on the issues, and could not have been used, and we must assume that it was used, as that was its only use, to weaken the defendant in answering the charge of fraud in regard to the sale of the timber. "Where the inadvertent effect of receiving immaterial evidence has been to injure a party by exciting sympathy for his (134) adversary, or hostility to himself, or in any other way, its admission constitutes reversible error." 16 Cyc., 1115. As said in *Denning v. Gainey,* 95 N. C., 532, there was no legitimate use to be made of the proposed inquiry, and it was calculated to prejudice the minds of the jury, and its exclusion was proper. Where this was the case, a similar question, and having the same general bearing, was asked in *Hutchins v. Hutchins,* 98 N. Y., 56, where the Court said: "Illegal evidence that would have a tendency to excite the passions, arouse the prejudices, awaken the sympathies, warp or influence the judgment of the jurors in

any degree, cannot be considered as harmless." Citing *Anderson v. R. R.*, 54 N. Y., 334, and quoting from *Judge Larned's* opinion in the court below as follows: "Nothing could be better fitted to divert the minds of the jury from the true issue than a pathetic contrast between the widow of a rich brother and the poor defendant." And the same may be said of this evidence, which was "fitted" to present just such a situation: the poverty of plaintiffs, who had lost their home by the mortgage, and the wealth of the defendant, who owned broad acres of timber land.

This error entitles the defendant to another jury.

New trial.

Cited: Dellinger v. Building Co., 187 N.C. 849; *S. v. Galloway*, 188 N.C. 417; *Hill v. Hill*, 196 N.C. 473; *Keller v. Furniture Co.*, 199 N.C. 414; *S. v. Page*, 215 N.C. 335; *Crouse v. Vernon*, 232 N.C. 32; *Sprinkle v. Ponder*, 233 N.C. 320.

JAMES F. YATES ET AL v. DIXIE FIRE INSURANCE COMPANY ET AL.

(Filed 30 May, 1914.)

Injunction—Vacating Restraining Order—Appeal and Error—Acts Committed—Courts—Procedure.

Where a restraining order has been vacated and appealed from, and it appears, upon the hearing in the Supreme Court, that the act sought to be restrained has been practically done, it is only in rare and exceptional instances that the Court may satisfactorily and intelligently decide upon the matters presented, the practice being for the appellant to reserve his rights by exceptions, regularly taken, at the trial, if necessary, and present them on appeal from the final judgment in the Superior Court.

(135) APPEAL by plaintiffs from order of *Lane, J.*, vacating a restraining order, 27 March, 1914, at chambers in GUILFORD.

John A. Barringer for plaintiffs.

Brooks, Sapp & Williams for defendants.

CLARK, C. J. The plaintiffs complain that they are part owners of the soil of a certain alleyway through which the defendants have a right of way, but no property interest in the soil, and that said defendants, in derogation of the legal rights of the plaintiffs, have begun 10 feet above the said alley to build across and above said alley a permanent structure

connecting the buildings on either side which belong to the defendants, and will thereby take from the plaintiffs their rights, as owners of the said soil, above ground.

The plaintiffs obtained a restraining order till 28 March, 1914, which was vacated, and from that order they have appealed. The work was far advanced when the restraining order was issued. An affidavit has been filed that since its dissolution the work has now been completed. Though this last is controverted, it is reasonable to suppose that at least the greater part of the work has now been done.

The appeal is from the vacation of the restraining order, and could only present the correctness of the judgment in refusing to continue the restraining order to the hearing. The defendants have proceeded at their peril, and whatever the rights of the parties are will be determined at the final hearing, when the issues of fact, if any are raised, can be determined by a jury and the rights of the parties and the remedy to be awarded can be determined by a final judgment. On an appeal from such judgment, if an appeal is taken, the matter will be adequately presented for consideration and determination by this Court. We cannot be sufficiently advised to pass intelligently upon the questions involved in such final determination by this appeal from the vacation of a restraining order which was asked to restrain further construction of the building. The building had been partly constructed when the (136) restraining order was issued, and must be now completed, or nearly so.

When a restraining order is granted, an appeal may bring up the questions essential to the final determination of the controversy. But when the restraining order is refused or vacated, and pending the appeal the work proceeds, it is rare that the Court can afford any remedy by considering whether the restraint should have been dissolved or not. In such cases the proper remedy is, except in rare instances, to try the case on its merits and, after a full determination of all the issues of fact and of law, to appeal from the final judgment.

Appeal dismissed.

Cited: Yates v. Ins. Co., 173 N.C. 474; *Boyd v. Brooks*, 197 N.C. 648; *Barker v. Dowdy*, 223 N.C. 151; *Coble v. Coble*, 229 N.C. 86; *Branch v. Board of Education*, 230 N.C. 507.

LILLIE H. COIT v. OWENBY-WOFFORD COMPANY ET AL.

(Filed 30 May, 1914.)

Railroads — Right of Way — Necessary Superstructures — Warehouse — Leases to Patrons—Benefits—Public Duties.

The principles of law which permit a railroad company to judge of the necessity for the use of its right of way for the convenience of the company and in the furtherance of its corporate business, extends for like purposes to the erection of warehouses or superstructures thereon, and it may permit or lease this right to its patrons as such in consideration of benefits to be received from them in the routing of their freight arising from the use of such buildings as stores and warehouses, when not prejudicial to its other patrons or inconsistent with its duties as a public-service corporation.

APPEAL by plaintiff from *Carter, J.*, at January Term, 1914, of CHEROKEE.

Civil action to recover possession of a warehouse on the right of way or station grounds of the Louisville and Nashville Railroad, successors of the Atlanta, Knoxville and Northern Railroad Company.

(137) On the trial it was shown that the plaintiff was the ultimate owner in fee of the land, and that the same had been previously condemned as a right of way of the Atlanta, Knoxville and Northern Railroad and now used and occupied as such by the Louisville and Nashville; that the former road, while same was under its control, leased a designated portion of the right of way or terminal ground for the purpose, to J. L. Smathers for a stated rent, who erected thereon a warehouse and used and occupied it for several years, when that firm leased or conveyed their rights in the same to the codefendant, the Owenby-Wofford Company, who in turn occupied and used the same under the terms of the lease till the building was torn down and removed at some time pending the controversy, the date of this occurrence not being fixed with exactness by the testimony.

The written lease, bearing date in 1900, purported to exact a rental of $12 per annum, ground rent, and contained the stipulation, among others (section 4), as follows:

"In further consideration of said lease, said party of the second part binds himself, his heirs and assigns, to make party of the first part his preferred line for the transportation of inbound and outbound merchandise to and from said warehouse during the existence of this lease and so long as party of the first part affords rates equal with those of the Southern Railway Company for like service. By preferred line is meant the routing of shipments so as to give party of the first part the prefer-

ence on all competitive business by the longest haul practicable within the rates at the time in force."

As to the use of the property under the lease, J. L. Smathers, witness for defendant, testified, among other things: "We were there in the produce business, tan-bark shippers and wholesale grocery business, and used it for receiving and shipping goods. It was built with reference to our business." And further: "My contract for the erection of this warehouse is in writing; I turned over my copy of it to my codefendant. We used that warehouse for the private business of the J. L. Smathers Company; we used it for receiving and shipping freight, for the wholesale grocery business; the private business of our corporation. There was another freight room where the general public was (138) served. There was an agreement for rent at $12 per year to be paid by us to the road. I did not pay it. As well as I remember, we paid it the first year. After that, it occurs to me that the management changed, and possibly it escaped their attention. They never did call on us for it. Owenby-Wofford Company succeeded us 1 March, four years ago. I turned over the contract to Owenby-Wofford Company. We used that building without paying rent for eight years, as I recollect; I might be wrong. I went altogether according to the lease I had from the A. K. and N. Railway."

There was further evidence tending to show that a fair rental for the warehouse in question was $40 per month.

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

M. W. Bell and Dillard & Hill for plaintiff.

J. D. Mallonee, Witherspoon & Witherspoon, and E. B. Norvell for defendant.

HOKE, J. The decisions of this State are to the effect that, in condemning a right of way, under ordinary proceedings, the railroad acquires an easement in the property, to be held and used as the necessities and well ordered management of the road may require, and that the company authorities are made the judges of the extent and necessities of this use. *R. R. v. McLean,* 158 N. C., 498; *Earnhardt v. R. R.,* 157 N. C., 358; *R. R. v. Olive,* 142 N. C., 273.

The cases further hold that, to the extent that the land covered by the right of way is not presently required for the purposes of the road, the owner may continue to occupy and use it in a manner not inconsistent with the full and proper enjoyment of the easement. *R. R. v. McLean, supra; Lumber Co. v. Hines Bros.,* 126 N. C., 254; *Sturgeon v. R. R.,*

120 N. C., 225. In the practical application of these recognized principles, here and elsewhere, it is very generally held that, while a railroad company may not use or license the use of its right of way or depot grounds for purposes strictly individual or private, it may erect
(139) thereon any and all buildings and superstructures reasonably required for the convenience of the company as a corporation and in promotion and furtherance of its corporate business; and what it may do for itself and for like purpose, it may permit or license to its patrons to the extent that it does not hinder or interfere with the proper performance of its duties to the public.

In the well considered and learned brief of defendant's counsel we were referred to numerous decisions to the effect that railroad companies could not be held for trespass on the rights of the owner in erecting or permitting the erection on its right of way and in furtherance of the company's business, coal chutes, sheds, elevators, platforms, and conveniences of all kinds affording facilities for receipt and shipment of freight, such as lumber yards, stock yards and pens, storage-houses, etc., and even hotels and boarding-houses when carried on for the accommodation or benefit of passengers and company employees, an instance of which occurs in our own reports in *Gudger v. R. R.*, 106 N. C., 481, and see, also, *Anderson v. Interstate Manufacturing Co.*, Iowa, 132 N. W., 152, reported with an instructive note in 36 L. R. A. (N. S.), at page 512; *Gurley v. Minneapolis Elevator Co.*, 63 Minn., 70; *Pierce v. R. R.*, 141 Mass., 481; *Hartford Ins. Co. v. Chicago and Mil. R. R.*, 175 U. S., 91; *Grand Trunk Ry. v. Richardson*, 91 U. S., 468; *Ill. Central v. Wathen*, 17 Ill. App., 580.

In *Grand Trunk Ry. v. Richardson, supra, Associate Justice Strong*, delivering the opinion, said: "It is not doubted that the defendant might have erected similar structures on the ground on which the plaintiffs' buildings were placed, if in its judgment the structures were convenient for the receipt and delivery of freight on its road. Such erections would not have been inconsistent with the purposes for which its charter was granted. And if the company might have put up the buildings, why might it not license others to do the same thing for the same object, namely, the increase of its facilities for the receipt and delivery of freight?" These authorities and the principle which they uphold and illustrate are in full support of his Honor's judgment awarding a nonsuit, for it appears, by correct interpretation of the only testi-
(140) mony relevant to the question, that, while the user of the warehouse was restricted to the private business of the lessees, its chief and controlling purpose was to afford facilities for these lessees, as patrons of the road, in the storage, receipt and shipment of freight.

There is no error, and the judgment of nonsuit must be Affirmed.

Cited: R.R. v. Bunting, 168 N.C. 579, 580; *Sparrow v. Tobacco Co.,* 232 N.C. 592.

ROBERT N. ARCHER ET AL. v. GEORGE W. McCLURE ET AL.

(Filed 30 May, 1914.)

1. Reformation—Mutual Mistake—Equity—Written Contracts—Parol Evidence.

Equity will reform a written instrument when such is necessary to make it express the intention of the contracting parties, which by reason of mutual mistake, or the mistake of the draftsman, it fails to do, if no intervening or superior equities of third persons have arisen by reason of the mistake, this not coming within the rule that parol evidence will not be received to vary the terms of a written contract.

2. Same—Burden of Proof—Trials—Questions for Jury.

It is required that the proof of the mistake be clear, strong, and convincing, where a written contract is sought to be reformed, the burden of proof being on the party seeking the equitable relief, and the question as to whether the proof meets this requirement is one for the jury, and not for the court, to decide.

3. Same—Principal and Surety—Principal and Agent—Indemnity Bond.

Where a bond of indemnity is given to an agent, instead of to his principal, for whom it was intended, and liability has arisen under its terms and conditions, it may be shown that, by mutual mistake or mistake of the draftsman, the name of the agent was inserted as the obligee, and, upon the proof required, the written instrument may be reformed by parol evidence to speak the true intent of the parties.

4. Same—Knowledge Implied—Quantum of Proof.

In an action involving title to lands, the defendants were restrained from cutting the timber thereon, and it was agreed between the parties that the defendants be permitted to sell the timber to a third person upon indemnifying the plaintiff, with sufficient bond, against loss if he succeeded in his action. This bond was accordingly given, except that by mutual mistake the agent of the plaintiff was named as the obligee. *Held,* equity will reform the bond to make it conform to the actual agreement entered into; and it appearing that the bonding company had notice of the pending action and the purpose of the parties to indemnify the plaintiff therein against any loss of the character stated, it was some evidence of the mistake to be submitted to the jury.

(141) APPEAL by defendant from *Ferguson, J.*, at November Term, 1913, of CHEROKEE.

This action or proceeding was brought by the plaintiffs to reform and recover upon a bond given by the defendants in an action brought by Robert N. Archer and others against George W. McClure. The original action of Archer and others against McClure was brought for the recovery of a certain tract of land described in the complaint, and a restraining order was issued therein against the said McClure, enjoining him from cutting timber from the lands in dispute, and from removing certain sawed lumber. Thereafter the lumber claimed by McClure was sold by him to the Albert Haas Lumber Company, and in order to remove the lumber the Albert Haas Lumber Company, through one of its members, went to M. E. Cozad, who had represented the plaintiffs, Archer and others, as agent, and told him that they were making arrangements to purchase the lumber from McClure and did not care to trespass on the land, and Cozad told Haas that if he would give a good bond of indemnity against all loss, that they could remove the lumber. The original suit of Archer and others against McClure, as shown by the record, was instituted in the name of Archer and others, as trustees, by M. E. Cozad, agent for the plaintiffs, and Mr. Cozad was the active agent in prosecuting the same, Archer and others, trustees, being nonresidents of the State.

After the purchase of the lumber by the Albert Haas Lumber Company and the conversation with Mr. Cozad, in which he agreed to allow them to give bond and remove it, the Albert Haas Lumber Com-
(142) pany undertook to give this bond, and applied to the defendant Fidelity and Deposit Company of Maryland to make it. A copy of the bond and of the power of attorney is set out in the record of the original case of Archer and others against McClure, as appears therefrom. The bond is signed by George W. McClure, the Albert Haas Lumber Company, and Fidelity and Deposit Company of Maryland, and its execution authorized by the latter, by the power of attorney attached, the only difference being that the name of M. E. Cozad, who was acting as agent, was inserted in the bond as obligee, without the names of his principals. It is this bond that gave rise to the controversy, the name of M. E. Cozad having, as the plaintiffs alleged, been written in the bond by mistake instead of Archer and others, trustees, the real plaintiffs in the action. This mistake was not discovered until some time after a judgment by default was taken against McClure, adjudging that the plaintiffs were the owners of the land in dispute, and ordering an inquiry as to the damages, and at the succeeding term of court an issue of damages was submitted, and were assessed by the jury at $805. Upon the

judgment by default and the verdict assessing damages, a judgment was asked by the plaintiffs (M. E. Cozad having come in and made himself a party plaintiff) against the defendants George W. McClure and the Albert Haas Lumber Company and Fidelity and Deposit Company of Maryland, which judgment was resisted by the latter company upon the ground that the bond given by it was to pay all such sums as might be recovered against the said McClure for the removal of the lumber described in the complaint on file in the suit of M. E. Cozad against George W. McClure.

This proceeding was then instituted to correct the bond so as to conform to the alleged original intention and agreement, which was to indemnify the plaintiffs Archer and others from loss on account of removing the lumber.

The power of attorney signed by the defendant which was filed in the original suit of Archer and others against McClure shows that Aaron Haas or Edwin R. Haas was authorized to execute a bond which the Albert Haas Lumber Company was required to file in the Superior Court of Cherokee County, North Carolina, in the case of (143) M. E. Cozad against G. W. McClure, and the bond was accordingly executed by Albert Haas as attorney in fact of the Fidelity and Deposit Company.

The following verdict was returned by the jury:

1. Did the defendants G. W. McClure, Albert Haas Lumber Company, and Fidelity and Deposit Company execute the bond dated 7 June, 1906? Answer: Yes.

2. Was said bond given for the purpose of allowing the removal of the lumber mentioned in the complaint in the case of R. N. Archer *et al.* v. G. W. McClure, and was said bond intended to have been given in that case, and by mutual mistake and the mistake of the draftsman the name of M. E. Cozad inserted instead of R. N. Archer and others? Answer: Yes.

3. Did the Fidelity and Deposit Company of Maryland know when the bond was executed that there was such a suit pending in favor of R. N. Archer, Louis Krohn, W. R. Hopkins, F. W. Bruch, E. I. Leighton, and George Reeves? Answer: Yes.

4. Did the Fidelity and Deposit Company of Maryland authorize any one to execute any bond for or on its behalf in any action in favor of R. N. Archer? Answer: Yes.

5. Have the defendants G. W. McClure and Albert Haas Lumber Company been discharged in bankruptcy? Answer: Yes.

J. D. Mallonee and Zebulon Weaver for plaintiffs.

E. B. Norvell for defendants.

WALKER, J., after stating the case: The doctrine is elementary that parol evidence is not, in general, admissible between the parties to vary a written instrument, but it is equally well settled that mistake, fraud, surprise, and accident furnish exceptions to the universal principle, and parol evidence, in any case brought within one of the exceptions, is admitted to vary the writing so far as to make it accord with the true intention and agreement of the parties. These exceptions rest upon the highest motives of policy and expediency, or otherwise an injured party would generally be without remedy. Equity follows the law, it
(144) is true, but sometimes it will intervene and afford relief where the remedy at law is inadequate for the purpose. The doctrine we have stated has often been applied by this and other courts in the correction of written contracts, bonds, deeds, and other instruments, where the mistake was one of fact, mutual and common to all the parties, and the proof clear, strong, and convincing. 2 Pomeroy's Eq. Jur. (1 Ed.), sec. 858; 1 Beach Mod. Eq. Jur., secs. 48 and 51; 1 Story's Eq. Jur. (12 Ed.), sec. 138 and note; *Dillard v. Jones,* 229 Ill., 119. A mistake exists when a person, under some erroneous conviction of law or fact, does or omits to do some act which but for the erroneous conviction he would not have done or omitted. It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. Where the mistake arises from imposition or misplaced confidence, relief may be had on the ground of fraud. Where it arises from unconsciousness, ignorance, or forgetfulness, no element of fraud exists, and redress must be obtained, if obtained at all, on the distinct equitable basis of mistake. Bispham on Equity (6 Ed.), sec. 185.

It is said in 34 Cyc., 908, to be settled by a host of authorities that where because of mistake an instrument does not express the real intention of the parties, equity will correct the mistake, unless the rights of third parties, having prior and better equities, have intervened. This is done, not for the purpose of relieving against a hard or even oppressive bargain or to give either party a better one, but simply to enforce the agreement as it was made and to prevent the injustice which would ensue if this is not done. Nor will chancery make a new contract, under the pretext of correcting a mistake, for where there is no meeting of the minds, there is no case or ground for reformation. Wherever an instrument is drawn with the intention of carrying into execution an agreement previously made, and by mistake of the draftsman or scrivener it fails to do so, the mistake will be corrected, and the original contract enforced according to the real intention of the parties.

(145) We have said the mistake must be mutual, but by this is not meant that both parties must agree at the hearing that the mis-

take was in fact made, but the evidence of the mutuality must relate to the time of the execution of the instrument and show that the parties then intended to say one thing and by mistake expressed another and different thing. 34 Cyc., 907 to 935.

A court of equity cannot add or substitute other parties for those appearing on the face of a contract, since the effect might be to make a new contract, but the mistaken use of names of parties appearing in the contract may be rectified in order to carry out the real agreement. 34 Cyc., 934, and cases cited; as, for instance, the insertion of a wrong name through a clerical error or a misnomer of the true obligee in a bond. 34 Cyc., 935, and cases in the notes.

Care must be taken to distinguish between the rule at law excluding parol evidence to vary or contradict a written instrument and that in equity, by which it is reformed so as to make it speak the truth. We considered these questions recently in *Wilson v. Scarboro,* 163 N. C., 380, and defined the jurisdiction of a court of equity in such matters. There are decided and well considered cases to the effect that a court of equity will thus correct a mistake in the name of a party to the contract where it was erroneously inserted for the name of another, which is our case precisely. In a case of this sort, *Chief Justice Parker,* in *Brown v. Gilman,* 13 Mass., 158, said: "Authorities have been read to show that where a contract in writing has been made and signed, but the name of the party contracted with omitted, it may be supplied by extrinsic proof. Of this we have no doubt, where the name was omitted by mistake *or a wrong name inserted.*" (Italics ours.) And the same was held in *Gayle v. Hudson,* 10 Ala., 116, where the name of one person was inserted as obligee for that of another, who was the one intended, and it was further said that the equity of reformation could be enforced even against a surety to the bond. The Court concluded as follows: "It is abundantly shown by the citations to the point, and what we have said, that a court of equity is entirely competent to reform (146) the bond so as to make it speak the intention of the parties, upon satisfactory proof being adduced of the mistake."

Without commenting upon them separately, it will be found that the following authorities clearly sustain the right in equity to have this bond corrected so as to insert the name of the intended obligee, some of them being much like our case in their facts, and in them the correction was decreed where the name of the agent had been inadvertently or by mistake inserted for that of his principal: *Wait v. Axford,* 63 Mich., 227; *Bell v. Tanguay,* 46 Ind., 49; *Rankin v. Miller,* 43 Iowa, 11; *Lee v. Percival,* 85 Iowa, 639; *Eustis Mfg. Co. v. Saco Brick Co.,* 198 Mass., 212; *Denver B. and M. Co. v. McAlister,* 6 Col., 261; *Scales v. Ashbrook,* 58

Ky. (1 Metcalf), 358; *Smith v. Watson,* 88 Iowa, 73; *Smith v. Wainwright,* 24 Vt., 97.

The courts are more inclined to exercise this jurisdiction where it will not prejudice the obligor in the bond or the party against whom correction of the instrument is asked. *Gayle v. Hudson, supra.*

Applying these principles to the facts of this case, we find that there is ample evidence of a mutual mistake. M. E. Cozad was the agent of the plaintiffs, and also had charge of the prosecution of the other action for them. There was but one suit pending in the county relating to the timber, and that was the one in which the bond was given. There was no reason for indemnifying Cozad, as the contract was not with him, but with the plaintiffs, whose timber was about to be removed. According to Mr. Dillard's testimony (and he drew the bond), it was intended to indemnify the plaintiffs in the suit in which G. W. McClure was defendant, and from whom the Albert Haas Lumber Company had bought the lumber, and the plaintiffs in that suit were Robert N. Archer and others. There cannot be the least doubt, upon the evidence, as to the suit referred to in the bond, though the name of the plaintiff therein was mistakenly supposed to be M. E. Cozad. It would not be creditable to the indemnity company should we assume that it was engaging (147) in so important a business transaction as the giving of a bond of indemnity in a suit without knowing what suit it was and where it was pending. And again, it may be said that it is immaterial to defendant who was named as obligee by mistake, as its main and only reliance for reimbursement was upon its coöbligors or the principals in the bond, and in that respect the bond is not changed. The defendant owes the money, and it would not be right if we should permit it to escape upon a mere technicality, or an inadvertence of the draftsman, or mistake of the parties as to the real name of the plaintiff. The law is strongly against any such view. It does not regard the name of persons so much as it does the substance and actual identity of the agreement.

The Court, in *Smith v. Wainwright, supra,* upon a state of facts not substantially unlike ours, said: "Under these circumstances it seems to us that it would be a virtual fraud upon the obligees to allow Wainwright to escape from the obligation of the bond. Upon this ground alone, if they made proper application to the court of chancery to have the bond reformed in this particular, we entertain no doubt it would be the duty of that court to make such a decree upon the present state of the evidence."

If we could see, as contended by the defendant, that it had made one contract and plaintiffs were attempting to substitute another, we would not hesitate to deny the latter any relief; but in this case, while the con-

tract was nominally with M. E. Cozad, it was really with his principals, the plaintiffs.

There is one case decided by this Court which seems to be directly in point, *McIntosh v. Insurance Co.,* 152 N. C., 50, and it was an action upon an insurance policy. The Court there said, by *Justice Brown:* "In *Henkle v. Insurance Co.,* 1 Ves., case 156, p. 318, the bill sought to reform a written policy after loss had actually happened, upon the ground that it did not express the intent of the contracting parties. *Lord Hardwicke* said: 'No doubt but this Court had jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that if reduced to writing contrary to the intent of the parties, on proper proof, it would be rectified.' If the plaintiffs can establish by the proper degree of proof that this (148) contract of insurance was made for the benefit of the wife and the two infants, who are the owners of the property, and that by mutual mistake, or the error of the draftsman, A. H. McIntosh was erroneously made the beneficiary therein, instead of the other plaintiffs, they will have made out a cause of action which will enable them to have a reformation of the written policy."

In *Nicholson v. Dover,* 145 N. C., 18, 21, the Court said, citing and quoting from *Woodruff v. McGehee,* 30 Ga., 158: "Where an agent makes a contract without disclosing the name of his principal, the latter may claim all his rights, with the single limitation that the other party shall not be injured thereby." And the law is the same, as we have seen, where the contract runs in the name of the agent, without his being designated as such, when it was intended to be for the benefit of the principal.

The jury have found, upon sufficient evidence, that the bond was intended by the parties to be given in the Archer suit, and that the authority of Albert Haas, as attorney in fact for the indemnity company, related to that suit and extended to the giving of the particular bond now in question.

There are no grounds, for the reasons stated, for disturbing the verdict. The bankruptcy of McClure and the Haas Lumber Company does not affect plaintiff's right to recover. It was the misfortune of the indemnity company that it occurred, and it is in no way attributable to any fault of the plaintiffs. There was no exception, though, on this ground.

The evidence of the mistake must, of course, be clear, strong, and convincing, because of the force of the presumption in favor of the correctness of the instrument as written; but whether it is of that character is for the jury, and not for the court, to decide. *Lehew v. Hewett,* 138

N. C., 6 (*s. c.*, 130 N. C., 22); *Cuthbertson v. Morgan*, 149 N. C., 72; *Avery v. Stewart*, 136 N. C., 426; but if we were at liberty to decide upon it in this case, we would unhesitatingly hold it to be clear and satisfactory that a mutual mistake had been made, and that the name of
(149) M. E. Cozad had been erroneously inserted for the names of the plaintiffs.

There was no error in the proceedings below.

No error.

Cited: Tire Co. v. Lester, 190 N.C. 417; *Alexander v. Bank*, 201 N.C. 451; *Hubbard & Co. v. Horne*, 203 N.C. 209; *Crews v. Crews*, 210 N.C. 221.

F. H. BRIGGS ET AL. v. CITY OF RALEIGH ET AL.

(Filed 30 May, 1914.)

Municipal Corporations—Cities and Towns—Bond Issues—Necessaries—Single Ballot—Constitutional Law.

Where a municipal corporation under a special legislative act, and voted upon in accordance with its charter provisions, submits to its qualified voters the question of the issuance of bonds for necessary municipal purposes, as in this case, for extending its sewer line, purchasing a site for and building a fire station, and for permanent pavements, proportioning a certain amount to be expended for the first two items and the balance of the issue for the last one, the purposes of the various items are related to each other, the information given being for an intelligent ballot, and the bonds voted upon as a single proposition or upon a single ballot, are valid. *City of Winston v. Wachovia Bank and Trust Co.*, 158 N. C., 512, cited and distinguished.

APPEAL by plaintiffs from *Allen, J.*, at May Term, 1914, of WAKE.

This is a civil action, tried upon an agreed statement of facts. The purpose of the action is to enjoin the issuing and selling of a certain bond issue. The court denied the injunction, and the plaintiff appealed.

W. B. Snow for plaintiff.

J. W. Hinsdale, Jr., Manning & Kitchin for defendant.

BROWN, J. The defendants, in full accord with the provisions of the charter of the city of Raleigh, adopted an ordinance providing for the issue of certain bonds, the material part of which reads as follows:
(150) "SECTION 1. That the city of Raleigh issue $100,000 in bonds (par value) of said city, with interest coupons attached, bearing

5 per cent interest per annum, for the purpose of extending the sewer line emptying into Pigeon House Branch to Crabtree Creek; for purchasing a site and building thereon a fire house to be occupied by Fire Company No. 2, and for building permanent pavements in said city, said bonds to be denominated 'Raleigh Public Improvement Bonds.'

"SEC. 2. That not more than $8,000 of said issue be used in extending said sewer line; that not more than $6,000 be used in purchasing a site and erecting thereon a fire house to be occupied by Fire Company No. 2, and the balance of said $100,000 bond issue be used in laying permanent pavements in the city of Raleigh."

An election was held under provisions of the city charter, requiring those who favored the proposition to vote a ticket marked "Approved," and those opposed to it, "Not Approved." Fourteen hundred and forty-six qualified electors of the city registered for the said election, and 1,020 voted "Approved" and 158 of the said voters voted "Not Approved."

The first contention of the plaintiff is that the election was void for the reason that three distinct propositions were voted together: $8,000 for sewers, $6,000 for fire house, and the balance for permanent street improvements.

The plaintiffs rely upon the leading case of the *City of Winston v. Wachovia Bank and Trust Co.*, 158 N. C., 512, to sustain their contention. We think that there is a marked distinction between the two cases.

In the *Winston case* the voters had submitted to them the proposition of issuing $350,000 of bonds, of which amount $75,000 was to be used for street improvements, $85,000 for sewerage purposes, $40,000 for waterworks; $60,000 for school buildings, and $90,000 for larger hospital facilities. Two of these propositions, towit, schools and hospital facilities, were not necessary expenses of the city, and the total amount of $350,000 was to be apportioned in large amounts to each of the proposed propositions.

In that case the Court held that when a popular vote is re- (151) quired to validate a municipal indebtedness, the proposition should be single, when the question embodies two or more distinct and unrelated propositions. In that case the propositions for street improvements, necessary municipal expenses, were entirely disconnected and not related to the proposition for school buildings and larger hospital facilities, neither of which is a necessary municipal expense.

This question has been decided in different ways in different States, the matter largely dependent upon constitutional or legislative regulation. There is no constitutional provision upon the subject in this State, and there is nothing in the charter of the defendant, or in the general

legislation of the State, which prohibits the submission as a single proposition for issuing bonds for public improvements.

As we construe the ordinance adopted, the proposition which the electors voted on was to issue $100,000 in bonds for public improvements in the city of Raleigh, and the sums to be devoted for the purposes mentioned were simply for the information of the citizens as to how the money was to be spent and in what proportion. It must be admitted that the purposes for which the bonds were issued are all municipal necessary expenses and closely related to each other.

In the case of *Hotel Co. v. Red Springs,* 157 N. C., 137, we held that the legislative grant of authority to a town generally to issue bonds for the purpose of providing necessary waterworks and also a necessary sewerage system is not invalid, because it provides for these two purposes in one issue, leaving the division of the proceeds to the sound discretion of the municipal authorities.

We find in other jurisdictions that bond issues have been sustained, the proceeds to be expended for different purposes, where the proposition was submitted in a single ballot.

In *Grey v. Bourgeois,* 107 La., 571, it was held: In Louisiana neither the Constitution nor the laws require more than a detailed statement of the purpose for which the debt is to be created or the tax applied, (152) and a proposition to incur debt for the purchase of a fire engine or the construction of an engine house and the erection of a public market in a single aggregate amount has been held to comply with the requirements of that Constitution.

In *Conklin v. El Paso* (Tex. Civ. App.), 44 S. W. Rep., 879: Where the statute does not require it, it is not necessary that the proposition should specify the purposes for which the bonds are to be issued.

In the case of *Potter v. Lainhart,* 44 Fla., 674, it was held: A proposition for the issuance of bonds to a certain amount for the erection of a courthouse and jail, and also to a certain amount for building roads, was held valid.

In the case of *Louisville v. Park Commissioners,* 113 Ky., 409, it was held: That a proposition submitted to the voters of a municipality for the issuance of bonds to a certain amount for municipal improvements is not invalid because the purposes for which the proceeds of the bonds are to be expended, namely, city parks and sewers, are stated in the proposition.

In *Kept v. Hazelhurst,* 80 Miss., 443, it was held that where a single proposition was submitted for the issuing of bonds for the erection of an electric light plant, and also waterworks, on a single ballot, it was valid.

In the case of *City of Louisville v. Board of Park Commissioners, supra,* an ordinance passed by the city council of Louisville providing for the issue of $500,000, $250,000 of which was to be used for park purposes and $250,000 for the construction of sewers, was voted on under one ballot.

In delivering the opinion, on page 413, the Court says: "The first objection argued we do not think can be sustained. The object of the ordinance was single; it was the issuance of city bonds to the amount of $500,000. The mere statement of the purposes for which the proceeds of the bonds was to be expended does not vitiate the submission of a single question whether the liability was to be incurred."

In the charter of the city of Winston there was some provision requiring the aldermen to specify the amount of bonds to be issued for each specific purpose; but there is nothing of the sort in the char- (153) ter of the city of Raleigh. The only provision in that charter is as follows:

"The board of commissioners shall have power to issue bonds of the city only after they have passed an ordinance by a majority vote of the entire board at two separate regular meetings, submitting the question of issuing the same to a vote of the people, and after a majority of the qualified voters shall have voted in favor thereof."

It is further contended that fifteen days notice of the new registration was not given. Yet it appears from the findings of the court that the electors of the city of Raleigh had actual knowledge of the registration, and that a very large majority of the electors did register and vote. Notice of the election and registration was published in the *Raleigh Times* and in the *News and Observer* for thirty days; and the court further finds that no citizen of Raleigh was denied the privilege of registering, but every qualified voter in the said city had ample opportunity to register, and that a very large majority of the newly qualified electors did register.

In a somewhat similar case, *Yount v. Commissioners,* 151 N. C., 582, this Court said: "And when it has been found as a fact by the lower court that every qualified voter has had a fair and ample opportunity to register, an election declaring for a special school tax will not be declared invalid by reason of the fact that the registrar left the district for a part of two days out of the twenty days required in registration."

In *DeBerry v. Nicholson,* 102 N. C., 456, it was held: "Statutes prescribing rules for conducting popular elections are designed chiefly for the purpose of affording an opportunity for the free and fair exercise of the right to vote. Such rules are directory, not jurisdictional or im-

perative. Only the forms which affect the merits are essential to the validity of an election or the registration of an elector."

An irregularity in the conduct of an election which does not deprive a voter of his rights or admit a disqualified person to vote, which casts no uncertainty on the result, and which was not caused by the agency (154) of one seeking to derive a benefit from the result of the election, will be overlooked when the only question is which vote was greatest. The same principles are applicable to the rules regulating the registration of electors.

In McCrary on Elections, secs. 187 to 190, inclusive, the proposition is laid down: "If, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that this performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the merits of the election."

The third contention is that notice of election is signed by the city clerk, instead of the three city commissioners. The notice recited that it was published by authority of the board of commissioners, and under instructions from them.

In the case of *Lawson v. Ry. Co.*, 30 Wis., 597, it was held: "Under a statute requiring the notice of election to be given by the board of supervisors of a town, it may be given by order of the board signed only by the clerk."

In the case of *Jordan v. Hayne,* 36 Iowa, 9: "Where it is shown that the notices required by law were in fact given, the fact that they were posted by the clerk of the board instead of by the trustees, themselves, will not vitiate the election."

In the case of *Battis v. Price,* 2 Pearson, 456, it was held: "When an election was held at the right time and place, and by the proper officers, it cannot be contested on the ground that notice to hold it was not given by the officer directed by law to do so."

Upon a review of the whole record, we are of opinion that the bonds are a valid obligation of the city of Raleigh, and the judgment of the Superior Court is

Affirmed.

Cited: Moran v. Comrs., 168 N.C. 290; *Hill v. Skinner,* 169 N.C. 412, 415; *Hardee v. Henderson,* 170 N.C. 575; *Keith v. Lockhart,* 171 N.C. 457; *Woodall v. Highway Com.,* 176 N.C. 392; *Hill v. Lenoir County,* 176 N.C. 580; *Allen v. Reidsville,* 178 N.C. 523; *Comrs. v. Malone,* 179 N.C. 14; *Riddle v. Cumberland,* 180 N.C. 326; *Heckert v. Graded School,* 184 N.C. 476; *Lazenby v. Comrs.,* 186 N.C. 550.

(155)

FRANK T. SMITH v. SOUTHERN EXPRESS COMPANY.

(Filed 30 May, 1914.)

1. Intoxicating Liquors—Prohibition Law—Druggists — Exceptions — License—Interpretation of Statutes.

One of the restricted instances where the sale of intoxicating liquors is allowed under our prohibition laws, which have become the established public policy of our State, is by licensed and regular pharmacists upon the written prescription of a physician, etc. (Revisal, sec. 2063), and in order that an abuse of this public policy may not be allowed, our statutes have imposed certain conditions upon which the license may be obtained by a druggist, requiring application to be made to the board of county commissioners, with certain safeguards as to character, place of sale, etc. (Revisal, sec. 2064); and that the license shall be printed in a certain form and issued by the sheriff upon the order of the board of commissioners (Revisal, sec. 2066). *Held*, that a license issued by the sheriff to a druggist to sell intoxicating liquors, without meeting these requirements, is void, and a sale made under such invalid license is a violation of the prohibition law.

2. Intoxicating Liquors—Carriers of Goods—Refusal to Deliver—Penalty Statutes—Unlawful Sales—Interstate Commerce.

A druggist who has not received a valid license, in accordance with the requirements of our statutes, to sell intoxicating liquors for the purposes and in the manner indicated, may not recover of the carrier the penalty provided by Revisal, sec. 2633, for the failure to deliver such liquors to him for the purposes of sale, for such are unlawful and prohibited, and cannot be aided or encouraged by the courts of the State, whether the shipment be intrastate or interstate.

3. Intoxicating Liquors—Unlawful Sales—Carriers of Goods—Penalty Statutes—Interstate Commerce—Constitutional Law.

The delivery of intoxicating liquors for the purposes of sale is made unlawful by our statute, Revisal, sec. 3534, and the Webb-Kenyon law forbids delivery in interstate commerce; and whether this law is constitutional or otherwise, it could not be considered that our courts should penalize a carrier for refusing to deliver such shipment to the consignee in violation of our laws enacted to carry out our established public policy in relation to such matters. Federal Constitution, Art. I, sec. 8, clause 3.

4. Intoxicating Liquors—Prohibition Law — Exceptions — Validity of License—Collateral Attack—Direct Proceedings—Issues.

Where a consignee of goods brings his action against the carrier to enforce the delivery to him of intoxicating liquors for the purposes of sale, claiming that he has a right to the liquors and the sale thereof, being a duly licensed druggist for whom an exception is made by our prohibition laws, the action puts the existence and validity of the license directly at issue, and the objection is not tenable that its validity is being collaterally attacked; especially, as in this case, where it appears that the license is invalid for the want of compliance with the provisions of the statute upon which alone its validity could be sustained.

(156) APPEAL by plaintiff from *Ferguson, J.*, at Fall Term, 1913, of MACON.

Civil action to recover penalty for nondelivery of goods, under section 2633 of Revisal, tried on appeal from a justice's court.

The facts in evidence tended to show that plaintiff was a druggist and pharmacist, regularly licensed by the State Board of Pharmacy, same being in force in June, 1913; that at said date he was *bona fide* proprietor of a drug store in Franklin, N. C.; that, as such, he held a regular license as retail liquor dealer from United States Government and also a license to carry on the business of liquor dealer, covering the period from 31 May, 1913, to 31 May, 1914, signed by Alex. Moore, sheriff of Macon County; that during the month of June, 1913, he ordered 6 quarts of Cognac brandy from Rose & Co., Tennessee; paid charges on same, and that the shipment by defendant company was received at Franklin, N. C., this being its destination, and plaintiff demanded same, in person, of defendant, and delivery was refused; that it was the purpose of plaintiff to sell said brandy for profit, but only in the way of filling prescriptions in the *bona fide* pursuit of his calling and regular business, and this was well known to defendant's agent.

Plaintiff, testifying as a witness in his own behalf, said, among other things, that he had not applied for his license to the board of aldermen of Franklin nor to the county commissioners of Macon County, as required by section 2063 of Revisal, but had merely gone to the
(157) sheriff for his privilege license tax, and the sheriff had given him the license referred to and appearing in evidence.

His Honor charged the jury, if they believed the testimony, they would answer the issue of indebtedness for the penalty in favor of defendant. Verdict for defendant. Judgment, and plaintiff excepted and appealed.

T. J. Johnston for plaintiff.
Johnston & Horne for defendant.

HOKE, J., after stating the case: It is now the established public policy of this State, approved by popular vote and expressed and enforced by the general and many local statutes, that, except in very restricted instances, the manufacturing and sale of intoxicating liquors shall not be allowed.

There is an exception made in the case of licensed and regular pharmacists when the liquor is sold "for use by a sick person upon the written prescription of a regularly licensed and practicing physician or surgeon having such sick person under his charge, and not otherwise."

Revisal, sec. 2063. But the Legislature, recognizing the fact that, unless carefully guarded, such an exception might be greatly abused and at times threaten the efficient enforcement of the law, closed this section of the Revisal with the provision, "That nothing in this section shall be construed so as to relieve druggists from complying with the law as to license and taxes," and, in the next succeeding section, No. 2064, enacts that: "Every person desiring to sell liquors shall make application to the board of county commissioners for an order to the sheriff to issue license. The application shall be in writing, and shall show that the applicant is a *bona fide* citizen of the United States and a legal voter of North Carolina; that he has never been convicted nor confessed his guilt in a court of competent jurisdiction of any violation of the laws of any State regulating the sale of liquors; and the place where the business is to be carried on, which in all cases (druggists excepted) must be within an incorporated town or city, and more than 200 feet in a direct line from any church edifice or the premises pertaining thereto. The appli- (158) cation must have been approved before filing by the board of commissioners, aldermen, or governing body, by whatever name called, of the city or town in which it is proposed to carry on the business, and must be accompanied by the affidavit of six freeholders who are taxpayers and residents of the township in which the applicant proposes to do business, all of whom shall declare upon oath that the applicant is a proper person to sell spirituous, vinous, or malt liquors; that the building specified is a suitable place for the business to be carried on, and that he has not recommended any other person for liquor license in the same township."

In section 2065 provision is made for a public hearing on the question, and section 2066 enacts "that the license shall be printed in a certain form, furnished by the register of deeds and issued by the sheriff upon *order* of the *board* of county commissioners, etc."

Recurring to the evidence, the plaintiff himself testifies that the license held by him was not issued by order of board of county commissioners; that he made no application to said board, nor did he otherwise comply with the section above cited, enacted to regulate the matter.

It thus appears that he has no valid license permitting him to sell either as druggist or otherwise, and, it being his avowed intent to sell for profit and by way of prescription, an act made a misdemeanor by the statute unless a valid license is first obtained, the court will not aid him to this intended breach of the criminal law, nor should it penalize one who, knowing the facts, has declined to deliver the liquor in furtherance of his unlawful purpose. The principle has been recognized and applied in several recent cases on contract, some of them made in other States

and valid where made, and recovery thereon was denied here because in contravention of the public policy prevailing in this jurisdiction. *Bluthenthal v. Kennedy,* 165 N. C., 372; *Fashion Co. v. Grant,* 165 N. C., 453; *Pfeifer v. Israel,* 161 N. C., 409; *Vinegar Co. v. Hawn,* 149 N. C., 355; *Cannady v. R. R.,* 143 N. C., 439; *Armstrong v. Best,* 112
(159) N. C., 59; *Leak v. Comrs.,* 64 N. C., 134. And the law bearing more directly on the conduct of the defendant is equally in support of his Honor's ruling.

In reference to the issue directly involved in this controversy, the Court has frequently held that the penalty prescribed by section 2633, for the nondelivery of freight, though shipped from another State, after the same has reached its destination, does not raise or present a Federal question so as to withdraw the cause from the jurisdiction of the State courts. *Thurston v. R. R.,* 165 N. C., 598; *Macon Supply Co. v. R. R., ante,* 82; *Jeans v. R. R.,* 164 N. C., 224; *Harrell v. R. R.,* 144 N. C., 537. But, on the record and in whatever aspect this matter may be considered, the law forbids a delivery by defendant company.

The facts showing that plaintiff has no valid license, and his avowed purpose to sell for profit being, as stated, in breach of the criminal law, if looked at as an intrastate matter, our State statute, section 3534, makes the delivery unlawful; and, if the case is to be dealt with as one arising under the commerce clause of the Federal Constitution, the act known as the Webb-Kenyon law, recently passed by Congress, in express terms forbids a delivery.

Although there may be some conflict as to the correct interpretation of the Webb-Kenyon act, there is coming to be a general consensus of opinion that the act is constitutional. It has been so held in several cases, cited in the concurring opinion of *Chief Justice Clark* in the case of *S. v. Cardwell, post,* 309; *S. v. Grier,* 88 Atl., 20 Nov., 1913; *S. v. Express Co.* (Iowa), 145 N. W., 451, and also an opinion by *Beam, J.,* in *U. S. v. R. R.,* decided in January, 1914; and, while the Supreme Court of the United States has not had the question directly presented, there seems no good reason to doubt that the statute will be upheld as to cases coming within its provisions. In several cases before that Court it has been held that the absolute inhibition of some special article may be and is properly considered a valid regulation of commerce, within the meaning of Article I, sec. 8, clause 3, of the Federal Constitution, an interpretation especially insistent in cases coming so peculiarly
(160) within the police power as intoxicating liquor, and a similar principle has been approved and upheld in *Champion v. Ames,* 188 U. S., 221, and other decisions of like purport. A delivery, therefore, would be unlawful in any view of the evidence, and, of a certainty, the

court should not impose a penalty on the company for refusing to aid or take part in an act in contravention of our public policy and in express violation of our statute law.

It is urged for plaintiff that he had at the time a license signed by the sheriff of the county; that this was not subject to collateral attack, and, therefore, the proposed sale by him in the line of his business should not be considered and dealt with as unlawful.

There are many decisions holding that a license, apparently regular, cannot be collaterally attacked, but the principle has, no doubt, been generally applied in cases where the license has been issued by officers of boards vested with the discretionary power to issue them.

In the present case the statute expressly provides that a license can only issue on the order of the county commissioners, and after a hearing of the matter. Revisal, ch. 49, secs. 2064-65-66. The county commissioners, therefore, is the body vested with discretion on this subject. The sheriff is only a ministerial agent, and, in this instance, he seems to have acted entirely without authority, and the facts, therefore, hardly bring the present case within the principle; but however that may be, as said in *Hargett v. Bell,* 134 N. C., 394-95, a license, even when issued by the proper board, is not to be considered as a contract to be set aside only by bill in equity, or a legislative office or franchise, to be annulled and withdrawn only by proceedings in *quo warranto* or some such formal procedure. It may be impeached in any action which directly involves its validity and which gives the claimant a trial by jury on the issue. In this suit, a civil action brought by plaintiff to enforce delivery of intoxicating liquors for purposes of sale and claiming the right to do so on the ground that he is a regular druggist, duly licensed for the purpose. The action itself puts the existence of the alleged license in issue; affords the opportunity for a jury trial, and should be (161) properly considered a direct proceeding to pass upon and determine the question of its validity. We find no error in the record, and judgment for defendant is affirmed.

No error.

Cited: S. v. R.R., 169 N.C. 299, 300; *Pfeifer v. Drug Co.,* 171 N.C 215.

P. C. GUNTER v. WHITING MANUFACTURING COMPANY.

(Filed 27 May, 1914.)

1. Deeds and Conveyances—Reverse Calls—Location of Points—Calls in Deed—Acreage—Distance—Variance—Trials—Evidence.

Where the disputed title to lands depends upon the location thereof contained in the description of a prior grant, which is represented upon the map filed as a parallelogram with the northern boundary as a river, the first call being definite and fixed, the second call being to a stake upon the river, which by actual survey is found to deflect sharply northward between the first and second calls of the grant, without giving the distance between them, but giving the distance between the other calls to a stake, it is correct that the calls be reversed by the surveyor for the ascertainment of the second call, and then follow course and distance given in grant; and it is held that this manner of ascertaining the boundaries of the land granted is not affected by the number of acres therein specified, or that the distance between the third and the last call does not conform to that given on the map.

2. Grants—Plats—Variance—Trials—Evidence.

A plat of the land attached to the original grant is not conclusive, and cannot control the words of the grant; and in connection with other testimony, it is competent as evidence that the location by an original survey was different from that actually ascertained by running the calls of the grant.

APPEAL by defendant from *Ferguson, J.*, at Fall Term, 1913, of GRAHAM.

This is a civil action in the nature of trespass to determine the title to certain land.

There was a verdict and judgment for the plaintiff. The defendant appealed.

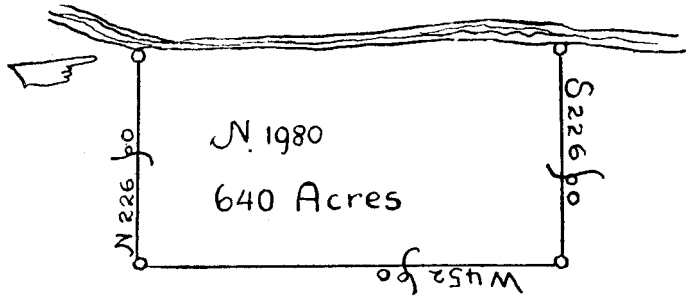
(162) *Dillard & Hill for plaintiff.*

Morphew & Phillips, Duff Merrick, Zebulon V. Weaver for defendant.

In this case there are two plats, one marked "A," and is a copy of the original plat attached to the grant. The other is "Exhibit B," the official survey made in this cause.

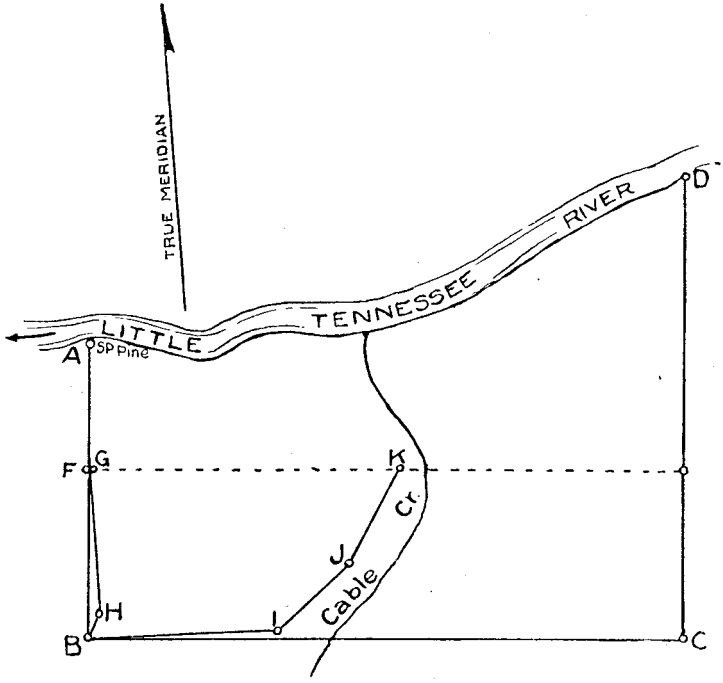
BROWN, J. The only question presented in this case is the proper method of surveying the tract of land claimed by the defendant, embraced in Grant No. 2906, to Pete and Gilbert, dated 3 November, 1860. The plaintiff claims the land in dispute in this action under a junior

(A)



grant of recent date, towit, Grant No. 17596, dated 22 September, 1910, and the title to the plaintiff under said grant depends on whether or not Grant No. 2906, under which the defendant claims, covers the land in dispute.

(B)



ABCDA—Location of Grant 2906 by reversing calls.
ADEFA—Location of Grant 2906 claimed by plaintiff.
GHBIJKG—Location of Grant 17569.

Grant No. 2906 calls for a tract of land now situate in Graham County, "containing 640 acres of land on the waters of the Tennessee River, beginning at a spruce pine, the northeast corner of Grant No. 2341, on the bank of the Tennessee River opposite the mouth of Hazel Creek, and runs up the river with its meanders east to a stake on the bank of the river; thence south 226 poles to a stake; thence west 452 poles to a stake; thence north 226 poles to the beginning."

The plat attached to the original grant, and upon which it was issued, is set out as an exhibit, and shows a tract of land containing 640 acres, said plat indicating that from the spruce pine eastward the river ran a direct east course, the second call and the last call being parallel
(163) with each other and of equal length. The actual survey of the property, however, showed that, running from the beginning corner, the spruce pine, east, about half of the length of the grant, the river turns sharply to the north.

The evidence of D. B. Burns, a surveyor, is to the effect that the original surveyor did not actually run the grant on the ground, but only established the one corner at the spruce pine, which was found, and about which there was no dispute; that the first call cannot be run in the order set out in the deed, for the reason that there is no distance given at which to stop on the bank of the river; that the second call, south 226 poles, is for a stake, and not a natural object, and that the same is true of the next call, west 452 poles, which also calls for a stake, and
(164) the next and last call is 226 poles to the beginning, the spruce pine; that there being no other corner fixed, or a natural object, that he had to reverse the calls in order to survey the tract, and that so reversing the calls and running from the spruce pine south 226 poles to a stake, as called for in the grant; then east 452 poles; then north to the bank of the river; then with the river to the beginning, would entirely cover the lands claimed by the plaintiff; that to so run the tract of land would add only about 75 acres to the acreage called for in the grant, and would correspond with the original grant made by Piercey, the county surveyor, except that the second call would be slightly lengthened because of the turn in the river, of which Piercey evidently did not know. He laid out the tract supposing that the river continued a direct eastward course from the beginning point.

The plaintiff introduced J. H. Crisp as a witness, who also testified that if said calls were so reversed it would cover all the land claimed by the plaintiff. That if a survey should begin at the spruce pine and follow up the meanders of the river to the corner of the map at the point "D," and then run south 226 poles; thence west 452 poles; thence north to the beginning, that it would not cover the lands in dispute, such sur-

vey being indicated on the map by the dotted line from E to F. He further testified that he made a survey of Grant No. 2906, starting from the spruce pine, the beginning corner, and ran south in reverse order about 100 poles, and then east 452 poles; then north to the river, establishing the upper corner on the river by this method; but that in making the survey in this manner, he did not go hardly far enough south to have 226 poles on the line running north to the river, and that he drove up a stake at the point from which he turned to the river and went on to the end of 226 poles, and that in order not to cover up the plaintiff's land, it would be necessary to make the western line of Grant No. 2906 about 100 poles instead of 226.

It being evidently impossible to make a survey of the tract from the calls set out in the deed, because of the failure of the first call to give the number of poles, and no natural object being called for, it evidently became necessary to reverse the calls, and the court charged the jury that in running the tract they should reverse the calls and (165) run south from the spruce pine 226 poles to a stake, thence east 452 poles to a stake, then north to the river, and that this would establish the corner on the river, and that having done so, they would then take up the point so established on the river at the end of the first call and run back south therefrom the distance of 226 poles as called for in the grant, then west 452 poles, then north to the beginning, regardless of the distance, and that, so running said tract, it would not cover the plaintiff's land, and the plaintiff was therefore entitled to recover the lands described in their complaint.

It is not necessary to run the reverse course of the calls of Grant 2906 in order to fix the second corner of the grant, although it can be done in that way. It is patent, as testified to by Surveyor Crisp, that the second corner can be located at exactly the same place by beginning at the admitted beginning, the spruce pine on the bank of the river, and running east 452 poles and thence north to the river. The purpose of running the reverse course was to locate the second corner only, and not to locate the entire grant.

The second corner being located with mathematical precision, the whole grant can be definitely located by following the calls of the grant in their natural order, as was held by the court below.

The fourth corner is a stake, and was not located on the ground by the original surveyor. The defendant contends that the third corner, a stake, should be located by reversing from the beginning corner and running south 226 poles; thence east 452 poles; that the third corner should be located at the point where a line run due south from the second

corner intersects with the line run due east from the fourth corner, as established by reversing the calls of the grant.

The decisions of this State are to the effect that the second corner being located, the land must be surveyed by the calls as laid down in the grant, and not by reversing the calls. This question was before the Court in the case of *Harry v. Graham,* 18 N. C., 76. In that case the fourth corner was a marked tree, and was agreed upon by both parties;
(166) but the Court held that the third corner must be fixed, not by reversing from the fourth corner, but by following the calls and distances from the second corner. *Duncan v. Hall,* 117 N. C., 443; *Tucker v. Satterthwaite,* 123 N. C., 511; *Lindsay v. Austin,* 139 N. C., 463; *Land Co. v. Lang,* 146 N. C., 311; *Hanstein v. Ferrall,* 149 N. C., 240.

The subject is discussed in *Norwood v. Crawford,* 114 N. C., 513, and *Harry v. Graham* and *Safret v. Hartman,* cited and commented on.

Mr. Justice Avery says: "It is decided in that case that a posterior line could not be reversed in order by its intersection with the prior line to show corners, unless such posterior line was certain, because to do so would be to extend the distance of the prior by the course of the posterior line.

"The chance of mistake resting on the one or the other being equal, it was deemed proper to follow the order in which the survey was made. If the measurements of lines in all original surveys had been accurate, instead, as we continually observe, of falling far short of monuments reared as corners, and if all surveys were laid off in squares or equilateral triangles, it might make no material difference whether surveyors should run backward or forward from any admitted corner in order to locate the boundary lines.

"But where by running with the calls a different result from that attained by reversing is necessarily reached, or may ensue, the safer and more certain method of following the order of the original survey by the interested party who directed it is, as a rule, adopted. *Harry v. Graham, supra.*

"*We find no case in our Reports where this Court has given its sanction to the correctness of a survey made by reversing the lines from a known beginning corner.*

"The rule is to run with the calls in regular order from a known beginning, and to resort to the test of reversing in the subsequent progress around the boundary only where the terminus of a call cannot be ascertained by running forward, but can be fixed with absolute certainty by running reversely the next succeeding line."

We do not think that the area of the grant is of much assistance (167) here. According to Surveyor Crisp, the area of Grant No. 2906, if located according to the contention of the plaintiff, would be 400 to 500 acres instead of 600 acres, as called for in the grant; if located according to the contention of the defendant, it would contain 800 to 1,000 acres.

Surveyor Burns testified that if Grant No. 2906 was located according to the contention of the plaintiff, its area would be about 344 acres, while if located according to the contention of the defendant, it would be 714 acres. This evidence could be of no service in fixing the calls of this grant.

It is true that there is a plat annexed to the original grant, and this is made a part of the grant for the purpose of indicating the shape and location of the boundary; but his plat is not conclusive and cannot of itself control the words of the grant. It is only competent, in connection with other testimony, as evidence of the location by an original survey different from that ascertained by running the calls of the grant. *Higdon v. Rice,* 119 N. C., 624; *Redmond v. Mullenax,* 113 N. C., 506.

The plat attached to Grant 2906 is manifestly incorrect, and it arises from the fact that the surveyor did not run out and survey the land, but merely platted it after establishing the spruce pine as the beginning.

This plat indicates that from the spruce pine eastward the river runs a direct east course, the second call and the last call being parallel with each other and of equal length.

The actual survey of the property, however, showed that running from the beginning corner, the spruce pine, east, about half of the length of the grant, the river turns sharply to the north. This accounts for the error in the original plat, attached to the grant.

We are of opinion that the judgment of the Superior Court is correct.

No error.

Cited: Jarvis v. Swain, 173 N.C. 13, *Cornelison v. Hammond,* 224 N.C. 759; *Belhaven v. Hodges,* 226 N.C. 491.

(168)

RALEIGH, CHARLOTTE AND SOUTHERN RAILROAD COMPANY v. MECKLENBURG MANUFACTURING COMPANY.

(Filed 27 May, 1914.)

1. **Railroads — Condemnation — Right of Way — Measure of Damages — Offsets.**

The damages which may be awarded to the owner of lands through which a railroad company has condemned a right of way are such as are directly caused by and are confined to injuries peculiar to the lands condemned, and not such as are generally caused to lands in that community; nor is the railroad company entitled to have the damages offset by advantages generally accruing to the community, but only those which accrue to and enhance the value of the particular lands condemned by reason of the advantages to be especially derived by them from the operation of the railroad.

2. **Railroads—Condemnation—Right of Way—Cotton Mills—Speculative Damages—Expert Evidence—Trials.**

Where a corporation is the owner of lands being condemned for a right of way by a railroad company, upon which it has tenant houses rented to its employees, and which are situated on a tract of land upon which defendant operates a cotton mill, the defendant is not entitled to recover damages of a speculative character, *i. e.*, such as possible inconvenience caused to its employees by the noise or smoke from the plaintiff's trains, or the inconvenience or danger to the operatives in going to or from work; or danger to their children caused by the operation of the railroad near their dwellings; or any possible increase in the cost of operating the plant caused by the running of the plaintiff's trains, etc.; and as the damages recoverable are those apparent to the ordinary observation of persons acquainted with the value of lands in that locality, the matter is not such as would call for "expert opinion" of those who have special knowledge of cotton mills generally and of operating conditions generally affecting their value.

3. **Railroads—Condemnation—Rights of Way—Cotton Mills—Measure of Damages.**

Where lands of a cotton mill corporation are condemned for a right of way of a railroad company, the damages to be assessed are the value of the lands taken for the right of way, and any injury shown to have been done to the remaining part of the land, by way of special damages, such as impairing the physical property in the mechanical operation of its plant by vibrations and smoke; and it is error to allow evidence as to the difference in value of the whole tract before the condemnation of the right of way and afterwards.

4. **Judgments—Interest—Interpretation of Statutes—Trials—Instructions —Evidence.**

Interest is not allowed on a judgment rendered in the Superior Court for damages awarded by the jury to the owner for taking his lands in condemnation (Revisal, *sec.* 1954); for while the jury may award interest in their verdict, the owner may not complain when such has not been done,

in the absence of a special request for instructions with relation to it, and the absence of evidence tending to show he is entitled to it.

5. Railroads—Condemnation—Dwellings—Tenant Houses—Interpretation of Statutes.

A railroad proceeded to condemn the lands of a cotton mill corporation, and upon the easement to be acquired there were several tenant houses belonging to the defendant. The defendant resisted the plaintiff's right of condemnation upon the ground that the statute, Revisal, 2575, expressly requires the consent of the owner to the taking of his "dwelling-house, yard, kitchen," etc.: *Held*, the section referred to is an exception to section 2578, giving such public-service corporation the right to condemn lands, and does not apply to tenant houses, but only to the dwelling of the owner of the lands, which is preserved to him for sentimental reasons; and which could not exist where such owner is a corporation renting the dwelling to its tenants.

HOKE and ALLEN, JJ., dissenting; WALKER, J., dissenting in part.

APPEAL by both parties from *Harding, J.*, at November Term, (169) 1913, of MECKLENBURG.

Tillett & Guthrie for plaintiff.

Maxwell & Keerans and Cansler & Cansler for defendant.

PLAINTIFF'S APPEAL.

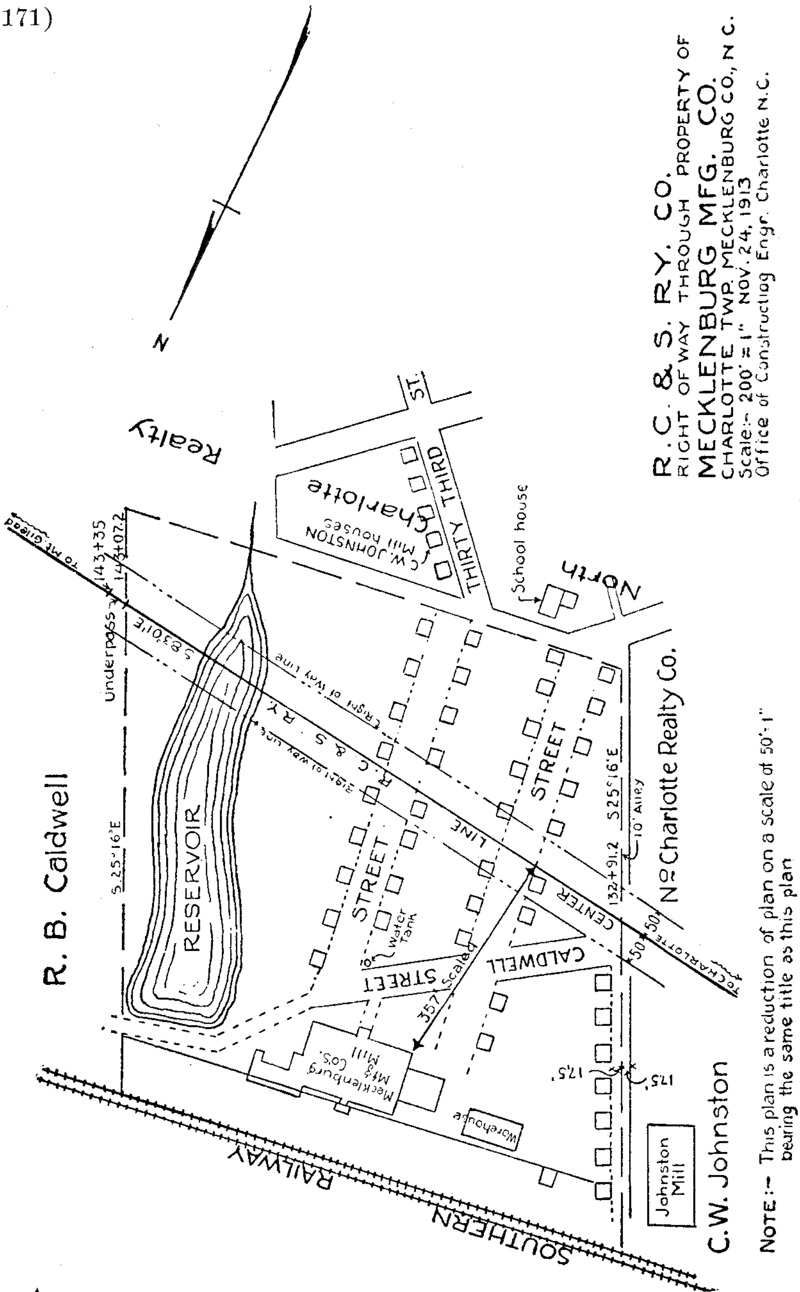
CLARK, C. J. This is the plaintiff's appeal in the proceeding to condemn a right of way 100 feet wide through the defendant's mill village located on a 20-acre tract of land near the northeast limits of Charlotte, upon which are the defendant's cotton mill and other buildings, including 43 tenant houses. Running through this land is a pub- (170) lic highway, which is an extension of a street in Charlotte. At about right angles to this highway are two private streets 50 feet wide extending from north to south entirely across said village. Fronting upon these streets are 34 of the 43 tenant houses composing the village, which are occupied by the mill operatives. The plaintiff's right of way runs diagonally across the village, intersecting the streets and highway above referred to at grade.

The plaintiff's exceptions are numerous, but all refer to the evidence and the charge on the measure of damages.

The plaintiff contends that the defendant was entitled as compensation to the value of the land embraced in the right of way, plus any direct actual damages to any part of the remaining land.

The defendant contends that the compensation to which it is entitled is the difference in the value of its entire manufacturing plant and

(171)


R. C. & S. RY. CO.
RIGHT OF WAY THROUGH PROPERTY OF
MECKLENBURG MFG. CO.
CHARLOTTE TWP. MECKLENBURG CO., N. C.
Scale:- 200' = 1" NOV. 24, 1913
Office of Constructing Engr. Charlotte N.C.
N
Realty
Charlotte
C. W. JOHNSTON Mill houses
THIRTY THIRD
ST.
School house
North
R. B. Caldwell
RESERVOIR
Underpass
143+35
143+07.2
S.25°16'E
S.83°01'E
Right of way line
R. C. & S. RY.
CENTER LINE
STREET
STREET
STREET
CALDWELL
Water Tank
357' Scaled
Mecklenburg Mfg. Co.'s Mill
Warehouse
175'
132+91.2
S.25°16'E
10' Alley
No Charlotte Realty Co.
To Mt. Gilead
To Charlotte
Johnston Mill
C. W. Johnston
SOUTHERN RAILWAY
NOTE:- This plan is a reduction of plan on a scale of 50'=1" bearing the same title as this plan

premises, embracing 20 acres, before the right of way was condemned and afterwards, and that this difference in value is to be estimated by taking into consideration that the operation of a steam railroad would inconvenience and annoy the operatives by the noise, smoke, and inconvenience produced by the trains operating in proximity to their houses; that the dangers and perils to the operatives in going to and from their work would be increased by having to cross said railroad track; that the lives and limbs of the children of the mill operatives will be imperiled by their crossing said track in going to school and while playing near-by; that their parents would be in constant fear, while at work in the mill, lest the children should be run over by the passing trains, and that on account of these conditions the better class of operatives will be driven away and the defendant will be able to secure in their places only inferior help at increased wages, with result of a decrease in the quantity and quality of the mill output and an increase in the cost of production, thereby materially depreciating the market value of the property as a cotton manufacturing plant.

Over the plaintiff's objections, the jury were allowed to con- (172) sider these as grounds of damages, and also to introduce as experts cotton manufacturers to give their opinion as to the effect upon the value of this mill property by the laying out of the plaintiff's right of way. These experts estimated that the difference on the pay-roll from the above causes would be $4,000 to $5,000 per year, which they capitalized at $60,000 to $80,000, and expressed their "expert opinion" that the plaintiff should pay the defendant this sum of money as damages for the right of way 100 feet wide, of which only some 20 feet probably is actually occupied by the railroad, and a little over 300 yards long.

From the map, filed in the record, the track of the Southern Railway Company lies just beyond the outer edge of these mill premises, and much nearer the principal building and to many of the tenant houses than is the track of the plaintiff. As the defendant placed its mill and village at this spot because of the benefit to it of such transportation facilities, it can hardly be that the proximity of the plaintiff's track can work so great a depreciation as the "experts" deemed.

It seems to us, upon the authorities and reason, that the measure of damages as claimed by the defendant and allowed by the court is speculative, and could be extended by that line of reasoning to any amount. Recently in this Court, in a cause where one railroad company sought to extend a spur line across the main track of another, a somewhat similar calculation was made, based upon the number of times that the trains and cars of the railroad objecting would be stopped, the loss of wages, the possible and probable damages from collisions and the deaths and

injuries to persons and cars, and it was very ingeniously figured up that such damages properly capitalized would amount to hundreds of thousands of dollars. But the record in that case shows that while still objecting as a matter of law to the other railroad crossing its track, it was finally agreed that $300 was the proper amount of damages if the other railroad, as a matter of law, had the right to extend its spur track across the main line of the other railroad. *R. R. v. R. R.*, 165 N. C., 425; *s. c.*, 161 N. C., 531.

(173) It is impossible that the defendant can actually sustain the damages capitalized on the above basis, since it deemed it an advantage and not a detriment to locate its plant on the line of the Southern Railway with its main building and many of its tenant houses much nearer to the track of that railroad than to the track laid down by this plaintiff.

The right of eminent domain is granted because the public interest requires that private property shall be taken for public use under the circumstances and in the manner prescribed by law. The owner is entitled as compensation to the actual and direct damages which he may sustain by being deprived of his property. These damages are limited to those which embrace the actual value of the property taken and the direct physical injuries to the remaining property. In the present case the nearest part of the defendant's mill building to the plaintiff's track is 357 feet. There are only seven houses that are wholly or partly on the right of way, three of which were moved at the plaintiff's expense to make room for the track, and all seven have remained continuously in the use and occupation of the defendant's operatives, who pay weekly rent therefor. There is no evidence tending to show that the operation of plaintiff's road has interfered mechanically or physically with the operation of the defendant's machinery, or damaged or injured its product, nor that the vibrations of the train, smoke, noise, dust, or escaping steam have interfered in any way with the mechanical and manufacturing processes of the defendant, nor that it has even lost any of its operatives by reason of the location of the plaintiff's track, nor been forced to pay higher prices to its operatives nor hire inferior hands for that cause; though we would not be understood as saying that the latter would be ground of damage, if shown.

The defendant contends that the difference in value of the whole tract of 20 acres before the condemnation for the right of way and afterwards is an item of damage to be assessed by the jury. This proposition is condemned, 2 Lewis Em. Dom., sec. 706, p. 1232: "It is said in some cases that it is proper to consider every element of damages which

(174) would be taken into consideration in a sale between private par-

ties. But this needs some qualification, since remote and speculative reasons are often urged by the seller in support of the valuation claimed."

This point is clearly stated in *Simons v. R. R.*, 128 Iowa, 152: "The trial court told the jury that it was proper for them to take into account every element of annoyance and disadvantage resulting from the construction of a railroad which would influence an intending purchaser in making an estimate of the market value of the plaintiff's property. This we think was error, in that it led the jurors into an unlimited field of conjecture and speculation. It furnished no rule for the assessment of damages and gives no certain test for ascertaining the market value. It left the matter open to the caprices and whims of each individual juror."

In the leading case of *R. R. v. Wicker*, 74 N. C., 220, the judge below told the jury that in assessing damages they might consider the possibility that cattle might be killed on the road, and that the landowner was entitled to have this element considered. This Court said: "The answer to this is that the danger that the cars may injure cattle without negligence, and consequently without liability to an action, is not peculiar to the landowner, a part of whose land is taken. It is common to all who own cattle near the line of the road, whether a part of their land is taken for the road or not. It is clear that those persons no part of whose land is taken cannot recover anything for this danger of possible loss, and as the defendant is not required to abate the damage proper to him by reason of any benefits which he may derive from the road in common with the whole neighborhood, so he is not entitled to be compensated for any damages which are in like manner common to all, such as this we are considering, or such as may arise from smoke, noise, etc. In *Presbytery v. R. R.*, 103 Mass., 1, and *R. R. v. Helm*, 8 Bush (Ky.), 681, the Court says: 'Such depreciation is not occasioned directly by any effect upon the land of which the construction or the maintenance of the railroad is the cause. It belongs to that class of results which necessarily arise from the exercise of the franchise granted to such corporation in consideration of the general advantage which the (175) whole community are expected to derive from it. The annoyances to the landowner are the same in kind with those which are suffered by the whole community.' "

We do not think that the defendant was entitled to have the entire mill village and plant on this 20-acre tract of land valued, and to deduct from it the supposed value of the entire tract after the new railroad was laid down. This is too speculative, and would admit of the consideration of the above alleged causes of damage, which are not a part of the damages to the land by the loss of the right of way, and would take into

consideration elements of annoyance and inconvenience which the defendant would suffer in common with the community or which are necessarily incident to the exercise of the right of eminent domain. The defendant is not entitled to have considered the possible injury to persons or property by reason of the operation of the railroad, nor possible danger from exposure to fire (for all which it would be compensated if caused by plaintiff's negligence), nor for the effect, if any, upon the employment of help by reason of their apprehension of danger and the possible increase of wages, nor the alternative of employing inferior labor caused by such fears. These matters, if they exist, are *damnum absque injuria,* and if allowable would call for similar compensation for more or less speculative damages to every landowner along the line of every railroad, and would make the construction of railroads well-nigh impossible.

These incidents, if they exist, are common to the public, and the defendant must bear them as its due to the sovereignty of the State, which takes the property for public use. On the other hand, in assessing damages the railroad company is not allowed to offset any general benefits which may accrue to the landowner in common with the public at large by reason of the construction of the road. The construction of this railroad will doubtless enhance the prosperity of Charlotte and the value of property there and all along the line of the road, including necessarily the value of defendant's property. The plaintiff is not allowed to deduct this general benefit which the defendant will receive, and the
(176) plaintiff cannot be charged with the remote though possible damages which the defendant may incur for the causes claimed by it.

The defendant is entitled to have assessed the value of the land taken for the right of way and any injury done to the remaining part of the land, if any, by way of special damages, such as impairing the physical and mechanical operation of its plant by vibrations and smoke, if there is evidence of such direct injury. But the defendant cannot go any further than this.

The defendant relies upon *R. R. v. Church,* 104 N. C., 529, where a railroad condemning a right of way running through the grounds of a country church at which the attendants were in the habit of hitching their horses, was required to pay the depreciation in the value of the property caused by the interference with church worship in distracting the attention of the worshipers, scaring the horses and driving the people away from the church. But this was the direct damage to the value of the plant by interfering with its use for the purposes for which it was established. In this case there is no such direct interference with the use of the plant. There is no oscillation or other interference with the use

of the machinery, and indeed the mill building is much nearer to the track of another railroad, and was located there for greater convenience.

In *Brown v. Power Co.*, 140 N. C., 333, the landowner had a spring on her land and some bottom-lands which abutted on the river. The spring was submerged and destroyed by the backing of the water, which also interfered with her working the bottoms. The Court held that she was entitled to damages for the physical injuries to the land and the depreciation of its value by reason of its being covered by the backwater, but said that she was not entitled to any sentimental damages by reason of her peaceful and happy condition being disturbed by reason of losing her spring of good water and the support she had made on her bottom-lands; that the march of progress and the demands of a large city for water and lights required the taking of her property, and for this she was entitled to pecuniary compensation. But she was not allowed damages for the interference with her peaceful and idyllic condition, nor (177) for the supposed unhappiness resulting therefrom, or the unhealthiness which she thought would be caused by the ponding water.

In *Lambeth v. Power Co.*, 152 N. C., 371, the judge below charged the jury: "You cannot allow anything as damages based upon unknown or imaginary contingencies or events, or such as may not reasonably and naturally be expected to occur to the plaintiff—not to other persons—from the construction, operation, and maintenance of defendant's line for the uses for which it was constructed." This Court, commenting upon this charge, says: "The entire charge is an admirable instruction upon the law governing the assessment of damages in cases of this character," and cites many cases.

To the same effect, requiring the jury to restrict the damages to such as are direct and apparent from the evidence, and to disallow those which are remote and speculative, can be cited numerous cases. In *Stone v. R. R.*, 68 Ill., 396, the Court says: "The difficulty of crossing a railroad track, the detention by trains, the frightening of horses, the danger to persons crossing the track, the noise of the trains, and various other things that might be named, are inconveniences which property owners on a street where a railroad is located have to suffer; yet to hold that such could recover damages would, in effect, prevent the construction of a railroad upon a public street." Civilized man cannot have all the conveniences of civilization without any of its inconveniences.

A most illuminating case is *Austin v. R. R.* (Ga.), 47 L. R. A., 755, which holds that the damages recoverable are only such as arise from "some physical interference with property, or physical interference with a right or use appurtenant to property; and therefore a railroad company is not liable to the owner of real property for diminution in the

market value thereof resulting from the making of noise or from the sending forth of smoke and cinders in the prosecution of the company's lawful business which does not physically affect or injure the property itself, but merely causes personal inconvenience or discomfort to the occupants of the same." In this case and the notes thereto many others are cited.

(178) In *Becker v. R. R.* (177 Pa., 252), 35 L. R. A., 583, it is held that "diminished value of a stock of merchandise because of removal rendered necessary by the taking of real estate is not an element of damages in such proceedings." In *McReynolds v. R. R.,* 106 Ill., 100, the Court excluded as an element of damage the danger of crossing the track with teams and the danger to children and members of the family by reason of a farm being bisected with a railroad track, though it allowed damages for the inconvenience of carrying on the farm work from that cause. The latter was direct and ascertainable. The other was remote and conjectural. For the same reason, in *R. R. v. Hammers,* 51 Kan., 127, the Court excluded alleged damages for the frightening of stock, as speculative and consequential. To the same purport, *R. R. v. Lyon,* 24 Kan., 745; *R. R. v. Mason,* 26 Ind. App., 395.

In *R. R. v. Johnson,* 18 Mass., 62, the Court excluded an expected loss of business as too remote and consequential to be allowed in estimating damages to real estate on which it is conducted. Danger of fire from passing locomotives was held too remote to be considered in estimating compensation. *Lance v. R. R.,* 57 Iowa, 636; *Connors v. R. R.,* 93 Ill., 464; *R. R. v. Freeman,* 210 Ill., 270.

Most of the above and many other cases are cited in the plaintiff's brief, and many others might readily be added.

Nor do we think that the opinion of cotton manufacturers as to possible deterioration in the value of mill property by the opening up of a railroad is a matter of art or science which justifies or admits expert testimony. It is a matter as to which other persons are as competent to form an opinion as they, depending upon their observation and intelligence, which of course are to be weighed by the jury. While the valuation of land is necessarily largely one of opinion, it is not a matter of expert evidence. We must take the opinion of those who know the property in question and the value thereof. What effect the building of a railroad may have upon one plant, under of course different circumstances, can have no weight in fixing the value of the land taken

(179) under condemnation in another case where the witness has no personal knowledge of its value.

If the issue here involved had been as to how much cloth a bale of cotton would produce, or the number of pounds of dye-stuff required to

dye a given quantity of yarn, or other similar questions, these manufacturers could from their experience have been of assistance to the jury with their expert testimony; but it is not so as to the valuation of land, as to which we must depend, not upon expert testimony, but upon the personal knowledge of those who know the land in question and can thus form an opinion as to its value from their own knowledge.

For the errors stated, the verdict and judgment in the plaintiff's appeal must be set aside, and the damages will be assessed on another trial in accordance with the views herein expressed.

Error.

DEFENDANT'S APPEAL.

CLARK, C. J. This is a proceeding for the condemnation of a right of way 100 feet in width through the mill village of the defendant, near the northeast limits of Charlotte. The defendant owns some 43 tenant houses, rented to its operatives, the rent being payable weekly. It became necessary for the plaintiff, in order to effect an entrance into Charlotte, to acquire a right of way through the defendant's property of some 20 acres. The clerk found as a fact: "It is necessary for the petitioner to have a right of way over the lands described in the petition." This finding of fact was not excepted to by the defendant. Upon the hearing of the appeal in the Superior Court, the judge found as a fact: "It is necessary for the petitioner, in order to construct, maintain, and operate its railroad, that it shall condemn a right of way over said 100-foot strip." The defendant did not except to this finding of fact. So it is settled that the plaintiff is entitled to have this 100-foot strip as a right of way over the lands of the defendant through its mill village, according to the petition and plat.

On the right of way of the plaintiff, as asked for and located, there were situated wholly or partly seven tenant houses, four of which remain untouched and the other three were moved by the plain- (180) tiff, at its own expense, to make room for the track, to other locations partly on and partly outside the right of way. All of the seven houses, including the three which were removed and the other four, have been at all times and still are occupied by the tenants of the defendant. The houses have not become the property of the plaintiff, the tenants have the right to live in them, and are still living in them, and can continue to do so until they shall become, if ever, actually needed for railroad purposes. *R. R. v. Sturgeon,* 120 N. C., 225; *R. R. v. Shields,* 129 N. C., 1.

The defendant contends, however, that its land is not subject to condemnation, because Revisal, 2578, provides: "No such corporation shall be allowed to have condemned to its use without the consent of the owner

his dwelling-house, yard, kitchen, garden, or burial ground." This section is an exception to Revisal, 2575, which confers broadly the right of condemnation. His Honor properly held that Revisal, 2578, does not exempt all dwelling-houses, but only the dwelling-house of the owner of the land sought to be condemned, and did not apply to cases like the present, where the tenant houses are merely appurtenances in the operation of the plant.

The exercise of the power of eminent domain is an attribute of sovereignty, under which, upon considerations of the greater benefit to the public, private property is taken for public use. "A dwelling-house is, of itself, no more exempt from condemnation for public uses than any other property." Mills Em. Dom. (1888), sec. 120. The dwelling-house of the owner, his yard, garden, and burial ground are exempt only because the statute so provides. Revisal, 2578, does not purport to exempt all dwelling-houses, or dwelling-houses generally. It expressly limits the exemption to the "owner's dwelling-house." There is no room for construction. No corporation "can have condemned, without the consent of the owner, *his dwelling-house.*" The exemption from the taking of private property for public use upon compensation is not conferred upon the landowner's tenant houses, nor his tenants' dwelling-houses,
(181) nor upon defendant's 43 tenant houses occupied by tenants who pay weekly rent, but such exemption is confined to the *"owner's* dwelling-house." This proceeding is to condemn the land of the defendant. Its tenants, holding by the week, are not parties to this action, and have no interest in the land to prevent its condemnation by the State for a public use.

The evident intent of this legislation was to exempt the family home, rendered sacred by sentiment or the local attachment of the owner. The defendant is a corporation, and has no dwelling-house. These tenements can have no sentimental value to the defendant corporation. It has doubtless a place of business, a principal office, but it does not have a "dwelling-house," a home, nor has it ability to live in 43 dwelling-houses. A corporation can have no property the value of which cannot be measured in money, for it has no sentiment and no affections.

A case almost exactly in point is *R. R. v. Mosely,* 117 La., 314, in which the Court held that the almost identical wording of Article 2637 in the Civil Code of that State was "intended to be applied in cases where citizens are disturbed in their homes, and not in cases where the property consists of tenements which are rented from month to month to any one who may choose to take them." The present case is really stronger, because here the owner is a corporation who can have no "dwelling-house," while in that case the occupant of the tenant house

was an individual, but not the owner of the land sought to be condemned, and he therefore had no property right therein as against the exercise of the power of eminent domain.

"Statutes exempting a dwelling-house and land within 60 feet thereof apply only to land belonging to the owner of the dwelling-house, and in such cases land of another within 60 feet of such dwelling is not exempt." *R. R. v. Wicker,* 13 Gratt. (Va.), 375. In *Lansing v. Caswell,* 4 Paige (N. Y.), 522, the Court held that the "garden or yard, or inclosure, does not exempt every yard or inclosure, but only such as are necessary to the use and enjoyment of the dwelling-house, and cites with approval *Clark v. Phelps,* 4 Cowen, 190.

The Pennsylvania statute is very slightly different from ours, (182) and forbids the taking "without the consent of the owner of his dwelling-house." It was held that this was only another way of saying "the dwelling-house occupied by the owner." *Hagner v. R. R.,* 154 Pa., 475.

The only other exception on this appeal is that the court did not allow interest on the amount of damages from the date of the condemnation of the right of way, but only from the date of the verdict and judgment. In this there was no error. Revisal, 1954, provides that all sums of money due by contract, except on penal bonds, shall bear interest. But judgments in other cases than on contract bear interest only from the date of the judgment. At common law a judgment did not carry interest when an execution was issued upon it. The statute was passed for the purpose of amending the law in this respect. *Collais v. McLeod,* 30 N. C., 221, cited *McNeill v. R. R.,* 138 N. C., 4. The cause of action here does not arise on contract, but is for damages on account of defendant's land taken under the right of eminent domain. These damages fall directly under Revisal, 1954, and the law gives interest only from the rendition of the judgment.

The defendant did not contend on the trial that it was entitled to interest before judgment, and did not request the court to so instruct the jury. It is true that the jury in awarding damages could in their discretion have given interest as a part of the damages if the circumstances seemed to them to justify it. But the court was not asked so to charge, and here the circumstances would not have justified the allowance of interest. It is found as a fact herein that none of the defendant's seven houses have ever been vacated, but at all times since the condemnation they have been occupied by the tenants of the defendant. There is no evidence that the rent has been reduced or that any tenant has failed to pay his rent promptly. The defendant was not receiving any revenue from the land taken except the rent of the seven houses, which he is still

receiving, and has therefore sustained no loss in income. Under the *Sturgeon case* above cited, this condition will continue indefinitely (183) unless the railroad shall actually need the land now covered by the houses, which is very improbable, as the track has been laid and is now in daily use.

In *R. R. v. Balthaser,* 119 Pa. St., 473, the Court said: "The lapse of time between the happening of an injury and the trial is a proper subject to be considered by the jury in making up the amount of damages for which to render verdict, but interest as such is not recoverable in action *ex delicto.* In actions where a definite sum of money is demandable as a debt, interest at the legal rate is a matter of right, and the jury properly can be directed to include it in their verdict; but actions brought to recover unliquidated damages for a wrong done proceed upon a different basis. The nature of the wrong, the attending circumstances, and the time when it was committed are all for the jury, and may be properly considered in the adjustment of the amount of the verdict." This case has been cited with approval, *Klager v. R. R.,* 160 Pa. St., 386. Another case directly in point is *Fowler v. R. R.,* 113 Mo., 458. Indeed, the principle is well recognized.

In *Stephens v. Koonce,* 103 N. C., 269, which was an action for damages for conversion, the Court held that in an action for damages not arising on contract the allowance of interest is a question for the jury to determine, and when they have not allowed it in their verdict the judgment bears interest only from its date. This is cited with approval in *Lance v. Butler,* 135 N. C., 423. In *Williams v. Lumber Co.,* 118 N. C., 928, it was held that where damages were assessed upon a judgment by default and inquiry, "It was error to add any interest for the time elapsed prior to the verdict, as interest, if it should be allowed, is presumed to have been included by the jury in the amount of their verdict."

In the defendant's appeal we find

No error.

WALKER, J., dissenting: In the defendant's appeal, I am unable to agree, with my brethren, that the expression in the statute exempting from condemnation the dwelling-house, yard, kitchen, garden, or (184) burial ground is confined solely to the mansion-house, and does not protect the humble cottage or the hut, if it happens to be occupied by a tenant unable, by reason of his poverty, perhaps, to own his own home in fee. I do not think this was intended by the Legislature, nor that such a construction is at all warranted by its language. The purpose was to shield the home itself, without regard to who may occupy it, from the hostile invasion. What difference should it make

that it is the dwelling of a tenant? It is as much a wrong in the one case as in the other to condemn the home, and more oppressive, generally, in the case of a tenant. When the Legislature provided that "No corporation shall be allowed to have condemned to its use, without the consent of the owner, his dwelling-house, yard, kitchen, garden, or burial ground," it used the word "his" as a possessive pronoun, and the phrase clearly means that without his consent no dwelling, etc., *belonging to him* shall be condemned. Surely, it will not be contended that there is any good reason for making such a distinction between the landlord and the tenant, to the disparagement of the latter. The Legislature is supposed to be just, and to distribute its favors equally among those entitled to them and coming within the same class.

None of the cases cited by the Court sustain its view.

In the Louisiana case the houses had not been occupied, but were held merely as an investment. In *Hagner v. R. R.,* 154 Pa. St., 475, the statute required, as appears by the opinion, the personal occupation of the owner, and the party resisting condemnation had entered fraudulently to prevent it. The Court said in regard to these facts: "A mere recital of the facts in this case convinces us that the occupancy was but a scheme to defeat the railroad construction on the proposed line. . . . A dwelling-house under such circumstances is not in the contemplation of the law a 'dwelling-house in the occupancy of the owner.' The Legislature means to protect the man who owns his land and occupies it in good faith. Their protection cannot extend to the man who becomes an occupant for the mere purpose of defeating public improvement or for the purpose of extorting excessive compensations. Such an (185) occupancy, instead of being honest, is fraudulent. Mills on Eminent Domain, sec. 120. We conclude that, as between the plaintiff and defendant corporation, the house in question was not a dwelling-house *in the occupancy of the owner.*" Our statute and that one are differently worded.

Of course, as said in the Court's opinion, the Legislature may refuse to exempt a dwelling-house and its curtilage, as the whole matter is entirely within its power; but it has not done so.

The cases of *R. R. v. Micker,* 13 Grattan (Va.), 375; *Lansing v. Caswell,* 4 Paige (N. Y.), 52, and *Clark v. Phelps,* 4 Conn., 190, it is evident, do not touch the question. They merely define what is the curtilage and its extent. But there is direct authority for the position that the house occupied in good faith by a tenant is exempt from condemnation. The immunity embraces both mansion-house and tenement.

In *R. R. v. Pack,* 6 W. Va., 397, the Court had under consideration this very question, the statute being identical with ours, and it was held,

at p. 405: "There is no sufficient reason, by construction, to restrict it so that it will apply only to dwelling-houses and lands occupied by the owner himself, in fee, but not to such as are occupied by a tenant for any less estate. The provision must, therefore, be deemed sufficient to protect, not only the former, but as well the latter class of property." This doctrine is accepted as the true one and approved by the author in 15 Cyc., p. 605, in these words: "A *bona fide* occupancy by a tenant will, however, entitle the owner (of the dwelling) to the exemption." There are no well-considered cases to the contrary, that I have been able to find.

But the question may be considered from another standpoint. The authorities uniformly hold that "the word 'owner,' as used in the statute, applies to all persons who have an interest in the estate." *Gerrard v. R. R.*, 14 Neb., 270. It is quite obvious that the satute does not use the word "owner" in the sense of the holder of the legal title, but in the sense of one having, at the time of condemnation, the control of it, which would include a tenant. *Tompkins v. R. R.*, 21 S. C., at page 431.

(186) Mills, in his work on Eminent Domain (2 Ed.), sec. 65, under the title, "What persons are considered as 'owners,'" says: "In the land or property taken there may be various interests, in different individuals. The entire value of the land is all that can be awarded to the several owners, and no contracts between the owners can oblige the public to pay more than the entire value of the land as a whole. In settling the damages between the owners, the situation and manner of the occupation should be considered. Among the various titles and interests recognized as entitled to compensation as owners are lessees and landlords, mortgagors and mortgagees, mortgagees of leaseholds, etc. . . . The term 'owner' includes all persons who have an interest in the property. Damages are to be assessed to every owner, although no claim may have been made." It may be taken as settled by the decisions not to be necessary that the owner in fee in the dwelling-house should actually occupy it to protect it from condemnation, and that the word "owner," within the meaning of the statute, applies to and includes a tenant, as well as the owner of the fee. This was expressly held in the case of *Lister v. Lobley*, 7 Adol. and E., 124, where it was said, in construing a similar statute: "The word 'owner' means the tenant for the term, and not necessarily the owner in fee simple." See, also, to same effect, *R. R. v. Walker*, 45 Ohio St., 577; *Parker v. R. R.*, 79 Minn., 372; *Proctor v. R. R.*, 64 Mo., 112; *Shott v. Harvey*, 51 Am. Rep., 201; *Gilligan v. Providence*, 11 R. I., 258; *Choteau v. Thompson*, 2 Ohio St., 114; *Higgins v. San Diego*, 131 Cal., 294. In all the above cited cases it is held that the word "owner" is sufficient to include a tenant or other person in possession having any less estate or interest in the property than a fee.

As to parties and those who should be notified, 15 Cyc., p. 844, says: "All persons having any interest in the lands proposed to be taken are entitled to notice. A lessee is entitled to notice as well as the owner." *Board of Levee Comrs. v. Johnson,* 66 Miss., 248.

It is true that the plaintiff cannot be said to be actually living in the houses, but that is not required. There were seven of the houses on the right of way, as I understood the record, and the plaintiff (187) was occupying them constructively by his tenants. Besides, the tenants are to be considered personally as the "owners," for they had an estate, well known in the law, in them, and were in actual occupation of the premises. The Legislature did not regard the character of the *owner,* whether a natural or an artificial person, but only the person occupying the house, whether as owner in fee or tenant, deeming the one as much entitled to protection against invasion of his private premises as the other; and this is the just and proper view to be taken of the subject. In any view to be taken of the question, these houses were dwellings within the protection of the clause exempting them from condemnation. It can make no difference that the houses are now standing on the right of way and occupied by the tenants, or that three have been removed. Plaintiff had no right to interfere with them at all, and was a trespasser when it did so (*Fore v. R. R.,* 101 N. C., 526), as the law had forbidden it.

On this branch of the case I dissent, as I believe the uniform decisions of the Court sustain my view, and it is fully sanctioned by my sense of justice and right. I concur in other respects.

Cited: R. R. v. Armfield, 167 N.C. 464, 465, 467, 468; *Durham v. Davis,* 171 N.C. 308; *Selma v. Nobles,* 183 N.C. 325; *Ayden v. Lancaster,* 197 N.C. 560; *S. v. Lumber Co.,* 199 N.C. 202; *Yancey v. Highway Com.,* 221 N.C. 188, 189.

E. J. FAUST v. A. J. ROHR.

(Filed 30 May, 1914.)

Contracts—Restraint of Trade—Partnerships—Waiver.

F. and R., barbers, were partners in the town of M. F. bought out R. under an express agreement that the latter would not engage in the same business in the town of M. so long as F. continued it there. They again formed a partnership at M., and thereafter R. separately engaged in the trade of barber in opposition to F. *Held,* that the negative stipulation in

the agreement of the parties in the former dissolution was intended to prevent rivalry between them in opposing the skill and influence of R. in the business of barber at M., which was not revoked impliedly by the formation of their second partnership, for therein both the skill and influence of R. was for the firm's benefit, and to the advantage of each member, and the formation of the second partnership could not in any manner conflict with the agreement entered into between F. and R. upon the dissolution of the first partnership, nor be considered as a waiver of the rights of F. to insist upon it; and it is further held that the agreement was not objectionable as being in restraint of trade, and is, therefore, enforcible. The law as to contracts in restraint of trade discussed by WALKER, J.

(188) APPEAL by plaintiff from *Shaw, J.*, at May Term, 1914, of UNION.

This is a motion to vacate a restraining order, previously granted in the action, by which the defendant was "restrained and enjoined from engaging directly or indirectly, or concerning himself, in carrying on or conducting the business of a barber, either as principal, agent, or servant, within the corporate limits of the city of Monroe, N. C., until the further order of the court." The defendant was further required to show cause on Monday, 4 May, 1914, why the restraining order should not be continued, or an injunction granted, to the hearing. On the return day of the order the matter was heard and decided by the court upon the following case stated by the judge from the affidavits filed:

"This cause coming on to be heard upon the return of the temporary restraining order hereinbefore issued by the undersigned, and being heard on affidavits of plaintiff and defendant and of other witnesses filed in support of and against a motion by defendant to dissolve the temporary restraining order, on consideration of same the court finds the following facts:

"1. That prior to 15 December, 1902, plaintiff and defendant were partners engaged in the business of conducting a barber shop in Monroe, N. C. That on said date plaintiff and defendant entered into the contract evidenced by plaintiff's Exhibit A. That on 29 December, 1902, plaintiff and defendant entered into the contract evidenced by defendant's Exhibit 2, and under said contract the defendant worked for plaintiff for about a year at a wage of $2 per working day. That ever since the first contract was executed the plaintiff has been and is

(189) still engaged in the business of running a barber shop in said city of Monroe.

"2. That plaintiff and defendant entered into other contracts of employment of defendant by plaintiff to work in his shop as a barber, defendant's wages being increased by plaintiff from time to time until the month of June, 1913.

"3. That on 12 June, 1913, plaintiff and defendant entered into the articles of copartnership evidenced by defendant's Exhibit 1, and defendant paid the plaintiff the sum of $400 for a half interest in the business; that thereafter plaintiff and defendant as partners actively engaged in the barber business in the corporate limits of Monroe, N. C.

"4. That about the middle of March, 1914, the plaintiff purchased defendant's interest in the partnership business, paying him the sum of $400 in cash. That neither upon the said purchase of defendant's interest by plaintiff nor at any time since has defendant expressly stipulated or agreed that he would not reëngage in the business of barber in the corporate limits of Monroe.

"5. That about the last of March, 1914, and while the plaintiff was actively engaged in the business of barber in the corporate limits of Monroe, N. C., the defendant entered the employment of one James Keziah, who conducts a barber shop within the corporate limits of Monroe, N. C., in which plaintiff owns no interest. That defendant was actively engaged in the duties of his employment at the beginning of this action and up till the time of service of restraining order; that the plaintiff is likewise actively engaged in the barber business within the corporate limits of Monroe, N. C.

"Upon the foregoing facts the court is of the opinion, and so holds, that the contract of partnership mentioned in finding of fact numbered 3 is a discharge and abrogation of the contract under which the plaintiff seeks continuance of temporary restraining order, and the said temporary restraining order is hereby vacated and dissolved. It is further ordered and adjudged that the defendant recover of the plaintiff and his sureties the costs incident to the said restraining order."

Plaintiff appealed from this order.

Adams, Armfield & Adams for plaintiff. (190)
Vann & Pratt for defendant.

WALKER, J., after stating the case: It may be premised that the articles of copartnership, dated 12 June, 1913 (Exhibit 1), contained no terms that expressly, or by necessary implication, abrogated the prior agreement of the parties, dated 15 December, 1902, by which the plaintiff, E. G. Faust, purchased from defendant, A. J. Rohr, the furniture and fixtures of the partnership theretofore existing between them, and which firm had conducted the business of barbers in the city of Monroe, N. C., and in which agreement the defendant, A. J. Rohr, covenanted with the plaintiff, E. G. Faust, "that he would not at any time thereafter engage in, directly or indirectly, or concern himself in carrying on

or conducting the business of a barber, either as principal, agent, or servant, within the incorporated limits of the said city, so long as the plaintiff, E. G. Faust, may conduct or carry on the business of a barber therein."

But this statement is not to be understood as meaning that the said stipulation in the contract of 15 December, 1902, was not abrogated by the partnership articles, if the latter, otherwise, and from their very nature, should in law have such an effect.

The terms of the copartnership of 12 December, 1913, were of the usual character in such cases, providing for its formation, the interest that each of its members should have in its stock and property, the proportion in which losses should be borne, and generally for the proper and orderly management and conduct of its affairs, and finally for the manner of its dissolution and a just division of its assets and effects upon such dissolution.

So we have before us the question whether the mere formation of a partnership afterwards, for the purpose of carrying on the same kind of business, and conducting the business for the space of less than a year, should have the legal effect of a waiver or discharge of the negative covenant in the prior agreement. We do not think it should be so construed.

This Court has before had under consideration contracts of this sort, for the purpose of ascertaining their nature, validity, and the scope of their operation. *Baker v. Cordon,* 86 N. C., 116; *Cowan v. Fair-*
(191) *brother,* 118 N. C., 406; *Kramer v. Old,* 119 N. C., 1; *Hauser v. Harding,* 126 N. C., 295; *King v. Fountain,* 126 N. C., 196; *Teague v. Schaub,* 133 N. C., 458; *Jolly v. Brady,* 127 N. C., 142; *Dissosway v. Edwards,* 134 N. C., 254.

No question has been made as to the validity of this contract. In *King v. Fountain, supra,* the Court said with respect to this point: "The general rule was, and still is, that contracts in restraint of trade and the like are void, on the ground that they are against public policy, similar to contracts illegal and *contra bonos mores.* Clark on Contracts, 451-457. This rule has been modified in order to protect the business of the covenantee or promisee, when it can be done without detriment to the public interest. The reasonableness of such restraint depends in each case on all the circumstances. If it be greater than is required for the protection of the promisee, the agreement is unreasonable and void. If it is a reasonable limit in time and space, the current of decisions is that the agreement is reasonable, and will be upheld."

In *Downing v. Edwards, supra,* the place was New Bern, N. C., and the term twenty years. In *Jolly v. Brady, supra,* the territorial limit

was Greenville, N. C., and the term one year. In *King v. Fountain, supra,* the limit was Greenville, N. C., and the time three years. The time in *Kramer v. Old, supra,* was practically indefinite, commencing after a certain date (1 September, 1891) and extending to the "full completion of the agreement," and the place was Elizabeth City, N. C. The contract in *Baker v. Cordon* was like the one in this case, the place being Tarboro, N. C., and the agreement as to the duration of the restraint being that "the defendant would not carry on the business in the time while the plaintiff was engaged in it." The contracts were upheld in those cases, the Court granting an injunction in *Baker v. Cordon,* and adjudging the defendant guilty of contempt in violating it. This was affirmed, upon appeal, by this Court.

The question is discussed at length in *Kramer v. Old, supra,* by *Justice Avery,* who thus stated the law: "Where the contract is between individuals or between private corporations, which do not belong to the *quasi*-public class, there is no reason why the general rule, (192) that the seller should not be allowed to fix the time for the operation of the restriction so as to command the highest market price for the property he disposes of, should apply. *Diamond Match Co. v. Roeber,* 106 N. Y., 473; *Morgan v. Perhamus,* 36 Ohio St., 517; *Morse v. Morse,* 103 Mass., 73. The stipulation on the part of James Y. Old, W. P. Old, and W. N. Old, to quote the exact language of the contract, is 'that they will not continue the business of milling in the vicinity of Elizabeth City after 1 September, 1891, and the full completion of this agreement.' The contract having been in other respects performed, the agreement is now complete in the sense contemplated by the parties. The three defendants were at most restricted from engaging in the business for the lives of each and every one of them. Such a sale has been upheld upon reason and authority in other courts. The plaintiff bought their right to compete in their own persons in the business to which he succeeded as purchaser. It was not unreasonable that he should insist upon the stipulation that none of the three should interfere while they lived, by competition at the particular place mentioned, either with him as purchaser or his assignee in law or in fact. In *Morgan v. Perhamus, supra,* the facts were that a milliner sold her stock and good-will, and engaged 'not to carry on the business *at any time in future* at the town of F. or within such distance of said town as would interfere with said business, whether carried on by said L. S. and P. or their successors.' The agreement was held to be binding by the Supreme Court, and the seller was enjoined from resuming business. There, as in our case, the time was not described, except as an inhibition on a particular person, with the implication that it should extend to her life. The law would have construed

the contract as conferring the right to sell or transmit to a personal representative as a part of the assets of his estate the property bought, whenever the time was found to be coextensive with the lives of the three defendants. *Cowan v. Fairbrother, supra;* Clark Contracts, pp. 454, 455, and note, p. 456; 2 High Inj., sec. 1345; *Lewis v. Langdon,* 7 Sim., 442; *Bininger v. Clark,* 60 Barb., 113. In *McClary's Appeal,* 58
(193) Pa. St., 51, the agreement, which was held not to be unreasonable, was that a physician who had sold his business and good-will to another physician should 'never thereafter establish himself as a physician within 12 miles (of his original place of business) without the consent of the purchaser.' The contract there, like that under consideration, could be fairly construed in no other way than as operating for the term of the seller's life. These cases and others are cited with approval by text-writers, and seem as a rule to have established the reasonable doctrine contended for by the plaintiff in the States as well as in England. 2 High, *supra,* sec. 1180; 1 Beach Inj., secs. 462 to 470; *Whitaker v. Howe,* 3 Bear, 383."

We are not now called upon to decide this question, as the facts are not all before us, and we merely refer to the trend of decision by this Court, as it may tend to shorten litigation.

The question immediately before us is the one we have stated, and we will proceed to consider it, and we think that, by reason and authority, our answer to it, already given, is fully sustained. It is well understood in the law that an agreement should receive that construction which will best effectuate the intention of the parties; and this intention must be collected, not from the detached parts of the agreement, but from the whole thereof. Greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. Where the intention clearly appears from the words used, there is no need to go further, for in such a case the words must govern; or, as it is sometimes said, where there is no doubt there is no room for construction. But if the meaning is not clear, the Court will consider the circumstances under which the contract was made, the subject-matter, the relation of the parties, and the object of the agreement, in order to ascertain their intention, and for this purpose parol evidence is admissible. Clark on Contracts (2 Ed.), p. 403. "It is a general rule applicable to all contracts in restraint of trade, that the first duty of the court is to interpret the covenant or agreement itself, and to ascertain according to the ordinary rules of construction
(194) what is the fair meaning of the parties. It has often been asserted that contracts in restraint of trade are against public policy and therefore presumably bad, and that their provisions should

not be extended by construction or implication so as to favor persons desiring to enforce them beyond what the terms would clearly require. This rule of construction has been handed down from the old cases, and is founded upon the idea that there is something intrinsically vicious in a contract restraining liberty of trade; but the more recent cases, especially in the more liberal jurisdictions, have denied the existence of any presumption against such contracts, but recognize them as entirely valid and legal, and interpret them not only without any adverse bias, but in such a way as to effectuate rather than defeat them. Contracts which at one time would have been considered void *in toto* are now treated as severable as possible, and the legal portion allowed to stand. The legal restraint is not implied from doubtful words, and there is a decided disposition to set aside the arbitrary and narrow rules of construction once prevalent in favor of greater liberty and breadth of view. Such a contract is to be construed in the light of its subject-matter and the conditions under which it was made, the situation of the parties, the nature of their business, the interests to be protected by the restriction and its effect upon the public." 24 A. and E. Enc. of Law, p. 857.

When we interpret this contract in the light of these rules, we find little difficulty in reaching what we regard as the right conclusion.

The object of the plaintiff in making the contract was to prevent competition on the part of the defendant, either directly or indirectly, either as principal or servant, and this must have been well understood by the defendant. It was to suppress rivalry between the two men, as barbers, and this formed a material part of the consideration or inducement for making the agreement.

If the intention and purpose of the parties was the prevention of competition, and no other can be deduced from the plain terms of the agreement, then it cannot be that the formation of the second copartnership was an abrogation of this stipulation in the con- (195) tract for the dissolution of the former copartnership, which contained the negative covenant, and for the simple reason that by becoming the plaintiff's partner, the defendant in no way was brought into competition with him, but the opposite result would necessarily follow. While the new copartnership lasted, they worked in harmony, the interest and advantage of one extending to both, and there was, therefore, no conflict of interests; but it would have been otherwise had the two been pitted against one another in a business rivalry, each of them striving for the mastery, and this is what the covenant was manifestly intended to prevent.

But the question has undergone careful consideration by the Supreme Court of New Jersey (whose opinions are entitled to the greatest

respect), in *Scudder v. Kilford,* 57 N. J. Eq., 171. That case is so instructive and so exactly in point, so convincing in its reasoning and logically so conclusive, that we cannot do better than to quote the pith and substance of it, omitting less important parts. The *Vice Chancellor* said:

"The contention of counsel for the petitioner is that subsequent to the making of the decree the complainant, by taking the defendant into partnership, and so permitting him to carry on the enjoined business, abandoned his right under the original agreement. It is not stated that the complainant, upon entering into the partnership relation with the petitioner, expressly agreed that the former covenant should be rescinded. Nor at the termination of their relation was there any agreement to that effect. The waiver or abandonment of the previous agreement, it is insisted, arose from the fact that they entered into a partnership to transact the same kind of business, and then dissolved their partnership relation. The line of reasoning by which this result is put forward is, that the covenant by which the petitioner bound himself not to transact business in Princeton was equivalent to a sale to complainant of the good-will of the business which petitioner then sold to complainant; that when they entered into partnership this good-will became a part of the property or assets of the firm, in which the petitioner acquired (196) an equal interest; that upon dissolution of the firm a moiety of this interest remained his property, and entitles him personally to engage in the same business. It seems to me that this line of argumentation is defective. The negative covenant entered into by the petitioner, by which he bound himself not to engage in the same business within the borough, was of much more consequence than a mere sale of the good-will of the business to Mr. Scudder. The sale of the good-will would have only precluded the vendor from soliciting trade from the old customers of the firm, but would not have prevented him from setting up a rival business in Princeton or anywhere else. *Labuchere v. Dawson,* L. R., 13 Eq., 322; *Newark Coal Co. v. Spangler,* 8 Dick. Ch. Rep., 354; *Althen v. Vreeland,* 36 Atl. Rep., 479. By virtue of the contract, Scudder therefore got much more than the 'good-will,' namely, the right to prevent Kilfoil from soliciting the old customers of the business; he got a right to exclude Kilfoil from doing any business at all in the same line in the same place. If Scudder had entered into partnership with a third person, no right to enforce Kilfoil's covenant would have passed to the partnership, but would have remained the sole right of Scudder, the covenantee. So, when Kilfoil became a partner, he obtained no interest in the covenant as such partner which could annul his obligation as covenantor. The question, then, is reduced to this, Did the consent by

Scudder, that Kilfoil should engage in the same business in Princeton, as his partner, imply a waiver of his rights under the contract? I am clear that it did not. The two contracts were not incongruous or inconsistent. The covenant in the original contract provided against Kilfoil entering upon the same business in rivalry with Scudder. The permission implied by the partnership arrangement was that he might engage in the same business in copartnership with Scudder. If Scudder had hired Kilfoil to assist him in his business, I do not see how this could be tortured into a consent that the latter could work for himself. Now, their relation as partners, both interested in the business of the firm, made the consent of Scudder that Kilfoil should so work as partner of much the same quality as would have been his assumed consent that Kilfoil should work as his servant. His consent in the latter (197) case would have been that he could work for Scudder; in the former, that he could work in the interest of Scudder. To this extent only was there a consent that Kilfoil should engage in business while Scudder was still in business. When Kilfoil ceased to be a partner, and even that consent was withdrawn by the cessation of the firm relationship, he had acquired no right to engage in business on his own account, in contravention of the terms of his original contract."

It is apparent from a careful reading of the contract under interpretation in this case that the defendant, A. J. Rohr, did not merely sell his "good-will in the business," but went further, and specifically contracted not to enter the business, or concern himself in the business, of barber, directly or indirectly, as principal or agent, in the limits of the city of Monroe, as long thereafter as the plaintiff Faust should be engaged in such business in Monroe. The courts have said that the latter covenant is a much more solemn and far-reaching one than the mere sale of good-will. The good-will of a trade or business may be defined as the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it received from the constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessities, or even partialities or prejudices. 14 A. and E. Enc. of Law (2 Ed.), p. 1085. It has been stated to be a general rule that good-will exists in a professional as well as in a commercial business, subject to the distinction that it has no local existence, like the good-will of a trade, but attaches to the person of a professional man as a result of confidence in his skill and ability. Consequently, in enforcing the agreement where there has been nothing more than a mere sale of "good-will," the courts

at most have only held that the vendor of the good-will is precluded by his contract from soliciting the former customers of the old partnership to deal with himself or not to deal with his vendee. 14 A. and E. Enc. of Law, p. 1091.

(198) It appeared in *Foss v. Roby,* 195 Mass., 292 (10 L. R. S. (N. S.), 1200), that the defendant sold his good-will in the dental profession to the plaintiff, the two having been theretofore partners in the business. Thereafter the plaintiff went into bankruptcy. After the bankruptcy, plaintiff entered into business with another, assigning to the new firm his rights to keep the defendant from competing which he had acquired under the contract before mentioned between plaintiff and defendant. After this, plaintiff again engaged in business for himself as dentist, taking an assignment to himself, from the firm of which he had been a member, of rights against the defendant under the said contract. Defendant Roby then resumed business as a dentist in the territory in question. Plaintiff brought suit to enjoin him from interfering with his rights. The Court held that the right, as against the defendant Roby, which the plaintiff had to the good-will of the dental business in the specified territory, was an assignable property right, and its assignment by the plaintiff to the firm of which he was a member, as well as the subsequent assignment by this firm to the plaintiff, were valid; that the rights of the plaintiff were not affected by his having gone into bankruptcy, and, further, that the plaintiff was entitled to injunctive relief.

Faust's employment of Rohr after the first contract, and later his association with him as partner, was nothing more than a temporary license to him to engage in business as a barber in Monroe, and it was subject to the condition that Rohr should be considered as an employee or partner of Faust. Certainly there was nothing in these subsequent contracts that permanently released Rohr from his first contract not to compete, as principal or agent, with Faust in the city of Monroe. A rescission would not take place unless there had been some subsequent agreement or conduct inconsistent or incompatible with the restrictive covenant. The acceptance of the resignation of an employee before the term of employment fixed by the contract expires does not abrogate such employee's restrictive covenant, but leaves the parties in the same situation as they would have been at the end of the term if the employee had then left the employer's service. Nor does the employer's consent

(199) that the employee shall enter the service of another release his restrictive agreement for the future time. 24 A. and E. Enc. of Law (2 Ed.), 856-857. And again: Where it is claimed that a contract has been discharged by a new contract, or by the introduction of new

terms, the intention to discharge the original contract must distinctly appear, to give rise to such an implication, from the inconsistency of the new terms with the old ones. A mere postponement of performance for the convenience of one of the parties does not operate as a discharge. Clark on Contracts, pp. 612, 613. That contracts of this and a similar restrictive nature will be enforced by the courts and a violation of them enjoined is, it seems, well settled. *Gordon v. Knott,* 199 Mass., 173 (*s. c.,* 19 L. R. A. (N. S.), 762 and note). This Court has often enforced them and issued restraining process to prevent their infringement. See *Baker v. Cordon* and other cases cited, *supra.*

The defendant's counsel in a learned and well prepared brief, have controverted these positions taken by the plaintiff and now approved by us. It will be found, though, that their authorities relate mainly to contracts for the sale of the good-will of business concerns, without any negative covenant, such as we have here. Those authorities hold that the sale of the good-will merely will not prevent the vendor from engaging in a competitive business, except in so far as it would interfere with the due enjoyment of the thing sold. As an illustration of this principle, it was decided in *Foss v. Roby, supra,* that one selling the good-will of a dental business impliedly undertakes that he will not thereafter practice his profession so as to destroy or injure the business he has sold, wherefore he will not be permitted to establish himself in the same business and solicit the patronage of his former patients, for that would be in direct opposition to his former promise, and a breach of the contract. *Hoxie v. Chaney,* 143 Mass., 592; *Yeakly v. Gaston,* 111 S. W. Rep., 768; *Dwight v. Hamilton,* 113 Mass., 175. It is frankly conceded in their brief that "the sale of the good-will of a business will not, of itself, be sufficient to preclude the seller from engaging in a separate and independent business of the same kind in the same village or city," and "whenever such is the intention of the parties, that is, to (200) prevent the vendor from engaging in the same kind of business in the same place upon the sale of the good-will, it is accomplished only by an express stipulation to that effect, which, if not in undue restraint of trade, will be valid and binding; and upon such a sale of the good-will of a business, without more, the vendor is not precluded from setting up a similar business in the vicinity. If the vendee wishes a more beneficial stipulation and greater restraint upon the vendor, he must see to it that provision for that purpose is inserted in the contract. 20 Cyc., 1279; *Hoxie v. Chaney,* 143 Mass., 592; 24 Am. Digest, p. 2650, where the cases are collected. But the learned counsel cite and rely mainly on *Norris & Cochran v. Howard,* 41 Iowa, 508, and the conclusion of the Court, founded upon facts substantially the same as those in this case, supports

the defendant's contention; but we think the reasoning of the Court is fallacious and the deduction therefrom is unsound. The Court clearly loses sight of the precise nature of the stipulation forbidding the vendor from engaging in similar business and of the object for which it was inserted in the contract, and therefore it was led into the error of assuming that "it formed an impediment to his becoming a partner" with his vendor. If we admit the premise, that it does, the conclusion may well be warranted; but this is a false assumption, as we respectfully think, for the object was the prevention of competition, and he does not become a competitor by entering the copartnership. We are much better satisfied with the reasoning and statement of the law as contained in the case of *Scudder v. Kilfoil,* 57 N. J. Eq., 171, to which we have referred. We are not inadvertent, though, to the clear distinction drawn in *Norris & Cochran v. Howard, supra,* between the sale of the good-will of a business and a restrictive covenant like the one found in this contract, which is as follows: "The agreement not to buy grain in Prairie City, nor thereafter to engage in such business at that place, is a thing distinct from the transfer of the mere good-will. The legal meaning of good-will, as defined by *Lord Eldon,* 'is nothing more than the probability that the old customers will resort to the old place.' 'It is nothing (201) more than a hope, grounded upon a probability.' Parsons on Partnership, 2 Ed., p. 273. 'The sale of a good-will, in the absence of any express stipulation, does not preclude the seller from setting up the same kind of business in the same neighborhood, if he do not describe himself as setting up the identical business that has been purchased.' Smith's Mercantile Law, p. 252, and cases cited." While this is a correct statement of the law, so far as it goes, it was not carried to its legitimate and logical sequence by proper argument and by keeping in mind the true nature and intended purpose of the stipulation against engaging in a similar occupation.

This also disposes of the position taken in the brief of defendant's counsel, that there is a necessary repugnancy between the said express stipulation and the subsequent agreement of partnership, for which they rely on *Redding v. Vogt,* 140 N. C., 562, and *Burns v. McFarland,* 146 N. C., 384, in the former of which cases it was said: "When the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the legal effect of the second agreement is to rescind the first"; and in *Myers v. Carnahan,* 61 W. Va., 414, also cited by them: "A subsequent contract which does not, by express terms, abrogate an earlier one, will operate as a discharge of it, in the absence of an express agreement to that effect, when clearly inconsistent with the continued existence of the original contract." But here we come

back to the original proposition, that the two contracts are not inconsistent when properly considered and construed, and the whole argument is based upon the false premise that they are. The quotation from 20 Cyc., 1281, is founded solely upon the authority of the Iowa decision, which we are unable to follow, as we consider it at variance with reason, a broad view of the contract and the clear intention of the parties.

There was error in vacating the preliminary injunction. The court should have continued it to the hearing.

Reversed.

Cited: Finch v. Michael, 167 N.C. 324; *Bradshaw v. Millikin,* 173 N.C. 434; *Cooperative Asso. v. Jones,* 185 N.C. 283; *Hill v. Davenport,* 195 N.C. 272; *Scott v. Gillis,* 197 N.C. 226; *Moskin Bros. v. Swartzberg,* 199 N.C. 544; *Wallace v. Bellamy,* 199 N.C. 763; *Lumberton v. Hood, Comr. of Revenue,* 204 N.C. 176; *Lilly & Co. v. Saunders,* 216 N.C. 195; *Beam v. Rutledge,* 217 N.C. 673.

SOUTHERN SPRUCE COMPANY v. HUNNICUTT ET ALS.

(Filed 30 May, 1914.)

1. Appeal and Error—Assignments of Error—Rule of Court.

The assignments of error on appeal should indicate the ground of the exceptions relied upon with such definiteness and particularity that the Court may examine into them without having to search the record to ascertain where and what they are; and the rule as to such assignments may not be waived by parties without the consent of the Court.

2. Corporations—Deeds and Conveyances—Probate.

The probate of a deed of a corporation will not be held as defective when it appears to have been made in substantial compliance with the statute, as in this case.

3. Deeds and Conveyances—Probate—De Facto Acts—Appeal and Error—Presumptions.

Where the probate of a deed appears to be regular on its face, and taken before one apparently acting as a justice of the peace, it will be effectual as the act of an officer *de facto*, if not *de jure;* and where the incapacity of such officer does not appear in the record, the one who takes under the grantee will be adjudged to have acquired a good title.

4. Pleadings—Admissions—Trials—Proof.

In an action to recover land the defendant cannot avail himself of the objection that there is no evidence of possession of the land by him when

the complaint alleges possession by the defendant, and this allegation is not denied in the answer.

5. Equity—Estoppel—Bond for Title—Laches.

The defendants in this case are barred in equity of their rights claimed under a bond for title to lands by the long lapse of time in which they failed to assert them, which is not affected by reason of their supposing that they had a different and superior valid title.

(202) APPEAL by defendant from *Shaw, J.*, at October Special Term, 1913, of SWAIN.

This is an action to recover land, and damages for wrongfully withholding possession thereof.

The defendants denied the title of the plaintiffs, and set up an equity under a bond for title of date 22 November, 1882, but which was not registered until 4 January, 1904.

(203) The land in controversy had been in either the actual or constructive possession of the plaintiff and its predecessors in title from the date of the grant up to the year 1911, one of the plaintiff's predecessors in title having lived on one of the tracts continuously for more than seven years. These lands, from the date of the grant to the date of plaintiff's deed, had passed through the hands of some nine or ten different owners and had increased in value from 50 cents per acre to from $15 to $20, according to defendant's evidence.

The defendant's ancestor, James M. Hunnicutt, had never during his lifetime placed the bond to record or instituted any suit to test its validity or seek to compel specific performance, he having died about the year 1903; neither did the defendants contend that the purchase money had been paid as provided in said instrument. They did, however, offer evidence that $21 had been paid at one time, which assertion was controverted by J. A. Chambers, the party who executed the bond, he testifying that he had never received a penny either from Whitt or Hunnicutt.

There was no evidence tending to show that any of the plaintiff's predecessors in title had notice of the existence of bond from the year 1882 till the date of registration in 1904, except that one or two witnesses testified that it was rumored in the community that Chambers had executed a bond to Whitt and Hunnicutt, and the further testimony of one of the defendants that Franklin Gibson, a former owner, had told him that he knew of the bond when he bought the land in 1892. Gibson, however, testified that he never heard of the bond until years after he had purchased the tract.

The defendants' only excuse for neglecting to assert their rights, if they ever had any under the bond, was that their ancestor, some time after the date of the bond, was informed by one Clarke Whittier that a

large tract he owned covered the tract embraced in the bond and was an older and better title. Hunnicutt took no further action either by offering to pay the money provided for in the bond or requesting title to be made thereunder; neither was any action taken by his heirs at law until some eight or nine years after his death, when one of (204) them moved into a vacant house on said land and asserted that he and his codefendants were the owners of the same.

The plaintiff offered a connected chain of title from the State covering the land in controversy, subject to the objection of the defendant to the admissibility of two deeds in the chain of title, objected to on account of defect of probate.

The first of these deeds was from the "Three M Lumber Company, a corporation, to W. S. Harrey," the probate of which was as follows: "STATE OF NORTH CAROLINA—Buncombe County.

"I, W. B. Williamson, a notary public in and for said county of Buncombe and State of North Carolina, do hereby certify that on this day the due execution of the foregoing deed by the Three M Lumber Company, a corporation, the grantor therein, was duly proved before me by the oath and examination of G. W. Morris and Frank L. Mitchell; and the said G. W. Morris being by me duly sworn, says: That he is the vice president of the said Three M Lumber Company, and the said Frank L. Mitchell is the secretary and treasurer; that the seal affixed to the foregoing deed is the corporate seal of said company, and was thereto affixed by him, the said G. W. Morris, by the authority of the board of directors of said company, and that he by like authority signed the name of said company to said deed by himself as its vice president, as aforesaid, and that the name of said company thereto appearing was so signed by him as such its vice president, and that the said Frank L. Mitchell at the same time attested said deed as the secretary and treasurer of said company as aforesaid, and that he was present and saw the said Frank L. Mitchell so attest said deed and sign his name thereto as so attesting the same.

"And the said Frank L. Mitchell, being duly sworn, says that he is the secretary and treasurer of the said the Three M Lumber Company, and that G. W. Morris is the vice president, and that he, the said Frank L. Mitchell, knows the corporate seal of said company, and that the corporate seal of said company is attached to the foregoing deed, and was thereto attached by the said G. W. Morris, its vice president (205) as aforesaid, by order of the board of directors of said company; and by like authority the said Morris as its vice president signed the name of said company to said deed by himself as such vice president, and that the said Frank L. Mitchell, as the said secretary and treasurer

of said company as aforesaid, attested said deed and signed his name thereto as so attesting the same, and that the said G. W. Morris so affixed to said deed the name of said company by himself as its vice president as aforesaid in the presence of the said Frank L. Mitchell."

The second of these deeds was from one Enloe to Connor, in August, 1893. The probate was regular in form. This deed was probated before J. A. Chambers, a justice of the peace. The clerk adjudged the probate to be in due form, and ordered the deed to be registered. There was no record of Chambers being a justice of the peace after 1902, but he testified that he was an acting justice at the date of the probate.

There was a verdict and judgment for the plaintiff, and the defendants appealed.

The assignments of error are as follows:

EXCEPTIONS GROUPED.

Plaintiff's evidence:

Par. (1) Case on appeal, admission of Three M Lumber Company deed.

Exceptions under Hinsdale Act, Pars. (13)-(26). Case on appeal.

Defendant's evidence:

Par. (15) Case on appeal, excluding testimony in Reagan's evidence.

Par. (17) Case on appeal, excluding testimony in Mrs. Hunnicutt's evidence.

Par. (19) Case on appeal, excluding testimony in Will Gibson's evidence.

Par. (21) Case on appeal, excluding testimony in Spurgeon Hunnicutt's evidence.

Par. (22) Case on appeal, excluding testimony in W. A. Hunnicutt's evidence.

(206) *Plaintiff's evidence in rebuttal:*

Par. (23) Case on appeal, admission of Enloe deed to Connor, probated August, 1905.

Pars. (24)-(25) Case on appeal, admission of Chambers' evidence and note handed him, and all he said about it, and his other evidence, duly excepted to.

Par. (27) Case on appeal, exception to charge as given and noted.

Pars. (31)-(32) Case on appeal, exception to refusal to submit defendant's issues.

Case on appeal, exception to refusal to give defendant's special instructions.

Bryson & Black for plaintiff.
F. C. Fisher for defendant.

ALLEN, J. The Court might well decline to consider any of the exceptions in the record for failure on the part of the appellant to comply with the rules in making the assignments of error.

The records are increasing in size year by year, and the Court requires for its own convenience and in the interest of justice that the exceptions or assignments of error shall be stated at the close of the case on appeal, and that they should at least indicate the ground of the exception, without requiring the Court to search for it through the record.

The rule is simple, easy to comply with, and one that counsel cannot waive without the consent of the Court.

We have, however, examined the exceptions principally relied on.

In *Withrell v. Murphy,* 154 N. C., 89, *Justice Manning,* quoting from 1 Enc. L. and P., 963, states the rule in regard to the requirements to constitute a sufficient probate to a corporate deed as follows:

"It must appear, when read in connection with the deed, that the person making the acknowledgment was authorized to execute the instrument for the corporation; that he was known, or proved, to be the corporate official he represented himself to be, and that he acknowledged the instrument to be the act and deed of the corpora- (207) tion. The substantial showing of the requisite facts is all that is required, and where the instrument purports to be the act of the corporation the certificate will not be held defective because it recites that the person who executed it in behalf of and under authority from the corporation, acknowledged it to be his act and deed, instead of that of the corporation."

Applying the above rule to the probate or certificate of the deed of the corporation, we find:

First. That it was taken before the proper officer, a notary public of Buncombe County, North Carolina; that the certificate recites that the instrument to which the proof was being taken was the deed of the Three M Lumber Company, a corporation, and said acknowledgment was made upon the oath and examination of G. W. Morris and Frank L. Mitchell. That Morris signed the deed as vice president of the grantor company, and the said Mitchell attested it as its secretary. The certificate states that this officer, the vice president, under oath, stated that G. W. Morris was the vice president of the Three M Lumber Company and that Frank L. Mitchell was its secretary and treasurer; that the seal affixed to the deed was the corporate seal of the company and that the same was affixed by the vice president by the authority of the board of directors, and that

by such authority he signed it in the corporate name by himself as vice president. Morris further states that F. L. Mitchell was the secretary and treasurer of the company, and that said Mitchell signed his name in his presence in attestation of said deed. Frank L. Mitchell stated upon his oath that he was the secretary and treasurer of said corporation and that G. W. Morris was its vice president; that he knew the corporate seal of the company, and that the same was attached to said deed by said Morris, its vice president, under the authority of the board of directors, and that the same was signed by said Morris under like authority, and that under the same authority he signed his name in attestation thereto.

That said Morris signed said instrument in his presence.

(208) Under the rule laid down in the case above cited, we are unable to see why the above certificate is not a substantial compliance with the requirements of the Revisal.

The objection to the probate of the deed by Chambers, justice of peace, is equally without merit.

He swears that he was then acting as a justice of the peace; and if so, his acts would be effectual as an officer *de facto,* although not an officer *de jure* (*Hughes v. Long,* 119 N. C., 52), and it is well settled that where the incapacity of an officer who takes a probate does not appear on the record, as in this case, one who takes under the grantee gets a good title. *Blanton v. Bostic,* 126 N. C., 421.

The point made in the brief of appellant, that there is no evidence that the defendants were in possession of the land, is met by the allegation of possession in the complaint, which is not denied in the answer.

The exceptions to evidence require no discussion, and they do not seem to be relied on in the brief.

No sufficient excuse is presented for the delay in prosecuting the rights of the defendant under their bond for title, and the equity is barred upon the admitted facts.

No error.

Cited: Ferebee v. Sawyer, 167 N.C. 204; *Hardware Co. v. Buggy Co.,* 170 N.C. 301; *Bailey v. Hassell,* 184 N.C. 456; *Bank v. Tolbert,* 192 N.C. 131.

EDMOND SNOWDEN v. C. M. BELL.

(Filed 18 February, 1914.)

Limitation of Actions — Adverse Possession — Evidence — Landlord and Tenant.

Where adverse possession is relied on to establish title, directions of the party to his tenants to use the land is some evidence thereof. See *s. c.*, 150 N. C., 500.

APPEAL by defendant from *Bragaw, J.*, at September Term, 1913, of CURRITUCK.

This is an action to establish the right to use a certain lane, described in the complaint, and to restrain the defendant from obstructing the same.

At the conclusion of the evidence the defendant moved for judg- (209) ment of nonsuit, which was refused, and he excepted.

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

Ehringhaus and Small and E. F. Aydlett for plaintiff.

Pruden & Pruden and S. Brown Shepherd for defendant.

PER CURIAM. This is the second appeal in this action. On the first appeal, which is reported in 150 N. C., 500, we held that it was error to instruct the jury to answer the issues in favor of the plaintiff if they believed the evidence, but after discussing the facts necessary to constitute an adverse user, we said: "Applying these principles, we are of opinion that the plaintiff introduced evidence of an adverse user for more than twenty years, which entitled him to have his case submitted to the jury, but that it was not of such conclusive character as to warrant a peremptory instruction in favor of the plaintiff."

The evidence in the two records is practically the same, and adhering to our former decision, the ruling on the motion for judgment of nonsuit must be affirmed.

The exceptions to the admission of evidence are without merit. It was competent to prove that the plaintiff directed his tenants to use the lane, as some evidence of an adverse user under claim of right.

No error.

Cited: Weaver v. Pitts, 191 N.C. 748.

FRANK BODDIE ET AL. v. WILLIAM ARRINGTON, EXECUTOR.

(Filed 18 February, 1914.)

Contracts—Compensation by Will—Services Rendered Deceased.

In this action to recover of the executor for the services rendered the deceased under an alleged contract that the testatrix would provide compensation for the plaintiff in her will, the complaint is held to be sufficiently comprehensive.

(210) APPEAL by defendant from *Connor, J.*, at November Term, 1913, of NASH.

This is an action to recover the value of services rendered by the plaintiff to the testatrix of the defendant under a contract, as alleged, that the said testatrix would provide compensation for the plaintiff in her will, if she remained with her until she married.

There was a verdict and judgment for the plaintiff, and the defendant appealed.

Bunn & Spruill for plaintiff.

Finch & Vaughan and Jacob Battle for defendant.

PER CURIAM. We are of opinion, under the liberal construction of pleadings, which prevails with us, that the complaint is sufficiently comprehensive to cover a contract made after the plaintiff began to live with the testatrix of the defendant; and with this question eliminated, the controversy resolves itself into one of fact, which has been settled by the verdict of the jury upon competent evidence.

No error.

IN RE WILL OF W. W. COOPER.

(Filed 25 March, 1914.)

Wills—Wife a Beneficiary—Undue Influence—Presumptions.

Where the wife is the beneficiary under a will sought to be set aside for undue influence, the principles announced *In re Everett's Will* have no application.

APPEAL by caveator from *Cooke, J.*, at December Term, 1913, of WAKE.

Issue of *devisavit vel non*. This issue was submitted: "Is the paper-writing being propounded, and every part thereof, the last will and

testament of W. W. Cooper, deceased?" and was answered by the jury in the affirmative.

The caveator appealed.

John W. Hinsdale, Jr., for propounders. (211)
R. C. Strong for caveator.

PER CURIAM. The assignments of error relate to the charge of the court. We have examined the charge, and find no substantial error that in our opinion necessitates another trial.

The position of the learned counsel for caveator that the burden of proof under the facts of this case is on the propounder, the wife of the testator, to rebut the presumption of undue influence, is untenable.

"The fact that a man bequeaths his estate to his wife, excluding his children and other relatives, is absolutely immaterial upon the question of undue influence. The silent influence of affection and respect, augmented by the tender and kindly attention of a faithful wife, cannot be regarded as in any sense undue influence." Underhill on Wills, 212; *In re Peterson,* 136 N. C., 28.

The *Everett case,* 153 N. C., 86, has no application here, where the wife is the beneficiary.

No error.

Cited: In re Bradford, 183 N.C. 7; *In re Will* of Ball, 225 N.C. 96.

J. F. MOORE ET ALS. v. COOPER MONUMENT COMPANY.

(Filed 1 April, 1914.)

1. Injunction—Restraining Order—Act Committed—Appeal and Error.

The correctness of a ruling dissolving a restraining order will not be considered on appeal when it is made to appear that the act sought to be restrained has been committed.

2. Injunction—Restraining Order—Trials — Final Judgment — Courts — Terms.

The sufficiency of the complaint will only be considered in determining the right to a restraining order, when the controversy is not before the court on its merits, and the action may not be dismissed by final judgment until the trial, and, except by consent of the parties, this must be in term of court of the county wherein the action is pending.

(212) APPEAL by plaintiffs from order of *Rountree, J.*, given at chambers, 24 November, 1913.

This is an action commenced in the Superior Court of PENDER COUNTY to prevent the erection of a Confederate monument at the intersection of Fremont and Wright streets in Burgaw upon the ground that it would be an obstruction in the streets.

The plaintiffs obtained a temporary order restraining the erection of the monument, which was returnable and was heard in Columbus County.

At the hearing the temporary order was dissolved, and the action dismissed, and the plaintiff excepted and appealed.

It is admitted that since the dissolution of the restraining order the monument has been erected.

J. D. Bellamy and J. T. Bland for plaintiffs.

Robert Ruark, E. L. Larkins, Stevens & Beasley, John J. Best, and A. McL. Graham for defendants.

PER CURIAM. As the monument has been erected, the Court will not entertain an appeal to determine the correctness of the ruling dissolving the restraining order. *Harrison v. New Bern,* 148 N. C., 315; *Pickler v. Board of Education,* 149 N. C., 221; *Wallace v. Wilkesboro,* 151 N. C., 614.

We think, however, there is error in dismissing the action and entering final judgment at the hearing in Columbus County.

The merits of the action were not before the court, and the sufficiency of the complaint could only be considered in determining the right to the restraining order.

The final judgment, except when hearings are elsewhere by consent, should be rendered in the county where the action is pending and in term. *Hamilton v. Icard,* 112 N. C., 589.

Modified and affirmed. The plaintiffs will pay the costs.

Cited: Kilpatrick v. Harvey, 170 N.C. 668; *In re Parker,* 177 N.C. 468; *S. v. Scott,* 182 N.C. 882; *Edwards v. Comrs.,* 183 N.C. 61; *Griffith v. Board of Education,* 183 N.C. 409; *Davenport v. Board of Education,* 183 N.C. 577; *Galloway v. Board of Education,* 184 N.C. 248; *Tobacco Growers Asso. v. Pollock,* 187 N.C. 413; *Grantham v. Nunn.* 188 N.C. 242; *Boyd v. Brooks,* 197 N.C. 648; *Glenn v. Culbreth,* 197 N.C. 678; *Board of Education v. Comrs. of Johnston County,* 198 N.C. 431; *Rousseau v. Bullis,* 201 N.C. 14; *Cahoon v. Comrs. of Hyde County,* 207 N.C. 49; *Groves v. McDonald,* 223 N.C. 141.

PETER HAWKINS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 1 April, 1914.)

Appeal and Error—Docketing Transcript—Rules of Court.

For an appellant to be entitled to have his case heard in the Supreme Court as a matter of right, he must conform to the rules and regulations respecting appeals (164 N. C., 544); and when he has failed to file his transcript in the Supreme Court by Tuesday preceding the week of the call of his district (Rule 5), and the appeal has been dismissed (Rule 17), his motion to reinstate (Rule 18) will be denied.

FROM CRAVEN. No transcript sent to reporter. (213)

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

PER CURIAM. This cause was tried at January term of Craven, beginning 5 January, 1914. From the verdict and judgment the defendant appealed. Under Rule 5 of this Court, 164 N. C., 540, the transcript of the record should have been docketed by Tuesday of the week preceding the call of the Fifth District, to which it belonged, that is, on or before 24 February, 1914, and if not docketed at that time the appellee had a right to docket the clerk's certificate and dismiss under Rule 17 at any time thereafter during the term (164 N. C., 544), provided the motion was made before the appellant docketed his appeal. The appellee filed his motion to that effect on Monday, 2 March. The appellant docketed his record on 3 March, and on call of the docket on Tuesday, 3 March, the cause was accordingly dismissed.

This is a motion to reinstate said appeal, upon notice given under Rule 18. The right of appeal, as we have often held, is not an absolute right, but must be exercised in accordance with the rules and regulations prescribed.

This subject is fully discussed and settled in every aspect by the opinion and decision in *Vivian v. Mitchell,* 144 N. C., 472, in which the Court cites, among other cases, *Harrison v. Hoff,* 102 N. C., 25; *Jones v. Asheville,* 114 N. C., 620; *Pain v. Cureton, ib.,* 606; (214) *Mortgage Co. v. Long,* 116 N. C., 77; *Barber v. Justice,* 138 N. C., 20; *Craddock v. Barnes,* 140 N. C., 427; *Cozart v. Assurance Co.,* 142 N. C., 523; and the Court added: "The decisions to this effect have been uniform and so often repeated that of late years the Court has usually contented itself by following the precedents, without opinion, by a *per curiam* order." This course has usually been followed since, though that case was cited and approved in opinions in *Laney v. Mackey,* 144

N. C., 631, and in *Truelove v. Norris,* 152 N. C., 757; *Hewitt v. Beck, ib.,* 759. In the latter case, as in this, the appellant sought to excuse himself because there had been delay in "settling the case," without any fault on his part. But the Court held, in accordance with our uniform decisions, that in such case it is the duty of the appellant to docket the transcript of the record proper, in the proper time, to get a foothold in this Court, and only when that is done can he ask for a *certiorari* to procure the transmission of the "case on appeal," when it has not been sent up by reason of the delay of the judge in settling the case on appeal, or for other cause not attributable to the laches of the appellant. In *Burrell v. Hughes,* 120 N. C., 277, it is said, citing many cases, "There are some matters which should be deemed settled, and this is one of them." This case has been often cited since. See Anno. Ed.

The motion to reinstate is denied.

Motion denied.

Cited: Transportation Co. v. Lumber Co., 168 N.C. 61; *Land Co. v. McKay,* 168 N.C. 85; *Carroll v. Mfg. Co.,* 180 N.C. 661; *Cox v. Kinston,* 217 N.C. 397.

J. E. LATHAM v. J. E. FIELDS ET AL.

(Filed 15 April, 1914.)

Appeal and Error—Second Appeal—Same Exceptions.

Where a case has been tried in the Superior Court in accordance with a decision therein rendered on a former appeal, exceptions therein taken will not again be passed upon by the Supreme Court on a second appeal.

(215) APPEAL by defendants from *Lane, J.,* at January Term, 1914, of GUILFORD.

King & Kimball and Thomas S. Beall for plaintiff.
Thomas C. Hoyle, R. C. Strudwick, and T. J. Norris for defendant.

PER CURIAM. This is the third appeal in this case. 160 N. C., 335; 163 N. C., 356. A close examination of the evidence taken at the last trial satisfies us that there was ample proof of the fact that John D. Turner was acting for J. E. Field & Son in selling the cotton to plaintiff, and not for himself, and that the sale was made by J. E. Field & Son to plaintiff, through J. D. Turner. There was strong oral and documentary evidence of this fact, which was properly left to the jury.

That was the main question in controversy. The evidence now before us is substantially the same as that considered by the Court in the other appeals, the difference, if any, being in favor of plaintiff, appellee. When this is the case, we follow the former decision, which cannot be reviewed by another appeal. *Carson v. Insurance Co.*, 165 N. C., 135; *Bank v. Furniture Co.*, 120 N. C., 475. The case was tried in strict accordance with our opinions in those appeals, and therefore there is no ground for reversal. There must be an end of litigation somewhere, and this cannot be accomplished and nothing would ever be settled if by successive appeals parties are permitted to revive the same questions already decided. The jury have found that Turner was acting as defendant's agent, upon sufficient evidence of the fact, and the judgment on the verdict will not be disturbed.

No error.

ALICE J. WATKINS v. ROBERT L. LAWSON.

(Filed 22 April, 1914.)

1. Appeal and Error—Assignments of Error—Appellant's Brief—Rules of Court.

Statements made in appellant's brief, that he has ten assignments of error and insists upon them all, do not come within Rule 34 of the Supreme Court, and they will not be considered; the requirements being that there must be some reason or argument in their support set out in the brief.

2. Slander—Separate Charges—Separate Recovery—Trials—Instructions.

Where there are several and distinct actionable charges in the complaint made against the defendant in an action for slander, and not dependent on each other, with evidence tending to support them all, it is not error for the court to charge the jury that the plaintiff may recover damages should he establish either of the charges.

APPEAL by defendant from *Cooke, J.*, at Spring Term, 1913, of (216) STOKES.

This is an action to recover damages for the speaking of certain slanderous words. The jury returned the following verdict:

"1. Did the defendant falsely speak of the plaintiff that she, meaning the plaintiff, had stole things from the stores around here, and were the words uttered in the hearing of other persons, as alleged in paragraph 2 of the complaint? Answer: 'Yes.'

"2. Were such words spoken by the defendant with malice against the plaintiff? Answer: 'Yes.'

"3. Did the defendant falsely speak of the plaintiff that she, meaning the plaintiff, 'is a thief, and I can prove it; she has been in the habit of stealing goods from the stores in this neighborhood, going to stores pretending to buy, and stealing goods from the stores and going off without paying for them,' and were such words spoken in the hearing of other persons, as alleged in article 3 of the complaint? Answer: 'No.'

"4. Were such words spoken by the defendant maliciously? Answer: 'No.'

(217) "5. Did the defendant, in the hearing of other persons, falsely speak of the plaintiff, 'She has forged due-bills'? Answer: 'Yes.'

"6. Were such words spoken maliciously? Answer: 'Yes.'

"7. Did the defendant, in the hearing of others falsely speak of and concerning the plaintiff that she had sold 4 bushels of corn for 5, meaning and intending thereby to charge that she, the plaintiff, purposely, by false measure, sold for 5 bushels of corn only 4 bushels, and intending and knowing that the persons so standing around and hearing the words should so understand that significance of the words? Answer: 'Yes.'

"8. Were the words spoken maliciously? Answer: 'Yes.'

"9. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: '$225.'"

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

J. W. Hall, Watson, Buxton & Watson, Benbow & Hall, Winston & Biggs for plaintiff.

J. D. Humphreys and Jones & Patterson for defendant.

PER CURIAM. It is provided in the Rules of Practice in this Court, No. 34, that exceptions in the record by appellant, "in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him," and applying the rule, we must decline to consider the statement in the brief filed, that "the defendant has ten assignments of error, all of which he insists upon in this Court."

The only exception discussed is to the charge of his Honor that the plaintiff would be entitled to recover damages if she established either of the charges made in the complaint, and in this there is no error.

The charges are distinct and separate, and the establishment of one in no way depended on the other.

No error.

Cited: Guano Co. v. Mercantile Co., 168 N.C. 225.

JAMES NEVILLE, ADMINISTRATOR OF SAMUEL B. NEVILLE, v. W. R. BONSAL AND A. R. CLOUD, TRADING AS BONSAL & CO.

(Filed 22 April, 1914.)

1. Master and Servant—Trials—Gravel Pit—Supports—Negligence—Evidence—Nonsuit.

The plaintiff's intestate, an employee of the defendant, was at work in the latter's gravel pit, under the supervision of their manager and with the manager's knowledge of the fact. The manager caused a bank of dirt which acted as a brace at the base of the gravel embankment to be removed without providing any support to take its place, and the gravel consequently rolled down upon the intestate and killed him. In an action by the intestate's administrator to recover damages for his death, alleged to have negligently been caused by the defendant, it is held that this was evidence of negligence, and the defendant's motion as of nonsuit was properly denied.

2. Master and Servant—Dangerous Employment—Assumption of Risks—Master's Negligence—Nonsuit.

Whatever is necessary for the servant to do in the course of his employment is incidental thereto and a part thereof, and the servant assumes the risk of the dangerous character of his duties when the employment is a dangerous one; but where an injury is directly caused to the servant by a negligent act of the master or another employee in a superior capacity, in connection with the work, the master is responsible.

APPEAL by defendant from *Devin, J.*, at December Term, 1913, (218) of ORANGE.

Civil action. These issues were submitted to the jury:

1. Was the plaintiff's intestate killed through the negligence of the defendants, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff's intestate assume the risk, as alleged in the answer? Answer: No.

3. What sum, if any, is the plaintiff entitled to recover? Answer: $1,300.

From the judgment rendered, the defendants appealed.

Frank Nash, S. M. Gattis, and V. S. Bryant for plaintiff.

F. P. Hobgood, Jr., for defendant.

PER CURIAM. The motion to nonsuit was properly overruled. The evidence tends to prove that the plaintiff's intestate was employed by the defendants at work in a gravel pit, and was killed by the (219) dirt piling up over him, caused by a cave-in; that the conditions there were such that there was a high bank, the plaintiff contends, 18 to possibly 20 feet high, perpendicular; that he was employed in working in

connection with a steam shovel that was excavating at this place; that there was at the base of this bank of earth or well a certain amount of earth along its base which, as the plaintiff contends, acted as a brace to it at the base, which extends up to some 4 or 6 feet, and that in proceeding with their work of excavating this earth, and while the plaintiff's intestate, Sam Neville, was in a position of danger, they excavated or removed this earth at the base of this wall, and that this acted as a support to the wall, and that when it was removed, and by their act in removing it, the earth in the bank of earth crumpled or caved in and fell upon Sam Neville and caused his death, and that his death was due to the negligence of the defendants in removing this without any other protection.

The work was being done under the management of one Stowe, who, about three hours before the cave-in, ordered the plaintiff's intestate to work at that place. The evidence shows that Stowe was in and out of the pit all the time, and knew of the conditions.

It is a fair inference from the evidence that Stowe took no precautions to prevent a cave-in before the supporting bank of dirt was removed. It was the duty of Stowe to take such precautions as the situation permitted, so as to prevent injury to his subordinates when the bank of dirt at the base of the pit was removed; ordinary prudence dictated it.

Upon the second issue his Honor charged: "A servant assumes all the risks and dangers incident to his employment. He does not assume a risk or danger growing out of the master's negligence. Whatever is necessary to be done in the work in which the servant is engaged is incident to the servant's employment, and whatever risk or danger attaches to it, or necessarily grows out of it, he assumes."

This is in accord with the decisions of this Court.

Upon a review of the record, we find

No error.

Cited: Mace v. Mineral Co., 169 N.C. 149; *O'Neal v. Jones,* 199 N.C. 653.

J. A. AUSTIN v. J. A. McCOLLUM.

(Filed 22 April, 1914.)

Processioning—Trials—Issues of Fact—Judgment—Direction to Surveyor.

In this proceeding for processioning lands the questions involved are issues of fact found by the jury under correct instruction of the court as to the law thereon; and the judgment rendered according to the verdict, and directing the surveyor to run and mark the line thus ascertained, is held no error.

AUSTIN *v.* MCCOLLUM.

APPEAL by defendant from *Adams, J.,* at August Term, 1913, (220) of UNION.

This is a processioning proceeding. Upon the finding of the jury in response to the issue submitted the court rendered judgment as follows:

This cause coming on to be heard and being heard before the undersigned judge and a jury at the August Term, 1913, of Union Superior Court, and the jury having found that the true dividing lines between land of plaintiff and the lands of defendants are: first, from the stone at "2" on the map, plaintiff's second corner, N. 88.50 W. 10.60 chains to a large white-oak stump marked "Z" on the map; and, second, from the said large white-oak stump marked "Z" on the map S. 23 E. 23.68 chains to a stake driven down by H. M. Lilly, surveyor, near a pine-stump hole, said stake being driven down at the Tomberlin line, and indicated by the point "10" on the map:

It is adjudged that the said lines as above described are the true dividing lines between the land of plaintiff and the lands of the defendants, and it is ordered that H. M. Lilly, surveyor, run and mark said lines, setting up permanent monuments of boundary at the corners.

And it is ordered and adjudged that the plaintiff recover of the defendants his costs in this action to be taxed by the clerk of the court.

W. J. ADAMS,
Judge Presiding.

The defendant appealed.

Adams, Armfield & Adams, Stack & Parker for plaintiff. (221)
Manning & Kitchin, Redwine & Sikes for defendant.

PER CURIAM. We have carefully considered the eighteen assignments of error set out in the record in this case, and are of opinion that they are without merit. The controversy between the parties is practically one of fact as to the location of certain division lines between their lands, and in the determination of the matter we find no substantial error committed by the trial judge which necessitates another trial.

No error.

SUPREME COUNCIL A. A. S. R. v. GRAND LODGE OF A. F. AND A. M. OF NORTH CAROLINA.

(Filed 22 April, 1914.)

1. Appeal and Error—Pleadings—Amendments—Fragmentary Appeals.

An appeal from an order of the lower court permitting an amendment to a pleading is premature and will be dismissed in the Supreme Court.

2. Actions—Pleadings—Amendments—New Cause of Action—Libel—Boycott—Appeal and Error.

A new and distinct cause of action is not allowable by amendment to the complaint, and where the original complaint alleges a cause of action for libel, it may not be amended so as to maintain an action for damages arising from an alleged boycott by the defendant; for if the amendment be for the purpose alone of showing malice, it was unnecessary, and if relied on as a cause of action it was not permissible by amendment.

CLARK, C. J., did not sit on this case.

APPEAL by defendant from *Lane, J.*, at November Term, 1913, of FORSYTH.

This is an action to recover damages for an alleged libelous publication of date 14 January, 1909.

(222) At the trial term the plaintiff moved to amend the complaint theretofore filed, which declared upon the publication, by alleging that the defendant declared a boycott against the plaintiff in the Spring of 1908.

His Honor denied the motion as matter of law, and the plaintiff excepted and appealed.

Lindsay Patterson for plaintiff.

S. M. Gattis, Alexander, Parrish & Körner, and A. B. Andrews, Jr., for defendant.

PER CURIAM. The position taken in the defendant's brief that the appeal is premature must be sustained. *Goodwin v. Fertilizer Works,* 123 N. C., 162.

If we were to hold otherwise, parties could appeal from every adverse ruling in the Superior Court, with the result that the docket of this Court would be incumbered with unnecessary matter, the costs to litigants greatly increased, and trials needlessly delayed.

An exception ought to have been entered and the trial proceeded with.

We are, however, of opinion that the motion to amend was properly denied.

If the facts alleged therein are competent against the defendant as evidence of malice, they may be offered under the allegations of the original complaint; and if relied on as a cause of action, they introduce a new and distinct cause of action, which is not permissible, when resisted. *McNair v. Buncombe County,* 93 N. C., 364; *Clendennin v. Turner,* 96 N. C., 416.

Appeal dismissed.

CLARK, C. J., not sitting.

W. H. BOONE v. HIRAM JONES AND W. A. J. CHEEK.

(Filed 29 April, 1914.)

APPEAL by plaintiff from *Devin, J.,* at December Term, 1913, (223) of ORANGE.

This is an action to recover a mule, and from a judgment in favor of the interpleader, Cheek, the plaintiff appeals.

John W. Graham for plaintiff.

Frank Nash, Manning, Everett & Kitchin for interpleader.

PER CURIAM. The plaintiff claims under a mortgage executed by Hiram Jones, and the interpleader by purchase from the same party, and the real controversy is one of fact as to whether the mule bought is the one described in the mortgage.

This has been settled against the plaintiff by the verdict, and we find no error in the trial justifying a reversal of the judgment.

No error.

J. Q. A. MICHAEL v. J. L. LEACH.

(Filed 13 May, 1914.)

1. Malicious Prosecution—Trials—Evidence—Nonsuit.

In an action for damages for malicious prosecution, where it is admitted that the defendant procured a warrant for the arrest of the plaintiff upon the charge of embezzlement, that the plaintiff was acquitted, and there was evidence of the want of probable cause, as well as malice on the part of the

defendant in thus acting, a judgment as of nonsuit upon the evidence will be denied.

2. Malicious Prosecution—Execution Against Person—Trials—Nonsuit.

Where an action for damages for malicious prosecution alleges "an injury to the person or character" of the plaintiff, and upon the evidence the jury have answered the issues in the plaintiff's favor, a judgment is not held for error that execution issue against defendant's property, and if returned unsatisfied in whole or in part, then, upon motion of plaintiff, execution issue against the person of defendant, for the statute, Revisal, 727, gives the plaintiff this right of execution against the person of the defendant without incorporating it in the judgment.

(224) APPEAL by defendant from *Cline, J.*, at the January Term, 1914, of MCDOWELL COUNTY.

This is a civil action.

These issues were submitted to the jury:

1. Did the defendant, J. L. Leach, cause the arrest and prosecution of the plaintiff, J. Q. A. Michael, upon the warrant and indictment referred to in pleadings? Answer: Yes.

2. Was the same done without probable cause? Answer: Yes.

3. Was the same done with malice? Answer: Yes.

4. Has the criminal action terminated? Answer: Yes.

5. What damages, if any, has the plaintiff sustained thereby? Answer: $2,000.

C. C. Lisenbee, Pless & Winborne for the plaintiff.

C. L. Whitener, W. A. Self for the defendant.

PER CURIAM. We have examined the several exceptions relating to the evidence, and find them to be without merit.

The motion to nonsuit was properly overruled. It is admitted that the defendant procured a warrant in the county of Catawba, charging the plaintiff with feloniously embezzling $31, and that said cause was removed to McDowell County and tried, and that the plaintiff was acquitted.

There is sufficient evidence of a want of probable cause as well as of malice to warrant the judge in refusing defendant's prayers to direct the jury to answer the second and third issues No.

We have examined the charge carefully and find it free from error. It is a full, accurate and fair presentation of the case to the jury.

The defendant excepts to this part of this judgment: "It further appearing that lack of probable cause and malice of defendant (225) were alleged in the complaint, and that said wrongs resulted in

injury to the plaintiff's character, and the jury having answered the foregoing issues as shown herein: It is further adjudged that execution issue against the property of the defendant, as provided by law, and, if returned unsatisfied in whole or in part, then, upon motion of plaintiff, execution against the person of the defendant may be issued as provided by law in such cases."

The ancillary proceeding of arrest and bail, as well as final execution against the person, is allowed under Revisal, 727, where, as in this case, "the action is for an injury to person or character."

Section 625 of Revisal awards an execution against the person after execution against property has been returned unsatisfied in whole or in part.

But no execution shall issue against the person of a judgment debtor unless an order of arrest has been duly served; "or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement of facts be necessary to the cause of action or not." *Ledford v. Emerson,* 143 N. C., 529.

The complaint in this case sets out all the necessary facts constituting a cause of action for injury to person and character. The proper findings to establish such cause of action have been made by the jury.

The plaintiff, under such allegations and findings, will be entitled to an execution against the person without incorporating it in the judgment, for the statute awards such relief where the execution against property fails to discharge the judgment.

No error.

Cited: Ledford v. Smith, 212 N.C. 453.

EVANDER WILSON v. THE EUREKA LUMBER COMPANY.

(Filed 13 May, 1914.)

Trials—Negligence—Nonsuit.

In this action to recover damages of the defendant it appears that plaintiff, 5 or 6 years old, was injured while at play with other children, jumping from a heavy iron tank lying on defendant's yard. *Held,* the judgment of nonsuit entered in the lower court will not be disturbed, it appearing that an injury of this character could not have been reasonably anticipated, so far as the record discloses.

APPEAL by plaintiff from *Webb, J.,* at September Term, 1913, (226) of LINCOLN.

Civil action to recover damages for injuries caused by alleged negligence of defendant company.

On motion duly entered, there was judgment of nonsuit, under the statute, and plaintiff, having duly excepted, appealed.

A. L. Quickel and C. A. Jones for plaintiff.
L. B. Wetmore and C. E. Childs for defendant.

PER CURIAM. The proof showed that on or about 11 February, 1911, plaintiff, a child at that time 5 or 6 years of age, playing on the yard of defendant company, was seriously injured while engaged in climbing up and jumping off a heavy iron tank lying on the yard.

Although the testimony is set out with some fullness of detail, it has failed to apprise the Court of the character, shape, position, and placing of the tank with sufficient definiteness to justify or permit the conclusion that defendant company should be held responsible. It would seem rather to be one of those unfortunate incidents which the owners could not have reasonably been expected to foresee from any facts observable by them. The cause having been dismissed on judgment of nonsuit, the disposition is not necessarily final, and plaintiff, if so advised and on fuller statement, may be able to present his case in a different aspect; but on the record as it now appears we must hold that there has been no error committed and that the judgment of nonsuit be

Affirmed.

GEORGE W. BOLICK v. J. T. CLINE.

(Filed 13 May, 1914.)

Master and Servant—Trials—Contributory Negligence.

It is held that this case was correctly tried in the court below, the jury correctly instructed upon the legal principles involved, and that the injury alleged was not caused by the defendant's negligence, but by plaintiff's inattention in operating a cotton gin.

(227) APPEAL by plaintiff from *Cline, J.*, at November Term, 1913, of CATAWBA.

Councill & Yount for plaintiff.
A. A. Whitener for defendant.

PER CURIAM. Action to recover damages for injuries alleged to have been caused by defendant's negligence while plaintiff was operating his

cotton gin. We have considered the case and the briefs and argument of counsel carefully, and find no error. The cause was tried and decided according to principles settled by this Court, which were properly applied to the facts by the judge. Plaintiff's injuries were due to his own inattention, and not to any fault of the defendant.

No error.

S. W. WHITE ET AL. v. MARY HARRIS.

(Filed 6 May, 1914.)

Appeal and Error—Nonsuit—Trials—Evidence—Fragmentary Appeal.

An appeal from a judgment of nonsuit taken upon the ruling of the trial court upon admissibility of evidence not determinative of the controversy will not be considered. *Tester v. Mfg. Co.*, 151 N. C., 602, cited as controlling.

APPEAL by plaintiff from *Harding, J.*, at November Term, 1913, of MECKLENBURG.

This is an action to have a trust declared, and to recover a lot (228) of land.

Upon an adverse ruling as to the admissibility of certain evidence, not necessarily determinative of the action, the plaintiff submitted to judgment of nonsuit and appealed.

T. W. Alexander for plaintiff.

No counsel for defendant.

PER CURIAM. The appeal must be dismissed upon the authority of *Teeter v. Mfg. Co.*, 151 N. C., 602, and the cases there cited.

If parties were allowed to appeal whenever dissatisfied with a ruling upon evidence, the trial of the cause upon its merits could be indefinitely postponed.

Appeal dismissed.

Cited: Hill v. Clark, 209 N.C. 358.

IDA LATTA v. CHARLES U. NICHOLS.

(Filed 15 April, 1914.)

Held, this controversy involved issues of fact, and there is no error.

APPEAL by plaintiff from *Peebles, J.*, at May Term, 1913, of ORANGE.

Civil action tried upon these issues:

1. Is the defendant, Charles Nichols, indebted to the plaintiff, Ida Latta, and if so, in what amount? Answer: No.

2. Is the plaintiff, Ida Latta, indebted to the defendant, Charles U. Nichols, and if so, in what amount? Answer: Yes; $55.29, with interest from 23 January, 1912.

3. Is the defendant, Charles U. Nichols, indebted to the interpleader, Richard Latta, and if so, in what amount? Answer: $20.

From judgment rendered, the plaintiff appealed.

(229) *C. D. Turner for plaintiff.*

S. M. Gattis for defendant.

PER CURIAM. We have examined and considered the eight assignments of error set out in this record, and pressed upon our attention in the brief and argument of the learned counsel for the plaintiffs. The controversy appears to be one largely of fact, and we think is determined with substantial justice by the verdict of the jury.

No error.

UWARRA MINING COMPANY v. CANDOR MINES COMPANY.

(Filed 20 May, 1914.)

Deeds and Conveyances—Disputed Lines—Evidence of Location.

In passing upon the report of a referee to whom was referred an action involving title to adjoining lands of the parties litigant, there was evidence that the line called for in the plaintiff's deed and that in the defendant's deed were identical, and the finding of the trial judge, that the line between the parties should be varied to meet these descriptions according to the location testified by a witness, is held to be without error.

CIVIL ACTION, tried at April Term, 1914, of MONTGOMERY, *Harding, J.*, presiding, upon the report of a referee and the exceptions thereto.

The court made the findings of fact embodied in the following judgment:

1. That the beginning point in the land of the plaintiff is at a hickory, red oak and white oak pointers, in the line of J. C. Mosser & Co., and running thence north 27 east 441 feet to a stake, center of road, Parson's line, Spanish oak and black-jack pointers; thence south 28½ degrees east with road and Parson's line 300 feet to stake in road; thence south 53 east with road and Parson's line 450 feet to stake in road; thence south 59 east with road and Parson's line 825 feet to rock, beginning corner of Parson's tract, and the corner of J. C. Mosser & (230) Co.

That the last call in the land described above as set out in the deed is thence north 71½ west with line of J. C. Mosser & Co., 1,246 feet to the beginning, containing 5 acres, more or less.

2. That there is sufficient evidence to fix the last line in the deed to the plaintiff, other than north 71½ west with line of J. C. Mosser & Co.

3. That the evidence of P. E. Barber as to the following question and answer is competent: "What is the true direction from that rock corner to the fore and aft tree?" Answer: "North 73 degrees and 47 minutes west."

The defendant in apt time objected to the competency of the foregoing question and answer. The objection overruled, and the defendant excepts.

4. That the true boundary line between the plaintiff and defendant is a straight line running from the rock referred to as the northeast corner of the defendant's land and the southeast corner of the plaintiff's land to the beginning, referred to in the first finding of fact as the hickory, red oak and white oak pointers, on the line of J. C. Mosser & Co.

5. That the true course of said line is north 73 degrees and 47 minutes west.

6. That the evidence of the reputation of the location of the J. C. Mosser & Co. line and the Dempsey Pittman line is competent, and the defendant objects in apt time. Objection overruled, and defendant excepts.

The court adopts the conclusions of law of J. A. Spence, referee, and affirms the same as the judgment of this court. To the foregoing findings of fact and conclusions of law the defendant in apt time excepts.

From the foregoing findings of fact and conclusions of law it is, therefore, ordered, adjudged, and decreed that the plaintiff is the owner of the land described in the complaint hereinbefore set out, as described therein, except as to the last line, and that the last line in said descrip-

tion runs as the true line from the rock at the northeast corner of defendant's land and the southeast corner of the plaintiff's land, north 73 degrees and 47 minutes west to the hickory, red oak and white
(231) oak pointers, in the line of J. C. Mosser & Co., referred to in the deed to the plaintiff as the beginning corner.

W. F. HARDING,
Judge Presiding.

The defendant excepted and appealed.

Charles A. Armstrong, U. L. Spence, H. Grainger Gaither for plaintiff.

Jerome & Price for defendant.

PER CURIAM. We think that there is abundant evidence in this case identifying the Mosser line, referred to in the plaintiff's deeds, with the Dempsey Pittman line, referred to in the defendant's deeds. The evidence also sustains the finding of fact that the true location and direction of that line is 73 degrees 47 minutes west.

The line in the plaintiff's deed, which adjoins the defendant's land, is the last call, viz.: "A rock, beginning corner of Parsons' tract and corner of J. C. Mosser & Co.; thence north 71½ west with the line of J. C. Mosser & Co. 1,246 feet to the beginning."

The corresponding call and line in the defendant's deed reads as follows: "From Dempsey Pittman corner, pine stump, three pine pointers, thence with his line north 76 west 77 poles to a stake in his own line he purchased of L. Simmons."

Under the evidence, therefore, we think his Honor was correct in holding that the true location of the dividing line is with the Mosser or Dempsey Pittman line, and that the course must be slightly varied so as to run that line.

The judgment of the Superior Court is

Affirmed.

WADSWORTH LAND COMPANY v. PIEDMONT TRACTION COMPANY.

(Filed 27 May, 1914.)

New Trials—Evidence, Prejudicial—Appeal and Error.

It is held, on consideration of this petition to rehear, that the decision heretofore filed is correct in holding that evidence of a substantive and material character had been admitted to the appellant's prejudice, and in awarding a new trial.

Tillett & Guthrie, Maxwell & Keerans, Cansler & Cansler for (232) *petitioners.*

Osborne, Cocke & Robinson, Pharr & Bell for respondent.

PER CURIAM. This is a petition to rehear. Upon the former hearing a new trial was ordered on account of the admission of certain evidence, and upon a more careful examination of a voluminous record we are of opinion the error in admitting this evidence was cured in the charge, except as to the evidence of the value of other property, which was not withdrawn from the jury. The learned counsel for the plaintiff contends that this evidence of the value of other property was only admitted on cross-examination for the purpose of testing witnesses for the defendant, who had testified as to values; but this does not appear as to all of the evidence objected to. To illustrate:

A. J. Draper, a witness for the defendant, testified as follows: "Yes, I am a director in the Traction Company. I have been through the Wadsworth property a good many times on the street car. I know what the Traction Company proposes to do. I do not think that its operations through the property would injure it. I do not think a few more trains one way or the other through that property would make any difference."

Cross-examination: "Yes, I am also a director in the Stephens Company. It is developing some very high-class residential property east of the city. It paid more than $200 an acre for 1,200 acres on the east side of Sugar Creek. I think we have a very beautiful piece of property out there. We have been laying sewerage and water lines and putting down bitulithic on the streets and sidewalks."

Q. "And you have been selling those lots that you paid $200 (233) an acre for, at about $5,000 an acre?" (Objection. Overruled. Exception by the Traction Company.) "$4,500 is the highest that I have heard of an acre."

Adhering to our former ruling as to the admissibility of this evidence, the petition to rehear is dismissed.

Petition dismissed.

HOKE, J., dissents.

NORRIS MYERS v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 20 May, 1914.)

Railroads—Master and Servant—Trials—Negligence—Moving Train—Contributory Negligence—Questions for Jury.

An inexperienced employee of a railroad company acted under the peremptory order of the defendant's vice principal, whom he was required to obey, in attempting to board defendant's moving freight train, to go to another station to get the company's mail, and was thrown beneath the train to his injury. *Held*, the verdict of the jury awarding damages was rendered under competent evidence, and correct instructions of the court in relation to employee's acting within the scope of his duties and to the issue of defendant's negligence; and that the issue as to contributory negligence could not properly be answered in defendant's favor as a matter of law.

APPEAL by defendant from *Webb, J.*, at January Term, 1914, of WILKES.

This is a civil action for damages for personal injury received in the service of the defendant.

These issues were submitted to the jury:

1. Was the plaintiff injured by the negligence of the defendant? Answer: Yes.

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

(234) 3. Did the plaintiff sign the release and receipt offered in evidence? Answer: Yes.

4. Was the plaintiff induced to sign the release by the fraud and deceit of defendant's agent? Answer: Yes.

5. Was the plaintiff 21 years of age when he signed this release? Answer: No.

6. What damage is the plaintiff entitled to recover of the defendant? Answer: $1,800.

There was a judgment for the plaintiff, from which the defendant appealed.

Charles B. Spicer for plaintiff.

Watson, Buxton & Watson, W. W. Barber, Winston & Biggs for defendant.

PER CURIAM. This case was before the Court and is reported in 162 N. C., page 344, and in the opinion in that case the general facts are stated. The case was then tried under the Employer's Liability Act, and this Court held that the plaintiff was not engaged in interstate com-

merce. The cause was then tried under the law of this State, and from the verdict and judgment the defendant appeals, assigning numerous errors.

We have examined with care the exceptions set out in the record to the reception and rejection of evidence, and also to the charge of the court, and we think the case was substantially tried under the well-settled principles of law obtaining in this State. The motion to nonsuit was properly overruled.

There were three questions presented: (1) Was the plaintiff an employee, acting within the scope of his duty at the time of the injury? (2) Was he injured by the negligence of the defendant? (3) Did he so contribute to his injury that the court can say as a matter of law that he is not entitled to recover?

The plaintiff's evidence tends to prove that he was in the employ of the defendant to do whatever he was instructed to do—to work on the line of road, to run errands, go after the mail, tools, and other things; that he was under the control of Mr. Shaw, the foreman, and Mr. Lineberry, the assistant foremean; that on the particular Sunday when he was injured he was instructed by Mr. Lineberry to go to (235) Naugatuck and get the mail for the Company; that he was instructed to jump on a passing freight train; that he allowed two trains to pass by without catching them, and after being upbraided by Mr. Lineberry for not catching them, he was directed by Lineberry to catch a particular train passing the camp, being assured by him that it was safe to catch.

In attempting to obey this command, he was thrown under the cars and his leg amputated. Upon these facts being in evidence, we think his Honor very properly overruled the motion to nonsuit.

We cannot say that the plaintiff, as a matter of law, so contributed to his injury as to bar a recovery, although the evidence shows that he sustained the injury by attempting to board a moving train. We do not intend in any way to impinge upon the well-established principle laid down in *Lambeth v. R. R.*, 66 N. C., 495; *Burgin v. R. R.*, 115 N. C., 673, and other cases, in reference to getting on and off moving trains. But in this case the evidence shows that plaintiff was a new hand, inexperienced in railroading, and especially in boarding running trains, and the foreman knew it, and nevertheless peremptorily ordered plaintiff to board the train, and reprimanded him for not boarding the preceding train. Thus it would appear that plaintiff acted under duress, fearing to disobey his superior's orders, who had the power to discharge him.

Under the circumstances we think his Honor properly left the question of contributory negligence to the jury, applying the rule of the prudent man.

Upon a review of the whole record we are unable to see that any substantial error has been committed which warrants us in ordering another trial.

No error.

Cited: Ware v. R.R., 175 N.C. 503; *Hill v. R.R.*, 180 N.C. 492; *Robinson v. Ivey*, 193 N.C. 812; *Smith v. Ritch*, 196 N.C. 76.

(236)

LEE HOOPER v. D. D. DAVIES AND WIFE.

(Filed 30 May, 1914.)

Equity—Contracts—Specific Performance — Trials — Evidence — Balance Due—Judgments.

In an action for specific performance of a contract to convey land, the sufficiency of the writing being admitted, with evidence tending to show the full compliance on the part of the plaintiff, and to the contrary, that full amount of payment had not been made thereunder, a judgment of nonsuit is improperly allowed; and should on the new trial it be ascertained that defendant's contention is true in this case, the decree should direct a conveyance upon the payment by the plaintiff of the balance ascertained to be due.

APPEAL by plaintiff from *Ferguson, J.*, at October Term, 1913, of JACKSON.

Civil action to enforce specific performance of contract to convey lands.

On motion duly entered, there was judgment of nonsuit, and plaintiff excepted and appealed.

Alley, Buchanan & Leatherwood and Moore & Moore for plaintiff.
Coleman C. Cowan for defendant.

PER CURIAM. We were not favored with an argument for the appellee in the cause, but, on careful perusal of the record, we fail to find any facts justifying the judgment of nonsuit.

There was allegation, with evidence on part of plaintiff tending to show, that in November, 1910, he made a contract with defendant D. D. Davies to buy a tract of land from him of 78 acres at the price of $1,000, $500 of which was paid down and $250 was to be paid 1 January, 1911, and the remaining $250 as soon as the parties could have the land surveyed; that some time thereafter plaintiff paid $135 additional on the purchase price, and, late in August, 1911, although no survey had then

been made, he paid the balance due, this last being made in a debt due plaintiff from Thomas A. Cox, the agent of defendant, having full authority in the matter; that the contract was made for (237) defendant by Thomas A. Cox and some of the payments were made to him, and there was evidence tending to show that Mr. Cox was fully authorized to make the contract and receive payments for and in behalf of Mr. Davies; that he was intrusted by him with the entire management of the deal and of Mr. Davies' land matters, generally.

There was no denial in the pleadings that there was a valid contract in question, at the price of $1,000, as alleged, but defendant, admitting that the contract to sell the land had been made, alleged, on his part, that only $635 had been paid thereon, and, in the answer, averred that defendant was ready and willing to carry out the contract and make the deed on the payment of the balance due, etc.

There was evidence permitting the inference that there was a balance still due from plaintiff, and that the last payment of $365 was made on a debt due from Thomas A. Cox, the agent, to plaintiff, and that such payment may not have been within the scope of the agent's authority, but there was testimony also tending to show that such a payment was authorized, and, whether plaintiff or defendant is right in his position, the facts present no case for a nonsuit.

If there was a valid contract to convey and payment of purchase price completed, as plaintiff avers, there should be decree for specific performance.

If there is a balance still due and unpaid, this amount should be ascertained and decree for conveyance made on the payment of the amount, and, under our decisions, the question of cost, about which the parties seem to differ, will be in the discretion of the court, according to the facts established. *Parton v. Boyd,* 104 N. C., 422.

There is error, and the judgment of nonsuit will be set aside.

Reversed.

(238)

WILLIAM M. GOUGE v. BAXTER BENNETT.

(Filed 30 May, 1914.)

Appeal and Error—Process—Motion to Dismiss—Premature Appeal—Procedure—Exceptions.

An appeal from the refusal of the trial judge to dismiss an action for want of proper service of process is premature; the procedure being upon exception entered and appeal from final judgment if adverse to the movant.

FISHER *v.* COMMISSIONERS.

APPEAL by plaintiff from *Ferguson, J.*, at October Term, 1913, of JACKSON.

Charles E. Green, John C. McBee, and Pless & Winborne for plaintiff.
Lambert, Black & Wilson for defendant.

PER CURIAM. This is an appeal from the refusal of a motion to dismiss. Nothing is better settled than that "An appeal from the refusal of a motion to dismiss an action for want of proper service of process taken before final judgment is premature, and will not be considered. The better practice is to note an exception and proceed with the trial." *Guilford v. Georgia Co.*, 109 N. C., 310, and numerous cases cited in that case and in the citations thereto in the Anno. Ed.

Appeal dismissed.

W. B. FISHER ET ALS. v. COMMISSIONERS OF CHEROKEE ET ALS.

(Filed 30 May, 1914.)

Municipal Corporations—Bond Subscription to Railroad Stock—Commissioners—Discretionary Power—Mandamus—Good Faith.

An act authorizing municipalities and townships along the line of a prospective railroad to vote bonds therefor and subscribe to its capital stock was subsequently amended so as to appoint representatives for the various communities for the purpose of making subscriptions *de novo* to the capital stock of the corporation, of issuing bonds, etc., "as conditions may require and as they may determine, after the conditions and requirements provided in the act are complied with." *Held*, the establishment of the bonds, etc., is not a ministerial but a discretionary duty, to compel which a mandamus will not lie, except for abuse of this discretion; and there being evidence that the commissioners have acted in good faith, but have exercised their discretion to the extent of subscribing for a certain amount of the railroad stock, the case is remanded, with direction that the Superior Court find the facts more fully upon the affidavits and evidence presented.

(239) APPEAL from judgment rendered by *Carter, J.*, 11 April, 1914; from CHEROKEE.

This is a petition for a writ of mandamus, heard upon the complaint, answers, and affidavits, by his Honor, *Judge Carter*. His Honor made an order therein, which is set out in the record, from which the defendant appealed.

Bryson & Black and Zebulon Weaver for plaintiff.
M. W. Bell and Dillard & Hill for defendant.

PER CURIAM. Chapter 254, Private Laws 1913, chartered the Hiawassee Valley Railway Company, and the municipalities and townships through which the road is to run were authorized to vote bonds and subscribe to the capital stock.

For some reason the General Assembly, at its Special Session of 1913, enacted chapter 123, Public-Local Laws of that session, which made a very considerable change in the legislation covering this enterprise.

By virtue of that act the defendants W. P. Walker, H. N. Wells, and N. W. Abernethy were appointed representatives of Valley Town Township for the purpose of making subscriptions *de novo* to the capital stock of the corporation, and for the purpose of issuing bonds and selling the same from time to time "as conditions may require and as they may determine, after the conditions and requirements provided in the act are complied with."

The object of this petition is to compel these defendants, Walker, Wells, and Abernethy, to establish bonds of the said township in the sum of $75,000 to pay for stock subscription of like amount to the said railroad.

We have no hesitation in concluding that the question of sub- (240) scribing stock and the amounts to be subscribed is left by the act of the special session to the sound discretion of the three commissioners, and the court has no power, therefore, to compel them to subscribe unless there is some allegation and proof of an arbitrary or fraudulent refusal to exercise such discretion.

While a mandamus will lie to compel public officers to discharge a mere ministerial duty, it will not lie to compel them to perform an act which is left to their sound judgment and discretion. *County Board v. State Board,* 106 N. C., 81; *Russell v. Ayer,* 120 N. C., 180.

But it is contended that these three commissioners have exercised their discretion to the extent of subscribing for $10,000 of the railroad stock, and that they should be compelled to issue and sell $10,000 in bonds to make good such subscription.

This seems to be the view of the court below in making the order referred to. It is contended, in behalf of the three commissioners, that the entire matter is one within their sound discretion, and that a mandamus will not lie even to compel the issue of the $10,000 of bonds.

In their answer these three defendants have set up a number of facts by way of defense which we think it is necessary should be passed upon. Some affidavits are presented in the record in respect to the location of the road, the possibility of its construction, and other matters, going to show good faith on the part of the three defendants who have been intrusted with representing the township in this matter.

These defendants aver that they are not acting arbitrarily, but are exercising their discretion in a proper and legitimate manner under the act of the said special session.

We, therefore, are of opinion that the case should be remanded to the Superior Court of Cherokee County, with directions to find the facts more fully upon the affidavits and evidence presented.

The plaintiffs and the defendants will each be taxed one-half of the costs of this Court.

Remanded.

Cited: Board of Education v. Comrs. of Yancey County, 189 N.C. 652; *Jarrell v. Snow,* 225 N.C. 433.

(241)

STATE AND TOWN OF HERTFORD v. H. T. SHANNONHOUSE, AGENT.

(Filed 18 February, 1914.)

1. Cities and Towns—Fire Districts—Ordinances.

A town ordinance creating and regulating a fire district within the town is valid when authorized by statute.

2. Same—Building Permits—Substantial Repair.

An ordinance passed by a town under authority of a statute provides that no wooden building destroyed by fire, etc., or damaged more than a third, within the fire district, shall be repaired, "except as hereinafter provided," and a further section requires that permits for building and repairing within this fire district shall first be obtained from the town commissioners. *Held,* that a substantial repair cannot be made within such district, though less than "one-third," without obtaining the permit. Repairing a building by renewing piazza thereon is a substantial repair, and a violation of the ordinance if done without the permit.

BROWN, J., dissents.

APPEAL by defendant from *Bragaw, J.,* at October Term, 1913, of PERQUIMANS.

Attorney-General and Charles Whedbee for the State.

P. W. McMullan for defendant.

CLARK, C. J. This was an action begun in the mayor's court of the town of Hertford for the violation of an ordinance requiring a permit for the repair of wooden buildings within fire limits. From the judgment

against him, he appealed to the Superior Court, and on the special verdict in that court was adjudged guilty, and appealed.

The town of Hertford was incorporated, ch. 295, Pr. Laws 1903, which gave the town the powers and duties which are now set out in Rev., ch. 73. By Pr. Laws 1907, ch. 310, the charter was amended to read in part as follows: "Said board of commissioners shall also have full and exclusive control of all regulations relating to protection against fire, and the town of Hertford shall be exempt from the requirements of sub- (242) division 11, ch. 73, Rev. 1905. Said board of commissioners shall have the right to establish fire limits in said town and prescribe the character of buildings and the materials to be used in any building within the fire limits."

In pursuance of this authority the town specifically prescribed fire limits and passed, among others, the following ordinances:

"Third. Within said district no frame or wooden building already erected, which shall from fire or other cause be destroyed or damaged to the extent of one-third, shall be repaired except as hereinafter provided."

"Fifth. Any person desiring to build, add to, or repair any building within said fire district shall, before any work is done on same, apply to the board of commissioners of the town of Hertford for a permit, presenting with application plans and specifications of the building, additions, or repairs; and no work shall be done on any building or addition until the permit is granted."

It is found in the special verdict that the defendant owned the "Eagle Hotel" property within the said fire district, and after the date of said ordinance, "without making any application to the board for a permit to do so, tore away a part of the piazza to said hotel building in said fire district and replaced same with new timber; that the amount of work so done was very small in comparison to the total value of the building, and less than one-third."

The town of Hertford had authority to prescribe fire limits and enact these ordinances, under the authority conferred by statute. *S. v. Johnson,* 114 N. C., 946; *S. v. Lawing,* 164 N. C., 492; *Fellows v. Charleston,* 62 W. Va., 665.

It is true, it is said in *S. v. Lawing* that the ordinance could not reasonably be construed to prevent small repairs, such as putting in a pane of glass, hanging a door, repairing a broken step, and like matters; and it follows that this ordinance requiring a permit would not require a permit in such cases. But tearing away a piazza and replacing the same with new timber comes within the ordinance, as is decided in *S. v. Lawing.*

Nor does the provision in section 3 of the ordinance prohibiting (243) a permit to issue for the repair of a frame or wooden building

which has been damaged to the extent of one-third excuse the defendant from taking out a license when, as in this case, the repairs, though less than one-third of the cost of the building, are beyond the minor matters of slight repairs which we have mentioned. It is for the purpose of giving the commissioners opportunity to investigate and ascertain the amount and nature of the repairs necessary that section 3 was enacted. The board is not required to give such license in all cases when the damage is less than one-third. In such case issuing license is in the discretion of the board. When the cost of repairs is greater than one-third, the board is prohibited from giving permission. Though section 3 in such case adds "except as hereinafter provided," there is no subsequent provision, while section 5 provides, without exception, "No work shall be done on any building or addition (within said fire district) until permit is granted."

On the special verdict, while the repairs are less than one-third in value of the property, they are considerably beyond the slight incidental repairs we have mentioned, and it is further found that the defendant did not take out a permit. The court was properly of the opinion that the defendant was guilty.

No error.

BROWN, J., dissenting.

Cited: S. v. Stowe, 190 N.C. 81; *Bizzell v. Goldsboro,* 192 N.C. 358; *S. v. Hundley,* 195 N.C. 380.

STATE v. WALTER HARRIS.

(Filed 4 March, 1914.)

1. Intoxicating Liquors—Sale—Evidence—Trials—Questions for Jury.

On trial for the sale of whiskey in violation of our statute there was testimony by witnesses in behalf of the State: by one, that as he was watching through a crack in a wall upon the opposite side of the street, he saw the defendant give another a bottle of whiskey, and thought something passed between them, but did not know what it was; that "this was no more than a step" within the open door of a stable; by another, that he saw the defendant receive "some money" from the one to whom he had given the whiskey. The evidence further tended to show that the receipt of the whiskey and the passing of the money was at different times, between 2 and 5 o'clock of the same afternoon. *Held,* sufficient for conviction.

2. Courts—Expression of Opinion—Inferences from Evidence—Witnesses—Failure to Examine—Interpretation of Statutes.

Revisal, sec. 535, forbids the trial judge to express an opinion on the facts involved in the case, at any time, within the hearing of the jury, and this extends to any inference of fact arising from the evidence; and in a criminal prosecution for the sale of intoxicating liquors contrary to our statute, where the one to whom the alleged sale was made has been arrested by the State for the purpose of having his testimony, and he is not introduced as a witness, the prisoner's attorney has a right to comment upon this fact to the jury, as a favorable inference to be drawn by them in favor of his client, and an instruction by the court to disregard this argument is an expression of opinion forbidden by statute.

APPEAL by defendant from *Peebles, J.*, at Fall Term, 1913, of (244) VANCE.

Criminal action tried on appeal from recorder's court. The facts and occurrences of the trial are sufficiently and fairly stated in the case on appeal as follows:

R. M. Saunders testified for the State: "I am chief of police of Henderson. On 23 August of this year I was at Cooper's Warehouse, between the hours of 2 and 5 o'clock, watching through a crack in the wall. I saw the defendant and Ivey together on the street. Harris handed Ivey a bottle of whiskey, and I think I saw something pass between them. I don't know what it was."

Cross-examination: "There was a crowd in the street. Harris and Ivey were on the opposite side of the street from me, and stopped just in the door of a stable. Not more than a step inside. I cannot say that there was any sale, and I don't know that anything was given for the whiskey. Ivey came to me at once, and I got the whiskey from him and then went and got a warrant for Harris and arrested him right off, and (245) I searched him. He had no whiskey or anything else in his pockets."

Dock Langston, for State, testified: "I was a police officer and at Cooper's Warehouse on the afternoon of 23 August. I was watching from a different place from witness Saunders. I saw Harris and Ivey in the street, some 50 yards from me, and I saw Ivey give Harris some money. Crowd in the street."

Cross-examination: "There was no whiskey passed between them at the time the money was handed Harris. I paid Ivey for the whiskey we took from him. I cannot say that there was any sale."

When the State had produced its evidence and rested, the defendant moved for judgment of nonsuit. The motion was refused, and the defendant excepted. Exception 1.

Defendant introduced no evidence. Upon the argument counsel for defendant urged that no relation was shown between the passing of the

whiskey and the giving of the money, and that the acts were not even concurrent, but were shown to have been at different times, between the hours of 2 and 5 in the afternoon, and that the State ought to produce the evidence of Ivey, who knew the facts of the relation if any existed, and who was not hostile to the State, as shown by his giving up the whiskey to the officer and receiving pay from him for same. At the close of the argument his Honor asked if Ivey was summoned as a witness, and was informed by counsel that he was bound over as a witness for the State and had not been called.

His Honor charged the jury that they ought not to consider the failure of the State to produce Ivey; that the defendant might have subpœnaed him if he had wished, and it was as much his duty to give the jury the benefit of this evidence as of the State. To this charge the defendant excepted. Exception 2.

His Honor further charged the jury: "If you shall find the facts that defendant delivered the whiskey to Ivey, and at the time or afterwards Ivey paid the defendant some money, and you shall draw the inference from that that the money was paid for the whiskey beyond a reasonable doubt, you will find the defendant guilty." To this charge the defendant excepted. Exception 3.

(246) There was a verdict of guilty. Motion for a new trial. Motion overruled. Exception. Judgment set out in record. Exception 4. Defendant excepted and appealed to Supreme Court.

Attorney-General and T. H. Calvert, Assistant Attorney-General, for the State.

Thomas M. Pittman and H. T. Powell for defendant.

HOKE, J. There were facts in evidence permitting an inference of guilt, and his Honor was correct in submitting the case to the jury. We must hold, however, that there was error in the charge of the court to the effect "That the jury ought not to consider the failure of the State to produce Ivey," etc. It has been held in several cases that a solicitor must be allowed the control and general management of the State's case in a criminal prosecution, and may examine such of the witnesses as he may deem necessary or desirable. *S. v. Lucas,* 124 N. C., 825; *S. v. Jones,* 77 N. C., 520; *S. v. Smallwood,* 75 N. C., 104. But the fact that he fails to examine witnesses, cognizant of the material facts, bound over, as in this instance, for the State and presumably available at the trial, permits an inference of fact favorable to defendant, and the judge is allowed to express no opinion upon it. In one of the cases just cited, *S. v. Smallwood,* the Court holds:

"The solicitor is sole judge as to what witnesses shall be introduced on the part of the State; but it does not follow that the jury cannot consider the omission of the solicitor to introduce a witness, and draw from it any reasonable and natural inference. Therefore, it is error for a judge, on a trial in the Superior Court, to charge the jury that they cannot at all consider such omission."

Our North Carolina statute, Rev., sec. 535, forbidding the judge to express an opinion on the facts involved in a trial before him, applies not only to an opinion in the charge and on the ultimate fact of a defendant's guilt or innocence, but it extends to any expression of opinion by the judge in the hearing of the jury at any time during the trial (*S. v. Cook,* 161 N. C., 586), and includes any fact in evidence or any legitimate inference of fact arising on the testimony which is material (247) and relevant to the issue. *Withers v. Lane,* 144 N. C., 184; *S. v. Dick,* 60 N. C., 440. In the well considered case of *Withers v. Lane,* 144 N. C., 184, it was held, *Justice Walker* delivering the opinion: "Under Revisal, sec. 535, the trial judge is restricted to plainly and correctly stating the evidence and declaring and explaining the law arising thereon; and when his peculiar emphasis or language or manner in presenting or arraying the evidence indicates his opinion upon the facts, or conclusions of fact, a *venire de novo* will be ordered." And, in *S. v. Dick, supra,* the Court said: "Any remark made by a judge, on the trial of an issue by a jury, from which the jury may infer what his opinion is, as to the sufficiency or insufficiency of the evidence, or any part of it pertinent to the issue, is error; and the error is not corrected by his telling the jury that it is their exclusive province to determine on the sufficiency or insufficiency of evidence, and that they are not bound by his opinion in regard thereto."

The comments of his Honor, therefore, in reference to the failure of the State to examine the witness Ivey, were in contravention of our statute regulating jury trials, and constituted prejudicial error, entitling the defendant to have his cause tried before another jury.

Venire de novo.

Cited: S. v. Jones, 181 N.C. 547; *S. v. Brinkley,* 183 N.C. 724; *S. v. Taylor,* 236 N.C. 133.

STATE v. JOHN FENNER.

(Filed 25 February, 1914.)

1. Criminal Law—Sodomy—Crime Against Nature—Attempt—Interpretation of Statutes.

While the unnatural intercourse between male and male in the manner described in this case does not come within the definition of sodomy, it is forbidden by our statute, Revisal, sec. 3349, as a "crime against nature," and is an indictable offense; and an attempt to commit it is punishable under Revisal, sec. 3269.

2. Verdicts, Special—Inferences—Trials—Questions for Jury—Appeal and Error.

It is for the jury to draw inferences from the facts found or agreed upon, and not for the courts; and a special verdict is defective which contains merely a recital of evidence of a circumstantial nature, and on appeal therefrom a new trial will be ordered.

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

This is an indictment charging the defendant with the crime against nature, in that he had carnal knowledge of a male person.

The evidence tends to prove an attempt on the part of the defendant by inserting his private parts in the mouth of the male. There was a special verdict which consists in a recital of the evidence, which the jury finds to be true.

His Honor held that the defendant was not guilty, and the State appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. E. Daniel for defendant.

ALLEN, J. In the early English case of *Rex v. Jacobs,* Russell and Ryan's Crown Cases, 331, it was held that inserting the private parts in the mouth was not sodomy, and most of the text-writers, relying on that authority, so declare. The courts of California and Texas also follow this statement of the law. *People v. Boyd,* 116 Cal. 658; *Prindle v. State,* 31 Tex. Cr. R., 551.

The term sodomy is not used in our statute, but the crime denounced by section 3349 of the Revisal is the "crime against nature," which are words of broader import, and are sufficiently comprehensive to include the conduct of the defendant.

The question was considered by the Supreme Court of Georgia in *Herring v. State,* 119 Ga., 720, under a statute defining "sodomy" "as the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman," and it was held to be immaterial whether the penetration was through (249) the mouth or *per anum.* The Court said: "It is also to be noted that there is no limitation as to the means by which this crime may be committed. After much reflection, we are satisfied that if the baser form of the abominable and disgusting crime against nature, *i. e.,* by the mouth, had prevailed in the days of the early common law, the courts of England could well have held that that form of the offense was included in the current definition of the crime of sodomy. And no satisfactory reason occurs to us why the lesser form of this crime against nature should be covered by our statute and the greater excluded, when both are committed in a like unnatural manner, and when either might well be spoken of and understood as being 'the abominable crime not fit to be named among Christians.' We therefore think that it made no difference in this case whether Herring and Jordan had in mind the one or the other form of the crime."

Also in *Hanselman v. The People,* 168 Ill., 175, where the evidence showed a penetration by the mouth: "The method employed in this case is as much against nature, in the sense of being unnatural and against the order of nature, as sodomy or any bestial or unnatural copulation that can be conceived."

We are therefore of opinion that under our statute having carnal knowledge of another by inserting the private parts in the mouth is indictable.

It appears, however, that there was no evidence of penetration, which is an essential and necessary element of the offense, and therefore the defendant could not be convicted of the principal crime charged; but it also appears that there is evidence of an attempt to commit the crime, and under section 3269 of the Revisal, "upon the trial of any indictment the prisoner may be convicted of the crime charged therein, or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." We are therefore of opinion that there is evidence of an attempt to commit the crime charged in the indictment, for which the defendant may be tried.

The special verdict is defective, and will not support a judg- (250) ment, as it contains merely a recital of the evidence, which is circumstantial in its nature.

It was said as early as *S. v. Watts,* 32 N. C., 369, "It is common learning that a verdict is defective which finds only the evidence, since the Court cannot draw inferences of fact, but only apply the law to facts agreed or found." And in *S. v. McCloud,* 151 N. C., 730, "In determining the guilt or innocence of a defendant upon a special verdict, the Court is confined to the facts found, and is not at liberty to infer anything not directly found."

A new trial is ordered.

New trial.

Cited: S. v. Griffin, 175 N.C. 769; *S. v. Harper,* 235 N.C. 65.

STATE v. WAYLAND LEE.

(Filed 25 February, 1914.)

1. Evidence—Expression of Opinion—Inferences—Questions for Jury—Argument of Counsel—Appeal and Error.

It is for the jury to draw reasonable inferences from the evidence, and counsel may argue to them the inferences to be drawn; and while the court may instruct the jury that there is no direct evidence of the conclusion argued, it is reversible error to charge them to pay no attention to the argument, as such is an expression of opinion forbidden by statute, and deprives the client of the benefit of his attorney's services therein.

2. Criminal Law—Evidence—Inference—Malice.

Upon this trial for highway robbery alleged to have been committed at the point of a pistol as the prosecutor was on his way to church in a country community, at a place comparatively thickly settled, evidence that the defendant did not have a pistol; that shortly after the time of the offense charged the prisoner went into the meeting and afterwards left with a young woman, to whom he was engaged, living in the same neighborhood with the prosecutor, and whom the prosecutor knew, was, under the further circumstances of the case, sufficient upon which to base the inference and argument that the prosecutor had been influenced through jealousy and malice in swearing out the indictment.

3. Constitutional Law — Courts — Courtesy to Counsel — Prejudicial Remarks—Appeal and Error.

Where an attorney has argued to the jury a reasonable inference to be drawn from the evidence in favor of his client, it is reversible error for the judge, in his charge, to mention the inference as a statement of fact testified to by the attorney, saying that he was the only one who had so testified, as such statement could not be termed testimony, and prejudiced the prisoner's defense in the minds of the jury. The Court expresses its dis-

approbation of such language used by the judge (Const., Art. IV, sec. 8), and points out the fact that attorneys are entitled to courteous treatment.

4. Criminal Law—Sentences—Court's Discretion—Excessive Punishment.

Semble, under the evidence in this case the punishment for highway robbery was excessive, but not held as a matter of law to have exceeded the authority of the judge to impose. The intent of the Legislature in imposing a maximum and minimum punishment, leaving the extent otherwise in the discretion of the court, discussed by CLARK, C. J.

APPEAL by defendant from *Peebles, J.*, at September Term, (251) 1913, of BERTIE.

The defendant was convicted of highway robbery. He is a one-armed negro boy 19 years of age. Frank Gilliam, the prosecutor, also colored, testified that he was 17 years of age; that he never had any fuss with the defendant; that in June previous he was going along the public road to preaching at the schoolhouse; that when he passed James Bazemore's gate he saw William Taylor at the gate; that this was about 8 o'clock at night; that he passed Taylor without speaking and went about 60 yards farther along the public road, when he saw the defendant standing near a cedar tree; that as he passed the defendant the latter said he was going to kill him, and, following him, repeated the remark several times; that he turned around and asked him his name; that he had a pistol in his hand, not pointing at the witness, but down at his side, and he said: "If you don't give me your money, I am going to kill you"; that he gave him 11 cents that he had in his pocket, two nickels and a penny; the defendant had put the pistol in his pocket before the witness gave him the money; that he gave him the money because he was afraid he would take the pistol out and shoot him; the witness says he (252) then went on to church at the schoolhouse; that he was there but a few moments before the defendant came in; the defendant sat in the house about five minutes, and then went out and sat at the door, where there was a large crowd; the witness says he did not get out a warrant till the Wednesday following; that Bazemore lives near the road, and so does Mizzell; that where he was robbed was the open road; there were some weeds on one side of the road as high as your head. The State rested.

The defendant testified that he lost his arm six years ago, and can only drive a wagon, which is his work; that he did not see Gilliam, the prosecuting witness, along the road; did not have a pistol, does not own one; did not hold Gilliam up nor rob him and did not see him that night except at the schoolhouse; that he heard nothing about this charge until the following Saturday.

Matthew Bass and Gatling Freeman testified that they had worked in the woods with the defendant for a year, and that he did not have a pistol, and that they never saw him with a pistol at any time. Henry Bass testified to the same effect. David Outlaw testified that the defendant boarded at his house for a month, and did not have a pistol. J. J. Alston testified that he had known the defendant for years, and that his general character was good.

Bettie Gilliam testified that the defendant came to preaching soon after she got there with her father; that he went home with her; that he did not have a pistol, and never saw him with one. She further testified that she and the defendant are engaged to be married, and that she knows Frank Gilliam.

George Gilliam testified that he saw the defendant that night; that he has known him for years and never saw him with a pistol. Mary Gilliam testified to the same effect.

James Bazemore testified that he knows the defendant; that when he was going home he met him about 6 or 7 o'clock in company with William Taylor, at his gate; that they wanted to buy a watermelon, and he sold it, but they could not pay him because he could not change a $10 bill for the defendant; that he lives about 75 yards from the road
(253) and about 300 yards from the schoolhouse where the preaching took place that night; that Mizzell lives across the road from him; that Ward lives down the road about 200 yards; that the next house is about a quarter of a mile, and several other houses are along the road for about a mile. The defendant closed.

In his address to the jury defendant's counsel was contending that the whole situation negatived the contention of the State, and that the prosecutor, Frank Gilliam, must have been animated by some bad motive and should not be believed. He said: "What is that motive? You have heard the solicitor ask Bettie Gilliam if she and defendant were not engaged. She said they were. That question was doubtless prompted by the prosecutor who sits by the solicitor. Why is Frank Gilliam concerning himself about whom the defendant is engaged to? Does that account for his malice, if he has any? Is he concerned about Bettie Gilliam's engagement?" Counsel also insinuated that if the truth were known, the fact that Wayland Lee had captured Bettie has inspired this indictment by the prosecuting witness. The solicitor did not object to this line of argument, and in his reply referred at length to this insinuation of the defendant's counsel, saying that there was no evidence to support it, and that not a witness had ever testified that Frank Gilliam had ever spoken to Bettie Gilliam.

The court in charging the jury, among other things, said: "The defendant contends that Frank Gilliam is animated by malice and hatred of the defendant because the defendant has become engaged to Bettie Gilliam, and that he was in love with her himself. I charge you that there was no evidence of this. No witness has sworn to it or testified to it except Mr. Winston, and he was not sworn, and you must not pay any attention to anything that he has said about this." To this the defendant excepted. Verdict of guilty; judgment, and appeal.

Attorney-General T. W. Bickett and Assistant Attorney-General T. H. Calvert for the State.

Winston & Matthews for defendant.

CLARK, C. J. The evidence for the State was in many aspects (254) very improbable, and the defendant's counsel was justified in arguing to the jury that they should infer that the prosecution was based upon some bad motive. Considering that both the prosecuting witness and the defendant were young, and that the latter was engaged to Bettie Gilliam, counsel might reasonably argue that jealousy was the motive, and contend that the jury should draw that inference. The presiding judge was within his province when he told the jury that there was no evidence to that effect. But he erred when he told the jury that they should disregard the argument of counsel because no one but the counsel had testified to this state of facts, that he was not sworn, and that the jury should not pay any attention to anything that he had said about this.

It is the province of the jury to draw inferences from the facts in evidence and for counsel to argue what inferences they should draw. The court can tell the jury that there is no evidence on any point, but it is not in his province to tell the jury that they should not accept or pay any attention to any inference which the counsel has urged them to draw from the facts in evidence. This is to express an opinion, which is forbidden by statute. It was a very clear intimation to the jury that they should find the defendant guilty.

To illustrate our meaning: A morning paper has this paragraph: "A man in Sioux City placed in his stove, among other kindling, a stick of dynamite. The silver-plated handles cost $10." There was no statement of a catastrophe or a funeral, but an inference could be drawn. In this case the evidence, exclusive of the denial of the defendant, was that the robbery took place along a public road about 300 yards from the preaching to which people were going, in 60 yards of another man, near to two houses, and in the vicinity of several others; that both the prosecutor and the defendant went immediately to the preaching, where the latter

showed himself and sat with and mingled with the crowd of people; that no complaint was made for some days and no outcry at the time; both parties were under 21, and the defendant was engaged to be mar-
(255) ried to a girl whom the prosecutor knew. Upon these facts the distinguished counsel for the defendant was arguing that the evidence of the prosecution was improbable, and that there was a bad motive, and intimated that it might be jealousy. To tell the jury to disregard and "pay no attention" to this argument of the defense was to deprive him practically of the right to be heard by counsel, and was a strong intimation by the court that they ought not to believe such defense. In difficult cases Vidocq, the famous French detective, always told his agents, *"Cherchez la femme"*—that is, "Look for the woman." The defendant's counsel was asking the jury to apply this principle, and was fully within his rights in doing so.

Besides this, the remark of the court that counsel had "testified when he was not sworn" was a reflection upon the counsel. It was doubtless not so intended by his Honor, but under the supervisory authority given this Court "over the proceedings of the inferior courts" (Const., Art. IV, sec. 8) we must express our disapprobation of the words used. The relation between courts and counsel should always be courteous. Should counsel forget their duty in this respect, the presiding judge has authority to enforce respect by proceedings in contempt. Judges should therefore be careful to observe the respect which is due from them to counsel, for when this is not done there is not only no remedy except by appeal to this Court, but the cause which the counsel is advocating may be seriously damaged in the estimation of the jury, as was very probably the case in this instance.

It was incorrect to state that counsel had "testified," for he had not made, according to the record as sent up by the judge, any statement of fact, but had distinctly urged jealousy upon the jury as an inference from the evidence and the attendant circumstances merely as he had a right to do. Even if counsel had stated this as a fact, he certainly had not "testified" to it, because he had not been sworn as a witness in the cause, as the jury well knew.

This Court has always enforced the rule that witnesses must not be treated with indignity or discourtesy by court or counsel, and counsel certainly are entitled to be treated with equal consideration. They
(256) are not only entitled to this on their own account, but because derogatory remarks from the Bench towards counsel are calculated to injuriously affect the client and the cause which the counsel represents. From the evidence sent up in this case it is reasonable to suppose that the remark of the judge to the counsel and his direction to

the jury not to "pay any attention to anything that he has said about this," had a prejudicial effect upon the verdict. It is reasonable also to presume that the judge did not so intend, nor thought that he was reflecting upon counsel. But the result would be the same.

The defendant further excepts because a sentence of nine years and six months on the county roads upon a conviction on this state of facts was "cruel and unusual punishment." It is contended for the State that this being a felony, the punishment for which is fixed by statute at imprisonment "in the county jail or State's Prison not less than four months nor more than ten years," that this is a power conferred by legislative authority upon the trial court, and that this Court cannot hold unlawful a punishment which the statute has authorized. In *S. v. Rippy,* 127 N. C., 517, it is said: "The quantum of punishment, whenever mentioned in The Code, is either 'in the discretion of the court' or 'not exceeding.'" As to punishments that are in the discretion of the court, it is said in *S. v. Driver,* 78 N. C., at p. 429: "There is a limit to the power of the judge to punish, even when it is expressly left to his discretion. What the precise limit is cannot be prescribed. The Constitution does not fix it, precedents do not fix it, and we cannot fix it, and it ought not to be fixed. It ought to be left to the judge who inflicts it under the circumstances of each case, and it ought not to be abused, and had not been abused (grossly) in a century, and probably will not be in a century to come; and it ought not to be interfered with except in a case like the present, where the abuse is palpable." This was said in a case where the sentence was for an assault and battery, as to which the punishment is "in the discretion of the court."

Whether this Court could hold as a matter of law that the judge has exceeded his power in imposing a sentence within the limit prescribed by the statute is a different matter. As we have given a new trial for the errors above stated, we will not now discuss or consider (257) this proposition, as to which it is unnecessary that we intimate any opinion.

While we will not hold, therefore, that as a matter of law the punishment was in excess of the powers of the judge, we are frank to say that it does not commend itself to us as being at all commensurate with the offense, even if the defendant was properly found guilty upon the facts. There were neither aggravation nor circumstances which tended to show that the punishment should approximate the highest limit allowed by the law in such cases. It was evidently intended that where there was no aggravation that the punishment should approximate the lower limit allowed, and only when aggravation was shown should the highest degree of punishment authorized by the statute be inflicted.

For the errors above stated the judgment must be set aside, and we order a

New trial.

Cited: S. v. Rogers, 168 N.C. 115; *S. v. Hardy,* 189 N.C. 803; *S. v. Tucker,* 190 N.C. 712; *S. v. Howley,* 220 N.C. 118.

STATE v. J. D. GUPTON.

(Filed 25 February, 1914.)

Criminal Law—Warrants for Arrest—Sufficient Evidence—Self-Defense—Amendments—Court's Jurisdiction.

The complaint and warrant of arrest should be construed together, and when so construed, and within the jurisdiction of the court issuing them, if an offense has been charged, it is sufficient for the officer to make the arrest, no particular form being required; and in this case it is held that though the complaint and warrant might be too indefinite in allegation to sustain a conviction, except upon amendment which the magistrate had authority to make or authorize, it was error for the judge to exclude the defendant's evidence of self-defense as a justification for killing the one whom he had attempted to arrest under the warrant, because the warrant was insufficient and void. Having charged an indictable offense, though generally and defectively, it was sufficient as a justification of the arrest, on the trial of defendant for the murder of the party against whom it was issued by the justice of the peace. Arrests made under process, void or merely defective, discussed by WALKER, J., citing and applying *S. v. Jones,* 88 N. C., 671.

(258) APPEAL by defendant from *Peebles, J.,* at Fall Term, 1913, of VANCE.

This is an indictment for the murder of Charles Snyder on 1 February, 1913. It will not be necessary to state more than a part of the testimony introduced in behalf of the prisoner, as the appeal turns upon the question whether there was any evidence of self-defense, the conviction being for manslaughter and the sentence ten years imprisonment in the county jail, with directions that he may be required to work on the public roads.

The prisoner's defense was that he was in the act of executing a warrant for the arrest of the deceased, when he was attacked by the deceased and his wife with deadly weapons, his life was put in jeopardy, and he shot the deceased in justifiable self-defense. He offered to prove the affidavit and the warrant issued therein by the justice of the peace, as follows:

STATE OF NORTH CAROLINA—Vance County.

Henderson Township. Before W. H. Grissom, J. P.

STATE *v.* .....

Rut Johnson, being duly sworn, complains and says that at and in said county, and in Henderson Township, on or about 1 February, 1913, Charles Snyder did unlawfully and willfully assault with a pistol and shooting on public highway, against the form of the statute in such cases made and provided, contrary to law and against the peace and dignity of the State.

RUT JOHNSON.

Subscribed and sworn to before me this 1 February, 1913.

W. H. GRISSOM, J. P.

NORTH CAROLINA—Vance County.

Henderson Township.

The State of North Carolina,

To any Constable or other lawful officer of Vance County—Greeting:

You are forthwith commanded to arrest Charlie Snyder and safely keep so that you may have him before me at my office in Henderson, or some other magistrate of said county, immediately, to (259) answer the above complaint and be dealt with as the law directs.

Given under my hand and seal, this 1 February, 1913.

W. H. GRISSOM, J. P.

The State objected to the evidence, upon the ground that the warrant was void, for that, on its face, it charges no offense. The objection was sustained, and the defendant excepted.

The prisoner then testified in his own behalf: "I went to the Boon house with Bud Hamlet; went to the front door and sent him to the back door. I went in and asked for Mr. Snyder; did not curse or use violent language nor conduct myself in a rude and violent manner, as testified by Mrs. Boon. I found Snyder on the back porch, and told him I was an officer and had a warrant for him, and for him to consider himself under arrest. He did not give me time to get out the warrant and show it to him or read it to him. He became violent and cursed, and said he would not be taken. We then started back through the house, I in front, and Hamlet was with Snyder. Mrs. Snyder was not there when we went in, but as we started out she came in and was very violent

and said we should not take him. I was talking to her when Mr. Hamlet called for help. As I turned she took a large lamp and threw it at Hamlet. It missed him and struck the house, broke the lamp or chimney and spilled oil on Snyder and Hamlet and scattered glass about. She then got a pistol and shot me through the shoulder; the ball lodged just under the skin in my back. Just then Snyder cried out, 'God damn you, I'll kill you!' I looked, and he was in the act of striking me with an open knife. I threw up my pistol and fired at him and he began to fall; she continued firing, and I caught Snyder and held him between me and her. When she stopped shooting, I let him go down and went out and did not come in any more. As I went out I saw Mr. Sid Huff near his home, and called to him to come and help; that I was shot. I went to him and he brought me to the doctor; as I was going to him, Mrs. Snyder came out and shot me. I did not turn back nor threaten to shoot after I came out of the house. I was taken to the hospital. At (260) the time I shot Snyder he and his wife were both attacking me; she was between me and one door with a pistol, and he was between me and the other door with an open knife. I had no way to escape. The ball I shot had a steel jacket."

Bud Hamlet, witness for the defendant, testified: "I went with Mr. Gupton at his request. Mr. Snyder was on the back porch at Mrs. Boon's, and Gupton went through the house to him; took him by the arm and told him he was arrested. I don't know whether he said anything about the warrant. He did not read it. As we were going through the house to the front door, Snyder attacked me and Mrs. Snyder threw a lamp at me, which missed and broke against the house, scattering oil and glass on me and Snyder. She then got a pistol and shot it two or three times. One ball hit the end of my finger and then went through Mr. Gupton's shoulder. Snyder got out his knife and was striking at Gupton when he fired. Gupton then caught hold of him and held him up a bit and let him down on the floor when Mrs. Snyder stopped shooting, and left. Mrs. Snyder followed him to the door, and shot at him as he was leaving. He did not turn back any more, but went on to Mr. Huff, who brought him to the doctor. Gupton did not curse or act in a violent manner, and only shot at the time he was being attacked. Mr. and Mrs. Snyder were drunk and cursing. I have been in jail for making and selling liquor."

W. H. Johnson, for defendant, testified: "I am a merchant and have a store near the Harriet Cotton Mills. On that Saturday afternoon I let Mr. and Mrs. Snyder have a horse and buggy to go to town. Upon their return they were drunk, driving fast, cursing, and shooting a pistol or pistols on the street near my store. They shot over my home and over

the homes of Mr. Adams and Sadie Johnson. I phoned to Sheriff Royster about it, and he told me to get a warrant from the nearest justice and give it to the officer he would send over there. I sent my brother for the warrant to Squire Grissom, and it was given to Mr. Gupton on his arrival. He started after Snyder, taking Bud Hamlet with him."

There was other evidence tending to corroborate these witnesses, (261) and also evidence on the part of the State tending to contradict them in material respects, and to show that the prisoner did not act in self-defense when he shot and killed Charles Snyder.

The court charged the jury, in part, as follows: "The defendant had no lawful authority to arrest the deceased. He had a paper that he called a warrant, but upon inspection of it the court is of the opinion that that paper was void upon its face, and an officer or anybody who undertakes to execute a paper is bound to see that it is a lawful paper. He is not justified in executing it unless it is a lawful paper, and the court is of the opinion that that paper was absolutely void, and, therefore, afforded no justification to the prisoner.

"The court charges you that there is no evidence of excusable homicide, and it is your duty to find the prisoner guilty of murder in the second degree, or manslaughter."

Exceptions were taken to each of these instructions. The defendant appealed from the judgment upon the verdict.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Henry T. Powell and T. M. Pittman for defendant.

WALKER, J., after stating the case: The rejection of evidence and the instruction given to the jury, that there was no evidence offered of self-defense, were erroneous. They were based upon the mistaken view that the complaint and warrant were void, as no criminal offense was stated in them. The complaint charges that an unlawful and willful assault had been committed by Charlie Snyder, who was afterwards killed by the prisoner. The accusation is not expressed in very formal or technical language, but it is sufficient to show that a crime had been committed by Snyder. If he had appeared to answer the charge, he could have required that the offense be stated with greater particularity, so that he could know how to defend himself (Revisal, sec. 1467; *S. v. Pool,* 106 N. C., 698); but this he did not do. The justice could have amended the proceedings of his own motion, under that section. This contem- (262) plates, of course, that magistrates, not learned in the law, may sometimes issue papers defective in form, and even in substance, but the

method of correction is provided by the statute. An unlawful assault is a crime, and though not stated in the complaint and warrant with technical accuracy, this does not invalidate the warrant. It is but a defective statement, being too general; but the nature of the crime sufficiently appears for the purpose of the arrest and the justification of the officer in making it. The affidavit and warrant must be read together, and so construed. *S. v. Davis,* 111 N. C., 729; *S. v. Wilson,* 106 N. C., 718. It is not expected nor required, in the absence of special provision to the contrary, that an affidavit or complaint should be in any particular form, or should charge the crime with the fullness or particularity necessary in an information or indictment. 12 Cyc., 294.

But it is useless to emphasize the error in the ruling of the court by argument. This Court has held in a similar case that such a warrant confers lawful authority upon the officer to arrest the accused. *S. v. Jones,* 88 N. C., 671. The warrant in that case was for larceny, and the word "feloniously" was not used in describing the offense, nor was the ownership of the property alleged. In the last particular it is closely analogous to this case. Here the name of the person upon whom the assault was made was not stated. The Court there held that while the defects would have been fatal in an indictment for the larceny, the law in the case of warrants does not require the same certainty or particularity as in the formal charge by a grand jury, and one reason for this is that in the latter case the prisoner is entitled to be informed of the accusation against him in such manner that he may be enabled to make his defense. The Court concluded, therefore, that although a warrant may be defective in form, or not strictly legal, if it is issued for a crime within the jurisdiction of the justice, the officer to whom it is directed, if a regular one who is bound to obey it, or if a special one, who though not bound to obey it, undertakes to execute it, is protected equally, in (263) both instances, by it. And for this statement of the law we have the authority of 1 Hale Pleas of the Crown, 460, "that although the warrant of the justice be not in strictness lawful, as if it express not the cause particularly enough, yet if the matter be within his jurisdiction as a justice of the peace, the killing of such officer, in execution of his warrant, is murder; for in such case the officer cannot dispute the validity of the warrant." This passage from Hale was cited with approval in *Boyd's case,* 17 Ga., 194, with this comment: "If this be law—and who will doubt its reasonableness?—it is decisive of this exception. It would be monstrous to lay down a different rule. It would put in jeopardy the life of every officer in the land. It never could be intended that they should determine, at their peril, the strict legal sufficiency of every precept placed in their hands." This view is also supported by *Mackalley's case,*

Croke, James, 280 (9 Coke Rep., 117), wherein it was decided by all the judges, assembled in conference to resolve upon what the law was upon the record, amongst other things, that if there be error in awarding process, or in the mistake of one process for another, and an officer be slain in the execution thereof, the offender shall not have the advantage of such error, but that the resisting and staying of the officer, when he comes to make an arrest in the king's name, is murder. See, also, *Rex v. Croker,* 2 Chitty, 138; *King v. Wilkes,* 2 Wet. Rep., 151; 2 Hale P. C., 111; Chitty's Cr. Law, 41, and 2 McLain's Cr. Law, sec. 922, where the subject is carefully discussed, with a full citation of the authorities.

There are other considerations favoring the validity of the complaint and warrant, so far as their protection to the officer in making the arrest is concerned, but they need not be mentioned.

The deceased mistook his remedy. He should have submitted to the arrest, and asserted his right to a better warrant at the hearing, instead of defying the officer and assuming a hostile attitude towards him, endangering his life by the use of a deadly weapon, and actually encouraging his wife to attack him with a pistol, with which, acting in concert with her husband, she severely wounded him. He could not, in this (264) way, take the law into his own hands and become the aggressor.

The evidence as to the complaint and warrant should have been admitted. If this had been done, under the peremptory charge of the judge, we would be compelled here to interpret the evidence in the most favorable light for the prisoner. When thus viewed—he not being deprived of the legal right to defend himself because of any mere formal defect in the complaint and warrant, by reason of the generality of the charge, if it can be seen that an offense is alleged—it becomes apparent that the evidence should have been received and the case submitted to the jury, so as to give the prisoner the full benefit of the principle of self-defense, with proper instructions bearing upon that feature of the case. Whether he acted strictly in self-defense, or used excessive force or violence, are questions for the jury, who should be guided, of course, by directions of the court as to the law. He must be judged by the circumstances as they appeared to him at the time, the jurors being the judges of the reasonableness of his apprehension that he was about to be killed or to receive great bodily harm. *S. v. Barrett,* 132 N. C., 1005.

The exception of the prisoner to the rejection of the evidence, as above indicated, was well taken, and must be sustained. The reference in the charge to the insufficiency of the complaint and warrant was also objectionable. Other errors are assigned, but they need not be considered.

New trial.

Cited: S. v. Boykin, 211 N.C. 412; *Alexander v. Lindsey,* 230 N.C. 667.

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STATE v. LOUIS ALLEN.

(Filed 4 March, 1914.)

1. Trials—Special Verdict—Inferences of Fact—Questions for Jury.

A special verdict which refers to the decision of the judge any fact or inference of fact necessary to the determination of the issue is insufficient in law, and will be set aside.

2. Criminal Law—Arrest Without Warrant—Resistance—Necessary Force—Questions for Jury.

One who is being arrested by the prosecutor, without a warrant, has a right to resist and use all the force which, in the judgment of a jury, was necessary to free himself, on the facts as they reasonably appeared to him at the time.

3. Same—Evidence—Inferences of Fact.

In this case the prisoner was arrested for violating the prohibition law by the prosecutor without a warrant, while driving in a buggy on the highway, and found with from 3 to 5 gallons of intoxicating liquor in his possession. Later the prosecutor held the defendant's pistol in his right hand, and leaned over in the buggy to move the bottles or prevent the loss of them, and while in this position the prisoner cut him several times with a knife, a violent struggle ensued, in which the prosecutor was twice cut, which resulted in the prisoner's submission to be bound and taken to jail, wherein he was incarcerated without either warrant or mittimus. *Held,* it was for the jury to determine whether the prisoner cut the prosecutor in an effort to free himself; and whether it was necessary for such purpose is an inference of fact, likewise for their determination.

APPEAL by State from *Peebles, J.,* at September Term, 1913, of VANCE.

Indictment for assault with a deadly weapon on one William Royster. The jury returned a special verdict acquitting the defendant. The relevant and material facts in such verdict are as follows:

"That William Royster stopped the defendant on the highway along which he was driving and found in the buggy 3 to 5 gallons of liquor. Royster then got in the defendant's vehicle and ordered him to drive on towards Henderson, which defendant did. Royster was not an officer and had no warrant."

(266) The particulars of the assault are thus stated in the special verdict: "After going a mile or so, a suitcase either fell or was pushed by defendant out of the buggy; prosecutor turned the buggy around and recovered it; a little further on defendant pushed or rattled some bottles

in the foot of the buggy and was told by prosecutor to stop it, and prosecutor, still holding defendant's pistol in his right hand, leaned over to move or prevent the loss of the bottles, when he was suddenly cut on the back of his neck by the defendant with a knife; a violent scuffle ensued, in which prosecuting witness was cut twice more, under the shoulder and in the back, and the pistol, for which each was struggling, was broken or disconnected; prosecutor then got defendant on the ground and got on top of him and choked him until defendant gave up and submitted to be tied, which prosecutor did with defendant's own belt, and prosecutor then carried defendant 5 or 6 miles and locked him up in the county jail, without warrant or mittimus."

Pursuing the proper form in such cases, the verdict continues as follows: "If his Honor, upon the foregoing findings and special verdict, shall be of opinion that the defendant is guilty of an assault with a deadly weapon upon William Royster, the jury so find; otherwise, we find him not guilty."

Upon the foregoing facts, the court being of opinion the defendant is not guilty, so instructed the jury, and thereupon the jury find that defendant is not guilty. Defendant discharged, and State excepts and appeals.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

T. T. Hicks and A. A. Hicks for defendant.

HOKE, J. There are at least two authoritative decisions in this State to the effect that, on the trial of a criminal prosecution in the Superior Court, the determinative facts must be found by the jury. They may not be referred to the decision of the judge, even by consent of defendant or his counsel. *S. v. Holt,* 90 N. C., 749; *S. v. Stewart,* 89 N. C., 563. These facts are sometimes presented in the form of a special verdict, but when such procedure is had all the essential facts must be found (267) by the jury; the guilt or innocence of the defendant must follow as a conclusion of the law from the facts found, and a special verdict which refers to the decision of the judge any fact or inference of fact necessary to the determination of the issue is insufficient in law and will be set aside. *S. v. Fenner, ante,* 247; *S. v. McCloud,* 151 N. C., 730; *S. v. Watts,* 32 N. C., 369; Clark's Criminal Procedure, p. 488.

In the case before us, the defendant had been arrested and held without warrant. He had a right to resist and to use all the force which, in the judgment of the jury, was necessary to free himself, on the facts as they reasonably appeared to him. *S. v. Belk,* 76 N. C., 10.

According to the verdict, "the defendant suddenly cut the prosecuting witness with a knife, in the back of the neck, as the latter leaned over to hold the bottles in the buggy," and, in the fight which followed, "he cut the witness twice more, under the shoulder and in the back." Whether the cutting was in the effort to free himself is an open question on the verdict, and whether it was necessary for such purpose is an inference of fact which may or may not have been properly determined; but, under our law, the decision was not for the court, but the jury. True, the defendant was afterwards choked into submission and tied and taken to jail; but this was in the struggle, after the first cutting, and, while relevant to the issue, is not controlling thereon, as a conclusion of law.

For the error indicated, the judgment and verdict will be set aside, and this will be certified, that the question of defendant's guilt or innocence may be submitted to another jury.

Error.

Cited: S. v. Barber, 180 N.C. 714; *S. v. Crawford,* 197 N.C. 514; *S. v. Straughn,* 197 N.C. 692; *S. v. Fogleman,* 204 N.C. 405; *S. v. Hill,* 209 N.C. 54; *S. v. Lueders,* 214 N.C. 560; *S. v. Muse,* 219 N.C. 227; *S. v. Anderson,* 230 N.C. 56; *S. v. Harper,* 235 N.C. 65.

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STATE v. WILLIS PITT.

(Filed 11 March, 1914.)

1. Indictment—Motions to Quash—Interest of Grand Jury.

A motion to quash a bill of indictment on the ground that the foreman of the grand jury was interested in the prosecution will be denied when it appears that the foreman took no part in passing upon the indictment and signed the bill under the direction of the grand jury and returned it in open court. Revisal, sec. 3232.

2. Witnesses—Qualifications—Appeal and Error.

The determination of the trial judge of the disqualifications of witnesses to testify for lack of sufficient age or mental capacity is not reviewable on appeal. The religious requirements of a witness discussed, and Revisal, secs. 1496 (29), 2360, and 2354, referred to by CLARK, C. J.

3. Criminal Law—Larceny from Employer—Confidence—Trials—Evidence.

Upon a trial for larceny from an employer, evidence of whether or not the prisoner was trusted by the employer is incompetent.

4. Criminal Law—Instructions—"Reasonable Doubt"—Definition.

No particular formula is required of the judge in defining to the jury what is "reasonable doubt" in a criminal action; and his stating it to be "the same kind of reasonable doubt that an honest man meets up with in human life" is held to be no error in this case.

WALKER and ALLEN, JJ., concur in result.

APPEAL by defendant from *Whedbee, J.*, at August Term, 1913, of PITT.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Julius Brown for defendant.

CLARK, C. J. The defendant was convicted of larceny of the corn of one J. R. Bunting, standing in the field. The testimony came from eye-witnesses and was clear and explicit. The first exception is to the refusal of the court to quash the bill of indictment on the ground that said Bunting, who was foreman of the grand jury that passed on the (269) bill, was also the prosecutor and swore out the warrant before a justice of the peace. The court found as a fact that Bunting at the time that the grand jury was considering the bill retired from the grand jury room and did not discuss the case with the grand jury nor vote on passing the bill, and that he did nothing in regard to it except that as foreman of the grand jury he signed the bill at the direction of the grand jury and carried the indictment into court.

"The general rule has been laid down that interest in a particular prosecution other than a direct pecuniary interest will not disqualify a grand juror or be ground of objection to an indictment in the finding of which he participates. Accordingly, in the absence of statutory provisions to the contrary, the fact that a person has originated a complaint against the person accused of crime, or is a witness for the prosecution, does not operate as a disqualification. And the same rule has been applied to a person who has evinced a desire and purpose to enforce the law against the particular kind of crime, or has subscribed funds for the purpose of legitimately suppressing a particular violation of law." 20 Cyc., 1301, title, "Grand Jury."

In *S. v. Sharp,* 110 N. C., 604, where there is a full discussion of objections to the competency of a grand jury, it is held that the fact that a son of the prosecutor was a member of the grand jury did not vitiate the indictment, though he had actively participated in finding the bill.

In *S. v. McDonald,* 73 N. C., 356, it was held that a grand juror was a competent witness on the trial of the defendant. Revisal, 3232, provides

that grand juries shall return all bills of indictment in open court through the acting foreman, except in capital felonies, and it has been often held that an indictment need not necessarily be signed by any one. *S. v. Mace,* 86 N. C., 668.

Exceptions 2 and 3 are to the ruling of the court that two witnesses, respectively 11 and 12 years old, were of sufficient age and capacity to testify. The competency of a witness to testify is determined by
(270) the trial court, and is not reviewable on appeal. *S. v. Finger,* 131 N. C., 781; *S. v. Perry,* 44 N. C., 330; 40 Cyc., 2200.

One of these witnesses, 11 years old, testified that if he swore to a lie they would put him in jail; that he intended to tell the truth, and was going to tell what he knew. The other witness, 12 years old, testified that he had never been in court before; that when he kissed the book it meant that he would tell the truth; that if he should tell a lie they would put him in the lockup. When asked, "What else?" he replied, "I don't know, sir." The finding of the judge that these witnesses were competent to testify was conclusive, and not reviewable. This is so held both as to their moral and religious sensibility and their intelligence. *S. v. Manual,* 64 N. C., 603; *S. v. Edwards,* 79 N. C., 648.

Shaw v. Moore, 49 N. C., 25, is a very interesting discussion as to the disqualification of a witness on account of his religious belief. The Court there held that one who believed in the existence of a Supreme Being was a competent witness, though he did not believe that punishment would be inflicted in the world to come. In that case it would seem that the witnesses were of age. If it were open to us to review the findings of fact of his Honor as to the competency of these witnesses, it would seem that they gave very intelligent replies and a sense of their responsibility and intention to tell the truth, and that punishment would be awarded them should they fail to do so. The fact that one of the witnesses said he "did not know" what punishment would happen to him beyond imprisonment in jail should not disqualify him, in view of the other evidence showing his intelligence and sense of responsibility.

However, as already stated, the finding of the judge in such case is conclusive, and not reviewable by us. He sees the witnesses and can judge better of their intelligence and sense of responsibility than can possibly be transmitted to us on paper.

In *Shaw v. Moore, supra, Pearson, J.,* said that "in the old cases it was held to be common law that no infidel (in which class Jews were included) could be sworn as a witness in the courts of England." He then
(271) proceeds to say that the reason for this as given by my Lord Coke, "to say the least of it, is narrow-minded, illiberal, bigoted, and unsound." And adds that "Lord Hale, notwithstanding the opinion of

Coke and the old cases, held that a Jew is a competent witness and may be sworn on the Old Testament, and such has ever since been taken to be the law." We know that the Old Scriptures, which is the Hebrew Bible, do not teach a future life, and hence there is absent therefrom the doctrine of future rewards and punishments. Indeed, the New Testament teaches that "Life Eternal came through Jesus Christ." In the same case, *Shaw v. Moore, supra, Pearson* refers to *Omychund v. Barker,* 1 Atk., 19, as a great case, "for it relieved the common law from an error that was a reproach to it." In that case "a Gentoo, who did not believe in either Old or New Testament," was held to be a competent witness, though it did not appear "whether according to Gentoo religion rewards and punishments are to be in this world or the world to come. The decision was made without ascertaining how the fact was; so it must have been considered by the Court to be immaterial."

Judge Pearson further says that it was insisted on the argument that, however it was decided in *Omychund v. Barker,* it was otherwise under our statutory provisions prescribing the forms of oath. He says, as to this argument: "We think it manifest, by a perusal of the statute, that it was not intended to alter any rule of law, but the sole object was to prescribe forms adapted to the religious belief of the general mass of citizens, for the sake of convenience and uniformity."

The form of oath for witnesses now prescribed (Rev., 1496 (29), and 2360) simply requires the witness to swear that his evidence "shall be the truth, the whole truth, and nothing but the truth." The provision in Revisal, 2354, as to the manner of swearing is, as *Judge Pearson* says, merely a form "adapted to the religious belief of the general mass of citizens for the sake of convenience and uniformity." Revisal, 2363 (enacted 1899, ch. 50), validated oaths theretofore taken not in a manner prescribed by the laws of 1777, now Revisal, 2354.

If such reply from one who is honestly ignorant of what will (272) happen to him in another world shall render him incompetent to testify, not only the administration of justice will often be hindered, but unwilling witnesses can block needed investigations by professing like ignorance.

It was excepted that the defendant was not allowed to state that his employer trusted him with his property. This is not an issue in this cause. The question is not whether he was trusted by his employer, nor that he was unworthy of that confidence, but, Did he steal the corn of the prosecutor, as charged in the bill of indictment? It would not have been competent for the State to show that the defendant was not trusted, or was suspected by his employer. Nor is it competent for the defendant to testify that he was trusted.

Nor do we think it good ground of exception that the judge in his charge, in attempting to define what constitutes a reasonable doubt, said: "A reasonable doubt in the jury box is exactly the same kind of reasonable doubt that an honest man meets up with in human life." The law does not require that any particular formula shall be used in charging upon the doctrine of reasonable doubt. *S. v. Dobbins,* 149 N. C., 465; *S. v. Brabham,* 108 N. C., 793; *S. v. Matthews,* 66 N. C., 106; *S. v. Oscar,* 52 N. C., 305.

No error.

WALKER, J., and ALLEN, J., concurring in result.

Cited: Lanier v. Bryan, 184 N.C., 238; *S. v. Beal,* 199 N.C. 300.

STATE v. J. M. NIPPER AND JIM JOHNSON.

(Filed 25 March, 1914.)

Convicts—Punishment—Discipline—Flogging.

Flogging convicts to enforce discipline is not authorized by any statute nor any valid regulation, and there being no legal regulation in this case permitting it, its infliction is contrary to law. (The constitutional and statutory authority as a matter of discipline discussed by CLARK, C. J.)

WALKER, HOKE, and BROWN, JJ., concur in result.

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

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

R. N. Simms, Armistead Jones & Son, and J. W. Bunn for defendants.

CLARK, C. J. The defendant Nipper was supervisor in charge of a camp of convicts working upon the roads of Wake County, and the defendant Johnson was a guard at said camp. They were charged with assaulting, beating, and wounding one Dan Gallagher, a convict under their charge and supervision, with a leather strap 16 inches long and 3½ inches wide, attached to a wooden handle 5 inches long, whereby he was badly beaten and bruised. Said Gallagher was a man between 40 and 45 years of age. He was flogged on his bare flesh. A few hours later he was taken ill, and died that afternoon. The county physician testified

that he did not think the death of the said Gallagher was attributable in any way to the whipping. The chastisement was inflicted for refusal to work when ordered to do so. It was in evidence that "chastisement with a strap as a means of discipline for prisoners had been in general use and adoption and had been generally practiced in Wake County for more than a generation."

The court stated from the bench, before the argument began, that "after full consideration of the subject, he had reached the conclusion that under the Constitution and laws of this State the authorities who have control over convicts have no right to administer whippings to them for causes of discipline, and that this feature was eliminated from the further discussion of the case." The exception to this presents the controversy before us. The jury found the defendants guilty, and his Honor imposed a fine of $10 and costs on each defendant.

The indictment was not for homicide, but for assault. It was doubtless due to the fact that there was absence of all evidence of malice, the testimony of the physician above stated, and the further evidence that the use of such punishment had always been customary, that his Honor imposed so light a punishment.

The Attorney-General presents for our consideration the fact that the Constitution, Art. XI, sec. 1, declares that "Death, imprisonment with or without hard labor, fines, removal from office, and dis- (274) qualification to hold office" shall be the only punishments known to the laws of this State. Previous to 1868 we had retained the common-law punishments by which many corporal punishments could be inflicted, such as branding for manslaughter, cropping the ears for perjury, setting in the stocks, and flogging. The Constitution of 1868 intended by the above provisions to restrict the sentences which might be imposed by the courts upon conviction of crime to those above enumerated.

This constitutional provision has no direct application to the discipline required in our jails and penitentiaries, for if so it would prevent solitary confinement, restriction of rations, and other reasonable punishments that are in customary use in prisons and penitentiaries.

The question whether flogging can be used as part of the discipline in our State and county prisons depends not alone upon the constitutional provision, but also upon the question whether it is reasonable or authorized. Laws 1909, ch. 281, sec. 6, provides: "The convicts sentenced for hard labor shall be under the control of the county commissioners of said county, and said authorities shall have power to enact and enforce all needful rules and regulations for the successful working of all convicts upon the highways, and commit to the superintendent or super-

visors the custody of the whole and any part of the convict force. And they may authorize and empower them to use such discipline only as may be necessary to carry out the rules and regulations in the working of the highways to which said convicts may be put by the order of the county commissioners to *the same extent as is allowed by law to the authorities of the penitentiary in the custody and control of convicts committed to the State's Prison.*" This act is applicable only to Wake County.

We find no rule or regulation of the county commissioners authorizing the flogging of convicts, and as we find no authority of law given the State's Prison authorities to inflict such punishment, such regulation by the county commissioners would be void and no protection to the defendants, if it had been made.

It is true that flogging has been customary in the State's Prison, and also in the county convict camps; but that is no defense, since there is no statute authorizing it, unless such discipline is reasonable and necessary. In the absence of such statute, whether any given measure
(275) of discipline can be authorized by those in charge of the State and county prisoners depends upon whether the measure of discipline is reasonably necessary. In view of the enlightenment of this age, and the progress which has been made in prison discipline, we have no difficulty in coming to the conclusion that corporal punishment by flogging is not reasonable, and cannot be sustained. That which degrades and embrutes a man cannot be either necessary or reasonable.

Originally, flogging was recognized as a proper punishment in the armies and navies of the world. But it has long since been abolished in those services everywhere, notwithstanding the protests of officials who declared that the result would be mutiny and disorganization. Flogging has been long since abolished as a part of prison discipline by all the great and enlightened nations of the world, except Russia. In England, France, Germany, Austria, Italy, Belgium, Holland, Switzerland, Spain, and by the government of the United States, and even in Mexico and in most other civilized countries, the lash as an adjunct of prison discipline has long since been forbidden. In Mexico, in 1903, Art. 385 was adopted: "The lash or any other violent physical punishment shall not be employed" either as a sentence of the court or as a part of prison discipline. This has been taken substantially from the statutes obtaining in the more advanced countries.

The statute in New York provides: "No guard in any prison shall inflict any blows whatsoever upon any prisoner, unless in self-defense or to suppress a revolt or insurrection." Statutes or regulations to the same effect abolishing flogging prevail in all the northern and western

States, 32 out of 48, and it is there looked upon as a survival of barbarism. In many of the southern States, as in Maryland, District of Columbia, West Virginia, Oklahoma, Tennessee, Texas, and others, it has also been abolished and prohibited. This is one of the very few States in which it has been retained, and here not by authority of law, but as a matter of custom, and is the survival, doubtless, of a former condition of society, and it has lingered here, probably, owing to the fact that an unusually large part of our criminal population are colored.

The growing humanity of the age demands that punishment for crime, however justly inflicted, should be humanely administered, with due regard to the rights of the prisoner. About a century and a (276) quarter ago, when the celebrated John Howard visited the prisons of Europe, he awoke the world to a realization of the evils inflicted upon prisoners in England, and in other countries. He found that "the prisons were for the most part pestiferous dens, overcrowded, dark, foully dirty, not only ill-ventilated, but deprived altogether of fresh air. The wretched inmates were dependent for food upon the caprice of their jailers or the charity of the benevolent; water was denied them except in the scantiest proportions; their only bedding was putrid straw. Every one in durance, whether tried or untried, was heavily ironed. All alike were subject to the rapacity of their jailers and the extortions of their fellows. Jail fees were levied ruthlessly; also a contribution was paid by each individual to a common fund to be spent by the whole body generally in drink. Idleness, drunkenness, vicious intercourse, sickness, starvation, squalor, cruelty, chains, awful depression, and everywhere culpable neglect. In these words may be summed up the state of the jails at the time of Howard's visitation. At this time prisons were primarily places of detention, not of punishment, peopled by accused persons still innocent in the eyes of the law, and debtors guilty of breaches of the financial rules of a commercial country, framed chiefly in the interest of the creditor. Freedom from arrest was guaranteed by Magna Carta, save on a criminal charge; yet thousands were committed to jail on legal fictions and retained indefinitely for costs far in excess of the original debt. The impecunious were locked up and deprived of all hope of earning means to obtain enlargement; while their families and persons dependent on them shared their imprisonment and added to the overcrowding. The prisons were always full. Jail deliveries were a rare occurrence, and even when tardy trial ended in acquittal, release was delayed until illegal charges in the way of fees had been satisfied." Encyclopedia Britannica, Art. "Prison." Our Constitution of 1868 abolished imprisonment for debt as well as all corporal punishment.

We also know from the history of those times that even in England prisoners had no allowance from the Government for food, and were indebted to the contributions of charity or to the consideration of the jailer for their daily sustenance, and that when acquitted or discharged they were detained by the jailer till the debt for their support
(277) was liquidated by their friends. When it was proposed in Parliament that the Government should pay the jailers a salary, and should afford food for the prisoners at the public expense, a most serious and prolonged opposition was made against the incurring of such expense by the public.

Under the agitation begun by the investigations of Howard and maintained by the ability of Jeremy Bentham, a reform of prison discipline was begun which has alleviated to some extent the tyranny often inflicted upon those who were till then treated as if deprived of all rights as human beings because deprived of their personal liberty. It has been found that it is unsafe and unjust to intrust to the discretion of men, often of bad judgment and sometimes of evil passions, the infliction of corporal punishment upon helpless prisoners who, protected by no publicity and without any trial for breaches of discipline, are subjected to the arbitrary power of those in charge of them.

Further back in the so-called days of chivalry, throughout Europe every baron and lordling had beneath the lower floor of his castle a cellar into which he cast without trial, and often without food, in the mire and ooze, any one who displeased him. Their only avenger were the diseases which, rising from such pollution, often devastated the families of those on the upper floors, who spent their time in dancing and revelry while the unhappy victims, without light, often without food, were groaning in the underground receptacles, where, amid pollution and filth, they passed to miserable death. From that state of things to the condition found by John Howard was a gradation, but very far from what now obtains generally throughout civilized countries. The usual appeal for the maintenance of abuses is to the usages of the common law and of past ages, but cannot be maintained.

In 9 Cyc., 877, it is said: "A convict who violates any of the prison regulations may be subjected to solitary confinement or such other reasonable punishment as the statute may authorize (*Boone v. State,* 8 Lea (Tenn.), 739); but corporal punishment cannot lawfully be inflicted without legislative sanction. *Smith v. State,* 8 Lea (Tenn.), 744." The survival of flogging in a few of the Southern States only is doubtless due to the public attitude as to this matter which has descended to us from a former state of society. It is utterly tabooed elsewhere. Delaware and Maryland retain flogging, not as a part of prison discipline,

but as a court sentence for "wife beaters"—an admirable arrange- (278) ment and a most just application of the *lex talionis.*

There can be no analogy to the corporal punishment which is sometimes inflicted on pupils in the public schools. In those cases there is the utmost publicity as a deterrent against abuse and the protection of the parent, or other relatives, of the pupil. Still less is there any analogy to the punishment of a child by its parent. In that case, besides the protection of public sentiment, there is the safeguard of natural affection. The common-law right of a husband to chastise his wife was held as late as *S. v. Rhodes,* 61 N. C., 453, where a husband was held not guilty upon a special verdict that he "whipped his wife without provocation, with a switch as large as his finger, but no larger than his thumb," citing *S. v. Black,* 60 N. C., 263, which held that if there was no permanent injury nor excessive violence, the law permitted the husband to thrash her "to make her behave herself," and that if the courts intervened it would "encourage insubordination" on the part of wives. But in 1874, in *S. v. Oliver,* 70 N. C., 60, without any intervening statute, it was held that we had "advanced beyond that barbarism." Yet the wife had the protection of the affection of her husband and of public opinion. There is no protection to prisoners in jail. They are under a cloud, and receive small sympathy from any one. The discipline is necessarily peremptory, and when punishment is inflicted by flogging, whether it is justly imposed or not rests in the bosom of the officer who orders it. There is no inquiry or publicity, either as to the justice of the punishment or of its extent as commensurate with the offense. The extent of punishment, if legal, is committed to the arbitrary power of men who may happen to be unjust or of bad judgment. Their action is irreviewable except when in some cases of gross excess the matter may possibly be brought to public attention, and then the victim is at every disadvantage. The punishment, if by flogging, has already been inflicted, whether justly or not, and the suffering and degradation cannot be removed. The victim is usually ignorant and always impecunious and generally without friends. His fellow convicts often dare not testify in his behalf, and their testimony will not carry the weight given to statements made by those in authority.

In such circumstances, abuse is easy and almost invited. And (279) reparation is impossible when wrong has been done. Suppose a young man of otherwise good record is sentenced in a recorder's court without a grand jury and without a jury trial for carrying a concealed weapon or for an affray or other offense not involving moral turpitude, and while in jail or on the roads he should violate some order of the prison authorities, shall he be flogged as Gallagher was, and dis-

graced for life? We have no decision sustaining the right to flog prisoners to be overruled, as in the case of husband and wife, above cited.

In view of these considerations and the impolicy of subjecting men without trial, at the arbitrary will of other men, to a punishment whose effect must be to destroy the self-respect of the victim and harden and embrute him, it is no wonder that the intelligence and humanity of the age has abolished flogging, in all but a few States of this country, as any part of prison discipline. While our constitutional provision against the infliction of corporal punishment as a part of the sentence of the courts does not directly prohibit its infliction in prison discipline, its spirit is certainly against the longer use of flogging for that purpose.

The smallness of the sentence imposed in this case (a fine of $10 each and the costs) indicates that the humane and just judge who tried this cause deemed that the act of the defendants was without aggravation, and that they were only following the custom which has been observed in this State up to this time. We have been, however, discussing the legal rights of prisoners, and we find no authority for its longer continuance.

In at least two of the States, where the parole system obtains, it has been found that prisoners can be worked, with some exceptions, by humane methods which require the imposition of no punishment and by the hope of reward and by the shortening of their sentences for good conduct. In others a modification of that system has been successful. These are matters, however, which rest with the Legislature and the prison authorities.

We may note that the act of 1911, ch. 64, prescribing that persons sentenced to work on the public roads for misdemeanors shall not wear felon's stripes, is an indication that the Legislature did not intend that prisoners should be subjected to any unnecessary degradation. We are constrained to say that there is no statute or decision in this State that authorizes the infliction of flogging as a part of prison discipline,
(280) and that it is contrary to the spirit, at least, of the constitutional provision referred to. Such being the case, we must hold that the flogging of Gallagher was inflicted illegally and without authority of law.

No error.

HOKE, J., concurring: I concur in the disposition made of this appeal and am of opinion that the laws of North Carolina applicable to the subject do not refer the control and discipline of prisoners to the unregulated discretion of subordinate administrative officials. The general statute on the subject of working convicts on the public roads, Rev. 1905, sec. 1356, provides that "The county authorities shall have power to

enact all needful rules and regulations for the successful working of convicts on the public roads," etc., and the law of 1909, the statute specially applicable to Wake County, confers like power on the authorities of that county, with the limitation that the regulations made shall be in accord with those which prevail in the State's Prison—a limitation which does not obtain unless and until the authorities of the State's Prison shall have made such rules. These statutes clearly contemplate that the control and discipline of convicts and particularly in reference to their punishment, corporal or other, shall be pursuant to rules formally made and published by the board of county commissioners, or their duly authorized agents, and I would not hesitate to hold that these rules should be humane, reasonably designed to affect the well ordered governance of convicts, and that, in their prominent features, they should be made known beforehand to each and every prisoner, that they may live and act with knowledge of the penalties attendant on disobedience. In applying such a standard, I am not prepared to say that never, under any circumstances, is corporal punishment permissible, or that carefully prepared rules, looking to such result, are, in all instances, unlawful; but the question is not presented on this appeal, for there is no proof or suggestion that there were any rules or regulations of any kind which authorized the punishment inflicted in the present case. I am of opinion, therefore, that acts of defendants were without warrant of law and that they have been properly convicted.

WALKER, J., and BROWN, J., concurring in this opinion.

Cited: S. v. Mincher, 172 N.C. 899, 903; *Small v. Morrison,* 185 N.C. 596; *S. v. Revis,* 193 N.C. 198, 199; *S. v. Carpenter,* 231 N.C. 238.

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(281)

STATE v. HEDRICK DEVANE.

(Filed 1 April, 1914.)

Appeal and Error—Homicide—Escape—Filing Brief—Rules of Court.

When an appellant escapes pending his appeal to this Court, the Court in its discretion will either dismiss the appeal or affirm the judgment or continue the case. It can make no difference that the appellant is convicted of a capital felony. That entitles him to no special privileges.

APPEAL by defendant from *Allen, J.,* at October Term, 1913, of SAMPSON.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

No counsel for the defendant.

CLARK, C. J. This is a conviction for murder in the first degree. When the case was called for argument, counsel who had formerly represented the prisoner stated that his client had escaped jail, and that he would not file any brief for him.

This case stands on the same basis as any other. The fact that the prisoner has been found guilty of a capital offense gives him no special privilege or claim to consideration over any other litigant. The presumption of law is that the trial below was correct. No appellant is entitled to have his case reviewed except by following the method prescribed by law and the rules of the Court. If this appellant had not entered his appeal within ten days, or if he had not filed his bond or obtained leave to appeal *in forma pauperis,* or if he had not docketed his transcript in due time, or by his *laches* had failed to have the case settled by the judge: in any of these cases the appeal would be dismissed or other appropriate action taken, as in all other cases. The fact that he has withdrawn himself from the jurisdiction of the court by flight puts him in no better condition.

In *S. v. Jacobs,* 107 N. C., 772, the appellant had been convicted of murder in the first degree. When the case was called, he had
(282) escaped, but that did not appear, and the court affirmed the judgment. After his recapture, his counsel moved the Court to take up the record and to consider the exceptions. This the Court refused to do, with a very full discussion by *Avery, J.,* of the authorities. It was held that the principle that "persons charged with crime have the right to be present at their trial, to be informed of the accusation against them, to confront their accusers, and to have the aid of counsel, is guaranteed by the Constitution, which right cannot be waived in capital cases, extends only to the court which tries the facts, where the accused is presumed, on account of his peculiar knowledge, to be able to conduct, or assist in the conduct of, his defense. It does not prevail in the appellate court, which has jurisdiction only to review alleged errors of law on the trial below. Hence, when one who has been convicted appeals, and afterwards escapes, this Court may, in its discretion, proceed with the hearing of the exceptions, dismiss the appeal or retain the cause on the docket to await the possible but not probable return of the fugitive, and that any judgment it may pronounce will be valid, for it is not required that the appellants should be present in the appellate court." That case has been repeatedly affirmed since, see Anno. Ed.

In *S. v. Anderson,* 111 N. C., 689, which was also a conviction for murder in the first degree, the Court again affirmed the doctrine that the prisoner having made his escape, this Court, in its discretion, will either dismiss the appeal or hear it or continue it, and upon motion of the Attorney-General, the appeal was dismissed.

In *S. v. Cody,* 119 N. C., 908, which was another conviction for a capital felony and an escape, the Court reaffirmed the above ruling, and dismissed the appeal.

In *S. v. Dixon,* 131 N. C., 808, which was another conviction for murder in the first degree, the Court reaffirmed the above authorities and affirmed the judgment, saying: "One who thus dismisses himself abandons his appeal and has no ground to invoke a review of the trial by the appellate court."

In *S. v. Moses,* 149 N. C., 581, the Court said: "It appearing (283) that the defendant has broken jail and is still at large, the appeal is dismissed. *S. v. Jacobs,* 107 N. C., 772; *S. v. Keebler,* 145 N. C., 560." In *S. v. Keebler,* 145 N. C., 560, the Court dismissed the appeal, saying: "We will not deal with a defendant who is in the woods."

In *S. v. Jacobs,* 107 N. C., 772, *Avery, J.,* among many other cases, quoted from *Waite, C. J.,* in *Smith v. United States,* 94 U. S., 97, as follows: "It is clearly within our discretion to refuse to hear a criminal case in error unless the convicted party suing out the writ is where he can be made to respond to any judgment we may render. . . . If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear, or not, as he may consider most for his interest."

In *S. v. Keebler, supra,* the Court said: "No court will ordinarily decide a moot point, a mere abstraction; and to cumber the docket will ordinarily be useless, leading merely to a dismissal of the appeal at some future term, as in *S. v. Cody, supra.*" In both that case and in *S. v. Jacobs, supra,* there are numerous citations from other States showing that this is the general practice.

There are also numerous decisions showing that there is no distinction as to the procedure in this Court between appeals in criminal and in civil cases. In *S. v. Spivey,* 151 N. C., 676, it is said: "Exceptions appearing of record and not mentioned in the brief are deemed abandoned on appeal in criminal as well as in civil actions." In *S. v. Bramble,* 121 N. C., 603, the Court cites numerous cases in which appeals in criminal actions had been dismissed for a defect in the affidavit to appeal *in forma pauperis,* and reaffirmed the doctrine, which has been acted upon uniformly before and since, in *S. v. Atkinson,* 141 N. C., 735; *S. v. Smith,* 152 N. C., 842. In *S. v. Councill,* 129 N. C., 511, the Court held: "A

person convicted of a capital felony is not prejudiced by the fact that the Supreme Court renders a *per curiam* opinion affirming the conviction." This case has been cited and approved since, see Anno. Ed.

(284) We have, however, carefully reviewed the exceptions on the trial below, and find no error that was prejudicial to the prisoner. He was evidently well informed as to the merits of his case, and did not care to abide the action of this Court. The judgment is

Affirmed.

Cited: S. v. Martin, 172 N.C. 977; *S. v. Dalton,* 185 N.C. 606; *In re Morris,* 225 N.C. 51.

STATE v. W. H. MOORE.

(Filed 1 April, 1914.)

1. **Intoxicating Liquors—Warrants—Proviso — Matters of Defense — Motions to Quash.**

   A motion in arrest of judgment upon an alleged defect in a warrant charging the unlawful sale of intoxicating liquors, for that the warrant did not negative the idea that the defendant was a druggist or medical depositary (ch. 44, Public Laws 1913, sec. 1), will not be granted, as the exception in the statute is no part of the definition or description of the offense, but simply withdraws certain persons from its operation, and is a matter of defense. *Semble,* such exception should be taken in the trial courts where the warrant may be amended, and not for the first time in the Supreme Court on appeal.

2. **Intoxicating Liquors—Trials—Evidence—Declarations — Questions for Jury.**

   Held in this case, charging an unlawful sale of intoxicating liquor under ch. 44, Public Laws 1913, sec. 1, testimony that the defendant did not have any business is competent upon the question as to whether he was a druggist, etc.; and as to whether his declarations that he had sold intoxicants were made in jest was properly for the determination of the jury.

APPEAL by defendant from *Cooke, J.,* at Fall Term, 1913, of WAKE.

The defendant was convicted upon a warrant charging that he had engaged in the business of selling, etc., intoxicating liquors. The warrant does not negative the idea that the defendant is a druggist or a medical depositary, and the defendant moves in arrest of judgment in the Supreme Court for this alleged defect.

(285) The other exceptions of the defendant are:

"1. The court erred in admitting the question of the solicitor, put to the witness Mangum, 'as to what business the defendant was

engaged in,' as tending to show the character of the defendant, who had not then been introduced as a witness in his own behalf, and who was not afterwards introduced as a witness in his own behalf.

"2. The court erred in admitting the answer of the witness Mangum, 'that the defendant never had any business that he knew of,' as directly proving the character of the defendant, who was not introduced as a witness in his own behalf, and who did not open up his character by asking any witness introduced by the State as to his character.

"3. The Court erred in refusing to give the following special instruction as asked for by the defendant, towit: 'That in addition to the possession of the liquor, there must be evidence that the defendant has the liquor for the purpose of sale before the jury can find the defendant guilty.'

"4. That the court erred in not instructing the jury, in answer to the contention of the defendant, that the statements of the defendant that he had sold whiskey were mere 'big talk,' braggadocio, was meant in fun and jest, and not as the truth.

"5. That the charge was not responsive to the request contained in the special instruction: that there was no evidence whatever of any sale of the liquor which the defendant had in his possession, and the only evidence of any sale was what the defendant said in fun and jest."

Judgment was pronounced against the defendant, and he appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

J. C. L. Harris for defendant.

ALLEN, J. The defendant is charged with a violation of section 1 of ch. 44, Pub. Laws 1913, which reads as follows: "That it shall be unlawful for any person, firm, corporation, association, or company, by whatever name called, other than druggists and medical depositaries duly licensed thereto, to engage in the business of selling, (286) exchanging, bartering, giving away for the purpose of direct or indirect gain, or otherwise handling spirituous, vinous, or malt liquors in the State of North Carolina. Any person, firm, or corporation violating the provisions of this act shall be guilty of a misdemeanor."

The motion in arrest of judgment is for failure to allege in the warrant that the defendant is not a druggist or a medical depositary, the defendant relying upon the principle announced in Archbold's Criminal Pleading, page 53, and approved in *S. v. Heaton,* 81 N. C., 547; *S. v. Lanier,* 88 N. C., 658, and *S. v. Blackley,* 138 N. C., 622, that "If there be any exception contained in the same clause of the act which creates

the offense, the indictment must show, negatively, that the defendant or the subject of the indictment does not come within the exception."

The language used in the statute, "other than druggists and medical depositaries," is in effect an exception, and is contained in the clause creating the offense, and if the principle is applied without qualification, the warrant is defective, as contended by the defendant.

The rule was first adopted in England at a time when more than two hundred offenses were punishable with death, and when the judges were astute to discover means to relieve against the harshness and severity of the common law, and is not of universal application, the true test not being made to depend upon the place the exception has in the statute, but upon the nature and effect of the exception.

The rule, with its qualifications, is stated accurately and clearly in 22 Cyc., 344: "It is necessary to negative an exception or proviso contained in a statute defining an offense where it forms a portion of the description of the offense, so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted. Where, however, the exception or proviso is separable from the description and is not an ingredient thereof, it need not be noticed in the accusation, being a matter of defense. As the rule is frequently stated, an exception in the enacting clause must be pleaded; but an exception in a subsequent (287) clause or statute is matter of defense by the accused. But this is not an accurate statement, since the rule is to be determined, not by the position of the exception or proviso, but its nature as constituting an element of the description of the offense. An exception in a subsequent section or statute may be so closely connected with the description contained in a preceding section that it must be negatived; and, conversely, matter in the enacting clause may be so independent of the description that it form a matter of defense. While it has been held that a reference from the enacting clause to a clause containing the proviso will demand that the latter be negatived, such rule has not been generally followed, and a reference will not render it imperative to negative a proviso not a portion of the description. A proviso which withdraws a case from the operation of the statute need not be negatived."

This is the same principle declared by *Henderson, C. J.*, in *S. v. Norman*, 13 N. C., 226, in reference to provisos, where he said: "We find in the acts of our Legislature two kinds of provisos—the one in the nature of an exception, which withdraws the case provided for from the operation of the act; the other, adding a qualification, whereby a case is brought within that operation. Where the proviso is of the first kind, it is not necessary in an indictment, or other charge founded upon the act, to negative the proviso; but if the case is within the proviso, it is left to

the defendant to show that fact by way of defense. But in a proviso of the latter description the indictment must bring the case within the proviso. For, in reality, that which is provided for, in what is called a proviso to the act, is part of the enactment itself."

Again, in *S. v. Burton,* 138 N. C., 577, *Justice Connor,* while discussing the necessity of an allegation in an indictment as to matters contained in exceptions and provisos, after commenting upon *S. v. Norman* and *S. v. Heaton,* says: "The defendant misconstrues the words 'same clause,' used in many of the opinions, by giving to it the same signification as same section. The line separating the two classes of cases is not the mere location of the excepting language, but is dependent upon its office in describing the offense."

In *S. v. Connor,* 142 N. C., 701, *Justice Hoke* says: "It is well (288) established that when a statute creates a substantive criminal offense, the description of the same being complete and definite, and by subsequent clause, either in the same or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be negatived in the indictment, nor is proof required to be made in the first instance on the part of the prosecution"; and, further, that the rule "depends not so much on the placing of the qualifying words, or whether they are preceded by the terms 'provided' or 'except,' but rather on the motive, meaning, and purpose of the words themselves," and concluded that if the exception or proviso, wherever placed, is a part of the definition or description of the offense it must be negatived; but if it does no more than withdraw a case from the operation of the statute, it is not necessary to refer to it in the warrant or indictment, and is matter of defense for the accused to bring himself within the exception." The *Connor case* is approved in *S. v. Smith,* 157 N. C., 583, and *Justice Walker,* writing the opinion in the last case, quotes from Joyce on Indictments, sec. 279, that—

"The general rule as to exceptions, provisos, and the like is that where the exception or proviso forms a portion of the description of the offense, so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted, then it is necessary to negative the exception or proviso. But where the exception is separable from the description, and is not an ingredient thereof, it need not be noticed in the accusation; for it is a matter of defense."

Applying these principles, the motion in arrest of judgment must be overruled, as the exception in the statute is no part of the definition or description of the offense, but simply withdraws certain persons from its operation.

To hold otherwise would be a refinement, which could serve no useful purpose.

Criminal accusations, whether in the form of warrants or indictments, must fix and determine the identity of the offense with such particularity as to enable the accused to know exactly what he has to
(289) meet, and to avail himself of the conviction or acquittal as a bar to a further prosecution arising out of the same facts, and when these requirements are met the rights of the accused are properly and sufficiently safeguarded.

In the warrant before us the defendant is charged with engaging in the business of selling intoxicating liquors in Raleigh on or about 15 September, 1913, which is ample notice of the accusation, and he would have received no information or benefit by telling him that he was not a druggist or medical depositary.

We have considered the motion in arrest of judgment, although made for the first time in this Court, which is permissible as to indictments (*S. v. Marsh,* 132 N. C., 1000), but we do not hold that the same rule is applicable to warrants, which may be amended.

It was said of indictments, in *S. v. Shade,* 115 N. C., 758, the courts are not inclined to arrest the judgment after verdict when the defendant "attempts to reserve his fire until he takes first the chance of acquittal," and there is stronger reason for withholding relief when the objection is to a warrant, which the court can amend, and thereby cure the defect.

In some jurisdictions it is held that motions in arrest of judgment will not be entertained in any case unless made before judgment. 1 Chitty Cr. L., 664; *Hampton v. State,* 133 Ala., 180; *S. v. O'Neill,* 66 Vt., 357; *Perry v. The People,* 14 Ill., 497.

The other exceptions do not require discussion.

The question asked the witness Mangum was relevant to show that the defendant was not a druggist, and the court presented to the jury in the charge every aspect of the case to which the defendant was entitled.

It was for the jury and not the judge to say whether the admissions of the defendant were made in jest.

The evidence of the guilt of the defendant is plenary, and we see no reason for disturbing the judgment.

No error.

Cited: S. v. Thomas, 168 N.C. 146, 149; *S. v. Wainscott,* 169 N.C. 379; *S. v. Cathey,* 170 N.C. 796; *S. v. Walker,* 179 N.C. 732; *S. v. Hicks,* 179 N.C. 734; *S. v. Hege,* 194 N.C. 530; *S. v. Dowell,* 195 N.C. 527; *S. v. Epps,* 213 N.C. 717.

(290)

STATE v. WILLIAM T. McKENZIE.

(Filed 1 April, 1914.)

1. Homicide—Motive—Evidence—Bad Blood.

Upon a trial for murder, evidence is competent upon the question of motive for the crime, which tends to show ill-feeling of the prisoner towards the deceased, and the cause thereof; and where the deceased was the brother of the prisoner's deceased wife, it is competent to show that his wife's family, including the deceased, had charged the prisoner with having mistreated his wife.

2. Homicide—Subsequent Circumstances—Evidence.

Testimony of relevant circumstances immediately following the homicide, and which tends to show the guilt of the prisoner, is competent.

3. Homicide—Evidence—Contradiction.

Where on a trial for murder the prisoner's witness has been examined before the coroner and has made an affidavit before the clerk of the court, it is competent, for the purpose of contradiction, but not as substantive evidence, on cross-examination, to question him as to the statements he had thus theretofore made.

4. Appeal and Error—Unanswered Questions—Exceptions.

Exceptions to unanswered questions, without proper statement as to their relevancy to the subject-matter of the trial, will not be considered on appeal.

5. Homicide—Evidence—Impeaching.

Evidence that the witness for the prisoner on trial for homicide had stayed in the same cell with him on the previous night is competent for the purpose of impeaching the testimony of the witness.

6. Homicide—Deadly Weapon—Malice Implied—Burden of Proof.

The killing of deceased by the prisoner with a deadly weapon implies malice, which would sustain a conviction of murder in the second degree; the burden being upon the State to prove deliberation and premeditation for conviction for the greater offense of murder in the first degree, and upon the prisoner to show matters in defense to justify a less offense or acquittal.

7. Homicide—Premeditation—Evidence.

The evidence on this trial for homicide tends to show that on the day thereof the prisoner had quarreled with the deceased, who was a brother of his deceased wife; he went to the place where the deceased worked and spoke to him in abusive language; the prisoner fired upon the deceased, who was unarmed, five times with a pistol as they were walking towards each other, and then inflicted the fatal wound with a gun he was also carrying. *Held*, evidence of deliberation and premeditation sufficient to sustain a verdict of murder in the first degree.

8. Appeal and Error—Recitals in Exceptions.

Recitals in the appellant's exceptions not set out as a part of the statement of case on appeal settled by the judge will not be considered.

9. Same—Homicide—Trials—Prejudice.

Where the prisoner has appealed from a sentence of murder in the first degree, and as a part of his exceptions states that the wife of the deceased, with her children, attended the trial in mourning, and boarded at the same place with the jury, such recitations, if considered as a part of the case on appeal, will not alone be sufficient to set aside the sentence of the court.

(291) APPEAL from *Lyon, J.*, at September Term, 1913, of ROBESON.

The defendant was indicted for the murder of one Peter D. Jones, in Scotland County, on 22 October, 1912. From a judgment rendered on a verdict of guilty of murder in the first degree, he appealed.

The prisoner was the brother-in-law of the deceased, and his wife died about ten days before the homicide. There was evidence tending to show ill-feeling between the prisoner and his wife's family on account of supposed ill-treatment of his wife by the prisoner. The youngest child of the prisoner had been taken by his wife's family to their home immediately upon her death and had been kept by them until the day of the homicide. About the middle of the day the prisoner went to the home of Mr. Sam Jones, the father of the deceased, at whose house the child was staying, and took the child away and to his father's house. There is testimony tending to show that while he was at his father-in-law's there were some words between the prisoner and the members of his wife's family, and there is also testimony tending to show that there had been a quarrel earlier in the day between the prisoner and the deceased.

(292) About 3 or 4 o'clock in the afternoon of the day of the homicide the deceased and one Jake Bradley went to the woods to get a load of wood, and it was while they were there that the homicide was committed.

As to what occurred may properly be described in the language of Jake Bradley, who was a witness for the State. He testified in part:

"I was loading from the lower pile, about 25 yards from the road. As near as I can recollect, the time I started after the wood was between 3 and 4 o'clock in the afternoon. It was 22 October of last year. When I started for the wood on the wagon, my boy and Mr. Peter D. Jones went with me. My boy is 15 years old; Frank Bradley is his name. I met up with Mr. Jones at the Widow Jones', at his mail box on the side of the road. I spoke to him about the wood; he got on the wagon and went back to the woods with me. I got to the woods; I turned my wagon around up side the cord-wood pile and he sat down behind me and taken out his paper—newspaper. He commenced reading and I commenced

loading my wagon, and I got my wagon just about level full and gets up on the wagon to level it down so I could put on more, and just as I got up on the wagon and moved a piece or two of wood I happened to look up; in the old road there was Mr. Willie McKenzie and a gentleman by the name of Ed. Ingram. They were on the old road; they were traveling both on the same buggy. They were headed toward Laurinburg. Mr. Will he drove up and said, 'How you, Pete?' and he said, 'How you, Will?' and he stepped out of the buggy backwards—Will McKenzie did —with a gun in his right hand—a breech-loader. I think it was a double; and he says, 'Peter, when you cursed me I had nothing,' and he said, 'You are a dam black son of a bitch.' Mr. Peter got up, and he sticks the paper in his coat pocket and says, 'Yes, Will, you come to these woods to raise a row with me, and sure as you do you will pay for it.' They then commenced walking toward one another, and Mr. Will was cursing and Mr. Peter was shaking his finger, and says: 'You may raise a row, but I will see that you pay for it.' He was shaking his left hand. They were about 15 or 20 steps apart at that time, as near as I can come at it. When he was shaking his finger at Mr. Will, Mr. Will changed the gun in his hand and takes out the pistol. He (293) got the pistol back there where people always totes them. He shoots the pistol twice, and Mr. Peter stopped. He looked like he was shooting at Mr. Peter. And they made a step toward each other, and he shoots twice again, and they kept on until they got about 10 or 15 steps apart; he shot again one time with the pistol, and he threw it down, and he throwed it down, and about that time Mr. Peter made another step or two, and he changed hands with the gun into the right hand and shot it. Mr. Will shot with the gun. He was shooting after Mr. Peter. When he shot the gun, Mr. Peter fell."

Jake Bradley, this witness, further testified that deceased did not have anything in his hands, and that the prisoner came in a buggy as if he were coming from his father's house, and after the shooting got into the buggy, turned around, and went back in the same direction.

The coroner, J. R. Jordan, testified that the load of shot entered the left breast and came out just a little on the right side of the backbone. A closed knife was found in the right pants pocket, but there was no pistol or any weapon of any kind on the body. Other witnesses testified to the same facts.

Attorney-General Bickett and Assistant Attorney-General Calvert, McIntyre, Lawrence & Proctor, Russell & Weatherspoon for the State.

McLean, Varser & McLean, Cox & Dunn, E. H. Gibson, and W. H. Neal for defendant.

CLARK, C. J. Exceptions 1, 2, 3, 4, 5, 6, and 7 are to the admission of testimony to show the feelings of the prisoner towards the family of his deceased wife, whose brother he slew, by reason of their allegations of ill-treatment of his wife by prisoner, and their feeling towards him, as tending to show motive for the crime. Evidence of former difficulties between the defendant and the deceased and the state of feelings between them is admissible on a trial for homicide, and it is also
(294) proper to introduce evidence tending to show the cause of such difficulties and ill-feeling. 21 Cyc., 915; Wharton Cr. Ev., 898; *S. v. Tweed,* 152 N. C., 843.

Exceptions 8, 9, 10, and 11 are to the admission of the testimony of the widow of the deceased, that she saw the prisoner pass her house shortly after she heard the gun fired in the direction of the homicide, the distance from the house to the place where her husband was killed, the time he passed, and that the horse was in a lather and foaming in the harness. This was properly admitted as a recital of the circumstances immediately following the homicide.

Exceptions 12 and 25 from the refusal to nonsuit as to murder in the first degree cannot be sustained. There was evidence of premeditation and deliberation to be submitted to the jury. *S. v. McDowell,* 145 N. C., 563; *S. v. Banks,* 143 N. C., 652; *S. v. Teachey,* 138 N. C., 598.

Exceptions 13, 14, 15, 16, 17, 18, and 19 are to the cross-examination of Ed. Ingram, a witness for the prisoner, who was with him when he went to the woods and killed the deceased. This witness had testified before the coroner and had made an affidavit before the clerk of the Superior Court. Upon cross-examination the court overruled the objections to the questions asked him as to what he swore in the affidavit before the clerk of the court. The court instructed the jury that the questions asked him as to what he testified before the coroner and the clerk were not substantive testimony, but were competent to contradict the witness's testimony given on the trial, and that the jury would not consider it as substantive testimony. *S. v. Jordan,* 110 N. C., 491.

Exceptions 20, 21, and 22 need not be considered, as there was no answer given to the questions asked. Exception 23 must be overruled, as the question admitted, whether the prisoner and the witness had stayed together the previous night in the same cell, was competent as tending to impeach the witness.

Exception 34 was to the admission in evidence of the affidavit of the witness Ingram taken before the clerk of the court, which was admitted to contradict him, and was competent.

(295) The exceptions to the charge are numerous, but require no discussion, as they present no new point, and the charge conforms to

the settled precedents. The court properly charged that malice is implied from the slaying with a deadly weapon, and that, nothing else appearing, the prisoner would be guilty of murder in the second degree. That to raise the offense to murder in the first degree the burden was upon the State to prove deliberation and premeditation, and that to reduce the offense to a lower degree, matter of excuse or mitigation was upon the prisoner, as was also matter in defense that would justify a verdict of not guilty, but upon the whole case the jury must find the prisoner guilty of the offense, if any, found by their verdict.

We have examined with care all the exceptions, with the aid of the earnest and forcible arguments of the learned counsel for the prisoner, and do not find that he has suffered any prejudice in the investigation of the charge against him. Upon the evidence it seems to have been a deliberate and premeditated slaying, caused by ill-feeling of the prisoner against the deceased. The prisoner had had some words with members of his wife's family, and earlier in the day had a quarrel with the deceased, who was his deceased wife's brother. The prisoner armed himself with a double-barrel breech-loading gun and with a pistol, and rode in a buggy some distance into the woods where the deceased was at work, and approached him with a most opprobrious epithet. When the deceased rose and they walked towards each other, the deceased being entirely unarmed, the prisoner fired at him with a pistol five times, having changed his gun to his left hand. He then threw the pistol down and, taking the gun into his right hand, shot with it and killed the deceased.

The deceased had no weapon of any kind and a closed knife was found in his right-hand pants pocket. It can hardly be necessary to discuss the facts further.

The prisoner's counsel also filed exceptions that during the trial the widow of the deceased, dressed in mourning, with a child in her arms and four other small children, was permitted repeatedly to (296) come into the courtroom; that during the progress of the trial they were permitted to associate with the jury at the same boarding-house, and that the bloody clothes with the bullet holes were left in the jury room in view of the jury while they were deliberating upon the case. These allegations are not set out by the judge in his statement of the case on appeal, nor are they found as facts by him. They are merely recitals of the prisoner in his exceptions. This Court has repeatedly stated that such recitals cannot be considered by us, for if recitals of fact in exceptions filed by the appellant, which are his own act, can be considered, a reversal in every case would be simply a matter of course. *S. v. Dixon,* 131 N. C., 812; *Patterson v. Mills,* 121 N. C., 268; *Merrill v. Whitmore,* 110 N. C., 367; *Walker v. Scott,* 106 N. C., 56.

But if we take the facts in these recitals as true, they do not entitle the prisoner to a new trial. It was admissible for the widow to be present at the trial with her children. It may have been a subject of criticism if she had not worn mourning. There is no finding by the judge, and even the prisoner's recital of facts do not set forth, that such conduct on her part swayed the jury. We have to presume that they were intelligent men and knew that they were trying the case upon the evidence and the charge of the court. It was stated before us by counsel on both sides that in fact the bloody clothes were in a box and not in sight of the jury, except when they were exhibited in evidence, and while the exception recited that the widow and children associated with the jury at the boarding-house, it appears by the statement of counsel that they simply boarded at the same place, which was the only hotel in town, and there is no evidence or intimation that in fact the widow or her small children conversed with the jury or attempted to influence them, and indeed the jury were doubtless under the supervision of an officer and were kept together. If there was in fact any attempt to influence the jury, this should have been presented to the court by affidavit, and the judge should have found that fact and that they were influenced.

(297) In *S. v. Tilghman,* 33 N. C., 513, the Court held that "where the circumstances are such as to show, not that there was, but that there might have been, undue influence brought to bear on the jury, because there was opportunity and a chance for it, the matter rests in the discretion of the trial judge." This case has been repeatedly cited since. See the numerous citations in the Anno. Ed. Among many other cases, in *S. v. Dixon,* 131 N. C., 813, it is said: "It is not enough that there was opportunity, but the court must find that in fact the jury were prejudiced in such matters. *S. v. Tilghman,* 33 N. C., 513."

In *Willeford v. Bailey,* 132 N. C., 408, it is said: "It must affirmatively appear that undue or improper influence has affected the verdict," citing *S. v. Tilghman, supra,* and *S. v. Brittain,* 89 N. C., 481.

In *S. v. Boggan,* 133 N. C., 766, the Court cites from *S. v. Tilghman, supra,* that there must not only be opportunity and a chance for undue and improper influence, but it must be shown to have been exerted. That case further cites from *S. v. Crane,* 110 N. C., 530: "When it appears only that there was an opportunity whereby to influence the jury, but not that the jury was influenced—merely opportunity and chance for it—a new trial is in the discretion of the presiding judge," citing *S. v. Miller,* 18 N. C., 500.

In *S. v. Boggan, supra, Connor, J.,* also cites *Justice Ashe* in *S. v. Gould,* 90 N. C., 658, a capital felony: "Even if the circumstances had been such as to show that there was an opportunity and chance for exert-

ing influence upon the jury, it would have been a matter of discretion with the presiding judge whether he would have granted a new trial," and *Judge Connor* adds: "The presumption is in favor of the integrity of the jury and their verdict, that they tried the case upon the law and evidence. If it is sought to impeach the verdict, the burden is upon the prisoner either to show that they were improperly influenced or that their conduct was such that as a matter of law there had been no trial."

In *Abernathy v. Yount,* 138 N. C., 340, *Connor, J.,* quotes *S. v. Tilghman* on this point, and says that this ruling "has been uniformly adopted and followed by this Court." This ruling was again (298) cited with approval in *S. v. Exum,* 138 N. C., 606, and in other cases since.

Upon a careful review of the entire case and of all the exceptions we find

No error.

Cited: Schas v. Assurance Society, 170 N.C. 421; *Bowman v. Howard,* 182 N.C. 667; *S. v. Elder,* 217 N.C. 114.

STATE v. C. E. HILL.

(Filed 15 April, 1914.)

Landlord's Lien—Guests—Surreptitious Departure—Trials—Questions for Jury.

When there is evidence that one having received accommodation at a hotel left with his baggage without notice to the proprietor and without having paid his hotel bill, it is sufficient for conviction, under ch. 816, Laws 1907; Pell's Rev., 3434a; it being for the jury to determine whether he surreptitiously removed the baggage to defeat the landlord's lien (Rev., 2037), the statute not requiring proof or charge of intent to defraud in such instances.

APPEAL by defendant from *Lane, J.,* at March Term, 1914, of GUILFORD.

Attorney-General T. W. Bickett and Assistant Attorney-General T. H. Calvert for the State.

Thomas J. Gold and Stern & Duncan for defendant.

CLARK, C. J. The defendant was tried in the Municipal Court of High Point for violation of ch. 816, Laws 1907; Pell's Rev., 3434a, and

found guilty. On appeal to the Superior Court he was again found guilty and appealed.

The warrant charged that the defendant "did willfully, maliciously, and unlawfully obtain and procure board and lodging at the Elwood Hotel and did abscond, surreptitiously removing his baggage therefrom, without paying for said board and lodging, having obtained same with intent to defraud the proprietor of said hotel." The evidence is that he registered at said hotel, and was assigned to a room, to which he
(299) went, his hand baggage being carried up by a servant. The next morning, by his order, breakfast was sent to his room. Later in the day he was seen in the lobby and disappeared, having carried off his baggage and leaving his bill unpaid.

The only question that is presented is the sufficiency of the evidence to go to the jury. The defendant could not be indicted, of course, for non-payment of the debt, but he is guilty only if the jury finds that he obtained board and lodging and absconded, surreptitiously removing his baggage.

Rev., 3434a, prescribes three classes of offenses:

1. If any person obtains any lodging, food or accommodation at an inn, boarding-house, or lodging-house, without paying therefor, with intent to defraud the proprietor or manager thereof.

2. Or obtains credit at such an inn, boarding-house, or lodging-house by the use of any false pretense.

3. Or, after obtaining credit or accommodation at an inn, boarding-house, or lodging-house, absconds and surreptitiously removes his baggage therefrom, without paying for his food, accommodation, or lodging.

This last does not require proof or charge of intent to defraud. The landlord had a lien upon his baggage (Rev., 2037), and the abrupt departure of the defendant from the hotel and removing his baggage without notice to the proprietor and without paying his bill was an absconding and made him guilty if the baggage was removed surreptitiously and there was evidence from which the jury could so find.

There may happen instances where a guest must leave suddenly and without notice, and without any intention to defraud the proprietor. But in such case it is always open to him to show why he left without paying, and he will always take the promptest measures to forward payment to the proprietor. But there is here no evidence of such necessity for abrupt departure without notice, nor of any effort to send payment for his board to the proprietor. Indeed, on this evidence the jury might have inferred reasonably that the defendant was guilty on the first part of the bill for obtaining the accommodation with intent to defraud.

No error.

Cited: S. v. Barbee, 187 N.C. 704.

(300)

STATE v. WILLIAM DARNELL.

(Filed 8 April, 1914.)

Cities and Towns—Ordinances—Segregation of Races—Statutes—Interpretation.

Legislative authority given to a town to pass any ordinance for the good order, good government, or general welfare of the city, provided it does not contravene the laws and Constitution of the State, does not contemplate the passage of an ordinance prohibiting the ownership of land in certain locations and districts, by white or colored people, in accordance with whether the majority of the landowners in that district are white or colored people, such being in contravention of the general policy of the State and questionable as to its validity under the Federal Constitution.

APPEAL by defendant from *Devin, J.,* at Spring Term, 1913, of FORSYTH.

Attorney-General and Gilbert T. Stephenson for the State.
Watson, Buxton & Watson for defendant.

CLARK, C. J. On 5 July, 1912, the board of aldermen of Winston, N. C., adopted an ordinance which made it unlawful for any colored person to occupy as a residence any house upon any street or alley between two adjacent streets on which a greater number of houses are occupied as residences by white people than are occupied as residences by colored people. Another section of the ordinance made a similar restriction against white people occupying as residences houses on streets where there are more houses occupied by colored residents than by whites. In 1913 the defendant William Darnell, a colored man, moved his family into a house on Highland Avenue, to occupy it as a residence. At that time, in the other houses on that street and block there were more white families than colored. The defendant was tried in the municipal court for violating this ordinance, and being found guilty, he was fined, and appealed. In the Superior Court he was again found guilty and fined, and appealed to this Court.

The only authority which the board of aldermen claim for the (301) passage of this ordinance is section 44 of the city charter, which provides that the aldermen "may pass any ordinance which they may deem wise and proper for the good order, good government, or general

welfare of the city, provided it does not contravene the laws and Constitution of the State." In 1 Dillon Mun. Corp., sec. 89, which is copied and approved in *S. v. Webber,* 107 N. C., 962; 22 Am. St., 920, it is said: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) Those necessarily or fairly implied; (3) Those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the exercise is resolved by the courts against the corporation, and the power is denied." In *S. v. Thomas* the Court reiterated this doctrine and quoted with approval 1 Dillon Mun. Corp., sec. 325, as follows: "An ordinance cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent legislative grant." In *S. v. Dannenberg,* 150 N. C., 800, it was held: "Municipal corporations can only exercise such police powers as are granted by their charters, and all fair and reasonable doubts as to whether such powers have been conferred are resolved by the courts against their being exercised."

The brief for the State frankly says: "It is not claimed that the city of Winston had any express grant of power to pass a segregation ordinance. To uphold the validity of such an ordinance, therefore, it must be shown that the passage of it was a reasonable exercise of the police power." Revisal, 2923, is broader even than this provision of the charter, for it gives town commissioners "power to make ordinances, rules and regulations for the better government of the town not inconsistent with this chapter and the law of the land, as they may deem necessary," and to enforce them by suitable penalties. It is held under this last section that such ordinances and by-laws must be in harmony with
(302) the general laws of the State. *Washington v. Hammond,* 76 N. C., 33; *S. v. Langston,* 88 N. C., 692; *S. v. Brittain,* 89 N. C., 574.

We do not think that the authority conferred by section 44 of the charter to enact ordinances for the "general welfare of the city" can justly be construed as intended by the Legislature to authorize an ordinance of this kind which establishes a public policy which has hitherto been unknown in the legislation of our State. To do so would give to the words "general welfare" an extended and wholly unrestricted scope, which we do not think the Legislature could have contemplated in using those words. If the board of aldermen is thereby authorized to make this restriction, a bare majority of the board could, if they may "deem it wise and proper," require Republicans to live on certain streets and Democrats on others; or that Protestants shall reside only in certain

parts of the town and Catholics in another; or that Germans or people of German descent should reside only where they are in the majority, and that Irish and those of Irish descent should dwell only in certain localities, designated for them by the arbitrary judgment and permission of a majority of the aldermen. They could apply the restriction as well to business occupations as to residences, and could also prescribe the localities allotted to each class of people without reference to whether the majority already therein is of the prescribed race, nationality, or political or religious faith.

Besides, an ordinance of this kind forbids the owner of property to sell or to lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from doing so where they can make the best bargain. Yet this right of disposing of property, the *jus disponendi,* has always been held one of the inalienable rights incident to the ownership of property, which no statute will be construed as having power to take away. In *Bruce v. Strickland,* 81 N. C., 267, it is said: "The *jus disponendi* is an important element of property and a vested right protected by the clause in the Federal Constitution which declares the obligation of contracts inviolable." The same doctrine is fully held and discussed in *Hughes v. Hodges,* 102 N. C., 239, and in the numerous citations to those two cases which will be (303) found in the Anno. Ed. This ordinance forbids a white man or a colored man to live in his own house if it should descend to him by inheritance and should happen to be located on a street where the majority of the residents happen to be of such different race. There is no reason why the power of the county commissioners to provide for the public welfare should not be as broad as those of the town commissioners, and if under such general authority similar regulations are prescribed for the country districts, one who should buy or inherit property in a section where the opposite race is in the majority could not reside on his own property, and he could not sell it or rent it out except to persons of such different race, since none other could reside there. Neither a white manager nor any white tenants could reside on a farm where a majority of the tenants or hands are colored.

In Ireland there were years ago limits prescribed beyond which the native Irish or Celtic population could not reside. This was called the "Irish Pale," and one of the results was continued disorder and unrest in that unhappy island, which had as one of its consequences that more than half its population came to this country. That policy has since been reversed. But in Russia, to this day, there are certain districts to which the Jews are restricted, with the result that vast numbers of them are emigrating to this country. We can hardly believe that the Legisla-

ture by the ordinary words in a charter authorizing the aldermen to "provide for the public welfare" intended to initiate so revolutionary a public policy. Had this been intended there would certainly have been a thorough discussion and a full consideration by the General Assembly of the question whether under the Constitution of the United States and of this State the Legislature could establish a policy which would deny to the owners of lands, either in the country or town, the right to dispose of them by sale or renting to whomsoever they saw fit, as of ancient right they had been long accustomed to do, or to restrict any class of citizens from buying or renting where they wished.

(304) Indeed, so far as the declaration of a public policy is concerned, when a few years ago labor agents began carrying out of the State the colored laborers on whom many farmers depended for the cultivation of their crops which alone maintained the value of their lands, the Legislature promptly passed ch. 75, Laws 1891, which made it indictable to exercise such vocation without having first paid a license fee of $1,000. When that act was held invalid in *S. v. Moore,* 113 N. C., 697, the Legislature promptly passed another (ch. 9, Laws 1901), prescribing a smaller license fee, but making it indictable to act as agent to procure laborers for another State without obtaining such license. This was upheld in *S. v. Hunt,* 129 N. C., 686; as was also a like act to the same purport (Laws 1903, ch. 247, sec. 74) in *Carr v. Comrs.,* 136 N. C., 125.

Judging by the experience of the "Irish Pale" and of the similar restrictions upon the Jews in Russia, the result of this policy might well be a large exodus, and naturally of the most enterprising and thrifty element of the colored race, leaving the unthrifty and less desirable element in this State on the taxpayers. Such a result would be contrary to the above cited statutes by which the Legislature indicated a public policy of retaining the colored laborers in this State. The initiation by this ordinance of a public policy so little in accord with the above legislation cannot reasonably be inferred from the general expression in the charter relied upon.

There is a wide distinction between suffrage, which is not an inherent right, but which is conferred by constitutional prescription, and which is usually extended from time to time, and the inalienable right to own, acquire, and dispose of property, which is not conferred by the Constitution, but exists of natural right. There is no question that legislation can control social rights by forbidding intermarriage of the races, and in requiring Jim Crow cars and in similar matters. It was also held in *Mugler v. Kansas,* 123 U. S., 623, that as the State had the right to regulate or forbid the sale of liquor, that one who had devoted his property to such purpose could not object that he is forbidden longer to so

use it; but none of these interfere with the fundamental right of every one to acquire and dispose of property by sale. The right (305) to devise is statutory, and therefore can be modified. *In re Garland,* 160 N. C., 555.

Whether if the General Assembly had passed a statute conferring on town or county commissioners the authority to make such an ordinance as this, it would have been constitutional, is not now before us. We simply hold that an act of this broad scope, so entirely without precedent in the public policy of the State and so revolutionary in its nature, cannot be deemed to have been within the purview of the Legislature from the use of the words conferring authority to make ordinances for the general welfare.

There was a similar restriction of the Jews to certain quarters of the towns in the middle ages, and the quarters assigned them were called "Ghettoes." If the intention of the Legislature had been to establish such policy as to the colored people either in our towns or country districts, there would certainly have been some provision prescribing the methods to be used in selecting these districts. The selection would not have been left to the arbitrary and irreviewable power of the majority of the board elected without any reference to this matter. A man whose property might be made unsalable, or reduced in value, by forbidding him to sell or rent it to a white man because the majority of the houses in such district are occupied by negroes, certainly should have some compensation from the public for his loss. The same would be true of property just across the street from one of those Ghettoes which might be established to the depreciation of his property. Then, too, both in town and country the owners of property who might be deprived of the opportunity of renting it to laboring people of color, because the majority in that section or block are white people who do not wish to rent or buy, might make an objection to the demarcation adopted. Then, too, the designation of these localities surely would not be left to a majority of the aldermen or the county commissioners without some right to have the facts found by a jury and a review of the proceedings by a court of justice.

The absence of such provisions is further evidence that the (306) General Assembly did not intend to confer so broad and arbitrary a power upon the aldermen of Winston.

We therefore hold that the ordinance was adopted without authority of law and the indictment should have been quashed.

Action dismissed.

Cited: Berry v. Durham, 186 N.C. 427; *S. v. Gulledge,* 208 N.C. 207; *Clinard v. Winston-Salem,* 217 N.C. 121.

STATE v. ALBERT SHOUSE.

(Filed 8 April, 1914.)

1. **Homicide—Dying Declarations—Trials—Evidence.**

Where the prisoner shot the deceased, causing death the following day, and there is evidence that the deceased was informed by his attending physician that he could not recover from the wound, and that he was aware of its fatal nature, his declarations are competent evidence against the prisoner upon trial for the homicide.

2. **Homicide—Deadly Weapon—Trials—Presumptions—Evidence—Appeal and Error—Harmless Error.**

Upon the trial for murder, the law presumes malice from the killing with a pistol shot, and it is for the prisoner to show that the shooting was done under such circumstances as would justify the act or render it manslaughter; and where the jury has returned, in such case, a verdict of murder in the second degree, errors committed in admitting evidence of previous threats upon the question of premeditation and deliberation necessary for conviction of murder in the first degree are rendered harmless.

APPEAL by defendant from *Lane, J.,* at December Term, 1913, of FORSYTH.

Indictment for murder. The defendant was convicted of murder in the second degree, and from this judgment pronounced, appeals.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Louis M. Swink, W. T. Wilson for defendant.

(307) BROWN, J. The prisoner has been convicted of the crime of murder in the second degree in the killing of one James Webster on 12 October, 1913.

The testimony of the witnesses for the State tended to show that on 22 October the deceased was at the house of one Jess Anthony. While the deceased was sitting on the doorstep the prisoner came around the corner of the house and threw a rock towards the deceased, hitting him on the foot, and the deceased said, "Look out, Al."

The prisoner immediately jerked out a pistol and pointed it at the deceased and shot. The bullet entered near the extreme lower part of the

bowel and was extracted a little above the small of the back. He died the following day.

The first five assignments of error are directed to the ruling of the court admitting the dying declarations of the deceased.

It is contended that the deceased, when he made the declarations, was not in such condition of mind and body as rendered the declarations competent.

The witness James Holmes testified that he saw the deceased on the evening of the day on which he was shot, and he said to the witness that he was in bad shape. Deceased said: "I know I am going to die from the wound." Jim Webster, Sr., father of the deceased, said that he told witness that he was bound to die.

Dr. D. C. Speas testified that when he had examined the deceased, he made a statement to him about the result of the wound. "I told Jim Webster there was very little chance, if any, for him, and in my estimation there was none. I administered medicine to revive him. He asked me if he could get well, and I told him no." This witness testified on his first examination: "I found the patient very much depressed, suffering from shock due to the wound."

The declarations of the deceased, together with the evidence as to his actual condition, justified the admission of his statement as to what occurred at the time of the shooting.

In *S. v. Bagley,* 158 N. C., 608, we said: "It is not always necessary that the deceased should declare himself that he believes he is about to pass away, but all the circumstances and surroundings (308) in which he is placed should indicate that he is fully under the influence of the solemnity of such a belief."

The principle upon which these dying declarations are admitted is that they must be made by one who is in a condition so solemn and awful as to exclude the supposition that he could be influenced by malice, revenge, or any conceivable motive to speak anything except the truth. *S. v. Williams,* 67 N. C., 12; *S. v. Moody,* 3 N. C., 31; *S. v. Jefferson,* 125 N. C., 712.

All the evidence shows clearly that the deceased was in such condition when the declarations were made.

The three remaining assignments of error relate to the admission of certain threats.

William Crutchfield, a witness for the State, testified that when the prisoner returned from Virginia about three weeks before Webster was killed, the prisoner told witness that he had killed one man, and was going to kill two more, and then he would be willing to die and to go to torment like his brother.

Annie Dean, a witness for the State, testified that when the prisoner came to her house about three weeks before Webster was killed, that he said he had got in some trouble in West Virginia, that he had killed a man and left him in the mountains, and never expected to rest until he had killed two more; said he was going to kill two more, and that would be as many as his brother had killed; he said one time he thought he wanted to go to heaven, but now he wanted to go to hell.

We admit the principle that general threats to kill not shown to have any reference to the deceased are not admissible in evidence, but a threat to kill or injure some one not definitely designated is admissible in evidence, where other facts adduced give individuation to it. 21 Cyc., 922.

But these threats were offered to show premeditation, deliberation, and previous express malice, necessary to convict of murder in the first degree. *S. v. Tate,* 161 N. C., 280.

They were practically irrelevant, unnecessary, and harmless, as prisoner was acquitted of the capital felony.

(309) The prisoner admitted that he killed the deceased with a deadly weapon. He testified: "I was playing with the deceased. I pitched a rock at the deceased, and he said, 'Look out, Al.,' and I went to get my gun and went to pull it out, and it got caught, and went off. I was about 14 feet from the deceased. My coat was on my right arm. I am a right-handed man. I carried the rock with my left hand. I reached to get the pistol with my left hand, and my finger caught it, and it went off."

The killing of the deceased (who admittedly was unarmed and engaged in no unlawful act) with a deadly weapon being admitted, the law presumes malice, and it was the duty of the jury to convict of murder in the second degree unless the prisoner satisfied them that the killing was done under such circumstances as justified the act, or reduced it to manslaughter. This he failed to do.

We have examined the record, and find

No error.

Cited: S. v. Burton, 172 N.C. 941; *S. v. Brinkley,* 183 N.C. 722; *S. v. Wishon,* 198 N.C. 764; *S. v. Wallace,* 203 N.C. 288; *S. v. Payne,* 213 N.C. 725; *S. v. Bowser,* 214 N.C. 253; *S. v. Hudson,* 218 N.C. 230.

STATE v. JEFF CARDWELL.

(Filed 22 April, 1914.)

1. **Intoxicating Liquors—Criminal Law—Indictment—Offense Charged—Interpretation of Statutes.**

Where the prisoner is charged with an act made an offense by one statute, he may not be tried and convicted for another act made an offense under a different statute; and where the offense charged is an unlawful sale of whiskey made to a person named, the prisoner may not be convicted under Revisal, sec. 3534, relating to purchases from an illicit dealer; nor under Revisal, sec. 3527, relating to soliciting orders; nor under the Federal Penal Code.

2. **Intoxicating Liquors—Lex Loci—Trials—Evidence—Ownership—Interstate Commerce.**

Where the defendant, upon trial for violating our prohibition laws, has received here money for the purchase of whiskey, which is delivered here through an express company, and there is no evidence that he has thus acted as the agent of a seller in another State, where such sale was lawful, or for the sole accommodation of the purchaser, here, without profit, the acts of the prisoner are consistent with ownership of the whiskey at the time of sale, notwithstanding he may have had it sent from another State; and the evidence is sufficient to sustain a conviction of the offense charged. The Federal statute known as the Webb-Kenyon Act has no application.

3. **Trials—Evidence Excluded—Admissions—Harmless Error.**

The exclusion of testimony concerning matters admitted upon the trial to be true, if error, is harmless.

4. **Intoxicating Liquors—Indictment—Various Sales—Elect Between—Evidence.**

Where the warrant for the unlawful sale of intoxicating liquors charges several separate sales at various times, the defendant's motion that the State elect between the evidence of the different sales will be denied.

CLARK, C. J., dissenting in part, but concurring in result.

APPEAL by defendant from *Devin, J.*, at January Term, 1913, (310) of ROCKINGHAM.

The defendant was convicted upon the charge of unlawfully selling spirituous liquors to O. C. Sharp, who was the only witness for the State, and testified as follows: That he knew Jeff Cardwell, and that he lives in Reidsville. That he had a transaction with Jeff Cardwell relative to whiskey. That he went to him and asked him if he would get him a gallon of whiskey. He said he would, and witness told him the kind he wanted, and said he wanted Turkey Mountain Corn, and gave him the price of the whiskey, $2.25. He got the whiskey through the Southern Express Company's office six or seven hours thereafter.

On cross-examination, the witness O. C. Sharp said he really did not know the date, but it was some time before Christmas, 1913. This $2.25 was the list price of the liquor house. That was what the liquor sold for. He had a catalogue of the prices of the different brands. This was the list price of this liquor; $2.25 is the catalogue price of Turkey Mountain Corn.

Redirect examination: Witness said that he had not obtained any liquor from the defendant at all; had given to him money before that time two or three times, and received liquor. On these occasions he paid him the same amount of money, and got the same kind and
(311) amount of liquor, but did not remember exactly the first time he went to him, but to the best of his knowledge he told defendant that he wanted a gallon of whiskey and asked him if he would get it for him, and he said he would. That he got the whiskey through the Southern Express Company. When he received the first gallon he knew the price of Turkey Mountain Corn. That he thinks he got this information as to the price of the whiskey at that time from some one who came in his store and left a catalogue there. That he didn't get his first information as to the price of Turkey Mountain Corn from a booklet that came in the first package; a booklet had come in every package, but he had heard the price before. But he knew after the first package came because a booklet was in it. This whiskey gotten for him came through the Southern Express Company on every occasion, and he paid the defendant the list price every time.

O. C. Sharp, being recalled, said that he did not know of his own knowledge where the liquor came from, but it was on all occasions put up in a carton with an express label on it.

It was admitted that the books of the Southern Express Company would show that the other liquors testified to as received by the State's witness, O. C. Sharp, came by the Southern Express Company from Danville, in the State of Virginia.

At the conclusion of this evidence the court instructed the jury that if they believed the evidence beyond a reasonable doubt, that they would find the defendant guilty. To which charge the defendant excepted.

There was a verdict of guilty, and from the judgment pronounced thereon the defendant appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

C. O. McMichael and P. W. Glidewell for defendant.

ALLEN, J. The defendant is charged in the indictment with unlawfully selling intoxicating liquors to O. C. Sharp, and as he cannot be

indicted for one offense and tried for another, we are not permitted to inquire whether he is guilty under Revisal, sec. 3534, which, as said in *S. v. Burchfield,* 149 N. C., 540, "was intended to prevent (312) the purchase by one person from an illicit dealer," nor under Revisal, sec. 3527a, for soliciting orders for intoxicating liquors, nor under the Federal Penal Code.

If it could be reasonably inferred from the evidence that the defendant ordered the whiskey he is charged with selling, from a liquor house in Virginia, at the request of Sharp and solely for his accommodation, we would order a new trial, as such a transaction is not illegal under the State law in the county of Rockingham (*S. v. Whisnant,* 149 N. C., 515; *S. v. Allen,* 161 N. C., 226), and the charge excludes from the jury the consideration of this view; but this does not appear.

There is some evidence that the whiskey came by express from Virginia, but none that the defendant ordered it, or that it came from any one except himself, and nothing inconsistent with absolute ownership by the defendant.

So far as appears from the record, the defendant owned the whiskey, which was either in this State or in Virginia, and made the contract of sale, received the money, and through the Express Company delivered the whiskey in this State, which would constitute an illegal sale. *Pfeifer v. Israel,* 161 N. C., 409.

He does not purport to act as agent for a house in Virginia nor for Sharp, and throughout the transaction deals with the whiskey as his own, and it would require a strained and highly technical construction of the evidence to reach the conclusion that the defendant ordered the whiskey from a liquor house for the accommodation of the witness, particularly so when the defendant had it in his power to put the question beyond doubt.

The Webb-Kenyon Act is not remotely involved in this case, and we therefore refrain from discussing it.

The validity and construction of that act was argued at this term in *Kistler v. R. R.,* in which, in addition to very able briefs on the legal questions involved, statistics are collected as to the growth of the sentiment in behalf of prohibition, which cannot aid us in determining whether Cardwell sold liquor to Sharp.

If there was any error in excluding the evidence offered by the (313) defendant, that the label on the package showed that it came from Danville, it was cured by the admission made by the State.

There was no error in denying the motion to compel the State to elect between the evidence of the different sales. *S. v. Freeman,* 162 N. C., 596.

No error.

CLARK, C. J., concurs in the result and in the opinion proper, but not in the *obiter* that if the liquor had been shipped in from Danville, Va., the defendant could not have been convicted, citing *S. v. Whisnant,* 149 N. C., 515; *S. v. Allen,* 161 N. C., 226, for the reason that those cases were written before the passage of the Webb-Kenyon law, which was enacted for the very purpose of taking away the defense, on which those decisions were based, that interstate shipments of liquor were protected from the enforcement of a State statute.

Revisal, 2080, makes the place of delivery of intoxicating liquors the place of sale. This act was sustained in *S. v. Patterson,* 134 N. C., 612, which has been repeatedly cited since with approval. But in *S. v. Whisnant* and *S. v. Allen, supra,* it was held that where the liquor had been shipped in from another State the decision in *S. v. Patterson, supra,* and Revisal, 2080, would not apply. It was to cure this defect that the Webb-Kenyon law was passed, which is entitled "An act divesting intoxicating liquors of their interstate character in certain cases." This act provides that the shipment of intoxicating liquors into any State or territory in which said spirituous or intoxicating liquor "is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, territory, or district of the United States, is hereby prohibited."

The shipment of intoxicating liquors from another State into this State being thus deprived by act of Congress of its interstate character, it follows that when the liquor, if it came from Danville, Va., reached Reidsville, our laws applied to it as fully in every respect as if it (314) had been shipped in from another point in this State, and the decision in *S. v. Patterson* would fully apply. The Wilson act had provided that when whiskey was shipped into a State or a district in which the sale of intoxicating liquors was forbidden, that it should be "subject to the operation and effect of the laws of such State or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or territory." The United States Supreme Court, however, in *Rhodes v. Iowa,* 170 U. S., 412, and in *Wilkerson v. Rahrer,* 140 U. S., 100, construed the word "arrival" in the Wilson act to mean the actual delivery of the liquor to the consignee, and hence that it was exempt till then from being subject to the State law forbidding the sale of intoxicating liquors.

In this latter case, however, *Chief Justice Fuller,* speaking for the Court, says: "No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed

by a rule which *divests* them of that character at an earlier period of time than would otherwise be the case, it is not within its competency so to do." Upon this hint, Congress acted by passing the Webb-Kenyon law, which does so divest intoxicating liquors of their interstate character at the earliest period of time, that is, upon their delivery to the carrier.

In the same case *Chief Justice Fuller* further says: "Congress did not use terms of permission to the States to act, but simply removed an impediment to the enforcement of State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part." Congress in the Webb-Kenyon law acted upon this hint also and provided for the application of that statute to intoxicating liquor "which is intended by any one interested therein to be received, possessed, sold, *or in any manner used,* either in the original package *or otherwise,* in violation of any law of such State."

It therefore follows, both by the letter and the spirit of the Webb-Kenyon law, that the shipment of intoxicating liquors from another State to be "in any manner used, either in the original package or otherwise, in violation of any law" of this State, is prohibited, (315) and such articles are not, therefore, articles of interstate commerce, and cannot be protected in any manner from the enforcement of the State law as to their use in any manner. Such intoxicating liquors once in this State in any form, whether in the original package or not, and before, as well as after, the delivery to the consignee, are "subject to the State law to the same extent and in the same manner as though such liquors had been produced in this State." This is the language of the Wilson act, which is still in force, and the Webb-Kenyon law struck out the limitation which had been put upon the word "arrival" by the decision in the *Rahrer* and *Rhodes cases* above cited by divesting such liquor of its interstate protection from its receipt by the carrier. Not being a subject of interstate commerce, it cannot receive immunity on that account in any respect. The immunity until delivery to the consignee was stricken out by the Webb-Kenyon law, and this was the object expressed in the title of the act and in its text, and was fully understood to be such, as is shown by the debates in Congress and by the veto message of President Taft, which was promptly overruled by a two-thirds vote in both houses of a Congress in which his party friends were in the majority.

Indeed, if the act was not passed for the purpose of putting in force the provision of the Wilson bill, which had placed intoxicating liquors shipped in from another State on the same footing as if they had been produced in this State, by striking out *ab initio* the protection of inter-

state commerce, then there was no purpose in its enactment, and the several hundred lawyers in Congress who voted for it or against it, and the President vetoing it, were ignorant of what they were doing.

Revisal, 3534, provides: "If any person shall unlawfully procure and deliver any spirituous or malt liquors to another, he shall be deemed and held in law to be the agent of the person selling said spirituous and malt liquors, and shall be guilty of a misdemeanor and punished in the discretion of the court." This statute has been fully considered and sustained in an able opinion by *Walker, J.*, 149 N. C., 537, which has been repeatedly cited since as authority. If, therefore, Cardwell had (316) been acting as agent of the seller in Danville, this statute made him a co-principal and indictable for the sale, according to the indictment against him.

Indeed, independent of the Webb-Kenyon law, if the defendant either for himself or as agent for another solicited the order for the liquor, he was indictable for such sale, under this bill, even though the principal was in another State. Pell's Revisal, 3527a. This act was held valid when the principal was in another State, in *Delamater v. S. Dakota,* 205 U. S., 93. He would also have been indictable in the Federal court under U. S. Penal Code, 239, which makes it criminal if one "in any manner act as agent for the buyer or (nonresident) seller." The fact that he is indictable under the Federal statute for such act does not make him any less guilty of a violation of the State law. A man can be indicted for retailing both under the Federal statute and under the State statute. The same is true for acting as agent in procuring liquors from another State to be shipped into this State, for the offense against the State law is not merged in the offense against the Federal law. If the liquor had been shipped c. o. d., the Express Company would have been liable to a fine of $5,000 under the same section. These statutes are in sympathy with the purpose of the Webb-Kenyon law, which was enacted to enable a State which has adopted prohibition of intoxicating liquors as its public policy to enforce such policy against being nullified by shipments of liquor from other States.

By virtue of the Webb-Kenyon law, whether the intoxicating liquor was brought from Virginia or produced here, the transaction stands upon the same footing, for it has been *"divested* of its interstate character." Under Revisal, 3534, the defendant is made the agent of the seller, if he was not selling himself, and as a coprincipal is indictable for the sale. This was held in *S. v. Burchfield,* 149 N. C., 537, and cases cited.

Reidsville, the place of its delivery, is the place of sale. Revisal, 2080; *Hoke, J.,* in *S. v. Herring,* 145 N. C., 420, and other cases affirm-

ing *S. v. Patterson,* 134 N. C., 612. To same effect, *Brown, J.,* in *S. v. Johnson,* 139 N. C., 641, which has been often cited and approved.

We have held that a contract made for the sale of liquor in (317) this State is illegal, even though it was contemplated by the party that the liquor should be shipped from another State. *Vinegar Co. v. Hawn,* 149 N. C., 535; *Pfeiffer v. Israel,* 161 N. C., 409. We have also held at this term that when the contract was made in another State for liquor to be shipped into this State for sale here, the contract was illegal and the plaintiff could not collect the purchase money. *Bluthenthal v. Kennedy,* 165 N. C., 372.

It has been contended that Congress could not regulate an article of interstate commerce by prohibiting its shipment altogether in certain cases. But the contrary has been uniformly held, and as to many articles. In *Champion v. Ames,* 188 U. S., 221, *Justice Harlan* said that lottery tickets had always been legitimate subjects of commerce, but that Congress possessed the power under the commerce clause to prohibit altogether their transportation between State and State. The opinion is clear and able, and its reasoning applies as fully to intoxicating liquors as to lottery tickets. What subjects shall thus be prohibited as articles of interstate commerce is a matter resting in the discretion of the lawmaking department of the Government, and is not subject to review by the courts.

In *Hoke v. U. S.,* 227 U. S., 308, the Court held that the power of Congress over interstate commerce is direct, without limitations, and far-reaching, and includes the transportation of persons as well as property, and therefore held valid the statute of 25 June, 1910, prohibiting the white slave traffic. In that case it was held that the regulative power of Congress extends to the absolute prohibition or transportation in transit both in interstate and foreign commerce, citing the lottery ticket case, 188 U.S. 221, above referred to; the *Pure Food Case, Egg Co. v. U. S.,* 220 U. S., 45, and other cases. This decision has been reaffirmed by that Court in *Wilson v. U. S.,* opinion by *Justice Pitney,* 24 Feb., 1914, U. S. Adv. Ops., 15 March, 1914, 348.

These opinions are conclusive of the power of Congress to regulate interstate shipments of intoxicating liquor into prohibition territory by prohibiting them altogether.

The power of congress to decide what are subjects of interstate (318) commerce, like its power to exclude articles from importation into this country in foreign commerce, has never been challenged. Besides the instances above cited as to lottery tickets, the pure food law, the white slave traffic, there are other instances, among them the Lacey act adopted in March, 1904, which forbids the transportation in interstate commerce

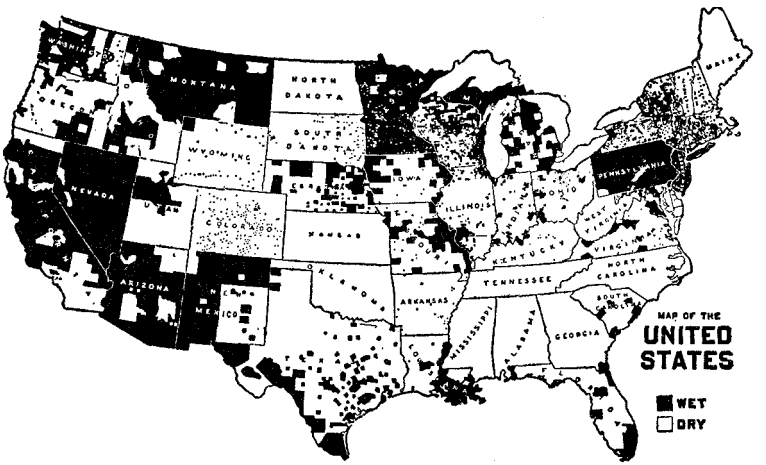
of game killed in violation of a State law. There are other instances and there are bills pending to exclude from interstate commerce articles made by convicts or by children under a certain age, and the like. Indeed, in *Penn. v. Bridge Co.,* 59 U. S., 421, where the United States Supreme Court had held in a former decision that a certain bridge over a navigable stream was an obstruction to commerce, Congress at once enacted a statute that this particular bridge was not an obstruction to commerce, and the Court held that Congress had the power to so declare.

Three State Supreme Courts have already upheld the Webb-Kenyon law as construed in this concurring opinion, *i.e.,* the Supreme Court of Delaware in *S. v. Grier,* 88 Atlantic, 20 November, 1913; *S. v. Express Co.,* decided by the Supreme Court of Iowa, January, 1914; and a decision made this month by the Supreme Court of Kansas. To the same effect is an able opinion of *Bean, J.,* in *U. S. v. R. R.,* in the United States District Court of Oregon, decided in January, 1914.

Indeed, Congress has taken every successive step that has been found necessary to enable prohibition States to enforce their public policies as to intoxicating liquors. For half a century, up to 1888, the courts recognized the jurisdiction of the States over interstate shipments of liquor from the time they entered the State to be the same as over domestic liquors. This was questioned in 1888 for the first time, in *Bowman v. Northwestern,* 125 U. S., 500 (by a vote of 5 judges against 4), and in *Leisy v. Hardin,* 135 U. S., 124 (3 judges dissenting), the Court basing its decision on the ground that as Congress had enacted no law restricting or limiting interstate commerce, such commerce should be free and untrammeled. The Wilson act was then passed to place liquors shipped into another State on arrival therein on the same footing in every re-
(319) spect and "as fully subject to its laws as if produced therein." The Court in *Rhodes v. Iowa,* 170 U. S., 412, held that "on arrival" meant delivery to the consignee. This deprived the States of jurisdiction up to the time of such delivery. Thereupon the Webb-Kenyon law was enacted to remove that restriction.

An act should always be construed according to its intent and with a view to remedy the evil. Any act that is not passed surreptitiously or by improper influences or inadvertence must be taken as expressing the will of the electorate. In considering what is the evil to be remedied and the will of the constituents of Congress, it will be appropriate to consider the present status and extent of the State laws prohibiting the sale of intoxicating liquors.

Absolute prohibition of the sale of intoxicating liquors as a beverage now prevails over three-fourths of the area of the United States, and as to 50 millions or 55 per cent of its population, as follows:



State-wide prohibition has been adopted in 9 States, Maine, Kansas, North Dakota, Georgia, North Carolina, Oklahoma, Mississippi Tennessee, and West Virginia, with an aggregate population of 14,685,961.

In 31 States, Local Option either by election or special acts of the Legislature has become operative as to 26,446,810 people of their population. These States are Alabama, Arizona, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, (320) Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New York, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin. In Illinois, by the aid of the votes of the newly enfranchised women, 22 more counties have just been added to the above "dry" area.

In 3 States, Arkansas, Iowa, and South Dakota, the Legislatures have enacted State-wide Prohibition except as to localities which by a majority vote may exempt themselves. In these three States there are 3,693,201 people living in Prohibition territory.

In Wyoming and New Mexico the Legislatures have prohibited the sale of liquors except in certain incorporated municipalities. In still other States the Legislatures have arbitrarily placed certain areas under prohibition territory, thus adding to the aggregate population protected.

The United States Government has prohibited the sale of liquor among the Indians and, in certain portions of the territories, in military forts and reservations, in the navy, in the national Capitol, in "soldiers' homes," and in other specified areas under Federal control. As a result, as we have said, more than half the population of the United States now

live under Prohibition and nearly three-fourths of our area is prohibition territory. The average addition per year in the last twenty years to dry territory has been 1,500,000 people per year.

Besides the States enumerated above, the Legislatures in the following States have submitted a State-wide Prohibition law to be voted on at the next general election: Virginia, Oregon, Idaho, Colorado, Washington, Michigan, and California. Each of these now has local option. The growth of the sentiment in our own State is shown by the fact that on a Referendum in 1881 Prohibition was defeated by more than 100,000 majority and in 1908 it was adopted by 44,000.

From the above it will be seen that the Prohibition sentiment may well be said to be predominant in more than the three-fourths of the States necessary to ratify a Nation-wide constitutional amendment, and (321) that it is as yet without foothold to any considerable extent in only three States, *i.e.*, Pennsylvania, New Jersey, and Nevada.

As the prohibition of the sale of intoxicating liquors is essentially a *State* matter in execution of the police power which is reserved to every State, Congress has seen the justice of providing against it being interfered with under the guise of interstate commerce. As the United States Supreme Court well said as to lotteries, 188 U. S., 321: "It would not permit the declared policies of the States which sought to protect their people against the mischiefs of the lottery business to be overthrown or disregarded by the agency of interstate commerce." This applies with equal force to the prohibition of the sale of intoxicating liquors. It has not been the intention of Congress to permit its control of interstate commerce to impair the police power of the States, but, on the contrary, to use it as an aid to the States in enforcing their home rule regulations.

Cited: S. v. R. R., 169 N.C. 300.

STATE v. JIM McCLURE.

(Filed 22 April, 1914.)

1. Homicide—Deadly Weapon—Matters in Mitigation—Trials—Charge—State's Evidence—Appeal and Error—Harmless Error.

Where the killing of a human being with a deadly weapon has been shown, and upon the trial of the accused for the homicide the judge has correctly charged that the burden was upon the prisoner to show matters in mitigation to reduce the degree of the crime from murder in the second degree, but the State must show premeditation and deliberation beyond a reasonable doubt for conviction in the first degree; and, also, that the pris-

oner could rely upon the State's evidence, as well as his own, to show such matters in mitigation, it is not held for error that in his charge the court further stated they should find the less offense, "if the defendant has shown the matters in mitigation by his evidence," for taking the charge as a whole it does not restrict such evidence, in the consideration of the jury, to that offered by the prisoner alone.

2. Homicide—Murder in First Degree—Premeditation—"Fixed Purpose"—Trials—Instructions.

Upon a trial for homicide, the burden of proof is upon the State to show premeditation and deliberation beyond a reasonable doubt to convict of murder in the first degree, and though a "fixed purpose" to kill may be formed under circumstances of mitigation or excuse, and may not alone be sufficient, yet when the charge of the judge has correctly stated the law in regard to premeditation and deliberation, it will not be held for reversible error that he also told the jury that they must find that the prisoner committed the act with a "fixed purpose," for the charge will be construed as a whole.

3. Criminal Law—Assault on Officer—Arrest Without Warrant.

It is not required that a lawful officer should have a warrant in making an arrest for an assault upon him, for such is not personal to the officer, but an offense against the public; and under the circumstances of this case it is held that he had not lost the right to arrest the prisoner because the latter had walked away some 50 or 75 yards after making the assault.

4. Same—Homicide—Sheriffs—Deadly Weapon—Murder in First Degree—Premeditation—Evidence—Trials.

The prisoner was engaged with others in committing a misdemeanor, and, anticipating arrest for the offense, thereafter procured a shotgun with ammunition, and while going upon a highway to his home was met by a deputy sheriff and others whom the sheriff had deputized for the purpose of making the arrest. The officer had no warrant for the arrest of prisoner for the misdemeanor, and upon the latter's declaration that no one should arrest him therefor, permitted him to walk about 50 or 75 yards down the road, and then proposed to arrest him, for assault made on him with the gun. The sheriff then aimed his pistol at the prisoner, several times called on him to halt, informed him of the offense for which he intended to arrest him, whereupon the prisoner snapped his gun at him, the sheriff shot at the prisoner, the prisoner shot the sheriff and inflicted the deadly wound. *Held*, (1) While an officer is not ordinarily permitted to use a firearm in making an arrest for a misdemeanor, the officer was justified in doing so under the circumstances, the prisoner's misdemeanor in making the assault upon the officer being in the officer's presence, and the use of the pistol found by the jury not to be force excessive of that required; (2) The evidence of premeditation and deliberation was sufficient to sustain a conviction of murder in the first degree; (3) The charge of the court was proper.

5. Homicide—Trials—Murder in First Degree—Instructions—Appeal and Error—Harmless Error.

The trial judge having explained to the jury the principles of law applicable upon the evidence in a trial for homicide, a portion of the charge,

that if the prisoner killed the deceased with premeditation and deliberation, as theretofore explained to them, and this is shown beyond a reasonable doubt, the prisoner would be guilty of murder in the first degree, is not held for error.

(323) APPEAL by defendant from *Shaw, J.*, at September Term, 1913, of GUILFORD.

This is an indictment for murder. The prisoner, a negro boy, was found guilty of the murder in the first degree of R. L. Bain, a deputy sheriff, and was sentenced to death, and appealed.

The record shows evidence tending to establish the following facts:

Pomona Station is about 3 miles west of Greensboro, and Pomona Cotton Mill is about one-half mile west of Pomona Station, both being on railroad and public road. Terra Cotta is about a quarter of a mile northwest of Pomona Mill. A street-car line runs out west from Greensboro to a little car shed on a cross-road running north from Pomona Mill. This shed is located at end of car line in open field, several hundred yards north of the Pomona Mill, and about one-half mile east of Terra Cotta. From it the cross-road runs south across the public road and railroad to Pomona Mill, and a path runs west down the bottom to Terra Cotta.

On Saturday afternoon, 2 August, 1913, a negro boy, Ernest Madkins, with a bunch of bananas, was going out from Greensboro to Terra Cotta on a street car, on which were several of the Pomona Mill boys, State's witnesses. In course of trip Madkins dropped a banana, and one of the mill boys grabbed it. Madkins said: "Mister, please give me my banana." The mill boy refused, and said he was going to keep it. Later on the trip the negro again asked for the banana, with the same result. On getting off the car at end of line, Madkins saw prisoner standing there with a cane and told him of the banana incident. Thereupon the negroes began to demand the banana, and still the boys refused to give it up. Then the white boys and negroes began throwing some

(324) rocks, and during this the deceased came running down the hill across the field from Pomona Mill, calling "Halt!" The negroes started to run down the bottom toward Terra Cotta. The deceased then shot. Running on, he caught Madkins, but prisoner ran on off. Deceased and the mill boys, who had joined with him, took Madkins on back to Company's Store, across railroad at mill. Nothing was known of prisoner until half an hour or more later, when he and another negro were seen passing down the public road from Terra Cotta toward Pomona. In the meantime the prisoner had procured a gun and had bought some shells, saying he was going to shoot birds. When seen, they had passed the cross-road that turns off to the mill and store where deceased

and mill boys were. The negroes, prisoner having a shotgun, went on down the road several hundred yards, met some other negroes in the road, talked a while, and then turned and started back up the road toward Terra Cotta. Meanwhile deceased had deputized men, giving Wright a pistol and keeping his own, and started out to meet prisoner and "arrest him." The men, led by deceased and Wright, and without a warrant, went out cross-road north across railroad to public road, and turning down east, went down it till they met the prisoner coming up road and going towards his home at Terra Cotta. Deceased walked up within 3 or 4 feet of the prisoner, and asked him if he was at car line in the riot. He denied it, refused to be arrested, asked who the officer was, drew his gun on deceased, stepped back from crowd, threatening to shoot, and refusing to be arrested. He then took down his gun and walked straight up the road toward home without looking back. Deceased and those with him stood still in the road till prisoner had gone from 30 to 40 yards away, and then deceased suggested arresting him for drawing his gun. The deceased and his party then advanced behind prisoner for some distance, gaining on him. Deceased covered him with his pistol and called "Halt!" from three to six times, all the time walking on behind prisoner, who did not even look around. Just as prisoner was nearly past the cross-road leading into mill, and was going on toward home and away from the mill and the crowd, deceased said: "I have told you my last time." Deceased had prisoner covered when he said this. Prisoner then looked back for first time; then, as he (325) raised his gun, he snapped it; the deceased shot at prisoner; prisoner shot once, killing deceased; turned and ran as hard as he could, with crowd chasing, firing ten to twenty-five or thirty shots after him.

Holly A. McNairy, introduced by the State, testified as follows: "I am a merchant at Terra Cotta and know the prisoner. I remember the date the deceased was killed, and I saw the prisoner on that afternoon before the deceased was killed, probably between one-half and three-quarters of an hour before. It was about 6 o'clock, something near 6 o'clock, when he came in the store and wanted 10 cents worth of shells. I sold them to him; he looked like he had been running; was hot. I asked him if he was going to shoot anybody, and he said no, he was going to shoot some birds. He had a gun with him, a double-barrel gun, I think. I didn't see him after he went out of the store."

N. J. Wright testified for the State as follows: "I live at Pomona Mills and remember the occasion on which the deceased was shot. I was with him at the time, but was not on the street car that afternoon. I was on my way to the mill and walked up to where the deceased and several others were standing at the Company Store. The deceased had

a negro under arrest and asked me to go with him up the road where those negroes were. I told him I would go, so I walked up the road to meet them. The prisoner is the only one I know. When the prisoner had met the other darkies down the road, they stopped and talked a little bit, and the prisoner and two others came down the road. The prisoner was carrying his gun. When we met the negroes, the deceased said: 'Were you down at the depot, at the car shed in that riot?' The prisoner said: 'No, by God, I wasn't.' He then asked what we were going to do about it. After that he stepped back and cocked his gun and asked which one of us was the God damned officer that was shooting at the car shed. The deceased then said: 'I am the officer; here is my badge.' The prisoner then drew his gun and said: 'You are the damned man I want.' He didn't put his gun to his shoulder. It was pointed toward the deceased. The deceased said he didn't want any trouble at all, but just wanted to get the straight of it; wanted to quiet it (326) down. The prisoner then asked what we were going to do about it, turned around, let his gun down, didn't let the hammers down, and started on up the road. Repeated several times that there was no God damned son of a bitch in the county who could arrest him; that he would kill any officer that undertook it. He went on up the road, one darkey with him, something like 50 or 75 yards. As he was going up the road, the deceased said to me: 'Let's arrest that negro for drawing that gun.' The deceased then told me to come with him, and we walked on up the road, gaining on the prisoner. The deceased hallooed 'Halt!' three or four times. Then the deceased said: 'I have told you my last time to halt.' The prisoner turned around then with his gun and said: 'I can shoot as damned hard as you can,' and snapped his gun at the deceased. The deceased fired at him, and then the prisoner shot and killed the deceased. The prisoner then turned and started to run."

There was other evidence to the same effect, introduced by the State.

The prisoner introduced no evidence.

The only exceptions relied on are to the charge of his Honor and to the refusal to give certain special instructions.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

S. Clay Williams for defendant.

ALLEN, J. We have examined the charge of his Honor with great care, and find no error in the charge given, or in the refusal of the special instructions, nor do we concur in the position that the evidence and contentions of the State were unduly emphasized.

The criticism of the charge that "The burden would be upon the defendant to show facts and circumstances in mitigation," and, "If the defendant, as heretofore explained by the court, has offered evidence which mitigates the offense," is supported by *S. v. Castle,* 133 N. C., 769, upon the ground that such a charge excludes the idea that the prisoner may rely on evidence offered by the State in mitigation; but the court did not let the matter rest here, and, on the contrary, distinctly charged the jury that in mitigating or excusing the (327) offense the prisoner "has a right to rely upon evidence offered by the State." His Honor charged the jury that they must be satisfied beyond a reasonable doubt that the killing was with premeditation and deliberation before they could convict of murder in the first degree.

He then further charged that, "Deliberation means to think about, to revolve over in one's mind; and if a person thinks about the performance of an act and determines in his mind to do that act, he had deliberated upon the act, gentlemen. Premeditation means to think beforehand, think over a matter beforehand; and where a person forms a purpose to kill another, and weighs this purpose in his mind long enough to form a fixed design to kill at a subsequent time, no matter how soon or how late, and pursuant to said fixed design kills said person, this would be a killing with premeditation and deliberation, and would be murder in the first degree. And the court charges you if you should find beyond a reasonable doubt, gentlemen, that prior to the time he killed the deceased he formed the fixed purpose in his mind to kill him, and that pursuant to that purpose he did kill the deceased because of the purpose in his mind, and not because of any legal provocation that was given by the deceased, then the court charges you that the prisoner would be guilty of murder in the first degree, and it would be your duty to so find."

The prisoner excepts to the latter part of the charge, contending that "fixed design" is not the equivalent of premeditation and deliberation, and that the prisoner could be convicted, under the instruction, of murder in the first degree, without premeditation and deliberation.

His Honor did not charge that the prisoner could be convicted of murder in the first degree because of the existence of a fixed design to kill, although there is authority justifying the charge (*S. v. Dowden,* 118 N. C., 1145; *S. v. Barrett,* 142 N. C., 565; *S. v. Jones,* 145 N. C., 466); but he was careful to tell the jury that they must find premeditation and deliberation; he explained accurately the meaning of these terms, and then said the killing must have been pursuant to the fixed purpose, and not on account of any legal provocation.

(328) The charge, considered as a whole, excludes the idea that the prisoner could be convicted because of the fixed design, although formed under circumstances that would mitigate or excuse.

In the *Dowden case* the Court says: "The word 'premeditate' means to think beforehand—as where a man thinks about the commission of an act and concludes or determines in his mind to commit the act; he has thus premeditated the commission of the act. The law does not lay down any rule as to the time which must elapse between the moment when a person premeditates or comes to the determination in his own mind to kill another person, and the moment when he does the killing, as a test. It is not a question of time. It is merely a question of whether the accused formed in his own mind the determination to kill the deceased, and then at some subsequent period, either immediate or remote, does carry his previously formed determination into effect by killing the deceased." And in the *Barrett case:* "The rule laid down in this State is, that where the prisoner weighs the purpose to kill long enough to form a fixed design, and then puts it into execution, it is murder in the first degree."

In the section from Wharton on Homicide, p. 161, relied on by the prisoner, while it is said that the formed design is not the equivalent of premeditation and deliberation, since the design may have been formed under circumstances of justification or excuse, the author also says: "That the homicide was determined upon beforehand, and purposely committed after reflection, with malice, however, is the equivalent of the willfulness, deliberation, malice, and premeditation required by the statute," which is in accord with the charge given.

The jurors were fully instructed as to the rights and duties of the prisoner, and of the deceased as an officer, at the time of the killing. They were told that the deceased had no right to arrest on account of the affray at the car shed, because that was a past transaction, and he had no warrant; that if he was attempting to arrest for that affray, the prisoner had the right "to use whatever reasonable force was necessary to prevent the arrest," and if reasonably necessary for that purpose to present his gun, he had the right to do so, and he would not be (329) guilty of an assault in so doing; that if not guilty of an assault, the deceased had no right to point a pistol at him, and that if the deceased was killed under these circumstances when necessary to prevent an arrest, the prisoner would be excused, and if not necessary, that his crime would be reduced to manslaughter.

He further charged the jury: "If you find under these circumstances as explained to you, that Mr. Bain had not attempted to arrest him there, and that the defendant drew his gun upon him, and that Mr. Bain

was an acting officer, and that he declared his purpose then to arrest him for the assault upon him, then the court charges you that he had a right to arrest him, and had the right to do it even for an assault, and even though the assault may have been committed upon Mr. Bain; that would be a breach of the peace, a crime, and though it may have personally affected Mr. Bain, it affected the public at large as well, and he would have a right, for a breach of the peace of that kind, to arrest him. And if you further find from the evidence that he made this announcement in the presence of the defendant, near enough for him, the defendant, to hear, that he was going to arrest him for that (referring to the drawing of the gun), and then that he ordered him to halt, then the court charges you that it was the duty of the defendant to stop, not to go on. If he ordered him to halt again, it was still his duty to stop and not to go on, and if you further find from the evidence that he ordered him to halt a third or fourth time, and told him this was the last time he was going to order him to halt, and he didn't have his pistol drawn on him at all—simply had it in his hand, or maybe not drawn out from his pocket—then the court instructs you that if the prisoner turned and shot him under those circumstances, that he would be at least guilty of murder in the second degree."

The last two paragraphs are excepted to principally upon the grounds—

(1) That the deceased had no right to arrest for an assault upon himself.

(2) That if he had the right to arrest, he had no right to use a pistol, because the offense was a misdemeanor.

(3) That if he had the right to arrest, he could only do so (330) immediately upon the assault being committed, and not after he had permitted the prisoner to go 50 or 75 yards.

The assault upon the deceased was not an offense against the individual, but one against the public, and for this reason the authorities generally support the position that it is the right of a peace officer to arrest, without warrant, one who assaults him (3 Cyc., 880; *Montgomery v. Sutton,* 67 Iowa, 497; *Leddy v. Crossman,* 108 Mass., 237), and the officer did not lose the right in this case because the prisoner had walked off, according to the evidence of one witness, 30 or 40 feet, and to that of another, 50 or 75 yards.

The second position presents greater difficulty, because it is generally held that an officer cannot kill to affect an arrest or to prevent the escape of one charged with a misdemeanor. *S. v. Phillips,* 67 L. R. A., 200, note, where the authorities are collected. It was well said in *Thomas v. Kinkead,* 29 A. S. R., 73, that as the lawmaking power itself

could not inflict the death penalty as a punishment for a misdemeanor, "it would ill become the 'majesty' of the law to sacrifice a human life to avoid a failure of justice in the case of a petty offender who is often brought into court without arrest and dismissed with a nominal fine."

It must be noted, however, that the prisoner was armed with a gun, which he had presented a few minutes before, and that he had declared his purpose to kill any one who tried to arrest him; and further, that the deceased did not shoot in the first instance. He had the pistol presented, it is true, but if he had the right to arrest, this was not only necessary to enable him to effect the arrest, but also to prevent the use of the gun.

In *S. v. Garrett,* 60 N. C., 149, which was an indictment against an officer for killing one charged with a misdemeanor, whom he was trying to arrest, the Court says: "His Honor ought to have instructed the jury that, as the deceased had put himself in resistance to the officer and his guard, they were not only authorized, but were bound, to use such a degree of force as was necessary in order to execute the warrants, and were entitled to a verdict of acquittal on the ground that the homicide was justifiable, if no unnecessary violence had been used, unless
(331) from the fact that the prisoner had started to cross the fence the jury should be satisfied that he had abandoned his deadly purpose of resisting to the death the execution of the law, and was attempting to make his escape by moving off; in which event there was no longer any necessity for shooting; and the officer, or some portion of his men, should have run after him and captured him in that way."

The case of *S. v. Horner,* 139 N. C., 607, is in many respects like the one before us, and *S. v. Durham,* 141 N. C., 744, is almost directly in point.

In the *Durham case* the prisoner was arrested upon a warrant charging a misdemeanor, and carried to the office of a justice. He slipped out and began running. He looked back and saw the officer pursuing him, about 20 yards distant, with a pistol in his hand, which was pointed at him. He then drew his pistol, but did not present it. The officer then shot at the prisoner, and the prisoner returned the fire. The officer shot a second time, grazing the arm of the prisoner, when he turned and shot and killed the officer. A conviction of murder in the second degree was sustained, there being no evidence of premeditation and deliberation, and the Court said: "The officer is not excused if he, with undue violence, menaces the life of the defendant when he attempts to arrest a person for a misdemeanor. The officer may be convicted and punished. But his crime will not excuse or condone the crime of the defendant in making open resistance to the process of the State. We are aware that

in some jurisdictions it is held otherwise, and that while an officer, in attempting to arrest for a misdemeanor, dangerously menaces the life of the accused, the latter may defend himself to the extent of taking the officer's life, and the plea of self-defense is open to him. But in this State we have a statute (Laws 1889, ch. 51) which enacts that 'any person who willfully and unlawfully resists, delays, or obstructs a public officer in discharging or attempting to discharge a duty of his office shall be guilty of a misdemeanor.' At the time he killed the deceased the defendant was engaged in an unlawful act, not only *malum in se* (being in armed resistance to the process of the State), but an act directly connected with, and which finally resulted in, the death of the officer; for it is plain that had the defendant himself not (332) resisted the law, but submitted to arrest, there would have been no homicide by any one."

We are, therefore, of opinion there is no error in the instructions complained of.

We do not agree with counsel for the prisoner that his Honor expressed an opinion upon the fact when he said, "And if he killed him with deliberation and premeditation, as heretofore explained to you by the court, and this is shown beyond a reasonable doubt from the evidence, he would be guilty of murder in the first degree."

In view of the whole charge, the jury could not have understood the judge as saying that premeditation and deliberation had been shown, but that the State must show it beyond a reasonable doubt.

The evidence of premeditation and deliberation was sufficient to be submitted to the jury. *S. v. McCormick,* 116 N. C., 1033; *S. v. Daniels,* 164 N. C., 469.

There was evidence that the deceased had tried to arrest the prisoner for the affray at the car shed; that he fled and procured a gun and shells; that immediately before the killing he committed an assault upon the officer, cursed and threatened to kill him.

We have discussed the exceptions chiefly relied on and have considered all that appears in the record, and while there are views of the evidence offered by the State which would have justified a conviction of murder in the second degree or manslaughter, we have no power to revise the findings of the jury, and are constrained to affirm the judgment.

The deceased would not have been killed, nor would the prisoner be now under sentence of death, if the witness for the State had given up the banana which he had wrongfully taken from the boy Madkins, when politely requested to do so; nor if the deceased had not deputized persons to aid him in arresting the prisoner and followed him, when he had no right to make the arrest for the first affray, having no warrant.

No error.

Cited: *S. v. Benson,* 183 N.C. 798; *S. v. Robinson,* 188 N.C. 785; *S. v. Steele,* 190 N.C. 511; *S. v. Miller,* 197 N.C. 447; *S. v. Evans,* 198 N.C. 84; *S. v. Bittings,* 206 N.C. 803; *S. v. Taylor,* 213 N.C. 523; *S. v. Payne,* 213 N.C. 727, 728, 729; *S. v. Bowser,* 214 N.C. 253; *S. v. Hawkins,* 214 N.C. 334; *S. v. French,* 225 N.C. 283, 284; *S. v. Wise,* 225 N.C. 748.

(333)

STATE v. GRADY LANE.

(Filed 29 April, 1914.)

1. **Trials—Instructions—Evidence—Harmless Error.**

Where in the trial of an action evidence has been erroneously admitted and afterwards withdrawn by the court from the jury with an instruction to them that they must disregard it, this Court will presume that the jury have obeyed the instruction of the court, and that the error has been cured.

2. **Trials—Evidence Admitted—Motion to Withdraw—Objections—Appeal and Error.**

When evidence has been admitted upon the trial of an action without objection from the appellant, his subsequent motion to strike it out is addressed to the discretion of the judge, and there is no appeal from his ruling thereon.

3. **Appeal and Error—Exceptions—Questions and Answer—Objections to Questions.**

Where exception is taken to the ruling out of an answer to a question asked a witness in the trial of a cause, it must in some way be made to appear what the expected answer would have been, so that the lower court, and this Court on appeal, may pass upon its competency or relevancy, or the exception will not be considered.

4. **Homicide—Declarations — Third Persons — Admissions — Evidence — Hearsay.**

The declarations of a third person that he had killed the deceased for whose murder the defendant is being tried, is hearsay, and inadmissible in the defendant's behalf.

5. **Trials—Attorney and Client—Argument—Irrelevant Matter—Courts.**

While counsel in their argument to the jury are usually permitted much latitude, they should confine themselves to relevant matters, and on a trial for murder it was not error for the court to stop the prisoner's counsel, when he was introducing irrelevant matters into his argument calculated to divert the minds of the jurors from the true issue and to prejudice the other side.

6. **Homicide—Deadly Weapon—Malice—Presumptions—Murder.**

Malice is presumed from the killing of the deceased with a gun, a deadly weapon, making the prisoner, on trial for the homicide, guilty, at least, of

murder in the second degree, unless he proves circumstances in excuse or mitigation of the offense to the satisfaction of the jury, the burden of proof being upon him.

7. Homicide—Perpetration of Crime—Presumptions—Murder—Statutes.

A homicide committed in the perpetration of, or in an attempt to perpetrate, a robbery will be deemed murder in the first degree, the jury being governed by the evidence under proper instructions in finding that or a less offense. Revisal, sec. 3271.

8. Trials—Courts—"Reasonable Doubt"—Words and Phrases—Instructions—Evidence.

The trial judge is not restricted to any particular formula in defining "reasonable doubt" to the jury upon a trial for homicide, and his charge in regard to the nature of the circumstantial evidence in this case and how the jury should consider it is held to be free from any error of which the prisoner can complain.

9. Appeal and Error—Trials—Instructions—Requests—Court's Discretion.

An appeal will not lie from the refusal of the trial judge to give requested instructions after the jury had retired to make up their verdict, the action of the judge being solely discretionary under the circumstances.

10. Homicide—Murder—Trials—Confessions—Evidence.

The verdict of the jury convicting the prisoner of murder in the first degree was well supported by the evidence, under correct instructions from the court, and the prisoner's voluntary confession to a fellow prisoner, while in the jail with him, that he had committed the crime deliberately and premeditatedly, is held to be competent evidence against him to prove his guilt as found by the jury.

APPEAL by defendant from *Lane, J.*, at August Term, 1913, of (334) MOORE.

This is an indictment for the murder of George McCain on 28 October, 1912. It was alleged by the State that the prisoner knew that the deceased had a large amount of money on his person, and that he lured him into a swamp, about 300 or 400 yards from the station at Aberdeen on the Seaboard Air Line Railway, for the ostensible purpose of gambling with him, but for the real purpose of robbery. The two were seen entering the swamp about 4:30 or 5 o'clock p. m. on the day of the homicide, and shortly thereafter two reports of a gun were heard, and deceased's body was found that night about 8 o'clock, with a fatal wound in the breast and one in the head, the side of his face having been blown off. The prisoner was seen about 6 o'clock, going in the (335) direction of the home of his father, Joab Lane, where he lived, and tracks of the prisoner were also found leading from the place of the homicide in the direction of that house. The prisoner had promised Julia Jones, who had picked cotton on that day for his father, to return

in the afternoon and weigh the cotton for her, and he did not do so, according to her statement, though he told the officer, Dan McDonald, that he had returned to his home for that purpose. There was evidence tending to show a close resemblance between shells in the prisoner's gun and two empty shells, one found near the body of the deceased and the other at a place in a field where prisoner had shot a rabbit on that day. When the body was found, the pockets of the deceased, where the money was, had been turned inside out, all the money was gone, the playing cards had been torn up, and a receipt and railroad pass with the name of the deceased on it, and a flat pint-bottle containing about a teaspoonful of scuppernong wine, were found near the body, the prisoner having been seen with such a bottle full of wine on the same day, just before the homicide was committed, having marks on it corresponding with those on the bottle that was found near the body. The prisoner made contradictory statements as to his whereabouts that day, and after being arrested, escaped from the officers, fled, and was not recaptured for several days. He made a confession in jail, to one Judson Jackson, that he had killed the deceased, in a manner indicating premeditation and deliberation, and robbed him of the money, $141. He then went down the creek and to his home, where he hid the money under a pile of cotton. The prisoner denied that he had killed the deceased or had made any confession to Jackson. He also introduced evidence to show an alibi and to explain the circumstances, evidence of which was offered by the State. Under the evidence and charge of the court, the jury returned a verdict of guilty of murder in the first degree. Judgment was entered upon the verdict, and the prisoner appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

U. L. Spence, Clegg & Clegg, and J. T. Brittain for defendant.

(336) WALKER, J., after stating the case: This case was very carefully tried in the court below, and the charge of the court is to be commended for its very clear and comprehensive statement of the law as applicable to every phase of the evidence, and for an equally lucid and logical analysis of the evidence itself, so that the issues were presented to the jury fairly and fully for both parties. There was undoubtedly evidence of the prisoner's guilt, and this was explained to the jury in such a way that the prisoner, at least, has no ground for complaint. If there is any error therein—and we do not think there is—it was committed in favor of the prisoner, and not against him. We will consider the exceptions in the order of their statement in the record.

Exception 1. When the court admitted the testimony of Dr. McLeod, that the empty shell was "found at the body," and upon afterwards discovering that the witness was speaking from hearsay, ruled it out, the error, if any, based upon the misapprehension of counsel and the court as to the nature of the testimony, was harmless, for the court distinctly and emphatically excluded it and cautioned the jury not to consider it. *Cowles v. Lovin,* 135 N. C., 488; *Livingston v. Dunlap,* 99 N. C., 268; *Blalock v. Clark,* 137 N. C., 140; *S. v. Keen,* 95 N. C., 646; and more especially *S. v. Flemming,* 130 N. C., 688; *S. v. Ellsworth, ibid.,* 690. We cannot assume that the jury disobeyed the court's instruction and considered the evidence, but we must presume the contrary, unless prejudice appears or is shown by the appellant in some way. The burden is on him to prove it. *Rush v. Steamboat Co.,* 67 N. C., 47; *Thomas v. Alexander,* 19 N. C., 385.

Exceptions 2 and 3. The testimony of E. Hillman, that the man he saw coming towards Joab Lane's house looked like the defendant, was competent in connection with the other evidence of identity. Similar rulings have been sustained by the following authorities: 17 Cyc., 132; *S. v. Lytle,* 117 N. C., 799; *S. v. Costner,* 127 N. C., 566; and more recently by *S. v. Carmon,* 145 N. C., 481, where the impression of the witness as to identity, based upon knowledge of the person, was less pronounced. But the evidence was afterwards excluded, and this rendered it harmless, even if at first it was erroneously admitted; and the same reason applies to exceptions 4, 5, 8, and 9, for the (337) testimony as to the examination and comparison of the three empty shells was withdrawn, with a proper caution to the jury in regard thereto, the gun and shells having been handed to the jurors for their inspection, by consent of the parties. Even then the court instructed the jury not to consider their own inspection of them, unless they found that they had been properly identified. The rights of the prisoner were fully guarded at every point.

Exception 6. The objection to the testimony of Dan Chambers came entirely too late. It was discretionary with the judge whether he would strike it out at that stage of the case, after it had been admitted without objection. *S. v. Efler,* 85 N. C., 585. But the probative force of the testimony was so slight that the prisoner could not have been prejudiced thereby. If it tended to prove anything, it was that the prisoner knew the deceased had much money, or was in the habit of carrying "a big wad of money," and this was a relevant circumstance in view of the strong trend of the evidence that robbery was his purpose when he went into the swamp on the afternoon of the homicide.

Exception 7. The question put to the witness David Knight, who was deputy sheriff, as to finding keys at the place of the homicide belonging to deceased, was not answered, nor was the nature of the evidence which was proposed to be elicited disclosed by the prisoner. We cannot, therefore, see that there was error. *In re Smith's Will,* 163 N. C., 464; *S. v. Rhyne,* 109 N. C., 794; *Sumner v. Candler,* 92 N. C., 634; *Knight v. Killebrew,* 86 N. C., 400. We must know what the answer would have been before we can pass upon the competency or relevancy of the evidence. Besides, as it now appears to us, the evidence was irrelevant and harmless, if we are to judge by the question.

Exceptions 10, 11, 12, and 13. These exceptions were taken to the refusal of the court to admit evidence of statements made by another person that he had killed McCain, and that another person was seen going in the direction of the swamp with a gun. It was expressly decided in *S. v. Boone,* 80 N. C., 461, citing *S. v. Duncan,* 28 N. C., 236; *S. v. May,* 15 N. C., 328, and *S. v. White,* 68 N. C., 158, that on
(338) a trial for murder, evidence of the declarations of a third party that he killed the deceased are inadmissible as hearsay and as not tending to disprove the guilt of the prisoner. In *S. v. Davis,* 77 N. C., 483, it was held that "evidence that a third party had malice towards the deceased, a motive to take his life and an opportunity to do so, and had made threats against him, and that some time before deceased was killed he went in the direction of deceased's house with a deadly weapon, threatening to kill him, was inadmissible," and this case was approved in *S. v. Lambert,* 93 N. C., 618, citing in support of the principle *S. v. Jones,* 80 N. C., 415; *S. v. Beverly,* 88 N. C., 632; *S. v. Gee,* 92 N. C., 756. There is no direct testimony to connect the third person with the *corpus delicti,* and nothing to show that his guilt, if there is any evidence to prove it, is inconsistent with the guilt of the prisoner. *S. v. Millican,* 158 N. C., 617; *S. v. Baxter,* 82 N. C., 602; *S. v. Bishop,* 73 N. C., 44; *S. v. White,* 68 N. C., 158. The subject is fully considered by *Justice Allen* in the *Millican case, supra.* It will be seen from the citations we have made that this Court has uniformly and rigidly adhered to the rule which excludes such evidence. Recently the question was decided in *Donnally v. U. S.,* 228 U. S., 243 (57 L. Ed., 820), where the declaration of his own guilt of the homicide was made by a person who was then *in extremis* and aware of his dying condition. The Court held the evidence incompetent, and said: "In this country there is a great and practically unanimous weight of authority in the State courts against admitting evidence of confessions of third parties, made out of court, and tending to exonerate the accused." The Court held that technically it was not a declaration against interest, which must be of a pecuniary

character, affecting some property right or interest, citing the *Berkeley Peerage Case* (1811), 4 Campbell, 401; *Sussex Peerage Case* (1844), 11 Clark and F., 85, 8 Jur., 793.

Exception 14. The court properly stopped counsel when commenting upon matter of which there was no evidence. The courts are liberal to counsel in argument, and generally permit much latitude to them when addressing the jury, but they must be careful not to go beyond their privilege and introduce irrelevant matters calculated to divert the minds of the jurors from the true issue and to prejudice the (339) other side. *Hopkins v. Hopkins,* 132 N. C., 25.

The remaining exceptions relate to the refusal of the court to instruct the jury as requested, and to the charge itself. There was no evidence of self-defense or manslaughter. The court charged the jury fully and correctly as to murder in the first degree. The instruction, that if the prisoner intentionally killed the deceased with a deadly weapon, towit, a gun, the law implied malice and the prisoner would be guilty of murder in the second degree, is well sustained by the cases. In all indictments for homicide, when the intentional killing is established or admitted, the law presumes malice from the use of a deadly weapon, and the defendant is guilty of murder (now in the second degree) unless he can satisfy the jury of the truth of facts which justify or excuse his act, or mitigate it to manslaughter. The burden is on the defendant to establish such facts to the satisfaction of the jury, unless they arise out of the evidence against him. This rule has been uniformly adhered to by this Court in indictments for homicide. *S. v. Quick,* 150 N. C., 820. This principle has been reiterated by us in more recent cases. *S. v. Worley,* 141 N. C., 764; *S. v. Yates,* 155 N. C., 450; *S. v. Rowe, ibid.,* 436; *S. v. Simonds,* 154 N. C., 197; *S. v. Cox,* 153 N. C., 638; *S. v. Fowler,* 151 N. C., 731, and formerly in *S. v. Clark,* 134 N. C., 698; *S. v. Brittain,* 89 N. C., 481. An intentional killing with a deadly weapon being shown, the defendant, therefore, was guilty of murder in the second degree, unless he satisfied the jury of matters mitigating or excusing the homicide. The judge also charged correctly as to murder in the first degree, and the instruction, that if the killing was done in the perpetration of or in the attempt to perpetrate a robbery, it would be deemed a murder in the first degree, was directly within the terms of the statute, 3631. The jury, nevertheless, could convict of murder in the second degree (Revisal, sec. 3271), or acquit, and they were so charged by the court, but they should, of course, be governed by the testimony, and find truly according to the fact. *S. v. Matthews,* 142 N. C., 621. The judge seems to have given substantially every prayer requested by the prisoner, or at least those which were correct in

(340) law and to which he was entitled. Some so given were more favorable than the prisoner had any right to expect. The charge, in regard to the nature of circumstantial evidence and how the jury should consider it, was certainly free from any error of which the prisoner can complain, and so was the charge upon the doctrine of reasonable doubt. *S. v. Adams,* 138 N. C., 688. There is no particular formula prescribed by the law for defining or stating what is meant by a reasonable doubt. *S. v. Whitson,* 111 N. C., 695; *S. v. Adams, supra.*

Whether the request for instructions, submitted after the jury had retired to their room, should have been given was within the discretion of the court. *S. v. Hairston,* 121 N. C., 579; *Shober v. Wheeler,* 113 N. C., 370. There not only was no abuse of the discretion, but the charge was so clear and comprehensive that the jury could not have misunderstood it, and the additional instruction was not necessary for any further consideration of the case.

The judge charged the jury that they could give any one of three verdicts—first degree murder, second degree murder, and acquittal—and granted requests of the prisoner for instructions which were exceedingly favorable to him. The evidence convinced the jury of his guilt, and it was amply sufficient for that purpose. The facts pointed to him alone as the perpetrator of the crime, and his own confession, of course, greatly increased the force of the evidence against him. It was made under such circumstances to his fellow-prisoner in jail as to carry conviction of its truth, especially when it is considered in the light of the other evidence.

After a careful review of the record, no error is disclosed.

No error.

Cited: Warren v. Susman, 168 N.C. 464; *Schas v. Assurance Society,* 170 N.C. 421; *S. v. Lowry,* 170 N.C. 735; *S. v. Wilkes,* 170 N.C. 736; *S. v. Merrick,* 172 N.C. 872; *S. v. Spencer,* 176 N.C. 715; *S. v. Brinkley,* 183 N.C. 723; *S. v. Freeman,* 183 N.C. 746; *S. v. Benson,* 183 N.C. 799; *S. v. Miller,* 185 N.C. 684; *S. v. Levy,* 187 N.C. 589; *S. v. Ashburn,* 187 N.C. 723, 725; *S. v. Stewart,* 189 N.C. 347; *S. v. Prytle,* 191 N.C. 699; *S. v. Church,* 192 N.C. 660; *S. v. Johnson,* 193 N.C. 704; *S. v. Carpenter,* 193 N.C. 848; *S. v. Newsome,* 195 N.C. 556; *S. v. Lawrence,* 196 N.C. 576; *S. v. English,* 201 N.C. 299; *S. v. Gregory,* 203 N.C. 531; *S. v. Banks,* 204 N.C. 239; *S. v. Langley,* 204 N.C. 689; *S. v. Ammons,* 204 N.C. 758; *S. v. Kluttz,* 206 N.C. 728; *S. v. Alston,* 215 N.C. 714; *S. v. Kelly,* 216 N.C. 645; *S. v. Herndon,* 223 N.C. 210; *S. v. Vicks,* 223 N.C. 387; *S. v. Church,* 231 N.C. 42; *S. v. Streeton,* 231 N.C. 306.

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STATE v. WALTER GADDY.

(Filed 29 April, 1914.)

1. Homicide—Assault—Defense of Mother—Justification—Deadly Weapon —Superior Strength.

Upon trial of the prisoner for homicide of his brother, justification was relied upon as a defense, and there was evidence tending to show that the defendant was physically deformed and the deceased was a man much stronger and of a dangerous character, who had assaulted their mother, had knocked the prisoner down when he attempted to interfere, and received the deadly cut from a knife the prisoner used while he was being held down. *Held*, that the prisoner was only permitted to use such force as the mother could have reasonably used in her own defense to repel the assault, and that the court properly charged the jury that they, in passing upon this question in relation to the personal assault made on the prisoner, should consider, under the circumstances, the relative size, strength, and position of the deceased and the prisoner, and determine whether the prisoner apprehended or had reasonable grounds to apprehend, at the time, either that he was in danger of losing his life or receiving great bodily harm.

2. Homicide — Assault Justification — Apprehension of Harm — Without Fault.

Where one, unprovoked, assaulted another, when he was at a place he had a right to be and doing what he had a right to do, the person assaulted may stand his ground and use such force in repelling the assault as may reasonably lead him to believe, and which he does believe, necessary to prevent his being killed or receiving serious bodily harm at the hands of the assailant, to the extent of taking his life; and the charge in this case, that the prisoner must have been "without fault" in provoking the assault, is held to be a correct statement of the law arising from the evidence.

3. Same—Trials—Instructions—Burden of Proof—Questions for Jury.

Upon a trial for murder wherein it appears that the prisoner killed the deceased with a deadly weapon while the latter was making an assault upon him unarmed, but that the deceased was of greatly superior strength and a dangerous character, matter in justification may be shown by the prisoner, both from his own and the State's evidence. that, under the circumstances, he killed his assailant with reasonable apprehension that it was necessary to do so either to save his own life or to keep himself from great bodily harm, though ordinarily the use of a deadly weapon would not be required, the question as to the degree of force the prisoner could use in his self-defense, and how the evidence should be considered, being for the jury under correct instructions from the court, the burden of proof being on the prisoner to show matters in mitigation to reduce the offense from murder in the second degree.

APPEAL by defendant from *Lane, J.*, at October Term, 1913, (342) of UNION.

The defendant was indicted for the murder of Will Gaddy on 29 July, 1913. There was a verdict of manslaughter, on which the defendant was sentenced to two years upon the roads, and he appealed from the judgment.

The evidence for the State tends to show that on 29 July, 1913, the deceased was killed by the prisoner, his brother, during a fight in which the prisoner cut the deceased several (seven) times, once in the jugular vein.

The evidence for the State is contained in the testimony of Mrs. Mollie Gaddy, widow of the deceased. She said: "I live 3 miles this side of Peachland, in Anson County. I do not know hardly how near the county line. Will Gaddy was my husband; he was a brother of Walter Gaddy. I don't know hardly how far Walter lived from us; about 300 yards. His brother, Charlie Gaddy, lived with us. Walter Gaddy lived with his mother. My husband is dead. I was present when my husband was killed. Clyde Gaddy came up to my house that day, and I asked Clyde if he had seen Will. He said, 'He is down home.' I went down to Walter Gaddy's and found there Walter Gaddy and his mother, and Charlie and Clyde Gaddy. My husband was laying a gun up in the rack when I got there. I asked him what did he mean, and he said, 'You go home and mind your business.' At that time Walter said, 'Let's all go up home to your house.' We all started—Miss Dollie, Mrs. Gaddy, Walter, Charlie, and Clyde, and Will, my husband—up to our house. Before we got there, my husband took hold of his mother around the neck, sort of. Walter told him to turn her loose, and my husband sort of shoved him back. Walter pulled out his knife, and my husband told him to put his knife back in his pocket, and about that time (343) Walter commenced cutting my husband. He cut him six or seven times, as far as I know. They were in the road when he commenced cutting. When he quit cutting him they were in the field about three steps, I reckon. Walter was in front and my husband back out in the field; Walter was cutting him then. My husband did not have any weapon in his hand. When Walter was cutting, my husband was knocking off the licks, or trying to. Walter hit him with a rock, too. My husband had fallen down; he was down in the field when he hit him with the rock. He hit him in the face. It was a rock about the size of my fists. My husband got up and started to throw a rock at him, but he could not throw; and the rock rolled by Walter's feet. My husband fell over and Walter hit him with another rock. My husband got up and said, 'Walter, I will go to the house and get my pistol.' He started and got about thirty steps and fell, and died about half an hour afterward. He did not talk any more after he fell. He had no weapon at all except

when he picked up that rock. I don't know what took place at the house before I went down there. My husband was cut here (indicating the neck), on the left side and on the back. There were seven cuts in all on his body. The knife Walter had was a common pocket knife, as far as I know. My husband never spoke while Walter was cutting him. Charlie, he ran up about the last of it. Charlie got cut in the hand. My husband fell twice; he picked up the rock the last time. He did not hit Walter with the rock."

The evidence for the defendant tended to prove that on the evening of 29 July the deceased, either drunk or angry, approached his mother's house. Before he reached the house, he came to his little brother Clyde, aged 12, and his sister Dollie, aged about 15, who were at work in the field near the house. He cursed them and bade them lay down their hoes and come to the house. They obeyed, and he proceeded to the house cursing. His mother heard him, and called to Walter, who was at work near-by, to come to the house. Deceased entered the house, and, cursing his mother, told her that she had to stop pouting around there, and they would all have to go up to his house and sit down, or he would land them every one in h— before sunset. His mother reproved him for cursing; and he cursed her again and walked up and down (344) the floor "popping" his fists and cursing, to the terror of the family. Shortly after his arrival, deceased with an oath sent his little brother Clyde to deceased's home, 300 yards distant, to tell "R. C.," who was there, to come on to his mother's, and the defendant dispatched Dollie for his brother-in-law, Bob McManus, who lived about a mile distant.

In the meantime deceased continued to curse and abuse his mother and the other members of the family. As soon as "R. C." arrived, deceased turned to get the gun, and told his mother to "hit the road." He told the family that they would all have to move, or he would blow their brains out. He got the gun and pointed it at his mother, and told them all that if they were slow about moving he would blow them to h—. "R. C." told him to put up the gun, and he cursed "R. C." and threatened to kill him. Defendant counseled that they yield to deceased and go to his house; and he and his mother, with her infant in her arms, and with the boy "R. C.," about 16 years of age, and the little boy Clyde, started down the public highway towards the house of deceased, the deceased putting up the gun, but following and continuing to curse them.

When the party had reached a point within about 100 yards of the house of deceased, the mother told him that she did not see how it could do any good for her to go to his house with him cursing and swearing so.

Deceased replied that he didn't take such "G—d—sass" as that, and seized his mother by the throat. Defendant and the other children begged him to turn her loose, but he would not. Defendant walked up and caught deceased by the arm to pull him away from his mother, and "R. C." took the baby. The deceased turned and knocked defendant down. Deceased was much larger and stronger than defendant, and had the reputation of being violent and dangerous. Defendant is deformed. After deceased had knocked defendant down, he continued to beat him with his fists. The defendant, in the language of "R. C.," "was bent back." At this time defendant got his knife and began cutting deceased. He says that he did so to protect himself. He was afraid of deceased, and believed that deceased would kill him and his mother and (345) brothers. "R. C." intervened and pushed deceased back. When he did so, defendant stepped back and made no further attempt to hurt deceased. Deceased, however, on getting clear of "R. C.," again assaulted defendant. Defendant began backing away from deceased across a field. As deceased advanced on him, he cut at deceased a number of times. Deceased knocked up the last lick, and this cut his throat. This cut severed the jugular vein. Defendant says that he did not intend to cut deceased's throat; that he was not mad at deceased and did not enter into the fight willingly; that he did not think he could defend himself with his fists, and that he cut to defend himself, believing that he and the other members of the family were in danger of being killed or receiving serious bodily harm at the hands of deceased.

The only exceptions are to parts of the charge and to the refusal to give certain special instructions.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

J. W. Gulledge, J. C. Brooks, and J. J. Parker for defendant.

ALLEN, J. The first exception is to the charge, where his Honor said: "But if an assault is made, and the person assaulted does not apprehend, and does not have reasonable grounds for apprehending, either that his life is in danger or that he is in danger of great bodily harm, it is his duty ordinarily to abandon the contest if a way is open for retreat, before taking the life of his assailant. Under such circumstances, it is the duty of the person assaulted to abandon the contest if he can do so with reasonable safety."

In this connection, his Honor also charged: "If you find from the evidence that deceased made an assault upon the defendant without a deadly weapon, you may consider all evidence tending to show the rela-

tive size, strength, and position of deceased and defendant, together with other circumstances arising upon the evidence, in determining whether the fierceness of the assault upon the part of the deceased was such that the defendant apprehended, or had reasonable grounds to apprehend, either that he was in danger of losing his life or of great bodily harm at the hands of the deceased. . . . Where a man is in a place (346) where he has a right to be, and is doing what he has a right to do, and is assaulted in a violent manner and under such circumstances as reasonably to lead him to believe, and he does believe, that he is in danger of being killed or of receiving some serious bodily harm, and he is himself without fault, the law does not require him to flee, but he may stand his ground and repel his assailant with such force as may appear to him, under all the circumstances, to be reasonably necessary."

The charge is fully supported by the authorities. *S. v. Blevins,* 138 N. C., 668; *S. v. Dove,* 156 N. C., 653.

The second exception is to the refusal to charge the jury that, "if they find from the testimony that the deceased laid his hands in rudeness or in violence upon the defendant's mother, and the defendant had reason to believe and did believe that his mother was in danger of receiving injury at the hands of the deceased, then the defendant had the right to use such force as was reasonably necessary to repel the attack upon his mother."

This prayer was substantially given when the court said: "There is evidence tending to show that the deceased assaulted his mother. The court charges you that members of a family have the legal right to protect and defend one another. But the right to defend another can be no greater than the latter's right to defend himself. Though a son may fight in defense of his mother, the son's act must receive the same construction the act of the mother would have received if it had been done by herself. If you find from the evidence that the deceased made an assault on the defendant's mother, she had the legal right to use such force as was necessary, or such force as reasonably appeared to her to be necessary, to repel the assault. And if you find from the evidence that the defendant under these circumstances seized the deceased when he was in the act of making an assault on their mother, and that the defendant used no greater force than the mother had a legal right to use under the same circumstances, and that a combat immediately thereafter ensued between deceased and defendant, the defendant in doing so would not, for this reason, be deemed to be in fault in bringing on the fight, and the defendant would not, for this reason, be denied the right of relying upon the plea of self-defense. If you find from the evi- (347) dence that the deceased assaulted the defendant because the

defendant intervened between him and his mother, under the circumstances which have just been stated, and for the defense of his mother, the act of the defendant would not be deemed to be a legal provocation for an assault by the deceased upon the defendant; and if you find from the evidence that the deceased assaulted the defendant under these circumstances, you will then find that the defendant had a legal right to use such force as was necessary, or such force as reasonably appeared to him to be necessary, under the circumstances, to repel the assault. He had the legal right to use such force as was necessary, or such as reasonably appeared to him to be necessary, to save his life or prevent great bodily harm."

The qualification that the conduct of the defendant in fighting in defense of his mother must receive the same construction as her conduct in her own defense is in accord with our decisions. *S. v. Greer,* 162 N. C., 648.

The third exception is to the failure to instruct the jury under what circumstances the defendant would be without fault, and to the refusal to give the following instruction: "The court charges you that when a man is in a place where he has a right to be, and is doing what he has a right to do, and is assaulted in a violent manner and under such circumstances as to reasonably lead him to believe, and he does believe, that he is in danger of being killed or of receiving some serious bodily harm at the hands of his assailant, the law does not require him to flee, but he may stand his ground and defend himself with such force as may appear to him under the circumstances to be reasonably necessary; and if he kills his assailant in so doing, the law calls it justifiable self-defense."

The instruction was given as requested, except the words "being without fault" were added, and the jury were told that the test of the defendant being without fault was not that he fought willingly, but, Did he provoke or bring on the difficulty?

Thus explained, the charge was equivalent to saying that if the defendant was where he had a right to be, and was doing what
(348) he had the right to do, and he did not provoke or bring on the difficulty, he was not required to flee, and could defend himself, which was favorable to the defendant.

The fourth exception is to the charge that the defendant must be without fault, and has been already considered.

The fifth exception is to the refusal to instruct the jury that, "although under ordinary conditions the law does not excuse the use of a deadly weapon to repel a simple assault, this principle does not apply where from the testimony it may be inferred that the use of such weapon

was or appeared to be reasonably necessary to save the person assaulted from great bodily harm, such person having been in no default in bringing on or unlawfully entering into the fight. In such case the defendant's right of self-defense is a question for the jury. It is not necessary to the existence of this right that the defendant should have been assailed with a deadly weapon. The jury may consider the fierceness of the assault upon him, the position of the parties, and the difference in their relative size and strength, with a view of determining whether, under all the circumstances, the defendant was reasonably led to believe and did believe that he was in danger of being killed or of receiving serious bodily harm at the hands of the deceased."

The instruction is taken from *S. v. Hill,* 141 N. C., 771, and was given, except his Honor added the language taken from the opinion in the *Hill case,* and omitted in the instruction: "It may, in exceptional instances, arise when the fierceness of this assault, the position of the parties, and the great difference in their relative sizes or strength show that the danger of great bodily harm is imminent," and then follows the first excerpt from the charge, copied in this opinion, thereby applying the exceptional cases to the contentions of the defendant.

The degree of force which the defendant could use in his self-defense, and how the evidence should be considered, were carefully explained to the jury, and there was no error in the charge that the killing with a deadly weapon being proven or admitted, the burden would then be on the defendant to prove matters in excuse or mitigation, with the explanation that this rule did not require the defendant to introduce evidence, and that he could rely on the evidence for the State.

This has been settled since the case of *S. v. Willis,* 63 N. C., (349) 26.

The charge, considered as a whole, is clear, full, and accurate, and fairly presents the contentions of the defendant as to law and fact.

No error.

Cited: S. v. Hand, 170 N.C. 706; *S. v. Holland,* 193 N.C. 718; *S. v. Maney,* 194 N.C. 36; *S. v. Dills,* 196 N.C. 460; *S. v. Talley,* 200 N.C. 47; *S. v. Wallace,* 203 N.C. 290; *S. v. Kirkman,* 208 N.C. 722; *S. v. Godwin,* 211 N.C. 422; *S. v. Robinson,* 213 N.C. 282; *S. v. Anderson,* 222 N.C. 150.

STATE v. JERRY M. ANDREWS.

(*Filed 22 April, 1914.*)

Trials—Withdrawing Juror—Court's Discretion—Appeal and Error—Statutes.

Upon the trial of misdemeanors and felonies less than capital, it is within the discretion of the trial judge to withdraw a juror and make a mistrial when to him the ends of justice seem to require; and in the absence of abuse of the exercise of this discretion therein, no appeal will lie; nor is this position affected by the provisions of ch. 73, Public Laws 1913, passed doubtless to enable a defendant to present the question of his innocence or guilt upon the State's evidence, etc., as a matter of law, with the right of appeal only from final judgment of guilt. *Semble*, if the statute affected the discretion of the trial judge, exception duly noted should be taken to his action and presented on appeal from final judgment or by *certiorari*.

APPEAL by defendant from *Lane, J.*, at January Term, 1914, of GUILFORD.

Indictment for abandonment. There was evidence offered by the State with a view of supporting the bill of indictment. At the close of the State's testimony, the case on appeal shows the following proceedings as transcribed from the minute docket entries:

"The defendant's counsel moved the court to dismiss the bill of indictment, on the ground that the testimony of the State, in the light most favorable to its contentions, did not show any offense to have been committed, but showed, on the contrary, that no offense had been committed, and that the defendant has neither abandoned nor failed to provide support, as charged.

(350) "His Honor, thereupon, intimated that he would allow this motion. Whereupon, the State asked leave, in deference to this intimation of the court, to enter a *nol. pros.* Upon intimation by the court that this would not be allowed, after the close of the testimony, and after the motion by the defendant, the State then asked the court to withdraw a juror and order a mistrial, which the court intimated its purpose to do. Thereupon the defendant, through his counsel, then moved the court to proceed with the trial of the cause. This motion of the defendant was also declined. To this refusal of his Honor to proceed with the cause, the defendant excepted. The court then refused to allow the defendant's motion to dismiss. To this refusal of his Honor, the defendant excepted. Thereupon the court caused entry to be made of the withdrawal of a juror and ordering a mistrial. To this action of the court the defendant excepted.

"The defendant, excepting to the action of his Honor in the particulars noted, in open court, appealed to the Supreme Court."

The record further shows the judgment of the court and other proceedings had as follows:

"When State had rested, counsel for defendant moved for a nonsuit. Overruled. Exception. It appearing to the court that there may be probabilities of the prosecuting witness and the defendant being reunited in a home, the court, in exercising its discretion, ordered a juror to be withdrawn and mistrial made. The defendant in open court gives notice of appeal from the ruling of the court overruling motion of the defendant for the dismissing of this case upon testimony of State's witness. Also for the refusal of the court to proceed with the trial of cause after said motion was overruled. For the ruling of the court withdrawing a juror and making a mistrial. Notice waived; appeal bond fixed at $25."

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. P. Bynum, R. R. King, Jr., and King & Kimball for defendant.

HOKE, J. The order of his Honor, making present disposition (351) of the cause, was one directing that a juror be withdrawn and a mistrial had, and it has been uniformly held with us that such an order presents no case for appeal in a criminal action, but, in misdemeanors and felonies less than capital, the matter is referred by our law to the discretion of the trial judge. *S. v. Thomas Hunter,* 143 N. C., 607; *S. v. Bass,* 82 N. C., 576; *S. v. Weaver,* 35 N. C., 203. In *S. v. Weaver, Nash, J.,* delivering the opinion, quotes with approval from *S. v. Morrison,* 20 N. C., 115: "That it must, from the reason and necessity of the thing, belong to the court on trials for misdemeanors to discharge the jury whenever the circumstances of the case render such interference essential to the furtherance of justice. Every question of this kind must rest with the court under all the peculiar circumstances of the case"; and again: "The rule, then, is that in misdemeanors the court may withdraw a juror when in its discretion it judges it necessary to the ends of justice. No precise rule can be laid down to govern the infinite variety of cases that may come under the general question touching the power of the court to discharge juries in criminal cases of misdemeanor. It must be left in the sound discretion of the judge who tries the cause. And it is right it should be so. The reasons for exercising the power must be more accurately perceived and more justly felt by him than by any other court. But aside from its propriety, it being a matter of

discretion, this Court has no power to interfere. *Brady v. Beason,* 28 N. C., 425." And in *S. v. Bass, supra,* it was expressly held, "That, in misdemeanors and all felonies not capital the presiding judge has the discretion to discharge a jury before verdict in furtherance of justice. He need not find facts constituting the necessity for such discharge, nor is his action reviewable"—a position undoubtedly sound unless under circumstances establishing gross abuse; a case not presented by this record. In *S. v. Thompson,* 95 N. C., pp. 596-600, to which we were referred, in holding that "the State could not enter a *nol. pros.* in a criminal action after the jury was impaneled, without the consent of the accused," the Court was careful to state that the decision had
(352) reference to the action of the solicitor, and that it was not intended to "question the right of the presiding judge to order a mistrial in proper instances."

It is urged for defendant that the principle announced and upheld in these cases has been altered or greatly modified by a recent act of the Legislature, and, on motions of this character made, under the terms of the law, "the judge has no longer right to order a mistrial, but must proceed with the cause to final judgment"; and it is argued, further, that unless this view be adopted the law would be of no effect. The statute, ch. 73, Public Laws 1913, is as follows:

"The General Assembly of North Carolina do enact:

"SECTION 1. When on the trial of any criminal action in the Superior Court the State shall have produced its evidence and rested its case, the defendant may move to dismiss the action or for judgment of nonsuit. If the motion shall be allowed, judgment shall be entered accordingly; and such judgment shall have the force and effect of 'Not guilty' as to such defendant.

"If the motion is refused, the defendant may except; and if the defendant introduce no evidence, the case shall be submitted to the jury as in other cases, and the defendant shall have the benefit of his exception on appeal to the Supreme Court.

"Nothing in this act shall prevent the defendant from introducing evidence after his motion for nonsuit shall have been overruled; and he may again move for judgment of nonsuit after all of the evidence in the case is concluded. If the motion is then refused, upon consideration of all of the evidence, the defendant may except; and, after the jury shall have rendered its verdict, he shall have the benefit of such latter exception on appeal to the Supreme Court.

"If such defendant's motion for judgment of nonsuit, made at the trial as herein provided, be granted, or be sustained on appeal to the

Supreme Court, it shall in all cases have the force and effect of a verdict of 'Not guilty.'"

The statute, as its terms import, was no doubt passed to enable a defendant to present the question of his guilt or innocence, on the State's testimony, as a legal proposition to the judge, and thus, if (353) successful, avoid the risk of an adverse jury verdict, and, if the ruling was against him and no further evidence is offered, to preserve the point on appeal from a final judgment in the trial then pending, a course not open to him before its enactment. *S. v. Moody,* 150 N. C., 847. But the statute nowhere withdraws or proposes to withdraw from a presiding judge the power, in his discretion, to order a mistrial, and we are not at liberty to make it do so by construction. Even if this view would result in rendering the present law of none effect, it is well understood that, in many instances, this power heretofore rested in a trial judge in his sound legal discretion, and is, in many instances, and for different reasons, essential to the due administration of justice, and we would hesitate to adopt and approve a position withdrawing or seriously impairing such power unless required to do so by the plain expression of the legislative will.

Apart from this, it is the well established principle with us that no statutory appeal, in ordinary form, lies in a criminal prosecution except from a judgment on conviction or a judgment in its nature final. *S. v. Webb,* 155 N. C., 426, and authorities cited. In that case the Court said: "It would lead to interminable delay and render the enforcement of the criminal law well-nigh impossible if an appeal were allowed from every interlocutory order made by a judge or court in the course of a criminal prosecution, or from any order except one in its nature final; accordingly, it has been uniformly held with us that an ordinary statutory appeal will not be entertained except from a judgment on conviction or one in its nature final, citing, among other authorities, *S. v. Lyon,* 93 N. C., 575; *S. v. Hinson,* 82 N. C., 540; *S. v. Jefferson,* 66 N. C., 309; *S. v. Bailey,* 65 N. C., 426.

The very statute under which defendant now endeavors to proceed is in full recognition of the principle. Thus, when the motion is made on the State's evidence, "the case shall be submitted to the jury as in other cases, and the defendant shall have the benefit of his exception on appeal, etc.," and "if further evidence is introduced and the motion is renewed on the entire testimony and refused, the defendant may (354) except and, after the jury shall have rendered its verdict, defendant shall have the benefit of the latter exception on appeal, etc."

Therefore, even if defendant is right in his position, he could only preserve his point by exception duly noted and have same renewed on a subsequent appeal or by *certiorari*.

For the reasons given, we are of opinion that the appeal should be dismissed, and it is so ordered.

Appeal dismissed.

Cited: S. v. R.R., 169 N.C. 306; *S. v. Lowry*, 170 N.C. 734; *S. v. Guice*, 201 N.C. 763; *S. v. Dove*, 222 N.C. 163.

STATE v. ARTHUR WELLMAN.

(Filed 13 May, 1914.)

Criminal Law—Larceny—Trials—Evidence.

Evidence is sufficient to sustain a verdict of guilty of larceny which tends to show that the defendant borrowed some money from A., was present in the room and saw A. take the money from his trunk, endeavored to borrow money from others about that time; went to see A. when he and all his family were absent except a little girl about the yard; was seen in A's room alone, and left upon the arrival of the wife of A.; had before then only small balance in one bank, not exceeding $50 at any time; and that thereafter, and soon after A.'s money was missing from the trunk, deposited $50 in another bank, in which he had not previously deposited, and two days later made therein another deposit of $200.

APPEAL by defendant from *Harding, J.*, at February Term, 1914, of ROWAN.

The defendant was convicted upon an indictment charging the larceny of $390 from his father-in-law, Thomas Spratt, and appealed from the judgment rendered upon the verdict.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. C. Coughenour, Jr., and Jerome & Price for defendant.

ALLEN, J. The only question presented by the appeal is whether the evidence was sufficient to be submitted to the jury.

(355) The evidence for the State tended to prove that Thomas Spratt, father-in-law of the defendant, lost $390 after Christmas, 1913; that the money was taken from a trunk in the room occupied by Spratt; that the trunk was broken open and the money was in $5, $10, and $20

bills; that the defendant went to the home of Spratt Christmas week and borrowed $25; that he was in the room where the trunk was kept, and saw the money taken from the trunk and the balance left, after making the loan of $25, replaced in the trunk; that he tried to borrow $10 or $15 from another party during Christmas week; that the defendant went to Spratt's house on 3 January, 1913, when no one was there except a little child 6 years old; that when a witness for the State went to the house the child was in the yard, and the defendant alone in the room where the trunk was; that when he saw the wife of Spratt approaching the house, he left; that the money was missed after that; that prior to that time the defendant had been banking with Davis & Wiley; that his deposits were small, his balances not over $50, and that he had to his credit with the bank on 26 December $1.11; that on 5 January he deposited in the Wachovia Bank $50, and on 7 January $200; that he had not before that time done business with the Wachovia Bank.

This evidence is not to our minds conclusive, and the jury would have been justified in acquitting; but it does more than raise a suspicion of guilt, and was properly submitted to the jury.

The respective duties of the judge and jury in the consideration of evidence are laid down in *S. v. Hawkins,* 155 N. C., 466.

No error.

Cited: S. v. Shoup, 226 N.C. 73.

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(356)

STATE v. ANDREW ROBERTSON AND CEPH. FOSTER.

(Filed 6 May, 1914.)

1. Witnesses—Trials—Impeachment—Specific Acts—Admissions—Contradictions.

A female witness, a married woman, testified upon the trial for homicide, in behalf of the defendants. She was shown a letter signed in her name, which she admitted to have written to a man, soliciting his visits, in the absence of her husband, for the purpose of improper relations. She then testified that if she had written the letter, it was for another woman. *Held,* that while the answer of a witness to questions asked concerning collateral matters for the purpose of impeaching his testimony is conclusive, and no specific act may be inquired into on cross-examination, it was competent to contradict the statement made by this witness with the contents of the letter she admittedly had written.

2. Homicide—Deadly Weapon—Mutual Fight—Aider and Abettor—Manslaughter.

Where a homicide with a deadly weapon is shown, and there is evidence that the defendant gave the weapon, a pistol in this case, to his codefendant, who committed the homicide, and incited him to do it, in the fight which ensued between him and the deceased, the evidence tends to show that the prisoner was the principal offender, and is sufficient to sustain a verdict of manslaughter, at least.

3. Homicide—Defense of Home—Justification—Trials—Evidence—Declarations.

The principle that a man may, under certain circumstances, have the right to kill another in defense of his home, does not apply where it is shown that the prisoner, if he was not the aggressor, fought willingly and fiercely, and inflicted the wound when the deceased, who had been visiting his home in a friendly way, was retreating, and declaring he had no intention of hurting any one, and the prisoner's life or limb not being in jeopardy, and the declarations of the prisoner made immediately preceding the homicide and while committing it are competent as evidence against him.

4. Homicide—Self-defense—Mutual Fight—Willingness.

Where upon the trial for a homicide there is evidence that the prisoners entered into the fight, which resulted in the death of the deceased, willingly, and fought fiercely and aggressively, and the deceased took no advantage of them, it is not error for the judge to instruct the jury that the plea of self-defense was not available if they should find the facts to be as thus testified.

5. Homicide—Deadly Weapon—Malice—Presumptions—Burden of Proof—Appeal and Error—Trials—Instructions.

Malice will be presumed from the killing of a human being with a deadly weapon, a pistol, rendering the offense, nothing else appearing, murder in the second degree at least, with the burden of proof on the prisoner to show matters of justification, excuse, or mitigation; and where the instructions given by the court thereon are correctly but generally stated, the failure to give more full or exact instructions will not be held as error in the absence of special prayers therefor, aptly and at the proper time requested.

6. Trials—Instructions—Appeal and Error—Record.

The charge of the court must be construed as a whole, and assignments of error thereon, not supported by the record, will be disregarded on appeal.

(357) APPEAL by defendant from *Webb, J.*, at September Term, 1913, of POLK.

The prisoners were indicted in the court below for the murder of Milton Patterson. The evidence tends to show that Grover Wilkerson, Milton Patterson (the deceased), Dean Bolan, and Will Harris went to the house of Jim Foster, where the homicide occurred, and there found Mrs. Minnie Foster and Andrew Robertson and Cephas Foster (the

prisoners), Tom Israel, and Fairy Foster. The following extract from the testimony of the State's witness, Grover Wilkerson, will be sufficient for an understanding of the assignments of error:

"All four went into the room. As witness went in the door, he said 'Hello!' Andrew Robertson said, 'Hello!' and Mrs. Foster said, 'Come in.' Witness walked in and turned to the right. Milton Patterson came in and walked to about the center of the room. Tom Israel and Fairy Foster were sitting on the far side of the room. Milton said to Tom, 'How is Spartanburg?' Tom said, 'All right.' This time Mrs. Foster got up and handed her chair to Will Harris. Will took the chair and sat down close to the bed, where witness was standing. Ceph. Foster was sitting in the corner, and he said to Dean Bolan, 'Come over and sit down on the trunk with me.' Bolan went over and took the (358) seat. Mrs. Minnie Foster got up and went out of the room on the front porch. Milton Patterson got up and went after her. Andrew Robertson got up and went out. Milton and Mrs. Foster spoke a word or two on the porch. Mrs. Foster turned and came back through the hallway and met Robertson in the hallway. Milton Patterson had just turned from about the front door and met Mr. Robertson. Robertson walked up to him and said, 'What sort of a damned man are you?' and further said, 'You must think you are a God damned bear.' Milton said, 'No; but I am a God damned man.' Robertson said, 'I am a God damned man, too,' and raised his arm like he meant to strike. Milton knocked his arm up and said, 'You have got me to show,' and started backward with Robertson. They were in the hall. Witness was standing in the door that goes into the room. They started coming toward witness, and witness stepped out. Andrew Robertson hollered, 'Shoot him, Tom' (referring to Tom Israel), and he also said to Ceph. Foster, at the same time, 'Kill him, God damn him.' Milton shoved him down on the floor near the dresser. Ceph. Foster ran up with his pistol in his hand and said, 'Must I shoot the God damned son of a bitch?' Witness was standing in the door, and said to Ceph., 'Don't shoot.' Went across and took hold of the pistol. Witness and Ceph. scuffled across to the other side of the house. Dean Bolan got up and took hold of Ceph. Said, 'We can stop this without any shooting or hurting anybody.' Ceph. said, 'Stop it, by God, right now.' Witness said, 'I will stop Milton if you will put the pistol up and give it to Dean Bolan.' Ceph said he would. 'I don't want to hurt him. I have got nothing against him, but take him off of Robertson.' Witness said, 'I will if you will not shoot.' He said, 'I will give the pistol to Mr. Bolan.' Mr. Bolan took hold of his hand and said, 'Go take Milton off Robertson.' Milton was down on Robertson, had his knife in his hand, holding it over him. Witness pulled Milton's

arm up and said, 'I would not cut him.' He said, 'I won't, if you say not.' He shut his knife up, took it in his hand and hit Robertson over the head two or three or four times with it shut. At that time witness heard Dean Bolan and Ceph scuffling, looked around, and Ceph
(359) was coming toward them with a pistol. Witness stepped around and took hold of him. He kept coming on. Dean Bolan had hold of an arm, and Will came up behind him and took hold of him around the waist. He kept getting nearer Milton with the pistol. Milton hollered to take the pistol away from that boy, that he had no harm for him, and didn't want to hurt him. Ceph got down right over him with the pistol; had both hands on it. Patterson was sitting on Robertson, had his head turned toward witness and the others, looking up. Ceph got near to him, and Milton said, 'Don't get near me.' Milton raised up and hit Robertson with the knife and Robertson ran out the door. Patterson turned like he was going out of the door, turned his head and looked back, and Ceph Foster fired the pistol and shot. Milton threw his hands up and said, 'Don't shoot again; you have killed me already.' Ceph said, 'I will kill you,' and he fired three more shots. Milton was on the floor when he shot. Ceph hit him every time. Hit him in the back the first time. The shot came out up here (indicating). The next shot hit him in the left arm, broke the arm all to pieces. Witness and Dean Bolan had turned him loose. Will Harris turned him loose when the pistol went to snapping. Ceph Foster threw his pistol down, threw the shells down to the trunk in the hallway, and commenced looking through the trunk. Witness and Dean Bolan went to where he was. Robertson was gone. As soon as he got loose from Patterson, he left. Witness said to Ceph, 'What are you doing? You have killed one man.' He said, 'I don't care if I have. I hope, God damn him, I have.' He laid the pistol down and walked to the kitchen. Witness went back to Milton and asked him how bad he was hurt. He said, 'I am shot all over and am going to die.' Said to go after Tom, his brother. 'I am going to die.' Witness went after him, and when he came back, Andrew Robertson was back. There were some other folks there at that time. Patterson died that day. Robertson said he wished he had never seen a pistol, and wished he had never let Ceph Foster have my pistol."

The evidence is voluminous. The prisoners relied on the plea of self-defense and offered testimony to sustain their contention. They were convicted of manslaughter, and appealed from the judgment upon the verdict.

(360) *Attorney-General Bickett and Assistant Attorney-General Calvert for the State.*

Smith & Shipman for defendant.

WALKER, J., after stating the case: The prisoners introduced as a witness Mrs. Minnie Foster, who gave material testimony in their behalf. The State, for the purpose of impeaching her, handed her a letter. The case states: "This letter was lost by the prosecutors during the trial, and could not be produced. The letter in substance was very affectionate and very solicitous that Will Harris should visit Mrs. Foster at times when Foster, her husband, was absent, and was sufficient to indicate that the writer was seeking amorous and illicit intercourse with Harris. Counsel read the letter at length to witness, and she said: 'I never wrote it to Will Harris for myself, and nobody need say I did. I wrote it for Fairy, if it is the one I wrote. I was in jail once; stayed pretty near five weeks. They never have had me in the lockup.'" If the witness had denied that she had written the letter, the matter being collateral to the issue, her answer would have been final and could not have been contradicted. But she admitted its authorship, adding merely that she wrote for her daughter, Fairy Foster, and the letter itself disclosed that she was having or wished to have illicit relations with Will Harris, in the absence of her husband. This, of course, tended to impeach her character and to impair her credibility. It was just as competent, for this purpose, as if she had admitted having a conversation with Harris to the same effect. Her statement that she wrote for her daughter tended further to impeach her, as the letter, on its face, conclusively proved the contrary. It was the contents of the letter, written by her, that impeached her character. This Court said in *S. v. Davidson,* 67 N. C., 119: "The doctrine, in regard to asking questions of witnesses, tending to disparage them, has been greatly modified in modern times, and it is now held that you may put almost any question to the witness, and that the witness is bound to answer it, unless the answer might subject him to an indictment, or to a penalty under the statute. The question, we think, should have been permitted, and he was bound to have answered it." *S. v. Exum,* 138 N. C., 599; *S. v. Fisher,* (361) 149 N. C., 557; *S. v. Holly,* 155 N. C., 485.

We have conceded the general rule, as stated in 1 Greenleaf on Evidence, sec. 449, cited by the prisoner's counsel, as follows: "It is a well-settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. And if a question is put to a witness which is collateral and irrelevant to the issue, his answer cannot be contradicted, but is conclusive against him." See, also, *S. v. Patterson,* 24 N. C., 346.

In this case, though, Mrs. Foster was impeached by her own admission that she wrote the letter and the very nature of its contents. The letter,

therefore, was not introduced to contradict her, but merely to show the bearing of her admission as to its authorship.

The prisoners relied on *S. v. Holly, supra,* but their contention in this respect grows out of a misapprehension as to the scope of that decision. There it was proposed to show by a witness, introduced by the prisoner to prove his good character, that it was rumored Holly had killed his wife. This was going into details. It was competent to test the value of the witness's opinion as to his general character, but not to call for hearsay as to specific acts. This is an eminently just rule, as will appear from these reasons, stated by *Justice Allen* in that case: "The defendant did not testify in his own behalf, but he was entitled to introduce evidence of his good character, as a circumstance tending to show the improbability of his having committed the crime alleged against him. *S. v. Laxton,* 76 N. C., 216; *S. v. Hice,* 117 N. C., 783. When he avails himself of this right, the State can introduce evidence of bad character, but cannot, by cross-examination or otherwise, offer evidence as to particular acts of misconduct. The rule is just, and based upon sound reason. A party charged with crime may be prepared to defend an attack upon his general character, which is a single fact, but he could not have at the trial witnesses to explain the conduct of a lifetime. Again, questions of this character, if permitted, would tend to multiply issues, would (362) needlessly prolong trials, and would be calculated to distract the minds of jurors from the real issue. If a witness may state that he has heard that the defendant had been charged with killing his wife, the defendant ought to be allowed, in reply, to show that the charge is false, and to do so might involve the examination of many witnesses. If one collateral question of this character can be raised and tried, the same rule would permit a hundred others. The authorities in this State are numerous and uniform that it is error to allow such questions on the cross-examination of a witness as to character." But that is far from sustaining this objection. We are not admitting evidence of specific or isolated acts, in regard to another witness's character, but only the admission of the witness herself as to her own virtue and chastity.

The second exception was taken to the refusal of an instruction that there is no evidence of Robertson's guilt. He was the aggressor and gave the first provocation that brought on the fight. The evidence showed that he handed the pistol to Ceph Foster, who killed the deceased with it, and also told him to shoot. He was not without fault, but, on the contrary, was the first and principal offender, and he therefore lost the benefit which otherwise he might have derived from the principle of self-defense. *S. v. Blevins,* 138 N. C., 668; *S. v. Lucas,* 164 N. C., 471. A killing with a deadly weapon being shown and admitted, the burden

was upon the prisoner to show matter in excuse or mitigation. There was evidence that Robertson was present, aiding and abetting Foster in the commission of the homicide, and the judge properly refused the prayer for instruction. Revisal, sec. 3287; *S. v. Whitson,* 111 N. C., 695; *S. v. Chastain,* 104 N. C., 900; *S. v. Cockman,* 60 N. C., 484; *S. v. Simmons,* 51 N. C., 21; *S. v. Hildreth,* 31 N. C., 440; 12 Cyc., 186; 21 *ibid.,* 683. "Where, in a trial for murder, it appeared that two persons had formed the purpose of wrongfully assailing the deceased, and one of them, in furtherance of such purpose, with a deadly weapon and without provocation, slew him, it was held that both were guilty of murder." *S. v. Simmons, supra.* See, also, *S. v. Gooch,* 94 N. C., 987. There was nothing to excuse the killing, and defendant Robertson clearly participated in it, and, as we have said, played an im- (363) portant and active part; he provoked the fight and was a leader in the fray, and is guilty of manslaughter, at least. *S. v. Garland,* 138 N. C., 675.

The third exception, taken to the refusal of the court to charge that Foster had the right, in his own house, to prevent the commission of a felony, is also untenable. He had that right, it is true, if exercised in a proper and lawful way; but it must be remembered that Milton Patterson was retreating when he first fired, and then Foster continued to shoot at him when there was absolutely no necessity for doing so in order to protect himself or his home, and he showed no remorse, after the killing, for his cruel act, but was wholly indifferent to the homicide, expressing even satisfaction at the tragic result. The manner of the killing by Foster, his acts and conduct attending its commission, and his declarations immediately connected therewith, were evidence of express malice. 21 Cyc., 889, 897, 924, 925; *S. v. Jarratt,* 23 N. C., 76. "The fierceness and atrocity of the attack, the circumstances under which it was made, the nature and extent of the injury inflicted, the condition of the body and wearing apparel, the deadly nature of the weapon used and the manner of using it, and all other facts constituting the *res gestæ,* are proper subjects of inquiry on the question of malice and intent. Subsequent statements of the accused showing that his hatred of the deceased was so intense that it pursued him beyond the grave, are admissible on the issue of express malice. So, also, on a trial for assault with intent to murder, subsequent statements of the assailant showing bitter hatred toward the person assaulted are admissible to show malice at the time of the assault. Any unseemly conduct toward the corpse of the person slain or any indignity offered it by the slayer should go to the jury as evidence of malice. His jeerings at the weeping relatives and

friends of the deceased may be considered as bearing upon the question of the malice of the accused." 21 Cyc., pp. 897, 898.

There is no circumstance in the case which can be fairly regarded as upholding the contention that Foster was defending "his castle" or his property or any member of his family. It was nothing but a common brawl, for which he and Robertson, his codefendant, were mainly (364) responsible. The principle that a man may defend his home against unlawful and unwarranted attacks has no application to these facts. 21 Cyc., 828; 1 Bishop Cr. Law (11 Ed.), 614, 806, and sec. 636; *S. v. Taylor,* 82 N. C., 554.

The fourth assignment of error to the charge of the court, that if defendants fought willingly they cannot avail themselves of the principle of self-defense, is sufficiently answered in *S. v. Garland,* 138 N. C., 675, by *Justice Hoke:* "It is the law of this State that where a man provokes a fight by unlawfully assaulting another, and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life. This is ordinarily true where a man unlawfully and willingly enters into a mutual combat with another and kills his adversary. In either case, in order to excuse the killing on the plea of self-defense, it is necessary for the accused to show that he 'quitted the combat before the mortal wound was given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life.' Foster's Crown Law, p. 276. The same author says on page 277: 'He, therefore, who in case of a mutual conflict would excuse himself on the plea of self-defense must show that before the mortal stroke was given he had declined any further combat and retreated as far as he could with safety, and also that he killed his adversary through mere necessity and to avoid immediate death. If he faileth in either of these circumstances he will incur the penalty of manslaughter.' To the same effect is *Lord Hale,* who lays it down, 'That if A. assaults B. first, and upon that assault B. reassaults A., and that so fiercely that A. cannot retreat to the wall or other *non ultra* without danger of his life, and then kills B., this shall not be interpreted to be *se defendendo,* but to be murder or simple homicide (manslaughter), according to the circumstances of the case; for, otherwise, we should have all the cases of murder or manslaughter, by way of interpretation, turned into *se defendendo.*' This principle was approved and applied in this State in *S. v. Brittain,* 89 N. C., 481."

See, also, *S. v. Yarbrough,* 8 N. C., 78, and substantially to the (365) same effect, *S. v. Simonds,* 154 N. C., 197; *S. v. Clark,* 134 N. C., 698; *S. v. Brittain,* 89 N. C., 481; *S. v. Dixon,* 75 N. C., 275.

But in this case the prisoners not only fought willingly, but aggressively, and the whole difficulty is traceable to their conduct.

There was no error in that part of the charge relating to the presumption arising from killing with a deadly weapon, and as to the burden of proof. The court stated that the law presumes malice from such a killing, and that, nothing else appearing, it would be murder in the second degree, and the burden is upon the prisoners to satisfy the jury as to any matter of justification, excuse, or mitigation. This is the correct rule. *S. v. Yates,* 155 N. C., 450; *S. v. Rowe, ibid.,* 436; *S. v. Simonds,* 154 N. C., 197; *S. v. Brittain,* 89 N. C., 481. See, also, *S. v. Cox,* 153 N. C., 638; *S. v. Worley,* 141 N. C., 764. If the prisoners desired any fuller or more exact instructions, they should have asked for them by a specific prayer, those given being substantially correct. *Simmons v. Davenport,* 140 N. C., 407; *McKinnon v. Morrison,* 104 N. C., 354; *Pate v. Bank,* 162 N. C., 508; *Monds v. Dunn,* 163 N. C., 108. This is the settled rule.

The last assignment of error to the instruction of the court, as to the different verdicts that could be returned, according as the jury might find the facts to be, is not supported by the record. The judge distinctly told the jury, several times, that they could acquit the prisoners, and the last instruction was intended merely to inform them how they could find in the event that they did not acquit. The charge must be construed as a whole. *S. v. Exum, supra.*

A careful review of the record has disclosed no error which entitles the prisoners to another trial.

No error.

Cited: S. v. Pollard, 168 N.C. 121; *S. v. Cooper,* 170 N.C. 725; *S. v. Killian,* 173 N.C. 796; *S. v. Westmoreland,* 181 N.C. 594; *S. v. Winder,* 183 N.C. 778; *S. v. Johnson,* 184 N.C. 645; *S. v. Baldwin,* 184 N.C. 792; *S. v. Steen,* 185 N.C. 778; *Milling Co. v. Highway Com.,* 190 N.C. 697; *S. v. Hardee,* 192 N.C. 536; *S. v. Colson,* 193 N.C. 239; *S. v. Mitchell,* 193 N.C. 797; *S. v. Beal,* 199 N.C. 298; *S. v. Banks,* 204 N.C. 237; *S. v. Smoak,* 213 N.C. 94; *S. v. Bowser,* 214 N.C. 254; *S. v. Roberson,* 215 N.C. 786; *S. v. Hairston,* 222 N.C. 462.

STATE v. SALISBURY ICE AND FUEL COMPANY.

(Filed 6 May, 1914.)

1. **Criminal Laws—False Pretense—Indictment—Surplusage.**

In a warrant or indictment it is not necessary to charge an intent to defraud any particular person (Revisal, sec. 3432), and where the charge therein is made that the intent was to defraud an actual person and a fictitious one, the allegation as to the person is surplusage, and a motion in arrest of judgment for a fatal variance in that respect will be denied.

2. **Criminal Law—Corporations—Intent—False Pretense—Principal and Agent.**

Where an agent of a corporation in the course of his and his employer's business obtains anything of value for the corporation by false pretenses (Revisal, sec. 3432), the corporation may be convicted of the fraudulent intent exercised for its benefit by its agent, and the agent may also be made a codefendant with his principal in the criminal action.

(366) APPEAL by defendant from *Long, J.*, at November Term, 1913, of ROWAN.

Attorney-General Bickett, Assistant Attorney-General Calvert, and A. H. Price for the State.

Linn & Linn for defendant.

CLARK, C. J. The defendant was indicted for obtaining money by false pretenses, under Revisal, 3432, by selling to J. N. Smith and C. M. Henderlite a certain amount of coke represented to be one ton in weight, whereas it weighed 1,750 pounds, the defendant well knowing the pretense to be false. Said Henderlite was a competitor in trade of the defendant company, and he suspected that it was selling short weight. On 8 January, 1913, he called up the office of the defendant over the phone and asked the price of coke. The reply was $5. He ordered a ton sent to J. N. Smith at a certain corner, and the defendant delivered the order as one ton and received payment. Henderlite then hauled the coke to the scales and found that it weighed only 1,750 pounds.

There are practically but two questions presented that require consideration:

(367) 1. The defendant moved in arrest of judgment on the ground of fatal variance in that the indictment charged false pretense "with intent to deceive C. M. Henderlite and J. N. Smith," whereas it appears from the evidence that J. N. Smith was a fictitious person and C. M. Henderlite was not known in the transaction either directly or indirectly, and was not deceived." Revisal, 3432, provides: "It

shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses to allege that the party did the act with intent to defraud, without alleging an intent to defraud any particular person and without alleging any ownership of the chattels, money, or valuable securities; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud." The charge as to the persons intended to be cheated was therefore surplusage and immaterial. *S. v. Ridge,* 125 N. C., 658.

2. The other exception is that a corporation cannot be convicted of a crime which requires an intent.

In *S. v. Lumber Co.,* 153 N. C., 612, it is said: "The first ground, that corporations cannot be convicted of an offense where the intent is an ingredient, is no longer tenable. They are as fully liable in such cases as individuals. They are liable for libel, assaults and battery, etc. Corporate existence can be shown, though not charged in the bill. *S. v. Shaw,* 92 N. C., 768."

This is fully sustained by all the late authorities. In *U. S. v. MacAndrews,* 149 Fed., 823, it is held that a corporation can be held criminally liable for conspiracy or any other crime requiring the proof of an intent. The Court says, on page 835: "It was long contended that even civil liability arising from evil intent could not be visited upon an artificial being. This fiction has vanished, and corporate liability on the criminal side permanently established, even for assault. *R. R. v. Prentice,* 147 U. S., 101, for conspiracy (citing many cases). It was even longer denied that a corporation could be indicted at all. *Queen v. R. R.,* 9 Q. B., 314. In *People v. Clark,* 14 N. Y. Supp., 642, the Court declared that the legal reason upholding this conten- (368) tion was the strange argument that a corporation could not plead in person, and therefore could not be called on to answer criminally. It certainly is now admitted law that not only may corporations (the art of pleading by attorney having been discovered) be indicted for nonfeasance, but for such deeds of misfeasance as are complete by the mere doing a thing prohibited, *e. g.:* violation of the 8-hour law, *U. S. v. Kelso Co.,* 86 Fed., 304; receiving usurious interest, *S. v. Bank,* 2 S. D., 568; not stopping gaming at a fair, *Comm. v. Agr. Society,* 92 Ky., 197. . . . These defendant corporations claim that since in conspiracy evil intent is of the essence of the crime, accusation is futile. This is but the remnant of a theory always fanciful and now in process of abandonment. In *Telegram Co. v. Com.,* 172 Mass., 294, 44 L. R. A., 159, 70 Am. St., 280, it was held: 'We think that a corporation may be liable

criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil.' To same effect, *S. v. R. R.*, 15 W. Va., 362, 36 Am. Rep., 803."

In *People v. Star Co.*, 120 N. Y. Supp., 498, it is held that a corporation can be convicted of a malicious libel, the Court adopting the following statement by Bishop in his New Crim. Law, sec. 417: "Within the sphere of its corporate capacity and to an undefined extent beyond, whenever it assumes to act as a corporation it has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man sustaining the like relations. . . . Some have stumbled on the seeming impossibility of the artificial and soulless being, called a corporation, having an evil mind, or criminal intent. . . . But the author explained in another work that, since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are things done."

It was recently said by the Supreme Court of the United States: "It is true that there are some crimes which in their nature cannot be committed by corporations. But there is a large class of offenses wherein the crime consists in purposely doing things prohibited by statute. (369) In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purpose of their agents, acting within the authority conferred upon them." 212 U. S., 481.

In *Grant v. U. S.*, 114 Pac., 955, it is held: "A corporation can form a criminal intent and have the knowledge essential, provided the officers representing it have such knowledge or intent." To the same effect, *U. S. v. Supply Co.*, 215 U. S., 50, and *Standard Oil Co. v. State*, 117 Tenn., 664, in which last the Court cited many cases holding "the criminal intent of the agent is imputed to the corporation."

Indeed, Revisal, 2831 (6), provides: "The word 'person' shall extend, and be applied, to bodies politic and corporate as well as to individuals, unless the context clearly shows to the contrary." The word "person" in Revisal, 3432, therefore, embraces corporations. This is fully discussed and sustained upon a similar statute in *S. v. Creamery Co.*, 83 Kan., 389.

Indeed, so many businesses of every kind are now carried on by corporations that it would render nugatory many criminal statutes for the protection of the public if they did not apply to the misconduct of corporations when the statute would apply to the same conduct by an individual. In this present case the business of selling coal and ice is carried on by a corporation, and it violated the statute by the false

pretense of selling a ton of coke when it delivered in fact only 1,750 pounds, intending to cheat, as fully as as individual could have done. It is true that when the statute imposes a penalty of a fine or imprisonment, that only the fine can be placed upon a corporation. But this is no reason why that should not be imposed. The corporation should not be wholly exempted from punishment because it cannot be imprisoned. The remedy is that the officer or agent may be indicted jointly with the corporation as a coprincipal or accessory, as the case may be, as has been done in the enforcement of the statutes against illegal trusts.

The defendant contends that he is not guilty, because the prosecutor was not deceived. Of course, to constitute the offense the conduct of the defendant must be "intended and calculated to deceive, and did deceive." The evidence was sufficient to establish these facts, (370) and was properly submitted to the jury, and it was so found by their verdict. It is true, the prosecutor had a strong suspicion that the defendant was selling by short weight, but he could not have testified to it as a fact. His testimony is: "I had to buy from you to find out whether you were (selling by short weight) or not." In another place he says that to the best of his judgment the defendant was selling in this mode, but he did not know this and could not know it till he had tested the matter, as he did.

The defendant offered a ton of coke for $5, the offer was accepted and it was paid for as a ton. The prosecutor acted in good faith, because he paid the purchase price for a ton, and on weighing it, the only possible method, he found that there was not a ton. He was therefore induced to part with his $5 in reliance upon the assertion of the defendant that a ton of coke had been sent him. He could not possibly know beforehand whether this would be done or not, nor indeed after he saw the coke until he had actually weighed it. However much he might have mistrusted the defendant's representation, he relied on it by paying the $5 charged.

A very similar case is *S. v. Smith,* 152 N. C., 798, for selling whiskey contrary to the statute, in which case a police officer, suspecting the defendant, employed one to buy whiskey from the defendant and furnished the money. The defendant, like all victims caught in a trap, viciously assailed the trap. He said he ought not to be punished, because the prosecutor had "connived" at his offense. This Court said: "It is not the motive of the buyer, but the conduct of the seller, which is to be considered," and held that the defendant was properly convicted. This was approved in *S. v. Hopkins,* 154 N. C., 622, where *Brown, J.,* says: "However much the defendant, when caught, may criticise the methods used to catch him, it has been held that the transaction is, so

far as the defendant is concerned, a violation of law, if the evidence is deemed by the jury sufficient proof of the facts."

No error.

Cited: S. v. R.R., 168 N.C. 111; *S. v. Love,* 229 N.C. 101.

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STATE v. BESSIE MOORE.

(Filed 6 May, 1914.)

Criminal Law—Municipal Corporations—Disorderly Conduct—Cursing—Ordinances—Statutes.

Disorderly conduct is a minor offense, not known to the common law, and a person so offending is not indictable except under a statute or authoritative ordinance of a municipality; and where a person is indicted, under the provisions of an ordinance, for cursing on the streets of a town, loud enough to be heard by those passing by and in a disorderly manner, a conviction may not be sustained when it is shown that the cursing was only heard by the policeman making the arrest, though there were others standing near, and was done in a low tone of voice which could not have disturbed any one; and a motion for a nonsuit upon the evidence was properly sustained. Ch. 73, Laws 1913.

APPEAL by defendant from *Harding, J.,* at February Term, 1914, of ROWAN.

The defendant was charged with the violation of "an ordinance of the town of Spencer, ch. 12, sec. 2, in that she did curse on the streets, loud enough to be heard by those passing by, in a disorderly manner, and on the streets of the town." The proof was that she had been arrested for violating an ordinance and given a bond for her appearance to answer the charge. Just as she stepped into her buggy, she was cautioned by the policeman, who had arrested her, as it appears, not to drive through the town, and replied to him that she would drive "where she damned please." The policeman testified that no one heard it except himself, and the other evidence was to the effect that it was not heard by any bystander or any passerby, and was uttered, necessarily, in an ordinary if not in an undertone. It did not appear to have disturbed any one, although there were bystanders as near as 8 or 10 feet from her at the time. Defendant was convicted by the magistrate and appealed, and was again convicted, after moving, under Laws 1913, ch. 73, to dismiss the proceeding and reserving her exceptions. She appealed from the judgment upon the last conviction to this Court.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Jerome & Price and W. C. Coughenour for defendant.

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WALKER, J., after stating the case: We will not venture to enter upon any casuistical discussion of the question whether the word "damn" is profanity or not, as our decision of the case does not require it. The speech of the defendant was not nice or refined, but this does not, of itself, render it criminal. Disorderly conduct is a species of nuisance, and it may be a violation of the ordinance without necessarily being indictable at common law (*S. v. Sherrard,* 117 N. C., 716), as it is a minor offense, below the grade of a misdemeanor, and not known to the law as a separate and distinct crime, except as made so by statute or municipal ordinance. Conduct can hardly be described as disorderly unless it tends in some degree to disturb the peace or good order of the town, or has a vicious or injurious tendency. As said in *S. v. Sherrard, supra:* "The ordinance has reference to and forbids such acts and conduct of persons as are offensive and deleterious to society, particularly in dense populations, as in cities or towns, but which do not *per se* constitute criminal offenses under the general law of the State," citing, among other cases, *S. v. Cainan,* 94 N. C., 880; *S. v. Debnam,* 98 N. C., 712. The object of ordinances, as stated by *Nash, J.,* in *Town of Washington v. Frank & John,* 46 N. C., at p. 440, is "to call into existence such laws and regulations of conduct as may be thought by the corporators to be required by their several situations and necessities, different provisions being required in different localities"; but we do not think it was contemplated by the municipal authorities of Spencer that the offense described in the evidence should be punishable. It is clearly not within the provision of the ordinance; nor was the good order and peace of the community interrupted by defendant's acts or conduct. It was merely a strong, intensive, and perhaps vehement way of expressing her displeasure, when irritated by what had just happened. The ordinance is not set out in the case, but gathering its provisions from the recitals in the affidavit and warrant, the charge as therein made was not sustained by the evidence, as there was a clear failure of (373) proof, and the conduct of defendant was not within the letter or spirit of the ordinance. *City of Jacksonville v. Headen,* 48 Ill. App., 60.

The defendant expressed her displeasure, or futile indignation, a little too strongly, and should not have used so indecorous an expletive in doing so, but it did not reach beyond the ears of the policeman, and hardly made a ripple on the placid surface of municipal peace. The evidence did not correspond with the allegation, nor tend to support it, nor was

there a breach of the ordinance, as it is set forth in the affidavit. The court should have granted the motion, under Laws 1913, ch. 73, to dismiss the proceeding, and such a judgment will be entered below and shall have the effect of a verdict of acquittal, as provided by the act of Assembly.

Reversed.

Cited: S. v. Carlson, 171 N.C. 824; *S. v. Pace,* 192 N.C. 784; *S. v. Montague,* 195 N.C. 22; *S. v. McLeod,* 198 N.C. 653.

STATE v. J. W. AND M. L. SEAHORN.

(Filed 6 May, 1914.)

1. Intoxicating Liquors—Trials—Evidence—Declarations—Conversations.

Upon a trial of the defendants, husband and wife, for the unlawful sale of intoxicating liquors, a witness for the State testified that he was a private detective, and went with one M. to the home of the defendants, with evidence tending to show that he purchased whiskey from the wife in the presence of her husband, and, representing himself as a whiskey salesman, obtained orders from each of the defendants. *Held,* testimony of this witness, that in being introduced to the defendant by M. the latter said the witness could take orders from them, is not hearsay, but competent as a circumstance tending to show that the defendants were engaged in the liquor traffic.

2. Appeal and Error—Assignments of Error.

An assignment for error made to the charge of the trial judge should set out briefly the parts of the charge excepted to; and in this case it is held to be insufficient that the charge is set out and the assignments refer to such portions as appear between certain marks of identification.

3. Intoxicating Liquors—Husband and Wife—Trials—Instructions—Presumptions—Appeal and Error—Harmless Error.

Upon this trial for the unlawful sale of intoxicating liquors, there was evidence tending to show that the defendants, husband and wife, kept such liquors for sale at their home, and that the *feme* defendant made the sale to the State's witness, in the presence of her husband, she testifying that she had not sold any intoxicants, and making no claim, therefore, that she was unlawfully acting under the restraint of her husband. *Held,* the judge erroneously instructed the jury as to their verdict upon their finding as to whether the wife or husband would be guilty upon the evidence of the husband's acquiescence or approval; but it is further held as harmless error, as the jury fully understood that her conviction rested entirely upon the question of whether she made the unlawful sale, and if so, did she act willingly and of her own accord.

CLARK, C. J., concurring.

APPEAL by defendant from *Long, J.*, at October Term, 1913, (374) of CABARRUS.

Indictment for selling liquor. The defendants were both convicted, and appeal.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

H. S. Williams and L. T. Hartsell for defendants.

BROWN, J. The defendants are husband and wife. Both were indicted and convicted of the crime of selling intoxicating liquor.

The evidence on the part of the State tends to show that the defendants kept a house of questionable repute; that the prosecuting witness, Lawrence, in company with another, visited the house, and that the *feme* defendant, in the presence of her husband, sold Lawrence two pints of whiskey; that at the same time the defendants gave Lawrence, who was posing as a whiskey drummer, two orders, one for 24 pints of whiskey to be shipped to Landis, a station near Concord, this order being signed by the wife, and one for one barrel of Budweiser to be shipped to Concord, this order being signed by the husband.

The evidence on the part of the defendant is that no liquor (375) was sold; that Lawrence himself furnished the liquor which, it is admitted, was drunk by the parties present.

There are two assignments of error:

1. For admitting testimony of Joe Lawrence as to what Mehaffey said, which is the subject of the first exception.

2. That part of his Honor's charge to the jury between (A) and (B), which is the subject of the second exception, and that part of his Honor's charge between (C) and (D), which is the subject of the third exception.

Joe Lawrence testified as follows:

"I was employed by the city of Concord as a detective, July, 1913, and went out to meet the defendants with Mr. Mehaffey. On 24 July I was in the Greek Candy Kitchen in Concord and came out and saw Mr. Mehaffey driving along the street in a buggy by himself. When we got out there, I found Mrs. Seahorn and two ladies. We sat down in the kitchen, and Mr. Mehaffey said to them, 'Shake hands with Mr. Lawrence, a whiskey drummer from Richmond.' Mr. Mehaffey said I could take some orders."

The objection is made upon the ground that witness told the defendants what Mehaffey said. This is not hearsay. It was a conversation with

both defendants. It sheds light upon the real issue, and is a circumstance tending to show that defendants were engaged in the liquor traffic.

The second assignment challenges the correctness of the following portions of the judge's charge to the jury:

"(A) So, gentlemen, when you come to examine this evidence to ascertain whether or not the defendants' contentions are true, it is left to you. I cannot tell you what to find. If you find that there was a sale of liquor made there to Lawrence, and that the wife got the liquor and delivered it to Lawrence in the hearing and with the approval and acquiescence of the husband, in the husband's house, you would be justified in finding the husband guilty, although he did not touch the liquor or the money. In other words, if you find that the wife was acting as the agent of her husband, that she was simply dealing and getting the liquor out of the trunk and handing it over to this man, and (376) then collecting the money for this man, as his agent, or coöperating with him, aiding and abetting him in making sale in that way, he would be just as guilty as she is.

"Ordinarily, what the wife does in the presence of her husband is presumed to be done with his consent, to the extent that the wife is often excused for acts committed by her in his presence. In order that this may be so, however, it must expressly appear that it was with his consent, or made to appear from his acts or words. (B)

"(C) One of the defendant's counsel asked me to instruct you that if she made sales in his presence and under circumstances that she was acting under his coercion, and it was with his consent and approval, that she should be acquitted. That is substantially the instruction as I understood counsel to make. I don't wish to give you that instruction in this case, because she came upon the stand and made a statement, herself, as to her conduct and the circumstances and the things that happened on the premises. I leave it to you to pass upon her guilt or innocence by saying to you that if you find that she was acting voluntarily in the sale of liquor on this occasion, actually making the sales, or aiding and abetting and assisting her husband, she was doing this willfully and deliberately, you should find her guilty.

"If you find, however, upon a review of the testimony, that she was acting under the constraint of her husband, and that he was exercising such power over her as to cause her to make sales of liquor, in his presence, so that it was not her own voluntary act, but she was the agent of her husband, then, under the circumstances, you should acquit the wife and convict the husband.

"So that I will leave the case to you to pass upon all this testimony and say whether or not, under all the evidence, you are satisfied in the

manner in which I have instructed you the husband is guilty or not guilty, or whether or not you will find the wife guilty or not guilty. (D)"

This second assignment is not in due form. It should have set out briefly the parts of the charge excepted to. As the point is not made by the State, we waive it without creating a precedent.

The charge is not, strictly speaking, a compliance with *S. v.* (377) *Williams,* 65 N. C., 398, and *S. v. Norvell,* 156 N. C., 652. But we think that it may be considered, if not a substantial compliance, at least harmless error.

The jury evidently understood that they should not convict the *feme* defendant unless they were fully satisfied that the wife was acting voluntarily and free from any constraint upon the part of her husband.

Then, again, the prayer itself was not technically correct. The defendants did not ask for any instruction about a presumption, but asked the judge to charge the jury that if the wife made the sale in the presence of the husband, and under circumstances that she was acting under his coercion, and with his consent and approval, that she should be acquitted.

It was entirely proper to decline to give this instruction, and if any error was committed, it was in the failure of the judge to charge that the law presumed that the wife acted under the compulsion of the husband, and the burden was upon the State to rebut this presumption.

This presumption is not a statutory presumption, but is a rule of evidence, established by the courts for the protection of married women at a time when they could not testify for themselves.

Now the *feme* defendant can testify for herself, and in this case she did, and testified that she sold no liquor at all. She did not claim to have acted under the constraint of her husband. It would appear that if any constraining was to be done, she was the more likely to do it than the husband. We doubt, in view of all the circumstances, and her own evidence, if she was entitled to this artificial presumption, but if so, she received the benefit of it.

Some courts hold against such presumption, and think it out of place in this enlightened age. *S. v. Hendricks,* 32 Kans., 559; and in Arkansas, Georgia, and Nebraska it has been abolished by statute. *S. v. Bell,* 92 Ga., 49; *Smith v. Myers,* 54 Neb., 1.

We think, upon a review of the whole case, that the defendants have had a fair and impartial trial.

No error.

CLARK, C. J., concurring: If the wife acted voluntarily, she (378) ought to be held liable, whether her husband was present or not.

If she acted under his compulsion, she ought to be exempt from punishment, not because of the marital relation, but like anyone else acting under compulsion. At common law there was a presumption that when a crime was committed by the wife in the presence of her husband, she acted under compulsion; but that presumption does not comport with Twentieth Century conditions. The contention that a wife has no more intelligence or responsibility than a child is now out of date. No one believes it.

In *S. v. Rhodes,* 61 N. C., 453, the Court affirmed the ruling below upon a special verdict, that a husband was not guilty where he whipped his wife without provocation "with a switch not larger than his thumb," and in *S. v. Black,* 60 N. C., 263, *Pearson, C. J.,* held that a husband could not be convicted of a battery on his wife unless he inflicted permanent injury or had used such excessive violence as to indicate malignity, saying that "the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself," adding that if such matters were taken notice of by the courts it would "encourage insubordination." In that state of the law, it was proper to hold that any crime committed by the wife in the presence of the husband was presumed to have been committed under his compulsion. That was just and proper when the husband could thrash her at will.

But in *S. v. Oliver,* 70 N. C., 61, in 1874 (just forty years ago), that doctrine was overruled, *Settle, J.,* saying: "The courts have advanced from that barbarism." This change in the law was made without any statute, as indeed the overruled decision had been made. When, however, the Court took this step forward and relieved the wife from this fear, it was but proper to change the ruling which had been based upon it, also without any statute, that if the wife committed a crime in the presence of the husband there was a presumption that it was under his compulsion. In most States, accordingly, and probably in all now, such presumption is denied and held out of place. *S. v. Bell,* 92 Ga., 49; *Smith v. Meyers,* 54 Neb., 1; *S. v. Hendricks,* 32 Kans., 551.

(379) The privy examination, required of a married woman when joining her husband in a conveyance, was based upon the same medieval idea of the right of the husband to control his wife with the lash, if he thought proper. Accordingly it has been abolished in England long since and in all the States of this Union except in North Carolina and five or six others. The requirement for a privy examination has for many years been abolished in all the States that adjoin us—Virginia, Tennessee, Georgia, and South Carolina. As, however, it is statutory, that can only be repealed by statute, as should have long since been

done here, considering the reason for its origin; but the presumption of compulsion of the husband as to crimes committed by the wife in the presence of her husband having been created solely by judicial decision, should be set aside in the same mode, since we have "advanced from the barbarism" upon which it was based.

It was as to this very presumption of the wife being under the direction of the husband that in Oliver Twist (ch. 51) Bumble, the Beadle, said: "If the law presumes that, the law is a Ass—a idiot."

Cited: S. v. Randall, 170 N.C. 762; *S. v. McKinney,* 175 N.C. 786.

STATE v. JIM CAMERON.

(Filed 6 May, 1914.)

1. Homicide—Premeditation—Trials—Evidence—Murder — Presumptions —Burden of Proof.

Upon the trial for homicide there was evidence tending to show that the prisoner worked for the deceased, and was angry and cursed him because he did not bring him some clothes he was expecting, and that he followed the deceased and killed him with a pistol, the deceased offering no resistance, and being unarmed. *Held,* evidence sufficient that the homicide was willful, deliberate, and premeditated, and the court properly instructed the jury to return a verdict of guilty of murder either in the first or second degree; and his further instruction, that they could acquit the prisoner, was not error of which he could complain. The charge of the court upon the law of premeditation, presumption of malice from the killing with a deadly weapon, and burden of proof, is approved.

2. Appeal and Error—Objections and Exceptions—Specific Exceptions.

An exception to the charge of the court must be to a specific proposition wherein error is alleged and pointed out, and an exception contained in an excerpt from the charge, containing several propositions, is not sufficiently definite for its consideration on appeal.

3. Indictment—Name of Deceased—Charge of Court.

Where the indictment was for murder of "John A. Blue," and the court charged that the trial was for murder of "J. A. (Archie) Blue," it is not error when there was no question of identity and no objection was taken at the time.

4. Trials—Instructions — Reading from Decisions — Appeal and Error — Harmless Error—Delays of Trial.

It is not commended that the trial judge while instructing the jury should lengthily read from decisions of the Court bearing, though correctly, upon the law relating to the controversy at issue; but this will not be held for reversible error.

STATE *v.* CAMERON.

The long delays of the law in trials for homicide in this country, compared with that in other countries, discussed and the remedy suggested by CLARK, C. J.

ALLEN, BROWN, HOKE and WALKER concur in the decision of the case.

(380) CRIMINAL ACTION. Appeal by defendant from *Adams, J.*, at December Term, 1913, of MOORE.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

George H. Humber and Hoyle & Hoyle for prisoner.

CLARK, C. J. The prisoner was indicted for the murder of John A. Blue on 11 August, 1913, and convicted of murder in the first degree. The testimony is that J. A. Blue, the deceased, was standing in the door of the commissary, which he ran in connection with the sawmill. The prisoner came around the house with a pistol in his right hand,
(381) looking angry, asked for Blue, and went around the house to where he was. The witness heard talking between him and Blue, and then heard some one curse; he then went there and saw the prisoner backing from the door, who said: "Don't curse me, you (using a foul expression)." Blue replied: "You're another." Prisoner then said: "Man, you stand up here and curse me!" The prisoner was then in the act of shooting. The witness cried out to him: "Jim, don't do that!" But he shot at the time the witness spoke. The prisoner turned and left in a half run. He was three or four steps from the deceased when he shot. The deceased wheeled around and fell. The witness took him up and carried him to the bed, pulled off his shoes and went after his brother. When the witness got back, which was within an hour, Blue was dead.

Other witnesses testified to the fact that the prisoner worked for the deceased, and was angry because the deceased had not brought him some clothes. There is the testimony of Daniel Blue and other witnesses that the prisoner first used vile, insulting expressions, and that the deceased replied, "You're another."

The first exception is to the refusal of the court to charge, "There is no such evidence of premeditation or deliberation as would warrant the jury in returning a verdict of guilty of murder in the first degree." There is testimony that the prisoner came direct from his shanty to the commissary door where the deceased was standing, that immediately the deceased went to his office, when the prisoner followed around the corner of the building with a pistol in his hand; that he was mad at the time, and that he first passed offensive language. This was sufficient evidence

upon which the jury could find that the homicide was willful, deliberate, and premeditated, and the court properly refused to instruct the jury otherwise.

Exceptions 2 and 3 are to the action of the court in permitting the solicitor to read to the jury part of the opinion in *S. v. Daniels,* 139 N. C., 550. On this point his Honor told the jury: "Revisal, 216, says that in jury trials the whole case, as well of law as of fact, may be argued to the jury. You will, of course, understand that the statement of facts in that case is given in the opinion only to explain the law. . . . You are to find the facts from the evidence—the evidence of this (382) case, not in the *Daniels case.*" The prisoner also excepted (Exc. 16) to this charge, but we find no error in the above.

Exception 4 is because the judge in his charge told the jury that the defendant was indicted for the alleged murder of "J. A. (Archie) Blue." There was no question raised on the evidence as to the identity of the deceased, and there was no prayer to instruct the jury that there was a variance. If such point had been raised, the court would at once, in the interest of justice both to the prisoner and to the State, have permitted or required evidence that John A. Blue named in the indictment and "J. A." (or Archie) Blue were one and the same person. It would be a reproach to the administration of justice if such exception could be deemed fatal when there was no indication or suggestion of a variance and all the testimony was directed to the trial of the prisoner for the murder of the person named in the bill of indictment.

As to exceptions 5 and 12, the judge properly told the jury that there was no evidence of manslaughter or of self-defense, and that they could return a verdict either of guilty of murder in the first degree or of murder in the second degree, or not guilty. Indeed, the court might well have told the jury that in any aspect of the case, if the evidence was believed, they should find the prisoner guilty either of murder in the first degree or of murder in the second degree.

As to exception 6, the court charged the jury: "Premeditation is a prior determination to do the act in question, but it is not necessary that such determination shall exist for any considerable period of time before it is carried into effect. If the determination is formed deliberately and upon due reflection, it makes no difference how soon afterwards the fatal resolve is carried into execution. To constitute murder in the first degree there must be express malice, not merely malice which is implied." This instruction merely defined murder in the first degree under Revisal, 3631, and his Honor's definition of premeditation and deliberation is in accordance with our uniform decisions. Among them, *S. v. Jones,* 145 N. C., 466; *S. v. Barrett,* 142 N. C., 565; *S. v. Exum,*

(383) 138 N. C., 602; *S. v. Teachey, ib.,* 588; *S. v. Dowden,* 118 N. C., 1145; *S. v. Thomas, ib.,* 1113; 21 Cyc., 726.

The court further charged the jury: "Murder in the second degree is the unlawful killing of a human being by a person who has formed in his mind a purpose, design, or intention unlawfully to kill, with malice, but without premeditation and deliberation. Manslaughter is the unlawful killing of a human being without malice, express or implied, and without deliberation or premeditation."

"The intentional killing of a human being with a deadly weapon implies malice." The prisoner excepted to the following charge: "When such killing is admitted by the prisoner or shown by the State, nothing else appearing, the prisoner is guilty of murder in the second degree; and the burden then rests on the State to show facts and circumstances sufficient to raise or to aggravate the crime to murder in the first degree —that is, to show beyond a reasonable doubt that the prisoner willfully, with deliberation and premeditation, formed and entertained the fixed design to take the life of the deceased."

The prisoner also excepted to the following charge: "When the killing is admitted by the prisoner, or shown by the State, it is incumbent upon the prisoner to satisfy the jury of facts and circumstances sufficient to mitigate the offense to manslaughter or to excuse the killing of the deceased, unless they arise out of the evidence against him. The court has already charged that there is not sufficient evidence of such mitigating or excusing circumstances—that is, that there is no evidence of manslaughter or self-defense."

The prisoner also excepted because the court charged: "If you find from the evidence beyond a reasonable doubt, the burden being upon the State, that the prisoner intentionally shot the deceased with a pistol and inflicted a wound which caused his death, malice in that event is implied, and the prisoner is deemed to be guilty of murder in the second degree, and in that event this will be your verdict, unless the prisoner is guilty of murder in the first degree."

(384) The above charge of the learned judge is carefully and clearly expressed in accordance with our precedents. *S. v. Yates,* 155 N. C., 450; *S. v. Rowe, ib.,* 436; *S. v. Simonds,* 154 N. C., 197; *S. v. Cox,* 153 N. C., 638; *S. v. Fowler,* 151 N. C., 731; *S. v. Clark,* 134 N. C., 698; *S. v. Brittain,* 89 N. C., 481.

Exception 11 is to a long excerpt from the charge containing a number of propositions. It is therefore an insufficient exception, for an exception must point to some specific proposition in the charge. *S. v. Johnson,* 161 N. C., 264. But after a careful reading of the whole matter excepted to, we find no error therein.

Exceptions 13 and 14 are taken to a statement by the court of the contentions of the State, and cannot be sustained. It is the duty of counsel to call the attention of the court at the time to any contention of the parties which is not supported by the evidence, or it will not be considered on appeal. *S. v. Blackwell,* 162 N. C., 672; *Jeffress v. R. R.,* 158 N. C., 215; *S. v. Cox,* 153 N. C., 638.

Exception 15 is because the court in its charge quoted the following language from *S. v. Daniels,* 164 N. C., 469 (which itself was quoted from *S. v. McCormac,* 116 N. C., 1036), as part of its charge: "While premeditation and deliberation are not to be inferred as a matter of course from the want either of legal provocation or of proof of the use of provoking language, yet all such circumstances may be considered by the jury in determining whether the testimony is inconsistent with any other hypothesis than that the prisoner acted upon a deliberately formed purpose. . . . The question whether there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. The test is involved in the question whether the accused acted under the influence of ungovernable passion or whether there was evidence of the exercise of reason. The conduct of the accused just before or immediately after the killing would tend at least to show a state of mind at the moment of inflicting a fatal wound."

The above was a quotation by *Judge Daniel* from the latest expression of this Court on the subject at the time of the trial. The reading of lengthy opinions in a charge to the jury, though not advised, was held not reversible error. *S. v. Quick,* 150 N. C., 820. There could certainly be no objection even as to the advisability of quoting a (385) short extract like the above.

We have already considered the sixteenth exception. The prisoner has had a fair and impartial trial, and we see no error of which the prisoner can complain.

Speaking not for the Court, but for myself, the objection, if any, to this trial might well come from the other side—organized society. This murder, in which, as it conclusively appears by the verdict of the jury, there were no extenuating circumstances, occurred more than eight months ago, and it is now just presented in argument on appeal. There is much and just criticism of the slow and cumbersome process of executing justice in this country, with its intricacy and uncertainty, which is in marked contrast with the procedure in Germany and England, where justice is swift and sure.

In Germany, in capital cases, the papers on appeal must be submitted by argument in the Supreme Court in a fortnight after the verdict, and it is very rarely that the Court neglects to hand down its opinion within

four weeks at the furthest. Under the English law appeals in criminal cases must be carried up within ten days after trial, and ordinarily the Court renders its decision in from 17 to 21 days, although in murder cases this period is usually much shorter.

In England, objections to the admission or rejection of evidence are rarely if ever taken, and if taken, are not subject to review on appeal. Until 1908 there was no appeal in criminal cases in England, but the verdict of the jury was final and conclusive, subject only to pardon or commutation by the Executive Department. Since the act of 1908 an appeal in criminal cases is allowed, but not as a matter of course. In 1911 there were applications for appeal in only 7 per cent of the convictions. There was a total of 623 applications for such leave to appeal and leave granted in only 109 of these. Out of 165 appeals considered, in 104 the conviction was affirmed, in 36 the sentence was altered, and in 25 a new trial was granted. There were in England and Wales in 1911, with 40 millions of people, only 7 appeals on conviction of murder. In 6 of these the conviction was affirmed and in the other it was set aside.

(386) The procedure in this State under which one charged with murder or other serious criminal offense is able to protract the controversy (for such it becomes) so that the punishment, if finally inflicted, sometimes comes one or two years after the crime was committed, deprives the punishment of its moral effect and its infliction takes on rather the appearance of revenge than of punishment. It is largely due to this, doubtless, that according to official statistics homicides have been so numerous in the United States, and especially in the southern part of the Union, as compared with other civilized countries. In 1896 the number of homicides in the United States was returned as 10,662, and in 1895 there were 10,500. Since then the number has decreased. The reports of the Attorney-General of North Carolina, whose publication is required by law for public information, show that for the year ending 1 July, 1912 (p. 75), there were 189 prosecutions in this State for homicide, exclusive, of course, of those lynched or not prosecuted for any other cause. The same reports show that in some years we have had from four to six lynchings in this State per year, while the executions by law were one or two. In 1894 our Attorney-General's report showed eight lynched and two legal executions, and the next year two lynched and no execution by law. These being reports required by law, we take official notice of them, and indeed they are required to be made that the public may benefit by the information. *S. v. Cole,* 132 N. C., at p. 1087; *S. v. Rhyne,* 124 N. C., at p. 859. Indeed, this information having been brought to the public, was largely

instrumental in procuring legislation as to lynching, and since then there have been more executions by law and consequently fewer lynchings. Lynching has been defined as a "vote of lack of confidence by society" against the slowness and uncertainty of justice.

There has been a serious discussion going on throughout this country, which is broadening in its depth and sweep, not only by the public, but by the leading members of the profession and the American Bar Association under the lead of its president, ex-President Taft, as to the best methods of reform in our criminal procedure.

This is said by the writer, *speaking for himself alone,* under a belief that if the matter is called to the impartial consideration of the Bench and Bar and of the people of the State, a speedier and (387) more just method of trial may be initiated which, in this country and in this State, would have the same effect that it has had in Germany and in England of reducing the enormous number of homicides which brings reproach upon the good name of our people. Indeed, a legal journal of prominence in discussing the excessive number of homicides in the United States (at that time 10,000 annually, though now happily reduced), and especially in the South, and the paucity of convictions, which at that time averaged 240 of murder in the first degree (with 100 executions or less) out of over 10,000 homicides annually in the United States, felt justified in its own opinion in referring to certain States by name, among them North Carolina, as being *in this respect* "Commonwealths of retarded development."

This great number of homicides is due mostly to the slowness in trial and uncertainty of conviction. The law of this State says that death shall be the punishment for deliberate and premeditated murder. But in practice, the punishment is too often a moderate fine paid by the murderer, or his friends, to his counsel in the shape of a fee and a very far heavier fine laid upon the taxpayers for the cost of a long, tedious, and futile trial.

To a large extent North Carolina has reformed its indictments, under the impulse originally given by *Chief Justice Ruffin* in *S. v. Moses,* 13 N. C., 452, by doing away with redundancy of phraseology and many other technicalities which formerly were held sacred by counsel for the defense. Indictments may well be simplified still further. One great fault in our capital trials has been the vast discrepancy in the number of peremptory challenges, 23 being till lately allowed the prisoner without cause and only 4 to the State. This was to some degree modified by the act of the last Legislature, but our method of obtaining juries in both civil and criminal cases is still very far behind the best methods known. Another fault in our procedure is in the long delay before trial and in

another long delay on appeal and the numerous exceptions entertained during the trial, especially as to the evidence which lengthens a trial inordinately and makes it unnecessarily expensive to the public.
(388) In England and Germany the verdict is practically the conclusion of the proceedings against the defendant. In this country, especially when the defendant is a man of means, it is often merely the beginning of a controversy, as, for instance, in the *Becker case* in New York, which is now prominently before the public. Our government rests in the people, and knowledge of no part of its administration should ever be withheld from them. When there are wrongs, give the people full knowledge and they can be trusted to correct them. The reports of the Attorney-General are required by law to be printed for this very purpose of giving the people the fullest information.

No error.

ALLEN, J., concurring in result: The prisoner has been convicted of murder in the first degree and sentenced to death, and the judgment has been affirmed. This would seem to be enough. I do not think that statistics, not relevant to the decision of the cause, and which are often misleading, have any place in a judicial opinion. Nor do I concur in the indictment against the people of this State, or the administration of her laws. I am well assured that facts and conditions existent here do not justify it.

I am authorized to say that Justices WALKER, BROWN, and HOKE concur in this opinion.

Cited: *S. v. Wade,* 169 N. C. 308; *S. v. Merrick,* 172 N.C. 872; *S. v. Johnson,* 172 N.C. 925; *S. v. Burton,* 172 N.C. 942; *S. v. Foster,* 172 N.C. 964; *S. v. Neville,* 175 N.C. 738; *S. v. Brinkley,* 183 N.C. 723; *S. v. Williams,* 185 N.C. 666; *S. v. Love,* 187 N.C. 39; *S. v. Steele,* 190 N.C. 510; *S. v. Evans,* 198 N.C. 84, 86; *S. v. Gregory,* 203 N.C. 531; *S. v. Bittings,* 206 N.C. 803; *S. v. Buffkin,* 209 N.C. 124; *S. v. Beatty,* 226 N.C. 766; *S. v. Lambe,* 232 N.C. 572.

STATE v. ROBINSON ROGERS, LEE ROGERS AND WALDO McCRACKEN.

(Filed 27 May, 1914.)

1. **Public Officers—Criminal Law—Arrest—Warrant—Offense Committed in Presence.**

An officer may not make an arrest without a warrant except for offenses committed in his presence, and then he should make known to the offender that he is an officer authorized to make the arrest.

2. **Public Officers—Criminal Law—Homicide—Arrest—Trials—Burden of Proof—Instructions—Several Motives—Presumption of Innocence.**

Where upon the trial for homicide the defense is interposed by the defendants that they killed the deceased in the performance of their duties as officers authorized to make an arrest in a manner justifiable, or that they had not shot the deceased, and were not responsible for his death, the question of guilt is for the jury to determine, under conflicting evidence, in accordance with how they should ascertain the facts to be, with the burden on the State of proving the defendants guilty beyond a reasonable doubt.

3. **Judge's Charge—Two Motives Inferable—Jury.**

The defendants are not entitled to an instruction that where there are two or more motives for the crime committed the humanity of the law will ascribe it to that which is not criminal.

APPEAL by defendants from *Ferguson, J.*, at September Term, (389) 1913, of HAYWOOD.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Bryson & Black, John M. Queen, and John M. Stamey for defendants.

CLARK, C. J. This is a conviction for manslaughter. The defendants were here on a former appeal, 162 N. C., 656. The defendant Rogers was the marshal of the town of Clyde and his codefendant had been deputized by him to assist in maintaining order at the time of the occurrence.

Exceptions 1, 3, and 5 present the question of the right of the defendants to arrest the deceased without a warrant for a previous disturbance which had occurred downtown.

That an officer cannot arrest without a warrant for a breach of the peace previously committed is well settled. *S. v. Campbell,* 107 N. C., 948, where the Court said: "After the offense, the emergency requiring such prompt and summary action having passed by, the justice of the peace or other proper officer should, upon proper affidavit, issue a State

warrant for the offenders." An arrest without warrant should be attempted only when the offense is committed in the officer's presence. *Sossamon v. Cruse,* 133 N. C., 470; *S. v. McAfee,* 107 N. C., 812; *S. v. Hunter,* 106 N. C., 796; *S. v. Freeman,* 89 N. C., 469.

Exception 2 is that the court charged that if the deceased was drunk at the time of the arrest the officer might have arrested him if he had made himself known as such. But the right to make an arrest (390) without warrant imposes upon the officer the duty to make himself known as such at the time; and if he fails to do so, the arrest is illegal, and may be lawfully resisted, unless the person arrested knows that he is an officer. *S. v. Rollins,* 113 N. C., 722. In the present case the defendant was making an arrest in the night-time with a deadly weapon, without a warrant, and, according to testimony of the State's witnesses, when no offense was being committed at the time. *S. v. Medlin,* 60 N. C., 489.

Exception 4 was abandoned in this Court. Exception 6 is to the refusal of request to charge that "where an act may be reasonably attributed to two or more motives, one criminal and the other not, the humanity of the law will ascribe it to that which is not criminal." This was said in *S. v. Hawkins,* 155 N. C., 466, which was a prosecution for entering a certain house at night with the intent to commit larceny, and the intent was the gravamen of the charge, in which case this Court sustained the conviction. The remark in *S. v. Hawkins, supra,* is quoted from *S. v. Massey,* 86 N. C., 660, and is there taken from the dissenting opinion in *S. v. Neely,* 74 N. C., 425; but it does not bear the meaning which the defendants seem to attribute to it, that when upon the evidence, if the jury believe it one way they should find the defendant not guilty, and if the contrary belief prevails the jury would find the defendant guilty, they must find, according to the humanity of the law, that he is not guilty.

What was really meant is thus stated by *Ruffin, J.,* immediately after quoting from *S. v. Neely* (86 N. C., at p. 661): "Every man is presumed to be innocent until the contrary is proven, and it is a well established rule in criminal cases that if there is any reasonable hypothesis upon which the circumstances are consistent with the innocence of the party accused, the court should instruct the jury to acquit, for the reason that the proof fails to sustain the charge. The guilt of a person is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence." This is simply the statement of the unquestioned law that a man must be acquitted unless he is found guilty beyond a reasonable doubt, or to the satisfaction of the jury. It is not intended to control the finding of the jury as to the facts by holding that

when the evidence for the defendant and the evidence for the State (391) conflict they must take the evidence that is most charitable to the accused. What the circumstances are is for the jury to determine.

What was said in *S. v. Massey* and *S. v. Hawkins, supra,* has no application in the present instance, where the contentions of the defendants are that neither of them fired the fatal shot, and that if either of them did so they had a right to do so, as the deceased was resisting an arrest and that they had a right to arrest him without a warrant, because he was drunk at the time. Under the charge, in connection with the evidence, the jury found them guilty, because the defendants were attempting to arrest the deceased without warrant for a matter which had occurred previously and at another place, and killed him for resisting. It was a question of fact as to the circumstances, and not one of intent.

Exceptions 7, 8, 9, and 10 are for refusals to charge as requested and as to the proof necessary to convict, and an examination will show that so far as these prayers were correct they were substantially and correctly given in the charge.

The deceased came to his death from gunshot wounds at a schoolhouse where an entertainment was being held. By the evidence for the State the deceased came there from the direction of the town of Clyde, about 10 p. m., riding at a moderate gait and peaceably. The defendants came out of the schoolhouse with pistols in their hands, and some one said: "There he is; catch him." The defendant McCracken went up to him with pistol in his hand and caught his horse by the bridle with his left hand and presented his pistol, saying, "I have got you." The firing then began. The deceased rode off about 50 yards and fell off his horse. There was much evidence to this effect, and there was evidence for the defendants. The jury evidently found, under the charge, that the above was the state of facts and that the defendants attempted to arrest deceased for some disturbance of the peace that he had previously made that day in the town of Clyde, without having a warrant and without telling him that they were officers. We do not find any error.

There were no exceptions to the evidence or otherwise, except to the charge and to the refusal to charge, as above stated.

The evidence was thoroughly argued to the jury, who found (392) the defendants guilty under a careful and correct charge of the court in which we find

No error.

Cited: *S. v. Kincaid,* 183 N.C. 718; *S. v. Loftin,* 186 N.C. 206; *S. v. Robinson,* 188 N.C. 785; *S. v. Shoup,* 226 N.C. 73; *Alexander v. Lindsey,* 230 N.C. 669; *S. v. Pillow,* 234 N.C. 148.

STATE v. BAILEY JOHNSON.

(Filed 20 May, 1914.)

Homicide—Trials — Self-defense — Evidence — Instructions — Appeal and Error.

Upon a trial for a homicide there was evidence tending to show that the deceased and the prisoner were friendly; that V., at whose home prisoner was living, had several days before the homicide, given the deceased permission to use his horse and buggy, and that during the night the deceased, unknown to the prisoner, took the horse from the pasture to get a prescription filled for a sick member of his family; that the prisoner was awakened and told someone had stolen the horse, and, arming himself with a gun, went in search of the supposed thief; that soon he heard the horse returning, but did not recognize deceased, who had shaved off his beard, and called to him to stop, but he kept on riding and called out "Quit that!" "Quit that!" etc.; that prisoner twice fired in the air to cause the rider to stop, and the third and fatal shot was fired because prisoner mistook a medicine bottle, which the deceased "flourished," for a pistol; and prisoner testified that he fired in apprehension for his own safety. *Held*, this evidence was sufficient to be submitted to the jury upon the question of whether the defendant reasonably believed, under the circumstances, he was acting in self-defense, or to save himself from death or great bodily harm; and an instruction that the jury return a verdict of manslaughter was reversible error.

CLARK, C. J., dissenting.

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

The defendant was indicted for the murder of Roby Carter on 21 July, 1913, and from the judgment rendered on a verdict of manslaughter, he appealed. He was sentenced to four years in the State's Prison.

(393) The deceased was living on a place owned by one Charles Voncanon, about 1½ or 2 miles from Voncanon's residence. The defendant is a boy of about 17 years of age, whose home is in Georgia, and who had been living with the Voncanons since about 20 April. On the night of the homicide the deceased went to the Voncanon pasture and took out a horse and rode off with it. Mr. Voncanon was away and Mrs. Voncanon was awakened by the slamming of the gate and the noise of the horse's hoofs. She got up, recognized the horse, but not the man, and awakened the defendant and told him to go out and see about it. The defendant went to the barn and pasture, discovered that the horse and bridle had been taken, and went over to the house of one Bynum Banner to see if he could learn anything about it. Banner had heard the horse going down the road about thirty minutes before, and while the defendant was there they heard a horse coming up the road. The

defendant went out, and the witness for the State, Bynum Banner, gives the following account of the shooting: "When I heard the horse the second time, defendant left my room. I heard defendant say, 'Halt there! Throw up your hands!' three times; then gun fired; 22 rifle. Carter said, 'Quit that.' Defendant said, 'Halt and throw up your hands!' Defendant shot second time. Carter said, 'Quit that! Quit that!' Then gun fired third time, and Carter said, 'Oh, Lordy! You have killed me.' I went out; they were walking toward each other. Roby said, 'Why did you shoot me?' Defendant said, 'I am sorry that I shot you; but you ought to have told me who you were; you ought to have stopped when I called to you.'" Bynum Banner further testified, on being recalled, that the defendant said to him that he thought some one had ridden the horse to get liquor.

There was evidence tending to show that Voncanon had told the deceased that he might borrow a horse at any time, and when the deceased borrowed the horse on the night he was killed, he did so to get medicine from a doctor for his sick child.

The defendant testified in his own behalf, and the material part is as follows: "I have been living in this country since 20 April, with Mrs. Voncanon. Am 17 years old. Night of 21 July I had been out late to rehearse; went to bed; been there half-hour. Aunt Nollie woke me up; told me she heard gate slam; heard trot of horse; (394) thought it was a certain horse of hers; I got up, went to barn; took rifle with me; searched the pasture; found one of the horses missing; found one of the bridles missing. I went back and told her. She wanted me to go to Bynum Banner's and see if I could get any information. I went and woke him up. Asked him where his horse was. Told him our horse was gone and one of the bridles missing. We talked a few minutes; heard the horse coming. I walked out in the moonlight to the fence. I looked to see if I could recognize the man with the horse. Could not. I told him to halt and throw up his hands. I had no reason to shoot, but he kept riding, and I shot. Did not shoot to hit him. He said, 'Quit that!' I hollered to him to halt and throw up his hands again. He was getting a little by me. He twisted around and had a bottle; I thought it was a nickel-plated pistol. I shot again and he either fell off or jumped off. He said, 'Don't shoot again; it is Roby.' I did not shoot to hit him at first, but just thought he would stop. Before he wore mustache; that night he was clean shaven. I asked him why he did not tell me sooner who he was. He said he just pulled on and thought I was 'kidding' him. The horse belonged to Mr. and Mrs. Voncanon. He passed from the barn by the house going to the doctor's. Forks of roads where I shot him, but I could not tell if he intended to

turn off at the forks or not. We were entirely friendly. I had given him a shirt the day before. Aunt Nollie told me that the horse had been taken without her permission." He further testified, on cross-examination: "I had known Roby Carter from April to 21 July. He worked there, but did not handle the horses. He worked a crop, but I plowed the ground for him. The moon was shining, giving light to a certain extent. I was 50 or 60 feet from Roby when I first saw him. Could not identify the horse when I first saw him. Could not tell its color, but judged it by its size and sound. I did not care about the man, but wanted the horse. Can't tell why I fired the first two shots; had no reason; fired it with the expectation of him stopping. Had the butt of gun on fence and fired straight up—the horse was trotting all the
(395) time. I did not shoot to hit him until he flourished the bottle, and I thought it was a nickel-plated pistol."

Mrs. Nollie Voncanon testified in behalf of defendant: "Was at home that night with my two little girls and Bailey. My husband was at Elk Park. I was awakened by slamming of gate and heard horse's hoofs. I got up and recognized the horse, but not the man. I waked Bailey; told him to go to the barn and see if the horse was gone. He did so and took this little rifle. I sent him to Bynum Banner's. No one asked me about the horse. When I got to where Bailey and Roby were, Bailey said, 'Roby, why did you not speak?' and Roby said, 'I was to blame; I ought to have spoken.' On Friday Roby had a mustache and growth of beard on his face. This day his hair was clipped and he clean shaven, 'ghostly looking.' Horse has long, slinging trot, different from any other horse we ever owned. I told Bailey that some one had stolen Curly, as I thought, but for him to go to the barn and see."

His Honor charged the jury, in effect, that if they believed the evidence, the defendant was guilty of manslaughter, at least, and the defendant excepted.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

L. D. Lowe, T. A. Love, and J. W. Ragland for defendant.

ALLEN, J. The charge of his Honor deprived the defendant of the benefit of his plea of self-defense, and if there is any evidence to support the plea, the charge is erroneous.

This Court said in *S. v. Gray,* 162 N. C., 612, that, "One may kill when necessary in defense of himself, his family, or his home, and he has the same right when not actually necessary, if he believes it to be so, and he has a reasonable ground for the belief," and in *S. v. Kimbrell,*

151 N. C., 709, "If there was *any* evidence to go to the jury in support of this contention, then it was for the *jury,* and not for the *court,* to pass upon the question of his *motive* in firing the shots, as well as the *reasonableness* of the grounds of his apprehension. *S. v. Nash,* 88 N. C., 618; *S. v. Harris,* 119 N. C., 861; *S. v. Hough,* 138 (396) N. C., 663; *S. v. Blevins,* 138 N. C., 668; *S. v. Castle,* 133 N. C., 769; *S. v. Clark,* 134 N. C., 699; *S. v. Barrett,* 132 N. C., 1005."

It was also said in *S. v. Barrett,* 132 N. C., 1007: "In some of the early cases expressions may be found which would seem to indicate that a case of self-defense is not made out unless the defendant can satisfy the jury that he killed the deceased from necessity; but we think the most humane doctrine and the one which commends itself to us as being more in accordance with the enlightened principles of the law is to be found in the more recent decisions of this Court. It is better to hold, as we believe, that the defendant's conduct must be judged by the facts and circumstances as they appeared to him at the time he committed the act, and it should be ascertained by the jury, under the evidence and proper instructions of the court, whether he had a reasonable apprehension that he was about to lose his life or to receive enormous bodily harm. The reasonableness of his apprehension must always be for the jury, and not the defendant, to pass upon, but the jury must form their conclusion from the facts and circumstances as they appeared to the defendant at the time he committed the alleged criminal act. If his adversary does anything which is calculated to excite in his mind, while in the exercise of ordinary firmness, a reasonable apprehension that he is about to assail him and to take his life or to inflict great bodily harm, it would seem that the law should permit him to act in obedience to the natural impulse of self-preservation and to defend himself against what he supposes to be a threatened attack, even though it may turn out afterwards that he was mistaken; provided, always, as we have said, the jury find that his apprehension was a reasonable one and that he acted with ordinary firmness," and this was approved in *S. v. Blackwell,* 162 N. C., 683.

These authorities (and many others to the same effect could be cited) establish the following propositions:

(1) That one may kill in his defense when necessary to prevent death or great bodily harm.

(2) That he may kill, when not necessary, if he believes it to be so and has a reasonable ground for the belief.

(3) That the reasonableness of the belief must be judged by (397) the facts and circumstances as they *appeared to the party* charged *at the time* of the killing.

(4) That the jury, and not the party charged, are to determine the reasonableness of the belief.

(5) That if there is any evidence that the party charged has killed under a reasonable belief that he is about to suffer death or great bodily harm, and to prevent it, the plea of self-defense must be submitted to the jury.

Applying these principles, we cannot say, as matter of law, there is no evidence of self-defense.

There is evidence tending to prove that the defendant was living at the home of Mrs. Voncanon; that on the night of the killing he was the only male present at the home; that he was awakened by Mrs. Voncanon late at night and told that her horse had been stolen; that he went to the pasture and found a horse and bridle missing; that he went to a neighbor's in search of the horse, carrying a rifle with him; that while there he heard the horse approaching and went to the road; that he recognized the horse; that he had known the deceased before, but did not know who he was at the time of the killing, because he had shaved off his mustache; that it was a moonlight night; that he told the deceased twice to stop, and he did not do so; that he fired the rifle twice and the deceased told him to quit; that he did not shoot at the deceased, but each time he shot, the butt of his rifle was resting on the fence, and he fired straight up; that after he shot the second time, the deceased twisted around and flourished something which the defendant thought was a pistol; that the defendant then fired the fatal shot and because he believed the deceased was going to shoot him.

If these facts are accepted by the jury, and they find that the last shot was fired under a reasonable apprehension of death or great bodily harm, the defendant would be entitled to an acquittal.

The deceased had a bottle of medicine and not a pistol, and he had not stolen the horse; but the conduct of the defendant must not be judged by the facts as they actually existed, but as they reasonably appeared to him.

(398) If his evidence is believed, he thought he was in pursuit of a horse thief, and it was the part of prudence to take his rifle with him. When he met the supposed thief, he had the right to tell him to stop, and he was not in the wrong to shoot the rifle in the air, and not at the deceased, as notice that he was armed, and an inducement to obey the command to halt. If so, he was guilty of no wrongful act up to the firing of the last shot, and there is evidence that this shot was fired in self-defense.

There is evidence on the part of the State tending to prove that the defendant knew the deceased; that the killing was in a short distance

of the place where the horse was taken; that as the deceased was going in that direction, the defendant must have known he was returning the horse, and other facts indicating that there was no necessity for the killing; but these are for the jury.

For the error pointed out, there must be a

New trial.

CLARK, C. J., dissenting: The deceased, Roby Carter, and the defendant lived on the land of Charlie Voncanon. Voncanon had given the deceased permission, in consideration of having doctored a crippled horse, to ride the other of his two horses. At 10 o'clock one night the child of the deceased being sick, he went to Voncanon's lot, got the other horse and went for some medicine. Voncanon being from home, his wife roused the defendant, who went down the road some 300 yards to the house of the witness Bynum Banner, who testified that he had heard the horse pass going off; that soon the deceased rode up on his return, when the defendant said, "Halt, there! throw up your hands!" three times, and fired. The deceased said, "Quit that"; the defendant again said "Halt, and throw up your hands!" three times, and shot a second time, and the deceased again said "Quit that"; then the defendant fired a third time. The deceased then said, "You have killed me," and added, "Why did you shoot me?" The defendant said, "I am sorry I shot you. You ought to have told me who you were. You ought to have stopped when I called to you." It was a moonlight night.

Linville Aldrich testified that while lying on the bed wounded, (399) the deceased said to the defendant, "You ought not to have shot me." Defendant said, "You ought to have stopped and held up your hands when I called to you," to which the deceased replied, "You shot me twice after I told you it was Roby."

Sam Aldrich testified that the deceased said at that time, "Bailey, you ought not to have shot me," to which the defendant said, "You ought to have stopped and held up your hands." The deceased replied, "You did not halt me until after you had shot twice. I told you it was Roby, and told you not to shoot." The defendant did not deny this statement then, nor in his evidence on the stand.

The defendant testified in his own behalf that he "heard the horse coming, walked out in the moonlight to the fence, did not recognize the man with the horse, told him to halt and throw up his hands. *I had no reason to shoot, but he kept riding, and I shot.* Did not shoot to hit him. He said 'Quit that.' I hollered to him to halt and throw up hands again. He was getting a little by me. He twisted around and had a bottle. I thought it was a nickel-plated pistol. I shot again, and he either fell off

or jumped off. He said, 'Don't shoot again; it is Roby.' I was a little afraid of him, but I went to him. He said he was shot, and I helped him up. I did not shoot to hit him at first, but just thought he would stop." On cross-examination he said: "Can't tell why I fired the first two shots; *had no reason;* fired with the expectation of him stopping; had the butt of gun on fence and fired straight up." When asked by the solicitor, "Why did you fire?" the defendant replied, "Why didn't he stop?" He then added: "The horse was trotting all the time. I did not shoot to hit him until he flourished the bottle, and I thought it was a nickel-plated pistol." The deceased died next day at noon.

The deceased was in no fault. He took the horse by permission of the owner and went for some medicine for his sick child. On his return home with the horse, the defendant, according to his own account on the stand, was on the side of the road and told him to halt and hold up his hands, and fired twice because he did not, and then he says the deceased "flourishing" a bottle he thought was a pistol, he fired and killed
(400) him. The two Aldriches testified that the deceased said to the defendant that he told him who he was and told him not to shoot, twice, before he was shot fatally, and that the defendant did not halt him until after he had shot twice. The defendant did not deny this conversation on the stand.

It appears from this evidence that the deceased was doing no unlawful act, and that the defendant shot him because he did not halt when told to do so by the defendant, and that he was unarmed. The defendant admitted on the stand that after each of the first two fires the deceased told him to "Quit that." If at this point, after being fired upon twice, the deceased had been armed and had fired back, the jury might well have acquitted the deceased upon the ground of self-defense. And if the defendant had then fired in return and killed, he would at least have been guilty of manslaughter, because he was in the wrong and brought on the affray. Certainly the condition of the defendant is no better when the deceased did not fire, was indeed unarmed, and the defendant does not allege even that the deceased pointed the bottle in his direction, but merely says that the defendant "flourished" it.

His Honor was right when he told the jury that "if they found beyond a reasonable doubt that the shot fired by the defendant caused the death of Roby Carter and the facts as to all matters in evidence which preceded the moment of the defendant's firing the rifle the third time were as testified to by all the witnesses, including the defendant himself, who was examined as a witness in his own behalf, then the defendant would be, in law, guilty of manslaughter at least, and it would be their duty to so find."

Life must be cheap indeed in North Carolina, and there is small risk in taking it, if a man riding along the road on a lawful errand can be halted by another who commands him to throw up his hands, and because he does not stop and hold up his hands, that other fires twice, and then because he supposes, mistakenly, that the man thus illegally assaulted "flourishes" a pistol, can kill him without liability. It makes no difference that the defendant thought the man was illegally in possession of the horse, nor that mistakenly he thought he was also in possession of a pistol. In fact, the man was lawfully in posses- (401) sion of the horse, and the defendant does not allege that the deceased did anything except failing to stop, telling the defendant to "Quit that." The defendant says he fired first two times because deceased did not stop. Halting the deceased and firing both shots were an illegal assault. The defendant could not justify under self-defense, even though the deceased had then returned his fire. This has been recently fully discussed by *Hoke, J.*, in *S. v. Lucas,* 164 N. C., 471, holding that "self-defense may not be successfully maintained where the prisoner has wrongfully assaulted the deceased or provoked a fight resulting in the latter's death." The conduct of the defendant from the beginning was illegal. The most that can be said is that he did not intend to kill the deceased until the third shot. Having brought on the trouble by unlawfully halting the deceased and firing twice to make him stop, when he had no right to do so, the subsequent killing was done "in the commission of an unlawful act, and was manslaughter." 4 Blackstone, 191.

To excuse a defendant in such a case as this and give him the benefit of excusable or justifiable homicide, it must clearly appear that he himself had not been at fault. *S. v. Clark,* 134 N. C., 698; *S. v. Brittain,* 89 N. C., 481; *S. v. Dixon,* 75 N. C., 275.

The deceased was in lawful possession of the horse, and was bringing him back home. But even if he had taken the animal without permission, and the defendant had killed him unintentionally, when taking the horse out of the lot, instead of bringing him home (as the deceased was doing), it would have been manslaughter. In *S. v. Roane,* 13 N. C., 58, *Henderson, J.*, held: "A homicide may be justified when it takes place to prevent a threatened felony, but not when inflicted as a punishment for one already committed." And he further says: "To justify the homicide of a felon for the purpose of arresting him, the slayer must show not only felony actually committed, but also that he avowed his object and the felon refused to submit."

In Wharton on Homicide (3 Ed.) it is said: "Though the trespass was against property and the killing was unintentional, it is at least

manslaughter where a deadly weapon was used," citing *S. v.*
(402) *Vance,* 17 Iowa, 138. Here the killing was intentional. And
again, on the same page of Wharton: "If a killing was done to prevent a felony, however, or in defense of home, property, or of another, but was unnecessary or done with improper force, it was manslaughter only if the act was without malice; otherwise, it was murder." Here all three shots were unnecessary to prevent felony and no felony had been committed or attempted.

The defendant had no right to slay the deceased, nor to try to arrest him because he thought the horse had been taken off illegally. He was not an officer, and if he had been, he had no warrant. *S. v. Rogers, ante,* 388. The fact that the deceased was bringing the horse homeward showed that taking him at the utmost was only a trespass. As already said, the prisoner had no right to kill the deceased, even if found taking the horse out of the lot, unless the prisoner had notified the deceased first that he would arrest him, and the felon had refused to submit. *S. v. Roane, supra.*

It follows that halting the deceased and shooting twice when the deceased was returning home with the horse was unlawful, and if an affray had followed in which the defendant had slain him, it would have been at least manslaughter. The deceased, not the defendant, could have pleaded self-defense. For a far stronger reason under these circumstances, when the deceased did not fire back or even attempt to do so, but merely flourished a bottle, the killing could not be justified as self-defense. The deceased was doing nothing unlawful. The defendant was not an officer and had no warrant. That he thought the deceased had illegally taken the horse did not justify him to halt or arrest the deceased with a shotgun. His mistake in supposing that the bottle was a pistol (if indeed he did so suppose) cannot make the killing self-defense when even if the deceased had fired the defendant would not have been entitled to this defense.

Can human life in this State be taken without liability because one, rightfully going along the road, does not stop when halted illegally by another, gun in hand? And is that other (who is not even an officer)
justifiable in slaying because he thinks the man who does not
(403) halt may shoot in return? His Honor was surely correct when
he told the jury that if they believed the uncontradicted evidence the defendant was at least guilty of manslaughter.

Cited: S. v. Pollard, 168 N.C. 121; *S. v. Johnson,* 184 N.C. 644; *S. v. Robinson,* 188 N.C. 786; *S. v. Waldroop,* 193 N.C. 12; *S. v. Holland,* 193 N.C. 718; *S. v. Dills,* 196 N.C. 460; *S. v. Marshall,* 208 N.C.

129; *S. v. Elmore,* 212 N.C. 532; *S. v. Robinson,* 213 N.C. 279; *S. v. Mosley,* 213 N.C. 307; *S. v. Ellerbe,* 223 N.C. 772, 774.

STATE v. SALISBURY ICE AND FUEL COMPANY.

(Filed 27 May, 1914.)

1. Criminal Law—False Pretense—Connivance to Convict.

Upon a trial for false pretense it is no defense that the prosecuting witness "set a trap" for the defendant in the particular case, it being different from a conviction of larceny, where the deception is held to be a consent to take the article; for the absence of consent is an essential ingredient for a conviction of the latter offense.

2. Appeal and Error—Criminal Action—Petition to Review—Motions—Newly Discovered Evidence—Supreme Court.

The Supreme Court can entertain a proper petition in a criminal action to "review the record and reconsider the opinion filed in the case before certification to the lower court on account of an alleged palpable oversight therein"; though in criminal cases a motion for a new trial for newly discovered evidence will not be allowed.

APPEAL by defendant from *Long, J.,* at September Term, 1913, of ROWAN.

Attorney-General Bickett, Assistant Attorney-General Calvert, and A. H. Price for the State.

Linn & Linn for defendant.

CLARK, C. J. This is a petition to "review the record and reconsider the opinion filed in this case before certification to the lower court, on account of an alleged palpable oversight therein." This is a criminal action in which the defendant is indicted for false pretense in obtaining money by means of short weight in coal. The petition to reconsider relies upon the evidence of the prosecutor, in that when he was asked, "Yet you allowed the money to be paid the driver, thinking (404) and feeling and knowing at the time that the ton of coke was at least 200 pounds short?" he answered, "To the best of my judgment."

This Court has uniformly held that "a petition to rehear, or to grant a new trial for newly discovered testimony, cannot be entertained in this Court in criminal actions." *S. v. Lilliston,* 141 N. C., 864, which reviews and approves *S. v. Jones,* 69 N. C., 16; *S. v. Starnes,* 94 N. C., 982; *S. v. Gooch, ib.,* 1006; *S. v. Starnes,* 97 N. C., 424; *S. v. Rowe,* 98

N. C., 630; *S. v. Edwards,* 126 N. C., 1055; *S. v. Councill,* 129 N. C., 511; *S. v. Register,* 133 N. C., 746; and *S. v. Lilliston* has itself since been cited and followed in *S. v. Turner,* 143 N. C., 643; *S. v. Arthur,* 151 N. C., 654; *Murdock v. R. R.,* 159 N. C., 132.

But this differs from a petition to rehear in that it is a motion to reconsider the opinion before it is certified down. In the evidence cited by the petitioner the question is mistaken for the answer. The answer does not say that before the witness paid for the coal he knew that it was less than a ton, but merely that it was so "to the best of his judgment." He further said in his evidence that he "had to buy from the defendant to find out whether it was or not (selling short weight)." He said he had been suspecting it all the time. Counsel for the defendant further asked the witness: "The very minute you looked at this coal that weighed 1,750 pounds, it was not necessary for you to take it to the scales?" To which the witness replied: "Yes, sir; to prove how many pounds; I had much rather have the weights than my judgment." All this shows that while the witness strongly suspected the defendant of selling short, he did not know positively that this was so until he had tested the matter on the scales. In fact, it was impossible for him to know beforehand as to his own purchase. All he really knew was that he was offered a ton of coal by defendant for $5, that the coal was sent to him for a ton, and that he paid the $5, and on weighing it he found that it was 250 pounds short. He also testified to several other instances in which he had bought coal from defendant for other parties, and when it came it was short weight by the scales, and that he sent the coal on to his customers, adding enough of his own coal to make up the weight.

(405) The judge charged the jury: "A false pretense is a false representation of a subsisting fact, false within the knowledge of the person making the representation, calculated to deceive and intended to deceive, and which representation does deceive. . . . When this is made to appear—all these things are made to appear to the satisfaction of the jury and beyond a reasonable doubt—then the offense is what is called obtaining goods under false pretense." There was evidence sufficient to submit the case on these points to the jury, and the charge was unexceptionable to the defendant in this respect.

While the charge included the expression "and did deceive," the latter expression means only that the defendant, by means of the false representation, procured the article. Revisal, 3432, requires merely that the person shall knowingly and designingly, by any false pretense whatsoever, obtain from any other person anything of value with intent to cheat. That section further provides that it is not necessary to allege an

intent to defraud any particular person or any ownership of the thing of value obtained nor to prove an intent to defraud any particular person; "but it shall be sufficient to prove that the party accused did the act charged, with an intent to defraud," and that amply appears in these sales made by defendant.

Nor was it different under the original English statute. In *Rex v. Ady,* 7 Carr. and P., 140; *s. c.,* 32 E. C. L., 469, it is held: "If a party obtains money by false pretense, knowing it to be false at the time, it is no answer to show that the party from whom he obtained the money laid a plan to entrap him into the commission of the offense."

This is followed by many cases in this country cited in the notes to *S. v. Littooy,* 17 A. and E. Anno. Cas., 292, which held: "It is no defense that the complaining witness solicited the defendant to perform the illegal operation charged in the bill with a view to having him prosecuted therefor." In the notes to that case, *ib.,* 295-298, numerous decisions are cited as to different offenses, upholding the above doctrine, among them Abortion, Counterfeiting, Disposing of bank notes with intent to defraud, False pretense, Selling obscene matter, and especially in Liquor Law violations, as to which it is held that "a person making an unlawful sale of liquor is not excused from the conse- (406) quences thereof because the sale was induced for the sole purpose of securing evidence to be used in prosecuting the seller," citing *Borck v. State* (Ala.), 39 So., 580; *Evanston v. Myers,* 172 Ill., 266; *People v. Murphy,* 93 Mich., 41; *People v. Rush,* 113 Mich., 539; *S. v. Quinn,* 94 Mo. App., 59; *s. c.,* 170 Mo., 176; *S. v. Lucas,* 94 Mo. App., 117; *Comrs. v. Backus,* 29 Howe Pr. (N. Y.), 33; *S. v. Smith,* 152 N. C., 796; *DeGraff v. State,* 2 Okla. App., 519; *Tripp v. Flannagan,* 10 R. I., 128.

Another offense as to which there have been many decisions to the above purport are prosecutions for using the mails illegally, in which it was held: "It is no defense that the mails were so used at the instance and solicitation of an officer of the Government." *Grimm v. U. S.,* 156 U. S., 604; *Rosen v. U. S.,* 161 U. S., 29; *Andrews v. U. S.,* 162 U. S., 420; *Price v. U. S.,* 165 U. S., 311; *U. S. v. Duff,* 6 Fed., 45; *Bates v. U. S.,* 10 Fed., 99; *U. S. v. Moore,* 19 Fed. 39.

In *Comrs. v. Backus,* 29 Howard Pr. (N. Y.), 33, which was an action for a penalty for an unlawful sale of liquor, the Court said: "The mode adopted by the plaintiff to bring to light the malfeasance of the defendant had no necessary connection with his violation of law. He exercised his own volition, independent of all outside influence or control. Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world and first interposed in Paradise: 'The

serpent beguiled me and I did eat.' That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment we may pass, upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian, ethics it never will."

There are some offenses, as, for instance, larceny and burglary, in which it is held that if the act is committed with the consent of the owner the perpetrator cannot be convicted; but that is because it is no offense unless the act is done against the owner's consent. The (407) difference between the cases like this and those cases in which the defense can be set up that the prosecuting witness was consenting to the act seems to be that where the owner of the property procures the offense to be committed and seduces or influences the perpetrator to do the act, then he cannot complain. But where the offender commits the act of his own volition, and an officer, or other party, suspecting that the crime is being committed, sets a trap, as by furnishing money to buy whiskey that is being sold illegally, or, as in this case, bargains for an article which on being weighed proves to be short weight, or sends decoy letters through the mail to "trap" a person who is suspected of using the mails illegally, and in like cases, such conduct does not procure the offense to be committed, but the offender acts of his own volition, and is simply caught in his own devices.

In any aspect of the case, therefore, we see no reason to reverse our former decision.

Petition dismissed.

Cited: S. v. Trull, 169 N.C. 370; *S. v. Jenkins,* 182 N.C. 819; *S. v. Williams,* 185 N.C. 664; *S. v. Griffin,* 190 N.C. 135; *S. v. Casey,* 201 N.C. 625; *S. v. Lee,* 203 N.C. 35.

STATE v. ELIZABETH SHAFT.

(*Filed 20 May, 1914.*)

1. Criminal Law—Abortion—Trials—Evidence—Harmless Error — Interpretation of Statutes.

Upon trial of a defendant for unlawfully, etc., administering a certain "noxious drug" to a pregnant woman with the intent to produce a miscarriage, against the provisions of Revisal, secs. 3618 and 3619, testimony as to sexual intercourse is immaterial, and its admission harmless error

2. Criminal Law—Abortion—Expert Evidence—Effect of Drug—Trials—Evidence—Interpretation of Statutes.

Where the defendant is being tried for an intent to produce an abortion upon a pregnant woman, contrary to Revisal, secs. 3618 and 3619, and there is evidence that a capsule given contained a certain drug, it is competent for experts to testify as to the effect of such in producing a miscarriage.

3. Criminal Law—Accomplice—Trials—Evidence—Abortion—Interpretation of Statutes.

While the judge should caution the jury as to the weight to be given the testimony of an accomplice to the crime upon which the defendant is being tried, a conviction may be had upon the unsupported testimony of the accomplice; but it is held that the victim of the defendant in the latter's effort to produce a miscarriage upon her, contrary to Revisal, secs. 3618 and 3619, is not an accomplice in the crime, in a legal sense, whether she consented thereto or not.

4. Criminal Law—Abortion—Intent—Interpretation of Statutes.

It is the intent with which a noxious drug is administered, and the purpose to produce an abortion, that is made indictable under our statutes, Revisal, secs. 3618 and 3619; and it is not necessary for the State to show that administering the drug named would have had the desired effect.

5. Criminal Law—Judgments—Cruel and Unusual Punishments—Constitutional Law.

The defendant was indicted, tried, and convicted of administering to a pregnant woman a noxious drug for the purpose of producing an abortion, contrary to Revisal, secs. 3618 and 3619. *Held*, a sentence to the State Prison for three years and the payment of $1,000 as a fine is not objectionable as cruel and unusual punishment.

APPEAL by defendant from *Carter, J.*, at November Term, (408) 1913, of BUNCOMBE.

This is an indictment for a violation of sections 3618 and 3619, Revisal.

The bill of indictment charged that the defendant "did unlawfully and willfully and feloniously advise and procure a certain woman, called Annie Kraft, to take a certain noxious drug, the name of which is to the grand jurors unknown, with intent thereby to procure the miscarriage of her, the said Annie Kraft, she being at the time pregnant."

From the judgment sentencing the defendant to imprisonment in the State's Prison for three years, and to pay a fine of $1,000, she appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

R. S. McCall and Mark W. Brown for defendant.

(409) BROWN, J. The first and second assignments of error relate to the admission of testimony tending to prove sexual intercourse upon the part of the girl, Annie Kraft. This testimony was wholly immaterial, and certainly harmless as to the defendant.

There was no dispute as to the pregnancy of the girl, and the only question to be determined was whether or not the defendant had administered to her medicine for the purpose of procuring an abortion.

Exceptions 3, 4, 5, and 6 relate to the competency of certain witnesses to testify as experts, and to their qualifications as such. A previous witness had testified that the capsule offered in evidence, and some of which had been administered to the girl, contained aloes, and these witnesses as experts were permitted to testify as to the effect of this drug upon pregnancy, when administered in large doses.

We see no objection to the competency of this evidence.

Exceptions 7, 9, and 11 were taken to the sufficiency of the evidence to go to the jury, and seem to rest upon two grounds:

First. It seems to be contended by the defendant that a conviction cannot be had in such cases on the uncorroborated testimony of the woman, as she is said to be an accomplice in the alleged offense.

Assuming that the girl, Kraft, was an accomplice, the testimony of an accomplice is competent in this State, and a person may be convicted upon the unsupported testimony of an accomplice, though the jury should be cautious in so doing. While Annie Kraft may be, in one sense, an accomplice of the defendant, it is only in a moral and not in a legal sense.

In a note to 12 A. and E. Annotated Cases, p. 1009, there is a full discussion of the cases showing that the victim of an abortion or attempted abortion, whether or not she consents thereto, is not in law an accomplice in the commission of the offense nor within the meaning of the statute providing that there shall be no conviction of a person upon the uncorroborated testimony of an accomplice.

Second. A further contention of the defendant under these exceptions seems to be that the testimony does not show that the defendant advised and procured the prosecuting witness to take or did not administer to her a noxious drug.

(410) There is abundant evidence that the defendant, at the solicitation of Annie Kraft, gave her the capsules containing aloes for the purpose of producing a miscarriage. While there is evidence that the drug furnished her would produce such an effect when administered in very large doses, yet it is not necessary that the State should prove that aloes are a noxious drug and capable of producing the intended effect.

The language of the statutes of the different States describing this offense varies, but they nearly all provide that whoever, with the intent to produce a miscarriage of any pregnant woman, unlawfully administers, or causes to be given to her, any drug of noxious substance whatever, with such intent, shall be guilty of the offense.

Under this statute it has been generally held that the offense may be committed by administering any substance with intent to produce an abortion, whether such substance be noxious or not, and whether it be capable of producing the intended effect or not.

There is a full discussion of this subject in the notes to *Abrams v. Foshee,* 66 Am. Dec., p. 82, where all of the authorities are collated.

The defendant excepts to the judgment of the court on the ground that it imposes a cruel and an unusual punishment, and relies upon the case of *S. v. Lee, ante,* 250. That case is no authority in support of the defendant's contention. The statute in this case limits the punishment to not less than one year nor more than ten years, and a fine in the discretion of the court. The sentence in this case is within the limitation prescribed by law.

Upon a review of the whole record, we find

No error.

Cited: S. v. Jones, 176 N.C. 703; *S. v. Powell,* 181 N.C. 515; *S. v. Ashburn,* 187 N.C. 728; *S. v. Kelly,* 216 N.C. 646.

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(411)

STATE v. ERT LANCE.

(Filed 30 May, 1914.)

1. Criminal Law—Statements by Prisoner—Evidence.

Statements made by a prisoner to an officer concerning a crime for which he is being arrested, and without threat or inducement of the officer, are competent as evidence against the prisoner upon the trial.

2. Trials—Instructions—Special Requests—Contentions—Inferences—Appeal and Error.

It is not error for the trial judge to refuse to give a prayer for special instruction which recites the contentions of the parties, with favorable inferences to be deduced therefrom, it being for the attorney to draw such inferences from the evidence introduced in his argument to the jury; and where the court may have omitted to state a correct contention of the party, his attorney should bring it to the attention of the court at the proper time, and the party cannot complain when he has not done so.

3. Criminal Law—Rape—Trials—Instructions—Evidence—Statutes.

Upon a trial for rape, the prisoner's counsel requested the judge to charge the jury that there were five verdicts which they could return: (1) Rape; (2) Assault with intent to commit rape; (3) Assault with a deadly weapon; (4) Simple assault, and (5) Not guilty. The prisoner admittedly was 22 years of age, and there was no evidence of an assault with a deadly weapon. *Held*, it was not error for the judge to refuse to charge upon the third and fourth propositions, and to substitute therefor an instruction relating to an assault by a man or boy over 18 years of age, upon a woman (Revisal, sec. 3620); and *Further held*, the evidence in this case was more than sufficient to sustain a conviction of the capital offense.

4. Criminal Law—Trials—Witnesses — Interests — Credibility — Instructions.

Upon this trial for rape, the charge to the jury as to the weight they should give the testimony of the defendant and his relatives, that notwithstanding their personal interest, the jury could consider the testimony in accordance as the witnesses were found to be credible, and if found to be credible, to give it the same weight as that of other witnesses, was not reversible error.

5. Criminal Law—Rape—Trials—Instructions—Less Offenses.

Upon a trial for rape, etc., when the evidence permits, it is proper for the judge to instruct the jury that if they should find the prisoner guilty of rape, they need not consider the less offenses charged in the indictment; but should they not so find, then to consider the question of assault with intent to commit rape, etc. Revisal, sec. 3268.

HOKE and WALKER, JJ., dissenting.

(412) APPEAL by defendant from *Cline, J.*, at January Term, 1914, of HENDERSON.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

O. V. F. Blythe and W. C. Rector for prisoner.

CLARK, C. J. Exception 1 cannot be sustained. Statements made to an officer are not incompetent merely because the defendant is at the time in custody or in jail, when they are made without threat or inducement. *S. v. Jones*, 145 N. C., 466; *S. v. Bohanon*, 142 N. C., 695; *S. v. Horner*, 139 N. C., 603; *S. v. Exum*, 138 N. C., 600.

Exception 2. It was not error for the court to refuse to recite a long statement of contentions prepared by prisoner's counsel, when the court stated fully the contentions which were supported by the testimony. If the court had failed to state any particular contention supported by evidence, counsel should have called it to the attention of the court, but

it was not called on to repeat the argument of counsel for the prisoner or in the particular manner and with the inferences which his counsel desired. Counsel could do that in his speech.

Exception 3. The prisoner requested the court to charge: "This is an indictment for rape, which involves an assault, and under the law of the State there are five verdicts that may be returned under this indictment: (1) Rape; (2) Assault with intent to commit rape; (3) Assault with deadly weapon; (4) Simple assault, and (5) Not guilty, as the jury may find; but no verdict of guilty of any offense can be rendered till you are satisfied from the evidence of the guilt of the defendant beyond a reasonable doubt."

The case states that the charge as asked "was given, except (413) that the third and fourth were omitted and instruction touching assault on a woman by a man or boy above the age of 18 years was substituted." Laws 1911, ch. 193, enacts that assault by a man or boy over 18, upon a woman, shall be added to the proviso in Revisal, 3620. This makes the punishment in such cases greater than other simple assaults, and as the prisoner testified that he was 22 years of age, the substitution was proper. The court therefore instructed the jury that they could return a verdict of rape, or of assault with intent to commit rape, or of assault by a man over 18 years of age upon a woman, or of not guilty.

The omission to charge that the prisoner could be convicted of an assault with a deadly weapon cannot be complained of by him, for there was no testimony of such assault. He testified that he did not make any assault with a deadly weapon, and the prosecutrix did not testify to the contrary. Both said he laid the gun down.

The jury refused to find the prisoner not guilty, and also refused to find him guilty of the simple assault upon a woman, or of the assault with intent to commit rape, but guilty of the capital felony. It could not be prejudicial that their attention was not called to the prayer that they might find him guilty of an assault with a deadly weapon, when there had been no evidence of such assault. The prayer was defective, and in such case the court can disregard it altogether.

That part of the charge presented in exception 6 is supported by *S. v. Monds,* 130 N. C., 697; *S. v. Hargrove,* 65 N. C., 466; *S. v. Starkey,* 63 N. C., 7, and *S. v. Hodges,* 61 N. C., 231.

Exceptions 7, 8, and 9, as to the instructions as to the testimony of the prisoner himself and of his relatives, testifying in his behalf, cannot be sustained, as the charge was in accordance with *S. v. Fogleman,* 164 N. C., 461; *S. v. Byers,* 100 N. C., 512, and cases cited. The court told the jury that notwithstanding the personal interest of the defendant

and of his relatives, the jury could consider their testimony, and if the jury "believed them to be credible witnesses, they should give to their testimony the same weight as that of other witnesses."

(414) The court also charged the jury: "If the jury under the law and the evidence should find the prisoner guilty of rape, as charged, they will not consider or pass upon the question of his guilt of any lesser offense. But if they should not find him guilty of rape, then the jury will consider the question whether or not he be guilty of an assault with intent to commit rape," etc. The exception of the prisoner to this charge is also without merit. It was proper that the jury should consider the charge in the indictment, and if they failed to find the prisoner guilty as therein charged, then to pass on to the lesser degree of the same offense. Revisal, 3268.

The prisoner, a negro man 22 years old, of unusually strong and lusty frame, according to his own evidence, is indicted for rape upon a white woman, Mrs. Caroline Crook, a widow 42 years old. Her husband died two years ago, leaving her four children to support, and she having lost by her necessities the little home which her husband left her, had moved to a rented place at a retired and unprotected spot, doing doubtless the best she could. She testified that she had a considerable struggle to keep the rent on it paid. She gave a straight and pitiful story of this negro man's coming to her place, making improper proposals and of being refused, assaulting her, running her little girl out of the house, throwing her down, beating her and committing the rape. No one lived in sight of the house, and there is no public road. There was much corroboration of her evidence.

John Gildon testified that when they got to the house Mrs. Crook came up from under the floor with blood on her hair, face, and bosom. We need not go through all the repulsive and shocking testimony, for certainly this condition of the woman, of which she still showed pitiful signs on her face and bosom at the trial, did not tend in any way to show that she had ever been willing to the embraces of the negro man, as he testified.

It is true, the statute permits that under an indictment for murder or rape the prisoner can be convicted of an assault, but that is permission to the jury to avoid the necessity of a new trial for the lesser offense. It does not require the jury to find the defendant guilty of the lesser offense when there is full evidence to satisfy them, as it did

(415) satisfy them in this case, beyond all reasonable doubt, that the prisoner was guilty of the rape charged. She was a poor widow deprived of the protection of her husband and of the little home left her, endeavoring to support her children and forced to live in this unpro-

tected spot, a distance from the public road, and therefore at the mercy of this negro man animated with such impulses as the jury have found. There was evidence that the character of Mrs. Crook and of all her witnesses was good, and there is not a syllable of evidence as to her bad character, save only from the prisoner himself. There was evidence that he was a man of bad character, and he admitted that he had served sentences for perjury and other offenses.

It has been repeatedly held that the judge upon a proper state of facts can tell the jury that if they believe the evidence they can find the prisoner guilty of murder or nothing. It would have been no error to have so charged on this occasion.

If the testimony of the woman was believed, corroborated as to many points by witnesses who proved a good character, he was guilty of a most brutal and shocking rape upon an unprotected white woman. His testimony that she had consented to his embraces was wholly unsupported. Her bloody and bruised condition when the neighbors came up, her being found under the floor, her own testimony, the natural repugnance of a decent white woman to such intercourse, naturally outweighed with the jury the unsupported and most improbable testimony of the prisoner. There could no prejudice accrue to the prisoner from the court not charging that the jury could convict of assault with a deadly weapon, for there was no testimony from her that he had assaulted her with the gun, and the prisoner testified that he did not assault her at all, but that she hurt herself by falling against a chair. There can be no error in not charging that they could convict him of simple assault, because under the law as it now stands, Laws 1913, ch. 193, there can be no simple assault in such a case as this, because when there is an assault by a man or a boy over 18 years old upon a woman it is a different offense and punishable like an assault with a deadly weapon, and the judge charged exactly as the statute required. She proved by herself and corroborating witnesses that he was guilty of the (416) highest crime—that of rape. If there had been any evidence of an assault with the gun, it is well settled by our decisions, and as a matter of common sense it is necessary in order that the courts may maintain public respect, that new trials shall not be granted for matters which, even if technically errors, could not reasonably change the result.

It is impossible to read this evidence and have any doubt that if the court had charged as the prisoner asked, the jury should have returned a verdict of rape as they did, if they believed the overwhelming weight of the testimony, and if they did not, they should have acquitted the prisoner altogether, for he testified not only that he did not assault her with a gun, but that he did not assault her at all, and that her bloody

and bruised condition was due to the fact that she assaulted him, and that he acted—a strong, able-bodied, vigorous negro man, 22 years old—purely in self-defense, and that she hurt herself. The jury did not believe him, and no one can suppose that any jury could be impaneled that would believe his version of self-defense. It was only by the quick use of automobiles that the prisoner was carried over the county line to safety in jail elsewhere. At the trial the public, in assured confidence that the law would be administered by twelve intelligent, honest men and an upright judge, refrained from all demonstration, though the woman's bruised and beaten countenance, as appears by the record, still bore the marks of the violence inflicted upon her feeble frame by this prisoner and corroborated the extreme energy with which the prisoner used his privilege of self-defense—if it was to be believed.

The prosecuting witness was poor and in humble circumstances, with a dependent family of four children—a widow living in an unprotected situation; but she was entitled to the protection of the laws of her country. The jury believed her statement. They did not believe that the prisoner had done nothing more than defend himself. If they had believed him, their verdict would have been "Not guilty."

It is a pitiful tale, calculated to arouse every feeling of humanity and of justice. The prisoner had a fair, full, and impartial trial at the hands of a jury to none of whom he objected, and under the
(417) guidance of an intelligent, just judge. No error appears on this record, and if there had been any, none which could reasonably affect the result.

The testimony of the prisoner that he had had previous sexual intercourse with the prosecutrix was utterly without corroboration, and unless this was true he was merely adding to the terrible offense of which the jury found him guilty, in attempting to destroy the good character she proved by her neighbors. Her character was not impeached by any witness. There was not only testimony of the prisoner's bad character, but, as already stated, he admitted on the stand that he had served a sentence for perjury and that he had been imprisoned and on the roads for other offenses. The evidence of the prosecutrix, in indignant denial of the charge of improper conduct, was uncontradicted by any other testimony than that of the prisoner. Even the colored woman who was summoned by the prisoner testified that she had never seen any improper conduct on the part of Mrs. Crook.

The evidence for the State was clear, direct, corroborated, and overwhelming; that for the defense was the uncorroborated testimony of the prisoner (who admitted he was a perjurer and a former convict), that the defenseless woman of a different race had been his paramour; that

he beat her up in "self-defense," or, rather, that she bloodied and bruised herself in assaulting him. The jury simply did not believe him.

No error.

HOKE, J., dissenting: Chapter 80, sec. 3269, provides that, on the trial of any indictment, the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime charged, or of an attempt to commit a less degree of the same crime, and doubts having arisen whether, on indictment for rape, a verdict for an ordinary assault could be rendered, the Legislature enacted section 3268 of Revisal, in terms as follows: "On the trial of any person for rape, or any felony whatsoever, when the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found, the court shall (418) have power to imprison the person so found guilty of an assault for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character."

In the present case the defendant has been indicted and convicted of the capital offense of rape, and there were facts in evidence to support the charge. Prosecutrix testified directly to the rape, and that, at the beginning, prisoner cocked his gun, which he had with him, and said, "Damn you, I'm coming on anyhow, and if you holler, I'll shoot your brains out," etc. On the part of defendant there was evidence tending to show that he had formerly had sexual intercourse with the prosecutrix by her consent; that on this occasion he went to see prosecutrix at her home, and she asked prisoner if he had any money, and, on being told that he had none, she became enraged, cursed witness, and they got into a fight; that she, the prosecutrix, had a piece of crooked iron and hit witness on the arm, and witness slapped her; "then we grabbed hold of each other and fell over on a chair, and she struck her face on the chair as we fell," etc. "We fell on the floor, and I was shaking her to keep her from hitting me with the iron when Miss Gildon ran up. Miss Gildon said, 'Oh! I've caught you!' or something like that, and prosecutrix then turned me loose, and I turned her loose," etc.; that witness did not commit a rape or have sexual intercourse with her at that time.

This witness, Mary Gildon, had testified in effect: "I saw Ert Lance at Caroline Crook's house the day before Christmas. He was on her between her legs. I saw him hit her in the mouth. He was down on her, her legs drawn up; she was bloody. He was doing that way [witness shows with her arms how defendant was shoving, with his arms,

the arms of prosecutrix]. I said, 'Uh, huh! I've caught you.' He raised up, got his gun. I was at one door of the house, and he went out the other. He fired his gun. I thought he shot me in the back."

With this and other testimony for and against the prisoner, the court was asked, among other things, to charge the jury that, on the bill of indictment and evidence, they could render one of five verdicts:
(419) (1) Guilty of rape, (2) Of assault with intent, (3) Assault with deadly weapon, (4) Simple assault, (5) Not guilty.

The court declined to charge that prisoner could be convicted of either an assault with a deadly weapon or a simple assault, and charged instead that, on this bill and the facts in evidence, the jury could convict of rape, assault with intent, etc., assault on a woman by a male above the age of 18 years, and not guilty, and, in thus modifying the prayers for instructions, I am of opinion that the court committed an error which entitles prisoner to a new trial.

It is a well recognized principle with us that where one is indicted for a crime and, under the same bill, he may be convicted of a lesser degree of the same crime, and there is evidence tending to support the milder verdict, the prisoner is entitled to have this view presented to the jury under a correct charge, and an error in this respect is not cured by a verdict convicting the prisoner of a higher offense, for, in such case, it cannot be determined that the jury would not have convicted of the lesser crime if the view had been correctly presented. *S. v. White,* 138 N. C., 715; *S. v. Foster,* 130 N. C., pp. 666-673; *S. v. Jones,* 79 N. C., 630.

In the present case defendant, as stated, is indicted for the crime of rape. Under such an indictment, and by express provision of our statute law, a verdict of assault with a deadly weapon or even of simple assault could be rendered if there is evidence to support such a position.

There was testimony of prosecution from which an assault with deadly weapon could well have been rendered, and evidence on the part of the prisoner tending to show he was guilty, if at all, of only a simple assault.

Not only was the law on such an issue not correctly presented in the charge, but his Honor in effect told the jury that they could not render any such verdict, and virtually directed them not to consider the evidence offered by prisoner at all.

It is no answer to this position that the jury were allowed to convict of an assault on a woman by a male over 18 years of age, and that the defendant could have had the benefit of every position open to
(420) him on the evidence considered under that charge.

There was evidence, as stated, on the part of the defendant tending to show a simple assault—an ordinary fight between them. It was all the defense the prisoner attempted.

Under our statutes and principles established by our decisions for the ascertainment of the truth in these cases, he was entitled to have the testimony considered according to its usual and natural significance. In *Jones' case, supra,* the Court held: "Where, upon a trial for homicide, the only evidence relied upon by the State to connect the prisoner with the offense are his own confessions, and those confessions tend to disclose a case of mutual combat upon sudden provocation between the prisoner and the deceased, it was held to be error to exclude that view of the case from the jury, however much it may conflict with opposite theories arising from other portions of the evidence."

Applying the principle, I am of opinion that this conviction has not been had in accordance with our laws, and prisoner is entitled to a new trial.

There is evidence in the record from other sources tending to corroborate the position insisted on by defendant, but no amount of reiteration pro or con, however appealing or eloquent, can or should be allowed to justify a plain departure from established legal principles, and especially when a prisoner is on trial for his life.

I am authorized to say that Associate Justice WALKER concurs in this dissent.

Cited: Ball v. McCormack, 172 N.C. 682; *S. v. Lovelace,* 178 N.C. 769; *S. v. Williams,* 185 N.C. 692; *S. v. Barnhill,* 186 N.C. 451; *S. v. Green,* 187 N.C. 469; *S. v. Newsome,* 195 N.C. 557; *S. v. Beal,* 199 N.C. 303; *S. v. Jones,* 203 N.C. 375; *S. v. Dee,* 214 N.C. 511; *S. v. Holland,* 216 N.C. 615; *S. v. McKinnon,* 223 N.C. 164; *S. v. Speller,* 230 N.C. 350.

STATE v. WALLACE RAY.

(Filed 30 May, 1914.)

1. Trials—Improper Arguments—Courts—Correction—Appeal and Error—Presumptions.

Remarks made by a solicitor in the prosecution of a case relating to extraneous matters, calculated to unduly prejudice the defense, should, in proper cases, be promptly rebuked from the bench, with such instruction as will remove from the minds of the jury the prejudice that may have been caused thereby; and when a motion for relief has been made in the

trial court based upon matters of this character, set out in an affidavit, upon which the court has not stated the facts, or there are no such findings appearing in the record on appeal, and it does not appear that he was requested to state them, it will be presumed that the facts were found adversely to the appellant, or that the prejudice had been properly removed in some way by the trial judge. This Court cannot consider the affidavit as findings of fact.

2. Homicide—Trials—Defendant's Fault—Evidence.

Upon this trial for homicide it is held that defendant's prayer for special instruction was properly refused, that "there was no evidence that he (the prisoner) did or said anything to bring on the difficulty with the deceased," there being evidence that he was the aggressor and entered into the fight willingly, and that the deceased, after making the assault, had retreated from five to seven steps, and the prisoner followed him and inflicted the mortal wound with a pistol shot.

3. Same—Instructions.

When one, without fault, has been murderously assailed, he may stand his ground and defend himself even to the extent of taking the life of the assailant, when such is necessary, or it reasonably appears to him to be so, it being for the jury to determine the reasonableness of this necessity from the surrounding circumstances, as they appeared to the prisoner at the time; and where there is evidence tending to show that the prisoner, having been assaulted by the deceased, following him some six or seven steps, while the latter was retreating, and inflicted the deadly wound with a pistol shot, an instruction requested by the defendant upon the law of self-defense which omits the view that the defendant must be without fault in bringing on the difficulty, was properly refused.

4. Trials—Instructions—Self-defense—Necessity to Kill — Questions for Jury.

The charge of the court to the jury should be construed as a whole, and upon a trial for homicide, wherein the plea of self-defense was relied on, it is not reversible error for the court to instruct the jury that the prisoner must have killed the deceased to save himself from death or great bodily harm, it appearing from the other parts of the charge that the jury were instructed to pass upon the matter in the view of the reasonableness of the necessity as it appeared to the prisoner at the time and under the circumstances, which instruction they could not have misunderstood.

(422) APPEAL by defendant from *Carter, J.*, at September Term, 1913, of MADISON.

We will state the substance of so much of the testimony as bears upon the exceptions of the prisoner, Wallace Ray.

The defendant and one Logan Franklin were indicted for the murder of Greeley Hensley in December, 1912. During the trial a verdict of not guilty was entered as to Logan Franklin.

Gaither Shelton, a witness for the State, testified that the killing occurred near his store on Shelton Laurel. It was on Sunday, and the deceased went to his store with one Bessie Kirk in the evening. They left, and not long after the witness and others in the store heard a pistol or gun shot, and very soon Logan Franklin appeared at the door of the store and said, "Boys, there is a dead man out here. Greeley Hensley is killed." They went out and saw deceased lying on his back, and the defendant was on his mule about eight or ten steps from him. No one was there but the defendant. Bessie Kirk came shortly after the witness got there. They did not see any weapon in the hands of the deceased or on or about him as he was lying, but one of the men pulled his coat back and found a pistol at his side in the holster, and took it out. The defendant stated to witness that he had to do it in self-defense. He was very much intoxicated.

Bessie Kirk testified that she was with the deceased on the day of the homicide. She met him on that morning at Chapel Hill, about 7 miles from Shelton Laurel, where the homicide occurred. After visiting several places and buying about one-half gallon of whiskey, one John Shelton, who was with them, went in one direction and witness and deceased went in another towards Gaither Shelton's store. Deceased had a pistol, but it had three empty shells in it, and he did not have any other cartridges. When they started, he had one loaded shell, but he shot that one in the field to attract Shelton and let him know where they were, as he had promised to meet them at a certain place; they were walking through the field and he riding around.

This witness did not see the shooting, but testified as to what occurred just before and immediately after the shooting, as follows: "I saw Jim first at the store. He came into the store, and Wallace and Logan stopped in the yard, at the head of the porch, on their mules. (423) Wallace said, 'Hello, there!' to Greeley, and he looked around and said, 'Hello.' Wallace told him to come out there, that he wanted to speak to him. Greeley went out and got up on Wallace's mule, facing Wallace; he was on the mule's neck, and Wallace shook hands with him. They shook hands, and then Wallace put his arm around Greeley and pulled him down and kissed him, and then Greeley gave him a bottle of whiskey; they then went down the road below the storehouse a piece; Logan Franklin went with them. Jim Shelton was in the store with Gaither Shelton. They only went down the road a little piece; they did not go out of sight. I told Greeley to come on and let's go. He was still on the mule, and I told him to come on and let's go, and he got off the mule from behind Wallace, and then he tried to get up behind Wallace again, and he could not do it, and Logan Franklin got down off his mule

and helped Greeley up in his saddle. They then went up the road a little piece, and then Greeley got off Logan's mule and Logan got up in the saddle and Greeley was walking between Logan and Wallace, and Greeley had one hand on Logan's knee and the other on Wallace's mule, I think. I said to Greeley, 'Come on, let's go,' and he said, 'All right, in a minute.' They were all laughing. I then went up to Lovada Cutshall's, about twenty steps from the store. The house is in the store yard. I did not see anything more. I heard the gun fire. It seemed like about four shots. I do not know exactly how many. Two shots and then, in about a thought, two more. They all sounded about the same. I then ran back there to him. Jim and Gaither and I got there about the same time. When I got there he was lying on his back in the road with both hands spread out. I did not see any pistol in his hands or on the ground. Wallace was on his mule down below Greeley."

She further testified: "Gaither asked Wallace what made him kill him, and Wallace said he had to do it; and Gaither said, 'If you had to do it, where is his knife or where is his gun, or any of his weapons?' and he said twice that he had to do it. It was Logan or Jim, one—Logan, I think—took the gun up after they turned him over. They took hold of his left arm and dragged him over to his left side. (424) His head was in my lap. They pulled his coat back and got his gun out of his holster. I saw them take the pistol out of the holster. The holster was under his back before they turned him over. They pulled the pistol out and Gaither told them to put it back. I saw Wallace Ray take his gun out and reload it."

Charlie Hensley testified to examining the body of the deceased on the day after he was killed, and said: "He had a sweater on that pulled down over his hips, and it was rolled up in front; we had to cut it off to get at the place he was shot. We found one hole, as near as I can guess, something like 1¼ inches above his left nipple; the other was something like from 4 to 6 inches above; then in the back of the head there was a place about 1½ inches long. It appeared to be a bruise part of the way. It was black all along in the palm of his hand and on his forefinger and thumb. I took it to be a powder burn. I saw his pistol. Briggs took it out and opened it, and it had three empty cartridge hulls in it. It was a large pistol. I think it was a .38. We examined his pockets and did not find any cartridges in them."

The defendant testified: "When we got above the store two or three steps, Greeley Hensley said, 'I want a drink of whiskey,' and I said I had no whiskey, and he said I was a liar, and then we climbed down off our mules. I was some 8 or 10 feet from him when the difficulty started. I do not know which one got on the ground first. I got on the ground

because I thought he was going to shoot. Then Greeley Hensley went behind Jim Shelton's mule. He was down the road and some five or six steps from me. At that time I would think he was something near in front of the store door. I walked down towards him. I do not know where Logan Franklin was at that time. When I got down next to Greeley, he turned and walked backwards down the road. I guess he stepped from five to seven steps."

"Q. And then you advanced on him—following him up? A. Yes, sir.

"Q. And you were telling him all the time, what? A. Told him if he treated me halfway right I would be as good a friend as he had.

"Q. You said that in a way to let him know that he had to (425) treat you right, didn't you? A. No, sir."

"He did not back any further. When I killed him I was about three steps from him. I don't know whether I shot him in the left hand or not. I do not deny that his left hand was powder burnt. He fell backwards when I shot. I shot three times. Greeley Hensley shot one shot just before my pistol fired."

That the defendant entered into the fight willingly also appears from the testimony of Logan Franklin, who testified as a witness for the defendant. Referring to both the deceased and the defendant, this witness said: "The way the boys were talking, I saw they wanted trouble."

Th court charged the jury, in part, as follows: "When, as in this case, the plea is self-defense, and the killing with a deadly weapon is established or admitted, two presumptions arise: first, that the killing was unlawful; second, that it was done with malice. An unlawful killing is manslaughter, and when there is established an element of malice, it is murder in the second degree. When the defendant sets up the plea of self-defense he must rebut both presumptions: the presumption that the killing was unlawful and the presumption that it was done with malice. If he stops when he has rebutted the presumption of malice, the presumption that the killing was unlawful still stands, and, unless rebutted, the defendant is guilty of manslaughter. This extract is read to you from a recent decision of our Supreme Court, and I should have prefaced it by stating to you that the evidence in this case is that the killing with a deadly weapon is admitted, and the law imposes upon the defendant the burden of proving such mitigating circumstances as would reduce the grade of the offense from murder in the second degree to manslaughter, and if he would entitle himself to an acquittal, the further burden is upon him of proving that the killing was justifiable or excusable. The burden is upon him to prove such mitigation or excuse to the satisfaction of the jury. He is not required to prove it beyond a reason-

able doubt, but he must satisfy the jury of it; and when the killing with a deadly weapon is admitted, as in this case, unless the defendant has satisfied the jury of circumstances of mitigation, it is the
(426) duty of the jury to convict him of murder in the second degree. And although he may have satisfied the jury that there were mitigating circumstances, that is to say, the killing was without malice, it is the duty of the jury to convict him of manslaughter, unless he shall have further satisfied the jury that the killing was excusable upon the principle of self-defense. Now, understand, gentlemen, the killing with a deadly weapon being proven beyond a reasonable doubt, or admitted by the defendant, if nothing else appeared in the case, it would be your duty to convict him of murder in the second degree. If he would reduce the grade of the killing from murder in the second degree to manslaughter, he must satisfy the jury that the killing was without malice; and if he would further excuse the killing upon the principle of self-defense, he must satisfy the jury that the killing was from necessity upon the principle of self-defense. The defendant has asked me to give you certain special instructions, which I do, and which you will take and deem the law in the case in all respects as if they were embraced in my general charge:

"1. The court charges you that the defendant, at the time of the homicide, was where he had a right to be, and it is contended by him that there is no evidence that he did or said anything to provoke or bring on the difficulty with the deceased.

"2. If the jury shall find from the evidence that the deceased, Greeley Hensley, said to the defendant, 'Back off there, you son of a bitch; I have had it in for you a long time,' at the same time drawing his pistol, and the defendant being without fault, and under the reasonable apprehension that he was about to suffer death or great and enormous bodily harm, fired and killed the deceased, then the court charges you that such killing would be excusable on the ground of self-defense, and it would be your duty to return a verdict of not guilty.

"3. If the jury shall find from the evidence that the defendant was without fault, and the deceased made an assault upon him with a pistol with intent to kill him, then the court charges you that the defendant was not required to retreat, but had the right to stand his ground and kill his adversary if necessary to save his own life or to protect his person from great bodily harm.

(427) "4. The necessity, real or apparent, of taking the life of the deceased is a question to be determined by you upon the facts as they reasonably appeared to the defendant at the time of the homicide, and though you may find from the evidence that the pistol of the

deceased was not loaded, yet if you shall further find from the evidence that the deceased drew his pistol on the defendant, and the defendant being himself without fault in bringing on the difficulty and acting under a reasonable apprehension that he was about to suffer death or great bodily harm at the hands of the deceased, fired and killed him, then the court charges you that the defendant would not be guilty, and you would so find.

"5. If the jury shall find from the evidence that the pistol of the deceased was not loaded, then the court charges you that there is no evidence that the defendant had any knowledge of that fact, and unless he had such knowledge, he had the right to presume that the pistol was loaded, and act upon that presumption in his own proper self-defense.

"6. If you shall find from the evidence that the deceased assaulted the defendant with a pistol in such manner as would lead the defendant to believe that he was about to suffer death or great bodily harm at the hands of the deceased, and that the defendant himself was without fault in bringing on the difficulty, then the court charges you that the defendant had the right to use his own pistol in his own defense, and to continue to use it until the deceased was disarmed, or until the danger, real or apparent, no longer existed.

"7. The court charges the jury that the previous troubles and difficulties of the defendant should not be considered by you as substantive evidence in passing upon the question of the guilt or innocence of the prisoner. You are not trying the prisoner for any previous crime he may or may not have committed, but any evidence in regard to previous crimes or troubles can only be considered by you in so far as the same may tend to impeach the credibility of the defendant.

"8. The court charges the jury that any admission of the defendant as to any previous troubles with other parties would not be any direct evidence bearing on the question of his guilt in this case.

"The defendant admits the killing with a deadly weapon, and (428) nevertheless asks you to acquit him upon the ground, as contended by him, that in slaying the deceased he was acting from necessity in his own proper self-defense. Where a man is violently assailed and is put in reasonable fear that he is about to suffer death or great bodily harm, he not being at fault in bringing on the difficulty either by having spoken words calculated and intended to provoke it, or without having entered the fight willingly, he has a right in his own proper self-defense to employ such force as under all the surrounding circumstances appeared to him reasonable to secure his own safety. The law, however, exacts of a defendant under circumstances of this sort entire good faith. The law excuses the killing in self-defense upon the principle of

necessity—a real necessity or an apparent necessity. Where such real or apparent necessity exists, the defendant being himself without fault, as explained to you, in bringing on the difficulty, he has a right to slay in his own defense where he acts honestly for that purpose."

The prisoner, Wallace Ray, was convicted of manslaughter, and appealed from the judgment.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Gudger & McElroy and Martin, Rollins & Wright for defendant.

WALKER, J., after stating the case: The prisoner complains that his case was not fairly tried in the court below, but was unduly prejudiced by certain remarks made by the solicitor in his address to the jury. This matter was brought to the attention of the judge by an affidavit of the prisoner, submitted on his motion for a new trial. The remarks of the solicitor, as set forth in the affidavit, were highly improper, and should have been met with a prompt and stern rebuke from the bench, if they were made; but there is no finding of fact by the judge based upon the affidavit, and we are not at liberty to find them ourselves. We cannot consider affidavits upon such a motion, but the party complaining must request the judge to find the facts or there must be an admission of the truth of the statements contained in the affidavit. (429) We must, therefore, assume that the remarks were not made as set forth, or, if they were, that the judge administered the proper correction and removed any prejudice arising therefrom. Parties complaining of improper remarks made by counsel must object thereto in apt time and proper form. We said in *S. v. Tyson,* 133 N. C., at p. 698, citing many cases: "The conduct of a trial in the court below, including the argument of counsel, must be left largely to the control and direction of the presiding judge, who, to be sure, should be careful to see that nothing is said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case, and when counsel grossly abuse their privilege at any time in the course of the trial, the presiding judge should interfere at once, when objection is made at the time, and correct the abuse. If no objection is made, while it is still proper for the judge to interfere in order to preserve the due and orderly administration of justice and to prevent prejudice and to secure a fair and impartial trial of the facts, it is not his duty to do so, in the sense that his failure to act at the time or to caution the jury in his charge will entitle the party who alleges that he has been injured to a new trial. Before that result can follow the judge's inaction, objec-

tion must be entered at least before verdict." If we accept the affidavit as properly reciting the facts, it appears therefrom that the judge did act promptly, and told the jury that the remarks were improper, and we must take it that everything was done to safeguard the prisoner's rights. Exceptions 1 and 2, therefore, are overruled.

The prisoner next excepted to the refusal of the court to give his special prayer for instruction to the jury, viz.: "There is no evidence that he did or said anything to provoke or bring on the difficulty with the deceased." This prayer was properly refused, as there was evidence in the case not only that the prisoner was the aggressor, but that he shot the deceased when he was retreating and under circumstances which would have warranted a verdict for murder in the first degree. His own testimony was sufficient for this purpose: "When I got down next to Greeley Hensley, he turned and walked backwards down the road. I guess he stepped from five to seven steps, and I then advanced on him—following him up." There was other evidence that jus- (430) tified the refusal of this instruction. This covers exceptions 3 and 4.

The 5th and 6th exceptions were taken to the court's modification of the prisoner's fourth and sixth requests for special instructions, by which the court inserted in each of the prayers the words, "and the defendant being himself without fault in bringing on the difficulty." We do not know certainly whether the contention of the prisoner is that the instruction should not, in law, have been restricted or qualified by the use of those words, or whether the point is that there was no evidence that the prisoner was in fault, and for that reason this should not have been made by the court. We have already disposed of the latter ground for the exception. As to the former, it may be remarked that the prisoner himself inserted similar language in his second and third prayers concerning his plea of self-defense. But the amendment of the instruction was right in itself. We may take it now as the settled law of this State that, "where a man provokes a fight by unlawfully assaulting another, and in the progress of the fight kills his adversary, he will be guilty of manslaughter at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his life. This is ordinarily true where a man unlawfully and willingly enters into a mutual combat with another and kills his adversary. In either case, in order to excuse the killing on the plea of self-defense, it is necessary for the accused to show that he 'quitted the combat before the mortal wound was given, and retreated or fled as far as he could with safety, and then, urged by mere necessity, killed his adversary for the preservation of his own life.' Foster's Crown Law, p. 276." The same

doctrine was more fully stated in *S. v. Blevins,* 138 N. C., 668: "It has been established in this State by several well considered decisions that where a man is without fault, and a murderous assault is made upon him—an assault with intent to kill—he is not required to retreat, but may stand his ground, and if he kills his assailant, and it is necessary to do so in order to save his own life or to protect his person from great bodily harm, it is excusable homicide, and will be so held (*S. v.* (431) *Harris,* 46 N. C., 190; *S. v. Dixon,* 75 N. C., 275; *S. v. Hough, ante,* 663); this necessity, real or apparent, to be determined by the jury on the facts as they reasonably appeared to him. True, as said in one or two of the decisions, this is a doctrine of rare and dangerous application. To have the benefit of it, the assaulted party must show that he is free from blame in the matter; that the assault upon him was with felonious purpose, and that he took life only when it was necessary to protect himself. It is otherwise in ordinary assaults, even with a deadly weapon. In such case a man is required to withdraw if he can do so, and to retreat as far as consistent with his own safety. *S. v. Kennedy,* 91 N. C., 572. In either case he can only kill from necessity. But, in the one, he can have that necessity determined in view of the fact that he has a right to stand his ground; in the other he must show as one feature of the necessity that he has retreated to the wall." And in *S. v. Hough,* 138 N. C., 663, we said: "If the assault was committed under such circumstances as would naturally induce the defendant to believe that the deceased was capable of doing him great bodily harm and intended to do it, then the law would excuse the killing, because any man who is not himself legally in fault has the right to save his own life or to prevent enormous bodily harm to himself." These cases were reviewed and approved in *S. v. Lucas,* 164 N. C., 471, and more recently in *S. v. Robertson, ante,* 356, and to them, as precedents may be added *S. v. Dixon,* 75 N. C., 275; *S. v. Brittain,* 89 N. C., 481, and *S. v. Clark* 134 N. C., 698.

The writer of this opinion was somewhat doubtful, when the *Blevins* and *Garland cases* were decided, whether the doctrine should be carried to such an extreme length, believing that, in many cases, it might be very harsh and unjust in its application, and knowing that it was derived from an author who wrote at a time when the law was not as tender in its regard for human life as it has been in later days; but it is the established law and has strong authority, in addition to our own cases, to support it. It is essential, perhaps, to the due administration of justice and the peace of society, and may be the cause of preventing frequent brawls and breaches of the law, and in its general operation contribute to the safety and preservation of human life. If, there-

fore, a murderous assault is made upon a man, and his life or (432) limb is put in jeopardy, he may stand his ground and defend himself, even to the taking of human life, but with this qualification, that he must not, by his own fault, have brought the necessity of so doing upon himself, in which case, if he kills, it is murder or manslaughter, according to the circumstances. If the law were otherwise, he who is guilty of the first offense might have committed it for the very purpose of seeking, under its cover and protection, an opportunity of slaying his enemy, or his adversary, for some real or imagined grievance. For this reason we have adopted the principle in the law of homicide already stated, and as given by Foster in his Crown Law, p. 276, and to which, as will appear in *Garland's case,* we have added this other statement by him, at p. 277: "He, therefore, who in case of a mutual conflict would excuse himself on the plea of self-defense must show that before the mortal stroke was given he had declined any further combat and retreated as far as he could with safety, and also that he killed his adversary through mere necessity and to avoid immediate death. If he faileth in either of these circumstances he will incur the penalty of manslaughter." To the same effect is Lord Hale, who lays it down, "That if A. assaults B. first, and upon that assault B. reassaults A., and that so fiercely that A. cannot retreat to the wall or other *non ultra* without danger of his life, and then kills B., this shall not be interpreted to be *se defendendo,* but to be murder or simple homicide (manslaughter), according to the circumstances of the case; for, otherwise, we should have all the cases of murder or manslaughter, by way of interpretation, turned into *se defendendo.*"

The same principle was stated by *Justice Hoke* in *Garland's case,* as having been applied in *S. v. Brittain,* 89 N. C., 481, and may be thus formulated:

When it appears that the prisoner had made an assault upon A. and was reassaulted so fiercely that he could not retreat without danger to his life, and he kills A., the killing cannot be excused upon the ground of self-defense. The first assailant has done the first wrong and, thereby, has brought upon himself the necessity of slaying his adversary, and is, therefore, not entitled to the favorable consideration of (433) the law.

We think the presiding judge correctly stated this principle to the jury in his charge.

We may repeat here what we substantially said in *S. v. Robertson, supra:* The jury could well have found upon the testimony that the prisoner fought, not only willingly, but aggressively, and that the whole difficulty is traceable to his original misconduct.

The prisoner further excepts because the court instructed the jury once or twice that in order to sustain the plea of self-defense the prisoner must have acted from *necessity,* in other words, that the killing should have been really *necessary* to the protection of his own life or to save him from great bodily harm. But we do not so understand the charge, which must be construed as a whole and not in segments. *S. v. Exum,* 138 N. C., 599; *Kornegay v. R. R.,* 154 N. C., 389; *Bird v. Lumber Co.,* 163 N. C., 162. The court had fully explained to the jury what the term "necessity" meant in the law of homicide—that it was either *real* or *apparent* necessity—and he impressed clearly upon the jury the view that if the prisoner slew the deceased from either real or apparent necessity, he was entitled to an acquittal, and when he used the word "necessity," it was simply for the purpose of distinguishing between the two grades of homicide, murder and manslaughter, by drawing the attention of the jury to the fact that if the prisoner fought and killed under the influence of passion merely, and not from the "necessity" of saving himself from death or bodily harm, it would be manslaughter, and this is what was emphasized in *S. v. Garland, supra.* There can be no mistake as to the correctness of Judge Carter's charge to the jury, for at the very last, and after he had illustrated the difference between murder and manslaughter and used the words considered as objectionable, he told the jury that "the law excuses the killing in self-defense upon the principle of necessity—a real necessity or an apparent necessity." There was no conflict or uncertainty in this charge, but it was clear, comprehensive, and consistent throughout, and intelligible to the most ordinary mind.

(434) What we said in *S. v. Price,* 158 N. C., 641, is applicable here: "It is true, the court told the jury that the prisoners must have killed in their necessary self-defense, but he explained to the jury what was meant, by this expression in other parts of the charge, and substantially instructed the jury, in language that could not well have been misunderstood, that if they had a reasonable apprehension, under the circumstances surrounding them, that they were about to suffer death or serious bodily harm, their act in slaying the deceased was excusable in law, and they should acquit the prisoners. The charge must be read and construed as a whole. *S. v. Exum, supra; Kornegay v. R. R.,* 154 N. C., 389; *S. v. Lewis, ibid.,* 632. When thus considered, it was a full and clear exposition of the law as applicable to the facts. This case bears no resemblance to *S. v. Barrett,* 132 N. C., 1005, and *S. v. Clark,* 134 N. C., 699." The prisoner's counsel relied on *S. v. Barrett, supra; S. v. Clark, supra,* and *S. v. Morgan,* 136 N. C., 628; but they are no more authorities for the contention than they were for a similar one in *S. v. Price, supra.*

The charge, in its entirety, was exceedingly fair and favorable to the prisoner. He has had the benefit of every principle of law to which he was legally entitled, and the evidence was fully explained to the jury in its different bearings, and in every possible phase of it.

A careful review of the record convinces us that no error was committed at the trial.

No error.

Cited: S. v. Pollard, 168 N.C. 121; *S. v. Coble,* 177 N.C. 592; *S. v. Johnson,* 184 N.C. 645; *Milling Co. v. Highway Com.,* 190 N.C. 697; *S. v. Robinson,* 213 N.C. 280.

STATE v. CLAUDE GOODLAKE.

(Filed 30 May, 1914.)

Appeal and Error—Attorney and Client—Duty of Client—Laches.

In criminal as well as civil cases it is the duty of the party appealing to see that his case on appeal has been prepared and sent up under the rules, and this duty is not excused because he has intrusted it to his attorneys, paid them the necessary fees for the transcript, etc., and, relying upon them, has taken no further steps until it was too late.

APPEAL from *Bragaw, J.,* at February Term, 1913, of BUN- (435) COMBE.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

A. Hall Johnston for defendant.

CLARK, C. J. This is a motion to reinstate the appeal in this case which was docketed and dismissed under Rule 17 on 12 May, 1914, on the call of the district to which it belonged. The petitioner files an affidavit that he appealed in this cause and paid his counsel to prepare his case on appeal for the Supreme Court and the necessary fees for preparing and printing the record, and supposed the matter had been attended to. But on 9 May, when he went to the office of his counsel and tendered their fees, he found that the case had not been settled on appeal and that the transcript had not been made out and sent up to this Court; that consequently the record has not been printed nor any

brief prepared. His counsel thereupon returned to him the $30 that he had tendered them on 9 May.

Upon this showing, the defendant certainly is not entitled to have his case reinstated. In *Vivian v. Mitchell,* 144 N. C., 476, this Court said: "This Court has often and always held that noncompliance with the requirements which entitle an appellant to have his case reviewed cannot be excused because the failure to observe them is due to the negligence of counsel. If this were not so, the more negligent counsel could be the more they would be in demand by appellants desirous of baffling the appellee and adding to the 'law's delay,' which the great dramatist enumerates among the greatest ills that 'flesh is heir to.' There is no suggestion that in this case counsel were purposely dilatory or negligent. We feel assured that they were not. But the matter of appeal must be regulated, and as a condition precedent to obtaining a review of a case on appeal, those requirements must be observed. If the appellant does not himself, or through some agent or attorney, take those necessary steps, and in apt time, the judgment below must stand. It is no excuse for a failure to comply with these requirements, these conditions (436) precedent, that the appellant's agent or attorney negligently failed to do what was necessary to entitle him to have his appeal heard. The point is fully discussed in *Edwards v. Henderson,* 109 N. C., 84, and many cases there cited; *Calvert v. Carstarphen,* 133 N. C., 26, 27, and cases cited. Indeed, there is nothing better settled." *Hewitt v. Beck,* 152 N. C., 758.

In *Paine v. Cureton,* 114 N. C., 606, it was said: "An appellant cannot simply take an appeal and pay the clerk's fees for transcript and thereafter leave the appeal to take care of itself like a log floating down a river or corn put in the hopper of a mill. The appeal requires attention."

In *Edwards v. Henderson,* 109 N. C., 84, the Court held that the negligence of counsel in having the appeal sent up and printed and the rules otherwise complied with is not an excuse for the appellant, who should see that the matter was attended to, and if, by any laches beyond his control, this is not done, he should make a motion in this Court at or before the time prescribed for the docketing of the appeal and file the record proper and an affidavit to procure a *certiorari* to issue if sufficient cause is shown. In this and other cases above cited there are numerous references to other cases of like purport, and the citations to the above cases in the Annotated Reports enumerate many others. The practice is so well settled, and it is so necessary that it should be adhered to, that of late years we have been acting upon the rule thus laid down without filing an opinion upon a matter so well settled. We dismiss the

appeal alike in civil and criminal cases when either the appeal is not taken in time or the record not docketed in time, or the case is not settled in time, or the record or brief of the appellant is not printed or assignments of error are not made, or there is failure in other respects to observe the requirements for an appeal, unless the record proper is docketed and sufficient excuse is shown by a motion for *certiorari* and affidavit, at the proper time. In this case none of these things were done.

Motion denied.

Cited: Phillips v. Junior Order, 175 N.C. 134.

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(437)

STATE v. WELDON HORTON.

(Filed 25 March, 1914.)

Criminal Law—Rape—Evidence Sufficient.

Testimony of the prosecutrix in this case, corroborated by her statement of the occurrence made to the witnesses as soon as she was in circumstances to make them, held sufficient to sustain a conviction of the defendant of an attempt to commit rape.

APPEAL by defendant from *Cooke, J.,* at October Term, 1913, of FRANKLIN.

The defendant was convicted of an assault with intent to commit rape, and upon judgment being pronounced against him, appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

W. M. Person for defendant.

PER CURIAM. The principal exception relied on by the defendant is to the refusal to instruct the jury that the evidence would not justify a conviction.

We have carefully examined the record, and are of opinion that the evidence of the prosecutrix, corroborated as it was by statements made by her as soon as she met any one with whom she could talk, is sufficient to establish an assault accompanied by the unlawful intent, and that the instruction was properly refused.

The other prayers for instruction were substantially given in the charge.

The one exception to evidence is untenable and requires no discussion. No error.

(438)

STATE v. GEORGE ATWOOD.

(Filed 8 April, 1914.)

Intoxicating Liquors—Search and Seizure—Possession—Prima Facie Case—Trials—Instructions—Appeal and Error—Harmless Error.

An erroneous charge under the search and seizure law, that one gallon of intoxicating liquor made out a *prima facie* case that defendant had it for the purpose of an unlawful sale, is rendered harmless under the evidence in this case establishing the fact that the defendant had more than that quantity. *S. v. Moore, ante*, 284, approved, denying the defendant's motion in arrest of judgment for that the warrant did not negative that he was a druggist, etc.

APPEAL by defendant from *Devin, J.*, at December Term, 1913, of FORSYTH.

This is an indictment under the search and seizure law, charging the defendant with having intoxicating liquors in his possession for the purpose of sale.

The only witness offered by the State was George W. Flynt, who testified that on 23 November he had a warrant against the defendant for having in his possession liquor for the purpose of sale, and in company with another officer went to the house of the defendant, south of Winston-Salem, and found that the defendant was not at home, but his wife was there, and he notified the defendant's wife that he wished to make a search for liquors. That he found on the premises of the defendant one jug containing one gallon of liquor and a number of small bottles containing about one-half gallon. In addition to the liquor, he found a number of empty bottles, a rubber tube and several tin vessels, about which he noticed the smell of whiskey. He further testified that he took possession of the spirits and tin vessels, including an empty keg, and in company with the officer who went with him started back to Winston-Salem. On his way back he met the defendant in a buggy with one Sam Reid. That he asked the defendant if he had any liquor in the buggy with him, and the defendant said he had a pint, and upon
(439) searching the buggy he found three pint bottles, but the defendant claimed that two of the pints belonged to Sam Reid, which Reid denied.

The State closed the evidence, and the defendant offered no evidence.

His Honor charged the jury that having possession of a gallon of liquor, or more, is evidence that the defendant had it for sale, and while this is true, the State must satisfy the jury beyond a reasonable doubt that the defendant had said liquor in his possession for the purpose of sale, and not merely for his own private use.

The defendant excepted. Jury rendered a verdict of guilty, with recommendation, towit, mercy of the court, and his Honor sentenced the defendant to six months to the county jail to be worked on the county roads. The defendant excepted.

The defendant moves in arrest of judgment in this Court for that the indictment fails to negative the exception in the statute that the defendant is a druggist or the keeper of a medical depository.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Watson, Buxton & Watson, Hastings & Whicker for defendant.

PER CURIAM. His Honor was in error in charging that the possession of one gallon of liquor was evidence that the defendant had it for sale, as the statute only gives this effect to the possession of liquor when the quantity exceeds one gallon in some degree; but this could not have affected the verdict, as all the evidence showed that he had one gallon and three pints at home and one pint in his buggy.

The language of the statute is, "The possession of more than one gallon of spirituous liquors at one time, whether in one or more places," shall constitute *prima facie* evidence, etc.

The questions raised by the motion in arrest of judgment have been decided adversely to the defendant in *S. v. Moore, ante,* 284.

No error.

Cited: S. v. Baldwin, 178 N.C. 697.

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(440)

STATE v. CHARLES AND FRANK SNIPES.

(Filed 15 April, 1914.)

Appeal and Error—Court's Discretion.

The appeal in this case being from rulings of the trial court, is of matters largely within his discretion, and no error is found.

APPEAL by defendant from *Devin, J.,* at January Term, 1914, of FORSYTH.

Indictment for resisting an officer.

Verdict of guilty. Judgment, and defendant excepted and appealed.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

E. B. Jones, W. T. Wilson, and L. M. Swink for defendant.

PER CURIAM. There was evidence to justify the verdict, and, on careful perusal of the record, we find no reason for disturbing the results of the trial. It was very properly admitted in the brief of the appellant's counsel that the rulings objected to were matters very largely in the discretion of the trial court, and assuredly there is shown no such abuse of his Honor's discretion as to present a question of law for our decision.

It was chiefly urged that the cross-examination of defendant was allowed to take too wide a range in seeking to develop facts as to defendant's conduct on the night of the occurrence and some time after the commission of the alleged offense; but we fail to find that there was any statement obtained from defendant in any way prejudicial to his cause.

A careful examination of the record shows that the questions objected to were either not responded to at all or were answered by defendant in his own favor.

We must hold that no reversible error has been shown, and the judgment on the verdict be affirmed.

No error.

Cited: S. v. Neal, 222 N.C. 547.

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(441)

STATE v. LESTER MORRIS.

(Filed 29 February, 1914.)

Convicts—Guards—Right to Whip — County Commissioners — Rules and Regulations.

In the absence of rules and regulations made and promulgated by the county commissioners permitting it, a guard has no legal right or authority to whip convicts in his care or custody. *S. v. Nipper, ante,* 272, cited as controlling.

APPEAL by defendant from *Adams, J.,* at January Term, 1914, of GASTON.

The defendant, a superintendent of one of the chain-gangs in Gaston County, was convicted of whipping a convict.

The whipping, with a leather strap 1¼ inches wide, 16 or 18 inches long, attached to a wooden handle 10 or 12 inches long, was admitted by the defendant, and the evidence for the State showed a serious beating and the use of a stick.

There were no written rules or regulations, and there is no evidence that the commissioners of Gaston County have formulated and adopted any rules or regulations for the discipline of convicts.

His Honor charged the jury that if they believed the evidence the defendant was guilty, and he excepted and appealed from the judgment imposing a fine of $10.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Mangum & Woltz for defendant.

PER CURIAM. The decision of this appeal is controlled by *S. v. Nipper, ante,* 272.

There was a difference of opinion among the members of the Court upon some of the questions raised in that case, but all agreed that guards have no right to whip the convicts in the absence of rules and regulations by the county commissioners, and none appear here.

No error.

Cited: S. v. Revis, 193 N.C. 199.

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(442)

STATE v. GILBERT P. MELTON.

(Filed 29 April, 1914.)

1. Homicide—Self-defense—Uncommunicated Threats.

Where upon a trial for homicide the killing with a deadly weapon is shown while the deceased was advancing upon the prisoner, and self-defense is relied upon, and it appearing that a verdict of manslaughter was rendered, evidently upon the idea that the prisoner used excessive force, the exclusion of evidence of uncommunicated threats is immaterial.

2. Homicide—Trials—Character Witnesses—Specific Acts.

Upon the trial of a white man for the homicide of a negro boy, it is incompetent to ask a witness in the prisoner's behalf whether some third person had not told the deceased that he would eventually be killed for his

impudence to white people; and it is also incompetent for the prisoner, in endeavoring to show the character of the deceased, to ask the witness in regard to special acts.

APPEAL by defendant from *Adams, J.*, at January Term, 1913, of GASTON.

Indictment for murder. The defendant was convicted of manslaughter, and from the judgment of the court appeals.

Attorney-General Bickett and Assistant Attorney-General Calvert for the State.

Osborne, Cocke & Robinson, Mangum & Woltz for defendant.

PER CURIAM. The defendant was indicted for the murder of Alexander Sutton, a colored boy 17 years old, and was convicted of manslaughter. All the evidence in this case tends to prove that the defendant killed the deceased by firing upon him with a pistol four or five times in succession, claiming that he acted in self-defense, and that the deceased was advancing on him with a knife.

There are only three assignments of error taken to the evidence, and none to the charge, which is not sent up with the record.

The first assignment of error is taken to the exclusion of certain alleged uncommunicated threats against the defendant, made by the deceased about ten minutes before the homicide.

(443) It is unnecessary to consider this assignment of error, as it is perfectly apparent from a perusal of all the evidence (and we understood it to be admitted upon the argument) that the only possible theory upon which the jury could have convicted the defendant of manslaughter was upon that of excessive force, and that the killing of the deceased under all the circumstances by shooting four bullets into his body was unnecessary. That being so, the evidence, if erroneous, was harmless.

The second assignment of error is to the ruling sustaining an objection by the State to the question, "Did you hear Mr. J. Flem Johnson tell that boy if he did not behave himself he would get killed, and stop being impudent to white people?"

The opinion of J. Flem Johnson and his prognostication as to what would happen to the boy is utterly incompetent and irrelevant to the issue tried in this case.

The third assignment of error is taken to the exclusion of the question, referring to the deceased, "What did you see him do tending to show his reputation for being a dangerous man?"

This witness had testified that he was not acquainted with the deceased, and in answer to a question, "Know his reputation for being anything dangerous?" had said, "No, sir; just what I saw the boy do."

In *S. v. Hairston,* 121 N. C., 582, the Court said: "A party introducing a witness as to character can only prove the general character of the person asked about. The witness on his own motion may say in what respect it is good or bad."

In no case, either on direct examination or on cross-examination, can a witness be asked to testify to particular acts. The limit of such evidence is testifying as to particular traits of character. The question here objected to seems to have been directed to an attempt to bring out testimony of some particular act of the deceased, which is not permissible. See, also, *S. v. Wilson,* 158 N. C., 599.

Upon a careful examination of this record, we find no just ground to award another trial.

The defendant is evidently indebted to the mercy of the jury, as well as to the leniency of the judge, that he has not received a severer sentence.

No error.

Cited: S. v. Reagan, 185 N.C. 713; *S. v. O'Neal,* 187 N.C. 24; *S. v. LeFevers,* 221 N.C. 185.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH.

FALL TERM, 1914.

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(445)

S. R. FOWLE & SON v. WHITLEY & WARREN.

(Filed 16 September, 1914.)

1. Tax Deeds—Requisites of Statute—Color of Title.

The purchaser of lands at a sale for taxes in 1898 who acquires a sheriff's deed therefor in 1899, without making the affidavit and giving the notice required by secs. 64 and 65, ch. 169, Laws 1897, has only color of title to the lands under his tax deed.

2. Same—Possession—Presumptions—Burden of Proof—Trials—Evidence.

R. was seized and possessed of certain lands, and lived thereon, until his death, with W. The latter received a tax deed from the sheriff to the lands, which operated only as color of title, and the two thereafter lived on the lands without change of attitude towards the possession, and after the death of R. his heirs at law sued to remove the tax deed as a cloud upon the title to the lands. W. testified that upon receiving the tax deed he immediately entered into possession of the lands, cultivating it, etc. *Held*, there is no presumption in law of adverse possession against a true paper title, and the burden of proof was on W. to show some act of ouster of R., of which the evidence in this case is insufficient.

APPEAL by plaintiff from *Ferguson, J.*, at February Term, 1914, of BEAUFORT.

Ward & Grimes for plaintiffs. (446)

Small, MacLean, Bragaw & Rodman for defendants.

CLARK, C. J. This is an action to remove a cloud from a title. In 1898 Isaiah Rowe was seized and possessed of the tract of land in question. On 1 May, 1898, the land was sold for taxes, and on 3 May, 1899, the sheriff executed a deed therefor to the defendant Warren. Warren,

however, failed to make the affidavit and to give the notice required by secs. 64 and 65, ch. 169, Laws 1897, and the court properly held that the tax deed was merely color of title. Warren was the nephew of Rowe, and was living with him on the land at the time of the purchase, and Rowe continued to live on the land up to within some fifteen or twenty days of his death, in July, 1901, and this action was brought in January, 1907. So that the defendant could not claim title under seven years adverse possession unless such adverse possession began before the death of Rowe. Rowe died intestate, leaving several heirs at law, of whom the defendant Warren was one.

Warren testified that he "entered into possession of this land as soon as he got the deed; that he went to farming on it, cutting rail timber and cultivating it and using it like any other property." In 1905 Warren sold a part of the land to the defendant Whitley. The plaintiffs purchased their interest from the other heirs at law, who claimed to be cotenants with D. C. Warren, who inherited one-fourth interest in the land, unless, as he claimed, he was entitled to the whole under his tax title.

The tax title being merely color of title, for the reason above given, the burden was on Warren to show that he acquired the adverse possession prior to the death of Isaiah Rowe. It is true, he testified that he "entered into possession of the land," but his evidence is that Isaiah Rowe was then living on the land, as he had been for many years previous, and that he continued there until a very few days of his death. Warren did not show any act or assertion of adverse possession to Rowe, who remained on the land, and there is no evidence that he paid rent or otherwise acknowledged the title and possession of
(447) D. C. Warren. There is no act of disseizin shown. From all that appears, both continued to live on the land as prior to said sale, without any change in the attitude of the parties to the possession. There is no evidence of the exclusive possession of Warren or any acknowledgment on the part of Rowe.

The court, therefore, erred in refusing the prayer, "There is no evidence in this case that any possession of D. C. Warren during the life of Isaiah Rowe was adverse to said Rowe."

There was also error in refusing the prayer, "The law raises no presumption to sustain a claim of title by way of adverse possession against a true paper title" (*Monk v. Wilmington,* 137 N. C., 322; *Bland v. Beasley,* 145 N. C., 168), and in refusing to charge, "There is no evidence in this case that Isaiah Rowe, after the tax deed, paid any rent to D. C. Warren, or that he was recognized by Warren as Warren's tenant or that his possession until his death was that of D. C. Warren."

The court also refused to charge, as prayed, "In order that Warren's possession, after getting his tax deed, should become adverse to Rowe, who was living on the land, it must appear to the satisfaction of the jury that Warren took such possession and performed such acts of occupancy as would have entitled Rowe to maintain an action of trespass in ejectment, or that Rowe attorned to Warren by doing such things or making such agreement as recognized himself as Warren's tenant." There is error in refusing this prayer. Indeed, there is no evidence to support such allegations, and the court should have so told the jury.

The jury found that the deed from Warren to Whitley was a cloud upon the title of plaintiff, and the defendants did not appeal. The jury found, however, against the plaintiffs as to the rest of the land, and the instruction to the jury in regard thereto, as pointed out, was

Error.

Cited: Brown v. Brown, 168 N.C. 13; *Lee v. Parker,* 171 N.C. 150; *Shermer v. Dobbins,* 176 N.C. 549.

(448)

N. S. McATEE v. BRANNING MANUFACTURING COMPANY.

(Filed 16 September, 1914.)

1. Master and Servant—Safe Place to Work—Trials—Negligence—Questions for Jury.

The plaintiff was an employee of the defendant in its power-driven manufacturing plant, and was injured while endeavoring to lace a belt in the course of his employment, on account of his hand being caught by the belt and carried to the shafting. There was evidence that the defendant furnished "blackjack" for the belt dressing, which was improper and would become very sticky, and that the plaintiff's hand, for that reason, was caught by the belt, resulting in the injury; that by the use of certain methods the belt could have been safely detached and laced in safety, and, also, that the plaintiff properly availed himself thereof; that the belt was old and worn and had broken several times on that day. *Held,* it was for the jury to determine whether the defendant had negligently failed in its duty to the plaintiff by furnishing defective material for the belt dressing, and whether such was the proximate cause of the injury; and, also, whether the plaintiff should have previously reported the defective material to the defendant under the circumstances of this case.

2. Master and Servant—Safe Place to Work—Contributory Negligence—Trials—Questions for Jury.

In this case it is held that whether the plaintiff, employee of the defendant, selected an unsafe way to do the work arising within the

scope of his employment when in the exercise of proper care a safe way was open to him, is a question of fact for the determination of the jury.

3. Negligence—Contributory Negligence—Assumption of Risk — Trials — Burden of Proof.

When assumption of risk and contributory negligence are relied on as defenses in an action to recover damages for a personal injury alleged to have been negligently inflicted on the plaintiff, the burden of proof of such defenses is on the defendant; and under the circumstances of this case it is held that issues of fact thereon were raised, and properly left to the determination of the jury.

APPEAL by defendant from *Ferguson, J.*, at April Term, 1914, of TYRRELL.

(449) This action was brought to recover damages for an injury to plaintiff's arm, requiring its amputation, which he alleges was caused by defendant's negligence. Plaintiff was employed by defendant, in its mill, to oil engines and machinery and to assist in keeping the machinery belts and belting, and other things connected therewith, in proper order. At the time of the injury he was lacing a belt, which he had been ordered to do by his superior, O. M. Spruill, who was the engineer. There was no one there to assist him, although when he spoke to Spruill about the condition of the belt, the latter promised to come and help him.

Section 5 of the complaint, which was admitted in the answer, was put in evidence, and reads as follows: "In the mill, and as a part thereof, and used by the defendant company in manufacturing lumber, there was on 27 May, 1912, a lath mill operated from the main shaft, and there was also a belt running on said main shaft and onto a pulley beneath. The pulley operated a sprocket wheel, and the wheel moved the dust chain, which was used to convey the sawdust, trash, and refuse matter from the lath mill to another and larger conveyor of sawdust and trash to the boiler room, there to be used as fuel."

Plaintiff alleged that the belt was old, worn, and split, which caused the edges to fray, and while he was lacing it his hand was caught or stuck in some blackjack, which was used as an oil to lubricate it. This dragged his hand and arm under the main shaft, jerking his hand off and stripping the arm to the shoulder of its flesh, leaving the bone entirely naked.

There was evidence of an attempt by the defendant to compromise with him, but these negotiations failed. The evidence also tended to show that blackjack was not the proper thing to use for oiling, as it is very sticky.

Plaintiff testified, with respect to the proper kind of dressing for the belt: "I had been using blackjack on that belt in attempting to oil it; that blackjack was put there for me to use. I do not know what blackjack is made of; when used on a belt it would accumulate on each side of the belt, and if you happened to get too much on it in warm weather, it would spread; blackjack is a sticky, gummy substance; you have to keep it warm to use it; they never had any regular belt (450) dressing in the mill, to be used, while I was there; every place I ever worked I had used regular belt dressing; I ran a little coal mine; we only used one belt and used belt dressing on that. I have worked in one or two sawmills, and they used belt dressing; belt dressing is pliant and has a tendency to make the belt stick or cling; it produces enough friction to run the machine. This blackjack was placed on the steam chest of the hog engine, in a small can with a paddle, for me or any one else to get to oil the machinery."

H. Corwin, president of defendant company, testified: "I have a practical knowledge of machinery, especially with respect to belt dressing. The question of belt dressing is one that people are divided upon; in our mill business, that is to say, personally, I was nowhere that I ever bought a particular dressing; never bought it for the Edenton mill or the Ahoskie mill. I didn't consider it necessary, although some others do. It is a divided question, and is controlled by the general manager. From what I can learn about this blackjack, it was a material that was furnished by the rubber oil people. I never heard of people using it on belts; it is, however, not unlike belt dressing. I have not examined that particular belt dressing, and don't know whether it is more sticky or less sticky."

O. M. Spruill, defendant's witness, testified: "I said to McAtee, 'The main thing is to be careful and watch, and if there is anything that you do not understand, ask me.' When I got there the next morning his father-in-law and he had been there and oiled up. I didn't point out this particular machine that he was to work at. I don't know that the risk and hazard were explained to him. When I put a man there to work, I explain his duties to look after the belts, lubricate and oil them; to watch out and not get caught in the belts. He said that he had had experience in mills. I had no conversation about this particular place where he got hurt. That day, before he was hurt, he passed by me and said, 'Got a knife there?—the lacing has come out.' I handed him my knife; I don't know whether I told him I would be there 'presently' or not; I saw the belt after he was hurt; it was not broken; that was the first time that it had been broken that morning, that I know of; it was the lacing that was broken that time. Whoever saw (451)

it first had the duty to put the lacing in. The lacing was of rawhide. I know about blackjack and belt dressing. I have had experience with both as long as I have been at the mill. You have to heat blackjack; if you put on a little blackjack properly heated, it would cause the belt to stick; the belt dressing does the same thing; either blackjack or belt dressing does as well as the other. The machinery was new; this particular piece was new. I saw McAtee that night and asked him how it happened; he said: 'I caught it around the belt.' I carried him to the doctor's; I was not there when the doctor operated on him; he was not crying; he had a good nerve on him; I think he was the most composed of the whole of us; he had more sense than all of us at the time. It was not necessary for Mr. McAtee to stand at this particular point all day; he went there and saw that something was the matter with the belt. I found his hand; the palm was on the shaft, between the shaft and the belt."

Plaintiff testified that the belt had broken three times during that morning, and was in very bad condition. He further said: "I went in where Mr. Spruill was, to get the lacing and punch. I said, 'Let me have your knife, Mony; that belt is broken again.' He said, 'Go ahead and be at work on it; I want to see John about something; I will be in in a few minutes to help you.' That is all the direction he gave me; I had fixed it many a time; I never laced belts until I went there; I had fixed belts before—had done it twice that morning; I thought I knew how to do it. I knew a little something about the danger of machinery. Mr. Spruill gave me orders to go there and fix it; that conversation was the only one that occurred that morning; the belt was split in the center, and the effect of the splitting made the sides ravel, and the splitting made it weaker, made the holes break, on account of the raveling; it didn't ravel in the center and it didn't ravel on the side that was not split. There was no other oil, or other dressing of any sort, in that mill."

There was evidence that the lacing could have been done safely by manipulating the idler or tightener—lifting or pulling it up—
(452) and plaintiff stated that he pushed back the idler. He also testified: "It caught my finger between the sticky stuff and the belt. My finger would not have been caught by the belt and shaft if there hadn't been any sticky stuff there. The sticky stuff was not enough to hold my hand without the assistance of the belt, but if you have your hand in that and then touch the belt, it will hold your hand."

Charles Brush, defendant's witness, testified: "In order to lace the belt with safety, the first thing to do is to relieve the idler, the next thing is to take the belt off the pulley; when you have done that, you can then lace the belt without danger. There are two things: first, to

relieve the belt, you put the belt off the pulley wheel; wherever the belt may be broken, you pull it down to you; there is nothing about that place in the mill where McAtee was at work to produce that condition, except by the idler being thrown on the belt after the pulley was on the wheel. Where I work original belt dressing is used. I have worked at Magnolia Mill and have seen it used generally, going through mills and seeing it. Belt dressing is generally used. Belt dressing is sticky; not quite as sticky as blackjack."

There was other evidence tending to support the contentions of the respective parties.

The court charged the jury, among other things, as follows:

"The burden is on the plaintiff to satisfy the jury by the greater weight of evidence that he was injured by the negligence of the defendant, that is, that the defendant was negligent in performing its duty towards the plaintiff, and that such negligence was the proximate cause of the injury; so that it becomes necessary for you to ascertain the duty the defendant owed the plaintiff. It is the duty of the employer to provide a reasonably safe place for his employee to work, and reasonably safe appliances with which to do the work required of him. There is a corresponding duty devolving upon the plaintiff, who is required to go about his work in a reasonably safe and careful manner, so as to save himself from injury, and so as not to injure the property of his employer. He is required to do his work as a prudent man would, being reasonably careful not to get injured. The burden is on the defendant on the second and third issues to satisfy you by the (453) greater weight of evidence—not beyond a reasonable doubt or to your full satisfaction, as in criminal cases. That rule does not apply to civil cases. Civil cases are tried upon the weight of the testimony. It is the duty of the defendant to satisfy you by the greater weight of the evidence that the plaintiff assumed the risk incident to the employment, and that he knew the conditions, and that he chose to work on under those conditions as they appeared and were known to him.

"According to the plaintiff's complaint filed in this cause, plaintiff alleges that his duties were to oil the engine and machinery and to keep the machinery, belting, etc., in order, and to do such work as he was called upon to do towards keeping the machinery running. Now, if the plaintiff failed in any way to perform the duties required of him, and such failure was the proximate cause of the hurt and injury which came to him, then it is the duty of the jury to answer the first issue 'No' and the second issue 'Yes.'

"If he failed to perform the duty which was required of him, even if they failed to furnish him proper material, you would answer it 'Yes,'

if you find that that failure was the proximate cause of the injury, although you might find that the defendant was negligent.

"It was the plaintiff's duty, while in the position occupied by him, if he discovered any defects in the machinery under his charge, or in the belts, belt dressing, or other appliances connected therewith, which should be remedied, to notify the defendant thereof, in order that the same might be supplied, and if he failed to do so, and from such failure the injury which he suffered came to him as the proximate cause thereof, then it is the duty of the jury to answer the second issue 'Yes.'

"If the jury shall find from the greater weight of the evidence that it was the plaintiff's duty to keep the belts, especially in the lathe department, in good condition and order, and the plaintiff failed to keep the same in proper condition and order, and the jury shall find that such failure was the proximate cause of the plaintiff's hurt, then the jury should answer the second issue 'Yes.'

(454) "If, when the plaintiff undertook to lace the belting, there was a safe way by which he could have done the same, and, instead of following the safe way, he adopted an unsafe way of his own accord, and as a result of the same, and as the proximate cause thereof, the injury complained of happened, then it will be the duty of the jury to answer the first issue 'No' and the second issue 'Yes.'

"There is a rule of law that where the employee has a safe and an unsafe way to do his work, if he undertakes to do it in an unsafe way, it is his misfortune and his employer is not responsible for the consequence; but in order for that rule to prevail, there must be a safe and unsafe way to perform the particular work which was required of the employee. If the material called blackjack was unsuited and dangerous to use upon the belt, and the plaintiff knew this, and then continued using the same without notifying the defendant thereof, and failed to make any request or demand to supply suitable and safe material, then I charge you that he assumed the risk if he did the work knowing the material was unsafe, if it was unsafe."

The court further charged the jury as to the legal duty of the defendant to the plaintiff and of the plaintiff to himself and the defendant, stating the general rule as to the master's duty to exercise ordinary care to furnish his servant a reasonably safe place in which to do his work and reasonably safe appliances and materials with which to do it, and as to the servant's duty to exercise corresponding care for his own safety.

The jury returned the following verdict:

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

"2. Did the plaintiff by his own negligence contribute to his injury, as alleged? Answer: No.

"3. Did the plaintiff by his employment assume the risk, as alleged? Answer: No.

"4. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: $3,750."

Judgment was entered thereon for the plaintiff, from which defendant appealed, and assigned the following errors: That the court refused to grant the motion to nonsuit or to instruct the jury, as (455) requested, first, that upon the whole evidence the jury should answer the first issue "No" and the second issue "Yes," and, second, that even upon plaintiff's own testimony they should answer the issues the same way.

Mark Majette and Ward & Thompson for plaintiff.

Pruden & Pruden, S. B. Shepherd, T. H. Woodley, and I. M. Meekins for defendant.

WALKER, J. In stating the case as above we have selected those portions of the testimony which tend to establish the defense and to overthrow the case of the plaintiff, although the invariable rule is, upon a motion to nonsuit or its equivalent, a request for a peremptory instruction to find for the defendant, to reject such evidence and consider only that which makes for the plaintiff and tends to sustain his cause of action. *Hodges v. Wilson,* 165 N. C., 323. But in no view of the evidence and the charge of the court do we see anything except a pure question of fact for the jury. There certainly was evidence to show that the defendant had been negligent in furnishing the blackjack for oiling the belt, instead of the ordinary belt dressing, and that this failure of duty on its part was the proximate cause of the injury, even though it may have combined with some other cause. If the plaintiff's testimony is accepted as stating the real facts, the defendant was negligent in this respect, and thereby caused the plaintiff to lose his arm after it had been horribly mangled. The charge was in exact accordance with the law as to the legal duty of each of the parties. It was well conceived, carefully prepared, and clearly delivered, and fully covered every phase of the case. It leaves the impression that the learned judge who presided was absolutely and unqualifiedly fair and just to the defendant, omitting nothing that could possibly aid the jury in giving intelligent consideration to its contentions. If either party has any right to complain of the charge, it is not the defendant, though there is no room for any criticism by either of them.

The evidence bore strongly against the defendant, even some of (456) its own being unfavorable to it.

The duty of the master to furnish a reasonably safe place for the servant, while at his work, has been so frequently stated as scarcely to need repetition here. The latest expression of the Court upon this subject in *Ammons v. Manufacturing Co.*, 165 N. C., 449, is as follows:

"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 (reasonably) 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," citing *Pigford v. R. R.*, 160 N. C., 93, and other recent cases.

There was evidence that blackjack was sticky and not the proper material for oiling, and on account thereof plaintiff's hand was caught in it and injured by the belt and shafting. The negligence of defendant consisted in furnishing defective material and an old and worn belt which was in such a bad condition that it had broken three times in one morning.

Negligence should not be declared by the court as matter of law, where more than one inference may legitimately be drawn from it, or where two fair-minded persons of equal intelligence may differ in regard to it and form different conclusions of fact, one of which inferences or conclusions is favorable to the plaintiff. *Alexander v. Statesville*, 165 N. C., 527, citing *Ramsbottom v. R. R.*, 138 N. C., 38; *Graves v. R. R.*, 136 N. C., 3; *Russell v. R. R.*, 118 N. C., 1112; *Spruill v. Insurance Co.*, 120 N. C., 141.

Whether plaintiff should have reported the bad quality of the material supplied for oiling to the master depends somewhat upon his own knowledge of it, and also upon the master's existing knowledge. In the state of the evidence, the jury may well have found that the master knew more about it than his servant. The president of the defendant himself seems to have entertained some doubt as to its adaptability for the purpose of oiling the belt.

(457) Whether the plaintiff selected a safe way to do his work, in the exercise of proper care, when two ways were open to him for the purpose, one safe and the other dangerous, was manifestly a question for the jury, as was also the question whether the bad quality of the belt dressing furnished by defendant was the proximate cause of the injury. It is true that no cause of action can arise by reason of a negligent default, unless there is some breach of a legal duty which leads to the result in continuous and natural sequence, and which a person of ordinary prudence could foresee would naturally and probably ensue.

Brewster v. Elizabeth City, 137 N. C., 392; *Blevins v. Cotton Mills,* 150 N. C., 500; *Ramsbottom v. R. R., supra.* There must be cause and effect —a breach of a legal duty and resultant injury, with causal connection between the two, so that the one flows directly from the other; but it is for the jury to say how this is, and whether this relation which the law requires between the alleged cause and the damage really existed, unless both in the case of the negligence and its proximity to the consequent injury the facts so appear that there can be but one opinion or conclusion with regard to it, in the minds of two equally intelligent persons; and that is not the case here, but the contrary. *Harvell v. Lumber Co.,* 154 N. C., 262.

From the description given by plaintiff of the blackjack, viz., "it was sticky as tar," the jury might reasonably infer that it was dangerous to one handling a rapidly moving belt and using it for oiling or dressing purposes, and there was evidence for the plaintiff which clearly warranted the conclusion that this sticky blackjack proximately caused the injury. It would be useless to prolong the discussion. The burden was upon the defendant as to contributory negligence and assumption of risk, and there was ample evidence to support the finding of the jury upon those issues. We cannot say, as matter of law, that the evidence showed the risk and danger of using the blackjack to be so obvious that a reasonably prudent man would not, under like circumstances, have undertaken to do the particular work, and this question, therefore, was properly left to the jury. *Lloyd v. Hanes,* 126 N. C., 359; *Smith v. Baker,* L. R. App. Cases, 891. In the case last cited, *Lord Halsbury* said: "In order to defeat a plaintiff's right to recover (458) by the maxim relied on (*volenti non fit injuria, anglice,* 'assumption of risk'), the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself." The present *Chief Justice,* commenting on this passage in *Lloyd v. Hanes, supra,* said: "The distinction is wide between mere 'knowledge of the danger' and 'voluntary assumption of the risk.' Besides, 'assumption of risk' is a matter of defense, analogous to and, indeed, embraced in the defense of 'contributory negligence' (*Rittenhouse v. R. R.,* 120 N. C., 544), and it is an error to direct a nonsuit. *Cox v. R. R.,* 123 N. C., 604. The jury, as *Lord Halsbury* says, must pass upon the question whether the employee voluntarily assumed the risk. It is not enough to show merely that he worked on, knowing the danger."

The charge of the court was a clear and correct statement of the principles of law applicable to the facts as the jury might find them from

the evidence, and the motion for a nonsuit and the requests for instructions were properly denied.

No error.

Cited: Lynch v. Veneer Co., 169 N.C. 172; *Ridge v. High Point,* 176 N.C. 425; *Gaither v. Clement,* 183 N.C. 456; *Freeman v. Ramsey,* 189 N.C. 797; *Riggs v. Mfg. Co.,* 190 N.C. 258; *Bennett v. Powers,* 192 N.C. 603; *Griggs v. Sears, Roebuck & Co.,* 218 N.C. 168; *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 214.

W. G. UNDERWOOD v. COBURN MOTOR CAR COMPANY.

(Filed 16 September, 1914.)

1. Vendor and Purchaser—Contracts—Warranties — Trials — Evidence—Questions for Jury.

Representations made by the vendor in the sale of an automobile, that it was durable, reliable, first-class in workmanship and material, was well made, and suitable for the roads upon which the vendee would use it; that it would run a certain distance on 1 gallon of gasoline, and was better than a certain other car, are evidence of an express warranty of the car consequently purchased.

2. Same—Consideration.

Warranties made by the vendor of an article after the contract of sale has been completed are unenforcible for the want of consideration; but in this case the evidence was contradictory on the question of whether the warranty was contemporaneously made with the sale, and was properly left to the determination of the jury, under a correct charge from the court.

3. Vendor and Purchaser—Contracts—Warranties—Measure of Damages.

Damages for the breach of warranty in the sale of an article—in this case, an automobile—are measured by the difference in the value of the car as it was represented and warranted to be and as it really was at the time of its purchase, with such special damages as the vendee incurred, at the request of the vendor, to ascertain if it could not be made to come up to the representation.

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

This is a civil action tried upon these issues:

1. Did the defendant warrant the car, as alleged? Answer: Yes.
2. If so, was said car as warranted? Answer: No.

3. What damage, if any, is the plaintiff entitled to recover? Answer: Five hundred dollars ($500).

From the judgment rendered, the defendant appealed.

Charles Whedbee, P. W. McMullen and Aydlett & Simpson for plaintiff.

J. S. McNider and Ehringhaus & Small for defendant.

BROWN, J. This action is brought to recover damages from the defendant for an alleged breach of warranty in the sale of an E. M. F. car. The plaintiff alleged that at the time of and as an inducement to the purchase of the car the defendant warranted the same, as alleged in the complaint. The defendant denied that it warranted the car, and alleged that, if it did, the warranty was made after the sale without consideration and was *nudum pactum.*

There are a number of exceptions set out in the record, which we will not consider *seriatim.* The several assignments of error present three matters for consideration: First, was there a warranty? Second, was the warranty void? and, Third, the measure of damages recoverable.

An express warranty is defined in 35 Cyc., page 366: "When (460) the seller makes affirmation with respect to the article to be sold, pending the treaty of sale, upon which it is intended that the buyer shall rely in making the purchase." Or, as stated in *Pemberton v. Dean,* 88 Minn., 60: "A warranty consists in representations and statement of and concerning conditions and quality of personal property, the subject of sale, made by the person making the sale to induce and bring it about."

We think that there is abundant evidence of an express warranty, if the testimony of the plaintiff is to be believed. He testified that he went to the defendant's place in Norfolk and saw Mr. Coburn, who showed him an E. M. F. car. Coburn told him that it was durable and reliable, first-class in workmanship and material and well made.

Coburn said that if the plaintiff bought, he would guarantee the car to be satisfactory in every respect; that it was particularly adapted for roads such as we have in this country; and that 1 gallon of gasoline would run the car 15 miles; that it was a better car than one called the "Rambler."

We think that this evidence, which seems to have been believed by the jury, establishes an express warranty. The language used leaves very little for implication or construction. *Lewis v. Rountree,* 78 N. C., 323; *Reiger v. Worth,* 130 N. C., 268.

Second, it is contended by the defendant that the warranty in question was made without consideration, because it was made, as the defendant contends, after a complete contract of sale had been concluded between the plaintiff and the defendant. It is undoubtedly true that a warranty made after the contract of sale is complete is inoperative unless there is a new consideration to support it. It is well settled that the statements relied upon as a warranty must be made contemporaneously with and as a part of the contract of sale. 35 Cyc., 373; *McDugald v. McFadgin*, 51 N. C., 89.

We think this question was very fully, clearly, and correctly submitted to the jury by his Honor as a question of fact as to when the alleged warranty was made. It is true, as contended by the defendant,

(461) that there was some correspondence between the plaintiff and the defendant, looking to the purchase of an automobile, but the automobile had not been delivered, the plaintiff had not seen it, and no payment had been made on it. It cannot be said, in view of all of the evidence, that there was a completed contract of sale and that the alleged warranty was made after it had been completed, and, therefore, without any consideration.

According to the plaintiff's own testimony, the warranty was given by the president of the defendant and in the very inception of the transaction. The plaintiff testified that the "first conversation or dealing which I had, looking to the purchase of this car, I had with Mr. Coburn, who was president of the defendant company, and the other transaction relative to the purchase of this car from the defendant I had with Mr. Coburn personally. At the first of this transaction I went to Mr. Coburn's place in Norfolk and saw Mr. Coburn and looked at an E. M. F. car."

Then the witness goes on to testify, as hereinbefore set out, as to what took place between him and Mr. Coburn in respect to the warranty. The witness further testifies that "On the strength of his persuasion, I bought the car. I paid him a check for $100 to close the bargain and gave it to him personally. I did not send the check to him for this $100. I had not seen the car which I bought, but saw one of the same kind in the shop. The price I paid for the car, with the fixtures, was $1,407.40. I afterwards sent him a check for $1,307.40." That this testimony, taken to be true, makes out a clear case of a contemporaneous warranty as a part of the sale transaction scarcely admits of a doubt.

Third, it is contended by the defendant his Honor made a number of errors in his charge upon the question of damage. There is abundant evidence introduced on the part of the plaintiff that the car was not first-

class in workmanship or material and was not well made. According to the plaintiff's testimony, the car was exceedingly defective and almost worthless.

The evidence also shows that the plaintiff made complaint to the defendant at once. His Honor charged the jury that the measure of damages would be the difference in the value of the car as it was represented and warranted to be and as the jury shall find it was (462) at the time of the purchase. This is in accordance with all the decisions. In the absence of special circumstances, the measure of damages for breach of warranty as to the quality or capacity of machinery sold is the difference between the contract price and the actual value, with such special damages which were in contemplation of the parties. *Critcher v. Porter,* 135 N. C., 543; *Kester v. Miller,* 119 N. C., 475; *Mfg. Co. v. Gray,* 126 N. C., 108.

His Honor further charged the jury that the plaintiff would be entitled to some special damages, viz., any extra expense in having repairs done on the car which the plaintiff was induced to have done at the instance and request of the defendant, to see if the car could not be made to come up to the guarantee. We think his Honor was correct in that charge and properly limited the special damages to such expenses and repairs as the plaintiff was induced to incur by reason of the representations of the defendant. *Kester v. Miller, supra.*

Upon a review of the whole record, we find

No error.

Cited: Poovey v. Sugar Co., 191 N.C. 726; *Troitino v. Goodman,* 225 N.C. 413, 414.

TRUSTEES OF THE NORMAL SCHOOL OF ELIZABETH CITY v. STATE BOARD OF EDUCATION AND BOARD OF TRUSTEES OF COLORED STATE NORMAL SCHOOL OF ELIZABETH CITY.

(Filed 16 September, 1914.)

Deeds and Conveyances—Fraud—Trials—Evidence—Nonsuit — Principal and Agent—Schools.

The plaintiff school trustees having acquired certain real estate by deed for permanent school purposes for freedmen and children, irrespective of color, conducted a school thereon, with one of their number, their secretary, in charge, and when the buildings became inadequate for want of repair, and there being no available funds, the secretary applied for aid to the State Board of Education through its local board of managers, was informed that to receive aid for permanent improvements it was necessary

for the title to the property to be in the State, which ultimately resulted in a deed from the plaintiff trustees to the defendant, the State Board of Education, reciting that it was to be held for the purposes of education of the colored youths, etc., whereupon this defendant expended $1,000 in permanent improvements. Thereafter, these buildings becoming again inadequate, this defendant procured about 23 acres of other lands, erected buildings thereon at a cost of $32,000 and therein conducted a satisfactory colored normal school for the colored race, and proposed to sell the lands acquired from the plaintiffs and use the proceeds to help pay for the property thus acquired. This action is brought to set aside the plaintiff's deed and enjoin the sale of the lands, on the ground that the plaintiff's secretary had fraudulently represented to some of the plaintiff trustees, illiterate men, that the deed was only a lease of the lands, etc. There was no evidence that the defendants knew of or participated in the fraud, and it is held that a judgment of nonsuit upon the evidence should have been granted, there being no sufficient evidence to show that the plaintiff's secretary was acting as the defendant's agent in the transaction, but only as the agent for his cotrustees, who executed the deed.

(463) APPEAL by defendant from *Ferguson, J.*, at March Term, 1914, of PASQUOTANK.

Civil action to set aside a deed on the ground of fraud and to restrain a sale of property thereunder.

Plaintiffs alleged that they were induced to convey certain property in Elizabeth City to defendants by the false representations of one P. W. Moore, a member and secretary of plaintiff board, said Moore acting in the matter as agent of defendants; the deed in question being as follows:

"This deed, made this 5 August, 1905, by James E. Brown, Elisha Overton, Robert Bowe, A. L. Hawkins, Charles Norfleet, Charles Harvey, Dr. G. W. Cardwell, P. W. Moore, and W. B. Butler, trustees of the Colored Normal School of Elizabeth City, N. C., parties of the first part, to the State Board of Education of North Carolina, party of the second part, witnesseth:

"That whereas, by deed dated 11 July, 1870, executed by George D. Poole, trustee, to T. W. Cardoza *et al.*, trustees of the Colored Normal School, and their successors in office forever, for permanent school purposes for freedmen and children irrespective of color, said
(464) deed duly recorded in Deed Book P. P., page 217, in the office of the register of deeds of Pasquotank County, conveying the hereinafter described tract or parcel of land; and whereas the said property is insufficient in value and quantity to support or maintain a school, and the said trustees cannot, therefore, carry out the purposes of said trust; and whereas the State of North Carolina has been aiding in conducing a normal school on said property, and purposes to further aid the education of the colored race by establishing a permanent colored normal

school in or near Elizabeth City, N. C., for the education of the colored youth of Elizabeth City and surrounding territory; and whereas, at a regular meeting of the board of trustees of the property above referred to it was decided that the said board could best carry out the trust aforesaid by conveying the hereinafter described lot or parcel of land to the State Board of Education:

"Now, therefore, in consideration of the premises and the further sum of $5 in hand paid by the party of the second part to the parties of the first part, the receipt whereof is hereby acknowledged, the said parties of the first part have this day bargained, sold, and conveyed unto the party of the second part, its successors and assigns, the following described tract or lot of land, situate in the State and county aforesaid and in the town of Elizabeth City, and bounded as follows: Situate on the east side of Shannon Street and fronting on said street about 123 or 125 feet, and bounded on the south by Brown Street, on the east by lot of Minerva Martin, and on the north by lot of Isaac Leigh, said lot being about 165 feet deep.

"To have and to hold the said tract or parcel of land, together with all the privileges, improvements, and appurtenances thereto belonging or in any wise appertaining, to the said State Board of Education of the State of North Carolina, its successors and assigns, in fee simple, with the understanding that the property or the proceeds from the sale of the same shall be devoted by the said party of the second part towards the permanent establishment of a colored normal school in or near Elizabeth City. In testimony, etc."

Motions of nonsuit, formally entered by defendants, were over- (465) ruled, and defendants excepted.

The jury rendered the following verdict:

"1. Are the signatures of A. L. Hawkins and Elisha Overton or either of them forgeries? Answer: No.

"2. Were the signatures of the grantors to the writing in question procured by the fraud and misrepresentation of P. W. Moore? Answer: Yes.

"3. Was P. W. Moore the agent of the defendants or their board of local managers? Answer: Yes."

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

Isaac M. Meekins for plaintiff.

Attorney-General Bickett, Assistant Attorney-General Calvert, Walter L. Cohoon, and Thomas J. Markham for defendants.

HOKE, J. On the hearing it was made to appear that plaintiffs, "Board of Trustees for the Normal School in Elizabeth City, N. C.," had been the owners of a piece of property in said city, under a deed conveying same to "them and their successors, to their use in fee simple forever, for permanent school purposes for freedmen and children, irrespective of color, etc.," and a school for colored people had been conducted for some years on said property by P. W. Moore, a member of plaintiff board and its secretary; that the building being insufficient and having become very much dilapidated, it became necessary to have same restored and repaired, and, there being no funds available for the purpose, P. W. Moore, trustee and secretary, applied for aid to the State Board of Education through its local board of managers in Elizabeth City. The Board of Education stated that they were not authorized to advance money for the permanent improvement of property unless the title was in the State, and thereupon P. W. Moore, having consulted with his associates, they, in August, 1905, executed the deed in question, intrusted same for delivery to P. W. Moore, and he delivered it to de-

(466) fendants. Thereupon the defendants entered into possession; expended amount of $1,000 in repairing and improving property, and had a school for the colored race conducted thereon for six or seven years, when, the buildings having again become inadequate, the Board of Education procured about 23 acres of land, just out of the city limits, erected suitable buildings thereon, at a cost of $32,000 or more, and are conducting a normal school for the colored race upon the latter property, in all respects satisfactory, so far as the evidence shows.

The board then advertised the old lot and building for sale, the proceeds to be used in part payment of the expense of the present enterprise, when this action was instituted, as stated, to prevent the sale and to set aside the deed on the ground of fraudulent representations on the part of P. W. Moore by which his cotrustees were induced to sign the deed.

It is not claimed or suggested that there was any fraud on the part of the State Board of Education or its board of local managers or any one of them, or knowledge or notice of any facts tending to establish such fraud; but there was evidence offered on part of plaintiffs that some of them could neither read nor write, and that they were induced to execute said deed in its present form by representations of Moore, at the time, that the instrument was, in effect, a lease passing the property to the defendants only so long as a school for the colored race was being conducted thereon; and it is insisted for plaintiffs that Moore was acting in this matter for defendants, and that their title, so acquired, may be impeached by reason of his misconduct.

It is a well recognized principle with us that one may not acquire and hold property by the fraud of his agent and avoid responsibility for the agent's acts (*Sprunt v. May,* 156 N. C., 388, and authorities cited); and, in restricted instances, it seems the position is allowed to prevail in cases of double agency when good faith is clearly shown and both principals are fully aware of the circumstances. Mechem on Agency, sec. 67; Tiffany on Agency, p. 418. But, on careful consideration of the facts in evidence, the Court is of opinion that there is no testimony worthy of consideration by the jury that, in procuring the deed, P. W. Moore acted as agent of defendants within the meaning of the (467) principle referred to. The testimony tends to show that this entire effort was to procure the benefits of a colored normal school for the inhabitants of Elizabeth City and its vicinity, and that has been accomplished. At an expenditure of $32,000, and more, the State has established such a school near the limits of the city, and the same, as stated, is properly placed and is being satisfactorily conducted. And while Mr. Lamb, a member of the local board of managers, testifies, in effect, that as he understood, the witness Moore was acting for both boards, a perusal of his and the entire testimony makes it clear that, so far as these defendants were concerned, Moore was only acting for them, if at all, in a ministerial capacity, that is, to bring them the deed when it was executed, and that defendants throughout dealt with him and intended to deal with him only as a grantor in the deed and coöwner of the property with the plaintiffs, and, in our opinion, the only inference permissible from this evidence is that, in procuring the execution of the deed in question and as to defendants, the grantor, Moore, must be considered the agent of his cotrustees, and they having executed the deed in its present form and intrusted it to him for delivery, the defendants being entirely ignorant of any fraud or misrepresentations, the case calls rather for application of the principle that "Whenever one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it." *Bowers v. Lumber Co.,* 152 N. C., 604 and 607; *Rollins v. Ebbs,* 138 N. C., 140; *R. R. v. Kitchen,* 91 N. C., 39; *Dair v. United States,* 83 U. S., 1; *Butler v. U. S.,* 88 U. S., 272.

On the record as now presented we think the motion of nonsuit by defendants should have been sustained, and it is so ordered.

Reversed.

(468)

J. S. JOHNSON v. BOARD OF EDUCATION OF WILSON COUNTY.

(Filed 16 September, 1914.)

1. Schools—Colored Race—Negro Blood—Constitutional Law.

Our Constitution, Art. IX, sec. 2, requiring that the General Assembly provide for a "general and uniform system of public schools," etc., and that "the children of the white race and the children of the colored race shall be taught in separate public schools, but that there shall be no discrimination in favor of or to the prejudice of either race," gives authority to the Legislature to declare what shall be considered a "white child" or a "colored child"; and Revisal, sec. 4086, prohibiting a child "with negro blood in his veins, however remote the strain," from attending a school for the white race, is constitutional and valid. Art. XIV, sec. 8, of the Constitution, relating to marriages between the races, has no application.

2. Constitutional Law—Power of This Court to Declare Legislative Acts Unconstitutional.

The courts may declare an act of the Legislature unconstitutional, but the power should be exercised sparingly and only in those cases where the conflict between the act and the Constitution is very clear and beyond any reasonable doubt, and the two cannot be reconciled.

CLARK, C. J., concurs in result.

APPEAL by defendant from *Bond, J.*, at February Term, 1914, of WILSON.

This action was brought by the plaintiff for a mandamus to compel defendant to admit to the proper public school of said county for the white race his four children, who are of school age. He alleged that his oldest child, Arthur Johnson, attended school for two days, when he was refused further admission to and attendance, as a pupil, at the school. He thereupon made a demand upon the defendant for the admission of all his children to the proper public school of the county for the white race, and that defendant refused to comply with the said demand. He further alleged that he was lawfully married and the children, in whose behalf he made the demand upon the defendant, are the lawful issue of the union.

(469) The essential allegations of the complaint were virtually admitted in the answer, except the ninth, in which it is alleged that the plaintiff's children are entitled to admission to the schools for the white race, which is denied, and it is averred in the answer that said children are not entitled to attend the public schools for the white race, for the reason that they have negro blood in their veins. The presiding judge at the hearing of the application for the writ of mandamus entered the following judgment:

"This cause coming on to be heard, all parties being regularly before the court, both sides being represented by counsel, and in addition to the facts admitted in the answer, the following specific fact is admitted, to-wit: That each of said four minor children have a slight mixture of negro blood, the same being less in each child than one-sixteenth; and this hearing being had on 10 February, to which time it had been continued by consent:

"It is, therefore, on the admissions in the answer, coupled with the admissions above referred to, ordered, adjudged, and decreed as follows: That each of said children is entitled to attend the school for white children designated in the complaint, or any other school for white children in any other district in which said children or either of them may hereafter live; and the defendant board is hereby ordered and directed to allow all of said children all privileges with reference to said school which belong and appertain in any way to the white children of said school district.

"It is further adjudged that the plaintiffs recover of the defendant the costs of this proceeding, to be taxed by the clerk of the Superior Court of Wilson County.

"The court bases its judgment upon the following facts:

"First. It is admitted in the answer that the father of the said children was the husband by a valid marriage of the mother of said children.

"The Constitution provides that the Legislature shall provide separate schools for the children of the white and colored races, and it also makes valid a marriage between a white man and a woman who has not as much as one-eighth admixture of colored blood. (See section 2, Article IX, and section 8 of Article XIV.)

"The court is of opinion that the Legislature exceeded its (470) power when in section 4086 of Pell's Revisal it attempts to deny the offspring of a marriage which the Constitution says is valid the right which generally pertains to children of that particular race. In other words, the status of the child is fixed by the constitutional recognition of the marriage."

Defendant excepted to the judgment, and has brought the case here by appeal.

W. A. Finch and H. G. Connor, Jr., for plaintiff.

Barnes & Dickinson for defendant.

WALKER, J., after stating the facts: We are strongly of the opinion that the learned judge erred in rendering judgment for the plaintiff. The facts, as stated by him in the judgment, plainly imply that the

children inherited the negro blood from their mother, and it is admitted in the pleadings that the father, J. S. Johnson, is a white man, having a pure strain of blood. But the wife has less than one-eighth admixture of negro blood. So the question is presented, whether it was within the constitutional power of the Legislature to enact section 22, chapter 435 of the Public Laws of 1903, now Revisal, sec. 4086. In order to acquire an accurate conception of the question involved, it will be well to reproduce here the clauses of the Constitution and statute bearing upon it.

The Constitution provides as follows:

Art. IX, sec. 2: "The General Assembly, at its first session under this Constitution, shall provide, by taxation and otherwise, for a general and uniform system of public schools, wherein tuition shall be free of charge to all the children of the State between the ages of 6 and 21 years. And the children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor of, or to the prejudice of, either race."

Art. XIV, sec. 8: "All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are hereby forever prohibited."

(471) Revisal, sec. 4086: "The children of the white race and the children of the colored race shall be taught in separate public schools; but there shall be no discrimination in favor or to the prejudice of either race. All white children shall be taught in the public schools provided for the white race, and all colored children shall be taught in the public schools provided for the colored race; but no child with negro blood in his veins, however remote the strain, shall attend a school for the white race; and no such child shall be considered a white child. The descendants of the Croatan Indians, now living in Robeson and Richmond counties, shall have separate schools for their children, as hereinafter provided in this chapter."

Should it be conceded, for the sake of discussion, that the marriage between J. S. Johnson and the woman who is the mother of his children is a valid one, it does not by any means settle the important and delicate question presented in this record in favor of the plaintiff. If Article XIV, sec. 8, *prohibiting* marriage "between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive" has the effect, contended for by learned counsel of plaintiff, to validate the marriage between plaintiff and the mother of his children, it does only that much and legitimates the offspring of the union; but by no subtle alchemy known to the laboratory of logic can it be claimed to have extracted the negro element from the blood in the veins of such offspring and made it pure. The clause merely prohibited

marriage between persons one of whom is descended from a negro to and including the third generation. It does not even declare that marriages between persons one of whom has negro blood, though beyond the inhibited degree, shall be valid, but only that a marriage between a white person and one within the proscribed degree shall be void. But it is not necessary to the decision of this case that we should give an exact interpretation of that section of the Constitution and thereby fix its precise limits. If it validates the marriage and legitimates the progeny, it does not go far enough to deny to the Legislature the power of classifying school children, so as to exclude from the public schools of the white race any and every child who had inherited negro (472) blood, "however remote the strain," or of declaring by enactment that no such child shall be considered as a member of the white race. It might, and perhaps would, lead to grave consequences if we should hold that, by section 8 of Article XIV, the Legislature has been deprived of any such power.

While we may pronounce an act of the Legislature unconstitutional, as we have often decided, the right to do so should be exercised sparingly, and the conflict between the fundamental law and the legislation should be manifest, and clear beyond any reasonable doubt. We should endeavor, by the use of all reasonable logic, to harmonize the two, and only resort to the power as a last expedient, where our plain duty requires us to exercise it in order to preserve the supremacy of the Constitution.

This case does not require us to invoke the power, as we are asked to do by the plaintiff, upon the ground, as he contends, that section 4086 of the Revisal is an unauthorized act of the Legislature and in direct violation of the Constitution.

Article XIV, sec. 8, leaves intact the right of the Legislature to provide, in the valid exercise of its police power and within its unquestionable privilege to declare the public policy of the State, that children of pure white blood and those having any negro blood, no matter how small a quantity, in their veins shall be separated in the public schools. Nor would it be proper for us to question the propriety or expediency of such a law, or to suggest whether it is wise or unwise. In this respect, the Legislature is a law unto itself, and its power to act, while, perhaps, not absolutely unlimited, can rarely ever be disputed.

Under the Constitution, the Legislature may also declare, as it has done in Revisal, sec. 4086, who shall be considered a white child, where there is an admixture of negro blood. Constitution, Art. IX, sec. 2, provides that "the children of the white race and those of the colored race shall be taught in separate public schools, but there shall be no

discrimination in favor of, or to the prejudice of, either race." The first part of this clause taken from the Constitution favors the legislation contained in Revisal, sec. 4086, and the last part refers
(473) entirely to discrimination or prejudice in respect to school privileges and accommodations, and not to racial divisions or separation. If we give it any such construction, it would conflict with the policy declared in the first part of the clause. There is nothing else in the Constitution that touches the question, and we conclude, from what has been stated, that the Legislature was left free to pass section 4086 of the Revisal. If we were required to express an opinion, we would not hesitate to say that this construction clearly makes for the peace, harmony, and welfare of the two races, according to each race equal privileges and advantages of education and mental and moral training with the other, but keeping them apart in the schoolroom, where, by reason of racial instincts and characteristics peculiar to each, unpleasant antagonism would arise, which would prove fatal to proper school regulation and discipline, and end, of course, in disruption of our school system—a deplorable result for either race.

But the question has been considered by this Court, in one of its phases, in *Ferrall v. Ferrall,* 153 N. C., 177. *Justice Hoke* there said: "It may be well to note that since the decision of *Hare v. Board of Education,* 113 N. C., 10, the legislation as to separate schools for the two races has been changed, and it is now provided, 'that all white children shall be taught in the public schools provided for the white race, and all colored children shall be taught in schools provided for the colored race, but no child with negro blood in its veins, however remote the strain, shall attend a school for the white race.' Public Laws 1903, ch. 435, sec. 22; Revisal 1905, sec. 4086. The language of our Constitution on this subject, Art. IX, sec. 2, is: 'And the children of the white race and the children of the colored race shall be taught in separate public schools, but there shall be no discrimination in favor of, or to the prejudice of, either race.' It will be observed here that, unlike the section controlling the question of marriage, the words used are of more general import and permit of legislative definition in fixing the status of the two races, as in the case of *Wall v. Oyster* (decided by the Supreme Court of the District of Columbia, 7 June, 1910)."

This language of the Court is a plain recognition of the validity
(474) of Revisal, sec. 4086, to which it refers. The context of the opinion in that case also sustains our view, but we have selected for quotation that part which directly bears upon the question and places the matter beyond cavil or dispute.

The case of *Wall v. Oyster* is also in point, as will appear by this language of the Court: "Although providing for separate white and 'colored' schools, Congress has by no enactment undertaken to define what race or what percentage or proportion of racial blood shall characterize an individual as 'colored'; therefore, the term being without legislative definition, is left to the import ascribed to it in the common parlance of the people. There is, then, to be examined whether in the weekday speech of the people the word 'colored' bears a significance which should be considered to include this child. That the common use of the word throughout the United States is in no wise significant of mere complexion is quite definitely established by considering the universal habit of the people in their unalterable failure to apply it to the Indian, who is red, the Mongolian, who is yellow, or to the Malay, who is brown; its application to one of these un-fair complexions is not any time to be heard; to those of negro blood alone is it ever found to be suited; and then not depending for the propriety of its application upon a shade of particular blackness, but rather upon an admixture of a particular racial blood, the Negro. Whether complexions appear distinctly black or approaching toward the fair by gradations of shading is all one, if there be physical touches, whether of shade, hair, or physiognomy, telling of negro blood, such a one is held by the people to be 'colored,' despite his color or want of color. In confirmation of the accuracy of this conception, one need appeal to no mentor beyond the honesty of his own observations day by day. . . . Actual color seems to the public mind to be important only as one of the several evidences which, if sufficiently pronounced, serve to identify the subject as of the negro race; and this consideration, that is to say, the consideration of racial status, seems to my mind to measure an ultimate conception to which the mind of the people has arrived. It is this—putting away for the moment particular instances which might present more refined complications: persons, of whatever complexion, who bear negro (475) blood in whatever degree and who abide in the racial status of the Negro, are 'colored' in the common estimation of the people."

It will be observed that the Court, in that case, directed attention to the failure of Congress to define the word "colored," conceding its power to do so; while here we have a clear and accurate definition by the Legislature, which agrees with the public estimate of who is "colored," and definitely fixes the racial status of those who may be admitted to the white public schools and those who are disqualified by blood for such admission.

The case of *Tucker v. Blease,* 81 S. E., 668, decided by the Supreme Court of South Carolina in April of this year, is also closely applicable,

as its facts are practically the same as those in this record. It was held there that the Legislature could separate the races in the public schools, notwithstanding a provision of the Constitution of that State substantially the same as Article XIV, sec. 8, of our Constitution. The Court also quotes, with evident approval and in support of its decision, a passage from *Plessy v. Ferguson,* 163 U. S., 537, as follows: "The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages has been frequently drawn by this Court. A statute which implies merely a legal distinction between the white and colored races, and which must always exist so long as white men are distinguished from the other race by color, has no tendency to destroy the legal equality of the two races. The object of the fourteenth amendment was undoubtedly to enforce the absolute equality of the two races before the law; but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as
(476) within the competency of the State legislatures, in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for the white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

Even considering alone the welfare of the two races, and following the maxim, "The greatest good to the greatest number," as said by the Court in *Plessy's case,* it would seem to be far better that the children of the two races should each be segregated than that a large majority of those attending the public schools should be denied educational advantages. It avoids the disastrous results of racial antagonisms, which cannot be removed by legislation, and does not withdraw from either race any of the equal benefits of education conferred by the Constitution and guaranteed by the laws of the land. This policy of racial separation in the schools is not only fixed by law in plain terms, but is commended by every consideration upon which the prosperity and happiness of the two races is founded. Living side by side in a free country, with equal rights before the law, it is a just and wise policy that provides for the maintenance of that harmony between the two races which is so essential to their friendly relations and to the peace and welfare of both.

The learned judge erred in deciding with the plaintiff, and we must, therefore, reverse the judgment, and direct that a judgment in accordance with this opinion be entered for the defendant in the court below.

Reversed.

CLARK, C. J., concurs in result.

Cited: Medlin v. Board of Education, 167 N.C. 240, 242; *Bickett v. Tax Com.,* 177 N.C. 435; *Kornegay v. Goldsboro,* 180 N.C. 445, 446.

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(477)

C. L. AND A. L. HINTON, EXECUTORS, v. CALEB HALL AND W. L. COHOON.

(Filed 16 September, 1914.)

1. Mortgages—Registration—Fraud — Trials — Evidence — Attorney and Client.

Where the owner of lands takes a mortgage to secure the balance of the purchase price, but holds it and has it registered subsequent to the registration of another mortgage the purchaser has made and executed thereon, and the later made but prior registered mortgage is attacked for fraud and failure of consideration, it is competent for the attorney of such mortgagee to testify, in corroboration of his evidence as to the *bona fides* of the loan, that he had loaned as such attorney the money out of funds of his client in his hands for the purpose, and had made many transactions of a similar character for him.

2. Deeds and Conveyances—Acknowledgments—Privy Examination—Notaries Public—Interests.

The mere fact that the notary public taking the acknowledgment of the grantor in a mortgage deed to lands, and the privy examination of his wife, is a brother-in-law of the mortgagee does not disqualify him, for interest, to act as such notary, nor is he disqualified by the fact that under agreement with the mortgagor he received a certain part of the money loaned, in payment of obligations of the mortgagor to his wife and himself.

3. Mortgages—Sales—Advertisements—Irregularities—Notice—Immediate Purchasers—Remote Grantees—Chain of Title.

While the immediate purchaser at a sale of lands under mortgage is required to see that proper advertisement of the lands has been made, this does not apply to subsequent or remote grantees of the land, for they acquire a good title if the recitals in their chain of title appear to be regular. *Eubank v. Becton,* 158 N. C., 230, cited and distinguished.

4. Mortgages—Sales—Advertisements—Irregularities—Second Mortgagee —Measure of Damages.

Where there are two or more mortgages on the same land, and by a sale under the first mortgage, not advertised according to its terms, the lands have been acquired by subsequent grantees without notice of the irregularity, the second mortgagee may elect to sue the first mortgagee for any damage which he has suffered on account of the irregularity, the measure thereof being the difference between the amount due under the first mortgage and the value of the land at the time of the sale.

5. Issues.

Where the trial judge has submitted to the jury issues upon the controverted facts which are fully determinative of the rights of the parties, his refusal to submit additional issues will not be held for reversible error.

(478) APPEAL by defendant from *Ferguson, J.*, at December Term, 1913, of CAMDEN.

Aydlett & Simpson for plaintiffs.

Ward & Thompson and Ehringhaus & Small for defendants.

CLARK, C. J. The plaintiffs' intestate, J. L. Hinton, conveyed to the defendant Caleb Hall a tract of land on 11 July, 1908, and Hall executed a mortgage to Hinton on the same date to secure the purchase money. The deed to Hall was recorded at once, but his mortgage back to Hinton was not registered till 23 August, 1909. In the meantime, on 5 February, 1909, Hall and wife executed a mortgage to D. E. Williams to secure a loan of $800, and this was recorded at once. The acknowledgment and privy examination to this were taken before W. L. Cohoon, the brother-in-law of D. E. Williams, who made the loan as agent for Williams.

On 26 April, 1910, Williams, the mortgagee, sold under the power of sale in said mortgage and executed a deed to the purchaser, Margaret W. Cohoon, which was duly recorded. On 29 December, 1910, Margaret W. Cohoon and husband, W. L. Cohoon, executed to A. E. Cohoon a deed for the same property, which was duly registered. On 31 January, 1911, A. E. Cohoon executed a deed for the same property to M. N. Sawyer, and on 28 March, 1911, Sawyer and wife executed a deed therefor to Missouri Sawyer.

The complaint alleged that the mortgage deed from Hall to Hinton was a fraud and a sham pursuant to an agreement between W. L. Cohoon and Hall in order to defeat Hinton's mortgage, which had not been recorded; that in fact no loan had been made Hall by Williams,
(479) as set out in the mortgage; that in fact no money was received by Hall; that Cohoon was really the only one interested in the

transaction; that the property was not properly advertised at the time of the sale under the mortgage, and hence the sale was null and void to pass title.

The jury, in answer to the issues submitted, found that the defendant D. E. Williams loaned through his attorney, W. L. Cohoon, to Caleb Hall $800, for which the mortgage was given as security; that there was no other irregularity except that in the foreclosure the advertisement was not made in a newspaper published in Pasquotank County; that the value of the land in question at the time of the sale was $1,050; that Missouri Sawyer, and also M. N. Sawyer, from whom she purchased, had no notice of any defect in title or of any irregularity in the foreclosure proceeding.

Upon the verdict the judge held that Missouri Sawyer had obtained a good title to the land; that the irregularity in the advertisement made the sale irregular, and that D. E. Williams and Margaret W. Cohoon were responsible to the owner of the junior recorded mortgage for the difference in the value of the land at the time of the sale, *i. e.*, $1,050, as found by the jury, less $800, the sum secured in the mortgage to Williams.

It was competent for the witness Cohoon, in corroboration of his evidence as to the *bona fides* of the loan to Williams, to testify that he had acted as agent for Williams in many other transactions of this kind, and that he had money on hand of Williams' which he loaned to Hall. W. L. Cohoon had no pecuniary interest in the transaction, and his relation to Williams as brother-in-law did not disqualify him as notary public to take the acknowledgment of Hall and the privy examination of Hall's wife. Cohoon testified that of the $800 loaned Hall, $75 was paid to himself for a debt which Hall owed him and $300 for an indebtedness of Hall to Cohoon's wife for a tract of land.

The court submitted to the jury under proper instructions these matters, and the jury found that there was a *bona fide* loan of $800 made by Williams to Hall. The fact that out of this loan Hall agreed to pay certain debts to Cohoon and his wife did not give (480) them an interest in the mortgage, which the jury found was a *bona fide* transaction between Williams and Hall.

The mortgage contained a power of sale, requiring that the property should be advertised by posting notices at the courthouse door and three other public places in the county for thirty days, and also by publishing said notice for four weeks in some newspaper in Elizabeth City. It was in evidence that the advertisement was made as thus required, except that there was no publication in the newspaper, and the jury found that there was no other irregularity in the proceeding.

It was true that failure to advertise according to the terms of the power of sale invalidates the sale. *Eubank v. Becton,* 158 N. C., 230. But it is said that such sale is not absolutely void, but will pass the legal title. *Eubank v. Becton, supra; Brett v. Davenport,* 151 N. C., 58. While such sale would be set aside as to the purchaser, a subsequent or remote grantee without notice and in good faith takes a good title against such defects or irregularities in the sale of which he had no notice. 27 Cyc., 1494.

The jury find that Missouri Sawyer and her grantor, M. N. Sawyer, through whom she claims, had no notice of any defect in the title or foreclosure proceeding. As said in *Eubank v. Becton,* they would be affected with notice of any defect which would appear in their chain of title, but this is all. In going to the record to look up this title, they found it recited that due advertisement as in said mortgage prescribed, and by law provided, had been made. In *Eubank v. Becton* the record disclosed that while the mortgage required advertisement in four public places, the trustee's deed recited that it had been made at only three places.

The purchaser at a mortgage sale is required to investigate and is fixed with notice of the defect in advertising or other like irregularity, but this is not true of subsequent grantees, who are required only to look to the recitals in the trustee's deed.

(481) The second mortgagee could elect to sue the first mortgagee for any damage which he has suffered by any irregularity in making the sale. The most that the second mortgagee could possibly have suffered in this case was the difference between the actual amount of the indebtedness due under the Williams mortgage, which the jury find to have been $800, and the actual value of the land at the time of the sale.

The only other exception is the refusal to submit additional issues; but the issues submitted were fully determinative of the rights of the parties to the action, and this is all that is required. *Kimberly v. Howland,* 143 N. C., 398; *Clark v. Guano Co.,* 144 N. C., 64.

No error.

Cited: Hux v. Reflector Co., 173 N.C. 100; *Brewington v. Hargrove,* 178 N.C. 146; *Harvey v. Brown,* 187 N.C. 365; *Douglas v. Rhodes,* 188 N.C. 584; *Whitley v. Powell,* 191 N.C. 477; *Brown v. Sheets,* 197 N.C. 272; *Investment Co. v. Wooten,* 198 N.C. 453; *Phipps v. Wyatt,* 199 N.C. 731.

CLARA ELLIOTT v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 16 September, 1914.)

1. Carriers of Passengers—Flag Stations—Failure to Stop—Tickets—Negligence—Interpretation of Statutes.

A passenger on a railway train is entitled, as a matter of right, to have the train stop at a station to which he has purchased his ticket; and where his destination is a flag station at which the train fails to stop, attributable to the neglect of the conductor in failing to take up the passenger's ticket in time, the railroad company is answerable for the consequent damages. *Revisal, sec.* 2611.

2. Evidence—Corroboration.

Where there is pertinent evidence, upon the measure of damages in an action for a personal injury, that since the time of the negligent act complained of the plaintiff suffered with rheumatism, which she had never had before then, testimony of her family physician that he had not heard her complain before of having rheumatism is competent as corroborative.

3. Same—Trials—Requests — Appeal and Error — Objections and Exceptions.

An exception that the court did not limit the admission of corroborative evidence to its corroborative character must be taken to the refusal of the court to so limit it upon appellant's request; and where the record is silent in this respect, it is presumed on appeal that this was properly done by the trial court.

APPEAL by defendant from *Ferguson, J.*, at January Term, (482) 1914, of PERQUIMANS.

This is a civil action, tried upon these issues:

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

2. Did the plaintiff, by her own negligence, contribute to her said injury? Answer: No.

3. What actual damage, if any, is plaintiff entitled to recover? Answer: $300.

From the judgment rendered the defendant appealed.

P. W. McMullan for plaintiff.

Small & MacLean, Bragaw & Rodman for defendant.

BROWN, J. It is in evidence that on 11 February, 1914, about 11 p.m., the plaintiff purchased a ticket at Elizabeth City for Winfall and took a seat in the defendant's train passing through Elizabeth City for Winfall and the south that night. It appears that Winfall was a flag station,

but the plaintiff had no knowledge that it was; she had frequently ridden on this night train from Elizabeth City to Winfall, and the conductor had always taken up her ticket before reaching Winfall; the train had always stopped there for her to alight.

The plaintiff further testified that the train made no stop at Winfall, but did stop at a station known as Okisko, making no other stop between Elizabeth City and Hertford. Consequenly the plaintiff did not know when the train passed Winfall. She had her ticket in her hand, but nobody called on her for it. She listened for the conductor or porter to call out "Winfall," and relied on the conductor to come back and take up her ticket, as had always been done before. The conductor passed backward and forward through the car, seeming to be in a hurry. It was a cold, snowy night, and the only light at Hertford was from the snow.

There was no depot at Hertford, as it had been burned down. She had to get off in the snow at Hertford and remain there until some
(483) one came up and spoke to her. The plaintiff then testifies as to her condition, situation, suffering, and the consequences which befell her on account of such exposure. There was contradictory evidence. Upon this testimony, we think the court properly overruled the motion to nonsuit.

It is the settled law of this State that where a common carrier receives a passenger upon its train, with a ticket calling for a certain station, it is the duty of the railroad company to stop the train at such station, even though the passenger did not know that this particular train did not stop at such station.

In this case Winfall was a flag station and the plaintiff held a ticket for Winfall. It was the conductor's duty to take up that ticket, and if he had done so he would have discovered that the plaintiff was a passenger for Winfall, and it would have been his duty to stop such train at such station to let the plaintiff alight.

The statute provides (Revisal, sec. 2611) that passengers shall be put off at the destination to which they have paid, or for which they may have received tickets, and that the carrier shall be liable to the party aggrieved in an action for damages for any negligence or refusal in the premises.

In Thompson on Carriers, sec. 66, it is stated: "Carrying a passenger beyond his destination in disregard of his request to be put off there will afford a good ground of action, and this though no bodily harm, mental suffering, insult, oppression, or pecuniary loss be shown." *Hutchinson v. R. R.*, 140 N. C., 124.

It is true that the plaintiff made no request to be put off at Winfall, but it was not her duty to hunt up the conductor and tell him to what

station she was bound. It was his duty to take up her ticket, and then he would have known the station to which she had purchased a ticket.

The defendant excepts because Dr. Sharpe was asked the following question: "What complaint, if any, had you ever heard her make about having rheumatism before that?" The plaintiff had testified that she had never had rheumatism before the night complained of, but that since the exposure in the snow the night that she was put off at Hertford, she had contracted it, and suffered with it constantly. (484)

Dr. Sharpe had testified that since that night she had complained a great deal of rheumatism, and he had treated her for it, as her family physician. Such testimony was competent to corroborate the plaintiff's own evidence that she had suffered from rheumatism ever since that particular night. In any event, the defendant having failed to request the court to limit the testimony elicited to corroboration, cannot complain now. Rules of the Supreme Court, No. 27.

It is true that, considering this testimony as corroborative only, it was the duty of the court, at the time of its admission, to limit its purpose and explain its nature to the jury. But in the absence of a contrary showing in the record the court is presumed to have done this. *S. v. Parker,* 134 N. C., 209.

We have examined the other exceptions taken in the record, together with the charge of the judge, and find the exceptions to be without merit. In his charge his Honor presented the case very fully and clearly to the jury, and followed the well settled decisions of this Court. The judgment is

Affirmed.

Cited: Guano Co. v. Mercantile Co., 168 N.C. 225; *Sawyer v. R.R.,* 171 N.C. 16; *Garland v. R.R.,* 172 N.C. 641; *Perry v. Mfg. Co.,* 176 N.C. 71; *Blaylock v. R.R.,* 173 N.C. 355; *S. v. Steele,* 190 N.C. 508.

C. L. AND W. F. HINTON v. LAKE DRUMMOND CANAL COMPANY.

(Filed 16 September, 1914.)

1. Canals—Water and Water-courses—Bridges — Maintenance — Convenience—Title—Damages—Trials—Evidence.

"Turner's Cut" was dug by the predecessor of the defendant from the mouth of its canal to a point on the Pasquotank River to avoid going through "Moccasin Tract" with boats, and thus saving some distance in their travel. When the defendant purchased the property of its prede-

cessor, the Dismal Swamp Canal Company, there was a bridge over "Turner's Cut," which it maintained and erected a phone station to notify boats and rafts going through the "cut." In cutting down expenses, the defendant did away with the phone station and ceased to maintain the bridge. The plaintiffs seek to compel the defendant to maintain this bridge for the benefit of their toll road, and by amendment of the pleadings to recover damages for the defendant's failure to maintain it. *Held*, it was competent for the defendant to prove that it had never acquired or claimed title to the lands through which "Turner's Cut" had been dug; that the United States Government had taken over and controlled the "cut" as a part of its public waterways, appropriating large sums of money for its maintenance; and that the defendant had previously maintained the bridge only for its own convenience; and *Further held*, that upon the facts established, there was no liability upon the defendants.

2. Deeds and Conveyances—Defective Probate—Title.

It is held in this case that the objection to the validity of probate of a deed under which the plaintiff claims title to the land in dispute is immaterial, the plaintiff having shown a connected chain of title through another deed, which was properly probated.

WALKER and HOKE, JJ., dissenting.

(485) APPEAL by plaintiffs and defendant from *Ferguson, J.*, at March Term, 1914, of CAMDEN.

Ward & Thompson for plaintiffs.
Aydlett & Simpson for defendant.

CLARK, C. J. This is an action to compel the defendant to maintain a drawbridge across "Turner's Cut." This was refused, and the plaintiffs appealed. The court held that the plaintiffs were entitled to recover damages for the discontinuance of the bridge, and might amend their complaint to so allege, and might submit an issue as to the amount, and the defendant appealed.

Before "Turner's Cut" was dug, boats went through what was known as the Moccasin Tract, which is a part of Pasquotank River. The canal company, the Dismal Swamp Canal Company, which was the predecessor of the defendant in title, thereupon cut "Turner's Cut" from the mouth of their canal to a point on the Pasquotank River, which avoided
(486) going through the Moccasin Tract part of that river, thus making the route 4 miles shorter.

It was in evidence that some thirty years ago the superintendent of the Dismal Swamp Canal Company disclaimed on the part of his company the ownership of "Turner's Cut" and permitted the Government to take it over, which was done. The Government widened and deepened

it as a part of Pasquotank River presumably, spending over $150,000 in doing so, and permitted its free use by the public.

The defendant contends that when it purchased the property of the Dismal Swamp Canal Company, 30 July, 1892, it did not purchase "Turner's Cut." The defendant has never set up any claim to "Turner's Cut," has never collected any toll for its use nor spent any money on its repair nor maintained it in any way.

There was a bridge across "Turner's Cut" when the defendant purchased the Dismal Swamp Canal. The defendant has maintained this bridge and a phone station to notify boats and rafts passing through the "cut." After the United States Government had purchased the Albemarle and Chesapeake Canal, which was a competitor of this canal, the defendant in reducing expenses did away with the phone station and ceased to maintain this bridge. The plaintiffs then instituted this suit to compel the defendant to maintain the bridge for the benefit of their toll road.

It was competent for the defendant's witness to testify that the defendant had never claimed any right, title, or interest in "Turner's Cut" nor any part thereof, and that the Government had appropriated large sums for its maintenance and permitted its free use by the public.

It was also competent for the witness to testify that when the defendant purchased the Dismal Swamp Canal property that this bridge was over Turner's Cut, and that the defendant continued to maintain the bridge merely as a matter of convenience and without assuming any obligation.

The records of the United States Government were duly certi- (487) fied as required by Pell's Rev., sec. 1617; *S. v. Dowdy,* 145 N. C., 432; *S. v. R. R.,* 141 N. C., 854. These excerpts from the records of the War Department show that the United States Government had taken over, as part of the public waters of the United States, the section called "Turner's Cut"; that it was appropriating large sums of money for its maintenance, and that the defendant had not managed or controlled this cut nor claimed to own it.

We find no error in the refusal of the mandatory injunction to compel the defendant to keep up and maintain the bridge.

The defendant objected to the introduction of the deed from Newton and Ellis, trustees, to the Dismal Swamp Canal Company, of 15 January, 1880, on the ground that the probate was not sufficient, and therefore that it was not properly registered.

It is unnecessary to consider this proposition, because if the probate of this deed was insufficient to pass the title, the deed of the said company to Thom and Bain, 1 July, 1882, was properly probated and

recorded, and from them there is a complete title by mesne conveyances to the defendant.

The court having properly held that the plaintiff was not entitled to a mandamus to compel the defendant to maintain a bridge across "Turner's Cut," because it did not have title thereto, and that the United States is maintaining said cut as a part of the navigable waters of the State, it follows that the plaintiffs are not entitled to an issue as to the damages it has sustained by reason of the defendant not maintaining said bridge.

While the Dismal Swamp Canal Company, predecessor in title of the defendant, cut the waterway known as "Turner's Cut," it was not a part of the property which it held under its franchise, but was merely an adjunct or convenience which it operated. The title to said "Turner's Cut" was not a part of the franchise and did not pass by the defendant's purchase. The United States Government subsequently took it over and for thirty years has been expending money upon it as a part of the navigable waters of the State, and the defendant has not been charging toll or exercising control over it.

(488) There is no obligation, express or implied, requiring the defendant to maintain the bridge, which it has done heretofore voluntarily and as a matter of convenience, and it was error to adjudge that the plaintiff was entitled to recover damages and to authorize the amendment to the complaint to the end that an issue as to such damages should be submitted to the jury.

In plaintiffs' appeal, No error.
In defendant's appeal, Reversed.

WALKER and HOKE, JJ., dissent.

J. S. CAMPBELL ET AL v. WASHINGTON LIGHT AND POWER COMPANY.

(Filed 16 September, 1914.)

1. Actions—Misjoinder—Causes and Parties—Dismissal of Action.

An action brought by a father, in his own behalf and in that of his son, a minor, as next friend, alleging damages to them both for a personal injury to the latter, is a misjoinder of parties as well as causes of action, not capable of division, and may be dismissed.

2. Actions—Misjoinder—Withdrawal of Party — Costs — Amendments — Court's Discretion.

Where there has been a misjoinder of parties as well as causes of action, it is within the discretion of the trial judge at any time before verdict or adverse decision to permit the withdrawal of one of the parties, leaving the action to proceed singly as to the other, and to allow a proper amendment of the pleadings as to the remaining cause, where the defendant has asked for no affirmative relief and his defense cannot be prejudiced (Revisal, sec. 507); but the defendant is entitled to recover his cost against the party retiring from the case.

APPEAL by defendant from *Ferguson, J.*, at March Term, 1914, of PASQUOTANK.

This action was brought by the plaintiff J. S. Campbell, in behalf of himself and, as next friend, in behalf of his son, James Campbell, a minor, to recover damages for supplying impure water to the (489) said minor, whereby he became ill with typhoid fever, causing him great physical and mental suffering, and whereby the other plaintiff, his father, was put to great expense in taking care of him and effecting his cure, lost the benefit of his services, and suffered great mental anguish on account of his sickness.

Defendant demurred upon the ground of a misjoinder of parties and causes of action.

At the hearing upon the demurrer, the court, at the request of plaintiffs, permitted J. S. Campbell, suing in his individual capacity, to withdraw, as a party, from the action, and ordered the case to proceed as to the other plaintiff, James Campbell, by his next friend, J. S. Campbell, with leave to replead if he desired to do so.

Defendant excepted and appealed.

Daniel & Warren and Manning & Kitchin for plaintiffs.
Small, McLean, Bragaw & Rodman for defendant.

WALKER, J., after stating the case: The defendant contends that there was a misjoinder of parties and causes of action, and in support of its contention relies on the following authorities: *Cooper v. Express Co.*, 165 N. C., 538; *Mitchell v. Mitchell*, 96 N. C., 14; *Cromartie v. Parker*, 121 N. C., 198; *Morton v. Telegraph Co.*, 130 N. C., 299; *Thigpen v. Cotton Mills*, 151 N. C., 97.

It may be conceded that there was a misjoinder of parties and causes of action, and *Thigpen v. Cotton Mills, supra*, seems to be "on all-fours" with this case in that respect; but this concession does not justify the conclusion that the court erred in permitting the withdrawal of the father, as a party, and allowing the action to proceed further in the

name of the son alone as plaintiff. It would not have been proper to divide the action into two—one in the name of the father and the other in the name of the son, for a division is authorized only where "the causes of action alone are distinct," as said by the *Chief Justice* in *Cooper v. Express Co., supra,* where the facts were similar. But
(490) this is not a division of the action, allowing each to proceed by separate action in his own name, but a retirement by one plaintiff, leaving the action to be prosecuted in the name of the other as his action, with proper amendment of the pleadings for that purpose.

It is provided in Revisal, sec. 507, that "the judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or *striking out* the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case." It was held in *Jarrett v. Gibbs,* 107 N. C., 303, construing the corresponding section in The Code (sec. 273), that "the motion of the plaintiff, Fannie E. Murphy, to be allowed to withdraw and to amend the process and pleadings by striking out her name was within the power and rested within the discretion of the court." This left the other party, Jarrett, as the sole plaintiff, with the cause of action belonging to him, the other party and his cause of action having been eliminated by the permission of the court. That is our case. This Court also ruled in that case that the amendment could have been ordered, in the discretion of the judge below, even if its legal effect had been to substitute one plaintiff for another, citing, for this proposition, *Reynolds v. Smathers,* 87 N. C., 24, which held that an amendment allowing a change of plaintiffs is allowable.

Defendant could not be hurt by the amendment, as it asked for no affirmative relief, but is entitled to its costs. *Gatewood v. Leak,* 99 N. C., 363; *Tate v. Phillips,* 77 N. C., 126; *Pritchard v. Mitchell,* 139 N. C., 54; *McKesson v. Mendenhall,* 64 N. C., 502.

Plaintiff J. S. Campbell could withdraw or submit to a nonsuit at any time before verdict or decision adverse to him. *Gatewood v. Leak,* 99 N. C., 363. The party retiring is not, in a strict sense, said to take a nonsuit, "but is allowed to withdraw or depart, with costs against him," as said in *Gatewood v. Leak, supra,* and in *Lafoon v. Shearin,* 95 N. C., 391; *Bynum v. Powe,* 97 N. C., 374.

(491) Where there is an improper joinder of causes of action, and defendant's demurrer thereto is allowed, there may be a severance of the causes, or a division into as many actions as may be found necessary for the proper determination of the causes of action so misjoined (Revisal, sec. 476), but not so where there is a misjoinder of

parties and causes of action. In that case a demurrer on that account should be sustained, unless, as in this case, one of the parties withdraws himself with his cause of action, leaving only one plaintiff, with a single cause, or with several that may be properly joined in one action. In the latter case, the reason for refusing a division where there is a misjoinder of parties and causes does not apply. It is not, in fact or in law, a division of the parties and causes, but an elimination, which reduces the unwarranted number to one only, or leaves the process and pleading in unobjectionable form.

The view we have taken of this question appears to be sanctioned by the Court in *Tripp v. City of Yankton,* 11 S. D., 353. A demurrer was there entered for misjoinder of causes of action. With reference to a request by plaintiff to withdraw one of the causes, the Court said: "If the request is to be understood as eliminating the third cause of action from this proceeding entirely, which the Court understands to be the effect, it will be allowed. In the absence of a counterclaim or showing that a discontinuance would materially prejudice respondent, appellant had a right to dismiss, either before or after issue was joined, one or all of his causes of action; and a denial of such application would constitute an abuse of discretion." See also 1 Enc. of Pl. and Pr., pp. 543 and 544 and notes.

However the rule may have been under the ancient system of pleading and procedure, the liberal practice introduced and authorized by our present Code, which disregards technicalities and seeks to try and settle controversies upon their merits, sustains the decision of the court in this case. Revisal, sec. 507.

We have not considered the validity of the plaintiff's cause of action, preferring to wait until the new complaint is filed and the matter is brought before the Court upon that pleading, which may entirely supersede the old one.

No error.

Cited: McLaughlin v. R.R., 174 N.C. 185; *Roberts v. Mfg. Co.,* 181 N.C. 205; *Evans v. Davis,* 186 N.C. 46; *Rogers v. Rogers,* 192 N.C. 52; *Bank v. Angelo,* 193 N.C. 578; *Jones v. Vanstory,* 200 N.C. 585; *Greene v. Jones,* 208 N.C. 222; *Sink v. Hire,* 210 N.C. 403; *Clevenger v. Grover,* 212 N.C. 16; *Smith v. Land Bank,* 213 N.C. 347; *Snotherly v. Jenrette,* 232 N.C. 608.

(492)

M. D. DARDEN AND WIFE, LIZZIE, v. THE TOWN OF PLYMOUTH.

(Filed 16 September, 1914.)

Municipal Corporations—Sidewalks—Obstructions—Trials—Negligence—Contributory Negligence—Questions for Jury—Nonsuit.

In an action against an incorporated town to recover damages for a personal injury, there was evidence tending to show that for more than two months the defendant had permitted building material to obstruct the sidewalks on both sides of the street, and that the plaintiff's injury was received in consequence of her stumbling upon some loose brick or building material, rendering the sidewalk uneven, as she was going to her home at night; that at this place the obstructions on the sidewalk would not permit two persons to pass abreast of each other; and it was in a shadow cast by a street light from a shed that extended across the sidewalk; and that the plaintiff was mindful of the obstructions in endeavoring to choose her way along: *Held*, evidence sufficient of defendant's actionable negligence in failing to keep the sidewalk in proper condition, and this, with the question of plaintiff's contributory negligence, should be submitted to the jury. *Owens v. Charlotte*, 159 N. C., 332, and like other cases where the plaintiff knew of the conditions and could have avoided the injury by the exercise of proper care, cited and distinguished.

APPEAL by plaintiffs from *Ferguson, J.*, at June Term, 1914, of WASHINGTON.

Civil action to recover damages for physical injuries caused by alleged negligence of defendant in failing to keep the streets of the town in proper repair.

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

W. M. Bond, Jr., for plaintiffs.

L. W. Gaylord and H. S. Ward for defendant.

HOKE, J. The evidence on the part of plaintiff tended to show that, in September, 1912, about 9 p. m., *feme* plaintiff was injured by a fall as she was endeavoring to go along Water Street in Plymouth; that the injury occurred under a shed over the street from Hampton's warehouse,

(493) a brick structure abutting on the street; that on the outer edge of the sidewalk at this place there was some kind of a counter and on the inner edge, next the building, there was a pile of loose lumber sloping towards the sidewalk and narrowing same so that two people could not pass abreast. As we understand the facts, the surface of the sidewalk here was uneven, by reason of loose brick and pieces of lumber falling on the same, and the opposite sidewalk was also obstructed

by brick and building material placed there for the erection of some building on that side. That there were electric lights in the town, but the same were so placed that the shadow of the brick warehouse and the shed over the sidewalk prevented proper effect, and it was right dark at the time and place the injury occurred; that this pile of lumber and the condition of the sidewalk at the place in question had existed for two months and more; that the warehouse belonged to one of the town aldermen; that the office of the chief of police was some distance below, and that officer, himself, passed the place at least two or three times every day; that the husband's place of business was on the same street, just above the warehouse, and, on the night in question, about 9 p. m., *feme* plaintiff, who assisted in her husband's business, had left the store and was on her way home when she fell on the sidewalk by reason of the lumber pile and the uneven surface there, and received severe physical injuries from which she had not yet recovered. The witness stated that she was mindful of the pile of lumber and was doing what she could to avoid being hurt, but, notwithstanding her efforts, she stumbled and fell and received the injuries, as stated and described fully in the evidence.

From this, a fair summary of the facts making in plaintiff's favor, as they now appear of record, we think that the order of nonsuit was erroneous, and the same must be set aside, for, under our decisions applicable, if these facts are established, they permit the inference of culpable negligence on the part of the town in the care and supervision of the streets (*Bailey v. Winston,* 157 N. C., 252; *Fitzgerald v. Concord.* 140 N. C., 110; *Bunch v. Edenton,* 90 N. C., 431), and in our opinion the issue of contributory negligence must also be referred to the jury.

True, in several decisions to which we were referred by counsel (494) for defendant a nonsuit was sustained, and chiefly on the ground that it appeared from the testimony offered by plaintiff himself that he was, at the time, fully aware of the dangerous conditions complained of; but a careful examination of these authorities and others of like kind will disclose that in these cases the danger was obvious, and it further appeared, either from positive testimony to that effect or from the character of the obstructions and the facts and attendant circumstances, that the plaintiff could not at the time have been properly careful for his own safety. Thus, in *Ovens v. Charlotte,* 159 N. C., 332, a case much relied on by defendant, plaintiff was injured by driving against a stump which, he maintained, was negligently left on the street by the municipal authorities, and it also appeared that he was fully aware of the existence of the stump and its exact placing, "and could readily have seen it, by an electric light, if he had been attentive to his driving."

In *Austin's case,* 146 N. C., 336, plaintiff was not on the street at all, but was injured in trying to go a dangerous way across a private lot. The danger, too, in that case was obvious and the risk was knowingly and voluntarily incurred by plaintiff. And so in *Neal's case,* 126 N. C., 412. The town had constructed a perfectly safe sidewalk on one side of the street which was customarily used by pedestrians, and on the other was an abandoned pathway running near an excavation that imported danger, and it appeared that plaintiff, being fully aware of the conditions and the custom and of the attendant danger, voluntarily left the safe and customary sidewalk and was injured in attempting, at night, to go along the old path. And, in *Watkins' case,* 96 N. C., referred to in *Austin's case, supra,* plaintiff was injured by falling into an excavation which the town authorities had made on an open lot, and it appeared that he was fully aware of the existence of the pit and the incidental danger, but "that he was thinking of something else at the time, and forgot about the pit."

But not so here. According to *feme* plaintiff's account, she was going from her work place to her home, along the street that was provided;

(495) that she was mindful of the lumber pile and the conditions attendant and was doing what she could to avoid a fall, but the place was rendered too dark to observe fully by the shadow of the building and the shed overhead, and notwithstanding her care, she slipped and fell.

Upon these facts, if established, we must hold, as stated, that the question of contributory negligence on the part of plaintiff must be referred to the jury, and that the present case comes under the principles declared in *Russell v. Monroe,* 116 N. C., 720, and in which it was held that "Previous knowledge, on the part of a person injured, of a defect in a sidewalk does not *per se* establish negligence on his part."

There is error, and the judgment of nonsuit must be set aside and the cause submitted to the jury.

Error.

Cited: Leggett v. R.R., 168 N.C. 366, 368; *Nicholson v. Express Co.,* 170 N.C. 69; *Seagraves v. Winston,* 170 N.C. 622; *Duke v. Belhaven,* 174 N.C. 97; *Graham v. Charlotte,* 186 N.C. 664; *Willis v. New Bern,* 191 N.C. 511; *Wall v. Asheville,* 219 N.C. 169; *Hunt v. High Point,* 226 N.C. 77; *Broadaway v. King-Hunter, Inc.,* 236 N.C. 676, 677.

FRANK CHANCE v. CRYSTAL ICE AND COAL COMPANY.

(Filed 16 September, 1914.)

Courts—Expression of Opinion—Credibility of Witness—Interpretation of Statutes.

Where a material witness for a party to an action has been asked a question which was withdrawn upon objection, and to his answer to the next question asked him adds the testimony called for in the question and withdrawn, it is reversible error for the judge to tell the jury that the objectionable part of the answer was stricken out, and to add, "This witness is too smart," for the added portion of the instruction is an expression of opinion by the judge upon the credibility of the witness, and is forbidden by statute.

APPEAL by defendant from *Ferguson, J.*, at February Term, 1914, of PASQUOTANK.

This is a civil action, tried upon these issues:

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

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

3. What damage has the plaintiff sustained? Answer: $300. (496)

From the judgment rendered, the defendant appealed.

Aydlett & Simpson for plaintiff.

I. M. Meekins for defendant.

BROWN, J. We do not deem it necessary to discuss the sufficiency of the evidence of negligence, as the case is to be tried again and the evidence may be different from that presented in this record.

The plaintiff testified that he was injured while going into the cold-storage room of the defendant's plant by stepping upon a plank laid across a nail keg and used as a step. There was much evidence offered both by the plaintiff and the defendant.

W. E. Dunstan, manager of the defendant company, was introduced as a witness in behalf of the defendant. He was asked: "Are there any steps leading from the cold-storage room to the anteroom now?" This was objected to, and the question was withdrawn. The witness was then asked by the defendant: "Were there any steps there at the time of the injury?" The witness answered: "No; nor none since." The plaintiff objected to that part of the answer, "nor none since," and moved to strike it out. The court then interposed and in the presence and hearing of the jury said: "That part of the answer is stricken out; this witness

is too smart." The defendant excepted to the remark of the judge commenting upon the conduct of the witness.

This witness appears to have been a very important witness for the defendant, which relied almost entirely upon his testimony to contradict that of the plaintiff. The witness Dunstan not only testified as to facts which he believed would exonerate the defendant from liability, but also testified very materially as to the damage which the plaintiff sustained.

We think that the language of the judge in saying that the witness was too smart, however inadvertent upon the part of his Honor, was an infringement upon the prerogative of the defendant, and we cannot see anything in the record from which we can infer that the witness deserved such a rebuke.

(497) We are quite sure that it was not intended to prejudice the defendant's case by the able and painstaking judge who tried this case, but it undoubtedly was well calculated to prejudice the jury against that particular witness, and was practically an expression of opinion upon the part of the judge as to the credibility of such witness.

The judge, under our law, is denied from expressing any opinion, or in any way conducting himself so as to influence the findings of the jury upon the questions of fact. The influence of the judge upon the jury under our system of practice is very great, and the law is careful to see that that influence is not thrown into the jury box adversely to either party.

While it is the duty of the jury to take the law from the court, it is also the duty of the judge to so conduct the trial that the jury may not be influenced in their findings of fact by any opinion that may fall from the court. This matter has been so fully discussed by *Mr. Justice Walker* in *Withers v. Lane,* 144 N. C., 184, that we deem it unnecessary to say anything further. *S. v. Howard,* 129 N. C., 584.

For the error complained of, there must be a

New trial.

Cited: Morris v. Kramer, 182 N.C. 90, 91; *McNinch v. Trust Co.,* 183 N.C. 41; *S. v. Hart,* 186 N.C. 588; *S. v. Sullivan,* 193 N.C. 756; *S. v. Auston,* 223 N.C. 205; *S. v. Owenby,* 226 N.C. 522; *S. v. Shinn,* 234 N.C. 398.

W. A. SAWYER v. J. E. WILKINSON.

(Filed 16 September, 1914.)

Bailments—Contracts—Hire of Mule—Negligence—Trials.

An agreement of hire of a mule for plowing purposes for a period of two weeks, at the end of which time the mule should be returned in as good condition as received, is an ordinary bailment determined by the common law relating to bailments for hire; and the bailee, being held to exercise only ordinary care for its preservation and protection, is not responsible for the destruction of the mule and his consequent failure to return it, in the absence of any negligence on his part. *Robertson v. Lumber Co.*, 165 N. C., 4, cited and distinguished.

APPEAL by plaintiff from *Ferguson, J.*, at Spring Term, 1914, (498) of HYDE.

This is a civil action tried upon these issues:

1. Did the defendant contract with the plaintiff that he would return and deliver to plaintiff at the end of two weeks the mule and harness in as good condition as he received them, as alleged? Answer: Yes.

2. Did the defendant comply with said contract? Answer: No.

3. What was the value of said mule and harness? Answer: Mule $100 and harness $5.

4. Was said mule and harness destroyed by the negligence of the defendant? Answer: No.

The plaintiff tendered judgment for $105, which his Honor refused and rendered judgment against the defendant for the sum of $5 and costs. The plaintiff excepted and appealed.

S. S. Mann and Ward & Thompson for plaintiff.

Spencer & Spencer, John Tooley, Ward & Grimes for defendant.

BROWN, J. The plaintiff hired a mule to the defendant for plowing purposes for a period of two weeks. The evidence tends to prove, and the jury have found, that the defendant contracted that he would return the mule at the end of two weeks in as good condition as he received it.

Before the expiration of two weeks the mule, together with some of the defendant's stock, was burned to death by a fire which burned the defendant's stables. It is admitted that the fire was not caused by any negligence of the defendant. In refusing to give judgment for the value of the mule, we think his Honor was correct. His Honor gave judgment for the value of the harness because there is no evidence that the harness was destroyed. The transaction between the plaintiff and the defendant constituted an ordinary bailment, and the contract contained no provi-

sions or conditions which have been violated touching the stabling or the management of the mule. Nor does the contract contain any condition to pay for the mule in case it is not returned.

(499) As we view the contract, it is an ordinary bailment, determined by the doctrines of the common law relating to bailments for hire. It is not a contract of insurance, and the defendant is only liable in case he fails to exercise reasonable care in the preservation and protection of the property bailed. There is a class of cases which fastens liability upon the bailee upon failure to return the property or its value in money. In these cases the bailee is regarded as an insurer. *Grady v. Schweinler,* 15 A. and E. Anno. Cases, 161; *Drake v. White,* 117 Mass., 10.

The contract of hiring in this case imposes no more upon the bailee by its terms than the law raises by implication, namely, to return the mule, and its return is excused by intervening impossibility to perform, which operates as a release upon the obligation of the contract in the absence of neglect on the part of the bailee.

An interesting case on all-fours with this is *Seevers v. Gabel,* Iowa Supreme Court, 27 L. R. A., page 733, in which it is held that a hirer of personal property under an agreement to return it at the expiration of the lease in as good condition as when taken, the usual wear excepted, is not liable for its loss by fire without his fault.

The duty assumed by the defendant in this case was to exercise ordinary care for the preservation and protection of the mule, and he is chargeable only with the liability to the plaintiff for loss occasioned by his failure to discharge such duty. *Mallory v. Willis,* 4 N. Y., 76; *Foster v. Pettibone,* 7 N. Y., 433; *Stuart v. Stone,* 14 L. R. A., 215.

In *Seevers v. Gabel, supra,* the subject of the bailment was one "saw rig complete." The contract was to pay a stipulated rent per month and to return the property "in as good condition as it now is."

In *McEvers v. Steamboat "Sangamon,"* 22 Mo., 188, a barge was hired by the defendant under an agreement that it was "to be delivered in good order, usual wear and tear excepted." The barge was destroyed by ice without negligence upon the part of the steamboat company. The Missouri Court held that the steamboat company was not liable on

(500) the contract for the non-delivery of the barge in the absence of a finding of negligence.

In *Young v. Bruces,* 5 Litt. (Ky.), 324, the subject of bailment was a slave, hired until 25 December, 1819, to be returned well clothed and in good condition. The slave was drowned by accident without fault of the defendants, whereby they were prevented from returning him. The Court held that the defendants were not responsible for the death of the slave without fault of the defendants.

In *Harris v. Nicholson,* 5 Munf., 483, the contract of bailment was construed and the Court held that the defendants were not liable for the destruction of the property, unless brought about by their own negligence. See also *Maggort v. Hansbargar,* 8 Leigh, 532; *Warner v. Hitchings,* 5 Barber, 666; *Wainscott v. Silvers,* 13 Ind., 497; *David v. Ryan,* 49 Iowa, 642; *Van Wormer v. Crane,* 51 Mich., 363; 5 Cyc., 204; 3 Dec. Dig., Bailments, sec. 14, subsec. 1; *Miller v. Morris,* 40 Am. Rep., 804; *Pratt v. Waddington,* 21 A. and E. Anno. Cases, bottom page 843; *Fortune v. Harris,* 51 N. C., 532; *Chaffin v. Lawrence,* 50 N. C., 179; *Henderson v. Bessent,* 68 N. C., 224; *Heathcock v. Pennington,* 33 N. C., 640.

The plaintiff insists that this case is controlled by our decision in *Robertson v. Lumber Co.,* 165 N. C., 4. There is quite a distinction between the two cases. It is true, the Court said that "under the contract, as testified to by Hopkins, it is only necessary to prove a breach of the contract, namely, that the boat was not kept in good repair nor returned in good condition, and there is abundant evidence of that."

In that case it was found by the jury that the plaintiff's boat was injured by the negligence of the defendant and that the plaintiff was damaged to the extent of $250. The boat was not destroyed by an inevitable accident, which ordinary care upon the part of the bailee could have prevented. The boat was returned to the bailee, but in a damaged condition, and that damage brought about by the negligence of the defendant. There is a marked difference between the facts in that case and the one we are now considering.

The judgment of the Superior Court is

Affirmed.

Cited: Cooke v. Veneer Co., 169 N.C. 494; *Clark v. Whitehurst,* 171 N.C. 3; *Sams v. Cochran,* 188 N.C. 735, 736; *Lacy v. Indemnity Co.,* 193 N.C. 182; *Edwards v. Power Co.,* 193 N.C. 783; *Falls v. Goforth,* 216 N.C. 503.

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(501)

D. O. BRINKLEY v. JOHN L. ROPER LUMBER COMPANY.

(Filed 16 September, 1914.)

Removal of Causes—Diversity of Citizenship—Amount Involved—Title to Lands.

Where a cause is sought to be removed from the State to the Federal court for diversity of citizenship, and it appears from the complaint that damages are alleged for cutting plaintiff's timber in the sum of $2,250, and the petition to remove denies plaintiff's title to the lands, valued at $800,

the title to the lands is in controversy, and the amounts thus involved exceeding $3,000, exclusive of interest and cost, it is sufficient for the purposes of removal. *Corporation Commission v. R. R.*, 135 N. C., 81, cited and distinguished.

APPEAL by plaintiff from *Bond, J.*, at August Term, 1914, of WASHINGTON.

Ward & Grimes for plaintiff.

Small, MacLean, Bragaw & Rodman, and W. M. Bond, Jr., for defendant.

CLARK, C. J. This is an appeal from an order removing the cause to the United States District Court. The complaint alleges that the plaintiff is the owner in fee of a certain tract of land therein set out and that the defendant has wrongfully cut and removed therefrom timber to the value of $2,250. The defendant alleges that it is a corporation of the State of Virginia, and that the amount in dispute exceeds $3,000.

Upon the face of the petition the cause is removable, for in addition to the recovery of $2,250 sought to be recovered for damages, the petition for removal avers: "That the defendant in good faith claims to own said land, and the title to same will be put in issue; that the said land so involved in this suit, and which the plaintiff seeks to recover, was worth when this suit was begun and is still worth the sum of $800; and thus it appears from the allegation of the complaint that the amount in dispute exceeded when this suit was brought and still exceeds the sum of $3,000, exclusive of interest and costs."

(502) The complaint alleges title to the realty and the denial puts the value thereof in issue, for the determination of this action would be an estoppel as to title in any other action (*Tyler v. Capehart*, 125 N. C., 64), and the value of the land is therefore a part of the amount in controversy.

While the land is not sought to be recovered, the title to it is to be conclusively determined in this action, and therefore its value is necessarily a part of the amount in controversy. It is held as to an action of ejectment that the value of the matter in dispute is that of the interest in the land sought to be recovered, although the plaintiff avers the interest to be of less value or only an easement in the same, together with damages. 34 Cyc., 1233.

This is not like *Corporation Commission v. R. R.*, 135 N. C., 81, at p. 91, where it appeared that "the amount in controversy was based, not upon the amount that the object of the action might be to the

plaintiff, but the inconvenience and loss of the defendant because of the interference of the Corporation Commission with the right of the defendant to manage its large interstate commerce." It was there said that such "statement as to the matter in controversy was simply a conclusion of law, and an erroneous one, in our opinion, from the facts as they appear in the record, and even in the petition."

In the present case the title to the land which is averred to be worth $800 will be conclusively determined and is a part of the amount in controversy as much as the $2,250 damages sought to be recovered.

The order of removal is

Affirmed.

(503)

GEORGE F. KEECH v. JOHN L. ROPER LUMBER COMPANY.

(Filed 16 September, 1914.)

1. Trials—Negligence—Evidence—Questions for Jury.

The plaintiff was injured while engaged in sawing logs for the defendant, and was struck by a log which had improperly been placed across a near-by pile of them by the defendant in such position that it would be likely to fall at any moment and strike him. *Held*, sufficient evidence of defendant's actionable negligence to be submitted to the jury.

2. Master and Servant—Independent Contractor—Issues—Trials — Questions for Jury.

The evidence in this case is conflicting as to whether the defendant had let out the doing of the work, wherein the plaintiff was injured, to an independent contractor; and the charge of the trial judge upon the evidence, on this phase of the case, given upon the issue of negligence, is held no error, there being no specific issue submitted upon the question of independent contractor.

APPEAL by defendant from *Ferguson, J.*, at February Term, 1914, of BEAUFORT.

This is a civil action tried upon these issues:

1. Was the plaintiff injured by the negligence of the defendant John L. Roper Lumber Company, as alleged in the complaint? Answer: No.

2. Was the plaintiff injured by the negligence of the defendants J. A. and S. W. Wilkinson, as alleged in the complaint? Answer: Yes.

3. Did the plaintiff, by his own negligence, contribute to his injury, as alleged by the defendants? Answer: No.

4. Did the plaintiff assume the risk of the injury received by him, as alleged by the defendants? Answer: No.

5. Were the defendants J. A. and S. W. Wilkinson independent contractors of John L. Roper Lumber Company? Answer: Yes.

6. What damage, if any, is the plaintiff entitled to recover? Answer: $500.

(504) Upon the issues the court rendered judgment in favor of the John L. Roper Lumber Company, dismissing the action as to that corporation and giving judgment against the defendants S. W. and J. A. Wilkinson, doing business as S. W. Wilkinson & Brother, for the sum of $500, with costs.

The defendants S. W. and J. A. Wilkinson appealed to the Supreme Court.

Daniel & Warren, Manning & Kitchin for plaintiff.

Small & MacLean, Bragaw & Rodman for defendants.

BROWN, J. There are only two questions necessary to be considered in the disposition of this appeal: First, was there any evidence of negligence? We think that there was sufficient evidence of negligence to carry the case to the jury. The plaintiff offered evidence tending to prove that he was engaged in sawing logs with a crosscut saw for the defendant; that he was struck by a log which fell off the pile and hit him on the left hip and knocked him down and broke his ankle; that the log that hurt him was lying across some other logs, and some other logs placed across that one. The logs were placed parallel with the railroad track and across the other logs diagonally. The log that fell off and hit him was not placed correctly and in the usual manner, but was placed diagonally across the other logs so that it was liable to roll off and hit the plaintiff at any moment. These logs were brought to the place by a skidding machine, which would pull the logs from the woods and then they were piled up near the track.

The plaintiff testified in substance that the log that hit him was not placed in the usual manner in which the logs were accustomed to be placed; that it was placed crosswise the other logs and then two or three other logs placed across it; that he did not discover the particular danger at the time that he was sawing.

We think the testimony of the plaintiff upon the question of negligence in the manner of piling the logs was sufficient to carry the case to the jury.

(505) Second. It is contended that one Dunbar was having this work done, and that he was an independent contractor for the Wilkinsons. While no special issue was submitted involving this question, his Honor practically submitted it under the second issue. His

Honor instructed the jury "that the Wilkinsons contend that they are not responsible, because they had transferred their contract to Dunbar, and this is denied upon the part of the plaintiff.

"If the Wilkinsons, after they had taken a contract from the Roper Lumber Company, made a contract with Dunbar that Dunbar was to do the logging in his own way, load the logs on the train and get them out of the woods and cut them in proper lengths and load them on the train for a certain price, and do it in his own way, and the Wilkinsons were to furnish the skidder and engine, and the Wilkinsons furnished the skidder and engine in proper condition, then Dunbar would be an independent contractor.

"He would have the right to hire and discharge hands and be responsible for their pay, and the Wilkinsons would not be connected with the people who were working for Dunbar, and in that contract they might agree that the payments should be made through the store of the Wilkinsons, if that was part of the contract; but as the Wilkinsons had no management or control over the manner in which the work was done, the manner in which the trees were cut down and put on the cars, then Dunbar would be an independent contractor.

"The plaintiff, however, contends that that was not the purpose of making the contract or intention of the parties. The plaintiff contends that Dunbar was an insolvent man and that the most that was intended by the contract was that Dunbar should be put in charge of the logging business and take his compensation out of what he could save out of $3.50 per thousand feet, and that he was the manager of the Wilkinsons. If Dunbar was insolvent and was an experienced man, and the contract was made in good faith, still he would be an independent contractor.

"(But if he was insolvent, it is a circumstance which you will (506) take into consideration in finding as to whether the contract was made as claimed by the defendants Wilkinson.)

"If you should find from the evidence that the Wilkinsons made this contract with Dunbar, and Dunbar was an independent contractor in that he had the right to do the work in his own way, hire the hands, employ or discharge them, then the Wilkinsons would not be responsible for any damage which might result from any negligence of Dunbar or those under his control, and would not be responsible for the negligence of Will Russ, and the plaintiff would not be entitled to recover."

We think this question was properly left to the jury, and that there is no error in the charge under which it was submitted. Upon a review of the whole record, we find

No error.

In this case S. W. and John A. Wilkinson are appellants, and the judgment is against them.

Cited: Beach v. McLean, 219 N.C. 527.

J. B. BACHELOR v. CHARLES NORRIS.

(Filed 16 September, 1914.)

1. Deeds and Conveyances—Married Women—Abandonment—Joinder of Husband—Constitutional Law.

Revisal, sec. 2117, authorizing a married woman to execute a valid conveyance of her real property, without the joinder of her husband, when she has been abandoned by him, is constitutional.

2. Deeds and Conveyances—Married Women — Abandonment — Trials — Evidence.

Evidence of abandonment of the wife by the husband is sufficient for her to execute a valid conveyance of her lands without his joinder, which tends to show that they had separated; he had gone to another State without leaving her anything for her support; that they had had numerous quarrels, the cause of which he had attributed to others living in the same house with them, where he had refused to remain.

3. Deeds and Conveyances—Words and Phrases—"Binding Lands"—Description—Vagueness—Parol Evidence—Trials.

The term "binding lands" used in the description of a deed is equivalent to the call of another tract; and the following description in a deed is held sufficient to admit of parol evidence of identification, after reciting the county, etc.: "adjoining the lands of B. B. J., and others, bounded as follows, viz.: Beginning at an oak stump at the road gate, thence westwardly, binding the lands of B. B. J., to a holly tree; thence same course across the road; thence eastwardly, binding the swamp to a cypress tree; thence same course, binding the swamp to the first station, containing 4 acres, more or less." And where a witness, after identifying the lands, testifies on cross-examination that the oak stump, the beginning point named, was not upon the line referred to, and would not be reached again by following the swamp, this is only material upon the question of identification, and does not render the deed void for uncertainty of description.

(507) APPEAL by plaintiff from *Ferguson, J.,* at December Special Term, 1913, of CAMDEN.

This is an action to recover damages for trespass on land and the title to the land is in issue.

The defendant claims under a deed executed by the *feme* plaintiff, Georgiana Bachelor, on 30 October, 1902, in which the land is described

as follows: "A certain tract or parcel of land in Camden County, State of North Carolina, adjoining the lands of B. B. James and others, bounded as follows, viz.: Beginning at an oak stump at the road gate; thence westwardly, binding the lands of B. B. James to a holly tree; thence same course across the road; thence eastwardly binding the swamp to a cypress tree; thence same course, still binding the swamp to the first station, containing 4 acres, more or less."

The plaintiff admits the execution of this deed, but contends that it is void:

(1) Because Georgiana Bachelor was a married woman at the time of its execution, and her husband was not a party to the deed.

(2) Because of the vagueness and uncertainty in the description of the land.

The defendant admits that the said Georgiana Bachelor was a (508) married woman at the time of the execution of the deed and that her husband did not join in the execution, but contends that the deed is valid because at the time it was executed the husband of the said Georgiana Bachelor had abandoned her, and further, that the description of the land in the deed is sufficient.

There are several exceptions in the record, but all of them that are material were entered to preserve the contentions of the parties as above stated.

There was a verdict in favor of the defendant, the first issue submitted to the jury and the finding thereon being as follows: "1. Was the said Georgiana Bachelor abandoned by her husband, J. B. Bachelor, at the date of the execution of the deed from G. W. Barnham and Georgiana Bachelor to Florence B. Ashley? Answer: Yes."

There was a judgment for the defendant, and the plaintiff excepted and appealed.

Worth and Pugh for plaintiff.

W. I. Halstead and Ward & Thompson for defendant.

ALLEN, J. The constitutionality of the statute (Rev., sec. 2117) authorizing a married woman to execute a valid conveyance of real property without the joinder of her husband, when she has been abandoned by her husband, has been sustained in several decisions of this Court. (*Hall v. Walker,* 118 N. C., 377; *Brown v. Brown,* 121 N. C., 8; *Finger v. Hunter,* 130 N. C., 531), and as the fact of abandonment has been found by the jury in favor of the defendant, the only question left open to the plaintiff on this branch of the case is whether there is evidence to support the verdict.

There was evidence that the husband was in Virginia when the deed was executed; that the wife stated that he had nothing to do with the deed, and had left her and gone to Virginia; that both husband and wife stated they had separated; that the husband made no provision for his wife when he left for Virginia and she had to buy supplies on her own credit; that the husband said the Ashleys had moved to his house and he would not stay there with them, as it would cause trouble for (509) all; that the husband was frequently intoxicated, and he said his wife had numerous quarrels, and this has as much probative force as that held sufficient on an issue of abandonment in *Vandiford v. Humphrey,* 139 N. C., 65.

We are also of opinion the deed is not void for vagueness in the description, which is more definite and certain than many others that have been upheld. *Farmer v. Batts,* 83 N. C., 387; *Perry v. Scott,* 109 N. C., 374; *Johnson v. Manufacturing Co.,* 165 N. C., 106.

The term, "binding the lands," it is true, is equivalent to the call for another tract (*Allen v. Sallinger,* 108 N. C., 161), and one of the witnesses for the defendant, after identifying the land on his examination in chief, said on cross-examination that the oak stump was 100 yards from the James land, and that if you continued to follow the swamp you would not get back to the beginning; but this does not render the deed void, and is only material on the location of the land in the deed.

As was said in *Coltrain v. Lumber Co.,* 165 N. C., 44, "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."

We find no error in the trial, and the judgment is affirmed.

No error.

Cited: Patton v. Sluder, 167 N.C. 503; *Alston v. Savage,* 173 N.C. 215; *Lancaster v. Lancaster,* 178 N.C. 23; *Freeman v. Ramsey,* 189 N.C. 797; *Keys v. Tuten,* 199 N.C. 370; *Nichols v. York,* 219 N.C. 270.

PERCY C. TYLER v. J. AND E. MAHONEY.

(Filed 16 September, 1914.)

1. Attachment—Undertaking—Separate Action.

A successful defendant in attachment must seek relief in a separate action on the undertaking.

2. Attachment—Probable Cause—Damages—Malice.

Where plaintiff in attachment without malice has sued out his writ and seized the property of the defendant without probable cause, he is liable to the defendant in that action in the amount of actual damages he has thereby sustained.

3. Same—Res Judicata.

The question of recovery by the plaintiff in this action for damages he has sustained by reason of the defendant's having seized his property in attachment without probable cause is not decided in defendant's appeal in the attachment proceedings, *Mahoney v. Tyler*, 136 N. C., 42, and the defense of *res judicata* is untenable.

4. Attachment—Nonresident—Malice—Evidence — Information, Available Knowledge.

Where a person merely leaves the State temporarily for the purpose of prospecting, an attachment against his property here will not lie upon the ground that he was a nonresident; and where he sues the attaching creditor for damages, it is sufficient for him to show as want of probable cause, that the latter acted upon rumor that the plaintiff had changed his place of residence to another State, without asking information from the plaintiff's wife or family, who had remained in the State, or used other available means to ascertain the truth of the rumor he had heard.

5. Attachment—Probable Cause—Trials—Questions for Jury—Questions for Court.

In this case it is held that the question of probable cause is a mixed one of law and fact, leaving for the jury to determine from the evidence, as a matter of fact, whether the circumstances show the cause to be probable or not probable; but whether, admitting them to be true, they amount to a probable cause is a question of law for the judge.

APPEAL by plaintiff from *Connor, J.*, at February Term, 1914, (510) of BERTIE.

This is a civil action for damages for wrongfully and illegally attaching the plaintiff's property. The following issues were submitted to the court by the plaintiff and accepted by the defendants, towit:

1. Did the defendants wrongfully, unlawfully, and without probable cause, attach the property of the plaintiff, as alleged in the complaint?

2. If the defendants wrongfully, unlawfully, and without probable cause, attached the property of the plaintiff, as alleged in the complaint, has the plaintiff been damaged thereby?

3. If so damaged, in what sum has he been damaged? (511)

4. In what sum has the plaintiff been damaged by reason of the wasting loss of the property seized under the attachment issued?

The plaintiff stated in open court that he made no claim against the defendant upon his undertaking, and that the only claim made by him

was that the attachment was issued without probable cause, and for abuse of process.

At the conclusion of the evidence, his Honor, being of opinion that there was no sufficient evidence of a want of probable cause, sustained the motion to nonsuit. The plaintiff appealed.

Winston & Matthews for plaintiff.

Winborne & Winborne, J. B. Martin, and Murray Allen for defendant.

BROWN, J. It appears from the evidence in this case that the plaintiff was indebted to the defendant in the Spring of 1903 in the sum of $537. In September of that year the defendant sued out a writ of attachment and levied it upon the plaintiff's crop and other property, which property, it seems, was sold and applied to the defendant's debt.

Upon the return of the writ of attachment before *Cooke, Judge,* the writ was vacated and the property attached ordered to be restored to the defendant in the attachment. The defendant in the attachment, Tyler, moved in the cause for a judgment on the undertaking in the attachment proceedings. Upon appeal to this Court, it was held that the successful defendant in attachment must seek relief for damages in a separate action on the undertaking. *Mahoney v. Tyler,* 136 N. C., 42.

The ground upon which the attachment was sued out was that the defendant therein, Tyler, had left the State and had become a citizen of South Carolina. Upon a hearing of the attachment, the court held that the defendant was still a resident of this State at the time of the levy of the attachment and vacated the same, which ruling was affirmed by this Court. The plaintiff, Tyler, brings this action against the defendant for the value of the property taken and for all damages sustained by reason of the unlawful levy of the attachment.

(512) It is contended by the defendant and set up in the answer that the matter is *res adjudicata* by the decision of this Court above cited, and that the plaintiff, if he has any remedy, should sue the sheriff who levied the attachment. This position cannot be sustained. It is apparent, upon reading the opinion of the Court (136 N. C., page 41), that the only matter passed upon was the regularity of the proceedings.

In that opinion the Court, holding that a motion in the cause was not the proper remedy, says: "That being true, it follows, with equal if not greater reason, that the defendant's remedy is by civil action, as he could recover at common law damages only for wrongfully suing out the attachment, and his suit would be in the nature of an action for malicious prosecution, in which a want of probable cause must be shown in order to sustain the action."

The present action is brought in pursuance of that decision. The liability of one who wrongfully and without probable cause sues out an attachment and levies it upon the property of another is not open to question, and is fully recognized in the opinion of that case.

The allegations of the complaint in this action are:

That the defendants wrongfully and unlawfully sued out and had levied on the said crops an attachment, without having any probable cause therefor, and under which attachment they seized the plaintiff's property as aforesaid and took the same unto their possession through their agent, one Carter.

That while in the possession of their agent, the said property was damaged, injured, destroyed, wasted, and much of it made way with, to plaintiff's great damage and at least the sum of $500.

That all of defendant's acts in suing out said attachment, in levying the same on said property, in taking possession of the said property, in wasting, damaging, destroying, and injuring the same was wrongful, unlawful, and willful and without probable cause.

We are of opinion that his Honor erred in holding that there is no evidence of a want of probable cause. The plaintiff is not proceeding in this case against the sheriff, but against the defendant (513) upon the elementary principles of common law to recover such damages as he sustained for the unlawful seizure and appropriation of his property. *R. R. v. Hardware Co.*, 138 N. C., 175.

Having been deprived of his property by process of law wrongfully and illegally sued out by the defendants, the law would be unjust to itself as well as to the plaintiff if it did not restore to him that of which he has wrongfully been deprived, or monetary damages in lieu thereof. *Perry v. Tupper*, 71 N. C., 386; *Sneeden v. Harris*, 109 N. C., 357; *R. R. v. Hardware Co.*, 135 N. C., 73; *R. R. v. Hardware Co.*, 138 N. C., 175; *R. R. v. Hardware Co.*, 143 N. C., 54.

Taking all the evidence in this case, we are of opinion that in any view of it, if believed by the jury, a want of probable cause is made out. The ground upon which the attachment was issued is that Tyler had left the State and become a citizen of South Carolina. The evidence tends to show that he lived in Kelford, Bertie County, early in 1903; that he gave up his business in Kelford and moved over into Northampton County; that he was cultivating a crop and lived on the Edgar Powell farm in Northampton County.

In July, 1903, the plaintiff had laid by his crop and left his family in North Carolina and went to South Carolina on a temporary visit and remained not quite two months. He testifies that his family did not expect to follow him to South Carolina, his furniture had not been

packed for shipment; that he was down there temporarily at the instance of the Atlantic Coast Lumber Company; his family remained in Northampton County. In September he heard that his crop had been attached, and he came back to look after it.

The defendant's evidence tends to prove that the witness Baxter was a clerk of the defendant in Portsmouth, Va.; that he was sent down to look after the debt which the plaintiff owed the defendant. Baxter testifies: "I made inquiry as to the residence of Tyler before the attachment was issued. I went to Kelford and was there informed that he had gone to South Carolina to work and make his home; heard (514) this from several men. They told me he had packed up his furniture, and his family was going to join him in South Carolina. I went back to Norfolk and reported to Mr. Mahoney." Baxter further testified: "I did not go to see Mrs. Tyler nor any of Mr. Tyler's relatives to find out if he had moved to South Carolina. I acted on what was told me on the street. I was hot after our money, but did not get it."

Mahoney testifies as to what Baxter reported to him, and that his attorney, Martin, advised him to get out an attachment, as Tyler was a nonresident of this State; that he believed Tyler was a nonresident and had permanently left the State to live in South Carolina.

In *Mahoney v. Tyler, supra,* it is held that a person leaving the State to seek work, for the purpose of prospecting, does not sustain an attachment on the ground that the defendant was a nonresident.

The evidence shows that Baxter, the defendant's agent, made no inquiry in Northampton County, where the defendant's family resided; that he did not go to his residence; that he made no inquiry of persons who were supposed to know anything about the plaintiff; that he does not give the names of the persons who told him in Kelford; that he relied on a mere street rumor, and upon such rumor the defendant and his counsel acted and issued an attachment and practically destroyed the plaintiff's crop. If these facts are true, and the jury should find them to be true, it establishes a want of probable cause, in our opinion.

The question of probable cause in cases like this is a mixed one of law and fact, leaving for the jury to determine from the evidence as a matter of fact whether the circumstances of the case show the cause to be probable or not probable; but whether, supposing them to be true, they amount to a probable cause, is a question of law for the judge. *Wilkinson v. Wilkinson,* 159 N. C., 265.

As is shown in *Mahoney v. Tyler, supra,* it is not necessary to prove actual malice in this case in order to recover substantial damages, but it is necessary to prove a want of probable cause. The effect of prov-

ing malice would be to authorize the jury, in case they saw (515) fit, to award punitive damages. But it is not necessary to consider this question, as punitive damages are disclaimed in specific terms in the brief of the counsel for the plaintiff, wherein it is said:

"No question of punitive damages is raised. It is simply a question of recompensing the plaintiff for property they seized and have not accounted for."

The judgment of nonsuit is set aside and a new trial ordered.

Reversed.

Cited: Tyler v. Mahoney, 168 N.C. 238; *Martin v. Rexford,* 170 N.C. 541; *Shute v. Shute,* 180 N.C. 391; *Williams v. Perkins,* 192 N.C. 177; *Dickerson v. Refining Co.,* 201 N.C. 94; *Carson v. Doggett,* 231 N.C. 633.

ISAAC TILLETT, JR., v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 23 September, 1914.)

1. Railroads—Negligence—Contributory Negligence—Master and Servant—Insufficient Help—Trials—Evidence—Questions for Jury.

In this action brought by an employee of the defendant railroad company for damages resulting while loading 560-pound rails, 30 feet long, upon a flat car 4½ feet from the ground, there was evidence tending to show that the injury occurred while the plaintiff was attempting, under the orders of the defendant's vice principal, to load one of the rails with insufficient help; the plaintiff was on the ground with another man to help him lift the rail to such position and in such manner that others upon the car could receive and place it there; that while lifting a rail in this manner, it slipped from the hands of the plaintiff's helper, inflicting the injury complained of: *Held* sufficient, upon the question of defendant's actionable negligence in failing to furnish sufficient help, to be submitted to the jury, and plaintiff's cause of action was not barred by the defense of contributory negligence as a matter of law, under the evidence. *Pigford v. R. R.,* 160 N. C., 93, applied, and *Bryan v. R. R.,* 128 N. C., 387, distinguished.

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

The question of defendant's negligence in this case depending upon whether the defendant had provided sufficient help for the plaintiff to load rails upon its flat car, the admission of his testimony as to the number of men required is held harmless, if erroneous, he having elsewhere testified thereto without objection; and his answer to another question objected to, having little if any probative force, under the circumstances of this case is not held for reversible error.

3. Verdicts—Agreement—Taken by Clerk — Unanswered Issues — Subsequent Answers—Judgments—Unapproved Practice.

It having been agreed by the parties that the clerk should take the verdict of the jury during recess of court, the foreman put the verdict in his pocket, the jury separated, some of them telling what the verdict was, and the foreman handed it to the judge upon reconvening of court. The judge then reassembled the jury, asked them if they had agreed upon their verdict, was informed that they had, and then read the issues and answers to them, which they said was their verdict, agreed upon before they separated. The judge sustained the verdict thus rendered, and it is held on appeal to be no error. The custom permitting clerks of court to take verdicts in recess in the absence of the judge is not approved.

(516) APPEAL by defendant from *Ferguson, J.*, at January Term, 1914, of CURRITUCK.

This is an action to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendant in failing to furnish a sufficient force of hands to do the work in which the plaintiff was engaged at the time of his injury.

The plaintiff testified as follows: "In May, 1911, I was working on the Norfolk Southern Railroad at Snowden in this county, and was loading 30-foot iron rails on flat cars. The flat car was 4½ feet from the ground. The rails were lying down by the side of the track. There were four of us loading the rails. We had to take the rails up and put them on the car; the first rail we had four men. Four were the crew, and the bossman made five. When I got hurt nobody but the captain and myself were loading. There were two of the men on the flat car. The rails weighed 560 pounds. Thornton Lowry was boss; Enoch Whedbee, William Bray, and a fellow by the name of Nema (but he had stepped off) and myself were in the gang. Whedbee and Bray
(517) were on the flat car. Lowry and I were on the ground loading rails, trying to raise them from the ground and put them on the car. The captain and I were lifting a rail and trying to put it in the car, and by the time that we got it a little above our heads, the captain let it slip out of his hand. It slipped at the other end. Captain said it slipped out of his hand and hit me on the head, and I did not know anything else. It was too much for us to lift, and I said to the captain that we could not raise it, but he said, 'Oh, yes, we can. Come on.' I told him that there was not enough men. There were two men on the flat car. After he told me to go ahead, I lifted the rail with his help."

Question: "State what was the cause of it slipping from his hand, if you know."

To this question the defendant objected, which objection was overruled, and defendant excepted.

Answer: "We did not have enough men; two men were not enough to load the rails.

"He told me to hold it in my arms till he could get a new hold. He asked me if I could hold it till he could get a new hold, and before I could grab it again it slipped out of his hands. It struck me on the head. I did not know anything else till I got to headquarters between 10 and 11 o'clock. They carried me to the doctor's office, and I was then taken home. I was confined at home for twenty-two or twenty-three days. While I was there, at times I would not have any sense, and sometimes I was not any good. I was confined to the bed for twenty-three days. I was up and about during the twenty-three days. The captain came to see me and asked me how I was getting along. The doctor said that I did not need any further treatment, and said that I could go back and do what I felt like doing. I went back to work and stayed five or six days. I could not work; got worse. This was in June. I have stopped ever since. When I tried to work I felt in the head like I would fall. I felt like my head was going around and around. My head gets that way sometimes now. Before this I was all right. I was never troubled with my head before. It hurts me now, and I have a pain in my eye. I have had it ever since the time that I (518) was struck till the present. I cannot stand the hot weather, and cannot do half a man's work. I could stand hot weather before. I have not been paid anything for loss of time.

"I went to Norfolk at the request of the railroad. They wanted me to sign something. I do not know what it was called. I reckon it was for me to go to work. They wanted me to sign and release any claim. I did not sign it.

"We always used as many as two or three men on the push car, and this was the flat car. The push car is not as high as a flat car. We had two or three men to put it on the push car. Never used less than four men to put on a car of this size. We had nothing to keep them from falling when we raised them."

Question: "If you had had a piece to have held the rail when you were getting a grip, what effect would that have had?"

To this question the defendant objected, which objection was overruled, and defendant excepted.

Answer: "That would have had a light force.

"If we had had as many as four men we would have loaded it all right. We had five men to put on the first rail. One had stepped aside, and there was no one on the ground except the captain and myself. I got $1.10 per day."

Cross-examination: "I have been working for the railroad for nine years. The rails were 30 feet long and weighed 560 pounds. I think Wallace Bray and Whedbee have moved to Virginia. I have often loaded cars before. Whedbee had been working a year or two, Bray about a month, and Captain Lowry about three years. If we did not have enough men, we would get wooden forks and carry them up as the rails went. We would lift them this way and slide them on the car. We would lift it that way and then get around and push it on. At the time that I was hurt we did not get the first end up. The men on the car had not taken hold of the rail. We were going to hand it to them. We would go to the end and try to get the other end up; we would hand it to them. I cannot tell how many rails I have loaded that way. We would get an angle bar and stick it there and get the other end and (519) put it on. That is the way the boss loaded rails. We had not gotten the first end up when I was hurt. I didn't know anything when I got hurt. I was carried to Moyock on the hand car, and was able to walk up to Dr. Mann's office.

"I am not working anywhere. My wife is working and helps me along. I can do a little something, but I cannot do as I used to do. I cannot do half a man's work. I have had headaching never before as now. I do only work a part of a day. I try to farm a little, so that I can sit down when I want to."

The defendant by motion to nonsuit, by exceptions to parts of the charge, and to the refusal to give certain prayers for instruction, raised the question as to whether there is any evidence of negligence, and if there is such evidence, contends that the plaintiff on his own evidence assumed the risk of his injury or was guilty of contributory negligence.

The jury returned the following verdict:

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

"2. Did plaintiff contribute to his own negligence? Answer: No.

"3. What damage is plaintiff entitled to recover? Answer: $500."

"The case was given to the jury just before the noon recess of court. By consent, the jury were instructed to return their verdict to the clerk. The jury retired and the court took recess. The jury agreed on the verdict, and wrote their answer to the issues. The foreman of the jury put the issues so answered in his pocket, and the jury, without returning the verdict, separated. They told on the outside during the recess of the court what their verdict was. On the reassembling of the court the foreman, in the absence of a number of the jury, handed the issues so answered to the judge. The judge did not read aloud the issues and answers until all the members of the jury were in their seats in the box.

The judge then asked the jury if they had agreed on their verdict. They answered that they had. He then read the issues and responses, and asked if that was their verdict. They answered yes, and that they had agreed on the verdict and issues answered before they sepa- (520) rated. The court reproved the jury for separating before returning the verdict.

"The defendant moved to set aside the verdict because of the above facts. This was denied. The defendant excepted."

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

Aydlett and Simpson for plaintiff.

J. Kenyon Wilson for defendant.

ALLEN, J. In the case of *Pigford v. R. R.*, 160 N. C., 93, in which the evidence was very much like that in this case, *Associate Justice Walker* delivers a comprehensive and learned opinion which covers all of the exceptions of the defendant as to negligence, assumption of risk, and contributory negligence, and further discussion of these questions here is unnecessary.

The case of *Bryan v. R. R.*, 128 N. C., 387, relied on by the defendant, is not in point, because in that case there was no evidence of failure to furnish a sufficient force of hands, and it was because of failure to produce such evidence that the Court held that the injury to the plaintiff was the result of an accident.

The exceptions to evidence cannot be sustained.

If the answer to the first question is objectionable as an expression of opinion, as contended by the defendant, the same witness gave the same testimony without objection. He testified to the circumstances attending the injury, the weight of the rails and the number of hands employed, and said, when there was no objection taken, "If we had had as many as four men we would have loaded it all right."

The answer to the question which is the subject of the second exception to the evidence had very little, if any, probative force, and could not constitute reversible error.

The custom, which is very general, of allowing juries to return their verdicts to the clerk in the absence of the judge, is not approved, as it frequently results in misunderstandings and in an attempt to impeach the verdict; but in this case the findings of the judge show that the verdict upon which the judgment is rendered was agreed to before the jury separated, and there is nothing to indicate that any improper influence induced the verdict, and the action of his Honor in (521)

refusing to set it aside is sustained. *King v. Blackwell,* 96 N. C., 322; *Luttrell v. Martin,* 112 N. C., 594.

In the first of these cases it was agreed that the clerk might take the verdict of the jury and the court adjourned at 7 p. m. until 9:30 o'clock the next day. The jury coming to a conclusion at 11:30 p. m., and the clerk having gone home, by permission they placed their verdict in an envelope and sealed the same, wrote on the back of the envelope, "Verdict of the jury," and handed it to the sheriff of the county, who had the jury in charge. The sheriff placed the envelope in his safe and on the meeting of the court the judge had the jury called into the box and the foreman in the presence of the jury opened the envelope, and it was held that the exception to the verdict could not be sustained; and in the second case the jury returned their verdict to the clerk without answering the third issue, and on the next day the judge called the jury into the box and permitted them to answer this issue, although it was in evidence that some of the jurors had talked with several parties, after their separation, about the case, and it appearing that the jury had agreed upon an answer to the third issue before they separated and the court finding that they had not been influenced by anything said to them, the verdict was sustained, the Court saying: "The jury having found the third issue before their separation, it was no error to permit them to assemble again and write it down, especially as the judge finds as a fact that the jury had not been influenced by what had been said to them after their separation."

No error.

Cited: Zageir v. Express Co., 171 N.C. 696; *Marshall v. Telephone Co.,* 181 N.C. 411; *Ledford v. Lumber Co.,* 183 N.C. 616; *Gentry v. Utilities Com.,* 185 N.C. 287; *Shelton v. R.R.,* 193 N.C. 674; *Queen v. DeHart,* 209 N.C. 421; *Owens v. Lumber Co.,* 212 N.C. 138; *Edwards v. Junior Order,* 220 N.C. 46; *S. v. Williams,* 220 N.C. 455.

(522)

ATLANTIC COAST LINE RAILROAD COMPANY AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY, TRADING AND OPERATING UNDER THE NAME "GEORGIA RAILROAD," v. F. F. SPENCER AND FAIRFIELD AND ELIZABETH CITY TRANSPORTATION COMPANY.

(Filed 23 September, 1914.)

1. Corporations, Domestic—Charter—Questions of Law.

Whether a corporation operating here is a North Carolina corporation or not is a matter of law depending upon the provisions of its charter. *Staton v. R. R.*, 144 N. C., 145, cited and applied.

2. Removal of Causes—Corporations, Domestic—Cause of Action—Venue —Wrong County—Motion to Transfer.

A corporation of this State should bring its action in the county wherein it has its principal place of business, and not in the county wherein the defendant resides; and where this has not been done, the defendant's remedy is by motion to remove the cause to the proper county.

3. Appeal and Error—Transfer of Causes—Principles of Law.

The action of the trial judge in transferring a cause of action to another county will be reviewed on appeal when such action is based solely on a proposition of law.

APPEAL by plaintiff from order of *Ferguson, J.*, 15 April, 1914; from GATES.

J. Kenyon Wilson for plaintiff.
Ward & Thompson for defendants.

CLARK, C. J. The defendants moved to remove this action to Hyde County for improper venue, upon the ground that the Atlantic Coast Line Railroad Company was a foreign corporation, and that the defendant Spencer is a resident of Hyde County and the defendant transportation company is a domestic corporation having its principal place of business in said county. The cause was removed, not as a matter of discretion, or because of the convenience of witnesses, but on the ground that it was improperly brought in the county of Gates, the Atlantic Coast Line Railroad Company being held a foreign corporation.

The motion was erroneously allowed. Whether an individual (523) is a resident of this State or not depends upon evidence, and is a question of fact to be passed upon by the Federal court. But whether a corporation is a North Carolina corporation or not is a matter of law depending upon its charter.

The question of law whether the Atlantic Coast Line Railroad Company is a North Carolina corporation was decided in this Court in a

very able and conclusive opinion by *Connor, J.*, now the accomplished judge of the United States District Court for the Eastern District of North Carolina, in an exhaustive opinion in *Staton v. R. R.*, 144 N. C., pp. 145-154, to which we feel unable to add anything. That opinion is based upon Federal authorities therein cited. It has been cited as authority, *Hough v. R. R.*, 144 N. C., 701; *Hurst v. R. R.*, 162 N. C., 371, 372; and has been reaffirmed in *Cox v. R. R., post.*

If, as suggested, the principal place of business of the Atlantic Coast Line Railroad Company is in New Hanover, the action should have been brought in that county. Rev., 422. But Rev., 425, provides that if an action is not brought "in the proper county, it may, notwithstanding, be tried there, unless the defendant before the time of answering expires demand in writing that the trial be had in the proper county." The defendant did not demand that the action be removed to New Hanover, and it was error to remove it to the county of Hyde, on the ground assigned in the motion and order of removal.

Reversed.

Cited: Brown v. Jackson, 179 N.C. 365, 375, 377; *Mizzell v. R. R.*, 181 N.C. 38; *Corporation Com. v. Mfg. Co.*, 185 N.C. 36.

JOHN H. BURDEN v. LOUIS LIPSITZ.

(Filed 23 September, 1914.)

Wills—Estates—Contingent Limitations—Death of Devisee—Direct Beneficiaries—Interpretation of Statutes.

A devise of lands to B. in fee, "provided he has a child or children; but if he has no child, then to him for life," with limitation over to the testator's heirs at law, carries to the devisee a fee-simple estate, defeasible upon his death without having had a child, the contingent event by which the estate is determined referring to the death of the devisee and holder of the prior estate unless a contrary intent clearly appears from the will itself (Revisal, sec. 1581); and upon his death and nonhappening of the contingency named, the inheritance passes directly from the testator to the ultimate devisees. Hence, when the holder of the prior estate has acquired the interests therein of the children of the testator then living, he cannot convey a good title to the land; for prior to his death some of these heirs may have died leaving children, who, in that event, would take directly from the testator as his heirs at law.

(524) APPEAL by defendant from *Connor, J.*, at April Term, 1914, of BERTIE.

Controversy submitted without action. The demand of plaintiff was for the purchase price of land which plaintiff had bargained to defendant, and defendant resisted payment on the ground that the title offered was defective. The Court being of opinion that the deed of John H. Burden, tendered to defendant, would convey a good title, entered judgment for the contract price, and defendant excepted and appealed.

Winston & Matthews for plaintiff.
Gilliam & Davenport for defendant.

HOKE, J. The title tendered was admitted to depend upon the construction of the will of John L. Burden, devising the lands covered by the deed to plaintiff, in terms as follows: "I give to my son, John Henry Burden, a fee-simple title to the tract of land on which I live, it being all the land I own, provided he has a child or children; but if he has no child, then I give him the said land during his life, and to his widow if he leaves one surviving, during her widowhood, and then the said land shall go in equal portions to my heirs at law as if I had made no will. And the said John H. Burden shall pay to each of my children who shall survive me, and the representatives of such as may be dead, $100. In the event the said John Henry has a child born to him, then the land to be absolutely his in fee simple"; and upon the following facts agreed upon by the parties as relevant to its correct interpretation: "John L. Burden owned the lands described in said contract. In his last will and testament as set out on page 6 of the record he devised (525) said lands to John H. Burden upon the condition therein named. The said John H. Burden duly qualified as executor of said estate under said will, and paid his sisters the said sum of $100 as required in said will. The said John L. Burden left surviving him the following daughters, towit, Willie J. Cowand, C. E. Morris, Lurinda Pritchard, Lucy A. Pritchard, E. C. Cherry, and Sally F. Bazemore, and also a granddaughter, Mary E. Thomas, the only surviving child of a daughter who had predeceased him, and said John H. Burden. The said daughters and granddaughter were his only heirs at law. Afterwards, on 6 December, 1890, the said sisters and their husbands, in consideration of said $100 and the further sum of $100 more paid to each of them, conveyed all of their right, title, and interest in said lands to said John H. Burden. (See paragraph 5, page 2 of the record, and also Exhibit "B" on page 7 of the record.) On 4 July, 1892, for the same consideration, the said Mary E. Thomas conveyed her rights, title, and interest in said

lands by deed described in paragraph 6 on page 3 of the record, and also in Exhibit "C" on page 9 of the record.

"Since the execution of the deed from the various sisters and their husbands to said John H. Burden, set out in Exhibit "B" as aforesaid, Willie J. Cowand and Lurinda Pritchard have died, leaving children surviving them, and all of whom are living at the present time.

"John Henry Burden, the plaintiff, is now a widower of the age of 62 years, and has never had a child born to him."

Upon these facts, it has been repeatedly held, in this State, that the devise in question carries to the devisee, the present plaintiff, an estate in fee simple defeasible upon his death without "having had a child born to him." *Rees v. Williams,* 164 N. C., 128, opinion by *Associate Justice Allen,* affirmed on a petition to rehear, 165 N. C., 201, opinion by *Associate Justice Walker; Smith v. Lumber Co.,* 155 N. C., 389; *Perrett v. Bird,* 152 N. C., 220; *Harrell v. Hagan,* 147 N. C., 111. And these and other authorities are to the effect that, under a correct interpretation of Revisal, sec. 1581, and, unless a contrary intention clearly (526) appears from the will itself, the contingent event by which an estate of this kind is determined must be referred, not to the death of the devisor, but to that of the devisee and holder of the prior estate. *Rees v. Williams, supra; Harrell v. Hagan, supra,* and *Buchanan v. Buchanan,* 99 N. C., 308. As shown in the case of *Sessoms v. Sessoms,* 144 N. C., pp. 122-125, and *Whitfield v. Garris,* 134 N. C., 24, on the happening of the contingency, "the limitation over is not to be considered as a qualification of the first estate, but the same is a separate estate which passes directly from the testator to the ultimate devisee," and, being a contingent one, only those who fill the description at the time it comes into existence can take under the terms of the will.

In the present case the plaintiff holds and tenders a deed for his own interest, fortified by the deeds of the other children of the testator. These were his heirs, and would fill the description at the time that he died, but, as the second estate does not arise till the death of the first taker, these grantors may not then be his heirs, but, in case of their death before the first holder, their children would become the heirs of the testator. As a matter of fact, two of the daughters of the testator have since died, leaving children who are now living, and these are at present among the heirs of the testator, and, as such, could claim an interest in the property on the present happening of the contingency.

Under the authorities cited, we must hold that the title offered is not a good one, and the judgment compelling payment of the purchase money must be reversed.

Reversed.

Cited: Hobgood v. Hobgood, 169 N.C. 489, 490; *O'Neal v. Borders,* 170 N.C. 484; *Whichard v. Craft,* 174 N.C. 129; *Patterson v. McCormick,* 177 N.C. 455; *Malloy v. Acheson,* 179 N.C. 97, 98; *Love v. Love,* 179 N.C. 117; *Hutchinson v. Lucas,* 181 N.C. 54, 55; *Baugham v. Trust Co.,* 181 N.C. 408; *Christopher v. Wilson,* 188 N.C. 760, 761; *Alexander v. Fleming,* 190 N.C. 817; *Daly v. Pate,* 210 N.C. 225; *Whitley v. McIver,* 220 N.C. 436; *Van Winkle v. Berger,* 228 N.C. 478; *Elmore v. Austin,* 232 N.C. 21, 23; *Buffaloe v. Blalock,* 232 N.C. 108, 110.

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(527)

C. B. BRANTLEY, SURVIVING PARTNER, ETC., v. MRS. IDA MARSHBOURN ET ALS.

(Filed 23 September, 1914.)

1. Partnership—Surviving Partner—Dissolution—Transactions, Etc., with Deceased—Interpretation of Statutes.

Where the action involves the question of division of partnership assets between the surviving partner and the heirs at law of the deceased one, and it is pertinent to the inquiry whether the surviving partner had bought out the interest of a third member of the firm and was entitled to his share thereof, testimony of a conversation between the surviving partner and this third person, still living, tending to show such transaction, etc., is not a transaction, etc., with a deceased person prohibited by Revisal, sec. 1631, and is competent.

2. Partnership—Dissolution—Division of Assets—Surviving Partner—Declaration of Deceased.

In an action by the surviving partner of a firm against the heirs at law of a deceased member thereof, where the shares of the partners in the assets of the firm are in question, it is held that declarations that had been made by the deceased partner against his interest are competent evidence for the defendants, but otherwise as to his declarations in his own favor made in the absence of the surviving partner.

3. Partnership—Dissolution—Division of Assets—Surviving Partner—Evidence—Book Entries.

Three partners were in business, and one of them was bought out, and the controversy arises as to whether one of the remaining members bought out the retiring member in his own right or for the benefit of the remaining firm, one of whom has since died. In an action by the surviving partner against the representatives of the deceased one, it is competent, upon the question stated, for the plaintiff to show that the deceased partner was the manager of the firm, had possession of its books, and that it nowhere therein appeared by entry that the deceased had any interest in the firm's assets where entries of this character had been made.

APPEAL by defendants from *Bond, J.*, at January Term, 1914, of NASH.

This was a special proceeding for the division of property belonging to a partnership, returnable before the clerk. Issues of fact being
(528) raised by the answer, the cause was transferred to the civil-issue docket for trial at a regular term.

The question at issue in the case was whether or not the plaintiff, C. B. Brantley, owned a two-thirds interest in the partnership property and all its original capital, or whether he owned only a one-half interest.

It was admitted by all parties that when the partnership was first formed, C. B. Brantley owned an undivided one-third and $3,000 capital stock, and that S. H. Brantley owned an undivided one-third and $2,000 capital stock, and that Samuel Marshbourn owned an undivided one-third, but no interest in the capital stock.

It was admitted by the plaintiff that Samuel Marshbourn at the time of his death (the defendants being his representatives) owned the interest which he had when the partnership was first formed.

It was admitted by the defendants that plaintiff, C. B. Brantley, owns the one-third undivided interest which he owned when said partnership was first formed and the $3,000 capital stock he put in the business.

It was contended by C. B. Brantley that some time after the formation of the copartnership he bought, for his own use and benefit, from S. H. Brantley the one-third interest that said S. H. Brantley owned at the outset of the business and his $2,000 capital stock.

It was contended by the defendants that at the time of or after the purchase from S. H. Brantley of his interest by C. B. Brantley said purchase inured to the advantage of both Samuel Marshbourn and the plaintiff, C. B. Brantley, so as to leave each owning a one-half interest. The plaintiff was contending that the entire one-third originally owned by S. H. Brantley, and his share of capital, was bought by the plaintiff, and that since then the plaintiff has owned an undivided two-thirds interest and all the capital stock, and the said Samuel Marshbourn at the time of his death owned only the other one-third and none of the capital stock.

(529) There was evidence introduced tending to sustain the contentions of both sides. No objection was made to form of issues submitted.

Among other pieces of evidence in favor of the plaintiff was the following:

S. H. Brantley was sworn, and testified to his signature to paper-writing, by the terms of which, some years ago, during lifetime of said Marshbourn, he had sold his entire one-third interest in said business, and his interest in capital stock, to the plaintiff, C. B. Brantley.

C. B. Brantley was sworn, and testified that some years ago he bought from S. H. Brantley the entire one-third interest owned at that time by S. H. Brantley and his entire interest in capital stock, and that he paid him for same by assigning to him certain shares of bank stock which belonged at that time to him, the said C. B. Brantley.

To the foregoing evidence of S. H. Brantley and of C. B. Brantley, tending to show that C. B. Brantley had bought the one-third interest of S. H. Brantley and his capital stock, the defendants objected upon the ground that said testimony was prohibited by section 1631 of the Revisal. Objection overruled. Defendants excepted.

The plaintiff introduced, in his behalf, one or more witnesses who had never had any interest in the controversy or in the event of the action, and proved by each of them that at different times they had heard Samuel Marshbourn say that he owned only a one-third interest in said partnership business, and that the plaintiff, C. B. Brantley, had bought the interest formerly owned by S. H. Brantley. As each of said witnesses proposed to so testify, the defendants objected; overruled, and the evidence admitted, and defendants excepted.

During the trial the defendants offered one or more witnesses by whom they proposed to prove that they had heard the defendant, Samuel Marshbourn, state in substance, in the absence of C. B. Brantley and not as a part of any conversation proven by the plaintiff or any other witnesses, that he, the said Samuel Marshbourn, owned a one-half interest in said business.

The plaintiff objected to each of said statements proposed to be (530) proven by said witnesses; the court sustained the objection, excluded the evidence, and to each of said rulings the defendant excepted.

During the trial plaintiff introduced J. J. Pitts, who had in the courtroom with him the books admitted by defendants to be the mercantile books of said firm during the life of said Samuel Marshbourn, and had him turn to various pages of said books showing entries pertaining to the capital stock of said firm. "No entry showed that said Marshbourn had any interest in said capital stock." Defendants objected; overruled, and defendants excepted.

During the argument one of counsel for the defendants was calling attention to what he claimed would be a presumption when nothing else appeared, to the effect that in an admitted partnership each partner would be presumed to own an equal interest with each other partner.

The court fully stated the contentions of both sides to the jury and among other things charged the jury, "That the burden of proof was on the plaintiff to show by the preponderance of the evidence, by the greater weight, that he owned two-thirds interest in surplus and profits of said

business, and all the capital stock, instead of one-half, as admitted by the defendants.

"That if plaintiff had so shown by greater weight of the evidence, by the preponderance of the evidence, then the jury would answer the first and second issues 'All of it' and the fifth issue 'Two-thirds'; and if the plaintiff had not so shown, jury should answer said issues 'One-half.'" The court saying that no question of presumption of equal interest would arise if the facts appeared differently.

"That if the plaintiff had shown by the greater weight of evidence, that is, by the preponderance thereof, that he owned two-thirds of surplus and profits of business, the jury should say in answer to the fifth issue 'Two-thirds.' If the plaintiff had failed so to show, or the evidence had left the matter so the jury could not say how it was, they should answer the said issue 'One-half.'"

(531) To the foregoing extract of the judge's charge (that being the only portion objected to) the defendants excepted.

The jury answered the issues in favor of the plaintiff.

Judgment for plaintiff, and defendants excepted and appealed to the Supreme Court.

E. B. Grantham, Finch & Vaughan for plaintiff.

T. T. Thorne for defendants.

ALLEN, J. The evidence of C. B. Brantley and of S. H. Brantley, relating solely to a transaction taking place between themselves, and at which the deceased Marshbourn was not present, both S. H. and C. B. Brantley being alive, does not come within the letter or the spirit of section 1631 of the Revisal. *Bunn v. Todd,* 107 N. C., 266.

It does not refer to a conversation or transaction with a deceased person.

It is equally clear that the declarations of Marshbourn against his interest were competent, and those in his own favor were properly excluded.

The record is not entirely clear as to the evidence of J. J. Pitts, but we infer that he produced the books of the partnership in existence at the time Marshbourn was alive, showing the entries of the capital stock, and that it did not appear from these entries that Marshbourn had any interest therein. If so, the evidence was competent, as the claim of the defendants is that at that time Marshbourn had bought an interest in the capital stock of S. H. Brantley, and as he had charge of the business and was in possession of the books, it was a reasonable inference that if he owned an interest in the capital stock it would have been entered, and

the failure to find such entry was a circumstance which the jury had the right to consider.

The exceptions to the charge as they are stated in the record are not insisted upon by counsel for the defendant, and the charge seems to be free from objection.

One of the assignments of error refers to an incident occurring during the argument of one of the counsel for the defendant, but as there is no exception in the case on appeal relating to the matter, it (532) cannot be considered. *Morse v. Freeman,* 157 N. C., 385.

No error.

G. D. PRITCHARD, RECEIVER OF THE LEROY STEAMBOAT COMPANY, v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 23 September, 1914.)

1. Carriers of Goods—Negligence—Water Damage—Evidence—Questions for Jury.

Held, in this action to recover of the defendant carrier damages caused to a shipment of a car-load of peanuts, that the evidence of actionable negligence on the defendant's part was sufficient which tended to show that the shipment was received from it in a damaged condition from water; that during its transportation it had been raining; that the roof of the car leaked, and that the condition of the car was such that the rain could have beaten in between its slats.

2. Carriers of Goods — Traffic Contracts — Pleadings — Amendments — Court's Discretion.

In an action between two carriers involving a balance alleged to be due the plaintiff under a traffic contract, it is within the discretion of the trial judge to allow the plaintiff to amend its complaint so as to allege that it had been forced to pay damages for a shipment of goods received by it from the defendant in a damaged condition, for which the defendant's negligence, while in its care, was responsible; and while the amendment creates an additional cause of action, it is so germane to the original cause that both may be considered as one action.

3. Carriers of Goods—Traffic Contracts—Connecting Carrier—Damage to Shipment—Payment—Limitation of Actions.

Where the controversy between two carriers involves a balance alleged to be due the plaintiff under a traffic contract, and the plaintiff is allowed by the court to amend its complaint to allege damages it had had to pay a customer of the road, which arose from the defendant's negligence, the cause of action thus alleged arose to the plaintiff at the time it paid the damages complained of, and the statute of limitations would begin to run from that time.

4. Same—Trials—Burden of Proof.

Where one carrier sues another for damages, alleged to have been paid by it, and caused by the latter's negligence, the burden of proof is on the plaintiff to show that the defendant's negligence caused the damages and that the plaintiff had paid them in the amount alleged; and in this case the evidence is held sufficient to be submitted to the jury that the damages were paid by plaintiff's drafts on money in defendant's hands, owing by the latter to the former.

5. Contracts—Vendor and Vendee—Deferred Payments—Trials—Evidence.

The plaintiff carrier purchased from the defendant carrier certain steamboats upon a certain cash payment, with agreement that the balance of the purchase price should be paid in equal amounts at stated times. There was evidence tending to show that the defendant carrier had moneys in its hands owing to plaintiff, under a traffic arrangement, sufficient to meet these deferred payments when due, and by the defendant's testimony it was admitted that it had plaintiff's money on hand, but could not state the amounts, and it was *Held*, on the question of allowing the defendant interest on the deferred payments, that it was for the defendant to show exactly what funds it had of plaintiff's on hand at the various times for the payment of interest, and the question was properly left to the determination of the jury.

6. Pleadings—Amendments—Court's Discretion—Excusable Neglect—Appeal and Error.

A refusal by the trial court to set aside a judgment rendered in an action upon contract, for surprise, inadvertence, and excusable neglect, on the ground that defendant had neglected to allege a mistake in the contract sued on, will not be disturbed on appeal when it appears that the pleadings had been filed, trial had upon the merits of the case, and the issues submitted were fully responsive to the pleadings.

(533) APPEAL by both parties to the action, from *Ferguson, J.*, at February Term, 1914, of PASQUOTANK.

Civil action tried upon these issues:

1. Is the plaintiff's claim for damages, paid to M. Hoffman & Bro., barred by the statute of limitations? Answer: No.

2. What amount is due the plaintiff, paid M. Hoffman & Bro., damages to the 337 bags? Answer: $728.41.

(534) 3. Is the plaintiff indebted to the defendant for interest on the deferred payments on the purchase money of the boats? Answer: No.

4. What amount is due the plaintiff by defendant for money had and received? Answer: $2,247.70.

Upon the judgment rendered, the defendant appealed.

Aydlett & Simpson for plaintiff.

J. Kenyon Wilson for defendant.

BROWN, J. This action is brought to recover a balance due from the defendant under a traffic contract, together with certain damages for injury to peanuts which the plaintiff alleges it has been compelled to pay, which injury was caused by the negligence of the defendant.

First. The plaintiff claims that in June, 1910, it received from M. Hoffman & Bro. a lot of peanuts, which under its traffic contract with the defendant it delivered to the defendant in good condition. The plaintiff further alleges that these peanuts were damaged by the negligence of the defendant while in transit to Suffolk, Va. The defendant denies the negligence and also pleads the statute of limitations. The question of negligence was properly submitted to the jury, and there is abundant evidence in the record tending to support the allegation.

The president of the LeRoy Steamboat Company testifies: "The peanuts were refused at Suffolk. I went to the agent of the Suffolk Peanut Company, and he advised me that the peanuts had been refused. Most of them were smoking from the heat. The doors of the railroad cars were gone and the rain beat in. The rain was universal for two or three weeks; the agent of the railroad said that it rained. There was nothing to keep the rain out except two or three slats. The doors were shut; they were about 6 feet high and about 10 feet wide. There was nothing in the space to keep the rain from beating in. The cars were in a bad condition and one had a leaky roof. I called Mr. Warren's attention to it, and I told him that they had no business to put peanuts in that car. The cars were wet from the inside. I did not see any cracks in the cars, but the roof was wet."

It is contended further that the claim is barred by the statute (535) of limitations. We do not think upon the admitted facts that the plea can be sustained. It is true, the action was commenced on 18 May, 1912, and the original complaint was filed on 24 May, 1912.

The action appears originally to have been brought for an accounting and settlement of the freight money due the plaintiff under the traffic contract. We find no mention in the complaint of the damages to the peanuts which were delivered to the defendant company in June, 1910; nor do we find, as attempted to be pointed out by the plaintiff's counsel, any reference to this demand in the bill of particulars. But an amendment to the complaint was filed on 8 January, 1914, and the plaintiff claims that cause of action did not arise until July, 1911, the time when the plaintiff paid the money for the damages to the shipper of the peanuts. In this amended complaint the allegations concerning the injury to the peanuts and the payment therefor by the plaintiff are fully set out.

We are of opinion that the filing of the amended complaint was a matter in the discretion of the court, and that while it is practically an

additional cause of action, it is so germane to the original cause of action that both may be considered in one action. If the cause of action arose in June, 1910, when the peanuts were injured, then we think the claim would be barred by the statute; but in our opinion the cause of action did not arise until the money was paid by the plaintiff to the owner of the peanuts, and that was in July, 1911.

His Honor, therefore, correctly charged the jury: "If you shall find that from the time the payment was made until the complaint was filed this January, there was less than three years, the statute does not bar the claim. If the payments were made in July, 1911, then the statute does not bar the claim, and you would answer the issue "No."

As between the common carrier and the shipper, the cause of action would arise when the damage ensued and the injury was inflicted; but now as between common carriers themselves, a cause of action would not arise in behalf of one carrier against the other until the common
(536) carrier suing for the same had paid the damages, as until that had been done it would have sustained no injury.

The LeRoy Steamboat Company and the defendant were practically copartners in the transportation business, and each is liable for any damage resulting from delay or otherwise on the lines of each other; but the one could not recover from the other damages which it had never been called upon or required to pay. *Mills v. R. R.*, 119 N. C., 694.

There is quite a distinction between the case at bar and that of *Penn. Co. v. C. N. and St. Paul Ry. Co.*, 144 Ill., 197. In that case one railroad company sued another for goods which it had delivered to it and which the defendant company had allowed to go astray, and for which a judgment had been rendered in behalf of the owner against the plaintiff company.

There is nothing in the record which shows that there was any traffic contract existing between the two companies for joint transportation. At the time the judgment was rendered, in 1893, the Carmack amendment was not in force. Therefore it was the ordinary case of a bailee delivering goods to another bailee, or of one common carrier employing another common carrier as its agent to make delivery of goods which had been received by it. In that case the cause of action, as was properly held by the Illinois Court, arose in behalf of the Pennsylvania Company against the defendant company when it failed to make delivery of the goods.

We think the cause of action accrued here when the LeRoy Steamboat Company paid the money to Hoffman. It is contended that there is no evidence in the record that the steamboat company ever paid the money to Hoffman. This contention cannot be sustained. There is evidence in the record of two drafts dated 28 July, 1911, one for $1,650 and one for

$200. It is contended by the plaintiff that these drafts, drawn on the funds of the LeRoy Steamboat Company in the hands of the defendant and paid by the defendant and charged up to the LeRoy Steamboat Company, embraced the money paid for the damaged peanuts, and there is evidence to sustain this contention.

It is true, as contended, that no judgment has ever been ren- (537) dered against the plaintiff company for these damages, but the plaintiff was not obliged to stand a suit for a claim which it acknowledged to be just. The burden of proof is upon the plaintiff and was so placed by the judge below to make out this claim against the defendant by a clear preponderance of evidence.

Second. It is contended that his Honor erred in refusing to charge the jury that the plaintiff was not indebted to the defendant for interest on the deferred payments for the steamboats purchased by the LeRoy Steamboat Company from the defendant. It appears that by virtue of a written contract the defendant sold to the said steamboat company three steamers for the sum of $15,000; $4,000 of which was paid in cash and $11,000 was to be paid in thirty-three equal monthly installments of $333.33 each.

It is admitted in the defendant's answer that there was an agreement entered into between the defendant and plaintiff by which certain through rates were established over said lines, and the agreement provided that the defendant should apply the money due the LeRoy Steamboat Company to the adjustment of claims of the defendant against the said company.

The plaintiff claims that these interest charges, if any were due under the contract for the sale of the steamers, were paid by the defendant to itself out of these moneys belonging to the plaintiff. That question was left to the jury, we think very correctly, in these words by his Honor:

"I charge you that if you shall find from the evidence that at the time that the monthly payments became due, that the defendant company had in its hands money of the plaintiff company sufficient to meet the monthly payments as they fell due, the defendant would be entitled to no interest, and, therefore, if you so find from the evidence, it would be your duty to disallow the claim for interest."

The defendant contends that there was no evidence to support this charge. There is not only evidence offered by the plaintiff tending to support it, but the defendant's own witness, Metcalf, testified:

"The payments were made each month. I will not say that every (538) month the steamboat company did not have enough in our hands to pay the amount due. Whatever we owed the steamboat company at the first of the month did not go to its credit till the 25th. I presume

that we had more than enough on the 25th of each month to pay the account of the steamboat company."

This evidence is sufficient to go to the jury so as to call upon the defendant to show exactly what funds it had in its hands belonging to the plaintiff at that time. Having failed to do so, we think the jury warranted in finding the issue in favor of the plaintiff.

We have carefully examined the other exceptions taken by the defendant, and we find them to be without merit.

No error.

DEFENDANT'S APPEAL.

At the following term of court the defendant moved to set aside the judgment rendered at the February Term, 1914, upon the ground of surprise, inadvertence, and excusable neglect. A number of affidavits were filed, upon which his Honor, *Judge Ferguson,* made his findings of fact and declined to set aside the judgment, and the defendant appealed.

It is said in the brief of counsel for the defendant that the neglect in this case consisted in the failure of the defendant in drafting its complaint to allege that there had been a mistake of the draftsman in drawing the contract, and in failing to introduce evidence of this mistake. It was an equitable defense which should have been pleaded, and counsel failed to plead the same, and failed to have evidence at the trial to support the contention.

We find upon an examination of the record that the defendant not only answered the original complaint, but in February, 1914, before his case was tried filed an answer to the amended complaint. It is true, the counsel did not set up these particular defenses referred to in his brief, but the Court cannot set aside a judgment for that reason.

(539) The case was tried before a jury, by counsel on both sides, and the issues submitted. These issues were responsive to the pleadings, and if the counsel desired other issues submitted, he should have tendered them to the court, and it was his privilege to ask the court to allow him to amend his answer.

Nothing of that sort was done. It is too late, therefore, after the trial is over and judgment is rendered, at a subsequent term, to ask the court to set aside a judgment because certain defenses were not made at the time of the trial.

It is held in *Stockton v. Mining Co.,* 144 N. C., 596, that an order of the court below setting aside a judgment by default and inquiry will be reversed on appeal by the Supreme Court when it appears that the delay in filing the answer was occasioned by the system of the defendant in employing foreign counsel to draft the answer, when such could have been left to the local counsel in attendance upon the court.

In the affidavits and findings in this case no reason is given why the counsel who tried the case in the Superior Court of Pasquotank County could not as well have pleaded in his answer these several defenses without the assistance of the general counsel of the defendant.

The ruling of his Honor refusing to set aside the judgment is Affirmed.

Cited: Currie v. Malloy, 185 N.C. 210.

T. H. SHEPARD v. NORFOLK AND SOUTHERN RAILROAD COMPANY.

(Filed 23 September, 1914.)

1. Railroads—Crossings—Signals—Stops—Look and Listen—Negligence—Trials—Questions for Jury.

Whether the failure of a traveler upon the highway in a conveyance to fully stop before entering upon a railroad track at a crossing, in addition to looking and listening, will amount to such contributory negligence as will bar his recovery for injuries consequently received there depends upon the facts and circumstances of each particular case, and is usually a question for the jury; and the absence of signals, warnings, or other precautionary measures usually observed by railroad companies at a given crossing where the injury has occurred is always relevant, and must be given due weight in determining whether the traveler has exercised the degree of care required of him for his own safety.

2. Same—Corporation Commission—Orders.

In this action to recover damages for injury to his automobile caused at night by a collision with the train of defendant railroad company at a public crossing, where there were obstructions caused by buildings coming within a short distance of the track, and when the plaintiff knew the crossing was dangerous, there was evidence tending to show that the plaintiff slowed down the machine and looked and listened before going upon the track, and the collision was caused without signal, light, or other warning, by the train coming suddenly backward upon him and not giving him time to stop his machine; that he was aware of a ruling of the Corporation Commission requiring the railroad company to stop its train before going upon this crossing, and to send an employee with a light ahead to signal to the engineer when there was no danger to those desiring to cross and that he was looking for this man with the light, and, not seeing him, he did not fully stop his machine, as stated, but fruitlessly endeavored to do so when he became aware of his danger. *Held,* it was for the jury to determine whether the plaintiff was guilty of contributory negligence in not fully stopping his machine before attempting to cross the defendant's track.

3. Railroads—Corporation Commission—Orders—Dangerous Crossings—Particular Signals—Negligence.

An order of the Corporation Commission relative to a certain crossing where the plaintiff in this case was injured required the railroad company to stop its cars at a certain distance from the edge of the street, "and said cars and engine shall remain standing until a man is sent forward to see that no one is approaching, such man at night to carry a lantern as a signal. No cars or engine shall be moved across the street until signaled to do so by the man sent out ahead, etc." *Held*, it is the purpose and intent of the order that the man sent ahead at night with the lantern shall remain upon the crossing with his lighted lantern to afford proper warning that the cars are approaching and to do what is reasonably required to prevent a collision.

(541) APPEAL by plaintiff from *Ferguson, J.*, at March Term, 1914, of CHOWAN.

Civil action to recover damages for injury to plaintiff's automobile.

Plaintiff, a witness in his own behalf, on his examination in chief testified, in substance, as follows: "That on 18 March, 1913, he had attended church in Edenton, and was returning to his home, about 7 miles below and to the east of Edenton, in his automobile, about 10:30 o'clock p. m., with his wife and son and two guests; that this was the only route from Edenton to his home, and was greatly used by the people going from Edenton below town; that the railroad ran practically north and south at the point of the accident and the street and road crossing the same ran east and west; that he knew this was a dangerous crossing, and knew of the order of the Corporation Commission aforesaid with respect to the same. That there were houses on the north side of Church Street extending for about a square to about 26 feet of the railroad track at that point, and which greatly obstructed the view of the railroad track in that direction; that because of these obstructions and of the presence near the said crossing of the peanut company's plant, a five-story building, and other causes, he regarded the crossing as dangerous; that because of this, when he approached the said crossing he slowed the automobile up as slow as he could so as not to stop it, and looked and listened, and there was nothing in the way—no man or anything else; no man standing on the track nor any light, signal, or sign indicating danger; that he saw no train and heard none approaching, and that there was no one upon the track with a lantern or otherwise to notify him of the approaching train; that he did not stop his automobile, but brought it to the lowest speed it could be brought without stopping. It was going at the speed when he approached the track, perhaps about 8 or 10 miles an hour. These houses are built up within 2 or 3 feet of the right of way on the Norfolk and Southern track, certainly 15 or 16

feet from the rail. Until you pass that line of houses it is not possible to see up the track at all; that he knew it to be a very dangerous crossing and of unusual danger, and that he had crossed it at (542) this point a thousand times or more; that when he entered Church Street and approached the track he looked for the signal required by the order aforesaid."

This witness further testified that just as he approached the track and was about to rise the little slope to it one of the defendant's cars backing in from the north loomed up on the track very close, possibly the length of the car from me. I threw out the clutch and threw on the brakes, but the momentum carried me on. The train was moving fast and struck my car. There was no person or light on the end of the railroad car, which was backing in. He testified that there was no personal damage done any of the occupants of the car, but the car was seriously damaged to the extent of $600 or $700."

And, on cross-examination, speaking to the question chiefly presented on this appeal, he testified as follows: "That he began to look up and down the track as soon as he got to a place where he could see the track, but that he was looking for a light and not for a train; that having seen no light at the crossing, he did not expect a train."

The testimony on this point was as follows:

Q. Was your automobile making any noise? A. I expect so. None of them are noiseless. It was not making any undue noise; there was nothing the matter with it.

Q. You did not stop your car or listen? A. I didn't stop, but I listened.

Q. Knowing the dangerous character of the crossing, and because of the light streaming from your automobile so you could not see the objects to one side or the other, you still didn't stop the automobile before you undertook to cross? A. No, sir. I didn't bring it to a full stop.

Q. When did you begin to look up and down the track? A. As soon as I could see down the track. I was looking for a light, and not a train.

Q. Seeing no light, you didn't look for a train? A. No, sir; seeing no light, I didn't expect a train.

Q. You neither stopped your car nor listened? A. I did listen.

There was evidence on the part of defendant in contradiction (543) of plaintiff's testimony as to slackening his speed, etc., and further to the effect that before backing on crossing a man had been sent there with a lantern, and, seeing no one approaching, had given the signal for train to cross, etc.

The following order of the Corporation Commission, in force at the time and applicable to this crossing, was shown forth in evidence:

"This matter coming on to be heard, and investigation of same having been had, and the location viewed, it is ordered that from and after 1 August, 1912, the Norfolk Southern Railroad Company shall observe and keep the following regulations in respect to the crossing at east end of Church Street in Edenton, North Carolina, towit: When any of its cars or engines are approaching said crossing, if going forward, it shall stop its engine at all times on arriving at a point 50 feet from the edge of said street, and when going backward it shall stop its cars as soon as the first one reaches a point 50 feet from the edge of the said street, and said cars and *engine shall remain standing* until a man is sent forward to said street ahead of same to see that no one is approaching, *such man at night to carry a lantern as a signal.* No cars or engine shall be moved across said street until signaled so to do by the man sent ahead as above required.

"The foregoing order is entered with the consent of defendant railroad company."

The court being of opinion that, under all the facts and circumstances, it was the duty of plaintiff to have brought his machine to a complete stop before attempting to cross the railroad, charged the jury, among other things, that if they believed the evidence offered by the plaintiff they would answer the issue as to contributory negligence "Yes," and plaintiff excepted.

The jury rendered the following verdict:

"1. Was plaintiff's automobile damaged by the negligence of defendant, as alleged in the complaint? Answer: Yes.

"2. What damage has the plaintiff sustained? Answer: Six hundred dollars ($600.00).

(544) "3. Did plaintiff by his own negligence contribute to his injury, as alleged in complaint? Answer: Yes."

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

Pruden & Pruden and S. Brown Shepherd for plaintiff.

Small, MacLean, Bragaw & Rodman for defendant.

HOKE, J., after stating the case: In *Cooper v. R. R.*, 140 N. C., 209, the Court laid down certain rules as to the conduct of travelers approaching a railroad crossing, in terms as follows:

"A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train

is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty.

"5. Where the view is unobstructed, a traveler who attempts to cross a railroad track under ordinary and usual conditions without first looking, when by doing so he could note the approach of a train in time to save himself by reasonable effort, is guilty of contributory negligence.

"6. Where the view is obstructed, a traveler may ordinarily rely upon his sense of hearing, and if he does listen and is induced to enter on a public crossing because of the negligent failure of the company to give the ordinary signals, this will usually be attributed to the failure of the company to warn the traveler of the danger, and not imputed to him for contributory negligence.

"7. There may be certain qualifying facts and conditions which so complicate the question of contributory negligence that it becomes one for the jury, even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether, as when gates are open or signals given by a watchman and the traveler enters on the crossing reasonably relying upon the assurance of safety."

These rules and the one last mentioned as being more particularly applicable to the questions presented on this appeal have been frequently upheld and applied in decisions of our Court, notably in the recent cases of *Johnston v. R. R.*, 163 N. C., 431; *Fann v. R. R.*, (545) 155 N. C., 136; *Wolfe v. R. R.*, 154 N. C., 569; *Farris v. R. R.*, 151 N. C., 483.

It is also established by the weight of authority that it is not always imperative on a traveler to come to a complete stop before entering on a railroad crossing; but "whether he must stop, in addition to looking and listening, depends upon the facts and circumstances of each particular case, and so is usually a question for the jury." *Alexander v. R. R.*, 112 N. C., 720; *Judson v. R. R.*, 158 N. Y., 597; *Malott v. Hawkins*, 159 Ind., pp. 127-134; 3 Elliott on Railroads (2 Ed.), sec. 1095, Note 147; 33 Cyc., pp. 1010, 1011-1020.

In *Alexander's case* it was held, among other things: "Where, in an action for damages for an injury received at a railroad crossing, plaintiff testified that she 'held up very slow' as she was driving across, and, hearing no bell, which she had heard the day before while at the crossing, notwithstanding the noise of the factories on each side of the street, concluded that no engine was approaching, and drove on: *Held*, that it was not necessary for her to get out of her buggy and go beyond the cars to look up and down the track, or to stop and listen for an approaching engine when no signal was given of its approach."

In *Judson's case, supra:* "A person approaching a railroad crossing is not required, as a matter of law, to stop before attempting to cross, but his omission to do so is a fact for the consideration of the jury."

In *Malott's case,* 159 Ind., *supra, Gellett, J.,* delivering the opinion, said: "Exceptional circumstances may also require him to stop, although this proposition generally presents itself as a mixed question of law and fact." And in this connection it is further held that the presence or absence of signal warnings or other precautionary measures usually observed by the company at a given crossing is always relevant, and must be given due weight in deciding as to whether the traveler has been observant of proper care before entering on the crossing and in failing to come to a complete stop. In 33 Cyc., at page 1028, the author,

(546) speaking to this question, says: "Where a railroad company maintains a flagman, gates, or other signals or warning at a railroad crossing, whether voluntarily or by law or custom, the public generally has a right to presume that these safeguards will be reasonably maintained and attended, and in the absence of knowledge to the contrary the fact that the gates are open, or automatic bells not ringing, or that the flagman is absent from his post or, if present, is not giving a warning of danger, is an assurance of safety and an implied invitation to cross upon which a traveler familiar with the crossing may rely and act within reasonable limits, on the presumption that it is safe for him to go on the crossing. The extent to which a traveler may rely on such assurance is a question of fact, and while ordinarily the same degree of care and vigilance is not required of a traveler under such circumstances as otherwise, he has no right to rely exclusively upon such circumstances, nor will such presumption or assurance excuse the traveler from using every reasonable precaution that an ordinarily prudent man would use under like circumstances. Such facts as the absence or presence of a flagman, or that the gates are open, or that the automatic bells are ringing or not ringing, are merely facts to be considered in determining whether the traveler exercises the degree of care required in attempting to cross."

Applying these principles, we must hold that on the facts in evidence there was error in the charge of his Honor on the issue as to contributory negligence. From the evidence of plaintiff, and construing the same in the light most favorable to him—the accepted rule when a nonsuit is ordered or the judge practically determines the issue as a question of law—it appears that plaintiff with his wife and son and two guests in his automobile, at 10:30 p. m., approached the crossing along Church Street; that knowing it was a dangerous crossing, a view of the railroad being obstructed by the positions of buildings along Church Street, he

slowed down "to the lowest speed it could be brought without stopping, and listened attentively for the noise of a train; that he was aware of the regulations about this crossing requiring trains to stop 50 feet before entering on same, and, in the nighttime and in case the train was backing, to send a man forward with a lantern; that he kept a (547) continuous outlook for the signal, and, hearing no train and seeing no man with a light, he did not consider it necessary to come to a complete stop, and in the endeavor to cross the collision occurred. This regulation, by fair interpretation, does not contemplate that in the nighttime the man should go forward with a lantern, give a signal, and then retire. The language of the regulation adopted, with the consent of the railroad, is "that said cars and engine shall remain standing until a man is sent forward to said street, ahead of same, to see that no one is approaching; such man, at night, to *carry a lantern as a signal.* No cars or engines shall be moved across said street until signaled to do so by the man sent ahead as above required"; and the meaning and purpose is that the man with the lantern shall remain upon the crossing with his lighted lantern to afford proper warning that cars are approaching and do what is reasonably required to prevent a collision. On careful perusal of the record, we are of opinion that the issue of contributory negligence must be referred to the decision of the jury on the question whether, on the entire facts and circumstances as the jury may find them to be, the plaintiff was in the exercise of reasonable care at the time in entering on the crossing without having come to a full stop. For the error indicated, the verdict will be set aside and there will be a new trial of all the issues.

Venire de novo.

Cited: Hunt v. R.R., 170 N.C. 444; *Brown v. R.R.*, 171 N.C. 269, 270; *Kimbrough v. Hines*, 180 N. C. 280, 281, 289; *Perry v. R.R.*, 180 N.C. 296, 297; *Parker v. R.R.*, 181 N.C. 105; *Jackson v. R.R.*, 181 N.C. 156; *Williams v. R.R.*, 182 N.C. 274; *Blum v. R.R.*, 187 N.C. 646; *Rigsbee v. R.R.*, 190 N.C. 233; *Barber v. R.R.*, 193 N.C. 694; *Moseley v. R.R.*, 197 N.C. 635; *Eller v. R.R.*, 200 N.C. 531; *Trust Co. v. R.R.*, 209 N.C. 308; *Oldham v. R.R.*, 210 N.C. 643, 644; *Johnson & Sons v. R.R.*, 214 N.C. 487; *Miller v. R.R.*, 220 N.C. 565, 570, 571, 572; *Mfg. Co. v. R.R.*, 233 N.C. 669.

W. C. NELSON v. ATLANTIC COAST LINE RAILROAD COMPANY AND SOUTHERN EXPRESS COMPANY.

(Filed 23 September, 1914.)

Carriers of Goods—Express Companies—Failure to Transport—Trials—Evidence—Negligence.

In an action against an express company for damages arising from the refusal of the defendant to transport a shipment tendered it at a small station where receipts for shipments were not issued, there was evidence tending to show that the railroad and express company had the same local agent, and that the express company received freight for shipment there; the railroad baggage man on the train was also the agent of the express company; the porter on the train usually helped to load express, but refused in this instance, and the shipment was too heavy to be handled by the express messenger alone; the station agent told the plaintiff, before he tendered the shipment, that it could go by express; the express messenger had his attention called to the shipment and requested the porter to assist him in loading it; the consignment thus tendered was beef, and remained at the station until it had spoiled and was worthless. *Held*, (1) a judgment of nonsuit upon the evidence as to the railroad company was properly rendered; (2) it was for the jury to determine, under conflicting evidence, whether the defendant express company through its authorized agents refused to accept the shipment.

(548) APPEAL by defendant from *Bond, J.*, at June Term, 1914, of EDGECOMBE.

This is an action against the Atlantic Coast Line Railroad Company and the Southern Express Company to recover damages for failure to receive and transport certain beef, alleged to be the property of the plaintiff.

The plaintiff testified as follows: "I am the plaintiff. On 7 August last I was living here in Tarboro. I was at that time in the wholesale beef business. About 1 August I received a letter from Mr. Hampton saying he had a couple of cows to sell me, and I told him when he had them ready I would come down and kill them. He wrote me to come, that he had the cattle up. I put them on the platform at the station and they failed to take them on board the train. The night before I took them to the platform I went to see the agent. I had the cattle shut up in his lot and asked him could I ship the beef from there by express, and he said I could; his son would attend to it; that he was going to Rocky Mount; so I killed the beef and the agent's son weighed it and I marked it all right and Mr. Fagan attended to it for me. Mr. Fagan was the agent at Darden. There was one beef going to Greenville and one going to Tarboro.

"When I carried the beef to the depot we put it in the ware- (549) house because it was raining. Mr. Fagan is the agent of the railroad company and express company there.

. . . . . .

"Mr. Fagan's son was at the platform to help put the beef on the train. Just as soon as the train left I went down and asked the agent to give me a receipt for my beef, got the postmaster and another man to see the beef was in good shape and marked all right so I would be safe in getting my money. . . . That is the writing that the agent there gave me. They left the beef right there. The beef was very large and the porter refused to come in and help pull the beef out, and the agent asked him to come in and help. They began to fuss and curse each other. I left the beef there in the agent's hands and he said that he sold the hide. I have forgotten exactly the weight of the beef, but those are the claims that I filed at the time. One claim was for $40.30 and one for $15.90, making $56.20. I think that was a fair valuation for the beef. I was shipping the beef to be paid for after it was delivered. The train passed there the next morning and never touched the beef. The beef was all in bags. It was also properly marked.

. . . . . .

"Mr. Fagan told me I could ship it from Darden. I took it to the station to ship by express. I have shipped four beefs from Darden since. I don't know whether there are books kept there or not. . . . I had never shipped beef from Darden by express before. My principal shipping points were Jamesville and Pinetown. . . . If Mr. Fagan had not told me I could ship it from Darden by express I would have carried the beef to Jamesville.

. . . . . .

"There is only one store at Darden. There is a warehouse there used by both companies and two waiting-rooms, and it is a nice little place."

A witness for the plaintiff, C. B. Fagan, testified as follows: "I live in Darden. On 7 August I was looking after the farm for my father while he was away. Mr. Nelson had seen my father about (550) shipping the beef, and asked me if I would flag the train and see about getting the beef off. I told him my father did not have anything to do with the express, but I would be there and I would flag the train and tell them the beef was there. When the train passed I flagged it and told the baggage-master the beef was there. Captain Wooten did not know anything about it. The express messenger was in the car. I saw him. I told him there was some beef to go; he said 'All right,' and told me to call the porter to help put it on, and he saw the beef. The porter just failed to load the beef. The beef was too heavy for him to

handle and too heavy for me to get out, and I asked him to help me and he did not do it, so I did not drag it out and the porter began to curse. I could not load the beef. The beef was marked and properly wrapped up. I told Mr. Nelson that I would see to its being put on the train. I did not tell him I would help load it. I told him I would flag the train and tell the baggage-master that it was there; but it was my intention to help load it; I was acting for my father, and he looks after the freight. I did not look after the express. Express is sent from there, but the only representative is the express messenger on the train; when any one has any freight to send they just flag the train and help put the express on the train. There has been beef sent from there before, but I don't know how many times. They had never refused to take on any beef from there before. The reason this was not taken was because the porter refused to help me put it on. Mr. Nelson put the beef in the warehouse because it was raining. The beef was not taken the next day. The beef stayed there and decayed. I finally sold the hide for $2.50. I have the money and intended turning it over to whoever it was decided it belonged to; I thought that I would save somebody that much. I have said before that beef had been shipped before from there."

Cross-examination: "Mr. Nelson wanted to ship his beef by express. There had been beef shipped from there before by express. It was always carried out and put in the express car and received by the (551) express messenger. I don't know where he bills his beef from. I only know the messenger had received beef from there before. I told the express messenger that the beef was there, and I also told the porter. The express messenger and the baggage-master are the same. The express messenger was Mr. Edmunson. There is an office there, but no books are kept there. No tickets are sold there, and my father just looks after the freight that is put off there. He does not issue any bills lading. I have never known him to sign any as agent."

Redirect examination: "They have warehouse and a platform at Darden. The train stops there whenever it is flagged. There are two waiting-rooms there, but they do not sell any tickets there. Freight is shipped from there. I did give Mr. Nelson a paper-writing after the train left. It is a statement of the weight of the beef received. I gave him the paper showing that the beef was brought to the station to be shipped, properly marked.

"DARDEN, N. C., 7 August, 1913.

"Received 451 pounds beef and 74 pounds hide from W. C. Nelson, Tarboro, N. C.; 2 sacks, 141 pounds, Greenville, N. C., H. Coben. H. A. Rollings & Co., 310 pounds, Tarboro, N. C.

"(Signed) C. C. FAGAN, *Agt.*

"This is the paper I gave Mr. Nelson. The statement shows that the porter refused to take the beef on the train. I did not notify the express company or have any communication with them about the beef being there. I did not have any orders to send the beef out next day."

There was evidence that the messenger for the express company was also baggage-master for the railroad company, and that the porter usually helped to load express on the car.

The conductor testified, among other things, "The porter usually helps load express at small stations," and the express messenger testified: "I received express at Darden when it was put on the car. The shipper, with the assistance of the porter, puts the express in the car. The porter usually helps."

There was also evidence on the part of the defendants that Darden was a nonagency station and that neither the railroad nor the express company had an agent there, and that C. C. Fagan was (552) not the agent of either company.

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

J. Frank Liles for plaintiff.

F. S. Spruill for defendants.

ALLEN, J. The judgment of nonsuit in favor of the railroad company must be sustained.

The evidence of the plaintiff shows that he intended to ship by express and not as freight, and there is nothing to show any delivery to the railroad company as carrier, or any purpose to make such delivery, and there is no evidence of negligence which would justify holding that company liable as warehouseman.

The evidence against the express company is, in our opinion, sufficient to be submitted to the jury.

The plaintiff testifies without any qualification that there is a warehouse at Darden used by both companies, and that C. C. Fagan is the agent of the railroad company and of the express company. He also testifies that he saw C. C. Fagan before he attempted to make delivery of the beef, and asked him if he could ship the beef from Darden by express, and that Fagan said he could, and it was also in evidence that the beef was delivered in the warehouse for the purpose of shipment, properly wrapped and marked.

This evidence is denied by the defendant, which raises an issue of fact to be determined by the jury, and which the judge could not decide as a matter of law.

If this issue should be determined against the plaintiff, there is another aspect of the case which is proper for the consideration of a jury. It is not denied that Edmunson was the agent of the express company, and it is in evidence that the beef was in the warehouse where it was seen by Edmunson when the train stopped; that Edmunson was told that the beef was for shipment by express and he said "All right," and that the porter would help load it, and that the beef was not actually
(553) delivered upon the car on account of the failure of the porter to help. Edmunson was the agent of the express company and baggage-master for the railroad, and the porter usually helped to load express.

This furnishes some evidence of acceptance of the shipment by the express messenger and that the porter was agent of both companies.

The judgment of nonsuit is therefore affirmed so far as the railroad company is concerned and set aside as to the express company.

Affirmed as to the railroad company.

Reversed as to the express company.

SUSAN B. KEERL AND THOMAS M. NELSON ET AL. V. J. F. HAYES AND THE TOXAWAY COMPANY.

(Filed 23 September, 1914.)

1. Reference, Compulsory—Exceptions to Order—Trial by Jury—Exceptions to Report—Issues Stated.

A compulsory reference is proper in a controversy involving conflicting boundaries of lands, but a party may preserve his right to a trial by jury by objecting and excepting to the order at the time it was made; and where he thereafter aptly excepts to the findings of the referee, and sets forth the issues upon which he desires a jury trial, he will not be held to have waived his rights thereto.

2. Reference, Compulsory—Exceptions—Collateral Agreements—Substitution of Trustee—Waiver—Trial by Jury.

Parties to an action which has been referred under a compulsory order of the court, who except to the order, but agree that it may be signed out of the term and district, do not by such agreement lose their rights to a trial by jury; nor do they lose such right by agreeing to the substitution of another referee, under the terms of the original order, upon the death of the referee therein named.

APPEAL by plaintiff from *Cline, J.*, at April Term, 1914, of TRANSYLVANIA.

This is a motion by the defendant for a jury trial. The court (554) made an order decreeing that the defendants were entitled to a jury trial upon certain issues set out in the record. The plaintiff excepted and appealed.

Smathers & Ward and D. L. English for plaintiffs.

J. H. Merrimon for defendants.

BROWN, J. The only question presented by this appeal is, Did the trial court err in ordering that the defendants be allowed a trial by jury of the issues raised by the defendants' exceptions to the referee's report and the pleadings?

This cause was referred to the Hon. Thomas B. Womack by an order of Neal, J., which contains the following paragraph:

"It was further agreed by all the parties that the order might be signed by the judge out of the district and not in term-time, it being understood that they do not agree to the reference, and all the parties except to the order of reference, waiving only the facts that the order is signed not in term-time and outside of the district."

During the progress of the reference and before the report had been filed, the referee Womack died and an order was made substituting S. J. Erwin "as referee in this action in the place and stead of the said Thomas B. Womack, and is hereby authorized and directed to carry out and execute the order appointing the said Thomas B. Womack as referee in this action."

The reference was completed by Mr. Erwin, who filed his report on 10 September, 1913. Exceptions were filed by the plaintiffs and the defendants, whereupon the court made the following order:

"The plaintiffs in due time filed one exception to the report of the referee, without asking a jury trial thereon. The defendants filed a number of exceptions, asking a jury trial thereon, as will appear by reference thereto.

"The plaintiffs at April Term, 1914, moved for a judgment upon the report of the referee and according thereto, except as to their one exception, which they ask the court to hear and determine.

"The court upon inspection of the original compulsory order (555) of reference to Judge Womack, now deceased, and also of the paper denominated a consent substitution of the name of S. J. Erwin as referee in the place of Judge Womack, was of the opinion, and so held, that the latter paper did not operate to estop the defendants from asking and demanding a jury trial upon such issues as were properly raised by exception taken in due time under the statute and issues

tendered, as provided by law, and it appearing to the court that the defendants had filed their exception and tendered suitable issues in due time, it is now ordered by the court that the case stand for trial before a jury upon such exceptions and such issues as will be found to be properly raised by the defendants' exceptions, and in order that the whole matter might be heard at the same time, continued the hearing of the plaintiffs' exception, and any exceptions of the defendants as are raised for the determination of the court without a trial by a jury, if any, and the plaintiffs excepted to the ruling of the court to the effect that the defendants were entitled to a trial by a jury.

"By consent, both plaintiffs and defendants were given twenty days after the adjournment of this term of court in which to file any additional exceptions to the report of the referee, if they so desired."

It must be admitted that the original order constitutes a compulsory reference. If so, the defendants cannot be said to have waived their constitutional right of trial by jury. *Hockaday v. Lawrence,* 156 N. C., 321.

The matter involved and at issue by the pleadings is one in which compulsory reference is proper, because it involves the conflicting question of boundary. Revisal, sec. 519, subsec. 3.

Such a reference, however, does not deprive the party of his right to have the issues tried by jury, where such right has not been waived or forfeited. *Wilson v. Featherston,* 120 N. C., 446; *Yelverton v. Coley,* 101 N. C., 248.

The defendants in this case, when the order of reference was made, specifically objected, and their exception appears in the order
(556) itself. That such exception saved their rights to a trial by jury, in accordance with our decisions, is well settled.

In *Ogden v. Land Co.,* 146 N. C., 444, *Mr. Justice Walker* says: "The defendants, when the reference was ordered by Judge Justice, entered *a general exception* to the same, in the following words: 'Defendants' counsel except to the above order of reference.' This was held 'sufficient to save the right of the defendants to a trial by jury.' What could an objection to an order of reference mean, unless it was a challenge of the power of the court to take away from the objector the right to a trial by jury?"

It is equally as plain to us that the defendants did not waive their rights to a trial by jury in the order appointing Erwin referee in place of Womack to complete the reference. That was a mere substitution of one person for another, and the consent related solely to the selection of the individual.

This substitute referee is empowered and directed to carry out and execute the order of reference theretofore made. The consent to substitute Erwin for Womack added nothing to and subtracted nothing from the original order of reference. There was no intention, however, upon the part of the defendants to waive their rights under the original order of reference, and their exception to that order has in no view, so far as we can see, been abandoned.

It is contended, however, by the plaintiffs that the defendants have waived their rights to trial by jury since making of the order of reference by not filing their exceptions and pertinent issues, as required by law. We recognize the rule of law that a party may waive and forfeit his rights to a jury trial, which he has preserved by proper exceptions in apt time to a compulsory reference. Such party will be deemed to have abandoned this right by not pointing out at the time when the exceptions were filed the issues upon his exceptions to the report of the referee and by not presenting such issues as he deems necessary to present the controverted facts, which were issuable upon the pleadings. *Ogden v. Lumber Co., supra; Driller Co. v. Worth,* 117 N. C., 515.

It appears in the order of Judge Cline that the defendants in (557) apt time filed a number of exceptions to the report of the referee and asked a jury trial upon the issues raised. The issues, which form a part of the exceptions of the defendant to the referee's report, all being dated 28 March, 1913, are set out in the record. There are twenty-eight in number. It is useless to repeat them in this opinion. They embody findings of fact upon quite a number of questions which have been passed on by the referee. We think his Honor was correct in holding that these issues, duly filed with the exceptions of the defendant to the report of the referee, should be submitted to a jury.

It is difficult to conceive how the defendants could have more completely complied with the decisions of this Court than they have.

In considering the order appealed from in this case, we doubt very much whether it is not a premature appeal, especially as in the order made all parties are given twenty days after the adjournment of the term in which to file additional exceptions to the report of the referee. But inasmuch as the point is not made by the appellee, and as it is evidently desirable to have the questions determined before the case is tried by a jury, we have concluded to pass upon the matters involved in the appeal upon their merits.

The judgment of the Superior Court is

Affirmed.

Cited: Alley v. Rogers, 170 N.C. 540; *Marler v. Golden,* 172 N.C. 825; *Robinson v. Johnson,* 174 N.C. 234; *Baker v. Edwards,* 176 N.C. 232; *Booker v. Highlands,* 198 N.C. 285, 286; *Brown v. Clement Co.,* 217 N.C. 53; *Bartlett v. Hopkins,* 235 N.C. 168.

TOMLINSON & CO. (INC.) v. H. M. MORGAN.

(Filed 23 September, 1914.)

1. Contracts—Vendor and Vendee—Warranty.

An affirmation of a material fact made by the seller of goods at the time of the sale as an inducement thereto, and accepted and relied on by the buyer, will amount to a warranty.

2. Same—Breach—Fertilizer—Damage to Crops.

A loss suffered by a purchaser of fertilizer in diminution of a given crop, when it is clearly attributable to a definite breach of warranty, as to its quality, made by the seller, at the time of sale and which induced the purchaser to buy it, is within the contemplation of the parties, and when the damages to crop by reason of its use are capable of being ascertained with a reasonable degree of certainty, they may be recovered.

3. Same—Tobacco—Evidence.

In this action to recover the purchase price of certain fertilizers sold and delivered, the defendant set up as counterclaim damages arising from a breach of warranty in the contract of sale; and there was evidence tending to show that the plaintiff had represented the fertilizer to be a certain high-grade brand especially adapted to tobacco, for which the defendant desired it; that the defendant used it upon proper soil for the purpose, and had properly planted and cultivated the crop, and there was a marked diminution of the value of the crop owing to lack of manure; and further, when a member of plaintiff's firm was asked to examine the crop, he said he wished to look no further, for he thought the factory had made a mistake in the use of acid for phosphate. *Held,* evidence sufficient to sustain a verdict awarding damages to the crop arising from the breach of plaintiff's warranty of the quality of fertilizer sold.

4. Fertilizers — Damage to Crop — Arbitrary Amount — Interpretation of Statutes.

Rev., sec. 3949, amended by ch. 96, sec. 2, Laws 1911, appearing in Pell's Supplement, p. 239, was enacted as a police regulation to compel manufacturers of fertilizer to keep their goods to the reputed grade, and its provisions do not and were not intended to interfere with the rights and remedies of parties as stipulated and provided for in their personal dealings, so as to fix the damages at an arbitrary amount where the quality of the fertilizer is not as represented, and a recovery is permitted.

APPEAL by plaintiff from *Justice, J.*, at February Term, 1914, (558) of WILSON.

Civil action to recover the contract price of certain fertilizers sold by plaintiff to defendant in 1907 for use on defendant's farm for that year and to foreclose a mortgage on certain personal property to secure the debt.

Defendant, admitting the amount and the execution of mortgage, set up a counterclaim and offered evidence tending to show that the guano in question was sold by plaintiff to defendant in 1907 for use on defendant's tobacco crop for that year, and was so sold to de- (559) fendant as "Dunnington Special," a high-grade fertilizer, specially suited to tobacco and known as "8-3-3 goods"; that defendant used good plants and same were properly put in and worked, and there was a marked diminution of his crop, arising from lack of proper manure; that the guano sold to defendant under said representation was off grade or improperly mixed; that defendant's crop for that year was thereby seriously injured, and that the amount of damage done, attributable to this default, was from $400 to $500, etc.

Omitting the issues as to value of property secured by the mortgage, which are irrelevant to any question presented, the jury rendered verdict on the claim and counterclaim as follows:

1. Is the defendant indebted unto the plaintiff, and if so, in what amount? Answer: "Yes; $274.55." (Answered by the court by consent.)

4. Did the plaintiffs contract to sell to the defendants a fertilizer suitable for the cultivation of tobacco? Answer: "Yes." (Answered by the court by consent.)

5. Was the guano sold by the plaintiff to the defendant suitable for the growth of tobacco? Answer: "No."

6. Did the guano so sold contain the percentage of phosphoric acid and potash as represented? Answer: "No."

7. Was the defendant damaged by the use of said fertilizer, and if so, in what amount? Answer: "$187.50."

There was judgment for plaintiff for amount of debt, less the counterclaim, and plaintiff, having duly excepted, appealed.

H. G. Connor, Jr., and W. A. Finch for plaintiff.

No counsel contra.

HOKE, J. In *Wren v. Morgan,* 148 N. C., pp. 101 and 104, the Court said: "It is accepted law that, to hold a bargainor in a sale responsible for a warranty, it is not necessary that this should be given in express terms, but that an affirmation of a material fact, made by the seller at

the time of the sale and as an inducement thereto and accepted and relied on by the buyer, will amount to a warranty," citing Tiffany (560) on Sales, p. 162; *McKimmon v. McIntosh,* 98 N. C., 89, and *Horton v. Greene,* 66 N. C., 596; and the Court further quoted from the opinion of *Davis, J.,* in *McKimmon v. McIntosh,* as follows: "If the vendor represents an article as possessing a value which, upon proof, it does not possess, he is liable, as on a warranty, express or implied, although he may not have known such an affirmation to be false, if such representation was intended, not as a mere expression of opinion, but the positive assertion of a fact, upon which the purchaser acts; and this is a question for the jury," citing *Thompson v. Tate,* 5 N. C., 97; *Inge v. Bond,* 10 N. C., 101; *Foggart v. Blackweller,* 26 N. C., 238; *Bell v. Jeffrey,* 35 N. C., 356; *Henson v. King,* 48 N. C., 419; *Lewis v. Rountree,* 78 N. C., 323; *Baum v. Stevens,* 24 N. C., 411; and in *Reiger v. Worth,* 130 N. C., 268, it was held that a purchase of rice under the assurance that it was excellent seed rice amounted to a warranty.

Applying the principles sustained by these authorities and others of like import, the verdict of the jury on the fifth issue, taken in connection with the pleading and evidence, establishes a warranty, made by plaintiff, that the guano sold in this instance, known as Dunnington Special, was a high-grade fertilizer, known as 8-3-3 goods and specially suitable for tobacco. There is nothing in the case of *Woodbridge v. Brown,* 149 N. C., 299, that in any way militates against this position. In that case the record shows that the breach of warranty, as a counterclaim, was expressly withdrawn, nor does it appear that there was any assertion of a material fact relied on as an inducement to the sale.

The Court does not understand that plaintiff seriously contends that a warranty has not been established by the verdict, but it is chiefly urged for error that there is no proper evidence tending to show a breach of the warranty, *i. e.,* that the guano sold was off grade, and, second, that, under our decisions, a loss claimed in diminution of the crop is too remote and uncertain to be made the basis for an award of damages.

Undoubtedly, a counterclaim of this character presents such an inviting field for litigation and is so liable to abuse that it should not (561) be entertained unless it is clearly established that there has been a definite breach of the warranty, and satisfactory evidence is offered that the loss claimed is directly attributable to the breach, and the amount can be ascertained with a reasonable degree of certainty. While the Court should always be careful to see that these rules are not transgressed to the injury of a litigant, when the facts in evidence clearly meet the requirements, authority in this State is to the effect

that the loss suffered in diminution of a given crop, when it is clearly attributable to a definite breach of warranty as to the quality of a fertilizer, that it is within the contemplation of the parties and capable of being ascertained with a reasonable degree of certainty, may be made the basis for an award of damages. *Herring v. Armwood,* 130 N. C., 177; *Spencer v. Hamilton,* 113 N. C., 49.

In *Spencer v. Hamilton, supra,* an action to recover rent, the tenant set up by way of counterclaim a breach of contract on the part of the landlord to have certain ditches cleaned out, and by reason of the failure the land was flooded and the crop lessened. Evidence as to the effect such failure had upon the crop and to what extent it was damaged thereby was competent as affording a basis to the jury for the measurement of damages sustained by defendant for the breach of the contract, and further: "That in such case the true measure of damages is not what it would have cost the defendant himself to clear out the ditches, but his loss "by having to work an undrained instead of a drained farm," and the present *Chief Justice,* delivering the opinion, said: "This case is easily distinguishable from *Foard v. R. R.,* 53 N. C., 235; *Ashe v. DeRosset, ibid.,* 240; *Boyle v. Reeder,* 23 N. C., 607, and *Sledge v. Reid,* 73 N. C., 440, and similar cases, in that in those cases the damage was incidental and unforeseen, or merely vague, uncertain, and conjectural. And in this they are immediate, necessary, and reasonably certain, and such as were in contemplation of the parties to the contract"; and in *Herring's case* it was held, directly, that "Damages resulting from failure of a landlord to furnish fertilizer to his tenant are not too remote for consideration."

In the present case there was testimony on the part of defend- (562) ant tending to show that defendant bought the fertilizer of plaintiff for use in his tobacco crop for the year 1907, under a statement and representations that it was a high-grade fertilizer specially suited for tobacco; that it was properly applied on 10 acres of land cultivated by defendant in tobacco and suitable for that purpose; that the plants were good, properly put in and worked, and there was a marked loss in diminution of the crop, owing to lack of manure; and, further, that when a member of plaintiff's firm was asked to examine the condition of the crop, he replied: "That he had seen as much as he wanted to see, and that he thought there must have been a mistake in the factory, putting acid instead of phosphate." These facts concurring, if accepted, bring the case within the principle adverted to and justify the court and jury in upholding the counterclaim of defendant.

In *Carson v. Bunting,* 154 N. C., 530, a case much relied on by defendant, the damages were restricted to the difference between the

actual and contract value, and this on the express ground that the "damages were discovered in time to have procured other fertilizer, and that the purchaser could have obtained the same."

In *Fertilizer Co. v. McLawhorn,* 158 N. C., 274, the principle of the *Carson case* was again applied, and the decision was also in part made to rest on the fact that the claimant as *del credere* agent of the plaintiff had sold the guano in different quantities to various purchasers, and the facts presented were not sufficiently definite and certain to permit the award of damages on the basis of a diminution in the crop; and in *Ober v. Katzenstein,* 160 N. C., 439, it again appeared that the suit was between a dealer in fertilizers and his agent, and *McLawhorn* and *Buntaing's cases* were followed, chiefly for the reason referred to, and in the opinion delivered by the *Chief Justice,* p. 441, it may be well to note that the cases of *Herring v. Armwood, supra,* and *Spencer v. Hamilton, supra,* are recognized as having been correctly decided.

(563) In *Sledge v. Reid,* 73 N. C., 440, the suit was to recover the value of a mule seized by defendant under process and wrongfully converted to his own use. In seeking to recover additional damage for the loss of crop caused by defendant's wrong, recovery was denied on the ground that such a demand, being for consequential damages, was too remote, the facts failing to show but that plaintiff could have had another mule, and thus avoided this specific loss.

It was further contended that, in section 3949 of Revisal, as it now appears in Pell's Supplement, p. 239, being chapter 96, sec. 2, Laws 1911, the Legislature had fixed the damages at an arbitrary amount, as it there appears; but a perusal of the statute will disclose that it was enacted as a police regulation to compel the manufacturers of fertilizers to keep their goods to the reputed grade, and that its provisions do not and were not intended to interfere with the rights and remedies of parties as stipulated and provided for in their private and personal dealings.

On careful consideration of the record, we are of opinion that no reversible error appears, and the judgment on the verdict is affirmed.

No error.

Cited: Guano Co. v. Live-Stock Co., 168 N. C., 451, 452; *Carter v. McGill,* 168 N.C. 510; *Furniture Co. v. Mfg. Co.,* 169 N.C. 44; *Perry v. Kime,* 169 N.C. 541; *Carter v. McGill,* 171 N.C. 775, 776; *Gatlin v. R.R.,* 179 N.C. 435; *Fertilizing Co. v. Thomas,* 181 N.C. 280; *Fertilizer Works v. Simpson,* 183 N.C. 253; *Pearsall v. Eakins,* 194 N.C. 293; *Gulley v. Raynor,* 185 N.C. 98; *Swift & Co. v. Aydlett,* 192 N.C. 335, 342, 345, 347; *Keith v. Gregg,* 210 N.C. 803; *Potter v. Supply Co.,* 230 N.C. 7.

R. S. NEAL v. CAMDEN FERRY COMPANY.

(Filed 23 September, 1914.)

1. Contracts—Interpretation—Technical Words and Expressions—Trials—Evidence—Questions for Jury.

Where words or expressions used in a contract have a known technical meaning with reference to the subject-matter, this meaning may be shown in evidence, by competent witnesses, and when accepted by the jury will control the interpretation of the contract.

2. Same—Bridges—Piling—Approximation.

In an action upon a contract to recover the price for building a bridge, according to the specifications and plans of the defendant's chief engineer, the length and number of the piles were estimated, with the provision that they were an "approximation as nearly as may be forecasted from the plans, profiles, and inspection of the soil, but is not a definite term in this contract." *Held*, it was competent for the plaintiff, who qualified as an expert bridge builder, to testify that in all specifications for bridge building the word approximation is a technical term and has a technical meaning, and an approximate length of pile would mean that it should be within 3 to 5 per cent of the absolute or true length, and that the pilings necessary for the construction of the bridge in accordance with the contract exceeded this discrepancy in their length, upon the question of recovery for the extra material and work accordingly required in their construction.

APPEAL by plaintiff from *Ferguson, J.*, at February Term, (564) 1914, of BEAUFORT.

Civil action to recover an alleged balance due upon a contract to build a bridge for the defendant. The court instructed the jury to find for the plaintiff in sum admitted by the defendant, towit, $284.95. The plaintiff excepted and appealed.

Small, MacLean, Bragaw & Rodman, and Daniel & Warren for plaintiff.

Aydlett & Simpson and Ward & Grimes for defendant.

BROWN, J. The plaintiff testified: "That he entered into a contract with the defendant, for which he was to be paid $10,000 for the construction of a bridge; that John W. Hays of Pittsburg was the chief engineer for the Camden Ferry Company, who made the plans and specifications submitted to contractors upon which to base bids for work, and that Hays finally received and accepted the work; that Hays had his representative, Mr. Greenleaf, directly in charge and supervision of the work, and Hays himself came occasionally and was present when the

bridge was finally accepted. The specifications upon which the bid was made contained the approximate length of each pile in the bridge, and when the work was done the total length of the overrun was 28.4 per cent in excess of the specifications."

The substance of the plaintiff's claim (over and above the sum admitted to be due) is for longer piling than those called for in the defendant's engineer's specifications.

(565) The plaintiff further testified that "A reasonable value for the excess of material used was $606.17, and a reasonable value of additional material and work aggregates a total of $1,125.60, amounting to an excess of 28.4 per cent in lineal feet over the specifications contained in the plans prepared by the engineer for the company as the basis of bids for the work."

The contract and specifications contained this clause: *"The length and number of pile estimated as follows, which is understood to be an approximation as nearly as may be forecasted from the plans, profiles, and inspection of soil, but is not a definite term in this contract."*

The plaintiff offered to prove that in bridge construction the word "approximation" has a technical meaning understood and accepted by civil engineers and contractors in the preparation of contracts and specifications.

The plaintiff qualified as an expert bridge builder and offered to testify that in all specifications for bridge building an approximate length of a pile would mean that it ought to be within 3 to 5 per cent of the absolute or true length. It is insisted that this question should have been submitted to the jury to determine whether or not 28.4 per cent excess in lineal feet over the amount called for in the plans and contract would be approximately the same as those called for in the plans and contract.

We are of opinion his Honor erred in excluding this evidence.

It is well settled that where words or expressions are used in a written contract, which have in particular trades or vocations a known technical meaning, parol evidence is competent to inform the court and jury as to the exact meaning of such expression in that particular trade or vocation, and it is for the jury to hear the evidence and give effect to such expressions as they may find their meaning to be. *Moore v. Eason,* 33 N. C., 569; *Blalock v. Clark,* 137 N. C., 142; *Ward v. Gay,* 137 N. C., 399; *Hutton v. Warren,* 1 M. and W., 466; *Sargent v. Adams,* 63 Am. Dec., 718.

While the construction of a written contract is ordinarily a matter for the court, yet where the language used is doubtful in the sense

(566) that it requires the exposition of experts or explanations by evi-

dence of the usage of trade or other extraneous circumstances, such testimony is admissible and should, under appropriate instructions, be submitted to the jury. *Simpson v. Pegram,* 112 N. C., 544; 1 Greenleaf Ev., 280; Page on Contracts, vol. 2, sec. 1107; McIntosh on Contracts, pp. 492-502.

When words are ambiguous and uncertain in their meaning, they should be given that meaning which all the facts and surrounding circumstances show that the parties intended them to have. *R. R. v. R. R.,* 147 N. C., 368.

We understood it to be admitted that the necessity for the extra long piling was not disputed, and there is abundant evidence to prove that they were furnished with the knowledge and consent of the defendant's engineer.

It follows, therefore, that if the jury should find by a preponderance of the evidence that the word "approximation," when used in such contracts, has the well understood meaning ascribed to it by the plaintiff, he would be entitled to recover for the extra expense and labor incident to furnishing the extra long piling.

New trial.

Cited: Perry v. Surety Co., 190 N.C. 291; *Owens v. Ins. Co.,* 206 N.C. 868.

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

(Filed 23 September, 1914.)

1. Appeal and Error—Defendant's Appeal—Appellee's Costs—Costs—Prosecution Bond—Interpretation of Statutes.

Where the defendant to an action has appealed from an adverse judgment rendered in the Superior Court, resulting in a reversal thereof in the Supreme Court, he is, upon motion made in the Supreme Court, under Revisal, sec. 1251, entitled to a judgment for his costs on appeal against the sureties on plaintiff's undertaking given in the lower court for the prosecution of the action; for under the language of this section and section 450 this undertaking or prosecution bond is required of the plaintiff to secure all costs, whether in the Superior or Supreme Court; and Revisal, sec. 605, requiring the appellant to give an undertaking for the costs on appeal, cannot apply to such instances.

2. Same—Costs Superior Court—Penalty of Bond—Application to Increase.

Where the defendant has been successful on his appeal to the Supreme Court, and his judgment for costs against the sureties on the prosecution

bond of the plaintiff results in making insecure the costs in the Superior Court, the remedy is by application to increase the penalty of the bond.

HOKE and ALLEN, JJ., dissenting.

(567) APPEAL from *George W. Connor, J.*, at May Term, 1914, of BERTIE.

Winston & Matthews for plaintiff.
Murray Allen for defendant.

WALKER, J. This is a motion to tax the sureties on the prosecution bond of the plaintiff with the defendant's costs in this Court, which were awarded in his favor and against the plaintiff upon the granting of a new trial to the defendant, and for judgment against plaintiff and his sureties for the same. The motion was duly docketed and heard at this term. It is based upon section 1251 of the Revisal of 1905, which reads as follows: "Whenever an action shall be brought in any court in which security shall be given for the prosecution thereof, or when any case shall be brought up to a court by an appeal, or otherwise, in which security for the prosecution of the suit shall have been given, and judgment shall be rendered against the plaintiff for the costs of the defendant, the appellate court, upon motion of the defendant, shall also give judgment against the surety for said costs, and execution may issue jointly against the plaintiff and his surety." Defendant contends that the expression, "security for the prosecution of the suit or action," refers to the undertaking given in the court below for the prosecution of the suit and the payment of the costs of defendant recovered in that court; and when there is an appeal, defendant, who succeeds in this Court, is entitled to judgment for his costs against plaintiff and his sureties
(568) upon the same undertaking, or what is sometimes called the prosecution bond, which is intended, if defendant's contention be correct, to secure defendant's costs both in the Superior Court and in this Court, as a part of the costs in the action, the condition of the prosecution bond being this: "That the same shall be void if the plaintiff shall pay the defendant all such costs as the defendant shall recover of him in the action." Revisal, sec. 450. That when there is an appeal, the "action" continues to be such in this Court as much so as if it were pending in the court below, and the bond given below was intended, by its very terms, to cover all the costs of defendant incurred in the action, both those accruing below and here, as they are all "costs in the action." It will be seen that section 1251 refers only to the costs of defendant, and provides, for instance, that if, when an appeal is taken, he is sus-

tained in this Court, judgment shall be entered against plaintiff and his sureties for defendant's costs; but this could not be done, and this provision would not be complied with, if plaintiff's contention is right, that it refers to appeal bonds only, as where defendant appeals and gets a judgment for his costs in this Court, there would be no appeal bond of the plaintiff upon which to enter judgment, and the only bond that would answer to the description of the statute would be his prosecution bond; otherwise, in such a case, this part of the statute would become nugatory. Besides, the plaintiff's contention is fully met by the fact that the Legislature had already given a remedy on appeal bonds by section 605 of the Revisal, which provides: "Undertakings for the prosecution of appeals and on writs of *certiorari* shall make a part of the record sent up to the Supreme Court on which judgment may be entered against the appellant or person prosecuting the writ of *certiorari* and his sureties, in all cases where judgment shall be rendered against the appellant or person prosecuting said writ." Take our case for illustration. Defendant appealed and was awarded a new trial. Section 1251 says that this Court shall give judgment against plaintiff and his sureties for the prosecution of the action; but the latter has no sureties except those on his original prosecution bond given below, as he did not appeal; so (569) that it follows that reference must necessarily be made to his prosecution bond, and we must adjudge the costs of this Court against the parties to that bond, if we would enforce the statute as, we think, it is clearly and positively written. Again: Section 1251 requires this Court to give judgment for defendant's costs against plaintiff and his sureties where a bond "shall have been given," not for the costs of an appeal, but "for the prosecution of the action." These words have a well known meaning in law, and refer only to the prosecution bond. If the defendant appeals, in which case the plaintiff would give no appeal bond, being appellee, and "judgment shall be rendered against the plaintiff for the costs of the defendant," the appellate court is required to give judgment also against plaintiff's sureties for such costs; but there would be no sureties, as we have seen, and we could not comply with this clearly expressed mandate, unless we resort to the prosecution bond, which is the only one described in the section, as it is given "for the prosecution of the suit" and not for the prosecution of an appeal. Replying to the suggestion that section 1251 applies only to cases in which the plaintiff appeals and gives an appeal bond, the words, "security for the prosecution of an action," referring to that kind of bond, it may be said that such a construction would require a radical change in phraseology and would not secure defendant's costs, on his own appeal, if they were adjudged against the plaintiff. We are not authorized to presume that

the Legislature meant what it did not say, and used language which has only one meaning, when it intended that it should have another and very different one. Besides, the section is so broadly worded as to apply to all cases where costs are adjudged for the defendant against the plaintiff, and not simply to those where the plaintiff appeals. The suggested construction would be inconsistent with the language of the section, or, at least, is not warranted by it; and, too, the case where the plaintiff appeals and gives security is fully provided for, as we have seen, by Revisal, sec. 605, so that there is nothing for the suggestion to rest upon.

(570) It is also argued that this section was taken from the Revised Code, ch. 13, sec. 126, and that it originally referred to appeals from justices of the peace, and from the county court to the Superior Court. This may be true, and yet it does not change the conclusion, but rather strengthens it. It will be found by comparing the two sections, that radical changes have been made in section 126 of the Revised Code by section 1251, and there is such a wide departure from its language and meaning as to show that the Legislature was conscious of the abolition of the county courts when it amended the law, and intended so to frame the new section as to make it conform to the present system and procedure, so very different from the former ones. Reading the two sections together, we cannot escape the conviction that the Legislature intended, for reasons deemed sufficient, to change the law so that prosecution bonds given in the Superior Court should be liable for all of the defendant's cost of the action, at any stage, whether incurred below or in this Court. Section 1251 cannot be restricted in its application to appeals from the court of a justice of the peace, for the first sentence of the section would not apply to such a court, as no prosecution bond for costs is given there, but only in the Superior Court, or in this Court if an action is brought here against the State, or perhaps in some other cases not cognizable by a justice of the peace.

An argument *ab inconvenienti* may be urged against our view, but it cannot be permitted to prevail against the plainly expressed intention of the Legislature, or the clear and explicit terms of the law. Black's Interp. of Laws, p. 87. We have, generally, nothing to do with the wisdom or unwisdom, the policy or impolicy of an enactment, but must abide by the will of the lawmaking body. *Ita lex scripta est.* But we must not be understood as admitting that there will be any inconvenience flowing from our construction which is not likely to occur in the case of other statutes where no doubt is entertained as to their meaning. If it should appear that the costs of this Court will probably exhaust the prosecution bond, and leave those of the court below unsecured, there is ample remedy to avoid the supposed unjust result by application to

increase the penalty of the bond—a not unusual procedure in (571) the courts. *Jones v. Cox,* 46 N. C., 373; *Adams v. Reeves,* 76 N. C., 412; *Vaughan v. Vincent,* 88 N. C., 116; *Rollins v. Henry,* 77 N. C., 467. The Legislature has recently amended Revisal, sec. 1251, by requiring the costs to be taxed here against the plaintiff, without any motion by defendant, making it mandatory upon us to act in the first instance. Public Laws 1913, ch. 189. Having this section under its direct supervision with a view to its amendment, it cannot be supposed that the Legislature was inadvertent to the fact that the county courts had ceased to exist, and therefore, if our construction of it is not correct, that it needed further revision to conform it with existing methods of practice and procedure, and our changed system of courts. It had altered the language of the corresponding section of the Revised Code radically and fundamentally, indicating clearly a purpose to effect a material change in procedure, and it used the words "security for the prosecution of the action," which had at the time a well defined meaning, and also the words "appellate court," which in view of the context could mean only this Court. Where a statute is reënacted literally or substantially, words or phrases used in the former which have received a settled construction should be interpreted accordingly in ascertaining the meaning of the later enactment. Black's Interp. of Laws, 159 *et seq.* The words "security for the prosecution of the action," in chapter 13, sec. 126 of the Revised Code, undeniably meant the prosecution bond, and, under the rule, should now have the same meaning. If the prosecution bond was not intended, the inaptness of the phraseology would hardly have escaped attention.

The motion is allowed, and the costs will be taxed accordingly.

Motion allowed.

HOKE and ALLEN, JJ., dissent.

Cited: Grimes v. Andrews, 171 N.C. 368.

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(572)

M. A. JAMES v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 October, 1914.)

1. Railroads—Animals—Negligence — Statutory Presumptions — Geese — Common Law—Trials—Burden of Proof.

No presumption of negligence against a railroad company is raised by the mere fact of killing fowls, etc., upon its track in the operation of its trains. Revisal, sec. 2645, makes it *prima facie* evidence of negligence in

respect only to "cattle and other live stock," which does not include "geese" or other fowl within its terms.

2. Railroads—"Geese"—Judicial Notice—Negligence—Signals — Trials — Evidence—Nonsuit.

From the phlegmatic disposition of geese, the blowing of the whistle or ringing of the bell is not calculated to make them run or fly to leave the track, as turkeys, a nervous fowl, would do; hence, in an action to recover damages against a railroad company for the killing of geese upon its track by its train, it is not sufficient to submit to the jury, upon the question of defendant's negligence, evidence merely that the geese were killed upon the track by the defendant's train, and that its employees did not sound the whistle or ring the bell of the locomotive. *Lewis v. R. R.*, 163 N. C., 33, cited and distinguished.

HOKE and ALLEN, JJ., dissenting.

APPEAL by defendant from *Daniels, J.*, August Term, 1914, of PITT.

Julius Brown for plaintiff.

Harry Skinner and L. G. Cooper for defendant.

CLARK, C. J. This is an action tried in the Superior Court on appeal from a justice of the peace for the negligent killing of nine geese —four at one time and five at another. On one occasion the geese were in the field by the railroad, and after the train passed the plaintiff found four geese killed. On another occasion the geese were near the railroad track, and after the train passed five were found killed. The point where these geese were killed was at a slight curve in the track about 100 yards from a farm crossing. No witness saw the geese when they were killed, on either occasion.

(573) There was no presumption of negligence. Revisal, 2645, provides: "When any cattle or other live stock shall be killed or injured by the engines or cars running upon any railroad, it shall be *prima facie* evidence of negligence on the part of the company in any action for damages," if the action is brought within six months. This expression, "any cattle or other live stock," cannot be construed as applicable to geese or other fowls.

There was no evidence of negligence unless it can be drawn from the testimony of the plaintiff that the whistle was not blown and that the bell was not rung. It is probable from above evidence that the geese stepped on the track so close to the engine that the engineer could not have avoided killing them, and the burden was upon the plaintiff to show that he could have prevented it with proper care. The mere fact that the whistle was not sounded nor the bell rung, if such was the fact,

is not sufficient evidence, taken alone, to have gone to the jury in this case.

The plaintiff relies upon the "turkey case," *Lewis v. R. R.*, 163 N. C., 33. But the two cases are very dissimilar. In that case the evidence was that the turkeys could have been seen at a distance of 500 yards; there was quite a drove of them, and they were crossing the track. The turkey is a nervous fowl, and the jury might well have found that if the whistle had been blown the turkeys would have taken wing or have run, and therefore we held that it was error to enter a nonsuit.

Geese, however, are phlegmatic and slow of movement, and the blowing of the whistle or ringing the bell would not be calculated to make them run or fly. On the contrary, the approach of the train would be more likely to cause them to huddle up in conference or to stretch out their necks to oppose the passage of the engine. In the absence of evidence showing circumstances of actual negligence, the mere fact that the whistle was not blown or the bell rung did not authorize the court to submit the case to the jury. In this case there is testimony that the geese could have been seen 300 yards, but there is no evidence that when the engine was that distance the geese were on the track, but rather that they were in the field or outside the track.

Certainly the court should have given the instruction asked by (574) the defendant: "The burden of proof is upon the plaintiff to satisfy you by the greater weight of the evidence that defendant's engineer failed to sound any alarm or whistle upon the approach to the place where the geese were killed; and you must further find that the engineer could have seen these geese by keeping a reasonable lookout, and that the failure to sound the whistle or alarm was the proximate cause of the damage—that is, if the alarms had been sounded the damage would have been avoided; and unless you so find the facts, you should answer the first issue 'No.'"

We find in the excellent brief of defendant's counsel that this point has been before the Court in another State. In *R. R. v. Davis*, 78 S. W., 1050 (Tenn.), it was held that "a goose is not an animal obstruction within the application of the statute requiring the alarm whistle to be sounded and the brakes to be set to prevent an accident when an animal obstruction appears on the track." Cited 33 Cyc., 1164.

"In the absence of recklessness or common-law negligence, the railroad company is not liable for the killing of geese permitted to run at large while trespassing on the railroad track." *R. R. v. Davis, supra.*

The court charged that, "It was the duty of the engineer to keep a reasonable lookout, and if he saw these geese on the track, or approaching the track, or negotiating any such movements as if they were likely

to go upon the track, then it was his duty to give some signal." There was no evidence of such state of facts. For all that appears, the geese waddled on the track just ahead of the engine. But if it were shown that they were on the track when the engine was 300 yards off, yet from the nature of the fowl is there any reason to assume that if the signal had been given they would have gotten off the track in time? They have too much dignity or are too combative to flee promptly from danger. Besides, as Mr. Cooper well observed in his argument, "Can the engineer determine what are the negotiations of a flock of geese in a field, or even on the track, when they put their heads together?"

(575) The difference between the characteristics of a turkey and of a goose is a matter of common knowledge. The turkey is long-legged, quick of movement, and promptly responsive to a signal of danger. The goose is short-legged, slow to fly or run, and resentful rather than appreciative of a warning of danger. Though of equal intelligence, probably, with most other fowl, this has made its name a synonym for stupidity. While a turkey on the track would be likely to save itself by flight if the whistle were sounded in time, geese would be likely to put their heads together, or at most waddle down the track away from the noise. In the absence of proof of recklessness or wantonness, the defendant was not liable. *R. R. v. Davis, supra.*

In *Moore v. Electric Co.,* 136 N. C., 554, the Court held that notice should be taken of the characteristics of a dog, and it was not required that motormen in charge of these cars should exercise the same degree of care to avoid running over a dog that the law requires of them to avoid injury to other animals. The Court in that case said that dogs "are known ordinarily to be able to take care of themselves amidst the dangers incident to their surroundings. Where a horse or a cow or a hog or any of the lower animals would be killed or injured by dangerous agencies a dog would extricate himself with safety." The quick intelligence of the dog and the stupidity of the goose are alike natural evidence, known of all men.

We would not be understood as holding that a railroad company would not be responsible for killing geese, if negligence was shown, but we do not think that there is evidence of negligence when nothing appears except the fact that the geese were killed by a passing train and no whistle or other alarm was sounded. As to "cattle or live stock," the statute raises a *prima facie* case of negligence from the fact of killing. In the turkey case the long distance at which the flock of turkeys could be seen and the nervous and alert character of that fowl was evidence sufficient to forbid a nonsuit and to require that the case should be left to the jury on the issue of negligence.

Certainly as to automobiles and other private conveyances there would be less evidence of negligence required than as to a railroad train carrying passengers and mail, or even freight for the public. The (576) latter are not required to stop except under such circumstances as make it negligence not to do so. The former go slower, and can stop more readily or swerve from the track to avoid killing geese or chickens. But even they may chance to kill when guilty of no negligence and hence without liability.

We are cited to the classic legend in Livy (Book V, ch. 47) when Rome was saved by the cackling of the geese on the Capitol. A great painter has memorialized the scene. This, however, was not due to the alertness of these birds to flee danger, but to their well known wakefulness at night. If the Gauls had blown their trumpets, the geese, instead of promptly getting out of the way, would simply have raised more clamor and hissed the warriors on both sides.

There was not sufficient evidence of negligence to submit the case to the jury, and the nonsuit should have been granted.

Error.

HOKE and ALLEN, JJ., dissent.

Cited: Enloe v. R.R., 179 N.C. 85; *Addison v. R.R.*, 190 N.C. 849.

L. D. McKINNEY v. TROY B. MATTHEWS.

(Filed 7 October, 1914.)

1. Contracts, Written—Timber—Words and Phrases—Lumber—Log Measurement—Expert Evidence—Instructions.

Lumber is the manufactured product of logs, and where the defendant has entered into a contract with the plaintiff to purchase the timber on his lands, and pay therefor at a certain price per thousand feet of lumber, it is error for the trial judge to charge the jury that the measure of plaintiff's recovery was at the stated price "log measure, including the sawdust that was cut out by the saws and the slabs"; and the instruction is further held erroneous in ignoring testimony in this case of the custom and the standard ordinarily prevailing for ascertaining the measurement of the timber sold. *Hardison v. Lumber Co.*, 136 N. C., 174, cited and applied.

2. Contracts, Written—Executory Contracts—Subsequent Modification—Parol Evidence—Trials—Instructions.

While a written executory contract is still in the course of performance, it may be modified by parol evidence as to subsequent obligations mutually

imposed by the parties, and such is not objectionable as varying the writing; and the waiver of any legal rights under the written contract is sufficient consideration to support the promises resting in parol. Hence, where under the written contract sued on the defendant bought the timber on plaintiff's land to be paid for at a certain price per thousand feet of lumber, and the evidence is conflicting upon the question of the quantity of lumber the defendant had received, it is competent for defendant to show that it was agreed by parol, subsequent to the execution of the writing, and relating to transactions since occurring, that the "tallies" or account kept by the defendant's vendee should control.

3. Contracts, Written—Parol Evidence — Explanation — Trials — Instructions.

Where the number of feet of lumber sold by the plaintiff to defendant is controverted in an action to recover the purchase price, and the defendant had not kept an account thereof, it is error for the trial judge to charge the jury that this was a circumstance they could consider in plaintiff's favor, and exclude from their consideration the defendant's testimony, in explanation, that subsequent to the written contract sued on the parties had mutually agreed by parol to take the tallies of the defendant's vendee, which were introduced in evidence.

(577) APPEAL from *Peebles, J.*, at February Term, 1914, of HARNETT.

This is an action to recover money alleged to be due on a contract for cutting certain timber by the defendant on the plaintiff's land, and the controversy is as to the quantity of timber cut.

The case on appeal states that the plaintiff alleged in his complaint that the "plaintiff entered into a contract with the defendant to sell to the defendant the timber upon certain of the plaintiff's land, at the price of $2 per thousand feet of lumber." And this was admitted by defendant's answer. The plaintiff offered evidence that tended to show that from a measurement of the stumps, laps and trees after the
(578) cutting, and counting the number of logs taken that the defendant cut and removed from plaintiff's land 464,088 feet of lumber, and that the defendant had not paid him for but 328,731 feet, and that the said measurement was based upon a generally recognized rule of measuring lumber by what is known as "log measure."

The defendant offered evidence that tended to show that after the making of the original contract (which was in writing) between the plaintiff and the defendant, that it was agreed between them that they should settle for the timber in accordance with the lumber tallies of the concern to whom he shipped the lumber, and the defendant testified that the twenty tallies which were introduced by him, which aggregated 328,731 feet, were the bills or tallies which he and plaintiff had agreed to settle by, and defendant testified that actual measure of the lumber

would be more than "log measure," and the plaintiff denied this agreement, and upon this point his Honor charged the jury as follows:

"This contract set up in the complaint and admitted in the answer sold the trees at $2 a thousand. After that contract was made, the defendant says that the plaintiff agreed to take the invoices, the countersales of the lumbermen to whom he sold the lumber. That was made after the other contract was made, and there is no consideration moving for it, and the plaintiff is entitled to recover $2 a thousand, log measure, including the sawdust that was cut out by the saws and the slabs—the outside that you cut off in order to make a sill." To which charge the defendant excepted.

His Honor charged the jury in part as follows:

"Now, it was the duty of the defendant when he bought that timber by the thousand to have had the timber measured when every stick of that timber was brought to his mill; it was his duty to have it measured and make a memoranda of it, because Mr. McKinney, the plaintiff, had intrusted him with keeping an account of it. He admitted that he did not do that; but he says he shipped the timber to a firm in Raleigh, that the returns of that firm showed that he shipped them 328,731 feet. Some of it, he said, was planed; he admits that he kept no account of the logs; did not measure any of them, and he put on two or (579) three men that said they went there and estimated it, and they estimated it, by just walking through and not counting the trees nor measuring any of them, at 250,000 feet. The plaintiff puts on two men who went there with him and measured the stumps and then to the lap where it was cut off and took as near as they could an average of the trees, and then averaged it, and there were 1,464 trees, and that the trees averaged 317 feet to the tree.

"It is for you to say which is the more accurate way of measuring timber, which is the most reliable, to go there and measure the stumps or to go and walk through the woods and not count the trees or measure them." To the foregoing charge the defendant excepts.

"When you go to consider the testimony of the defendant, you have a right to consider for what it is worth the fact that he did not keep an accurate account of this lumber." To the foregoing charge the defendant excepts.

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

E. F. Young for plaintiff.

Charles Ross for defendant.

ALLEN, J. The contract of the plaintiff is to sell the timber on certain land, to be paid for at the rate of $2 per thousand feet of *lumber,* and the evidence of the plaintiff is directed to proof of the quantity of *lumber* cut.

There is a well marked distinction between the terms "timber" and "lumber." "The word 'timber' has an enlarged or restricted sense, according to the connection in which it is employed. It may refer to standing trees or to stems or trunks of trees cut and shaped for use in the erection of buildings or other structures, and not manufactured into lumber within the ordinary meaning of the word 'lumber.' It does not ordinarily refer to the articles manufactured therefrom, such as shingles, laths, fence rails, or railroad ties. Lumber is timber sawed or (580) split for use in building, that is, the manufactured product of logs." 25 Cyc., 1545. "Slabs are not included within a statute giving a lien on the 'lumber and timber' for services in cutting logs." *Engi v. Hardell,* 123 Wis., 407.

It follows, therefore, as the purchase price is determined under the contract by the measurement of the lumber cut, the manufactured article, it was error to charge the jury that the plaintiff was entitled to recover for the whole log, including the sawdust cut out by the saws and the slabs.

If, however, the parties had not agreed that the purchase price should be determined by the measurement of lumber, the instruction would still be erroneous, as it was competent to prove the custom and the standard ordinarily prevailing under such contracts, and that this was not in accordance with the contention of the plaintiff. 25 Cyc., 1560; *Hardison v. Lumber Co.,* 136 N. C., 174.

It was also erroneous to instruct the jury that there was no consideration for the agreement between the defendant and the plaintiff, made subsequent to the original contract, to take the invoices of the sales of the lumber as the means of determining the quantity of lumber cut.

The evidence of this agreement is not objectionable as varying a written contract by parol, as the agreement testified to was subsequent to the original contract. *Harris v. Murphy,* 119 N. C., 34; *Freeman v. Bell,* 150 N. C., 148.

In the last case cited the Court says: "It is well settled that the rule that parol evidence will not be admitted to contradict or modify a written contract does not apply where the modification takes place after the execution of the contract," citing *Adams v. Battle,* 125 N. C., 153; *Harris v. Murphey,* 119 N. C., 34. Nor is the agreement without consideration to support it. *Adams v. Battle,* 125 N. C., 158; *Lipschultz v. Weatherly,* 140 N. C., 368; *Institute v. Mebane,* 165 N. C., 650.

In the last of these cases it was held that a valuable consideration 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, and that a waiver of any legal (581) right at the request of any party is a sufficient consideration for a promise, and in the *Lipschultz case* it is said by the Court: "It is well settled that a contract may be discharged by an express agreement that it shall no longer bind either party. This is usually and correctly termed a rescission. It is equally well settled that such an agreement to operate as a discharge must be supported by a valuable consideration, which may be either a payment in money, something of value, or by a release of mutual obligations arising out of the contract. In *Brown v. Lumber Co.*, 117 N. C., 287, it is said: 'When the contract is wholly executory, a mere agreement between the parties that it shall no longer bind them is valid, for the discharge of each by the other from his liabilities under the contract is a sufficient consideration for the promise of the other to forego his rights. . . . If a contract has been executed on one side, an agreement that it shall no longer be binding, without more, is void for want of a consideration. Clark on Contracts, 418. Of the several methods by which a contract may be discharged, one is by substitution of a new contract, the terms of which differ from the original. In such cases release of the obligations of the old and the substitution of new obligations constitute valuable considerations.' 'It is also now well settled that ordinarily a written contract, before breach, may be varied by a subsequent oral agreement, made on a sufficient consideration, as to the terms of it which are to be observed in the future. Such a subsequent oral agreement may enlarge the time of performance, or may vary other terms of the contract, or may waive and discharge it altogether.' *Hastings v. Lovejoy*, 140 Mass., 261. In *McCreery v. Levy*, 119 N. Y., *Andrews, J.*, says: 'The agreement annulling the prior contracts is supported by an adequate consideration. The new obligation which G. assumed under the contract of 25 October, 1882, was alone a sufficient consideration. There was a consideration also in the mutual agreement of the parties to the prior contract which was still executory, although in the course of performance, to discharge each other from reciprocal obligations thereunder and to substitute a new and different agreement in place thereof.'"

The mutual agreement and promise of the parties to settle by (582) the lumber tallies of the house to which the lumber was shipped, the mutual surrender of rights under the original contract, and a waiver of the right to keep accurate accounts of the timber cut and of the lumber shipped furnish a sufficient consideration under these authorities. In

Porter v. Bridgers, 132 N. C., 93, evidence of an agreement of the same character as that introduced in this case was received and acted upon, and while the fact is not clearly stated, the agreement relied on must have been subsequent to the original contract as it was made between the plaintiff, a party to the original contract, and the defendant, who was not a party to, but an assignee of, the original contract.

The evidence of the agreement was competent for another purpose, although not supported by a valuable consideration, and that is as explanatory of the failure of the defendant to keep accurate accounts as the timber was cut, and its effect for this purpose was destroyed by the charge.

If, as his Honor charged, it was competent for the jury to consider the failure of the defendant to keep accounts of the timber cut as a circumstance against him, surely it was competent for him to say that he did not keep the accounts because it was unnecessary to do so under his agreement with the plaintiff to settle by the tallies.

For the errors pointed out a new trial is ordered.

New trial.

Cited: Brown v. Mitchell, 168 N.C. 313; *Sumner v. Lumber Co.,* 175 N.C. 657; *Mfg. Co. v. McPhail,* 181 N.C. 208; *Fertilizer Co. v. Eason,* 194 N.C. 247; *Roebuck v. Carson,* 196 N.C. 674; *Grubb v. Motor Co.,* 209 N.C. 91; *Ins. Co. v. Morehead,* 209 N.C. 176; *Pack v. Katzin,* 215 N.C. 235; *Whitehurst v. FCX Fruit & Vegetable Service,* 224 N.C. 636.

PASQUOTANK AND NORTH RIVER STEAMBOAT COMPANY v. EASTERN CAROLINA TRANSPORTATION COMPANY.

(Filed 7 October, 1914.)

1. Contracts—Subject-matter—Specific Property—Accidentally Destroyed—Obligation of Party.

Where the parties contract with reference to specific property, and the obligations assumed clearly contemplate its continued existence, if the property is accidentally lost or destroyed by fire or otherwise, rendering performance impossible, the parties are relieved from further obligations concerning it.

2. Same—Services Rendered—Severable Contract—Liability.

Where from the nature of the contract made with reference to specific property the obligations of the parties to each other cease thereunder upon the destruction thereof, and the contract is severable, and substantial

benefit has been received under it and enjoyed by one of the parties, this must be accounted for according to the rates fixed by the contract when the work done or services rendered are therein specified to be done or paid for by installments or at stated periods; and where a steamboat is chartered for a certain trip every Sunday, and the contract specified that the lessee is to pay therefor a certain sum each Sunday, payable each month, on certain days, with provision that no payment should be made when weather conditions, etc., would not permit the making of the trip, the contract is severable, and the lessee of the boat is liable for such trips that have been made and not paid for by him, upon the destruction of the boat by an unavoidable circumstance not attributable to the lessor.

3. Same — Pleadings — Counterclaim — Possession — Trials — Burden of Proof.

The principle upon which a party to a contract with reference to specific property may be relieved from his obligations thereunder when the property has accidentally been destroyed, is in recognition of the general rule that business contracts are imperative in their nature, and where the other party to the contract insists that he has been wronged by the failure of performance, the position should be made available by counterclaim in the former's action to recover for services actually rendered, and where the property destroyed was in the possession of the plaintiff at the time, the burden is on him to show that he was in the exercise of proper care.

APPEAL by plaintiff from *Ferguson, J.*, at Spring Term, 1914, (583) of PASQUOTANK.

Civil action, tried on appeal from justice's court, in Superior Court.

It appeared in evidence that plaintiff had entered into a contract with defendant, in part as follows:

"Witnesseth, that whereas the said party of the first part is the owner of the steamship 'Virginia,' fully manned and equipped for carrying passengers and freight; and whereas the party of the second part is desirous of chartering said steamship for its use on certain (584) Sundays only, in carrying passengers and freight from Elizabeth City, North Carolina, to Nags Head, North Carolina, and return to Elizabeth City, North Carolina:

"Now, therefore, it is agreed by and between the parties hereto, in consideration of one dollar and other good and sufficient consideration not herein mentioned, in hand paid, and moving from each to the other of them, as follows, towit:

"(1) That the said party of the first part hereby leases and charters to the said party of the second part the said steamship 'Virginia,' fully manned and equipped, for each Sunday during the period or term beginning Sunday, 23 June, 1912, and ending Sunday, 29 September, 1912, both Sundays inclusive; and the said party of the second part is to pay

to the said party of the first part for the use of said steamship on said Sundays the sum of $80 per Sunday, payable on the 1st and 15th of each month and after said steamship has been so used by said party of the second part during said term."

And further:

"(7) It is further understood and agreed by and between the parties hereto that if on any of said Sundays the weather should be so bad that said steamship could not safely make said trip and land its passengers at Nags Head, then said steamship shall not make said trip on said day, and the said party of the second part will not be required to pay for said day the $80 above herein mentioned."

The evidence showed that pursuant to this contract the steamer was supplied for the purpose indicated until 4 August, 1912, when it was totally destroyed by fire. It was admitted that plaintiff had been paid for all the trips made to that time except those of 21 July and 28 July, and for the same no payment had been made.

Defendant resisted recovery, claiming, first, that the contract was entire and plaintiff had no right of action without showing full performance for the whole period of time covered by the contract.

(585) Defendant further set up a counterclaim against plaintiff by reason of failure to perform on its part.

At the close of the testimony a motion to nonsuit plaintiff's demand was allowed, and defendant, having then withdrawn his counterclaim, a judgment of nonsuit was duly entered, and plaintiff excepted and appealed.

Ehringhaus & Small for plaintiff.

J. Kenyon Wilson for defendant.

HOKE, J., after stating the case: Where parties contract with reference to specific property and the obligations assumed clearly contemplate its continued existence, if the property is accidentally lost or destroyed by fire or otherwise, rendering performance impossible, the parties are relieved from further obligations concerning it.

As to the executory features of such an agreement, the destruction of the property, without fault, will amount to a discharge of the contract. 3 Page on Contracts, sec. 1730; Clark on Contracts (2 Ed.), p. 475. Under the circumstances as stated and in reference to the adjustment of rights and liabilities of the parties by reason of stipulations already performed, if the contract in express terms or from its nature is entire and indivisible, requiring full performance before anything is due, then no recovery can be had; but if the contract is severable, and substantial

benefit has been received under it and enjoyed by one of the parties, this must ordinarily be accounted for, either according to the rates fixed by the contract or under a *quantum meruit,* as the case may be; and if under the terms of the contract the work done or the services rendered are to be paid for by installments or at stated periods, these installments or payments being fixed with regard to the value of the work done or as specified portions are performed, in that event, if the property is destroyed, the claimant may recover for the installments due or for the portion of the work done as for an amount already earned.

These general principles are in accordance with decided cases here and in other jurisdictions. *Keel v. Construction Co.,* 143 N. C., pp. 429-432; *Tussey v. Owen,* 139 N. C., 457; *Coal Co. v. Ice Co.,* (586) 134 N. C., 574; *Lawing v. Rintels,* 97 N. C., 350; *Chamblee v. Baker,* 95 N. C., 98; *Gorman v. Bellamy,* 82 N. C., 496; *Brewer v. Tysor,* 50 N. C., 173; *Viterbo v. Friedlander,* 120 U. S., 707; *McCaslin v. Mfg. Co.,* 155 Ind., 298; *Dexter v. Norton,* 47 N. Y., 62; *Wells v. Colnan,* 107 Mass., 514; *Stewart v. Stone,* 127 N. Y., 500; and the two cases of *Lawing v. Rintels, supra,* and *Keel v. Construction Co.,* very well illustrate the different positions as applied to the facts of the present appeal. In *Lawing's case* a contract to construct certain buildings as a whole was held to be entire, and, on accidental destruction of buildings before completion, it was held that the contractor could not recover any portion of the price. In the later case of *Keel v. Construction Co.* the contract was to construct a building, the payment to be by certain installments, due as specified portions of the structure were completed; the apportionment having evident reference to the portion of the work done, and in the opinion the general principles applicable were stated as follows:

"When one contracts with the owner of a lot to furnish all the materials and build and construct a house thereon for a certain price, the contract being entire and indivisible, if the structure, before completion, is destroyed by fire, without fault on the part of the owner, and the contractor, being given the opportunity, refuses to proceed further: in such case he is liable to refund any money which may have been paid him on the contract, and also for damages for its nonperformance. *Brewer v. Tysor,* 48 N. C., 181; *Lawing v. Rintels,* 97 N. C., 350; Beach's Modern Law of Contracts, sec. 232, citing *Tompkins v. Dudley,* 25 N. Y., 272."

And this principle will not be affected by the fact that the money is to be paid by installments, if the price is entire for a completed building and these installments are arbitrary and fixed without any regard to the value of any distinctive portion of the work. *School Trustees v. Barrett,* 27 N. J. Law.

But if the contract is divisible and severable—if the price is not entire for a completed building, but is payable by installments, these (587) installments being fixed with regard to the value of the work done, or as certain portions of same are finished: in that event, if the structure be destroyed by inevitable accident, "the builder is entitled to recover for the installments which have been fully earned." But it seems that he has no claim for a proportional part of the next installment which has been only partially earned. *Brewer v. Tysor,* 50 N. C., 173; Beach Modern Law, citing *Richardson v. Shaw,* 1 Mo. Ap., 234.

In this well considered case, *Laws, J.,* delivering the opinion, says: "The true principle which controls such a case as this is clearly stated in Addison on Contracts, 452: 'If the contract price of the building is to be paid by installments on the completion of certain specified portions of the work, each installment becomes a debt due to the builder as the particular portion specified is completed; and if the house is destroyed by accident, the employer would be bound to pay the installment then due, but would not be responsible for any intermediate work and labor and materials.'" And such is in effect the case presented here, the contract showing that plaintiff was to be paid "$80 per Sunday, payable on the 1st and 15th of each month after such steamship has been so used by said party of the second part during said term"; and in further support of the position that the price per Sunday was to be regarded as a severable item, it is provided further in the contract that in case the weather was such as to prevent the trip on any given Sunday, the stipulated price for such day was not to be required.

On the facts in evidence, therefore, the plaintiff, in any aspect of the case, had a definite claim for $160, earned under the provisions of the contract, which entitled him to bring suit; and if defendant desires to insist that it has been wronged by plaintiff's failure to perform further, the position should be made available by counterclaim, the course suggested and approved in some of the authorities cited. See *Coal Co. v. Ice Co.,* 134 N. C., at page 579; *Chamblee v. Baker, supra; Gorman v. Bellamy, supra.*

In reference to this counterclaim of defendant, it may be well to note that the obligations of an ordinary business contract are impera- (588) tive in their nature. This principle, which relieves a party to such a contract by reason of the destruction of the property with which it deals, is sometimes treated as an exception; the general rule being the other way. 9 Cyc., pp. 627-628-629.

Before a party can avail himself of such a position, he is required to show that the property was destroyed, and without fault on his part. For this reason, and further because, by the terms of the present con-

tract, the care and custody of the property was left with plaintiff, if it is established that plaintiff has failed to further perform the executory features of this agreement, the burden would be on plaintiff to show that the steamer was destroyed by fire and that the plaintiff and its agents were in the exercise of proper care at the time.

For the reasons heretofore given, the judgment of nonsuit must be set aside and a new trial had.

New trial.

Cited: Warren v. Dail, 170 N.C. 411; *Stagg v. Land Co.,* 171 N.C. 597; *Ball v. McCormack,* 172 N.C. 681; *Burch v. Bush,* 181 N.C. 128; *Highway Com. v. Rand,* 195 N.C. 804.

UNITED LUMBER COMPANY v. H. B. PEARCE.

(Filed 7 October, 1914.)

1. Tax Deeds—Recitations—Interpretation—"Color" of Title.

It is unnecessary that a tax deed to lands made by the sheriff should recite in specific words that the lands were sold for taxes to constitute color of title for the purchaser in possession, when it is perfectly apparent from its context and easily inferred from language used that the lands were thus sold; and it is held to be sufficient that the deed describes the lands, recites the date of sale, that it had not been redeemed, and that the holder of the certificate of purchase has complied with the laws of the State necessary to entitle him to a deed for the lands.

2. Tax Deeds—Descriptions—Identification—Parol Evidence.

A sheriff's deed to land sold for taxes recites: "The following described real estate was sold, towit, a tract of 166 acres of land lying in S. Township, adjoining J. W. V., deceased, J. R., and others, being a part of the lands belonging to the estate of W. J. B., deceased." *Held,* the description was sufficiently definite to admit of parol evidence of identification of the lands; and further, it was also competent to show by parol whether J. J. B. and W. J. B. are identical.

3. Equity—Cloud Upon Title—Tax Deeds—"Color" of Title—Payment of Taxes—Burden of Proof.

In an action brought to remove a tax deed as a cloud upon title to lands, the defendant as purchaser under such deed being in possession, it is necessary for the plaintiff to prove that the taxes upon the land for which it had been sold had been paid by him, as well as his own paper title.

(589) APPEAL by defendant from *Peebles, J.*, at February Term, 1914, of JOHNSTON.

This is a civil action brought to declare a certain deed hereinafter set out void and as a cloud upon the plaintiff's title. Upon motion of the plaintiff, his Honor, upon the allegations contained in the pleadings, adjudged "that said sheriff's deed is void, but that it constitutes a cloud upon the plaintiff's title, and to this end this judgment is ordered to be recorded in the registry of Johnston County as a cancellation of said sheriff's deed." The deed referred to is as follows:

NORTH CAROLINA—JOHNSTON COUNTY.

Whereas, at a sale of real estate made in the county aforesaid, on 5 May, 1902, the following described real estate was sold, to-wit: A tract of 166 acres of land lying in Selma Township, adjoining the lands of J. W. Vick (deceased), Jackson Raines, and others, being part of the lands belonging to the estate of W. J. Barrow, deceased; and whereas the same not having been redeemed from such sale, and it appearing that the holder of the certificate of purchase of said real estate has complied with the law of North Carolina necessary to entitle him to a deed for said real estate: Now, therefore, know ye that I, J. T. Ellington, sheriff of said county of Johnston, in consideration of the premises and by virtue of the statutes of North Carolina in such case provided, do hereby grant and convey unto H. B. Pearce, his heirs and assigns forever, the said real estate hereinbefore described, subject, however, to any redemption provided by law.

Given under my hand and seal, this 3 September, 1903.

J. T. ELLINGTON,
Sheriff. [SEAL]

The defendant appealed from the judgment rendered.

(590) *L. H. Allred and F. H. Brooks for plaintiff.*
J. D. Parker, Abell & Ward for defendant.

BROWN, J. 1. It is admitted in the pleadings that J. J. Barrow was the owner and seized in fee simple of the land in controversy at the time it was sold for nonpayment of taxes. Whether J. J. Barrow and W. J. Barrow are identical does not appear, and it may be a matter open to explanation by parol evidence.

It is further alleged in the answer that the defendant purchased the lands at the sheriff's sale for taxes on 5 May, 1902, and that the defendant has since been in actual possession of the same continuously to the present time, claiming the same under the said deed. His Honor held

that the deed was not color of title and that it was void on its face. In this ruling we think the learned judge was in error. A tax deed regular upon its face is color of title, when describing the land with sufficient certainty. *Greenleaf v. Bartlett,* 146 N. C., 496.

Color of title, as has often been said, is that which purports on its face to be a good title, but in fact is not. It is a writing upon its face professing to pass title, but which does not do it, either from want of title in the person making it or the defective mode of conveyance that is used. It must not be plainly and obviously defective, so much so that no man of ordinary capacity should be misled by it. *Tate v. Southard,* 10 N. C., 119; *Smith v. Proctor,* 139 N. C., 323.

The Supreme Court in the case of *Greenleaf v. Bartlett, supra,* after citing *Neal v. Nelson,* 117 N. C., 393, approves this language:

"These authorities, and many others which might be added, show that the trend of judicial opinion is towards the reasonable view that a purchaser that has paid the price for which he bought, whether from a public officer at auction sale or from an individual contractor, if he is in the occupation of the land bought, holds it adversely to all the world under any writing that describes the land and defines the nature of his claim."

The deed in question is not so obviously void on its face that a person of ordinary intelligence would discern that it passed no title. It is true that it fails to recite in specific words that the lands were (591) sold for taxes, but that is perfectly apparent from its context and is easily inferred from the language used. It describes the land, recites the date of sale, that the same has not been redeemed, and that the holder of certificate of purchase has complied with the laws of the State necessary to entitle him to a deed for the land. These recitals indicate plainly that the lands were sold for the taxes and that the purpose of the deed by the sheriff is to convey the title to the purchaser.

2. It is contended that the description is not sufficiently definite and that, therefore, the deed is void. We think the description is amply sufficient to allow the introduction of parol evidence for the purpose of identifying the land. Many cases have been before the courts where it has been necessary to decide upon the sufficiency of a description contained in a written instrument to admit of extrinsic evidence to locate the land. They are too numerous to review. A very full discussion of the subject by the learned *Chief Justice Smith* is to be found in *Farmer v. Batts,* 83 N. C., 387. In that case the description in the paper-writing was, "93 acres, more or less, it being the interest in two shares adjoining the lands of James Barnes, Eli Robbins, and others." See, also, *Moore v. Fowle,* 139 N. C., 51, and cases cited.

3. The learned judge overlooked the statutory requirement, or else failed to give force and effect to it, that as a condition precedent to contesting the title carried by a sheriff's deed, the contestant must show that the taxes have been paid, as well as make out the *prima facie* title in himself. The latter requirement is fulfilled only when the plaintiff connects itself by proof with the title of J. J. Barrow, who, it is admitted, owned the land. When his Honor rendered judgment upon the pleadings and declared the defendant's tax deed void, he relieved the plaintiff of the necessity of proving that the taxes upon the land, for which it was sold, have been paid.

It is true that this Court has decided in *Beck v. Merony,* 135 N. C., 533, that in an action to set aside a tax deed as a cloud on title it is not necessary that the complaint allege that all the taxes had been
(592) paid, but that case expressly decides that evidence of that fact must be introduced on the trial.

In *Moore v. Byrd,* 118 N. C., 688, it is said: "Since the statute makes the sheriff's tax deed *prima facie* evidence of title, the purchaser, as plaintiff in ejectment, is entitled to recover upon proof of the tax deed conveying the land, if the defendant introduced no evidence of his title and of his having paid the taxes for which the land was sold.

In *McMillan v. Hogan,* 129 N. C., 314, it is again held that, before successfully contesting a title under a tax deed, the contestant must prove that he has paid the taxes for which the land was sold. See, also, *McNair v. Boyd,* 163 N. C., 478.

For the reasons given, we think his Honor erred in rendering judgment upon the pleadings. The judgment is set aside and the cause remanded, to be proceeded with in accordance with this opinion.

Reversed.

J. H. HILL v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 23 September, 1914.)

1. Railroads—Motor Cars—Signals—Crossings—Negligence—Rule of Prudent Man—Questions for Jury.

It is required of a railroad company that its rolling equipment, in this case a motor car, traveling upon its tracks, shall give such signals while approaching a public crossing as will be reasonably sufficient for the purpose of warning those who intend to cross of their danger, or such as a man of ordinary prudence would in the exercise of reasonable care consider proper under the circumstances of each case.

2. Same—Lights at Night—Deaf Persons—Look and Listen—Trials—Evidence—Proximate Cause—Questions for Jury.

Where a deaf person has been injured while attempting to cross a railroad track at night, by a motor car of the railroad company traveling thereon, without a light, bell, or whistle, and there is evidence that he looked and listened before entering upon the track; that the defendant's employees on the car shouted to him to warn him of the danger; that had his hearing been normal he would have become aware of the approaching car; and also conflicting evidence of the speed of the car, and of its having been slowed by the defendant's employees as much as possible in their endeavor to prevent the injury, the issue as to the defendant's negligence is properly submitted to the jury under an instruction that the failure of the defendant to have a light on the car was evidence of negligence, which was actionable if it proximately caused the injury complained of. *Edwards v. R. R.*, 132 N. C., 99, cited and distinguished.

3. Railroads—Trials—Lights at Night—Negligence—Contributory Negligence—Defenses.

The negligence of the employees on a train or motor car of a railroad company running at night without a light, on its railroad track, is not such continuing negligence as will deprive the defendant, in an action for damages for a personal injury, of the defense of contributory negligence on the plaintiff's part. The charge of the court in this case is approved. *Stanley v. R. R.*, 120 N. C., 514, is overruled on this point.

APPEAL by defendant from *Bond, J.*, at June Term, 1914, of (593) WILSON.

Plaintiff, while walking over a public crossing in the town of Lucama, N. C., was struck by a motor car of defendant moving along its track, and seriously injured. There was evidence for plaintiff that the speed of the car was 25 miles an hour, and also evidence for defendant that it had been running at the rate of 10 miles an hour, but that the speed at the time it hit the plaintiff had been reduced to 5 miles an hour. Plaintiff's evidence tended to show that on a dark and cloudy night, 18 September, 1912, he was using the public crossing in going for some milk; that when he approached the tracks of defendant he looked and listened for cars and trains, and seeing none, he continued on his journey; that it was very dark and cloudy and he could not see the car, and being somewhat deaf, he could not hear it coming; the servants of defendant in charge of the car gave no signal by bell or whistle, and there was no light on the car. It was a motor car that struck him and was running 25 miles an hour.

Defendant's evidence tended to show that the noise of the moving car could easily have been heard by the plaintiff, if he had not been deaf, and that it was not dark enough, at the time, to prevent (594) him seeing the car in time to get off the track, provided he had

looked, as he says he had. It was admitted that there was no light, bell, or whistle on the car and no signal by the use of either of them was given. The men on the car halloed at plaintiff very loudly in time for him to avoid the truck, but he did not hear them, being deaf, and walked upon the track and was stricken by the car. That everything was done to stop the car after they first saw him, without success, as he was too near at the time, but the speed was lowered to 5 miles per hour.

The court charged the jury fully as to the rights of the respective parties, stating to the jury that it was the duty of the defendant, in approaching the crossing with its engines and cars, being a public one, to give signals to those using the same, and a failure to do so, if the proximate cause of the injury, would be actionable negligence, in the absence of plaintiff's contributory negligence. That it was the duty of the plaintiff to have looked and listened for approaching trains and cars, when crossing the tracks and before going thereon, and a failure to do so, if it proximately caused the injury, would be contributory negligence.

No serious exception was taken to the general charge of the court upon the law of negligence and contributory negligence as applicable to the facts, but defendant asks for a reversal of the verdict and judgment because the court virtually told the jury that, notwithstanding the noise of the car might have been heard by a man not deaf, or that the persons on the car called or shouted to the plaintiff to stop in time to have prevented the accident if he had not been deaf and could have heard, it was the duty of defendant to have had a light on the car moving on its track at night, if plaintiff would have seen it and thereby escaped the injury, and the failure to have it, under such circumstances, was negligence, the law requiring the plaintiff and other pedestrians using the crossing to look *and* listen for trains, but that this would not be so if plaintiff could have seen the car by looking, and failed to do so.

(595) *W. A. Finch and H. G. Connor, Jr., for plaintiff.*
F. S. Spruill for defendant.

WALKER, J. It was not denied that plaintiff was deaf and could not hear the noise of the moving car. The object of the law in requiring a signal is to give due warning of the approach of trains, and such signal should be given as will be reasonably sufficient to secure that end; or, to put it another way, such a signal as a man of ordinary prudence, in the exercise of reasonable care, would consider a proper one for that purpose, under the particular circumstances of each case. It is true, we said in *Edwards v. R. R.*, 132 N. C., 99, that an instruction of the court that a signal must be given by bell *and* whistle was erroneous, as the special

circumstances might not call for both, but it should be left to the judgment of the engineer, while exercising ordinary care, in each case. The ring of a bell might sometimes be more effective, as a warning to travelers and pedestrians on the crossing, than the blow of a whistle, and *vice versa*. We also there said: "It must be left to the jury to decide, under proper instructions from the court as to the law, what is a proper signal in any given case." But in the *Edwards case* we were speaking with reference to its special and peculiar facts, and of signals by bell or whistle, or both, from a train running in the daytime, when a headlight would be of little or no avail. The same cannot reasonably be said of the signal required by night, except in a general way. When a fast-moving engine or motor car is nearing a crossing in the night, common prudence requires that there should be some signal by light, so that the person using the crossing, who is required to look, may see the approaching engine or car, and for this reason engines are furnished with headlights. The user of the crossing is entitled to have it, so that he may exercise both senses, sight and hearing, which are given for his protection, and which the law requires him to employ for his own safety. And this Court has so held heretofore in *Purnell v. R. R.*, 122 N. C., 832. There were two dissenting opinions in that case, one by *Chief Justice Faircloth* and the other by *Justice Clark*, now Chief Justice; but neither was based upon any supposed error in the opinion of the (596) Court upon the question of defendant's negligence, but both related to the second issue, as to contributory negligence. We understand from the tenor of the dissenting opinions that both judges concurred with the majority opinion on the question as to the duty to give a signal by light when moving trains in the nighttime. That case is in harmony with *Lloyd v. R. R.*, 118 N. C., 1010; *Stanley v. R. R.*, 120 N. C., 514; *Mesic v. R. R., ibid.*, 489. In the *Lloyd case* the Court said: "It was negligence on the part of the defendant to run its engine after night, rear in front, without such a light, for two reasons: first, because by its aid the intestate might possibly have been seen in time to stop the train and avert the accident; and, secondly, because every person who used the track as a footway, under the implied license of the defendant, had reasonable ground to expect that such care would be exercised and to feel secure in acting upon that supposition." So in *Stanley's case* the Court said: "He (plaintiff's intestate, while walking on the track) had a right to suppose that the company would take care to provide against injuring pedestrians on the track by providing proper lights and signals, and to feel secure in acting upon that supposition. And if this light was not furnished (and there was testimony going to show that it was not), the company was not only negligent, but its negligence was a continuing one.

The jury found that the defendant was guilty of negligence for its failure to have a light on the car in front of the engine. On account of that failure, the plaintiff's intestate was put off his guard and cut off from the opportunity to see his danger."

In *Purnell's case* and *Stanley's case* the injured parties were standing or walking on the tracks, while in this case the plaintiff, when hurt, was on a public crossing, where he had a perfect right to be, and while there the defendant should have taken care of him by the ordinary precautions.

In *Morrow v. R. R.*, 147 N. C., at p. 627, we said: "Its (the defendant's) failure to have a headlight, so that he (the plaintiff) could see the train as it approached and clear the track, was negligence as to him."

And again, at p. 626: "Travelers on a highway which crosses
(597) a railroad track have the right to use the highway, and are therefore entitled to notice of the approach of trains to the crossing."

The case of *Gerringer v. R. R.*, 146 N. C., 32, seems to be directly in point. In that case *Justice Brown* said, at page 34: "The evidence that the shifting engine was backing up the track towards the crossing, upon a dark night, without any light or precautionary signal, and ran over and killed plaintiff's intestate and his companion, Craven, is full and convincing. The facts of this case disclose a degree of carelessness upon the part of the engineer in charge of the shifting engine that is almost criminal, and for the consequences of which the company could not reasonably expect to escape liability." The *Chief Justice* said in *Thompson v. R. R.*, 149 N. C., 155, 157: "The defendant was negligent in operating a train at night without a headlight," citing *Willis v. R. R.*, 122 N. C., 909. The case of *Heavener v. R. R.*, 141 N. C., 245, applies the same rule to facts very similar in principle to those in this case, and approves *Stanley's case, supra.* It is said in the recent case of *Allen v. R. R.*, 149 N. C., 258, 260, *Justice Brown* writing the opinion: "It has been repeatedly held by this Court that it is negligence in a railroad company to back its trains along a place used by the public as a common walkway, in the nighttime, without a light on the end of the backing train so as to give warning of its approach."

We could multiply the cases supporting the doctrine, but why do so? What is the use? To sum up: The judge charged the jury fully and clearly as to plaintiff's duty in passing over the crossing to *look* and to *listen*, and that if he failed to do so and was injured thereby, he could not recover, and they should answer the second issue "Yes"; and further, that it was the duty of the defendant to have a light at night on its car, so that it could be seen by those using the crossing of its tracks and the public street, if by having a light plaintiff would have seen the car and avoided injury. There was no light on the car. As it had no bell or

whistle with which to warn those on the crossing, or about to come upon it, of the danger, it stands to reason that the only other feasible signal, that is, a light, should have been supplied. The plaintiff could not hear, but he could see, and no doubt would have seen if there (598) had been a light. He was deprived of one sense, but the other, that of sight, was left to him unimpaired, and he had the right to the full use of it for his protection, and moreover was required by the law to resort to it in the absence of the other. But the use of it for his safety was practically destroyed by defendant's plain omission of duty.

The jury evidently found, under the evidence and charge, that plaintiff looked and could not see the car as it approached, and that he could not hear it, because the court instructed the jury that if he saw the car or did not look for it, he was guilty of contributory negligence, and they answered that issue "No." This being so, it becomes plain that he was entitled to the benefit of a light, that he might use his only other available sense, that of vision, to better advantage, and save himself from injury. A motor car has no special privilege in this respect which is denied to an engine or to a box car. Both can wound and kill.

While we have referred to *Stanley's case* and made an extract therefrom, we do not agree to all that is said therein; as we do not think it is what is called "continuing negligence" not to have a headlight on a moving engine at night, in the sense that the failure to have one would exclude the defense of contributory negligence and entitle the plaintiff to recover, even though he had failed to look and listen before going upon the track in the exercise of ordinary care. We have expressly approved the court's charge in the present case, because he gave the defendant the full benefit of the defense of contributory negligence, and required, before the jury could render a verdict in favor of the plaintiff, that they should find that he had exercised due care as defined by the law.

This disposes of the main exception and the only one upon which emphasis was laid. The other instructions excepted to were substantially correct, especially so when construed in the light of other parts of the charge, which must be viewed as a connected whole, and not distributively.

We find no reversible error in the record.

No error.

Cited: Horne v. R.R., 170 N.C. 656, 658; *Dunn v. R.R.*, 174 N.C. 258; *Rigsbee v. R.R.*, 190 N.C. 233.

(599)

MAJOR POWERS v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 30 September, 1914.)

1. Railroads—Public Crossings—Signals—Pedestrian Away from Crossings—Usages—Negligence—Evidence—Headlights.

Where a pedestrian is injured by a railroad train while walking upon its track away from a public crossing, evidence is competent tending to show that pedestrians habitually used the track at this place; and where the evidence further tends to show the proximity of a crossing where signals are required to be given by the company, and that if they had been given on the occasion complained of the injury would not have been inflicted, such evidence is competent on the issue of defendant's negligence, relating to the question of whether the defendant was carefully operating its train and giving the signals required.

2. Railroads—Headlights—Negligence Per Se—Statutes—Criminal Law.

Running a locomotive on the main line, at night, without a headlight is an indictable offense (Laws 1909, ch. 446), and hence negligence *per se*.

APPEAL by defendant from *Ferguson, J.*, at January Term, 1914, of CURRITUCK.

Aydlett & Simpson for plaintiff.

J. Kenyon Wilson for defendant.

CLARK, C. J. This is an action for personal injuries. The plaintiff was struck by a train coming from behind him while on the defendant's track about 200 yards from Moyock station on the night of 4 February, 1912. There was a crossing at the station about 200 yards south and another about 300 yards north of the place of this occurrence. There was a curve between these crossings, and the plaintiff was at the southern end of it. He had returned from Norfolk on the afternoon train and was drinking but not drunk. It was cold, snowy, and the wind was blowing. The defendant was running its freight train around the curve some 25 or 30 miles an hour. There was evidence that the train was running without a headlight and without blowing the whistle for
(600) either crossing. The engineer and conductor testified that the whistle was blown and the headlight was burning.

The evidence that the track was habitually used by pedestrians was competent. *McCall v. R. R.*, 129 N. C., 298; *Hord v. R. R., ib.*, 306, and see citations to these cases in the Anno. Ed.; *Thompson v. R. R.*, 149 N. C., 157.

There are many exceptions to the charge, but the appeal practically depends upon the correctness of the following paragraphs and the refusal of the instructions to the contrary:

"If the plaintiff was on the road of the defendant at a place other than the crossing, the defendant didn't owe him the duty of sounding the whistle at the crossing, because that requirement is for the protection of people who are traveling along the highway, and have as much right as the railroad company had to the use of the crossing. They have a right to cross the track, and if nothing else appeared, the plaintiff would not be entitled to recover. But the plaintiff says that not only did they not ring the bell or sound the whistle at the crossing, which if sounded would have given him warning, but that it had no headlight on its engine.

"(1) If the defendant was running its train without a headlight it was guilty of negligence towards the plaintiff, and if he was injured in consequence, if he was exercising the care of a reasonably prudent man, the defendant would be responsible for the injury which he sustained (2)."

To that part of the charge between the figures (1) and (2) above the defendant excepted.

"But if he could have heard the car or engine of the defendant's train approaching him, and remained on the track when he could have gotten off of it, he would not be entitled to recover. That raises the question of contributory negligence and damages.

"But if you fail to find by the greater weight of the evidence that the defendant failed to have a headlight, or if the evidence preponderates in favor of the defendant that it had a headlight, an improved pattern, which was throwing light along the road in the customary way, and the plaintiff did not take heed of the light, and was run over and injured, it would be an accident, and the plaintiff would not be (601) entitled to recover. The plaintiff argues that if there had been a headlight on the train he could have seen the light. If he had seen the light, the law presumes that a man walking on the track in normal condition would get off the track and the engineer is not required to slow up his train, thinking that the man would get off the track, unless he thinks that the man has failed to notice his train; then it is his duty to stop his train if he can. If you find that the defendant had its headlight burning on the train, which threw the light so that the plaintiff might have seen it if he had been looking, it was his duty to keep a lookout and listen, and if he failed to do so, it would not be the negligence of the defendant and it would be your duty to answer the first issue 'No.'

"(5) If you should find from the evidence by its greater weight that the train was being operated without a headlight, that is negligence, and if you should find that as a sequence of that negligence the plaintiff received his injury, you would answer the first issue 'Yes' (6)."

To that portion of the charge between the figures (5) and (6) above the defendant excepted.

These propositions have been repeatedly before this Court and have been well settled. In *Morrow v. R. R.*, 147 N. C., 623, it was held that the failure to give the crossing signals at a public crossing, while not negligence *per se* when the injury complained of occurred to a pedestrian while using the track at a different place, it is evidence of negligence and should be submitted to the jury on the question of negligence as to whether the train was carefully operated at the time of the injury or whether proper warnings were given in reasonable time to avoid it.

Running a train at night without a headlight is a continuing negligence. *Lloyd v. R. R.*, 118 N. C., 1010; *Mayes v. R. R.*, 119 N. C., 758; *Mesic v. R. R.*, 120 N. C., 491, and *Willis v. R. R.*, 122 N. C., 905.

The Legislature has adopted that rule by making the failure to carry a headlight negligence *per se*. By chapter 446, 1909, 3 Pell's Rev., 2617*a*,
all railroads were required to carry electric headlights upon their
(602) locomotives on their main line, as this was, and by 3 Pell's Rev.,
3753*a*, a violation of that requirement is made a misdemeanor. This Court has always held that any act of a common carrier which is a violation of law is negligence *per se*. It is true that at the time of this injury, under proviso in the statute the defendant could have defended an indictment by showing that one-half of its engines were thus equipped. But this being in a proviso, is a matter of defense, which the defendant must allege and prove, even in a criminal case. *S. v. Downs*, 116 N. C., 1067, and cases there cited and in many cases since citing it. See Anno. Ed. Still more is it necessary for the defendant in a civil case to prove such defense to rebut its negligence *per se*. The jury having found that the defendant did not carry any headlight, found of course that it did not carry an electric headlight. The charge, therefore, was even more favorable to the defendant than he was entitled to.

The charge between (1) and (2) required the plaintiff to be in the exercise of reasonable care.

The charge between (5) and (6), that the operation of the engine without a headlight was negligence, was restricted by the judge to the first issue and was necessarily correct, since the act was an indictable offense. The rest of the charge was not objectionable, and expressly instructed the jury that the plaintiff was guilty of contributory negligence if he was not exercising reasonable care to avoid the injury.

No error.

Cited: McNeill v. R.R., 167 N.C. 395; *Barnes v. R.R.*, 168 N.C. 514, 515; *Horne v. R.R.*, 170 N.C. 651; *Parker v. R.R.*, 181 N.C. 102; *Hanes v. Utilities Co.*, 191 N.C. 21.

L. H. HORNTHAL v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 23 September, 1914.)

Telegraphs—Mental Anguish—Other States—Lex Loci Contractus.

In an action against a telegraph company to recover damages for mental anguish alone for its negligent failure to transmit to and deliver a telegram in another State, and under the laws of that State a recovery for mental anguish may not be had unless accompanied with injury to the person or property, and it appears that the negligence complained of occurred wholly in such other State, the laws of that State control, and a recovery will accordingly be denied by our courts.

APPEAL by defendant from *Ferguson, J.*, at June Term, 1914, (603) of WASHINGTON.

Action to recover damages for mental anguish arising from a negligent delay in transmitting and delivering a telegram delivered by plaintiff's brother to defendant in Norfolk, Va., and addressed to plaintiff at Plymouth, N. C., in the following words: "I think you had better come at once; father very sick." The father lived in Norfolk at the time the telegram was sent. The following admissions were made in the case:

"1. That there was no negligence whatever committed by the defendant or its agents in North Carolina, and that the only negligence claimed by the plaintiff was that committed in the State of Virginia.

"2. That the telegraphic message sued on was delivered to the Western Union Telegraph Company in Norfolk, properly addressed to the plaintiff in Plymouth, at 6:05 p. m. on Saturday, but was not forwarded until 7:19 the following morning, and was received by the agent in Plymouth at 7:20 Sunday morning and by him delivered promptly to the plaintiff.

"3. That plaintiff left Plymouth on the Norfolk Southern Railroad, being the next train leaving there after he received the telegram sued on, and reached Norfolk about 4 p. m. Sunday.

"4. That plaintiff suffered no physical or pecuniary loss because of the failure to get the telegram on Saturday night, but claims mental anguish only.

"5. That by the law of Virginia no recovery can be had for mental anguish unless it is accompanied by physical suffering or pecuniary loss, and then the recovery is confined to a penalty of $100.

"6. There was a train leaving Plymouth about 1 o'clock at night for Norfolk, due there at 8:30 a. m. There was evidence on the part of the defendant, uncontradicted, that this train was about two hours late on the morning of the death of plaintiff's father."

(604) The verdict of the jury was as follows:

"1. Did the defendant receive the telegram referred to in the complaint and negligently fail and refuse to transmit and deliver same to plaintiff within a reasonable time, as alleged in the complaint? Answer: Yes.

"2. If so, what damages, if any, did the plaintiff sustain by reason of such delay in transmission and delivery? Answer: $500.

"3. Under the law of Virginia, can damages for mental anguish, independent of injury to person or property, be recovered against a telegraph company for negligence in failing to transmit or deliver a message, although the company is advised of the character of the message? Answer: No."

It is unnecessary to set out the charge of the court on the question of negligence in Norfolk, Va., in the view taken of the case by the Court.

Judgment for the plaintiff, and appeal by defendant.

Ward & Grimes for plaintiff.

George H. Fearons, Pruden & Pruden, S. Brown Shepherd, and Alfred S. Barnard for defendant.

WALKER, J., after stating the facts: It was admitted that there was no negligence unless it was in Norfolk, Va., and we may, in the beginning, concede, for the sake of argument, that there was evidence of negligence there. But if defendant was negligent in handling the message in Norfolk, and the court instructed the jury to confine their inquiry to that alleged negligence, as it was admitted there was none elsewhere, we are of the opinion that plaintiff, upon the verdict and admissions, was not entitled to judgment. We are confronted at the outset with the admission that the alleged negligence occurred in Virginia; that there was no negligence in this State, and, further, that a recovery for mental anguish is not permitted by the law of Virginia for negligence in not transmitting or delivering a telegram, where there is no injury to the person or property, and the law of Virginia is also so found by the verdict to be, as will appear by the third issue and the answer thereto.

(605) We need not consider the recent case of *Penn v. Telegraph Co.*, 159 N. C., 306, because the negligence was alleged therein to have taken place in this State, while here it occurred wholly and exclusively in the State of Virginia.

The very question now presented for our decision has recently been under consideration in the case of *W. U. Telegraph Co. v. Brown,* 34 Sup. Ct. Reporter (U. S.), p. 955. In that case it appeared that the telegram was sent from South Carolina to Washington, D. C., and the negligence occurred in the latter place. It was a message announcing the death of plaintiff's father, and the action was in tort to recover damages for mental anguish arising out of the failure of the company to deliver the message in Washington, D. C. The law of South Carolina allows a recovery for mental anguish, but the law of the District of Columbia does not. The case there presented was, therefore, the converse of ours, but the same principle must govern both, as neither suit was brought in the State where the wrong was committed. With reference to the facts as stated in the *Brown case,* the Court, by *Mr. Justice Holmes,* said: "It is established as the law of this Court that when a person recovers in one jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort that accompanies the person of the defendant elsewhere, and that is not only the ground, but the measure of the maximum recovery," citing *Slater v. R. R.,* 194 U. S., 126; *Cuba R. Co. v. Crosby,* 222 U. S., 473. And again: "What we said is enough to dispose of the case. But the act also is objectionable in its aspect of an attempt to regulate commerce among the States. That is, as construed, it attempts to determine the conduct required of the telegraph company in transmitting a message from one State to another or to this District, by determining the consequences of not pursuing such conduct, and in that way encounters *W. U. Telegraph Co. v. Pendleton,* 122 U. S., 347, a decision in no way qualified by *W. U. Telegraph Co. v. Commercial Mill Co.,* 218 U. S., 406."

In *Cuba R. Co. v. Crosby, supra,* the Court, by the same justice, said: "When an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of (606) the Court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law. *Slater v. Mexican Nat. R. Co.,* 194 U. S., 120. The law of the forum is material only as setting a limit of policy beyond which such obligation will not be enforced there. With very rare exceptions, the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. *American Banana Co. v. United Fruit Co.,* 213 U. S., 347. See *Bean v. Morris,* 221 U. S., 485, 486, 487. That and that alone is the foundation of their rights." The same doctrine is stated in Jaggard on Torts (H. S.), p. 102, where it is said that "The wrongfulness of the act or conduct complained of as a cause of action in tort is determined by the

lex loci, and not by the *lex fori,* and the same is true as to contracts, the validity of the cause of action depending upon the law of the place where the agreement was made, at least where the breach occurs wholly in that place."

It is needless for us to discuss, in this case, how it would be if the breach of the contract, which was made in Virginia, had occurred here, or the negligence in delivering the telegram had been committed here. See *Penn's case, supra.* It is quite sufficient to decide that, as the breach of the contract and the negligence or breach of duty took place wholly in Virginia, the plaintiff can have no cause of action in the courts of this State, unless it is given to him by the law of Virginia, which is negatived both by the admission of facts and by the verdict. In *Cuba R. Co. v. Crosby, supra,* the Court states strongly the view of the law upon this subject, which denies a cause of action to plaintiff, as follows: "We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt, he must allege and prove it."

(607) Minor's Conflict of Laws, pp. 479, 480, 481, thus states the principle governing this case: "The law of the situs of a tort is, of course, the 'proper law' to govern the liabilities and rights arising therefrom. If not liable by the *lex loci delicti,* the general rule is that the defendant will not be liable elsewhere. If liable by that law, he will usually be held liable wherever the question arises to the same extent as if he were sued in the *locus delicti* itself. But as in other cases, there are occasions upon which the foreign *lex loci delicti* will not be enforced in the courts of the forum. These are in the main the same exceptional cases which apply to the operation of any proper foreign law. As applied to torts, they may be said to consist of (1) those cases where the 'proper law' is in direct contravention of the law or policy of the forum; (2) where the remedy prescribed for the tort by the *lex loci delicti* is penal in character; and (3) statutory torts, where the statute, in creating the liability, at the same time creates a mode of redress peculiar to that State, by which alone the wrong is to be remedied. It is not always easy to ascertain the situs of a tort, the *locus delicti,* which is to furnish 'the proper law' of the case. If the whole injury is caused by one single act, or by several acts, all of which occur in the same jurisdiction, there is no trouble usually in locating the tort, as having its situs at the place where the injury occurs. But if the tort is committed upon the high seas, or if the cause of the injury arises partly in one State and partly in another, there is more difficulty."

If we apply these principles to the facts as admitted and stated in the verdict (third issue), the conclusion cannot be avoided that the court erred in not granting the nonsuit. We therefore sustain the first and third assignments of error, and with direction that the action be dismissed.

Reversed.

(608)

THE AMERICAN EXCHANGE NATIONAL BANK v. R. R. SEAGROVES.

(Filed 30 September, 1914.)

1. **Bills and Notes—Antecedent Debt—Transferee for Value.**

The transfer of a negotiable note by the holder to his creditor before maturity for an antecedent debt constitutes the transferee a holder for value. Revisal, sec. 2173.

2. **Same—Evidence—Trials—Instructions—Courts—Expression of Opinion—Statutes.**

Where a negotiable note held by a debtor bank has been transferred before maturity to its creditor bank, and there is evidence that at the time the former owed to the latter a larger sum of money than the amount of the note, and that the note was transferred as an extinguishment of the debt *pro tanto*, and in an action upon this note, it is introduced in evidence showing an indorsement on the back, made by the plaintiff, "For collection account," it is for the jury to find, under the conflicting evidence, whether the plaintiff received the note in part payment of the debt or for collection only, and an instruction by the judge that there is no evidence that the plaintiff paid value, and that it was its duty to appear and explain the transaction, is an expression of opinion forbidden by the statute.

3. **Bills and Notes—Due Course—Presumptions—Fraud—Pleadings—Burden of Proof—Statutes.**

To rebut the presumption that every holder of a negotiable instrument, acquired before maturity, is one in due course, it is necessary for the defendant in an action thereon to allege fraud, and when properly pleaded, the burden is upon the plaintiff to show the *bona fides* of the transaction (Revisal, secs. 2208, 2201); but in this case it is held that fraud has been insufficiently pleaded, the allegation being that the maker was induced to sign through the representations or promises of another and for accommodation, without in any manner connecting the plaintiff, who acquired for value and before maturity, with the transactions alleged.

APPEAL by plaintiff from *Peebles, J.*, at May Term, 1914, of CHATHAM.

(609) *H. A. London & Son for plaintiff.*
R. H. Hayes and F. W. Bynum for defendant.

CLARK, C. J. This is an action on a negotiable instrument under seal for $1,000, executed by defendant on 1 January, 1908, payable four years after date to the National Bank of Lillington, N. C., and indorsed by said bank to the plaintiff before maturity. The defendant in his answer denied the execution of this note, but admitted that he executed a note for that amount to the National Bank of Lillington in 1907 upon certain representations made to him by S. A. Salmon and for the accommodation of said Salmon. The defendant testified on the trial that he executed the note sued on and over the objection of the plaintiff testified that he did so on certain representations made to him by F. M. Nelson, president of the Lillington bank. Nelson in his deposition testified that the plaintiff knew nothing of the alleged transactions or conversations between Salmon and the defendant, and that the note in suit was given in renewal of the first note.

The exception most strenuously argued is that the court charged, "There is no evidence at all that the plaintiff paid anything of personal value for that note. If he did, it was knowledge peculiarly within his own breast, and it was his business to come here and tell you about it. Nelson never said the bank paid anything for it. He never said the bank credited his account with the amount of that note." In the deposition of Nelson he stated that the consideration for the transfer of this note to the plaintiff was an indebtedness of the National Bank of Lillington to The American Exchange National Bank; that at that time the Lillington bank owed the plaintiff about $5,000.

Revisal, 2173, provides: "An antecedent or preëxisting debt constitutes value." The indebtedness of the bank of Lillington, as above testified, to the plaintiff was value or consideration for the transfer of the note in suit. *Smathers v. Hotel Co.*, 162 N. C., 352, and cases there cited. It is true that there was in evidence the indorsement on the back of the note,

(610) "For collection account, American Exchange National Bank, N. Y. W. H. Bennett, Cashier." This was evidence for the jury to consider as to whether there was a *bona fide* transfer of the note for value or not, upon which the jury could pass, but did not authorize the judge to charge, as above set out, that there was "no evidence of any consideration or thing of value for the transfer of the note to the plaintiff," and this instruction was a clear expression of opinion upon the evidence.

Besides, every holder is deemed *prima facie* to be a holder in due course. Revisal, 2208, 2201. It is true that when fraud is pleaded the

burden is on the holder to prove that he is holder in due course. Revisal, 2208. But the defendant neither in his answer nor in his amended answer averred any fraud or false representation by Nelson or any one else in connection with the execution of the note sued on, but merely averred that he was induced to sign the first note in 1907 by the representations or promises of Salmon, who died several months before the second note was executed. Indeed, the answer denied the execution of the second note, though the defendant admitted it on the trial. Fraud must always be pleaded. In *Beaman v. Ward,* 132 N. C., 71, the Court states that fraud must not only be pleaded, but "the pleader must allege the facts constituting the fraud."

It may be that upon another trial the jury may find that the plaintiff did not take the note for value and without notice; but for the error above set out there must be a

New trial.

Cited: Colt v. Kimball, 190 N.C. 171; *Building & Loan Asso. v. Swaim,* 198 N.C. 16; *Griggs v. Griggs,* 213 N.C. 626.

C. E. WISE & BRO. v. THE TEXAS COMPANY.

(Filed 30 September, 1914.)

Vendor and Purchaser—Principal and Agent—Contracts — Ratification — Knowledge—Fraud—Trials—Evidence—Nonsuit.

For the unauthorized acts of an agent to bind his principal by ratification, it must appear that the principal acted with knowledge of the facts and circumstances in respect thereto, and where the person dealing with the agent is aware of the fact that he has exceeded his authority, and depends upon the agent's statement that his principal may act favorably thereon, the burden is upon such third person to show the matters necessary to bind the principal by his ratification of the agent's unauthorized act. Thus where an agent for the sale of gasoline entered into a contract with the purchaser to supply him at the former price after the market had greatly advanced, by antedating the contract, and the purchaser was aware of the fact that, at that time, the agent was not only unauthorized to sell the gasoline at the price named, but had been forbidden to do so, and, notwithstanding, relied upon the assertions of the agent that "he would try to get the contract through," the fact alone that the seller shipped out a part of the gasoline at the price specified, being deceived and imposed upon by the date appearing in the contract, is not evidence sufficient of his confirmation of the contract, and the burden of proof being upon the purchaser in his action to enforce delivery of the balance

of the gasoline, at the price named, a judgment of nonsuit should be rendered.

(611) APPEAL by defendants from *Ferguson, J.*, at Spring Term, 1914, of DARE.

This action was brought to recover $1,500 as damages for an alleged breach of contract to sell and deliver to the plaintiffs at Norfolk, Va., f. o. b., 350 barrels of motor gasoline, the balance of the entire lot of 500 barrels called for by the original contract. It is alleged that the contract was made through one C. C. Clark, agent of the defendants, and the price was 8½ cents per gallon. Defendants refused to ship the oil, and deny that any such contract was ever made. Plaintiffs put in evidence a written contract, signed by them and C. C. Clark, salesman, dated 19 August, 1911. It appears that this contract was not really made on the day of its date, but in the latter part of October, 1911, and dated back to 19 August, 1911, for the reason that the agent of defendants, C. C. Clark, had been forbidden by them to make any contracts after 19 August, 1911, for the sale of gasoline at 8½ cents per gallon, the price of gasoline having advanced rapidly at the time the paper was signed in October and was still advancing, the price in October being 9½ cents per gallon. The contract was as follows:

(612) THE TEXAS COMPANY

Ship to C. E. Wise & Bro., Stumpy Point.
When ship: As required. Route.....
Freight allowance to..... Terms, 30 days.
500 barrels motor gasoline @ 8½ cents, f. o. b. Norfolk.

In purchasing the above quantity it is the intention of the purchaser to cover his entire requirements for one year from date. If, however, purchaser shall be unable to use the entire quantity during the period indicated, the seller may cancel unused balance or extend period of delivery.

C. C. CLARK,
Salesman.

Accepted:
C. E. WISE & BRO.,
Purchasers.

Clark inclosed the contract to plaintiffs in a letter suggesting that they remit some money to keep the company in better humor.

E. F. Wise testified in part: "We had a contract with the Texas Company about some oil. (The contract is in writing, and it is shown wit-

ness; it is signed by 'C. E. Wise & Brother.') I did it; the name 'C. C. Clark, salesman,' was written by C. C. Clark; I know him; I saw him here to-day; he is here. I had dealings with him, buying oil from him, etc. I went over to the Texas office; I have been dealing with the Texas Company, through Mr. Clark, nearly a year. I know where the Texas Company's office is in Elizabeth City. Mr. C. C. Clark is in that office, acting for the company; he is the man who signed this paper, and was in the office of the Texas Oil Company in Elizabeth City when he signed the contract. We went to see him some time toward the latter part of October, 1911; Mr. Clark was in the office."

Q. What was said by you and him about entering into this contract at that time? A. He said that the company had quit accepting contracts after the 19th of August.

Q. What else? A. He said that by dating it back, he thought (613) that the company might accept it. He filled out the contract and signed and passed it to me and I signed it.

Q. What did you and he agree to do about it? A. He said that he was not positive that it would go through, but that he would send it to the Norfolk office and find out, and if it was accepted there it was all right.

Q. Anything else said? A. No, sir. I left and went home and he signed the contract; he sent a letter with it, and I have it with me. It was about a week after Clark signed the contract before I received the contract through mail. . . . After looking at the letters and so on, I am willing to withdraw the statement positively that it was in November. It was in the latter part of October. I was in Elizabeth City when I made this arrangement with Clark. I didn't date it back to August 19th; I haven't anything to do with that part of it.

Q. Didn't he tell you that he could not make the contract unless he dated it back? A. He told me that; yes, sir; but I didn't have anything to do with that part of it. Mr. Clark didn't tell me that he could make the contract; he said that the company had notified him not to accept any more contracts, but that was his own business and not mine. He then said he would send it to the office; I don't know whether oil had gone up at that time as much as a cent; it was worth 9 or 9½ cents; he told me he would rather we sign a contract; that several others had signed it, and he would rather we would. I stated when I was on the stand before as follows: "Q. Why did he say he wanted it dated back to August 19th? A. Because that was the time the time expired for accepting contracts; the company would not accept any more after that date." That was my answer; as a matter of fact, he didn't tell me that the company would not accept any more.

Q. You did testify to that before? A. I testified to that, but he must have known it by accepting it. He told me that the company would not accept any more after that date; he stated that he was not sure he could get it through, but that he would send it to the Norfolk office and see if he could get it accepted. When I got this contract, Mr. Clark
(614) told me he had instructions from the company not to take the contract, and it was dated back so that the company would furnish the oil. He told me the oil was going up, and that he received a wire not to make any more contracts at that price, and the only way he could make the contract was to date it back, and I agreed to take it with that understanding; that proposal was made to me by him.

Q. Wasn't that a fact? A. Yes, sir; most of it was. He told me that the company had refused to accept the contract; he made the proposal to me to get this contract through; he presented the contract to me and said that the company had notified him not to take any more contracts, but that he thought he could get it through. I said to him, if he could get it through I would take the risk of the oil going up or down.

The following is a part of the testimony of E. F. Wise, one of the plaintiffs, on a former trial of this case at July Term, 1913:

Q. Then, did you get this under the contract? A. It must have been so.

Q. Then your contract was made before October 14th, wasn't it? A. I don't think so.

Q. Will you explain to the court and jury how you got that 8½ cents October 14th, if it wasn't under the contract? A. I don't know the exact date our contract was signed; I judged it to be in November.

Q. I am asking you to state whether or not this was under the contract? A. It must have been under the contract.

Q. Then, according to that, the contract was made before October 14th? A. Yes, sir.

Q. When you got this contract, Mr. Clark told you that he had instructions from the company not to make the contract, didn't he; and you had it dated back so that the company would furnish the oil? A. Yes, sir; he dated it back and told me about it. He told me that oil was going up and he had received a wire not to make any more contracts at that price, and that the only way he could make the contract was to date it back, and I agreed to take it with that understanding.

(615) Q. When he agreed to that, then he signed the paper? A. I signed it and he signed it also.

Q. So, then, at the time the contract was made, oil had gone up how much? A. It seems to me it was about 9 cents.

Q. And the only way he could get that to you was to date the contract back? (Plaintiffs object; objection overruled, and the plaintiffs except.) A. That was the only way to get it through, so he said.

The defendant alleged and offered evidence to show that C. C. Clark had no authority to make the contract, but had been forbidden to do so, and that they would not have shipped any oil to plaintiffs under the terms of the paper had it been known at the time that the contract had been antedated in order to deceive them and produce the impression upon them, which was done, that the contract was correctly dated and they were bound to ship the oil, as it was not forbidden by the special instructions given to Clark by the defendant.

On this part of the case, and with reference to the orders for oil sent in by plaintiffs, W. Thompson testified: "On 14 October, 1911, an invoice was sent to us, showing a delivery to C. E. Wise & Bro. at 8½ cents a gallon, which was 1 cent lower than prices were at that time; it was not in accordance with our prices; it was sent in for approval, but was not approved, and I refused to approve it and held the invoice up and would not allow them to enter it on our books, and I asked Mr. Clark why he had done so. He said he had a contract with C. E. Wise; I said, 'We have no record of it'; he said, 'It ought to have been sent to you.' A short time after that he sent what purported to be a contract in; when it came it bore date of '19 August, 1911.' I took the contract in faith that it was made on the date shown. I first learned last term of court about its being dated back by hearing the testimony of Mr. Wise on the stand. Oil was worth, when the contract was sent in by Mr. Clark, 9½ cents f. o. b. Norfolk, wholesale. The oil would not have been delivered if I had known it had been dated back; I would not have sent any if I had known it was made in October instead of August. There were 79 barrels shipped; the company made contracts at this time, from 1 May, 1911, to 19 August, 1911; on 19 August, (616) 1911, our instructions to our salesmen were to increase their price 1 cent a gallon, and to take no more contracts; I sent him instructions by telegram and called him up over the phone; I have not the letter; I do not think we have been able to find it; we found a letter of 23 August, asking that Mr. Clark acknowledge receipt of our instructions; I instructed him to discontinue making contracts, to increase the price 1 cent a gallon, making 9½ cents f. o. b. Norfolk instead of 8½ cents. . . . We got this order the latter part of October or the first part of November."

Q. Do you remember the first time you ever saw it? A. I cannot say that I do—that particular order. I remember its coming in; it came in the regular course of mail or was handed me by Mr. C. Clark; I do

not open the mail myself; the mail is brought in to me after it has been opened; I remember its arrival in the Norfolk office, and I say again that it came in my mail or was handed to me by Mr. Clark, I do not know which.

Q. Who handed it to you personally? A. I cannot say that.

Q. Was there anything else with it? A. I do not think there was. I do not remember that there was anything else with it. I took it, looked at it, and I saw it was dated 19 August; I had previously said something to Clark about it.

Q. Did he say anything about it to you? A. Not until I took the matter up with him.

Q. Did you take it up personally with him? A. Yes, sir.

Q. Did you get it? A. Yes, sir.

Q. He told you he had it? A. He did.

Q. It came in and you filled it? A. It came in the usual course of business and I filled it, thinking it was made on 19 August; Clark gave me the impression that it was a *bona fide* order. Mr. Clark informed me that he had this contract with C. E. Wise. We sent all the oil that was shipped during the year under this contract. I was in the Norfolk office when Mr. Clark and I had that conversation. When I asked Clark about the invoice which had been sent in on 14 October, he told
(617) me he had a contract with Wise, and I told him that we had no such record; he informed me that we ought to have. I accepted order with understanding it had been made on 19 August, 1911; never heard of contract being dated back until the testimony of Mr. Wise.

The following list shows deliveries of oil by defendants to plaintiffs in and after October, 1911:

1911.			
Oct.	14.	5 iron barrels,	267 gals.
Nov.	1.	5 iron barrels,	267 gals.
Dec.	14.	6 iron barrels,	316 gals.
1912.			
Feb.	1.	10 iron barrels,	530 gals.
Mar.	1.	6 iron barrels,	310 gals.
Apr.	4.	10 iron barrels,	536 gals.
Apr.	13.	4 iron barrels,	218 gals.
May	11.	10 iron barrels,	533 gals.
June	21.	14 iron barrels,	757 gals.
Aug.	6.	bulk,	10 gals.
Aug.	9.	9 iron barrels,	481 gals.

The total deliveries amounted to 79 barrels during that period. On 5 August, 1912, the plaintiffs, supposing that they had received 150 instead of 79 barrels, demanded the delivery of the remaining 350 barrels. This was about two weeks before the contract expired. Defendants, believing still the contract had been correctly dated and was binding upon them, offered to let them have 100 more barrels, but this offer was thereupon refused. There was evidence that plaintiffs sold some of the oil they received from defendants under the alleged contract at 4½ cents less than the market price. They explained this by saying that they did not want to have more than they could handle, and that it sold for less at wholesale than retail; but the court charged that they were not entitled under the contract, if valid, to sell it wholesale, as they were engaged in the retail trade, and the oil demanded for that purpose the judge directed to be excluded from the estimate of damages.

The defendants requested the court to nonsuit the plaintiffs, (618) and to charge that there was no legal ratification of the unauthorized act of C. C. Clark, as agent, unless defendants acted with full knowledge of the real facts and as to the true date of the contract. There were also requests upon the measure of damages, which are not material, in our view of the case. These requests for instructions were denied by the court.

Judgment was entered upon the verdict, and defendants appealed.

Ehringhaus & Small and Ward & Thompson for plaintiffs.

Aydlett & Simpson and Guy Stevens for defendant.

WALKER, J., after stating the facts: This case, in one material aspect of it, turns upon the point whether there is any evidence of ratification by defendants of the unauthorized act of its agent, in contracting for them to sell the gasoline below the market price, and in positive violation of express instructions not to do so. In order to decide this question, we must consider the evidence in the most favorable light for the plaintiffs; but when it is thus viewed, we are of the opinion there was no ratification, and the nonsuit should have been granted.

We start out with the fact admitted that the plaintiffs knew, when the contract was made, that C. C. Clark, the agent, had no authority to make it in behalf of his principal. He so stated to them, and told them of his recent instructions, and they knew well why the defendants had withdrawn the authority to sell from him, because the price of gasoline was rapidly advancing, having risen to a point quite a full cent per gallon over the price mentioned in the alleged contract, and still advancing, and reaching within the ensuing year a price nearly double

that at which they proposed to buy. The contract was made under very suspicious circumstances, sufficient to warrant the inference, or even to produce the conviction, that it was intended to deceive the defendants and to induce them, unsuspectingly, to believe that their agent had made the contract at a time when he was authorized to do so, by antedating it and making it appear, on its face, to be within his authority as
(619) agent, and, therefore, valid as against the defendants. The entire evidence shows that defendants were, at the time, and remained ignorant of the real nature of the transaction, and that, believing it to be regular in all respects and to have been made on the day of its date, they naturally concluded that they were bound by it, and for that reason shipped 79 barrels of gasoline, from time to time, upon the orders of the plaintiffs. "No doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud." 1 Clark & Sykes on Agency (1905), sec. 106; *Owings v. Hull,* 9 Peters (U. S.), 607 (9 L. Ed., 246); Mechem on Agency (1889), sec. 129; Reinhardt on Agency (1902), sec. 109. The rule has been thus stated: "Unless the party undertaking to ratify knew that he was not liable without such ratification, he will not be bound." *P. & S. R. R. v. Gazzam,* 32 Pa. St., 340; Reinhardt on Agency, *supra.* 31 Cyc., 1253, states the rule in this way: "In order that a ratification of an unauthorized act or transaction of an agent may be valid and binding, it is essential that the principal have full knowledge, at the time of the ratification, of all material facts relative to the unauthorized transaction. And in order to make this rule operative, the principal must know the actual facts and not merely what the agent supposed were the facts. If the material facts have been suppressed or are unknown, there is no ratification, and the principal is at liberty to repudiate his assent and assert his rights in other ways, and it matters not whether the principal's want of knowledge was due to designed or undesigned concealment, or whether the question arises between the principal and the agent or as to third persons." And this statement of the rule has met with the approval of this Court in *Brittain v. Westall,* 137 N. C., 30. We, therefore, find it to be of the very essence of ratification, as of an election, that it be done advisedly, with a full knowledge of the party's rights. *Baldwin v. Burrows,* 47 N. J., 199, 211. In *Thorndike v. Godfrey,* 3 Me. at
(620) p. 432, the Court, in applying the rule, said: "We can never consider consent and ratification as implied, in those cases where there is no knowledge of the facts, to which it is said consent and ratifica-

tion extend. This would be an effect without a cause." The authorities are uniformly to the same effect.

Applying the principle to this case, we find no evidence of ratification of Clark's unauthorized act by the defendants. It is true, the defendants shipped 79 barrels of gasoline, but this is perfectly consistent with their ignorance of the facts at the time of the shipment.

It has been said that the act which is claimed to be a ratification must be with knowledge of the facts and "inconsistent with the existence of an intention not to adopt, and hence conduct which would have been within the principal's right in case he repudiated the transaction will not amount to ratification. And if the principal is ignorant of material facts, as where he accepts moneys from an agent without knowledge that they are the proceeds of an unauthorized sale, intention to ratify cannot be implied." Tiffany on Agency, p. 66.

The cases are numerous where the courts have held that the sale or acceptance of goods, or the doing of other acts, under an unauthorized contract made by an agent, when the principal proceeds without knowledge of the facts, is not a valid ratification; otherwise where the principal acts with knowledge or with what is equivalent to it. "If an agent, having unwritten authority to make leases of real property, execute a lease for more than three years, the knowledge of his principal that the tenant is in possession and paying rent is not sufficient to work either ratification or estoppel." *Clement v. Young,* 70 N. J. Eq., 677. The same was held in a case where the wife paid interest on a note of her husband and her mortgage to secure it, under the belief on her part that the mortgage was binding upon her, the Court saying that there was no ratification. *Brown v. Rouse,* 104 Cal., 672. So in *Nichols v. Bruns,* 5 S. D., 28, it was decided that one cannot be held liable for the fraudulent representations of an unauthorized agent by accepting the benefits without knowledge of the fraud, and where the court charged the jury if the principal accepted the benefits he was (621) liable for the representation, held error, as the mere acceptance of benefits did not imply knowledge of the facts. Where bailiffs distrained for rent in a manner not authorized by the landlord, he was said not to be liable, though he received the proceeds of property taken and sold to pay the rent, unless he had knowledge of the unauthorized acts of his agents. *Lewis v. Read,* 13 M. and W., 834. See, also, *Freeman v. Rosher,* L. R., 13 Q. B., 780; *Combs v. Scott,* 94 Mass. (12 Allen), 493; *Wheeler v. N. S. Co.,* 39 Fed., 347, in which many cases of the same kind are collected.

The principle was strongly and clearly stated by the Court in *Bell v. Cunningham,* 3 Peters (U. S.), 69: "If the principal, after a knowledge

that his orders have been violated by his agent, receives merchandise purchased for him contrary to orders, and sells the same without signifying any intention of disavowing the acts of the agent, an inference in favor of the ratification of the acts of the agent may be fairly drawn by the jury. But if the merchandise was received by the principal under a just confidence that his orders to his agent had been faithfully executed, such an inference would be in a high degree unreasonable." And the doctrine is well stated in *Roberts v. Rumley,* 58 Iowa, 306, 307: "It does not appear that the defendants ever had any intimation of the agreement which the plaintiff now alleges to exist, and which he is seeking to enforce, until the commencement of this suit. They could not have ratified and adopted an act about which they knew nothing. . . . To hold that the principal is bound by agreements between the special agent and the person with whom he contracts, not authorized by the agent's appointment, and of which he had no knowledge when he accepted the benefits of the contract, would be entirely subversive of the whole doctrine of special agency, and instead of requiring the persons dealing with the agent to ascertain, at his peril, that the agent has kept within his special authority, would require the principal to inquire, at his peril, whether the agent had gone beyond it." Here plaintiffs had full notice of the lack of authority.

(622) Ratification of an unauthorized act of the agent to be binding must not only be made with full knowledge of all material facts, but the burden is upon the party relying upon it to prove adoption of the agent's act with such knowledge. Tiffany on Agency, p. 73: *Moore v. Ensley,* 112 Ala., 333; *Combs v. Scott, supra; Wheeler v. N. S. Co., supra.*

In this case there is no evidence that defendants had knowledge of the fact that his agent and the plaintiffs had wrongfully antedated the contract, which, of course, was calculated to mislead and deceive the plaintiffs, unless we should hold, contrary to principle and authority, that the mere shipment of the gasoline was sufficient to show such knowledge. On the contrary, the only evidence upon the question tends strongly to show that the defendants had no knowledge of the facts until the first trial of this case, when one of the witnesses testified that the contract had been incorrectly dated. If there was such prior knowledge on the part of the defendants, the plaintiffs, upon whom rested the burden of proving it, had the means of doing so by the agent himself, who was not called to the stand. They should have known the facts, as a man would hardly ratify an unauthorized act, which was not binding upon him, and thereby entail a heavy loss upon himself, when he could so easily escape the liability by repudiating the wrongful act.

The case does not present a favorable aspect for the plaintiffs in any view we may reasonably take of it. It has not the right complexion. There is no satisfactory explanation of the order for 350 barrels of the oil, sent in just before the expiration of the year fixed by the alleged contract, when they had only ordered during the nine preceding months 79 barrels as fully sufficient to supply their wants for that period, and supposed (why, is not clear) that they had already ordered 150 barrels. The whole case shows that defendants were ignorant of the facts from the beginning to the end of this transaction.

It is perfectly evident that when the agent promised to "get the contract through" he expected to do so, and did do so, by a deception practiced upon his principals, and plaintiffs must have been cognizant of this purpose. There was no use at all in misdating the contract if such was not the object, because if a fair submission of the (623) matter to the defendants for the purpose of having an exception made, in this instance, to the agent's instructions was the intention of the parties, there would have been a full disclosure of the facts and no suppression of the true date, or, to speak more accurately, no misrepresentation of it. The transaction would have been a normal one and would not have taken so unusual and deceptive a form. The principal was entitled to know what his agent had done, if beyond the limit of his authority, and especially if directly in violation of his instructions, and there should have been no concealment of the facts under the guise of a false date.

The plaintiffs, having the burden of proof upon them, have not met the requirement of the law in such cases. The agent "put the contract through," but in disobedience of positive instructions, and, as the case shows, by imposition upon his principal, who was ignorant of the real transaction. It is hardly reasonable or conceivable to suppose that defendants would have assented to a losing contract, or that plaintiffs could have believed that they would do so. That would be presuming too much upon their charity and benevolence; and besides, if a fair and honest request for such a contract was intended, why falsify the date, instead of proceeding according to the natural and ordinary course of business dealings where the parties are inspired by perfect good faith? The whole trend of the evidence produces the conviction that the defendants were the victims of the deception, and there is nothing to relieve the transaction of the taint which, in law, vitiates it. As *Chief Justice Wilmot* said in *Collins v. Blanton,* 1 Wilson, 341 (1 Smith's Leading Cases (9 Ed.), 646): "The manner of the transaction was to gild over and conceal the truth, and wherever courts of law see such attempts made to conceal such wicked deeds, they will brush away the

cobweb varnish, and show the transactions in their true light. . . . All writers upon our laws agree in this: no polluted hand shall touch the pure fountains of justice. . . . You shall not have a right of action when you come into a court of justice in this unclean manner." *Ex dolo malo non oritur actio.*

(624) E. F. Wise testified: "Mr. Clark told me he had instructions from the company not to take the contract (not to sell after 19 August), and it was dated back so that the company would furnish the oil. . . . The only way he could make the contract was to date it back, and I agreed to take it with that understanding." And again: "Q. The only way he could get that to you was to date the contract back? A. That was the only way to get it through, so he said." This is a fair specimen of the evidence, which shows that plaintiffs participated in the wrong of the agent. The law will not countenance any such transaction.

The nonsuit should have been allowed.

Reversed.

Cited: Cox v. Lumber Co., 175 N.C. 310; *Hancammon v. Carr*, 229 N.C. 54.

ALMA J. GRIFFIN, ADMINISTRATRIX OF J. J. GRIFFIN, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 October, 1914.)

Railroads—Headlights—Negligence—Pedestrians—Trespassers — Trials—Evidence—Questions for Jury.

It is negligence for a railroad company to run its train on its main line at night without a headlight on the forward end of the train, and it is responsible in damages for an injury thereby proximately caused to a pedestrian, whether he at the time was a licensee or trespasser; and where the evidence tends to show that the plaintiff's intestate was seen walking upon the defendant's track at night, where pedestrians were accustomed to walk, going in a certain direction, and that soon thereafter the defendant's train was seen running there in the same direction, and the intestate was found the next morning mutilated on the track in such position as to indicate that he had been killed by the defendant's train, it is sufficient to be submitted to the jury upon the issue as to defendant's negligence, leaving the defense of contributory negligence available to the defendant under the surrounding circumstances.

APPEAL by defendant from *Peebles, J.*, at February Term, 1914, of HARNETT.

Civil action. The following issues were submitted to the jury: (625)

1. Was plaintiff's intestate killed by the negligence of the defendant?

2. Did the plaintiff's intestate, by his own negligence, contribute to his own injury?

3. What damage, if any, is the plaintiff entitled to recover?

N. A. Townsend, E. F. Young, and R. L. Godwin for plaintiff.

George M. Rose, J. C. Clifford for defendant.

BROWN, J. At the close of all the evidence, the court being of the opinion that there was no evidence of negligence of the defendant, and the court having intimated that it would charge the jury upon all the evidence to answer the first issue in favor of the defendant, the plaintiff, in deference to the ruling of the court, excepted and submitted to a nonsuit and appealed.

The plaintiff's evidence tends to prove that on the night of 21 July, 1912, some time between 3 o'clock a. m. and morning, the plaintiff's intestate was killed by one of the defendant's trains near the corporate limits of the town of Dunn. The defendant's railroad runs almost north and south through the town of Dunn and plaintiff's intestate resided about 1 mile south of the corporate limits of the town and near the defendant's railroad. Plaintiff's intestate was last seen between 3 and 4 o'clock a. m. on the night of 21 July, 1912. He was then in an intoxicated condition, going in the direction of his home, walking along the track of the defendant railroad company. He called at the house of Ed. Smith and asked for water, and after getting the water, left, walking along the railroad track going south in the direction of his home.

A few minutes thereafter a freight train passed, coming from the south, going north. This train was without any lights. The train had two engines and the front one was running backwards with no headlight. The body of the plaintiff's intestate was found next morning a short distance south of Ed. Smith's house, lying upon defendant's track in a badly mangled condition. The tracks of the defendant company were level and straight for nearly a mile in each direction from the place where deceased was killed, and the tracks at this place were much used (626) as a common footway by the traveling public, both day and night.

It is negligence upon the part of a railroad company to run its engines along its tracks, and especially its main line, without a headlight which will cast its light upon the track in the direction in which the train is going—is negligence not only according to the common law and a multitude of decisions in the courts of this country, but it is made so by

statute. The law requires a railroad company not only to equip their engines with headlights, but headlights of a certain kind and intensity. *Powers v. R. R., ante,* 599.

The learned counsel for the defendant, Mr. Clifford, very candidly admitted on the argument that the circumstances in evidence of this case are amply sufficient to go to the jury and to justify a finding that the plaintiff's intestate was killed by the engine hereinbefore mentioned. That being true, we have the facts in evidence that the engine was without any headlight; furthermore, that it ran over and killed the intestate. This admission was very properly made, because it is patent that the intestate was killed by the defendant's engine, as his head was severed from his body and was found between the rails of the track. We have, therefore, in evidence both the negligence and the injury.

The position contended for, that the railroad company did not owe the intestate any degree of care except not to willfully and wantonly injure him, cannot be maintained. It is immaterial whether the intestate was a licensee or a mere trespasser. The defendant owed it to him and to all other persons, whether on the track rightfully or wrongfully, to have a headlight upon its engines in order that the engineer may be enabled to discover, not only human beings, but any obstruction upon the track, and this is not only for the protection of the passengers and employees of the defendant, but for the protection of all persons who may for any reason be on the track.

While such duty is incumbent upon the railroad company, the omission of it does not always excuse the licensee or trespasser. It is always incumbent upon them to keep a lookout and to exercise reasonable care for their own protection.

(627) The defendant is not barred under the facts of this case from offering evidence tending to prove that the intestate was guilty of contributory negligence, himself. *Hill v. R. R., ante,* 592.

There is evidence in the record from which the jury may find, if they see fit, contributory negligence upon the part of the intestate, but the evidence is not of that character as will justify the court in any view of it to sustain a motion to nonsuit upon that ground. Besides, his Honor did not base his ruling upon contributory negligence, but solely upon the idea that there was no evidence of negligence upon the part of the defendant, and that he would so charge the jury.

For this error there must be a

New trial.

Cited: Horne v. R.R., 170 N.C. 648, 661.

MARY THOMAS ET AL. v. ROSA THOMAS.

(Filed 7 October, 1914.)

1. Estates—Tenant for Life—Waste — Common-law Definition — Modern Application.

While the common-law definition of waste is now held as sufficiently descriptive, the adaptation of the general principle to conditions existing in this country, as to the acts which constitute waste, have been variously modified until it has come to be established that a life tenant, as a general rule, may do what is required for the proper enjoyment of his estate to the extent that his acts and management are sanctioned by good husbandry in the locality where the land is situated, having regard, also, to its condition, and which do not cause a substantial injury to the inheritance.

2. Same—Sale of Timber—Improvements—Present Intent—Honest Expenditure—Other Improvements—Trials—Burden of Proof.

The general rule regarding waste by a life tenant in cutting and selling trees growing upon the inheritance is that he may not do so merely for his own profit; and when such is done for the improvement of the estate, it must be shown by him that sale of the timber was made with the present purpose of the improvements then contemplated, that the proceeds were honestly expended for such purpose, and with regard to the rule that the inheritance will not be substantially injured thereby, etc.; and it is not sufficient to show that the application of the proceeds of sale were subsequently made to improvements, or that in various ways he has expended sums of money in the improvement of the estate equaling that caused by the waste he has committed thereon.

APPEAL by plaintiff from *Peebles, J.*, at March Term, 1914, (628) of LEE.

Civil action to recover damages for waste.

Plaintiffs, children of John P. Thomas, deceased, by a former wife, and owners of a vested estate in remainder under their father's will, sued the defendant, the widow of said Thomas, who occupies and possesses the land as life tenant under said will, claiming that the life tenant has committed waste upon the land.

The evidence on part of plaintiff tended to show that since defendant had entered on the property as life tenant under the will, she had sold a lot of timber for cross-ties, receiving pay therefor; also some cordwood and saw stocks, this last to a small amount and which had been paid for by labor done on the estate by the purchaser. Some of the witnesses testified that the permanent damage done to the property by the sale and removal of this timber would amount to $75 or $100, but the evidence did not show that defendant had realized more than $40 or $50 from said sale.

On examination in chief and cross-examination of plaintiffs' witnesses, it appeared that defendant, while in possession of her present estate, had made some repairs on the property; had reconstructed a cotton house worth from $12 to $25, the estimates of the witnesses varying as to its value; that at another time she had rebuilt an old tobacco barn, which had fallen, using as part the old timbers and had also built and repaired some fencing on the property, the value of these improvements being under $50.

The court, among other things, charged the jury: "You will consider the evidence you have here from the witness stand and say whether or not the plaintiffs have satisfied you by the greater weight of the (629) evidence—and that does not mean the greater number of witnesses, but that carries to your hearts and minds the greater amount of conviction; if in that way the plaintiffs have satisfied you that she sold more wood and timber off that land than she applied to repairing and keeping up the farm and buildings, then you should answer the first issue 'Yes'; otherwise, answer it 'No.'" Plaintiff excepted.

There was verdict for defendant on the issue as to commission of waste. Judgment, and plaintiff excepted and appealed.

Hoyle & Hoyle for plaintiff.

R. H. Hayes for defendant.

HOKE, J. In *Norris v. Laws,* 150 N. C., 604, the definition of waste as recognized at common law is given as follows: "A spoil or destruction, done or permitted with respect to lands, houses, gardens, trees, or other corporeal hereditaments by the tenant thereof, to the prejudice of him in reversion or remainder, or, in other words, to the lasting injury of the inheritance." Definitions substantially similar are approved in *Sherrill v. Connor,* 107 N. C., 630, and *King v. Miller,* 99 N. C., 584, where waste is said to be a "spoiling or destroying of the estate in respect to buildings, wood, or soil, to the lasting injury of the inheritance." While these definitions are still regarded as sufficiently descriptive, as shown in the decisions referred to and others of like kind here and elsewhere, in adapting the general principle to conditions existent in this country, the acts which constitute waste have been variously modified until it has come to be established that a tenant as a general rule may do what is required for the proper enjoyment of his estate to the extent that his acts and management are sanctioned by good husbandry in the locality where the land is situated, having regard, also, to its condition and which do not cause a substantial injury to the inheritance. *Norris*

v. Laws, Sherrill v. Connor, King v. Miller, supra; Lambeth v. Warner, 55 N. C., 165; *Shine v. Wilcox,* 21 N. C., 631; *Ballentine v. Poyner,* 3 N. C., 110; *Sheppard v. Sheppard,* 3 N. C., 382; *Rutherford v. Wilson,* 95 Ark., 246; 37 L. R. A. (N. S.), p. 763; *Anderson v. Cowan,* 125 Iowa, 259; 106 Am. St. Rep., 303.

In *King v. Miller* the position is stated as follows: "While in (630) its essential elements, waste is the same in this country and in England, being a spoil or destruction of houses, trees, etc., to the permanent injury of the inheritance; yet, in respect to acts which constitute waste, the rules are not the same. Here an act is not waste in law which is not waste in fact. The real and important inquiry in such cases is, Has the land been abused, during the life tenant's occupancy, by a spoliation unwarranted by the usage of prudent husbandmen in respect to their own property, to the impairment of it, as a whole, in value?"

In *Sherrill's case, Avery, J.,* delivering the opinion, said: "While the courts of this country have generally adhered to the old definition of waste that we have already given, they have as uniformly maintained that what is permanent injury to the inheritance must of necessity depend often upon the circumstances attending a particular case, and that rules laid down in England for determining what acts constituted waste there were not always applicable in a new country, where the same acts might prove beneficial instead of detrimental to the inheritance. *Gaston, J.,* in *Shine v. Wilcox,* 1 Dev. and Bat. Eq., 631, says: 'While our ancestors brought over to this country the principles of the common law, these were, nevertheless, accommodated to their new condition. It would have been absurd to hold that the clearing of the forest, so as to fit it for the habitation and use of man, was waste. . . . We also hold that the turning out of exhausted land is not waste.' The Court in that case reached the conclusion that it was for the jury to determine whether, in clearing additional land or turning out that which had been exhausted, the tenant for life acted as a prudent owner in fee would have done, had he been cultivating the land for a support or for profit. Substantially the same reasoning is adopted in other cases decided before and since that opinion was delivered, here and in other States." And in *Norris v. Laws, Associate Justice Walker* thus succinctly states the principle: "We have held that what is a permanent injury to the inheritance must often depend upon the facts and circumstances of the particular case under consideration, and the jury must determine, under proper instructions of the court, whether the tenant for life, in what he has (631) done or omitted to do, has acted with the same care as a prudent owner of the fee would have exercised if he had been in possession, cultivating or using the land for a support or for profit."

In the practical application of the doctrine, as it now prevails, and under the restrictions and limitations as indicated, a tenant has been allowed to clear land required for the proper enjoyment of his estate, and where he may clear, it seems that he may sell the timber for his own benefit. Under his right of common estovers, towit, housebote, plowbote, and haybote, he may cut sufficient timber to repair the necessary buildings already on the premises and for fuel; second, for making and repairing implements of husbandry, and third, for repairing fences and hedges. *Parkins v. Coxe,* 3 N. C., 339; *Anderson v. Cowan, supra.* But the general rule is that the standing timber growing on land is considered a part of inheritance, and a tenant is never allowed to cut and sell timber therefrom merely for his own profit (*Dorsey v. Moore,* 100 N. C., 41; *Miles v. Miles,* 32 N. H., 147), and in case he has done this in violation of the rights of the remainderman or reversioner, he may not recoup or set off against such a demand the costs or profits from repairs or improvements made by him at another time. *Morehouse v. Cotheal,* 22 N. J. L., 521.

It may be that the cutting and selling of timber by a tenant for the present purpose of making necessary repairs on buildings already on the premises can, at times, be sustained. Such a course seems to have been approved in a few cases, as in *Loomis v. Wilbur,* 5 Mason, 13 Fed. Cases, No. 8498, where *Justice Story* states the proposition as follows: "If the cutting down of the timber was without any intention of repairs, but for sale generally, the act itself would doubtless be waste; and if so, it would not be purged or its character changed by a subsequent application of the proceeds to repairs. But if the cutting down and sale were originally for the purpose of repairs, and the sale was an economical mode of making the repairs, and the most for the benefit of all concerned, and the proceeds were *bona fide* applied for the purpose in
(632) pursuance of the original intention, it does not appear to me to be possible that such a cutting down and sale can be waste. It would be repugnant to the principles of common sense that the tenant should be obliged to make the repairs in the way most expensive and injurious to the estate."

Notwithstanding the closing sentences of the learned judge, or rather in correct interpretation of entire excerpt, if such a privilege can be upheld at all, it is only in very exceptional instances, and it must be made to appear that the cutting and sale was with a present view of making needed repairs; that the proceeds have been honestly expended for such purpose, and that no substantial injury to the inheritance has been caused, or, as said in the statement, "that it is most for the benefit of all concerned."

Pursuant to these authorities, we must hold that there was error in the directions given the jury on the present trial. There was no evidence offered that the cutting and sale of this timber, on the part of the widow, was with the purpose of making needed repairs or that the proceeds were expended for any such purpose. On the contrary, the defendant has been allowed to justify for an act that ordinarily constitutes waste, by showing in a general and indefinite way that, during her tenancy, she has expended for repairs an amount fully equal to the value of the timber sold.

On the record as it now appears the defendant, in selling the timber for cross-ties, etc., has *prima facie* committed an act of waste, and before she can be excused, it is incumbent upon her to show, as heretofore intimated, that the cutting and sale of the timber was with the present view of making necessary repairs on the property; that the proceeds were honestly expended for the purpose, and that such a course was in accordance with good husbandry and caused no substantial damage to the inheritance.

There is error entitling plaintiffs to a new trial of the cause, and it is so ordered.

New trial.

Cited: Fleming v. Sexton, 172 N.C. 256.

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(633)

JOSEPHINE HARTSELL v. CITY OF ASHEVILLE AND C. W. BEALE AND WIFE.

(Filed 30 September, 1914.)

1. Cities and Towns—Claims for Damages—Statutory Notice—Reasonable Opportunity.

A charter requirement that notice to a city must be given within ninety days after the occurrence of an injury for which it is claimed that the city is responsible through its negligence, is a valid one, and failure to give this notice will bar a plaintiff's right of recovery, unless it is shown by him that it was impossible, on account of his incapacity, with the ordinary means at his hands, to give such notice in the time required.

2. Same—Trials—Evidence—Questions for Jury.

The reason of a charter requirement that notice be given within ninety days of a claim of damages arising from its negligence is that within that time opportunity will reasonably be afforded the claimant to give such notice; and in this case, there being evidence tending to show that the plaintiff was in a hospital for eight weeks, absolutely helpless, and prac-

tically so for three months, and longer, it is held that the question should be submitted to the jury for their finding as to whether or not the plaintiff had been afforded a reasonable opportunity to give the notice in the time required.

PETITION to rehear this case, reported 164 N. C., 193.

J. H. Merrimon and Merrimon, Adams & Adams for plaintiff.
S. G. Bernard and Harkins & Van Winkle for defendants.

CLARK, C. J. When this case was here before, 164 N. C., 193, the Court held that there was no liability in favor of the plaintiff against Maria Beale and her husband by reason of their ownership of the lot adjoining the sidewalk on which the plaintiff slipped and fell, to her injury, and sustained the nonsuit as to the city of Asheville because the plaintiff had failed to offer sufficient evidence of an excuse for failure to file notice within ninety days of her claim, as required by the charter of the city.

The petition to rehear does not allege any error as to Mrs. Beale and husband, and is directed solely to the holding that there is no (634) evidence to submit to the jury to excuse plaintiff's failure to present the notice to the city within the required ninety days.

The requirement that such notice shall be presented within ninety days is a reasonable one and its legality is not controverted. But in *Terrell v. Washington,* 158 N. C., 298, it was said that to excuse a strict compliance with this requirement, "it must be shown that there is such physical or mental incapacity as to make it impossible for the injured person by any ordinary means at his hand to procure service of the notice . . . and if there is actual incapacity, it can make no practical difference whether it is mental or physical in its nature."

It is not necessary that the injured party should be in physical and mental condition to make such claim and give due notice for the whole period of ninety days. The ninety days is prescribed with the view that at some time within that period the injured party will be in condition to give the notice, and it should be given to permit the city to make prompt investigation and to avoid imposition. All that is necessary is that there should be reasonable opportunity within that time in which the plaintiff will be able to give the required notice.

On the former hearing, on consideration of the evidence, we thought that the plaintiff had not introduced any evidence which would authorize a jury to find that during the whole ninety days she had been under "such physical or mental incapacity as to make it impossible for her, by any ordinary means at hand, to procure service of the notice." But

upon reconsideration of the testimony, we find that, taking her testimony to be true, the jury might or might not so find. She testified that during the first eight weeks in the hospital she was absolutely helpless, and was practically helpless for three months, and that she left the hospital only at the end of three months. Her daughter testified that her mother during the time she was in the hospital was as helpless as a baby, and remained in a practically helpless condition for two months after she came home.

We are of opinion, upon reconsideration, that upon all the testimony the issue should have been submitted to the jury, under proper instructions from the court, whether by reason of her physical (635) or mental condition the plaintiff was unable at any time during the ninety days to give, or to cause to be given, to the city notice of her injury.

Petition allowed.

Cited: Dayton v. Asheville, 185 N.C. 16; *Foster v. Charlotte,* 206 N.C. 529; *Webster v. Charlotte,* 222 N.C. 323.

T. C. STEELE v. H. L. GRANT.

(Filed 7 October, 1914.)

1. Master and Servant — Safe Place to Work — Negligence — Evidence— Proximate Cause.

While the master is not held to the requirement of guaranteeing the safety of a workman he has engaged to work for him upon the erection of his structure or building, it is nevertheless his duty to provide for him reasonably safe tools and machinery and place to work, and to keep them in such condition as to afford him reasonable protection; and this duty being one personally required of him, he may not delegate it to another and escape liability for damages proximately caused to the servant in the performance of his duties.

2. Master and Servant—Safe Place to Work—Personal Duty—Delegation of Duties—Principal and Agent—Concurring Negligence—Proximate Cause.

Where the master has negligently failed in his duty to supply the servant with safe appliances and place for the work required of him, and this negligence concurs with that of a fellow-servant in proximately causing an injury to the servant, the master's responsibility is the same as if his negligence was the only cause thereof.

3. Same—Trials—Evidence—Nonsuit—Contributory Negligence—Assumption of Risks.

Plaintiff was employed by the owner in erecting a concrete structure, wherein an elevator was used to take the materials up to the various floors to be used, etc. There was evidence tending to show that plaintiff assisted in raising the head block on the fifth floor, where it was elevated upon a "stiff knee," and the following morning the plaintiff was required by his superior to put in a "cut-off" plank to hold the concrete about to be used in the floors there; that plaintiff called his attention to the fact that the "head block" as placed rendered this work dangerous, and was told to do the work, that it could safely be done if the elevator was not used at that time, and that this would be prevented; that while doing the work with this assurance, the elevator was run by some one, resulting in the head block falling upon the plaintiff, owing to its insecure fastenings, to his injury. *Held*, evidence of defendant's actionable negligence proper to be submitted to the jury; and it is *Further held*, there was no evidence that plaintiff had assumed the risk of this dangerous work, or of his contributory negligence.

(636) APPEAL by defendant from *Peebles, J.*, at April Term, 1914; of WAYNE.

This action was brought to recover damages for injuries sustained by the negligence of defendant. The plaintiff, T. C. Steele, was on 9 September, 1913, engaged as a carpenter in the construction of a five-story reënforced concrete building for H. L. Grant, defendant, in the city of Goldsboro. Steele is a carpenter by trade, with several years experience, and had been at work on this building since 1 July, 1913. An elevator was used for conveying the material up on the building as it progressed, and for taking trash down, and plaintiff had helped to build this elevator shaft. On the day before the injury plaintiff was told to raise the head block of the elevator above the fifth floor of the building so as to get ready to pour the cement for the fifth floor. On the morning of the injury plaintiff, with others, was engaged in putting in the cut-off plank on the fifth floor under or near the head block which plaintiff had helped to raise the afternoon before. In putting in this cut-off plank it seems to have been necessary to remove one of the braces which was in the way, and plaintiff sent a negro down below to nail on another brace, so that he (plaintiff) could remove the brace that was binding the elevator cable and release the cable. After that had been done, and while plaintiff was in the act of putting in the cut-off plank, one end of this same head block fell, struck plaintiff, and caused the injury complained of. When the head block had been removed so as to permit of the work in hand being done, Bailey, the foreman of carpenters, had his attention
(637) directed by plaintiff to the dangerous condition of the head block, if left to rest upon the stiff knee, if the elevator should be moved,

and suggested propping it with a lower head block or the one underneath it; but Bailey refused to let him brace it in that way, so that it would be safe in any emergency, and ordered him "to do what he had been told to do," promising him that the elevator should not be moved, in which case plaintiff's position would have been a safe one. The elevator was moved, and the head block swung around and caught plaintiff, severely injuring his leg and foot, and causing him great pain and suffering, and seriously impairing the usefulness of his leg and foot, the injury being a permanent one.

Plaintiff testified: "I was at work on Grant building on or about 9 September, 1913. I was injured on that morning between the hours of 9 and 10 o'clock. I went to put in a cut-off plank on the fifth floor, where the accident was, where I got hurt. [Here elevator model was exhibited.] This elevator was constructed as most all elevators are. On the morning that I went to work to put in the cut-off plank right here in that floor, the cut-off plank was to be raised 4 inches above that floor. Cut-off board is where the concrete is poured, and to hold the concrete. That was raised 4 inches above this floor on the morning. This head block had been raised the evening before. That went here. There was a little brace that was underneath here (attached to form a stiff knee) to hold this 4x4 before the head block was raised. The head block was resting on the floor the evening before it was raised temporarily, and this brace I put there to hold that (the stiff knee). We had to have this 4x4 (stiff knee) braced so that we could lift this (the head block) up and then brace it after it was raised. The next morning I had to have this brace removed, and therefore I sent a negro down below there to nail on this brace so I could release the cable here in this brace in front. After that was done, and while I was in the act of putting in that cut-off, the head block, the first I knew of it, was coming down on me. I didn't know the elevator was in use. I didn't know they were using the elevator. It was raised temporarily here, and we were not to use it. This elevator was constructed as follows: Those (638) were the guides that went to the basement, where they rested on solid foundation. These guides all the way up were thoroughly braced and nailed secure. Then the head block here (that is, the supporting head block), the first head block that held the guides in position were bolted in there (in the guides) with four bolts running clean through, so, and fastened securely. It being perfectly secure with that head block (the supporting head block) raised under this (the head block), but to take that head block out from under there and raise this head block with the shives in it above this post, this stiff knee in there would not be safe, as this post here (guide-post) didn't come up any further

than this (fifth) floor—right here; but to take this head block (supporting head block) and raise it up under there, then that holds that (the head block containing the pulleys or shives) and supports that and relieves the weight on this 4x4 (stiff knee). You can then brace them all the way around here. There was only one brace on this on the morning that I went there to put in the cut-off plank. This head block was not raised as it is now. I went to do this work under the direction of the foreman. I suggested to him to raise this head block under this as it is now. He told me it was not necessary, as he was the foreman, and I would do what I was told there. The foreman was Bill Bailey. The evening before this head block was resting right across here, on this floor here. It was in our way. We had to put in that cut-off, and had to raise it temporarily to get it out of the way. They were all in a rush there to get the floor poured. All the hands had something to do, and this had to be raised. It was raised up on this stiff knee here. There was no post up there to make it secure. I stated that I was doing this work under the direction of Mr. Bailey. Mr. Bailey was carpenters' foreman. He directed me to raise the head block on Monday evening, 8 September. After we raised the head block in the position that it is now, I went to Mr. Bailey and asked him could I raise the other head block under this one to support it, and he told me it was unnecessary; it was only raised temporarily. I understood him to say, at the time,

(639) it would not be operated in the condition it was at the time it fell. It would have been perfectly safe, and would not have fallen if it had not been put in use. On that evening, Bob Lee, labor foreman, was told by Bailey, in my presence, the elevator was in no condition to use, and instructed him not to use it. He (Lee) was working on the third floor, cleaning up trash. On the morning that I started to work to put in this cut-off I went to Mr. Bailey and asked him if the elevator was going to be used. He said it was not. They were not going to use the elevator that morning. I went over there to fix it and started to work. I had been at work half an hour when it fell. There was no defect in the construction of the elevator. The defect was when it was raised temporarily, as the position it now stands in. If this head block had been raised up under here, where it should have been, it would have been safe. There is where the defect was. If this head block had been raised under here and then bolted as down here, there was no possible chance for that to have fallen, but if it had fallen, it would not have caught me. It would have fallen over here, and struck the floor, and not toppled over here on me. It was this stiff knee in that that held it up there at the time it fell. It was all that held it up. I didn't send anybody down to knock that brace off; I reached down there

and took it off. It was a little four-penny nail. I sent him down to nail that on so I could knock this off. I just pulled out this little four-penny nail, driven halfway in. After I took this brace off we had then sawed our plank, and I was starting to stick this in here when the elevator fell. I don't know how long it was after I took this brace off before the elevator fell. The stiff knee gave way down here at this place. It broke. I could not say whether it was at a joint or below. I saw it hanging down there after it was done (broken). I was in so much misery and suffering so I could not tell exactly where it did break. I could see the elevator as my body was laying over there. The stiff knee was all right until there was weight put on that. It would have held up that head block, it would have held that up, but not the load that was on it. It was safe a-plenty to have held the head block. I could not tell the exact position of the stiff knee, I was suffering so much. I (640) did not see the condition after I was taken down."

M. H. Moore testified: "I was at work as a carpenter on the Grant building on the morning of 9 September. I was near-by at the time of the injury. On the evening before the injury occurred on the 9th, I heard something said between Steele and Bailey about the elevator. I could not say word for word; I know there was something said. The substance of it was that Bailey told plaintiff that the elevator was not safe for operation. I could not be positive who he was speaking to; they were all there together. Mr. Lee is the labor foreman, best I understood it; he had charge of that part of it. That stiff knee in here, that one, that had been pieced, broke, and the head block swung around, gate fashion, and caught Mr. Steele, and he was laying under it when I got there. We tried to raise the head block off of him, and could not do it, and called to the edge of the building to the engineer to lower the elevator, so that we could lift the head block off Mr. Steele. This portion of the elevator at the time would weigh 600 or 700 pounds. I did not notice whether or not the elevator was loaded at the time."

There was testimony of a medical expert as to the nature and extent of the injuries.

Defendant introduced no testimony, but at the close of plaintiff's, he moved for judgment of nonsuit, which was refused, and he excepted. Verdict and judgment for plaintiff, and appeal by defendant.

E. W. Hill and W. S. O'B. Robinson & Son for plaintiff.

Oates & Herring and George E. Hood for defendant.

WALKER, J., after stating the facts: There was evidence of negligence in this case, which we must assume was properly submitted to the jury

in the charge of the court, as the latter was not sent up. The general rule as to the duty of the master in respect to the place of his servant's work, and tools and appliances furnished to him for the purpose of doing the work, and as to structures which he is engaged in erecting, (641) was conceded, and may be thus formulated: The duty of the master to provide reasonably safe tools, machinery, and place to work does not go to the extent of a guarantee of safety to the employee, but does require that reasonable care and precaution be taken to secure safety, and this obligation, which is positive and primary, cannot be avoided by a delegation of it to others for its performance. The master's duty, though, is discharged if he does exercise reasonable care in furnishing suitable and adequate machinery and apparatus to the servant, with a reasonably safe place and structures in and about which to perform the work, and in keeping and maintaining them in such condition as to afford reasonable protection to the servant against injury. *R. R. v. Herbert,* 116 U. S., 642; *Gardner v. R. R.,* 150 U. S., 349; *R. R. v. Baugh,* 149 U. S., 368; *Steamship Co. v. Merchant,* 133 U. S., 375. This undertaking on the part of the master is implied from the contract of hiring. *Hough v. R. R.,* 100 U. S., 213. The rule was stated and applied in *Mincey v. R. R.,* 161 N. C., 467, citing the above authorities, and it has been frequently recognized in many other cases. The difficulty is not in the expression of the principle, but in the application of it to any given statement of facts. But this case does not present any such difficulty, as the facts are simple and practically uncontroverted. It was the plain duty of the defendant, when plaintiff was ordered to work on the fifth floor of the house he was then building, to see, in the exercise of proper care, that he had a reasonably safe place and surroundings for the performance of the task assigned to him, viz., putting in the cut-off plank to receive the concrete and hold it. It is hardly necessary to argue that he failed to do this, for construing the evidence most favorably for the plaintiff, as we are required to do, it appears that the head block had to be raised in order to do the work, and it was accordingly raised and placed upon the stiff knee. Owing to the nature of the latter, this produced a dangerous condition, and plaintiff suggested that it be done another and a safe way, but his suggestion was not heeded, and he was ordered to adopt the dangerous way, with the promise that he would be protected in his work against injury from the head block by (642) keeping the elevator still, which, if it had been done as promised, would have prevented the injury. But the elevator was moved, and the shafting or stiff knee being too weak to support and hold the head block, it swung around and caught the plaintiff, inflicting the injuries of which he complains. The elevator was placed there to be

used, and not to remain idle. It was likely to be started at almost any moment, unless proper precaution was taken to prevent it. The position of the plaintiff was safe if the elevator was not moved, but by reason of the weakness of the shaft or stiff knee, it was rendered dangerous if it was moved. So we have a case where the master uses a defective appliance to hold up the head block at the top of the elevator, and this combines with the negligence or willfulness of some one, in moving the elevator, to cause the injury. We have two acts of negligence coöperating to produce the injury, neither one of which would have done so without the presence of the other. These are reasonable inferences the jury might have made from the evidence as it is now presented, and they were properly allowed to pass upon it. It is a familiar principle that the negligence of the master, when uniting with some other negligence, and the two together directly causing the injury, makes the master liable, even though his negligence was only a contributing cause, and the other coöperating negligence was that of his employee's fellow-servant or of a stranger. The law will not, under such circumstances, apportion the liability, but requires the master to be sure, when one of his servants is negligent and injures another servant in the same employment, that he is free from culpable blame; otherwise the law will hold him responsible to the injured servant, as much so as if his own negligence had been the sole cause of the injury. *Moore v. Contracting Co.*, 149 N. C., 177. This doctrine was applied in that case, citing 12 Am. and Eng. Enc. of Law (2 Ed.), p. 905, where it is said: "It is a familiar principle that where an injury is caused by the concurring negligence of two persons, either or both may be held responsible. The application of this general rule in the law of master and servant is not affected by the fellow-servant doctrine. Where the negligence of the master is combined with the negligence of a fellow-servant in producing (643) the injury, and the negligence of neither is alone the sufficient cause, both the master and the fellow-servant are liable, and the injured servant may maintain his action against either or both together. The application of this rule occurs mostly in cases where the master is sued. That a master is liable for an injury to his servant caused by the concurrent negligence of himself and a fellow-servant, but which would not have happened had the master performed his duty, is clear; it is only where the negligence of a fellow-servant is the whole cause of the injury that the master is excused. And while contributory negligence may relieve a master from liability, it must be that of the person injured; it is immaterial that the negligence of a third person contributed to the injury. If, therefore, a servant who is himself free from negligence receives an injury, caused in part by the negligence of his master, or,

what amounts to the same thing, of a servant for whose negligence the master is responsible, and in part by that of a fellow-servant, he can maintain an action against his master for such injury."

The principle has found frequent and varied expression in the books. Where a seaman was killed by the explosion of a steam valve, due to the concurring negligence of the master in arranging the pipe to which it was attached in an unsafe manner and the negligence of the servant in opening the valve, it has been held that the master was liable. *Southern Pacific v. Dacasta,* 190 Fed. Rep., 689; 111 C. C. A., 417. "A master is liable for the injury to his servant, who is free from contributory negligence, where it is caused by the concurrent negligence of the master or his vice principal and a fellow-servant." 26 Cyc., 1302. "A servant does not assume the risk from the negligence of a fellow-servant augmented by that of the master." *Humphrey v. Raleigh C. and C. Co.,* 80 S. E. (W. Va.), 803. It has been said that while an employee cannot recover for personal injuries if the negligence of a fellow-servant was the proximate cause of the injury, if the injury is caused by the employer's negligence, as by furnishing defective machinery, the employee may recover even though the negligence of a
(644) fellow-servant was a contributory cause of the injury. *Helley v. Perkins Machine Co.,* 102 N. E., 944. It has also been held that an employee can recover for an injury caused by the negligence of his employer in providing a defective angle cock on the air-brake hose of an engine about which he worked, although the negligence of the engineer in moving the train while he was between the cars was also a proximate cause of the injury. *Watson v. A. C. L. Railway,* 74 S. E., 121. The duty of a master to provide reasonably safe tools and machinery and place to work does not go to the extent of a guarantee of safety, but does require that reasonable precautions be taken to secure safety; and this obligation cannot be avoided by delegating it to others. The duty of exercising reasonable care in furnishing suitable and safe machinery and appliances, and keeping them in repair, is a personal obligation which the master cannot rid himself of by delegating it to an agent to perform. If instead of himself performing the positive obligations which he owes to his servants, the master engages another to do them for him, he is liable for the neglect of that other, which is the neglect of the master to do the things which it is his duty to perform. It therefore follows that the duty of the master is not performed by the appointment of an agent to supply reasonably and adequately safe instrumentalities for the servant, but he is liable if the agent fails to do so. It being the duty of the master to exercise reasonable care to furnish suitable machinery and appliances and repair and inspect the same in proper

instances, and to provide a reasonably safe place in which to do the particular work assigned to his servant, he cannot interpose as a defense to an action for an injury to the employee the neglect of another servant to perform that duty for him; nor, where the negligence charged against him is the failure to supply a reasonably safe place to work, the master cannot escape liability upon the ground that a particular act of negligence was that of a fellow-servant. The negligence of the latter must be unmixed with his own in order that his plea can be available to him, provided the negligence of the two united and constituted the proximate cause of the injury. These principles are fully sustained in the following cases: *B. and O. R. Co. v. Baugh,* 149 U. S., 368; (645) *Hough v. T. and P. R. Co.,* 100 U. S., 213; *N. P. R. Co. v. Peterson,* 162 U. S., 346; *U. P. R. Co. v. Snyder,* 152 U. S., 684; *N. P. R. Co. v. Herbert,* 116 U. S., 642, where the subject is exhaustively discussed. They are also approved in *Barkley v. Waste Co.,* 147 N. C., 585 (*s. c.,* 149 N. C., 287); *Tanner v. Lumber Co.,* 140 N. C., 475; *Avery v. Lumber Co.,* 146 N. C., 592. It has been held by us that this duty of the master to exercise due care in furnishing his servant with reasonably safe machines and instrumentalities with which to do the work and a reasonably safe place in which to perform it, cannot be safely neglected by him, and his failure in this duty exposes the employee "to extraordinary risks and hazards." *Moore v. R. R.,* 141 N. C., 111. The master is not only liable to his servant for the neglect of a non-assignable duty, that is, one that is primary, personal, and positive, and for the neglect of his representative if he delegates it, and for his own neglect even if it unites with that of a fellow-servant, causing the injury, but he is also liable "when the other servant occupies such a relation to the injured party, or to his employment in the course of which his injury was received, as to make the negligence of such servant the negligence of the employer." *Q. S. S. Co. v. Merchant,* 133 U. S., 375. The principle was well stated and applied in *N. Pac. R. v. Peterson, supra,* where *Justice Peckham* said: "The general rule is, that those entering into the service of a common master become thereby engaged in a common service and are fellow-servants, and *prima facie* the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow-servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances, and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of

reasonably safe and competent men to perform their respective
(646) duties, and it has been held in many States that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employee, and if the employee suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow-servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

Applying this well settled doctrine to the case in hand, we find that the lift or elevator was in a defective condition, which was called to the attention of the foreman. If he, or any subordinate to whom he intrusted this primary duty of the master to cure the defect or to guard against its evil consequences, neglected the duty, the defendant, as master, was responsible just the same as if he had been personally present and acting for himself; and there was also some evidence from which the jury might have inferred that Bailey, the foreman, stood, in his relation to the defendant, as a vice principal.

But there was superadded to the default of the master, in having defective shafting, the express promise of the foreman that he would see to it that the servant's position was not made dangerous thereby, while he was engaged in performing his work. That is, in its legal character and essence, not unlike a promise to make needed repairs, called to the master's attention by the servant, in which case the rule is thus stated in 1 Labatt on Master and Servant (Ed. of 1904), sec. 421: "After the servant has shown that there has been a promise, actual or implied, on the part of the master, and that this promise amounts to an undertaking to remove, not only a danger, but a danger by which he himself is threatened, he still has the onus of proving that the inducing motive of his continuance in the employment was his reliance upon
(647) the fulfillment of the promise. Recovery cannot be had where the only reasonable inference from the testimony is that the servant continued work, not because he relied on the master's promise, as given, but merely because of an expectation, based on the defendant's habit, that he would make the repairs in question. But the mere fact that the servant has some suspicion that the master's assurances will not be made good is not enough to deprive him of his right of action. When complaining of defective instrumentalities or machinery it is not

necessary that the servant shall state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the service unless the defects be repaired or remedied. It is sufficient if, from the circumstances of the case, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise." We cannot, therefore, say that there was any assumption of risk or contributory negligence on the part of the plaintiff. As the evidence is now presented, there was none. It does not appear who moved the elevator—whether it was done by Lee, the labor foreman, or one of his subordinates, or by a stranger. In the view we take of the case, it can make no material difference by whom it was moved, as it was the duty of the master, who had made the promise through his representative, to use due care in protecting the plaintiff while at his work, and there is evidence that this was not done. It was held in *Keating v. Hewatt,* 99 N. E. (Mass.), 479, a case much like this one in its facts, that an employer is responsible for injury to an employee resulting from the foreman's negligent failure to protect the employee against injury at a machine, after assuring him that it would not start while he was working at it, and that it could be found by the jury that the injury was due solely to the negligent failure of the foreman to secure this promised protection after he had exposed the plaintiff to danger. For such negligence of the foreman, the employer is responsible. *Floettle v. R. R.,* 41 N. J. Sup., 792. We said recently in *Lynch v. R. R.,* 164 N. C., 249: "In *Whitson v. Wrenn,* 134 N. C., 86, the master had instructed the servant to do the work in a way that was safe, and he elected to disobey the orders and do it in a dangerous way, (648) and we held that he could not recover for the injury caused by a departure from his instructions, because the fault was all his own. Not so here, but the contrary. It is the converse of that case. The servant selected a safe method of doing the work, and the master ordered him to desist and do it in a dangerous way. The injury was, therefore, caused by the master's fault, and fixes him with responsibility for it. There is no pretense that the servant was guilty of any contributory negligence, and could not be, under the facts. *Orr v. Telephone Co.,* 132 N. C., 691." That case was approved, at the same term, in *Watson v. R. R.,* 164 N. C., 176.

We, therefore, conclude by the application of well defined principles of the law that the case was properly submitted to the jury. The only exception taken in the record and discussed in the brief was directed against the refusal to nonsuit, and that matter, as we have seen, was correctly decided by the court, in almost any view we can take of the

evidence for the plaintiff, and certainly so when we adopt the one most favorable to him.

No error.

Cited: Ridge v. R.R., 167 N.C. 525; *Cochran v. Mills Co.*, 169 N.C. 61; *Lynch v. Veneer Co.*, 169 N.C. 172; *Yarborough v. Geer*, 171 N.C. 336; *Wooten v. Holleman*, 171 N.C. 464; *Vogh v. Geer*, 171 N.C. 679; *Dunn v. Lumber Co.*, 172 N.C. 136; *Taylor v. Power Co.*, 174 N.C. 587; *Beck v. Tanning Co.*, 179 N.C. 125; *Newton v. Texas Co.*, 180 N.C. 565; *Comrs. of Jennings*, 181 N.C. 399; *Cook v. Mfg. Co.*, 183 N.C. 56; *Beck v. Chair Co.*, 188 N.C. 746; *Perkins v. Wood & Coal Co.*, 189 N.C. 607; *Paderick v. Lumber Co.*, 190 N.C. 312.

C. N. NORWOOD ET ALS. v. JOHN TOTTEN ET ALS.

(Filed 30 September, 1914.)

1. **Deeds and Conveyances—Married Women—Conveyance to Husband—Privy Examination—Certificate of Probate Officers—"Color"—Limitations of Actions.**

   A conveyance of land by the wife to her husband without her privy examination and the certificate of the probate officer that the contract "is not unreasonable or injurious to her" (Revisal, sec. 2107) is "color of title" which will ripen into a perfect title by seven years adverse possession of the husband, and his children by a former marriage after her death, there being no issue born alive by the second marriage and therefore no tenancy by curtesy of the husband in the lands.

2. **"Color of Title"—Approved Definition.**

   Definition of "color of title" in *Smith v. Proctor*, 139 N. C., 324, specially approved.

3. **Deeds and Conveyances—Description—Parol Evidence—Identification.**

   A description of lands in a deed, after naming the township and county, continued as follows: "Adjoining the lands of J. S. on the north and west, and the H. heirs on the east, and S. C. on the south, and bounded as follows: Containing 30 acres, more or less," is sufficient to admit of parol evidence of identification.

The constitutional necessity for the wife's privy examination in a deed to her lands questioned and discussed by CLARK, C. J.

(649) APPEAL by defendants from *Peebles, J.*, at May Term, 1914, of CHATHAM.

This action was begun before the clerk for the partition of land, and upon a plea of sole seizin it was transferred to the civil-issue docket, and tried before a jury. Verdict and judgment for plaintiffs. Appeal by defendants.

R. H. Hayes for plaintiffs.

A. C. Ray and Maness & Carver for defendants.

CLARK, C. J. Frances A. D. Norwood, who was the second wife of Mebane A. J. Norwood, on 11 October, 1905, executed a deed to the premises to her husband, whose heirs at law are the plaintiffs. Her privy examination was not taken. She died about a month thereafter, having had no issue born. The defendants are her heirs at law. The jury find, under proper instructions, that said husband and his children by the first wife have been in adverse possession under said deed more than seven years. This deed was offered merely as color of title, and the court properly held that it was sufficient for the purpose.

Judge Henderson's definition of color of title, in *Tate v. Southard,* 10 N. C., 121, is, "a writing, upon its face *professing* to pass title, but which does not do it, either from want of title in the person making it or the defective mode of conveyance used." He added: "It must not be plainly and obviously defective, so much so that no man of ordinary capacity could be misled by it."

Judge Gaston's definition of color of title is to be found in *Dobson v. Murphy,* 18 N. C., 586, as follows: "Some written document of title, *professing* to pass the land, and one not so obviously defec- (650) tive that it could not have misled a man of ordinary capacity." This has been approved in *Ellington v. Ellington,* 153 N. C., 154; *Avent v. Arrington,* 105 N. C., 390; *Keener v. Goodson,* 89 N. C., 277, and other cases.

The definition by *Judge Hoke* in *Smith v. Proctor,* 139 N. C., 324, is that "Color of title is a paper-writing (usually a deed) which professes and appears to pass the title, but fails to do so." This appears to us to be the best and clearest definition of the three.

Applying that to this deed, the judge was correct in holding the deed to be color of title. In *Pearse v. Owens,* 3 N. C., 415, it was held that a deed from husband and wife, to which her private examination had not been taken, and which, therefore, was not valid, was *color* of title. This was cited with approval in *McConnell v. McConnell,* 64 N. C., 342, and is quoted in *Perry v. Perry,* 99 N. C., 273. In *Ellington v. Ellington,* 103 N. C., 58, *Smith, C. J.,* also holds that a deed from husband and

wife, to which the privy examination of the wife has not been taken, is color of title sufficient to ripen title under adverse possession.

In *Smith v. Allen,* 112 N. C., 226, it is held, citing *Perry v. Perry, supra,* and other cases, that "a deed to which the privy examination of the married woman is not taken is color of title." In *Greenleaf v. Bartlett,* 146 N. C., 198, *Connor, J.,* in reviewing the authorities, quotes with approval the above cases of *Pearse v. Owens* and *Perry v. Perry,* that a "deed conveying the real estate of a married woman, without private examination, is color of title."

It may here be noted that the requirement of the private examination of a married woman to any conveyance was long ago abolished in England and in nearly all the States of this Union, including our adjacent States of South Carolina, Georgia, Alabama, Tennessee, Kentucky, West Virginia, Maryland, and Virginia. Besides North Carolina, there are only four other States in the Union retaining such requirement, Arkansas, Delaware, Florida, and Texas. 1 A. and E. (651) Enc., 522, 523. In many States it has been abolished by statute. In others it has been held that words substantially like those in our Constitution, Art. X, sec. 6, giving a married woman the right to convey her realty "as if she were unmarried" *per se* prohibit the requirement of a privy examination in her conveyance, and indeed the requirement in our Constitution of a private examination is made only (Art. X, sec. 6) as to the conveyance by the husband of his homestead. However, this Court, in a majority opinion, has held that it will require a statute to abolish the exaction of a privy examination. *Weathers v. Borders,* 124 N. C., 610.

"Acknowledgment is not ordinarily essential to the validity of an instrument. Consequently an instrument properly executed in other respects but defectively acknowledged is good against everybody except subsequent creditors and purchasers without notice. No one else can take advantage of the defect. . . . The fact that an instrument is defectively acknowledged will not affect its operative force as against the grantor and his heirs." 1 Cyc., 526, 527, and many cases cited.

It is true that this is a conveyance from the wife to the husband, and that Rev., 2107, requires, as to contracts by the wife with the husband, that the officer, besides the certificate of privy examination, must certify that such contract "is not unreasonable or injurious to her."

If, however, it had been required that such certificate as to the reasonableness of the transaction should be embraced in the certificate to conveyances, its absence would have no more effect than the absence of the certificate of a privy examination, that is, while it would invalidate the conveyance, it would not prevent it from being color of title.

Treating this defect in the acknowledgment as fatal to the validity of this deed, it was sufficient as color of title which was ripened by seven years adverse possession, under our authorities as above quoted. The same is the general doctrine elsewhere according to cases cited in 1 Cyc., 1087, which are summarized: "A deed which purports to convey title will give color of title, though it be not acknowledged or though it be defectively acknowledged."

The evidence here of adverse possession from the death of the (652) wife, the grantor, is amply sufficient. The building of a house on the land was not the beginning of the adverse possession, but only additional evidence. When the wife died, having had no children, the husband did not have tenancy by the curtesy, and the title went to her heirs at law, and possession by her husband became adverse to them, unless the contrary was shown, for the evidence was that he and his son after him, either in person or by their tenant, occupied and cultivated the land under known and visible metes and bounds for seven years.

The description of the land in the deed, after naming the township and county, "adjoining the land of John Stone on the north and west, and Hargrove heirs on the east, and Samuel Culbertson on the south, and bounded as follows, viz., containing 30 acres more or less," is not void for uncertainty, but the tract could be identified by parol evidence, if there had been any controversy in that regard. *Hudson v. Morton,* 162 N. C., 6; *Perry v. Scott,* 109 N. C., 377; *Farmer v. Batts,* 83 N. C., 387, where a list of descriptions is set out, some being held too indefinite and others not too indefinite to admit of parol testimony.

No error.

Cited: Gann v. Spencer, 167 N.C. 431; *Power Corp. v. Power Co.,* 168 N.C. 222; *Knight v. Lumber Co.,* 168 N.C. 453; *King v. McRackan,* 168 N.C. 623; *Adderholt v. Lowman,* 179 N.C. 550; *Elmore v. Byrd,* 180 N.C. 127; *Butler v. Bell,* 181 N.C. 89; *Clendinin v. Clendinin,* 181 N.C. 470; *Barbee v. Bumpass,* 191 N.C. 522; *Capps v. Massey,* 199 N.C. 198; *Potts v. Payne,* 200 N.C. 250; *Owens v. Lumber Co.,* 210 N.C. 512; *Ballard v. Ballard,* 230 N.C. 636.

HENRY COX v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 30 September, 1914.)

Removal of Causes—Corporations—Charter—Questions of Law—Statutes —Public Documents — Place of Citizenship — Judicial Notice — State Courts—Jurisdiction.

Where a cause, upon proper petition and bond, is sought to be removed by the defendant from the State to the Federal courts for diversity of citizenship, upon the ground that the movant is a nonresident corporation, the question of citizenship depends upon the construction of its charter, and in determining it the State courts may take judicial notice of pertinent State legislation upon the subject, and reports made by the defendant to the Corporation Commission, which are public documents; and when therefrom it appears that the defendant is a domestic corporation, the State court will retain jurisdiction of the cause; and in this cause, upon examining the various acts of the Legislature incorporating the Atlantic Coast Line Railroad Company, and permitting the consolidation of the Wilmington and Weldon Railroad, and in respect to taxing its branch lines, etc., reserving jurisdiction in the State courts, it is held that this railroad is a domestic corporation as a matter of law, and is not entitled to the removal of the cause on the ground stated.

BROWN and WALKER, JJ., dissenting.

(653) APPEAL by defendant from *Connor, J.*, at November Term, 1914, of EDGECOMBE.

This is an action to recover damages in the amount of $25,000 for personal injury, which the plaintiff alleges resulted from the negligent conduct of the defendant on 30 June, 1913, at a point between Smithfield and Four Oaks in Johnston County, on what was formerly one of the branch lines of the Wilmington and Weldon Railroad Company, and which is now a part of the Atlantic Coast Line.

The defendant in apt time filed its petition asking for the removal of the action to the Federal court upon the ground of diverse citizenship, it being alleged in the petition that the defendant company was at the commencement of this suit and at all times since has been and is a citizen and a resident of the State of Virginia, and that it is incorporated under the laws of the State of Virginia.

The motion to remove was denied, and the defendant excepted and appealed.

H. A. Gilliam, James M. Norfleet, J. W. Keel, and J. H. Pou for plaintiff.

F. S. Spruill for defendant.

ALLEN, J. The learned and well considered opinion of *Associate Justice Connor* in *Staton v. R. R.*, 144 N. C., 135, which was concurred in by all the members of the Court as now constituted, except the writer of this opinion, who was not then a member of the Court, is decisive of this appeal.

The defendant in both cases is the same and the injury in each (654) occurred on a branch of the Wilmington and Weldon Railroad after its consolidation with the Atlantic Coast Line Railroad.

The record in the two cases is in all material respects identical, except in the *Staton case* the plaintiff alleged that the defendant was a corporation of Virginia, which was a circumstance favorable to the defendant upon its contention that it had the right to remove to the Federal courts.

It was held in the *Staton case* that the allegation that the defendant was a foreign corporation and incorporated under the laws of Virginia was not a statement of a fact, but an inference or conclusion, and that having alleged corporate existence, the court had the right to look at the several acts of the General Assembly bearing upon its incorporation for the purpose of determining whether or not the conclusion was correct.

It was further held that as the defendant had made reports from time to time to the Corporation Commission, and had referred to its charter and acts of incorporation, that these became public documents which the Court had the right to inspect, and that from an examination and consideration of the acts of the General Assembly of this State the defendant was a domestic corporation, at least in so far as was necessary to give the courts of this State jurisdiction over causes of action arising in this State.

The conclusion is, in our opinion, in accordance with law. It is not in conflict with cases like *R. R. v. Dunn,* 122 U. S., 573, which was decided twenty-one years before the *Staton case,* because the determination of the citizenship of defendant here is a question of law dependent upon the construction of the acts of incorporation, and not an issue of fact, which cannot be investigated except by the Federal court. Nor does it involve the question decided in *Harrison v. St. Louis Railroad Co.,* vol. 24 of the Supreme Court Reporter, 333, which held that a statute in Oklahoma intended to prevent a foreign corporation doing business in the State from removing an action to the Federal court was void. This last case belongs to the same class as *Southern Railway Co. v. Allison,* 190 U. S., 326, which was considered and (655) distinguished in the *Staton case.* It is also in harmony with the agreement between the State and the Wilmington and Weldon Railroad existing at the time it became a part of the Atlantic Coast Line.

The Wilmington and Weldon Railroad was chartered in this State in 1834, and by the terms of this charter all of its property was exempt from taxation, and the authority was conferred to fix its own freight and passenger rates.

This charter was held to be a contract between the State and the railroad, which could not be impaired, by the Supreme Court of the United States in *R. R. v. Reid,* 13 Wall., 264.

The Wilmington and Weldon Railroad operated under this charter for about sixty years, and during this period it constructed, out of its earnings, branch lines exceeding its main line in length, and, in addition to paying regular dividends to its stockholders, issued to them interest-bearing certificates of indebtedness and stock dividends until, at or near the time of its consolidation with the Atlantic Coast Line, the holder of an original share of stock in the Wilmington and Weldon road of the par value of $100 held certificates of indebtedness and stock, thus issued to him, amounting at par to about $1,300, and of a market value between $2,000 and $3,000.

In 1891 the State began to investigate the right of the corporation to claim exemption from taxation upon its branch lines, and this resulted in the decision in *R. R. v. Allsbrook,* 110 N. C., 137, holding that the branch lines were not exempt from taxation, and this was affirmed by the Supreme Court of the United States.

These were the conditions existing when the General Assembly of 1893 met. At that time the charter of the Petersburg Railroad expired, and the Wilmington and Weldon Railroad was anxious to have it re-chartered, as it formed its connecting link with the north, and it was also desirous of avoiding the claim of the State for the collection of all back taxes on its branch lines, extending as to some of the lines over periods of from twenty to thirty years.

(656) A settlement was finally reached, which is embodied in chapter 100, Private Laws 1893, the railroad agreeing to surrender its exemption from taxation and to submit to the rules and regulations of the Corporation Commission as to freight and passenger rates, and the State agreeing to waive its right to collect back taxes except for three years on the branch lines and two years on the main line of the railroad company and also to recharter the Petersburg Railroad.

At the same session of the General Assembly the controversies between the State and the railroad having been adjusted, an act was passed (ch. 284, Private Laws 1893) authorizing the railroad to consolidate with other railroad companies, but it was declared in the act that such consolidation should not deprive the courts of this State of jurisdiction over causes of action arising in this State.

No steps were taken under these acts looking to a consolidation with any other railroad before the session of the General Assembly of 1899, and at that session another act was passed (ch. 105, Private Laws 1899) amending the act of 1893 and continuing the authority to consolidate.

This last act is entitled "An act to amend and reënact chapter 284 of the Laws of 1893 concerning the Wilmington and Weldon Railroad Company, and to authorize that company to change its name to the Atlantic Coast Line Railroad Company of North Carolina"; and it is expressly provided therein that "This act shall not have the effect of ousting the jurisdiction of the courts of this State over causes of action arising within this State," and "that any and all corporations consolidated, leased, or organized under the provisions of this act shall be domestic corporations of North Carolina and shall be subject to the jurisdiction thereof."

It was under the authority of these several acts of the General Assembly that the Wilmington and Weldon Railroad became a part of the Atlantic Coast Line. It had its existence originally by reason of the legislative act of this State, and was therefore a creation of the State. It continued a domestic corporation of this State for more than sixty years and prospered under our laws. It finally came to the (657) State and said that it desired to enter into other business arrangements, and the State consented, but upon condition that the Wilmington and Weldon Railroad Company or the company taking over its property or with which it should be consolidated should continue to be liable in the courts of the State for wrongs done in the State, which condition was accepted and acted on by the company.

In our opinion, the General Assembly of the State had the power to permit a consolidation and at the same time to refuse to surrender the jurisdiction of the State courts already existent, which is in effect what was done.

If this power does not exist, and the defendant may at will violate the agreement with the State and the condition upon which consolidation was permitted, the propriety and wisdom of repealing the consolidating acts of 1893 and 1899 under the authority conferred by Article VIII, sec. 1, of the Constitution, is a matter addressed to the General Assembly.

The judgment of the Superior Court is

Affirmed.

BROWN, J., dissenting: I admit, as stated in the opinion of the Court, that the question of removal involved in this case has been decided adversely to the defendant in the case of *Staton v. R. R.*, 144 N. C., 136,

decided in 1907, and that I concurred in that decision. Our judgment rendered then, in my opinion, is in conflict with the decisions of the Supreme Court of the United States, which are authoritative and binding upon all State courts upon the matter involved in this case.

The petition for removal in this case is admitted to be in due form and the requisite bond filed. It appears upon the face of that petition that the plaintiff is a citizen of the State of North Carolina, residing at Rocky Mount, and that the defendant "was at the commencement of this suit and at all times since has been and still is a citizen and resident of the State of Virginia; that it is incorporated under the laws of the State of Virginia, having its principal office in the city of Petersburg, Va."

(658) Thus it will be seen that the only traversable fact set out in the petition is the citizenship of the defendant. This question of citizenship is the very foundation of the jurisdiction of the Federal court, and it is well settled by the decisions of the Supreme Court of the United States that the citizenship, being jurisdictional, is a question to be decided by the Federal court.

It is held in a multitude of cases that issues of fact, arising upon a petition for removal of a cause from a State to a Federal court, are to be determined by the Federal court, and not by the State court, and that the State court, for the purpose of determining for itself whether it will surrender jurisdiction, must accept as true the allegations of fact in such petition. A corporation is a citizen within the meaning of the Constitution of the United States, its citizenship is essentially a jurisdictional fact, and must be determined by the Federal court as much so as if the defendant was an individual. *C. and O. Ry. Co. v. Cockrell,* U. S. Sup. Ct. Rep., No. 6, p. 229, 15 February, 1914. In that case is cited practically all the decisions of the Federal court on the subject.

This must necessarily be so in view of the fact that the judicial power of the United States is wholly independent of State action, and the State may not by any exertion of authority, whether legislative or judicial, directly or indirectly, abridge, limit, or destroy such power.

As said by *Chief Justice White* in *Harrison v. St. Louis R. R. Co.,* vol. 24, Sup. Ct. Rep., p. 333, 15 March, 1914: "The doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application."

In that case it is held that "averments challenging the foreign citizenship of a corporation are properly stricken from the answer in a suit brought by such corporation in a Federal court to enjoin (659) State officials from enforcing a forfeiture of its right to do business in the State because of its assertion of the right to remove an action against it from a State court to a Federal court, since such matters are properly cognizable only where presented in an appropriate manner and at the proper time to the Federal tribunal, which has a right to pass upon them when considering the propriety of the removal which is prayed."

It will be seen from reading the opinion of the *Chief Justice* in this case that the question of citizenship of a corporation is to be passed upon by the State court only as it is alleged and appears upon the petition for removal. When that citizenship is denied, the question can only be determined by the Federal court, for the very cogent reason that the question is vital to the jurisdiction of the latter.

The statute provides for the filing of a petition and bond in the State court and notice to the plaintiff, all of which is complied with. If the petition and bond are sufficient, the State court is divested of jurisdiction over the case. *Winslow v. Collins,* 110 N. C., 119; 14 S. E., 512; *S. v. Dunlap,* 65 N. C., 491; *Smith v. Quarries Co.,* 164 N. C., 338; *Higson v. Insurance Co.,* 153 N. C., 35.

The plaintiff can then raise the question of jurisdiction in the Federal court only by a motion to remand. In the recent case of *Smith v. Quarries Co.,* 164 N. C., at page 352, *Mr. Justice Hoke* says: "True, it is now uniformly held that when a verified petition for removal is filed, accompanied by a proper bond, and same contains facts sufficient to require a removal under the law, the jurisdiction of the State court is at an end; and in such case it is not for the State court to pass upon or decide the issue of fact so raised, but it may only consider and determine the sufficiency of the petition and the bond." *Herrick v. R. R.,* 158 N. C., 307; *Chesapeake v. McCabe,* 213 U. S., 207; *Wecker v. Enameling Co.,* 204 U. S., 176.

I agree to the conclusions reached by *Judge Connor* in the *Staton case,* that the Atlantic Coast Line Railway, according to the legislation cited by him, ought to be a North Carolina corporation; but I am very decidedly of the opinion that where the allegation of the (660) petition for removal is that it is a Virginia corporation, the State court has no jurisdiction to go behind the petition. That fact is one upon which rests the very foundation of the Federal jurisdiction; and to sustain that jurisdiction, it must necessarily be decided by the Federal and not by the State court.

The jurisdiction of the State courts to pass on a question of citizenship and to go behind the allegations contained in the petition does not seem to have been considered very fully in the *Staton case.*

For the reasons given, I am of opinion that the cause should be removed to the Federal court, and that the citizenship of the defendant can only be passed upon by that court upon a petition to remand.

WALKER, J., concurring in the dissent: However right this Court may have been when, in *Staton v. R. R.,* 144 N. C., 136, it declared the true status of the defendant with reference to its citizenship as being in this State or another, my opinion is now fixed that it is not competent for this Court, in the exercise of its proper jurisdiction, to decide that question where diverse citizenship is positively alleged in the petition, although it may be denied by the other party. It makes no difference what the truth of the matter may be, if upon its face the record shows a removable case, our jurisdiction ceases, and the issue of fact, and the law arising thereon, is at once, and automatically, transferred to the jurisdiction of the Federal court for decision. It requires no order or action of the State court to make such transfer effective. We cannot enter upon an investigation of any evidence, however it may be brought to our attention, whether by oral, documentary, or record proof. It is the bare allegation of fact contained in the record that determines the jurisdiction of this Court, and no denial, however direct, positive, or even circumstantial it may be, can prevent the jurisdiction of the Federal court from attaching immediately on filing the petition and the requisite bond.

(661) The language of the Supreme Court of the United States, by whose decision upon this and like Federal questions we must abide, has settled the practice in such cases and finally closed the discussion of this point in *Railway Co. v. Dunn,* 122 U. S., 573, referring to the recent decisions of *Stone v. South Carolina,* 117 U. S., 432, and *Carson v. Hyatt,* 118 U. S., 279.

The Court in the *Dunn case,* admits that there had been some confusion in the cases before that time, "the utterances of the Court not being clear and distinct," but says that the meaning of the removal legislation is very plain and unmistakable. Referring to *Stone v. South Carolina, supra,* and stating that the question was finally settled therein "on full consideration and with the view of announcing the opinion of the Court on that subject," the Court thus aptly and explicitly states the law: "Only two weeks after that case was decided, *Carson v. Hyatt* came up for determination, in which the precise question was directly presented, as the allegation of citizenship in the petition for removal was contra-

dicted by a statement in the answer, and it became necessary to determine what the fact really was. We there affirmed what had been said in *Stone v. South Carolina,* and decided that it was error in the State court to proceed further with the suit after the petition for removal was filed, because the circuit court alone had jurisdiction to try the question of fact which was involved. This rule was again recognized at this term in *Carson v. Dunham,* 121 U. S., 421 (*ante,* 992), and is in entire harmony with all that had been previously decided, though not with all that had been said in the opinions in some of the cases. To our minds, it is the true rule and calculated to produce less inconvenience than any other. The theory on which it rests is that that record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents, then, to the State court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the State court has the right to decide for itself; and if it errs in keeping the case, and the highest court (662) of the State affirms its decision, this Court has jurisdiction to correct the error, considering for that purpose only the part of the record which ends with the petition for removal. *Stone v. South Carolina,* 117 U. S., 432 (*supra*), and cases there cited."

This case and the remarks of the Court just quoted were fully reviewed and approved by us in *Herrick v. R. R.,* 158 N. C., 307, in which we said: "The rule, as thus formulated, has been recognized by this Court as the authoritative and controlling one in *Springs v. R. R.,* 130 N. C., 186. The cases to the same effect are collected in 5 Digest U. S. Supreme Court Reports (L. Ed., 1908), pp. 5100 and 5101. In the case of *R. R. v. Daughtry, supra,* the very question now before us was involved, and the Court held it to be 'thoroughly settled' by the decisions that issues of fact raised upon petitions for removal must be tried in the Federal court. The issue in that case was one of diverse citizenship. The matter was fully discussed at the last term by *Justice Hoke* in *Rea v. Mirror Co., ante,* 24, and we then reached the same conclusion as herein stated," citing *Crehore v. Railway Co.,* 131 U. S., 240; *R. R. v. Daughtry,* 138 U. S., 298.

In *Rea v. Mirror Co., supra, Justice Hoke* thus decisively closes the question: "If the plaintiff desires to challenge the truth of these averments, he must do so on motion to remand or other proper procedure in the Federal court. That court being charged with the duty of exercising jurisdiction in such case, must have the power to consider and determine

the facts upon which the jurisdiction rests," citing many cases to support his statement.

The mere fact that we may have resorted to the records of the Corporation Commission to establish certain facts does not take the case out of the settled rule, for they are, at least, but evidence of the facts they contain, and we have no jurisdiction to consider evidence, but only the allegations of the petition. It was attempted, in the case of *Carson v. Hyatt, supra,* to introduce the record of a former suit between the parties to estop Mrs. Carson upon the question of her citizenship. (663) With reference to this offer of *record* proof, the Court said: "At most, it was only evidence, and had nothing to do with the 'face of the record.' "

So we see that the form of the proposed proof in denial of defendant's citizenship, whether record or otherwise, has nothing to do with the matter, as it does not appear in, or "on the face of," the petition. This very question was distinctly raised in *Carson v. Hyatt, supra,* and this is the Court's emphatic response: "The State court is only at liberty to inquire whether, on the face of the record, a case has been made which requires it to proceed no further. In the present case the petition stated, in positive terms, that Mrs. Carson was, at the beginning of the suit, and still continued to be, a citizen of Massachusetts. With that fact established, the necessary citizenship for a removal existed. Whether it was a fact or not could, under the ruling in *Stone v. South Carolina,* only be tried in the circuit court." Nothing, therefore, extraneous to the record may be considered, but *only* those things that appear *therein.* The questions of fact and of law involved must afterwards be settled in the Federal court, upon the motion to remand.

If we take notice of evidence not in the record in order to decide the truth of the matter, we are not acting solely upon facts disclosed by the record, as we are imperatively required to do, but seeking information from foreign sources in order to pass upon the issue of fact, which we are clearly forbidden to do, and the quality of the evidence so used by us, whether legally conclusive or otherwise, does not differ the case from those we have cited, in which the Court has cleared up the obscurity in former decisions and stated the law with unequivocal directness, so as to leave no room for any possible doubt as to what is meant. It is our bounden duty, under the law, to let go our jurisdiction, unless there is sufficient warrant on the very face, and not outside, of the record for a retention of the case.

In this particular matter the Federal court may not agree with us as to the proper construction and the legal effect of the evidence considered by this Court in *Staton v. R. R.,* however much we may be convinced of

the correctness and unassailable character of our position, or it may deny our right to enter upon the investigation which led us (664) to the conclusion that the defendant in that case was a corporation of this State, having its domicile and citizenship here. I concurred in that view, and have not changed my opinion there held in regard to it; but I can clearly see, in the light of decisions of the Federal Court of last resort, which are binding upon us, that it is beyond our jurisdiction to decide the question. My conclusion is that defendant is entitled to the removal of the cause and that his application should be granted, although it may not be essential to a technical transfer of the case, which may take place without our intervention.

I may properly add to what has been said in this opinion, that when *Staton v. R. R.* was before this Court, it is apparent that the specific question involved in this appeal was not considered with reference to the authoritative utterances of the highest Federal Court, but we simply assumed, all of us, that the jurisdiction rested in this Court to decide the fact of citizenship, as the evidence of it came from such an indisputable source; and with this assumption, without any specific inquiry into the correctness of it, we did not, at the time, question our right to construe the evidence, not introduced in the case, but which we found in the reports of the Corporation Commission, but silently passed that point in the discussion of the case and immediately considered the nature and legal effect of the proof. None of this was in the petition or in the record, nor did any suggestion of the kind appear "on the face of the record." The case of *Staton v. R. R.* is, therefore, not binding as a precedent, and even if it is an authority, and we were inadvertent to the positive and unquestionable ruling of the higher court, we should follow the latter as controlling upon us. I am sure if the attention of the learned justice who wrote the opinion in that case had been drawn to that ruling, he would have concurred in our present view of the question. We altogether failed to notice it.

Cited: Brown v. Jackson, 179 N.C. 367, 371, 375, 377, 378; *Mizzell v. R.R.,* 181 N.C. 38.

PRESENTATION OF THE PORTRAIT

OF

PATRICK HENRY WINSTON

TO THE

SUPREME COURT OF NORTH CAROLINA

BY

HIS EXCELLENCY, LOCKE CRAIG

MARCH 31, 1914

His Excellency said:

I have the honor to present to the State the portrait of Patrick Henry Winston, the gift of his daughter and his three living sons.

He was born in the county of Franklin, on the 9th day of May, in the year 1820. His mother was Anne Fuller, daughter of Bartholomew Fuller, a man whose power and genius are potential in descendants of this generation. On the paternal side Mr. Winston comes from a family long illustrious both in England and America, a family whose public services and private virtues have exemplified in the highest degree the greatness of the English race. Son of a Winston mother was John Churchill, Duke of Marlborough, who saved England from the dominion of France; son of a Winston mother was Patrick Henry, who saved America from the dominion of England.

Of such stock William Winston, immigrant, came to Virginia in 1666, seeking in the new world fame, fortune, and honor. The records of the Virginia land office show his eagerness for acquiring land, and the vestry records of St. Peter's Parish, New Kent County, manifest his piety and hospitality.

From the virile loins of William Winston came a stock of men and women, unsurpassed in the annals of America for genius, for character, for achievement. In the second generation was William Winston, colonel in the Colonial Army, conspicuous for bravery in the French and Indian wars, "a greater orator than Patrick Henry," says William Wirt; in the third generation was Patrick Henry and his cousin Joseph Winston, hero of King's Mountain and Guilford Court-House; in the fourth generation was Dolly Madison, and her cousin, William Winston Seaton, founder of modern journalism, editor of the great Whig organ, the *National Intelligencer;* in the fifth generation were John Anthony Winston, Governor of Alabama, and Patrick Henry Winston of North Carolina, whose portrait is before us.

But Patrick Henry Winston has a title to nobility more indefeasible than that of descent. When the courtiers of Napoleon would please him by tracing back his pedigree to the Dukes of Treviso, he cut them

short by saying: "My patent of nobility dates from the Battle of Montenotte."

The early life of Mr. Winston was spent in manual labor on his father's farm. His only teacher was his mother, whose untimely death left him a plow-boy in the field, among his father's slaves. But a larger spirit stirred within him, and so, at the age of 18, he ran away from home and entered Wake Forest College, where he supported himself by manual labor, and accomplished in one year the studies that usually required three. Leaving Wake Forest, he taught for three years the Oak Grove Academy in Bertie County, and continued his education by intense and unremitting private study. His ambition now fully aroused and his views of life enlarged, he went to Washington City, and entered the Columbian University, where after three years of study he was graduated with the highest honors as valedictorian of his class. He then returned to North Carolina, and completed the course of study in the University Law School at Chapel Hill.

A characteristic incident concerning Mr. Winston during his law course at the University is told by the late Samuel F. Phillips, who was at the same time a student in the literary department of the University: "On the night of the grand commencement ball," says Mr. Phillips, "as I was going to my room, between midnight and day, I passed the open door of Winston's room, and found him intently reading 'Coke upon Littleton.' He had not left his room during the festivities of the occasion, but had studied all night long, as eagerly as the other boys had danced and frolicked." It was the keynote of his life. He was as fond of pleasures as any man, but he was their master, not their slave.

Obtaining license to practice law, he settled in Windsor, Bertie County, where he had previously taught school; and was married on 1 January, 1846, to Martha Elizabeth Byrd, to whom he had been betrothed while a teacher. He now took rank at once at the head of his profession; and maintained it for forty years, at a bar that had no superior in the State. He knew the foundations of the law, and his learning was accurate and profound As an advocate he was unique in his originality. By the force of logic and earnestness he compelled courts to his conclusions. He turned to view every side of a question, exposing fallacies, stripping off veneering, getting at the heart of it, illustrating every phase of it with homely illustrations drawn from everyday life, illuminating the driest legal points with quaint, irresistible humor, or broad, side-splitting fun. His courtroom speeches attracted people from far and wide. By the strong analytical light of his intellect abstruse propositions of law became clear, and complicated questions of fact were reduced to elemental simplicity. He did not declaim in high-sounding phrases and

splendid superlatives, but conjured judges and juries by the charm of convincing power.

In the town of Windsor Mr. Winston was a colossal figure. He walked along the streets thoughtful and with the calm dignity of conscious strength. He was always well dressed, immaculately clean, a perfect specimen of magnificent manhood. If he sat down in front of a store, he at once became the center of a group that listened with admiration to original utterances from a mind full of strong common sense and philosophic reflection, stored with learning, conversant with all the phases of human life. You did not feel constrained by courtesy to laugh at his humor, but laughter was spontaneous, the irrepressible expression of delightful emotion, when by the flash of his genius some person or position was exposed in ridiculous proportions.

The ablest lawyers of the State practiced in Windsor, and at the other courts that Mr. Winston attended. But he had no rival in the opinion of the people of Bertie. It was always assumed before court that the side on which Mr. Winston had been employed would win. This prejudgment by the people was nearly always affirmed by the courts and juries. As long as he practiced law, the universal confidence in his prowess was never shaken. His characteristic, original sayings passed, as current coin of thought, through all the eastern counties. Even negroes and illiterate laborers treasured his apt sayings and homely illustrations; loved his rich, broad humor; imitated his droll and charming mannerisms. For nearly half a century Mr. Winston was retained in every important case in the courts of northeastern North Carolina. His professional standing and his rare ability were recognized in his selection in the celebrated Johnston Will Case to make the leading argument in behalf of the will before the Supreme Court of the State. This case is reported on page 260 of Phillips' Law. Four weeks were consumed in the trial, presided over by the late Chief Justice Merrimon, then Superior Court judge. The place of the trial was the historic town of Edenton in the courthouse of colonial days. Dr. Hammond, the famous alienist, was relied upon by the caveators to break the will. There was never before at a trial in the South a more powerful and celebrated array of lawyers: Graham, Bragg, Vance, and Eaton were against the will; W. N. H. Smith, Bartholomew F. Moore, Judge Heath, Judge Gilliam, Edward Conigland, Samuel F. Phillips, and Patrick Henry Winston were for the will. It was a forensic contest that has passed into the history of the State. The feeling was intense, and has not abated to this day. By this will one of the largest estates in North Carolina passed from the heirs of the blood to those who were not of kin. The case involved the largest amount of property up to that time

in litigation in the courts of the State, and the compensation to the attorneys was likewise the largest ever paid up to that time. Mr. Winston's argument for the will exhibits every resource of a strong, fertile, and vigorous mind, well trained in law and skilled in lucid exposition. The will was sustained.

In 1850 and again in 1854 the people of Bertie chose Mr. Winston to represent them in the House of Commons. His career here made him hosts of friends and a State reputation. His powers as a speaker, his varied and profound learning, his accurate scholarship, his broad vision of life, as well as his charming personality and his rare social gifts, fitted him for a great public career. Political honors of the highest order invited him. With calm deliberation he put them aside, and resolved, for the sake of his wife and children, to spend his life at home. He never swerved from this high resolve, except under the greatest public emergencies.

In 1861, at the beginning of the Civil War, the Legislature elected him, together with Bartholomew F. Moore and Samuel F. Phillips, as a Board of Claims, one of the most important executive-judicial offices in the State, to pass upon claims against the State arising out of the Civil War. In this work Mr. Moore was always economical, Mr. Phillips always generous, so the real decision was made by Winston. He, himself, with characteristic humor, sized up the board as follows: "To Moore a silver dollar looks as big as a cart wheel; to Phillips, as little as a sixpence; to Winston, just the right size."

Mr. Winston's record on this board caused him to be appointed by Governor Vance financial agent between the State of North Carolina and the Confederate Government at Richmond. In this office he settled millions of dollars of claims, and protected the financial interests of the State with conspicuous fidelity, ability, and integrity. During the entire Civil War he was the intimate friend and counselor of Vance. From 1862 to 1865 few days passed without their meeting in council.

In 1865, at the close of the Civil War, Mr. Winston was selected by his native county of Franklin, where his family had resided as refugees during the Civil War, to represent it in the great Constitutional Convention of that year, a body of men chosen for wisdom, patriotism, and integrity, to deal with the most momentous problems that ever confronted the State. Mr. Winston's record in this convention was not surpassed by any member. The leaders of the convention united and formed a new party called "Conservative." Mr. Winston was urged for Governor in the approaching elections; but, recognizing the unwisdom of his own selection because of his prominent services in behalf of the Confederacy, he refused to be considered; and, in conjunction with other

leaders, brought forward Jonathan Worth, a Quaker of Randolph County, who was nominated and triumphantly elected. During Governor Worth's administration, Mr. Winston was president of the Council of State.

In 1868 he was urged by the people of the First Congressional District to represent them in Congress, but he declined the nomination, and henceforth devoted himself exclusively to the practice of law, the repairing of fortunes shattered by war, and the education of his children. In all of these purposes he was eminently successful. His law practice was the largest in the district, his plantations among the most valuable in the county, his children were all at school or college, and the delicious roe herrings of his Terrapin Point Fishery were famous as a breakfast dish from Baltimore to Atlanta.

As a man of business, Mr. Winston realized Carlyle's definition of genius: he had infinite capacity for taking pains. He not only personally knew, but in a large degree personally supervised, all the details of his very extensive farming and fishing operations. He visited them as often as he could get away from his law practice. His visits brought a delight to everybody, men, women, and children. His love of fun, his kindly sympathy, his merry humor, his shrewd worldly wisdom, his big-hearted and big-brained personality made his visits memorable to all. No patriarch in the age of Abraham ever ruled more kindly, more lovingly, or more completely. But he was thoroughly modern and progressive in business ideas and management. He was both scientific and practical as a farmer and fisherman, adopting the latest machinery and taking the newest ideas. Probably the first telephone ever seen in North Carolina was installed by him in 1870 between his Terrapin Point and Hopewell Fisheries.

Mr. Winston was a member of the Episcopal Church. His faith was unfaltering and unostentatious. His strong talents and lovable qualities were displayed in his private and domestic life.

Mrs. Winston was a lady of rare beauty, sweet disposition, and lovable character. She lived with him more than forty years, and bore him ten children; she made for him and managed for him a genuine home, a home of hospitality, of love, confidence, and sincerity, of neighborly kindness and high ideals. The doors of "Windsor Castle" always hung wide open. It is a pleasure to note that the marriage ceremony of this happy and well-mated pair was performed by the Rev. Andrew Craig, the father of your speaker; and that the friendship between the two families has continued through three generations and is now entering upon the fourth.

Mr. Winston was the center of this family life. The whole family system revolved around him. He not only selected for his children the

best schools and colleges, and personally supervised their education, but on their return home for vacation he personally examined them carefully in their studies, and tested both their knowledge and their mental habits. When they were at school or college in distant counties, or in other States, he lived with them day by day through letters. To one of his sons he wrote daily for five years; and even after graduation they exchanged letters three times a week for over ten years. His chirography was as clear-cut, regular and bold as copper-plate engraving. He would compress into one page a volume of instruction. The late Dr. Thomas D. Hogg of Raleigh, a warm personal friend, used to say that a letter from Winston received by him in Strasburg gave more information about the great cathedral and its wonderful clock than he could get in Strasburg. No person ever received a letter from him without being specially attracted by some striking peculiarity, quaint humor, finely turned phrase or pointed expression, as well as by its strong, practical common sense. His mind was never idle. He studied astronomy for thirty years and political economy all his life. During the long summer months he would read a play of Shakespeare each day after dinner, before returning to his law office. One of his sons, himself a scholar and teacher, says: "My father wrote me daily at Cornell University most interesting and instructive letters about my studies. He was especially interested in astronomy, political economy, mathematics, and Shakespeare. He knew more about these subjects than any of my teachers."

Mr. Winston's library was full of the best books, covering the whole range of human thought. Each child, as his mind grew, was taken to the library and introduced to some dear friend, to Scott or Prescott, to Webster or Everett, to the Bible and Shakespeare.

The spirit of the old South that was not crushed by the overwhelming disasters of defeat was nobly typified in Mr. Winston. In the day of ruin and the disintegration of our institutions many were discouraged; some in despair surrendered. The land had been smitten by the cruel, relentless hand of war. Eastern North Carolina and the county of Bertie had borne their full share of the sacrifice. The county was prostrate, her plantations were neglected, her homes were desolate, her property was gone, her children had been slain. The old men were hopeless; the young were reckless. An air of abandonment pervaded communities. The spirit of pride and culture and noble ambition no longer restrained and stimulated to high endeavor. The boys were not sent to college. The representatives of old families did not aspire to the positions of their fathers and sometimes went to dissolute and shameless lives. A tragedy more grievous than battle was enacted in the county once adorned by splendid citizenship.

Mr. Winston stood erect amid the general demoralization. With unfaltering courage he grappled and overcame the difficulties of this political, social, and industrial chaos. Regardless of cost and personal sacrifices he maintained the old traditions of home, and sent his children to the best schools and colleges to receive and worthily use the best culture and the highest inspiration of the age. As the head of his family he exemplified the highest ideals of our race; and from the loins of this father sprang a progeny inspired to noble accomplishment. His children have stood in the foremost ranks in politics, in law, in education, and in business; one an orator, whose brilliance was not surpassed, whose eloquence and humor were famous throughout the Union; one, the ablest educator of the South, ranking among the thinkers and philosophers of this generation. This is not the occasion to speak of the others who are yet in the strenuous activities of the contest.

The power of a man like this never ends; it grows ever broader and deeper. As Carlyle said of Robert Burns, and his virile father:

"His voice, fashioned by that old father there, does it not already reach like a great elegy, like a stern prophecy, to the ends of the world?"

To be ranked among the noblest of our State, to live after death in this our Pantheon of History, is a distinction he has nobly earned. And now, as he comes with the password of merit, he is welcomed by this exalted Order of the Immortals.

Posterity will gaze on those features and emulate those virtues whose memorial we here dedicate, with high honor to ourselves and lasting service to the State.

ACCEPTANCE BY CHIEF JUSTICE CLARK.

The Court has listened with interest to the eloquent speech of the Governor of this State in presenting the portrait of one of the most distinguished lawyers whom North Carolina has produced. It was the good fortune of the speaker to begin the practice of the law at the feet of Patrick Henry Winston, and he will ever retain a touching recollection of his courtesy and kindness to young lawyers and will remember always the deep admiration which in common with all others he conceived of Mr. Winston's learning, his ability, his noble qualities, his deep insight into human nature, his kindly feeling towards his fellowmen, and his almost lightning-like perception of the merits of a cause and of the principles involved.

When Mr. Winston himself came to the Bar conditions were very different from those of to-day. It was before the day of large aggregations of capital, when there were few railroads and no factories among us, when the coming of the judge to our little county towns was the event of the year, and when all persons of substance and leisure attended court to learn the law from the lips of his Honor. The relative importance of the Bar at that day was necessarily far greater than at present, and the influence of a leading lawyer like Mr. Winston left a deep impress, not only upon the people of the county in which he lived, but on the circuit which he rode, for in those days the lawyers as a body began the circuit with the judge and generally rode it with him to the end, in the old English style. The sayings of distinguished lawyers, especially one of Mr. Winston's ability and originality, were treasured up and repeated from one to another for years afterwards. He also came to the Bar at a time when the history of the law was an unopened book, and when law teachers impressed upon their students the sacredness of all the complex forms of actions, the inspired wisdom of the separation between law and equity, and especially that the greatest man that the Profession had known was Sir Edward Coke, and that the only lawyers who were possibly greater than he were the judges who had lived 400 years before him who in some inscrutable manner had discovered that "perfection of reason," the common law of England, "whose sources were as undiscoverable as those of the Nile." In short, it was heterodox for any lawyer to doubt that the farther back we went into the misty past the wiser were the judges and the greater were the lawyers and the law. This fiction narrowed the Profession and through them had its effect upon the public, with whom the Bar was the greatest single influence in the State at that time.

Mr. Winston, however, was one of those men whose natural ability, originality, and keen perception rose superior to this environment. While he did not, and no man can, altogether shake off the influence of his early education, he instinctively grasped the merits of every controversy in which he was engaged, and, as Governor Craig has well said, the side that retained him deemed that success was already assured.

In addition to the anecdotes which the Governor has mentioned, I recall one that still lingers in the traditions of the Bar in Eastern North Carolina and which has been printed in many of the law magazines. At his very first court an older lawyer put to him this question: "I have," said he, "an action for a tract of land in which my courses and distances are all right, except that when I start back from my last corner to the beginning, while the course is right, my distance overruns. Now, why can I not bend out to get my poleage?" To this the young lawyer, with

that deliberation which throughout life marked his speech, said, slowly: "There is no reason in the world, except that this man on the outside, a miserable sinner, may say, why do you not bend *in* and get your poleage?" The old lawyer exclaimed that this was utterly preposterous; but young Winston had hit the nail on the head and had gone directly to the center of the proposition. This clear, crisp, and unanswerable answer like a flash of lightning reveals to us the lineaments of the man more clearly than yonder portrait, for "as a man thinketh, so is he." The outward form changes, but the mind is the man.

Mr. Winston was not merely the descendant of an illustrious line, but he was far more—he was worthy of his descent. He has left behind him, too, those who have added just luster to his fame. One of his sons, president of the State University, and of the State Agricultural and Mechanical College, and of the University of the great State of Texas, took his stand among the great educators of the South. His two younger sons have served with distinction as judges of the Superior Court of North Carolina, and one of these also as Lieutenant Governor of the State. While his other and eldest son, having achieved reputation as Attorney-General of a distant Commonwealth whose shores are washed by the waters of the Pacific, died on the threshold of still higher honors and sleeps far from the land that knew him first. His only daughter is the wife of one of the most prominent lawyers of our State.

It is to its great "leaders of the Bar" that the Profession must look for that high sense of honor which is shown by them in the conduct of causes, that courtesy to opponents in high debate and that fair treatment of witnesses which the heat of no contest can cause them to forget, and that high bearing on all occasions which shall retain for the legal Profession the confidence and respect of the public, which have made lawyers a power in years gone by, and which alone can render the pursuit of the Profession honorable to themselves and a credit to the community. Among these men, Patrick Henry Winston of Bertie is entitled to high place, and his memory should ever be cherished in honor by the Profession which he adorned.

The Marshal will hang his portrait in its appropriate place by the side of the other great leaders whom he met in forensic debate or followed or preceded, and in sight of the many volumes which preserve the legal lore which he loved and mastered.

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.

ABANDONMENT. See Deeds and Conveyances, 13, 14.

ABORTIONS. See Criminal Law, 19, 20, 21, 22.

ACCEPTANCE OF CHECKS. See Banks and Banking, 3.

ACCIDENT. See Contracts, 13.

ACTIONS.

1. *Actions—Pleadings—Amendments—New Cause of Action—Libel—Boycott—Appeal and Error.*—A new and distinct cause of action is not allowable by amendment to the complaint, and where the original complaint alleges a cause of action for libel, it may not be amended so as to maintain an action for damages arising from an alleged boycott by the defendant; for if the amendment be for the purpose alone of showing malice, it was unnecessary, and if relied on as a cause of action it was not permissible by amendment. *Supreme Council v. Grand Lodge*, 221.
2. *Actions—Misjoinder—Causes and Parties—Dismissal of Action.* — An action brought by a father, in his own behalf and in that of his son, a minor, as next friend, alleging damages to them both for a personal injury to the latter, is a misjoinder of parties as well as causes of action, not capable of division, and may be dismissed. *Campbell v. Power Co.*, 488.
3. *Actions — Misjoinder — Withdrawal of Party — Costs — Amendments—Court's Discretion.*—Where there has been a misjoinder of parties as well as causes of action, it is within the discretion of the trial judge at any time before verdict or adverse decision to permit the withdrawal of one of the parties, leaving the action to proceed singly as to the other, and to allow a proper amendment of the pleadings as to the remaining cause, where the defendant has asked for no affirmative relief and his defense cannot be prejudiced (Revisal, sec. 507); but the defendant is entitled to recover his cost against the party retiring from the case. *Ibid.*

ADMISSIONS. See Evidence, 1; Appeal and Error, 23; Homicide, 25; Witnesses, 2.

ADVERSE POSSESSION. See Evidence, 2; Limitations of Actions.

ADVERTISEMENT. See Mortgages, 3.

AGREEMENT. See Verdict.

AMENDMENTS. See Pleadings, 3; Courts.

ANTECEDENT DEBT. See Bills and Notes, 3.

APPEAL AND ERROR.

1. *Appeal and Error—Brief—Exceptions Abandoned.*—Exceptions appearing in the record of the case on appeal, and not set out in the brief, or in support of which no reason or argument is stated or cited, are deemed abandoned on appeal. Rule 34. *Lloyd v. R. R.*, 24.

2. *Appeal and Error—Trials—Instructions—Verdict, Directing—Procedure Rules of Court.*—It is not required that an exception to the direction of a verdict by the court upon the evidence should conform to the particulars of Rules 19 and 34 of the Supreme Court regulating appeals, for it is analogous to instances of nonsuit, which require that the court examine into the pertinent evidence in the record. *Wynn v. Grant*, 39.

3. *Verdicts—Judgments—Modification—Appeal and Error.*—In this action the verdict of the jury established certain interests in defendant's favor in the lands in controversy which were not adjudicated in the judgment rendered; and as the plaintiff did not appeal, the judgment is accordingly modified and affirmed. *Johnson v. Whilden*, 104.

4. *Appeal and Error—Assignments of Error—Rule of Court.*—The assignments of error on appeal should indicate the ground of the exceptions relied upon with such definiteness and particularity that the Court may examine into them without having to search the record to ascertain where and what they are; and the rule as to such assignments may not be waived by parties without the consent of the Court. *Spruce Co. v. Hunnicutt*, 202.

5. *Deeds and Conveyances—Probate—De Facto Acts—Appeal and Error—Presumptions.*—Where the probate of a deed appears to be regular on its face, and taken before one apparently acting as a justice of the peace, it will be effectual as the act of an officer *de facto*, if not *de jure;* and where the incapacity of such officer does not appear in the record, the one who takes under the grantee will be adjudged to have acquired a good title. *Ibid.*

6. *Injunction—Restraining Order—Act Committed—Appeal and Error.*—The correctness of a ruling dissolving a restraining order will not be considered on appeal when it is made to appear that the act sought to be restrained has been committed. *Moore v. Monument Co.*, 211.

7. *Appeal and Error—Docketing Transcript—Rules of Court.*—For an appellant to be entitled to have his case heard in the Supreme Court as a matter of right, he must conform to the rules and regulations respecting appeals (164 N. C., 544); and when he has failed to file his transcript in the Supreme Court by Tuesday preceding the week of the call of his district (Rule 5), and the appeal has been dismissed (Rule 17), his motion to reinstate (Rule 18) will be denied. *Hawkins v. Telegraph Co.*, 213.

8. *Appeal and Error—Second Appeal—Same Exceptions.*—Where a case has been tried in the Superior Court in accordance with a decision therein rendered on a former appeal, exceptions therein taken will not again be passed upon by the Supreme Court on a second appeal. *Latham v. Fields*, 215.

9. *Appeal and Error—Assignments of Error—Appellant's Brief—Rules of Court.*—Statements made in appellant's brief, that he has ten assignments of error and insists upon them all, do not come within Rule 34

APPEAL AND ERROR—*Continued.*

of the Supreme Court, and they will not be considered; the requirements being that there must be some reason or argument in their support set out in the brief. *Watkins v. Lawson*, 216.

10. *Appeal and Error—Pleadings—Amendments—Fragmentary Appeals.*—An appeal from an order of the lower court permitting an amendment to a pleading is premature and will be dismissed in the Supreme Court. *Supreme Council v. Grand Lodge*, 221.

11. *Appeal and Error—Nonsuit—Trials—Evidence—Fragmentary Appeal.*—An appeal from a judgment of nonsuit taken upon the ruling of the trial court upon admissibility of evidence not determinative of the controversy will not be considered. *Tester v. Mfg. Co.*, 151 N. C., 602, cited and controlling. *White v. Harris*, 227.

12. *New Trials—Evidence, Prejudicial—Appeal and Error.*—It is held, on consideration of this petition to rehear, that the decision heretofore filed is correct in holding that evidence of a substantive and material character had been admitted to the appellant's prejudice, and in awarding a new trial. *Land Co. v. Traction Co.*, 232.

13. *Appeal and Error—Process—Motion to Dismiss—Premature Appeal—Procedure—Exceptions.*—An appeal from the refusal of the trial judge to dismiss an action for want of proper service of process is premature; the procedure being upon exception entered and appeal from final judgment if adverse to the movant. *Gouge v. Bennett*, 238.

14. *Verdicts, Special—Inferences—Trials—Questions for Jury—Appeal and Error.*—It is for the jury to draw inferences from the facts found or agreed upon, and not for the courts; and a special verdict is defective which contains merely a recital of evidence of a circumstantial nature, and on appeal therefrom a new trial will be ordered. *S. v. Fenner*, 247.

15. *Evidence—Expression of Opinion—Inferences—Questions for Jury—Argument of Counsel—Appeal and Error.*—It is for the jury to draw reasonable inferences from the evidence, and counsel may argue to them the inferences to be drawn; and while the court may instruct the jury that there is no direct evidence of the conclusion argued, it is reversible error to charge them to pay no attention to the argument, as such is an expression of opinion forbidden by statute, and deprives the client of the benefit of his attorney's services therein. *S. v. Lee*, 250.

16. *Constitutional Law—Courts—Courtesy to Counsel—Prejudicial Remarks Appeal and Error.*—Where an attorney has argued to the jury a reasonable inference to be drawn from the evidence in favor of his client, it is reversible error for the judge, in his charge, to mention the inference as a statement of fact testified to by the attorney, saying that he was the only one who had so testified, as such statement could not be termed testimony, and prejudiced the prisoner's defense in the minds of the jury. The Court expresses its disapprobation of such language used by the judge (Const., Art. IV, sec. 8), and points out the fact that attorneys are entitled to courteous treatment. *Ibid.*

17. *Witnesses—Qualifications—Appeal and Error.*—The determination of the trial judge of the disqualifications of witnesses to testify for lack of sufficient age or mental capacity is not reviewable on appeal. The

APPEAL AND ERROR—*Continued.*

religious requirements of a witness discussed, and Revisal, secs. 1496 (29), 2360, and 2354, referred to by CLARK, C. J. *S. v. Pitt*, 268.

18. *Appeal and Error—Homicide—Escape—Filing Brief—Rules of Court.*—When an appellant escapes pending his appeal to this Court, the Court in its discretion will either dismiss the appeal, or affirm the judgment or continue the case. It can make no difference that the appellant is convicted of a capital felony. That entitles him to no special privileges. *S. v. DeVane*, 281.

19. *Appeal and Error—Unanswered Questions—Exceptions.*—Exceptions to unanswered questions, without proper statement as to their relevancy to the subject-matter of the trial, will not be considered on appeal. *S. v. McKenzie*, 290.

20. *Appeal and Error—Recitals in Exceptions.*—Recitals in the appellant's exceptions not set out as a part of the statement of case on appeal settled by the judge will not be considered. *Ibid.*

21. *Same—Homicide—Trials—Prejudice.*—Where the prisoner has appealed from a sentence of murder in the first degree, and as a part of his exceptions states that the wife of the deceased, with her children, attended the trial in mourning, and boarded at the same place with the jury, such recitations, if considered as a part of the case on appeal, will not alone be sufficient to set aside the sentence of the court. *Ibid.*

22. *Homicide—Deadly Weapon—Trials—Presumptions—Evidence—Appeal and Error—Harmless Error.*—Upon the trial for murder, the law presumes malice from the killing with a pistol shot, and it is for the prisoner to show that the shooting was done under such circumstances as would justify the act or render it manslaughter; and where the jury has returned, in such case, a verdict of murder in the second degree, errors committed in admitting evidence of previous threats upon the question of premeditation and deliberation necessary for conviction of murder in the first degree are rendered harmless. *S. v. Shouse*, 306.

23. *Trials—Evidence Excluded—Admissions—Harmless Error.*—The exclusion of testimony concerning matters admitted upon the trial to be true, if error, is harmless. *S. v. Cardwell*, 309.

24. *Homicide—Deadly Weapon—Matters in Mitigation—Trials—Charge—State's Evidence—Appeal and Error—Harmless Error.*—Where the killing of a human being with a deadly weapon has been shown, and upon the trial of the accused for the homicide the judge has correctly charged that the burden was upon the prisoner to show matters in mitigation to reduce the degree of the crime from murder in the second degree, but the State must show premeditation and deliberation beyond a reasonable doubt for conviction in the first degree; and, also, that the prisoner could rely upon the State's evidence, as well as his own, to show such matters in mitigation, it is not held for error that in his charge the court further stated they should find the less offense, "if the defendant has shown the matters in mitigation by his evidence," for taking the charge as a whole it does not restrict such evidence, in the consideration of the jury, to that offered by the prisoner alone. *S. v. McClure*, 321.

APPEAL AND ERROR—*Continued.*

25. *Homicide—Trials—Murder in First Degree—Instructions—Appeal and Error—Harmless Error.*—The trial judge having explained to the jury the principles of law applicable upon the evidence in a trial for homicide, a portion of the charge, that if the prisoner killed the deceased with premeditation and deliberation, as theretofore explained to them, and this is shown beyond a reasonable doubt, the prisoner would be guilty of murder in the first degree, is not held for error. *Ibid.*

26. *Appeal and Error—Exceptions—Questions and Answer—Objections to Questions.*—Where exception is taken to the ruling out of an answer to a question asked a witness in the trial of a cause, it must in some way be made to appear what the expected answer would have been, so that the lower court, and this Court on appeal, may pass upon its competency or relevancy, or the exception will not be considered. *S. v. Lane*, 333.

27. *Appeal and Error—Trials—Instructions—Requests—Court's Discretion.*—An appeal will not lie from the refusal of the trial judge to give requested instructions after the jury had retired to make up their verdict, the action of the judge being solely discretionary under the circumstances. *Ibid.*

28. *Trials—Withdrawing Juror—Court's Discretion—Appeal and Error—Statutes.*—Upon the trial of misdemeanors and felonies less than capital, it is within the discretion of the trial judge to withdraw a juror and make a mistrial when to him the ends of justice seem to require; and in the absence of abuse of the exercise of this discretion therein, no appeal will lie; nor is this position affected by the provisions of ch. 73, Public Laws 1913, passed doubtless to enable a defendant to present the question of his innocence or guilt upon the State's evidence, etc., as a matter of law, with the right of appeal only from final judgment of guilt. *Semble*, if the statute affected the discretion of the trial judge, exception duly noted should be taken to his action and presented on appeal from final judgment or by *certiorari*. *S. v. Andrews*, 349.

29. *Appeal and Error—Assignments of Error.*—An assignment for error made to the charge of the trial judge should set out briefly the parts of the charge excepted to; and in this case it is held to be insufficient that the charge is set out and the assignments refer to such portions as appear between certain marks of identification. *S. v. Seahorn*, 373.

30. *Intoxicating Liquors—Husband and Wife—Trials—Instructions—Presumptions—Appeal and Error—Harmless Error.*—Upon this trial for the unlawful sale of intoxicating liquors, there was evidence tending to show that the defendants, husband and wife, kept such liquors for sale at their home, and that the *feme* defendant made the sale to the State's witness, in the presence of her husband, she testifying that she had not sold any intoxicants, and making no claim, therefore, that she was unlawfully acting under the restraint of her husband. *Held*, the judge erroneously instructed the jury as to their verdict upon their finding as to whether the wife or husband would be guilty upon the evidence of the husband's acquiescence or approval; but it is further held as harmless error, as the jury fully understood that her conviction rested entirely upon the question of whether she made the unlawful sale, and if so, did she act willingly and of her own accord. *Ibid.*

APPEAL AND ERROR—*Continued.*

31. *Appeal and Error—Objections and Exceptions—Specific Exceptions.*—An exception to the charge of the court must be to a specific proposition wherein error is alleged and pointed out, and an exception contained in an excerpt from the charge, containing several propositions, is not sufficiently definite for its consideration on appeal. *S. v. Cameron*, 379.

32. *Trials — Instructions — Reading from Decisions — Appeal and Error—Harmless Error—Delays of Trial.*—It is not commended that the trial judge while instructing the jury should lengthily read from decisions of the Court bearing, though correctly, upon the law relating to the controversy at issue; but this will not be held for reversible error. *Ibid.*

33. *Homicide—Trials—Self-defense—Evidence— Instructions — Appeal and Error.*—Upon a trial for a homicide there was evidence tending to show that the deceased and the prisoner were friendly; that V., at whose home prisoner was living, had several days before the homicide given the deceased permission to use his horse and buggy, and that during the night the deceased, unknown to the prisoner, took the horse from the pasture to get a prescription filled for a sick member of his family; that the prisoner was awakened and told some one had stolen the horse, and, arming himself with a gun, went in search of the supposed thief; that soon he heard the horse returning, but did not recognize deceased, who had shaved off his beard, and called to him to stop, but he kept on riding and called out "Quit that!" "Quit that!" etc.; that prisoner twice fired in the air to cause the rider to stop, and the third and fatal shot was fired because prisoner mistook a medicine bottle, which the deceased "flourished," for a pistol; and prisoner testified that he fired in apprehension for his own safety. *Held*, this evidence was sufficient to be submitted to the jury upon the question of whether the defendant reasonably believed, under the circumstances, he was acting in self-defense, or to save himself from death or great bodily harm; and an instruction that the jury return a verdict of manslaughter was reversible error. *S. v. Johnson*, 392.

34. *Appeal and Error—Criminal Action—Petition to Review—Motions—Newly Discovered Evidence—Supreme Court.* — The Supreme Court can entertain a proper petition in a criminal action to "review the record and reconsider the opinion filed in the case before certification to the lower court on account of an alleged palpable oversight therein"; though in criminal cases a motion for a new trial for newly discovered evidence will not be allowed. *S. v. Ice Co.*, 403.

35. *Trials—Instructions—Special Requests—Contentions—Inferences — Appeal and Error.*—It is not error for the trial judge to refuse to give a prayer for special instruction which recites the contentions of the parties, with favorable inferences to be deduced therefrom, it being for the attorney to draw such inferences from the evidence introduced in his argument to the jury: and where the court may have omitted to state a correct contention of the party, his attorney should bring it to the attention of the court at the proper time, and the party cannot complain when he has not done so. *S. v. Lance*, 411.

36. *Trials—Improper Arguments—Courts—Correction—Appeal and Error—Presumptions.*—Remarks made by a solicitor in the prosecution of

APPEAL AND ERROR—*Continued.*

a case relating to extraneous matters, calculated to unduly prejudice the defense, should, in proper cases, be promptly rebuked from the bench, with such instruction as will remove from the minds of the jury the prejudice that may have been caused thereby; and when a motion for relief has been made in the trial court based upon matters of this character, set out in an affidavit, upon which the court has not stated the facts, or there are no such findings appearing in the record on appeal, and it does not appear that he was requested to state them, it will be presumed that the facts were found adversely to the appellant, or that the prejudice had been properly removed in some way by the trial judge. This Court cannot consider the affidavit as findings of fact. *S. v. Ray*, 420.

37. *Appeal and Error—Attorney and Client—Duty of Client—Laches.*—In criminal as well as civil cases it is the duty of the party appealing to see that his case on appeal has been prepared and sent up under the rules, and this duty is not excused because he has intrusted it to his attorneys, paid them the necessary fees for the transcript, etc., and, relying upon them, has taken no further steps until it was too late. *S. v. Goodlake*, 434.

38. *Intoxicating Liquors — Search and Seizure — Possession — Prima Facie Case—Trials—Instructions—Appeal and Error—Harmless Error.*—An erroneous charge under the search and seizure law, that one gallon of intoxicating liquor made out a *prima facie* case that defendant had it for the purpose of an unlawful sale, is rendered harmless under the evidence in this case establishing the fact that the defendant had more than that quantity. *S. v. Moore*, at this term, approved, denying the defendant's motion in arrest of judgment for that the warrant did not negative that he was a druggist, etc. *S. v. Atwood*, 438.

39. *Appeal and Error—Court's Discretion.*—The appeal in this case being rulings of the trial court of matters largely within his discretion, no error is found. *S. v. Snipes*, 440.

40. *Issues.*—Where the trial judge has submitted to the jury issues upon the controverted facts which are fully determinative of the rights of the parties, his refusal to submit additional issues will not be held for reversible error. *Hinton v. Hall*, 477.

41. *Trials—Requests—Appeal and Error—Objections and Exceptions—Carriers—Negligence.*—An exception that the court did not limit the admission of corroborative evidence to its corroborative character must be taken to the refusal of the court to so limit it upon appellant's request; and where the record is silent in this respect, it is presumed on appeal that this was properly done by the trial court. *Elliott v. R. R.*, 481.

42. *Appeal and Error—Objections and Exceptions—Questions and Answers—Evidence—Harmless Error.*—The question of defendant's negligence in this case depending upon whether the defendant had provided sufficient help for the plaintiff to load rails upon its flat car, the admission of his testimony as to the number of men required is held harmless, if erroneous, he having elsewhere testified thereto without objection; and his answer to another question objected to, having little if any probative force, under the circumstances of this case is not held for reversible error. *Tillett v. R. R.*, 515.

APPEAL AND ERROR—*Continued.*

43. *Appeal and Error—Transfer of Causes—Principles of Law.*—The action of the trial judge in transferring a cause of action to another county will be reviewed on appeal when such action is based solely on a proposition of law. *R. R. v. Spencer*, 522.

44. *Pleadings—Amendments—Court's Discretion—Excusable Neglect—Appeal and Error.*—A refusal by the trial court to set aside a judgment rendered in an action upon contract, for surprise, inadvertence, and excusable neglect, on the ground that defendant had neglected to allege a mistake in the contract sued on, will not be disturbed on appeal when it appears that the pleadings had been filed, trial had upon the merits of the case, and the issues submitted were fully responsive to the pleadings. *Pritchard v. R. R.*, 532.

45. *Appeal and Error — Defendant's Appeal — Appellee's Costs — Costs — Prosecution Bond—Interpretation of Statutes.*—Where the defendant to an action has appealed from an adverse judgment rendered in the Superior Court, resulting in a reversal thereof in the Supreme Court, he is, upon motion made in the Supreme Court, under Revisal, sec. 1251, entitled to a judgment for his costs on appeal against the sureties on plaintiff's undertaking given in the lower court for the prosecution of the action; for under the language of this section and section 450 this undertaking or prosecution bond is required of the plaintiff to secure all costs, whether in the Superior or Supreme Court; and Revisal, sec. 605, requiring the appellant to give an undertaking for the costs on appeal, cannot apply to such instances. *Kenney v. R. R.*, 566.

46. *Same—Costs Superior Court—Penalty of Bond—Application to Increase.*—Where the defendant has been successful on his appeal to the Supreme Court, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the Superior Court, the remedy is by application to increase the penalty of the bond. *Ibid.*

APPLICATION. See Insurance.

APPROXIMATION. See Contracts.

ARGUMENT. See Trials, 36, 50, 71.

ARREST. See Criminal Law, 5, 9; Officers.

ASSAULT. See Homicide, 21, 23.

ASSIGNMENTS OF ERROR. See Appeal and Error, 4.

ASSUMPTION OF RISKS. See Master and Servant, 1, 25; Pleadings; Negligence.

ATTACHMENT.

1. *Attachment—Undertaking—Separate Action.*—A successful defendant in attachment must seek relief in a separate action on the undertaking. *Tyler v. Mahoney*, 509.

2. *Attachment—Probable Cause—Damages — Malice.* — Where plaintiff in attachment without malice has sued out his writ and seized the property of the defendant without probable cause, he is liable to the

ATTACHMENT—*Continued.*

defendant in that action in the amount of actual damages he has thereby sustained. *Ibid.*

3. *Same—Res Judicata.*—The question of recovery by the plaintiff in this action for damages he has sustained by reason of the defendant's having seized his property in attachment without probable cause is not decided in defendant's appeal in the attachment proceedings. *Mahoney v. Tyler*, 136 N. C., 42, and the defense of *res judicata* is untenable. *Ibid.*

4. *Attachment—Nonresident—Malice—Evidence — Information, Available Knowledge.*—Where a person merely leaves the State temporarily for the purpose of prospecting, an attachment against his property here will not lie upon the ground that he was a nonresident; and where he sues the attaching creditor for damages, it is sufficient for him to show, as want of probable cause, that the latter acted upon rumor that the plaintiff had changed his place of residence to another State, without asking information from the plaintiff's wife or family, who had remained in the State, or used other available means to ascertain the truth of the rumor he had heard. *Ibid.*

5. *Attachment—Probable Cause—Trials—Questions for Jury — Questions for Court.*—In this case it is held that the question of probable cause is a mixed one of law and fact, leaving for the jury to determine from the evidence, as a matter of fact, whether the circumstances show the cause to be probable or not probable; but whether, admitting them to be true, they amount to a probable cause is a question of law for the judge. *Ibid.*

ATTORNEY AND CLIENT. See Trials, 36, 50; Constitutional Law, 7; Appeal and Error, 37; Fraud, 4.

AUTOMOBILE. See Railroads, 9, 10.

BAILMENT.

Bailments—Contracts—Hire of Mule—Negligence—Trials.—An agreement of hire of a mule for plowing purposes for a period of two weeks, at the end of which time the mule should be returned in as good condition as received, is an ordinary bailment determined by the common law relating to bailments for hire; and the bailee, being held to exercise only ordinary care for its preservation and protection, is not responsible for the destruction of the mule and his consequent failure to return it in the absence of any negligence on his part. *Robertson v. Lumber Co.*, 165 N. C., 4, cited and distinguished. *Sawyer v. Wilkinson*, 497.

BALLOT. See Constitutional Law.

BANKS AND BANKING.

1. *Trials—Banking—Nonsuit—Due Course of Mail — Presumptions — Evidence—Conflicting—Questions for Jury.*—Where the evidence discloses that a letter containing a check on a bank would have been received by the bank in due course of the mail and of its business on a certain day, at which time there were sufficient funds of the maker on deposit with the bank to meet it, and the plaintiff, suing the bank

BANKS AND BANKING—*Continued.*

for the amount of the check, introduced a part of the defendant's answer in which it was alleged that the defendant "found the check in its mail" two days later, upon a motion to nonsuit, taking the evidence in the light most favorable to the plaintiff, the first date will be taken as the one on which the defendant received the check, the implied allegation of a later date in the answer which was introduced by plaintiff, not being conclusive upon him, but making a conflict in testimony which is for the jury to settle. *Trust Co. v. Bank*, 112.

2. *Banks—Deposits—Checking Arrangements—Parties.*—It appeared that the plaintiff bank had an arrangement with its depositor that it would receive for deposit and as cash items, checks payable to himself, and permit him to draw against them, and that the depositor had drawn out the full amount of the check in question. *Held*, sufficient evidence under the circumstances that the bank is the owner of the check so deposited and entitled to maintain an action thereon. *Ibid.*

3. *Banks—Rights of Check-holder—Bank as Agent and Drawee—Negligence of Bank and Constructive Acceptance of Check.*—Where a bank has received for collection from another bank at a different place a check drawn on itself by one of the depositors, and assumes the agency to present and collect the same, it is bound to good faith and due diligence in the performance of its duty as such agent, and the fact that the bank presents the check for payment and causes it to be protested for insufficiency of funds to the credit of the drawee is some evidence of the agency to be considered by the jury. The court examines the evidence in this case and finds that there is sufficient to be submitted to the jury upon the question whether the defendant bank failed in its duty as agent, and whether its conduct showed a constructive acceptance of the check within the principle of *Bank v. Kenan*, 75 N. C., 340, and other authorities cited. The rights of a holder of a check against the drawee, and the bank upon which it is drawn, discussed incidentally by WALKER, J. *Ibid.*

BILLS AND NOTES.

1. *Bills and Notes—Fraud and Deceit—Innocent Purchaser—Trials—Burden of Proof.*—Where it is proved or admitted that a negotiable note sued on has been obtained from the maker by fraud, or deceit, the transferee, the plaintiff in the action, must show by the preponderance of the evidence that he was a *bona fide* purchaser or derived his title from such purchaser, and it is insufficient that he acquired the note for value, before maturity. *Bank v. Drug Co.*, 99.

2. *Same—Impeaching Evidence.*—The burden of proof being on the plaintiff, in his action to recover on a negotiable note, to show that he was a *bona fide* purchaser for value, where it is shown that the note was procured from the maker by fraud or deceit, it is not required that the defendant negatively prove that the plaintiff was not such purchaser, and the plaintiff's testimony is subject to attack and to be discredited on cross-examination. *Ibid.*

3. *Bills and Notes—Antecedent Debt—Transferee for Value.*—The transfer of a negotiable note by the holder to his creditor before maturity for an antecedent debt constitutes the transferee a holder for value. Revisal, sec. 2173. *Bank v. Seagroves*, 608.

BILLS AND NOTES—*Continued.*

4. *Same—Evidence—Trials—Instructions—Courts—Expression of Opinion —Statutes.*—Where a negotiable note held by a debtor bank has been transferred before maturity to its creditor bank, and there is evidence that at the time the former owed to the latter a larger sum of money than the amount of the note, and that the note was transferred as an extinguishment of the debt *pro tanto*, and in an action upon this note, it is introduced in evidence showing an indorsement on the back, made by the plaintiff, "For collection account," it is for the jury to find, under the conflicting evidence, whether the plaintiff received the note in part payment of the debt or for collection only, and an instruction by the judge that there is no evidence that the plaintiff paid value and that it was its duty to appear and explain the transaction, is an expression of opinion forbidden by the statute. *Ibid.*

5. *Bills and Notes—Due Course—Presumptions—Fraud—Pleadings—Burden of Proof—Statutes.*—To rebut the presumption that every holder of a negotiable instrument, acquired before maturity, is one in due course, it is necessary for the defendant in an action thereon to allege fraud, and when properly pleaded, the burden is upon the plaintiff to show the *bona fides* of the transaction (Revisal, secs. 2208, 2201); but in this case it is held that fraud has been insufficiently pleaded, the allegation being that the maker was induced to sign through the representations or promises of another and for accommodation, without in any manner connecting the plaintiff, who acquired for value and before maturity, with the transactions alleged. *Ibid.*

BONDS. See Municipal Corporations.

BOOK ENTRIES. See Evidence, 6.

BRIEFS. See Appeal and Error, 1, 8.

BUILDING PERMITS. See Municipal, 13.

BURDEN OF PROOF. See Trials; Homicide.

CALLS. See Deeds and Conveyances, 3.

CANALS.

Canals—Water and Water-courses—Bridges—Maintenance—Convenience—Title—Damages—Trials—Evidence.—"Turner's Cut" was dug by the predecessor of the defendant from the mouth of its canal to a point on the Pasquotank River to avoid going through "Moccasin Tract" with boats, and thus saving some distance in their travel. When the defendant purchased the property of its predecessor, the Dismal Swamp Canal Company, there was a bridge over "Turner's Cut," which it maintained and erected a phone station to notify boats and rafts going through the "cut." In cutting down expenses, the defendant did away with the phone station and ceased to maintain the bridge. The plaintiffs seek to compel the defendant to maintain this bridge for the benefit of their toll road, and by amendment of the pleadings to recover damages for the defendant's failure to maintain it. *Held*, it was competent for the defendant to prove that it had never acquired or claimed title to the lands through which "Turner's Cut" had been dug; that the United States Government had taken

CANALS—*Continued.*

over and controlled the "cut" as a part of its public waterways, appropriating large sums of money for its maintenance; and that the defendant had previously maintained the bridge only for its own convenience; and *Further held*, that upon the facts established, there was no liability upon the defendants. *Hinton v. Canal Co.*, 484.

CANCELLATION. See Trusts and Trustees, 3.

CARRIERS OF GOODS. See Commerce.

1. *Carriers of Goods — Overcharge — Penalty Statutes — Interstate Commerce—Constitutional Law.*—Revisal, sec. 2644, imposing a penalty upon a public carrier of goods for failure to pay an overcharge of freight upon the conditions therein named is not an interference with interstate commerce, or void under the commerce clause of the Federal Constitution; for its provisions are constitutional and valid. *Supply Co. v. R. R.*, 82.

2. *Same—Amount Recovered—Excessive Demand—Carrier's Knowledge—Misinformation.*—The provision of Revisal, sec. 2644, that the shipper must recover the amount of overcharges claimed in his notice to the carrier in order to penalize the carrier for its nonpayment is to protect the carrier from payment of excessive demands when the amount of the claim is not ascertainable by it; and does not apply when the amount of the overcharge is readily ascertainable from its own records, as in case of *excessive* rates alone; and especially is this not required when the carrier's agent has misled the shipper by giving him an erroneous rate, upon which he has made his calculation and accordingly demanded more than the exact amount. *Ibid.*

3. *Intoxicating Liquors—Carriers of Goods—Refusal to Deliver—Penalty Statutes—Unlawful Sales—Interstate Commerce.*—A druggist who has not received a valid license, in accordance with the requirements of our statutes, to sell intoxicating liquors for the purposes and in the manner indicated, may not recover of the carrier the penalty provided by Revisal, sec. 2633, for the failure to deliver such liquors to him for the purposes of sale, for such are unlawful and prohibited, and cannot be aided or encouraged by the courts of the State, whether the shipment be intrastate or interstate. *Smith v. Express Co.*, 155.

4. *Intoxicating Liquors — Unlawful Sales — Carriers of Goods — Penalty Statutes—Interstate Commerce—Constitutional Law.* The delivery of intoxicating liquors for the purposes of sale is made unlawful by our statute, Revisal, sec. 3534, and the Webb-Kenyon law forbids delivery in interstate commerce; and whether this law is constitutional or otherwise, it could not be considered that our courts should penalize a carrier for refusing to deliver such shipment to the consignee in violation of our laws enacted to carry out our established public policy in relation to such matters. Federal Constitution, Art. I, sec. 8, clause 3. *Ibid.*

5. *Carriers of Goods—Negligence—Water Damage—Evidence—Questions for Jury.—Held*, in this action to recover of the defendant carrier damages caused to a shipment of a carload of peanuts, that the evidence of actionable negligence on the defendant's part was sufficient which tended to show that the shipment was received from it in a

CARRIERS OF GOODS—*Continued.*

damaged condition from water; that during its transportation it had been raining; that the roof of the car leaked, and that the condition of the car was such that the rain could have beaten in between its slats. *Pritchard v. R. R.*, 532.

6. *Carriers of Goods—Traffic Contracts—Pleadings—Amendments—Court's Discretion.*—In an action between two carriers involving a balance alleged to be due the plaintiff under a traffic contract, it is within the discretion of the trial judge to allow the plaintiff to amend its complaint so as to allege that it had been forced to pay damages for a shipment of goods received by it from the defendant in a damaged condition, for which the defendant's negligence, while in its care, was responsible; and while the amendment creates an additional cause of action, it is so germane to the original cause that both may be considered as one action. *Ibid.*

7. *Carriers of Goods—Traffic Contracts—Connecting Carrier—Damage to Shipment—Payment—Limitation of Actions.*—Where the controversy between two carriers involves a balance alleged to be due the plaintiff under a traffic contract, and the plaintiff is allowed by the court to amend its complaint to allege damages it had had to pay a customer of the road, which arose from the defendant's negligence, the cause of action thus alleged arose to the plaintiff at the time it paid the damages complained of, and the statute of limitations would begin to run from that time. *Ibid.*

8. *Carriers of Goods—Express Companies—Failure to Transport—Trials—Evidence—Negligence.*—In an action against an express company for damages arising from the refusal of the defendant to transport a shipment tendered it at a small station where receipts for shipments were not issued, there was evidence tending to show that the railroad and express company had the same local agent, and that the express company received freight for shipment there; the railroad baggage man on the train was also the agent of the express company; the porter on the train usually helped to load express, but refused in this instance, and the shipment was too heavy to be handled by the express messenger alone; the station agent told the plaintiff, before he tendered the shipment, that it could go by express; the express messenger had his attention called to the shipment and requested the porter to assist him in loading it; the consignment thus tendered was beef, and remained at the station until it had spoiled and was worthless. *Held*, (1) a judgment of nonsuit upon the evidence as to the railroad company was properly rendered; (2) it was for the jury to determine, under conflicting evidence, whether the defendant express company through its authorized agents refused to accept the shipment. *Nelson v. R. R.*, 547.

CARRIERS OF PASSENGERS.

1. *Carriers of Passengers—Flag Stations—Failure to Stop—Tickets—Negligence—Interpretation of Statutes.*—A passenger on a railway train is entitled, as a matter of right, to have the train stop at a station to which he has purchased his ticket; and where his destination is a flag station at which the train fails to stop, attributable to the neglect of the conductor in failing to take up the passenger's ticket in time,

CARRIERS OF PASSENGERS—*Continued.*

the railroad company is answerable for the consequent damages. Revisal, sec. 2611. *Elliott v. R. R.*, 481.

2. *Same—Trials — Requests — Appeal and Error — Objections and Exceptions.*—An exception that the court did not limit the admission of corroborative evidence to its corroborative character must be taken to the refusal of the court to so limit it upon appellant's request; and where the record is silent in this respect, it is presumed on appeal that this was properly done by the trial court. *Ibid.*

CERTIFICATE. See Deeds and Conveyances, 19.

CHARTER. See Corporations, 3; Removal of Causes, 6.

CITIES AND TOWNS. See Municipal Corporations.

CLAIMS. See Statutes, 35.

CLERKS OF COURTS. See Verdict.

CLOUD ON TITLE. See Equity, 3.

COLLATERAL ATTACK. See Intoxicating Liquors, 4.

COLOR OF TITLE. See Limitations of Actions; Deeds and Conveyances, 1, 16, 18, 19, 20.

COMMERCE. See Intoxicating Liquors, 2.

1. *Interstate Commerce — Carriers of Goods — Rate Established — Rates Charged.*—The schedule of rates of freight filed by the carrier with the Interstate Commerce Commission and published and promulgated as the Federal statutes require, are controlling in interstate shipments of goods unless and until changed in accordance with the methods the statute directs; and are enforcible notwithstanding the agent of the carrier and the shipper may have agreed or contracted that a different rate should be charged. *Peanut Co. v. R. R.*, 62.

2. *Interstate Commerce—Carriers of Goods—Rates Established—Posting of Rates.*—It is not necessary to the effectiveness of the schedules of rates that the copies of the same be posted in two public and conspicuous places in every depot or station of the carrier, that being a provision merely for the convenience of the public. *Ibid.*

3. *Interstate Commerce—Carriers of Goods—Rates Established—Filing with Commission—Publication—Inspection.*—The mere filing of a new or changed schedule of rates with the Interstate Commerce Commission is only the initial step in effecting a change of rates previously established, as it is necessary under the Federal statute that they shall be likewise "printed and kept open to public inspection," with further provision that they "shall not be effective until after thirty days notice to the public, published as aforesaid," the publication required being as stated, that these schedules must be "printed and kept open to public inspection"; it being further required, though not as a part of the publication, that they be posted at the various stations of the carrier for the greater convenience of the public. *Ibid.*

4. *Interstate Commerce—Carriers of Goods—Rates Established—Changes —Requisites—Former Rates — Overcharges — Recovery* — Where the

COMMERCE—*Continued.*

agent of a carrier has agreed to accept interstate shipments of merchandise in accordance with the schedule of rates filed with the Interstate Commerce Commission and "published" as required by the Federal statutes, these rates are not affected by the fact that the carrier has filed a different schedule of rates to effect a change in the rate so established, but which at the time of the shipment had not been "published" in accordance with the statutory requirement; and where the shipper has accordingly been required to pay a higher rate for the shipment, he may recover it back from the carrier, as an illegal overcharge involuntarily paid by him, and as money received by the carrier to his use, it having been wrongfully exacted from him. *Ibid.*

5. *Interstate Commerce — Carriers of Goods — Overcharge — Recovery—Courts—Commission—Concurrent Jurisdiction.*—It seems that the courts have concurrent jurisdiction with the Interstate Commerce Commission of proceedings by the shipper to recover the amount he has been required by the carrier to pay in excess of the lawful rates established for the interstate transportation of a commodity, and the shipper may have immediate recourse to a State court. The difference between "publication" of schedules, as essential to the effectiveness of rates, and "posting" of them, as not essential thereto, pointed out and discussed by WALKER, J. *Ibid.*

6. *Intoxicating Liquors—Lex Loci—Trials—Evidence—Ownership—Interstate Commerce.*—Where the defendant, upon trial for violating our prohibition laws, has received here money for the purchase of whiskey, which is delivered here through an express company, and there is no evidence that he has thus acted as the agent of a seller in another State, where such sale was lawful, or for the sole accommodation of the purchaser, here, without profit, the acts of the prisoner are consistent with ownership of the whiskey at the time of sale, notwithstanding he may have had it sent from another State; and the evidence is sufficient to sustain a conviction of the offense charged. The Federal statute known as the Webb-Kenyon Act has no application. *S. v. Cardwell*, 309.

CONCURRING. See Negligence.

CONDEMNATION. See Easements.

CONFESSION. See Homicide, 19.

CONNIVANCE. See Criminal Law, 17.

CONSIDERATION. See Vendor and Purchaser; Bills and Notes.

CONSTITUTION OF NORTH CAROLINA.

ART.

IV, sec. 8. Writ of prohibition will not lie from the Supreme Court pending an appeal, in an action of divorce, from the Superior Court, regarding the custody of minor children *pendente lite*. *Page v. Page*, 90.

IV, sec. 8. The language used in this case by the trial judge was to prisoner's prejudice, and the Supreme Court points out that attorneys are entitled to courteous treatment. *S. v. Lee*, 250.

CONSTITUTION OF NORTH CAROLINA—*Continued.*

V, sec. 5. A business enterprise, with municipal powers incidentally conferred, is not exempt from taxation. *Southern Assembly v. Palmer*, 75.

XIV, sec. 8. A statute prohibiting entry into public schools for the white race of children with any negro blood in their veins, however remote, is constitutional. *Johnson v. Board of Education*, 468.

CONSTITUTIONAL LAW.

1. *Constitutional Law—Corporations—Municipal Corporations — Taxation —Exemptions — Religious Corporations — Business Purposes.*—A municipal corporation is one designed to create within a prescribed territory a local government of the people therein, as a part of that exercised by the State, with certain and defined restrictions, and our State Constitution, Art. V, sec. 5, exempting municipal corporations from taxation, does not include within its meaning or intent a corporation composed of shareholders which in its form and controlling features is a business enterprise upon which municipal powers have been incidentally conferred in promotion of its primary purpose; and in this case it is held that the property of the Southern Assembly, chartered by special legislative act to establish a municipality for the benefit of the Methodist Episcopal Church, for the purposes of assemblies, conventions, public worship, and the like, may not be exempted from taxation, under our Constitution, it appearing that the ultimate control is in a body of stockholders and that the management shall be in commissioners elected by such stockholders, and that certain business enterprises may be carried on in furtherance of the general scheme. *Southern Assembly v. Palmer*, 75.

2. *Carriers of Goods—Overcharge—Penalty Statutes—Interstate Commerce Constitutional Law.*—Revisal, sec. 2644, imposing a penalty upon a public carrier of goods for failure to pay an overcharge of freight upon the conditions therein named is not an interference with interstate commerce, or void under the commerce clause of the Federal Constitution; for its provisions are constitutional and valid. *Supply Co. v. R. R.*, 82.

3. *Same—Amount Recovered—Excessive Demand—Carrier's Knowledge—Misinformation.*—The provision of Revisal, sec. 2644, that the shipper must recover the amount of overcharges claimed in his notice to the carrier in order to penalize the carrier for its nonpayment is to protect the carrier from payment of excessive demands when the amount of the claim is not ascertainable by it; and does not apply when the amount of the overcharge readily ascertainable from its own record, as in case of *excessive* rates alone; and especially is this not required when the carrier's agent has misled the shipper by giving him an erroneous rate, upon which he has made his calculation and accordingly demanded more than the exact amount. *Ibid.*

4. *Municipal Corporations—Cities and Towns—Bond Issues—Market House —Necessaries—Constitutional Law.*—Bonds issued by a municipality to build a market house are for a necessary expense, and when authorized by statute do not require, for their validity, that they be submitted to the qualified voters of the municipality. *LeRoy v. Elizabeth City*, 93.

CONSTITUTIONAL LAW—*Continued.*

5. *Municipal Corporations—Cities and Towns—Bond Issues—Necessaries—Single Ballot—Constitutional Law.*—Where a municipal corporation under a special legislative act, and voted upon in accordance with its charter provisions, submits to its qualified voters the question of the issuance of bonds for necessary municipal purposes, as in this case, for extending its sewer line, purchasing a site for and building a fire station, and for permanent pavements, proportioning a certain amount to be expended for the first two items and the balance of the issue for the last one, the purpose of the various items are related to each other, the information given being for an intelligent ballot, and the bonds voted upon as a single proposition or upon a single ballot, are valid. *City of Winston v. Wachovia Bank and Trust Co.*, 158 N. C., 512, cited and distinguished. *Briggs v. Raleigh*, 149.

6. *Intoxicating Liquors — Unlawful Sales — Carriers of Goods — Penalty Statutes—Interstate Commerce—Constitutional Law.* The delivery of intoxicating liquors for the purpose of sale is made unlawful by our statute, Revisal. sec. 3534, and the Webb-Kenyon law forbids delivery in interstate commerce; and whether this law is constitutional or otherwise, it could not be considered that our courts should penalize a carrier for refusing to deliver such shipment to the consignee in violation of our laws enacted to carry out our established public policy in relation to such matters. Federal Constitution, Art. I, sec. 8, clause 3. *Smith v. Express Co.*, 155.

7. *Constitutional Law — Courts — Courtesy to Counsel — Prejudicial Remarks—Appeal and Error.*—Where an attorney has argued to the jury a reasonable inference to be drawn from the evidence in favor of his client, it is reversible error for the judge, in his charge, to mention the inference as a statement of fact testified to by the attorney, saying that he was the only one who had so testified, as such statement could not be termed testimony, and prejudiced the prisoner's defense in the minds of the jury. The Court expresses its disapprobation of such language used by the judge (Const., Art. IV, sec. 8), and points out the fact that attorneys are entitled to courteous treatment. *S. v. Lee*, 250.

8. *Cities and Towns—Ordinances—Segregation of Races—Statutes—Interpretation.*—Legislative authority given to a town to pass any ordinance for the good order, good government, or general welfare of the city, provided it does not contravene the laws and Constitution of the State, does not contemplate the passage of an ordinance prohibiting the ownership of land in certain locations and districts, by white or colored people, in accordance with whether the majority of the landowners in that district are white or colored people, such being in contravention of the general policy of the State and questionable as to its validity under the Federal Constitution. *S. v. Darnell*, 300.

9. *Criminal Law—Judgments—Cruel and Unusual Punishments—Constitutional Law.*—The defendant was indicted, tried, and convicted of administering to a pregnant woman a noxious drug for the purpose of producing an abortion, contrary to Revisal, secs. 3618 and 3619. *Held,* a sentence to the State Prison for three years and the payment of $1,000 as a fine is not objectionable as cruel and unusual punishment. *S. v. Shaft*, 407.

CONSTITUTIONAL LAW—*Continued.*

10. *Schools—Colored Race—Negro Blood—Constitutional Law.*—Our Constitution, Art. IX, sec. 2, requiring that the General Assembly provide for a "general and uniform system of public schools," etc., and that "the children of the white race and the children of the colored race shall be taught in separate public schools, but that there shall be no discrimination in favor of or to the prejudice of either race," gives authority to the Legislature to declare what shall be considered a "white child" or a "colored child"; and Revisal, sec. 4086, prohibiting a child "with negro blood in his veins, however remote the strain," from attending a school for the white race, is constitutional and valid. Art. XIV, sec. 8, of the Constitution, relating to marriages between the races, has no application. *Johnson v. Board of Education*, 468.

11. *Constitutional Law—Power of this Court to Declare Legislative Acts Unconstitutional.*—The courts may declare an act of the Legislature unconstitutional, but the power should be exercised sparingly and only in those cases where the conflict between the act and the Constitution is very clear and beyond any reasonable doubt, and the two cannot be reconciled. *Ibid.*

12. *Deeds and Conveyances—Married Women—Abandonment—Joinder of Husband—Constitutional Law.*—Revisal, sec. 2117, authorizing a married woman to execute a valid conveyance of her real property, without the joinder of her husband, when she has been abandoned by him, is constitutional. *Bachelor v. Norris*, 506.

CONTRACTS. See Reformation, 1; Vendor and Purchaser; Bailment; Master and Servant, 10; Carriers of Goods, 6, 7; Telegraphs, 1; Equity.

1. *Contracts—Interest—Interpretation of Statutes—Unliquidated Damages.* The rule that all moneys due by contract except due on penal bonds shall bear interest (Revisal, sec. 1954) applies whenever a recovery is had for breach of contract and the amount is ascertained from the terms of the contract itself or from evidence relative to the inquiry, and due by one party to the contract to another; and it does not obtain as a matter of law where the interest sought does not come within the provisions of the statute and is by way of unliquidated damages, and there has been no adequate default on the part of the debtor in reference to withholding the principal sum, or a part of it. *Bond v. Cotton Mills*, 20.

2. *Same—Statutory Liens—Material Men—Trusts and Trustees—"Ready, Able, and Willing"—Payment Into Court—Tender.*—The relationship of the owner of a building to material men, etc., claiming a balance due to his contractor after receiving from them notice of their liens, is not that of debtor and creditor, in the ordinary sense, for he holds such balance in the nature of a trust to their use; and where the material men, etc., have entered suit in the nature of a creditor's bill to recover, pro rata, the funds so held, the owner is not chargeable with interest on the claims or held to the duty of paying the funds into court pending the action, unless so ordered, in order to avoid the payment of the interest; and the amounts of the respective claims necessarily being uncertain, it is sufficient that he has always been ready, able, and willing to pay them upon their being finally passed upon and adjudicated. *Ibid.*

CONTRACTS—*Continued.*

3. *Contracts—Restraint of Trade — Partnerships — Waiver.* — F. and R., barbers, were partners in the town of M. F. bought out R. under an express agreement that the latter would not engage in the same business in the town of M. so long as F. continued it there. They again formed a partnership at M., and thereafter R. separately engaged in the trade of barber in opposition to F. *Held*, that the negative stipulation in the agreement of the parties in the former dissolution was intended to prevent rivalry between them in opposing the skill and influence of R., in the business of barber at M., which was not revoked impliedly by the formation of their second partnership, for therein both the skill and influence of R. was for the firm's benefit, and to the advantage of each member, and the formation of the second partnership could not in any manner conflict with the agreement entered into between F. and R. upon the dissolution of the first partnership, nor be considered as a waiver of the rights of F. to insist upon it; and it is further held that the agreement was not objectionable as being in restraint of trade, and is, therefore, enforcible. The law as to contracts in restraint of trade discussed by WALKER, J. *Faust v. Rohr*, 187.

4. *Contracts — Compensation by Will — Services Rendered Deceased.*— In this action to recover of the executor for the services rendered the deceased under an alleged contract that the testratrix would provide compensation for the plaintiff in her will, the complaint is held to be sufficiently comprehensive. *Boddie v. Arrington*, 209.

5. *Contracts—Vendor and Vendee—Warranty.*—An affirmation of a material fact made by the seller of goods at the time of the sale as an inducement thereto, and accepted and relied on by the buyer, will amount to a warranty. *Tomlinson v. Morgan*, 557.

6. *Same—Breach—Fertilizer—Damage to Crops.*—A loss suffered by a purchaser of fertilizer in diminution of a given crop, when it is clearly attributable to a definite breach of warranty, as to its quality, made by the seller, at the time of sale and which induced the purchaser to buy it, is within the contemplation of the parties, and when the damages to crop by reason of its use are capable of being ascertained with a reasonable degree of certainty, they may be recovered. *Ibid.*

7. *Same—Tobacco—Evidence.*—In this action to recover the purchase price of certain fertilizers sold and delivered, the defendant set up as counterclaim damages arising from a breach of warranty in the contract of sale; and there was evidence tending to show that the plaintiff had represented the fertilizer to be a certain high-grade brand especially adapted to tobacco, for which the defendant desired it; that the defendant used it upon proper soil for the purpose, and had properly planted and cultivated the crop, and there was a marked diminution of the value of the crop owing to lack of manure; and further, when a member of plaintiff's firm was asked to examine the crop, he said he wished to look no further, for he thought the factory had made a mistake in the use of acid for phosphate. *Held*, evidence sufficient to sustain a verdict awarding damages to the crop arising from the breach of plaintiff's warranty of the quality of fertilizer sold. *Ibid.*

CONTRACTS—*Continued.*

8. *Contracts—Interpretation—Technical Words and Expressions—Trials—Evidence—Questions for Jury.*—Where words or expressions used in a contract have a known technical meaning with reference to the subject-matter, this meaning may be shown in evidence, by competent witnesses, and when accepted by the jury will control the interpretation of the contract. *Neal v. Ferry Co.*, 563.

9. *Same—Bridges—Piling—Approximation.*—In an action upon a contract to recover the price for building a bridge, according to the specifications and plans of the defendant's chief engineer, the length and number of the piles were estimated, with the provision that they were an "approximation as nearly as may be forecasted from the plans, profiles, and inspection of the soil, but is not a definite term in this contract." *Held*, it was competent for the plaintiff, who qualified as an expert bridge builder, to testify that in all specifications for bridge building the word approximation is a technical term and has a technical meaning, and an approximate length of pile would mean that it should be within 3 to 5 per cent of the absolute or true length, and that the pilings necessary for the construction of the bridge in accordance with the contract exceeded this discrepancy in their length, upon the question of recovery for the extra material and work accordingly required in their construction. *Ibid.*

10. *Contracts, Written—Timber—Words and Phrases—Lumber—Log Measurement—Expert Evidence—Instructions.*—Lumber is the manufactured product of logs, and where the defendant has entered into a contract with the plaintiff to purchase the timber on his lands, and pay therefor at a certain price per thousand feet of lumber, it is error for the trial judge to charge the jury that the measure of plaintiff's recovery was at the stated price "log measure, including the sawdust that was cut out by the saws and the slabs"; and the instruction is further held erroneous in ignoring testimony in this case of the custom and the standard ordinarily prevailing for ascertaining the measurement of the timber sold. *Hardison v. Lumber Co.*, 136 N. C., 174, cited and applied. *McKinney v. Matthews*, 576.

11. *Contracts, Written — Executory Contracts — Subsequent Modification—Parol Evidence—Trials—Instructions.*—While a written executory contract is still in the course of performance, it may be modified by parol evidence as to subsequent obligations mutually imposed by the parties, and such is not objectionable as varying the writing; and the waiver of any legal rights under the written contract is sufficient consideration to support the promises resting in parol. Hence, where under the written contract sued on the defendant bought the timber on plaintiff's land to be paid for at a certain price per thousand feet of lumber, and the evidence is conflicting upon the question of the quantity of lumber the defendant had received, it is competent for defendant to show that it was agreed by parol, subsequent to the execution of the writing, and relating to transactions since occurring, that the "tallies" or account kept by the defendant's vendee should control. *Ibid.*

12. *Contracts, Written—Parol Evidence—Explanation — Trials — Instructions.*—Where the number of feet of lumber sold by the plaintiff to defendant is controverted in an action to recover the purchase price,

CONTRACTS—*Continued.*

and the defendant had not kept an account thereof, it is error for the trial judge to charge the jury that this was a circumstance they could consider in plaintiff's favor, and exclude from their consideration the defendant's testimony, in explanation, that subsequent to the written contract sued on the parties had mutually agreed by parol to take the tallies of the defendant's vendee, which were introduced in evidence. *Ibid.*

13. *Contracts—Subject-matter—Specific Property—Accidentally Destroyed —Obligation of Party.*—Where the parties contract with reference to specific property, and the obligations assumed clearly contemplate its continued existence, if the property is accidentally lost or destroyed by fire or otherwise, rendering performance impossible, the parties are relieved from further obligations concerning it. *Steamboat Co. v. Transportation Co.*, 582.

14. *Same—Services Rendered—Severable Contract—Liability.*—Where from the nature of the contract made with reference to specific property the obligations of the parties to each other cease thereunder upon the destruction thereof, and the contract is severable, and substantial benefit has been received under it and enjoyed by one of the parties, this must be accounted for according to the rates fixed by the contract when the work done or services rendered are therein specified to be done or paid for by installments or at stated periods; and where a steamboat is chartered for a certain trip every Sunday, and the contract specified that the lessee is to pay therefor a certain sum each Sunday, payable each month, on certain days, with provision that no payment should be made when weather conditions, etc., would not permit the making of the trip, the contract is severable, and the lessee of the boat is liable for such trips that have been made and not paid for by him, upon the destruction of the boat by an unavoidable circumstance not attributable to the lessor. *Ibid.*

15. *Same—Pleadings—Counterclaim—Possession—Trials—Burden of Proof.* —The principle upon which a party to a contract with reference to specific property may be relieved from his obligations thereunder when the property has accidentally been destroyed, is in recognition of the general rule that business contracts are imperative in their nature, and where the other party to the contract insists that he has been wronged by the failure of performance, the position should be made available by counterclaim in the former's action to recover for services actually rendered, and where the property destroyed was in the possession of the plaintiff at the time, the burden is on him to show that he was in the exercise of proper care. *Ibid.*

16. *Vendor and Purchaser—Principal and Agent—Contracts—Ratification— Knowledge—Fraud—Trials—Evidence—Nonsuit.* — For the unauthorized acts of an agent to bind his principal by ratification, it must appear that the principal acted with knowledge of the facts and circumstances in respect thereto, and where the person dealing with the agent is aware of the fact that he has exceeded his authority, and depends upon the agent's statement that his principal may act favorably thereon, the burden is upon such third person to show the matters necessary to bind the principal by his ratification of the agent's unauthorized act. Thus where an agent for the sale of gasoline en-

CONTRACTS—*Continued.*

tered into a contract with the purchaser to supply him at the former price after the market had greatly advanced, by antedating the contract, and the purchaser was aware of the fact that, at that time, the agent was not only unauthorized to sell the gasoline at the price named, but had been forbidden to do so, and, notwithstanding, relied upon the assertions of the agent that "he would try to get the contract through," the fact alone that the seller shipped out a part of the gasoline at the price specified, being deceived and imposed upon by the date appearing in the contract, is not evidence sufficient of his confirmation of the contract, and the burden of proof being upon the purchaser in his action to enforce delivery of the balance of the gasoline, at the price named, a judgment of nonsuit should be rendered. *Wise v. Texas Co.*, 610.

CONTRADICTIONS. See Witness, 2.

CONTRIBUTORY NEGLIGENCE. See Statutes; Negligence.

CONVERSATIONS. See Intoxicating Liquors, 11.

CONVICTS.

1. *Convicts—Punishment—Discipline—Flogging.*—Flogging convicts to enforce discipline is not authorized by any statute nor any valid regulation, and there being no legal regulation in this case permitting it, its infliction is contrary to law. (The constitutional and statutory authority as a matter of discipline discussed by CLARK, C. J.) *S. v. Nipper*, 272.
2. *Convicts—Guards—Right to Whip—County Commissioners—Rules and Regulations.*—In the absence of rules and regulations made and promulgated by the county commissioners permitting it, a guard has no legal right or authority to whip convicts in his care or custody. *S. v. Nipper, ante*, 272, cited as controlling. *S. v. Morris*, 441.

CORPORATIONS. See Religious Societies, 1, 2; Criminal Law, 13; Removal of Causes, 6.

1. *Corporations—Deeds and Conveyances—Probate.*—The probate of a deed of a corporation will not be held as defective when it appears to have been made in substantial compliance with the statute, as in this case. *Spruce Co. v. Hunnicutt*, 202.
2. *Deeds and Conveyances—Probate—De Facto Acts—Appeal and Error—Presumptions.*—Where the probate of a deed appears to be regular on its face, and taken before one apparently acting as a justice of the peace, it will be effectual as the act of an officer *de facto*, if not *de jure;* and where the incapacity of such officer does not appear in the record, the one who takes under the grantee will be adjudged to have acquired a good title. *Ibid.*
3. *Corporations, Domestic—Charter—Questions of Law.*—Whether a corporation operating here is a North Carolina corporation or not is a matter of law depending upon the provisions of its charter. *Saton v. R. R.*, 144 N. C., 145, cited and applied. *R. R. v. Spencer*, 522.
4. *Removal of Causes—Corporations, Domestic—Cause of Action—Venue—Wrong County—Motion to Transfer.*—A corporation of this State

CORPORATIONS—*Continued.*

should bring its action in the county wherein it has its principal place of business, and not in the county wherein the defendant resides; and where this has not been done, the defendant's remedy is by motion to remove the cause to the proper county. *Ibid.*

CORPORATION COMMISSION. See Railroads, 5.

COSTS. See Appeal and Error, 45, 46.

COTTON MILLS. See Easements, 2, 3.

COURTS. See Trials; Commerce.

1. *Costs—Court's Discretion—Interpretation of Statutes—Trusts and Trustees.*—It is within the discretion of the trial court to tax the costs accruing upon either of the parties litigant, in an action in the nature of a creditor's bill, brought by material men, claiming under the statutory lien, the unpaid balance due by the owner of a dwelling, etc., to his contractor for its erection (Rev., sec. 1267); and the action of the judge in taxing the trust funds in the owner's hands with the cost is commended in this suit. *Bond v. Cotton Mills*, 20.

2. *Habeas Corpus—Supreme Court—Supervisory Powers—Supersedeas—Custody of Child—Retention in State—Writ of Prohibition—Procedure—Motion in the Cause.*—Pending an appeal in an action for divorce, the Supreme Court, in the exercise of its constitutional power to issue any remedial writ of supervision and control to inferior courts (Const., Art. IV, sec. 8), and under its general supervisory powers conferred by the Constitution, may issue a writ of supersedeas (Rev., secs. 590, 598) to a Superior Court judge before whom, in *habeas corpus* proceedings, the mother, living in another State, contends for the custody of a minor child, *pendente lite*, to the effect that the child be retained within the jurisdiction of the courts of this State. The writ of prohibition will not lie, for the judge with notice of the order will adjudge that the child is "legally detained," and dismiss the proceedings, and, in the absence of a supersedeas bond, award the custody of the child to some reliable person living in this State with sufficient surety for the safe keeping and proper care of the child, making such order in regard to its mother seeing the child as will appear to him to be proper. *Held*, in this case, the writ of *habeas corpus* was not the proper remedy, and the mother should have proceeded by motion in the cause. *Page v. Page*, 90.

3. *Process—Personal Service—Court's Jurisdiction.*—An action of debt is one personal to the debtor, and requires that personal service be made on the defendant within the territorial jurisdiction of the court issuing the process, or that he has in some recognized manner, by his acts or conduct, acknowledged the jurisdiction of the court so as to become bound by its judgment, where the defendant has no property in the jurisdiction invoked. *Johnson v. Whilden*, 104.

4. *Same—Proceedings in Rem—Levy—Void Judgments.*—Where personal service cannot be obtained upon a debtor in an action upon a money demand, who has property within the jurisdiction of the court, which is sought to be subjected to the payment of the debt, the proceedings are *quasi in rem* against the property subject to execution and levy;

COURTS—*Continued.*

and where the interest of the debtor in the property sought to be attached is incapable of levy and sale under execution, and the defendant has not personally been served with process, or recognized the jurisdiction of the court, the judgment rendered against him in the proceeding is a nullity. Revisal, secs. 767, 784. *Ibid.*

5. *Same—Trusts and Trustees—Property Subject to Levy.*—A certain land company obtained a decree against its agent, who had bought certain lands with the company's money and had taken title in himself, that he be declared a trustee for his company for the said lands, sell the same and distribute the proceeds among the shareholders of the company. Thereafter a creditor of the land company obtained a judgment for services rendered by publication of summons in attachment against the lands, and under a judgment obtained by default sold the lands under execution and became the purchaser at the sale. The defendant land company being beyond the jurisdiction of the court, had not been served with personal process, nor had it in any manner recognized the jurisdiction of the court. *Held*, the interest of the defendant in the lands was incapable of levy and sale under the execution, and the judgment rendered against it was a nullity. *Ibid.*

6. *Injunction—Vacating Restraining Order—Appeal and Error—Acts Committed—Courts—Procedure.*—Where a restraining order has been vacated and appealed from, and it appears, upon the hearing in the Supreme Court, that the act sought to be restrained has been practically done, it is only in rare and exceptional instances that the Court may satisfactorily and intelligently decide upon the matters presented, the practice being for the appellant to reserve his rights by exceptions, regularly taken, at the trial, if necessary, and present them on appeal from the final judgment in the Superior Court. *Yates v. Insurance Co.*, 134.

7. *Injunction—Restraining Order — Trials — Final Judgment — Courts—Terms.*—The sufficiency of the complaint will only be considered in determining the right to a restraining order, when the controversy is not before the court on its merits, and the action may not be dismissed by final judgment until the trial, and, except by consent of the parties, this must be in term of court of the county wherein the action is pending. *Moore v. Monument Co.*, 211.

8. *Appeal and Error—Pleadings—Amendments—Fragmentary Appeals.*—An appeal from an order of the lower court permitting an amendment to a pleading is premature and will be dismissed in the Supreme Court. *Supreme Council v. Grand Lodge*, 221.

9. *Courts—Expression of Opinion—Inferences from Evidence—Witnesses—Failure to Examine—Interpretation of Statutes.*—Revisal, sec. 535, forbids the trial judge to express an opinion on the facts involved in the case, at any time, within the hearing of the jury, and this extends to any inference of fact arising from the evidence; and in a criminal prosecution for the sale of intoxicating liquors contrary to our statute, where the one to whom the alleged sale was made has been arrested by the State for the purpose of having his testimony, and he is not introduced as a witness, the prisoner's attorney has a right to comment upon this fact to the jury, as a favorable inference to be drawn by them in favor of his client, and an instruction by the court to

COURTS—*Continued.*

disregard this argument is an expression of opinion forbidden by statute. *S. v. Harris*, 243.

10. *Criminal Law—Evidence—Inference—Malice.*—Upon this trial for highway robbery alleged to have been committed at the point of a pistol as the prosecutor was on his way to church in a country community, at a place comparatively thickly settled, evidence that the defendant did not have a pistol; that shortly after the time of the offense charged the prisoner went into the meeting and afterwards left with a young woman, to whom he was engaged, living in the same neighborhood with the prosecutor, and whom the prosecutor knew, was, under the further circumstances of the case, sufficient upon which to base the inference and argument that the prosecutor had been influenced through jealousy and malice in swearing out the indictment. *S. v. Lee*, 250.

11. *Constitutional Law—Courts—Courtesy to Counsel—Prejudicial Remarks—Appeal and Error.*—Where an attorney has argued to the jury a reasonable inference to be drawn from the evidence in favor of his client, it is reversible error for the judge, in his charge, to mention the inference as a statement of fact testified to by the attorney, saying that he was the only one who had so testified, as such statement could not be termed testimony, and prejudiced the prisoner's defense in the minds of the jury. The Court expresses its disapprobation of such language used by the judge (Const., Art. IV, sec. 8), and points out the fact that attorneys are entitled to courteous treatment. *Ibid.*

12. *Criminal Law—Sentences—Court's Discretion—Excessive Punishment.*—*Semble*, under the evidence in this case the punishment for highway robbery was excessive, but not held as a matter of law to have exceeded the authority of the judge to impose. The intent of the Legislature in imposing a maximum and minimum punishment, leaving the extent otherwise in the discretion of the court, discussed by CLARK, C. J. *Ibid.*

13. *Criminal Law—Warrants for Arrest—Sufficient Evidence—Self-defense—Amendments—Court's Jurisdiction.*—The complaint and warrant of arrest should be construed together, and when so construed, and within the jurisdiction of the court issuing them, if an offense has been charged, it is sufficient for the officer to make the arrest, no particular form being required; and in this case it is held that though the complaint and warrant might be too indefinite in allegation to sustain a conviction, except upon amendment which the magistrate had authority to make or authorize, it was error for the judge to exclude the defendant's evidence of self defense as a justification for killing the one whom he had attempted to arrest under the warrant, because the warrant was insufficient and void. Having charged an indictable offense, though generally and defectively, it was sufficient as a justification of the arrest, on the trial of defendant for the murder of the party against whom it was issued by the justice of the peace. Arrests made under process, void or merely defective, discussed by WALKER, J., citing and applying *S. v. Jones*, 88 N. C., 671. *S. v. Gupton*, 257.

14. *Trials—Attorney and Client—Argument—Irrelevant Matter—Courts.*—While counsel in their argument to the jury are usually permitted

COURTS—*Continued.*

much latitude, they should confine themselves to relevant matters, and on a trial for murder it was not error for the court to stop the prisoner's counsel, when he was introducing irrelevant matters into his argument calculated to divert the minds of the jurors from the true issue and to prejudice the other side. *S. v. Lane*, 333.

15. *Trials—Courts — "Reasonable Doubt" — Words and Phrases — Instructions—Evidence.*—The trial judge is not restricted to any particular formula in defining "reasonable doubt" to the jury upon a trial for homicide, and his charge in regard to the nature of the circumstantial evidence in this case and how the jury should consider it is held to be free from any error of which the prisoner can complain. *Ibid.*

16. *Appeal and Error—Trials—Instructions—Requests—Court's Discretion.* An appeal will not lie from the refusal of the trial judge to give requested instructions after the jury had retired to make up their verdict, the action of the judge being solely discretionary under the circumstances. *Ibid.*

17. *Trials—Withdrawing Juror—Court's Discretion—Appeal and Error—Statutes.*—Upon the trial of misdemeanors and felonies less than capital, it is within the discretion of the trial judge to withdraw a juror and make a mistrial when to him the ends of justice seem to require; and in the absence of abuse of the exercise of this discretion therein, no appeal will lie; nor is this position affected by the provisions of ch. 73, Public Laws 1913, passed doubtless to enable a defendant to present the question of his innocence or guilt upon the State's evidence, etc., as a matter of law, with the right of appeal only from final judgment of guilt. *Semble*, if the statute affected the discretion of the trial judge, exception duly noted should be taken to his action and presented on appeal from final judgment or by *certiorari*. *S. v. Andrews*, 349.

18. *Trials—Improper Arguments—Courts—Correction—Appeal and Error—Presumptions.*—Remarks made by a solicitor in the prosecution of a case relating to extraneous matters, calculated to unduly prejudice the defense, should, in proper cases, be promptly rebuked from the bench, with such instruction as will remove from the minds of the jury the prejudice that may have been caused thereby, and when a motion for relief has been made in the trial court based upon matters of this character, set out in an affidavit, upon which the court has not stated the facts, or there are no such findings appearing in the record on appeal, and it does not appear that he was requested to state them, it will be presumed that the facts were found adversely to the appellant, or that the prejudice had been properly removed in some way by the trial judge. This Court cannot consider the affidavit as findings of fact. *S. v. Ray*, 420.

19. *Appeal and Error—Court's Discretion.*—The appeal in this case being rulings of the trial court of matters largely within his discretion, no error is found. *S. v. Snipes*, 440.

20. *Constitutional Law—Power of this Court to Declare Legislative Acts Unconstitutional.*—The courts may declare an act of the Legislature unconstitutional, but the power should be exercised sparingly and only in those cases where the conflict between the act and the Constitution

COURTS—*Continued.*

is very clear and beyond any reasonable doubt, and the two cannot be reconciled. *Johnson v. Board of Education*, 468.

21. *Actions—Misjoinder — Withdrawal of Party — Costs — Amendments—Court's Discretion.*—Where there has been a misjoinder of parties as well as causes of action, it is within the discretion of the trial judge at any time before verdict or adverse decision to permit the withdrawal of one of the parties, leaving the action to proceed singly as to the other, and to allow a proper amendment of the pleadings as to the remaining cause, where the defendant has asked for no affirmative relief and his defense cannot be prejudiced (Revisal, sec. 507); but the defendant is entitled to recover his cost against the party retiring from the case. *Campbell v. Power Co.*, 488.

22. *Courts—Expression of Opinion—Credibility of Witness—Interpretation of Statutes.*—Where a material witness for a party to an action has been asked a question which was withdrawn upon objection, and to his answer to the next question asked him adds the testimony called for in the question asked and withdrawn, it is reversible error for the judge to tell the jury that the objectionable part of the answer was stricken out, and to add, "This witness is too smart," for the added portion of the instruction is an expression of opinion by the judge upon the credibility of the witness, and is forbidden by statute. *Chance v. Ice Co.*, 495.

23. *Carriers of Goods — Traffic Contracts — Pleadings — Amendments—Court's Discretion.*—In an action between two carriers involving a balance alleged to be due the plaintiff under a traffic contract, it is within the discretion of the trial judge to allow the plaintiff to amend its complaint so as to allege that it had been forced to pay damages for a shipment of goods received by it from the defendant in a damaged condition, for which the defendant's negligence, while in its care, was responsible; and while the amendment creates an additional cause of action, it is so germane to the original cause that both may be considered as one action. *Pritchard v. R. R.*, 532.

24. *Pleadings — Amendments — Court's Discretion — Excusable Neglect—Appeal and Error.*—A refusal by the trial court to set aside a judgment rendered in an action upon contract, for surprise, inadvertence, and excusable neglect, on the ground that defendant had neglected to allege a mistake in the contract sued on, will not be disturbed on appeal when it appears that the pleadings had been filed, trial had upon the merits of the case, and the issues submitted were fully responsive to the pleadings. *Ibid.*

25. *Bills and Notes—Antecedent Debt—Evidence—Trials—Instructions—Courts—Expression of Opinion—Statutes.*—Where a negotiable note held by a debtor bank has been transferred before maturity to its creditor bank, and there is evidence that at the time the former owed to the latter a larger sum of money than the amount of the note, and that the note was transferred as an extinguishment of the debt *pro tanto*, and in an action upon this note, it is introduced in evidence showing an indorsement on the back, made by the plaintiff, "For collection account," it is for the jury to find, under the conflicting evidence, whether the plaintiff received the note in part payment of the debt or for collection only, and an instruction by the judge that

COURTS—*Continued.*

there is no evidence that the plaintiff paid value, and that it was its duty to appear and explain the transaction, is an expression of opinion forbidden by the statute. *Bank v. Seagroves*, 608.

26. *Removal of Causes—Corporations—Charter—Questions of Law—Statutes—Public Documents—Place of Citizenship—Judicial Notice—State Courts—Jurisdiction.*—Where a cause, upon proper petition and bond, is sought to be removed by the defendant from the State to the Federal courts for diversity of citizenship, upon the ground that the movant is a nonresident corporation, the question of citizenship depends upon the construction of its charter, and in determining it the State courts may take judicial notice of pertinent State legislation upon the subject, and reports made by the defendant to the Corporation Commission, which are public documents; and when therefrom it appears that the defendant is a domestic corporation, the State court will retain jurisdiction of the cause; and in this cause, upon examining the various acts of the Legislature incorporating the Atlantic Coast Line Railroad Company, and permitting the consolidation of the Wilmington and Weldon Railroad, and in respect to taxing its branch lines, etc., reserving jurisdiction in the State courts, it is held that this railroad is a domestic corporation as a matter of law, and is not entitled to the removal of the cause on the ground stated. *Cox v. R. R.*, 652.

COURT'S JURISDICTION. See Removal of Causes, 1, 2.

CRIMINAL LAW. See Intoxicating Liquors; Officers; Negligence, 21.

1. *Criminal Law—Sodomy—Crime Against Nature—Attempt—Interpretation of Statutes.*—While the unnatural intercourse between male and male in the manner described in this case does not come within the definition of sodomy, it is forbidden by our statute, Revisal, sec. 3349, as a "crime against nature," and is an indictable offense; and an attempt to commit it is punishable under Revisal, sec. 3269. *S. v. Fenner*, 247.

2. *Criminal Law—Evidence—Inference—Malice.*—Upon this trial for highway robbery alleged to have been committed at the point of a pistol as the prosecutor was on his way to church in a country community, at a place comparatively thickly settled, evidence that the defendant did not have a pistol; that shortly after the time of the offense charged the prisoner went into the meeting and afterwards left with a young woman, to whom he was engaged, living in the same neighborhood with the prosecutor, and whom the prosecutor knew, was, under the further circumstances of the case, sufficient upon which to base the inference and argument that the prosecutor had been influenced through jealousy and malice in swearing out the indictment. *S. v. Lee*, 250.

3. *Criminal Law—Sentences—Court's Discretion—Excessive Punishment.*—*Semble*, under the evidence in this case the punishment for highway robbery was excessive, but not held as a matter of law to have exceeded the authority of the judge to impose. The intent of the Legislature in imposing a maximum and minimum punishment, leaving the extent otherwise in the discretion of the court, discussed by CLARK, C. J. *Ibid.*

CRIMINAL LAW—*Continued.*

4. *Criminal Law—Warrants for Arrest—Sufficient Evidence—Self-defense —Amendments—Court's Jurisdiction.*—The complaint and warrant of arrest should be construed together, and when so construed, and within the jurisdiction of the court issuing them, if an offense has been charged, it is sufficient for the officer to make the arrest, no particular form being required; and in this case it is held that though the complaint and warrant might be too indefinite in allegation to sustain a conviction, except upon amendment which the magistrate had authority to make or authorize, it was error for the judge to exclude the defendant's evidence of self-defense as a justification for killing the one whom he had attempted to arrest under the warrant, because the warrant was insufficient and void. Having charged an indictable offense, though generally and defectively, it was sufficient as a justification of the arrest, on the trial of defendant for the murder of the party against whom it was issued by the justice of the peace. Arrests made under process, void or merely defective, discussed by WALKER, J., citing and applying *S. v. Jones*, 88 N. C., 671. *S. v. Gupton*, 257.

5. *Criminal Law—Arrest Without Warrant—Resistance—Necessary Force —Questions for Jury.*—One who is being arrested by the prosecutor, without a warrant, has a right to resist and use all the force which, in the judgment of a jury, was necessary to free himself, on the facts as they reasonably appeared to him at the time. *S. v. Allen*, 265.

6. *Same—Evidence—Inferences of Fact.*—In this case the prisoner was arrested for violating the prohibition law by the prosecutor without a warrant, while driving in a buggy on the highway, and found with from 3 to 5 gallons of intoxicating liquor in his possession. Later the prosecutor held the defendant's pistol in his right hand, and leaned over in the buggy to move the bottles or prevent the loss of them, and while in this position the prisoner cut him several times with a knife, a violent struggle ensued, in which the prosecutor was twice cut, which resulted in the prisoner's submission to be bound and taken to jail, wherein he was incarcerated without either warrant or mittimus. *Held*, it was for the jury to determine whether the prisoner cut the prosecutor in an effort to free himself; and whether it was necessary for such purpose is an inference of fact, likewise for their determination. *Ibid.*

7. *Criminal Law—Larceny from Employer—Confidence—Trials—Evidence.* —Upon a trial for larceny from an employer, evidence of whether or not the prisoner was trusted by the employer is incompetent. *S. v. Pitt*, 268.

8. *Criminal Law—Instructions—"Reasonable Doubt"—Definition.*—No particular formula is required of the judge in defining to the jury what is "reasonable doubt" in a criminal action; and his stating it to be "the same kind of reasonable doubt that an honest man meets up with in human life" is held to be no error in this case. *Ibid.*

9. *Criminal Law—Assault on Officer—Arrest Without Warrant.*—It is not required that a lawful officer should have a warrant in making an arrest for an assault upon him, for such is not personal to the officer, but an offense against the public; and under the circumstances of this case it is held that he had not lost the right to arrest the prisoner

CRIMINAL LAW—*Continued.*

because the latter had walked away some 50 or 75 yards after making the assault. *S. v. McClure*, 321.

10. *Same—Homicide—Sheriffs—Deadly Weapon—Murder in First Degree—Premeditation—Evidence—Trials.*—The prisoner was engaged with others in committing a misdemeanor, and, anticipating arrest for the offense, thereafter procured a shotgun with ammunition, and while going upon a highway to his home was met by a deputy sheriff and others whom the sheriff had deputized for the purpose of making the arrest. The officer had no warrant for the arrest of prisoner for the misdemeanor, and upon the latter's declaration that no one should arrest him therefor, permitted him to walk about 50 or 75 yards down the road, and then proposed to arrest him for assault made on him with the gun. The sheriff then aimed his pistol at the prisoner, several times called him to halt, informed him of the offense for which he intended to arrest him, whereupon the prisoner snapped his gun at him, the sheriff shot at the prisoner, the prisoner shot the sheriff and inflicted the deadly wound. *Held*, (1) While an officer is not ordinarily permitted to use a firearm in making an arrest for a misdemeanor, the officer was justified in doing so under the circumstances, the prisoner's misdemeanor in making the assault upon the officer being in the officer's presence, and the use of the pistol found by the jury not to be force excessive of that required; (2) The evidence of premeditation and deliberation was sufficient to sustain a conviction of murder in the first degree; (3) The charge of the court was proper. *Ibid.*

11. *Criminal Law—Larceny—Trials—Evidence.*—Evidence is sufficient to sustain a verdict of guilty of larceny which tends to show that the defendant borrowed some money from A., was present in the room and saw A. take the money from his trunk, endeavored to borrow money from others about that time; went to see A. when he and all his family were absent except a little girl about the yard; was seen in A.'s room alone, and left upon the arrival of the wife of A.; had before then only small balance in one bank, not exceeding $50 at any time; and that thereafter, and soon after A.'s money was missing from the trunk, deposited $50 in another bank, in which he had not previously deposited, and two days later made therein another deposit of $200. *S. v. Wellman*, 354.

12. *Criminal Laws—False Pretense—Indictment—Surplusage.*—In a warrant or indictment it is not necessary to charge an intent to defraud any particular person (Revisal, sec. 3432), and where the charge therein is made that the intent was to defraud an actual person and a fictitious one, the allegation as to the person is surplusage, and a motion in arrest of judgment for a fatal variance in that respect will be denied. *S. v. Ice Co.*, 366.

13. *Criminal Law—Corporations—Intent—False Pretense—Principal and Agent.*—Where an agent of a corporation in the course of his and his employer's business obtains anything of value for the corporation by false pretenses (Revisal, sec. 3432), the corporation may be convicted of the fraudulent intent exercised for its benefit by its agent, and the agent may also be made a codefendant with his principal in the criminal action. *Ibid.*

CRIMINAL LAW—*Continued.*

14. *Criminal Law—Municipal Corporations—Disorderly Conduct—Cursing —Ordinances—Statutes.*—Disorderly conduct is a minor offense, not known to the common law, and a person so offending is not indictable except under a statute or authoritative ordinance of a municipality; and where a person is indicted, under the provisions of an ordinance, for cursing on the streets of a town, loud enough to be heard by those passing by and in a disorderly manner, a conviction may not be sustained when it is shown that the cursing was only heard by the policeman making the arrest, though there were others standing near, and was done in a low tone of voice which could not have disturbed any one; and a motion for a nonsuit upon the evidence was properly sustained. Ch. 73, Laws 1913. *S. v. Moore*, 371.

15. *Public Officers—Criminal Law—Homicide—Arrest—Trials—Burden of Proof—Instructions—Several Motives—Presumption of Innocence.*—Where upon the trial for homicide the defense is interposed by the defendants that they killed the deceased in the performance of their duties as officers authorized to make an arrest in a manner justifiable, or that they had not shot the deceased, and were not responsible for his death, the question of guilt is for the jury to determine, under conflicting evidence, in accordance with how they should ascertain the facts to be, with the burden on the State of proving the defendants guilty beyond a reasonable doubt. *S. v. Rogers*, 388.

16. *Judge's Charge—Two Motives Inferable—Jury.*—The defendants are not entitled to an instruction that where there are two or more motives for the crime committed the humanity of the law will ascribe it to that which is not criminal. *Ibid.*

17. *Criminal Law—False Pretense—Connivance to Convict.*—Upon a trial for false pretense it is no defense that the prosecuting witness "set a trap" for the defendant in the particular case, it being different from a conviction of larceny, where the deception is held to be a consent to take the article; for the absence of consent is an essential ingredient for a conviction of the latter offense. *S. v. Ice Co.*, 403.

18. *Appeal and Error—Criminal Action—Petition to Review—Motions—Newly Discovered Evidence—Supreme Court.*—The Supreme Court can entertain a proper petition in a criminal action to "review the record and reconsider the opinion filed in the case before certification to the lower court on account of an alleged palpable oversight therein"; though in criminal cases a motion for a new trial for newly discovered evidence will not be allowed. *Ibid.*

19. *Criminal Law—Abortion—Trials—Evidence—Harmless Error — Interpretation of Statutes.*—Upon a trial of a defendant for unlawfully, etc., administering a certain "noxious drug" to a pregnant woman with the intent to produce a miscarriage, against the provisions of Revisal, secs. 3618 and 3619, testimony as to sexual intercourse is immaterial, and its admission harmless error. *S. v. Shaft*, 407.

20. *Criminal Law—Abortion—Expert Evidence—Effect of Drug—Trials—Evidence—Interpretation of Statutes.*—Where the defendant is being tried for an intent to produce an abortion upon a pregnant woman, contrary to Revisal, secs. 3618 and 3619, and there is evidence that a capsule given contained a certain drug, it is competent for experts to testify as to the effect of such in producing a miscarriage. *Ibid.*

CRIMINAL LAW—*Continued.*

21. *Criminal Law—Accomplice—Trials—Evidence—Abortion — Interpretation of Statutes.*—While the judge should caution the jury as to the weight to be given the testimony of an accomplice to the crime upon which the defendant is being tried, a conviction may be had upon the unsupported testimony of the accomplice; but it is held that the victim of the defendant in the latter's effort to produce a miscarriage upon her, contrary to Revisal, secs. 3618 and 3619, is not an accomplice in the crime, in a legal sense, whether she consented thereto or not. *Ibid.*

22. *Criminal Law—Abortion—Intent—Interpretation of Statutes.*—It is the intent with which a noxious drug is administered, and the purpose to produce an abortion, that is made indictable under our statutes, Revisal, secs. 3618 and 3619; and it is not necessary for the State to show that administering the drug named would have had the desired effect. *Ibid.*

23. *Criminal Law—Judgments—Cruel and Unusual Punishments—Constitutional Law.*—The defendant was indicted, tried and convicted of administering to a pregnant woman a noxious drug for the purpose of producing an abortion, contrary to Revisal, secs. 3618 and 3619. *Held*, a sentence to the State Prison for three years and the payment of $1,000 as a fine is not objectionable as cruel and unusual punishment. *Ibid.*

24. *Criminal Law—Statements by Prisoner—Evidence.*—Statements made by a prisoner to an officer concerning a crime for which he is being arrested, and without threat or inducement of the officer, are competent as evidence against the prisoner upon the trial. *S. v. Lance*, 411.

25. *Criminal Law—Rape — Trials — Instructions — Evidence — Statutes.*—Upon a trial for rape, the prisoner's counsel requested the judge to charge the jury that there were five verdicts which they could return: (1) Rape; (2) Assault with intent to commit rape; (3) Assault with a deadly weapon; (4) Simple assault, and (5) Not guilty. The prisoner admittedly was 22 years of age, and there was no evidence of an assault with a deadly weapon. *Held*, it was not error for the judge to refuse to charge upon the third and fourth propositions, and to substitute therefor an instruction relating to an assault by a man or boy over 18 years of age upon a woman (Revisal, sec. 3620); and *Further held*, the evidence in this case was more than sufficient to sustain a conviction of the capital offense. *Ibid.*

26. *Criminal Law—Trials — Witnesses — Interests — Credibility — Instructions.*—Upon this trial for rape, the charge to the jury as to the weight they should give the testimony of the defendant and his relatives, that notwithstanding their personal interest, the jury could consider the testimony in accordance as the witnesses were found to be credible, and if found to be credible, to give it the same weight as that of other witnesses, was not reversible error. *Ibid.*

27. *Criminal Law—Rape—Trials—Instructions — Less Offenses.* — Upon a trial for rape, etc., when the evidence permits, it is proper for the judge to instruct the jury that if they should find the prisoner guilty of rape, they need not consider the less offenses charged in the indict-

CRIMINAL LAW—*Continued.*

ment; but should they not so find, then to consider the question of assault with intent to commit rape, etc. Revisal, sec. 3268. *Ibid.*

28. *Criminal Law—Rape—Evidence Sufficient.*—Testimony of the prosecutrix in this case, corroborated by her statement of the occurrence made to the witnesses as soon as she was in circumstances to make them, held sufficient to sustain a conviction of the defendant of an attempt to commit rape. *S. v. Horton*, 437.

CROSSINGS. See Railroads.

DAMAGES. See Statutes, 7, 8, 29; Easements; Contracts, 6.

1. *Contracts—Interest — Interpretation of Statutes — Unliquidated Damages.*—The rule that all moneys due by contract except due on penal bonds shall bear interest (Revisal, sec. 1954) applies whenever a recovery is had for breach of contract and the amount is ascertained from the terms of the contract itself or from evidence relative to the inquiry, and due by one party to the contract to another; and it does not obtain as a matter of law where the interest sought does not come within the provisions of the statute and is by way of unliquidated damages, and there has been no adequate default on the part of the debtor in reference to withholding the principal sum, or a part of it. *Bond v. Cotton Mills*, 20.

2. *Railroads—Condemnation—Right of Way—Measure of Damages—Offsets.*—The damages which may be awarded to the owner of lands through which a railroad company has condemned a right of way are such as are directly caused by and are confined to injuries peculiar to the lands condemned, and not such as are generally caused to lands in that community; nor is the railroad company entitled to have the damages offset by advantages generally accruing to the community, but only those which accrue to and enhance the value of the particular lands condemned by reason of the advantages to be especially derived by them from the operation of the railroad. *R. R. v. Mfg. Co.*, 168.

3. *Railroads—Condemnation—Right of Way—Cotton Mills — Speculative Damages—Expert Evidence—Trials.*—Where a corporation is the owner of lands being condemned for a right of way by a railroad company, upon which it has tenant houses rented to its employees, and which are situated on a tract of land upon which defendant operates a cotton mill, the defendant is not entitled to recover damages of a speculative character, *i. e.*, such as possible inconvenience caused to its employees by the noise or smoke from the plaintiff's trains, or the inconvenience or danger to the operatives in going to or from work; or danger to their children caused by the operation of the railroad near their dwellings; or any possible increase in the cost of operating the plant caused by the running of the plaintiff's trains, etc.; and as the damages recoverable are those apparent to the ordinary observation of persons acquainted with the value of lands in that locality, the matter is not such as would call for "expert opinion" of those who have special knowledge of cotton mills generally and of operating conditions generally affecting their value. *Ibid.*

4. *Railroads—Condemnation—Rights of Way—Cotton Mills—Measure of Damages.*—Where lands of a cotton mill corporation are condemned for a right of way of a railroad company, the damages to be assessed

DAMAGES—*Continued.*

are the value of the lands taken for the right of way, and any injury shown to have been done to the remaining part of the land, by way of special damages, such as impairing the physical property in the mechanical operation of its plant by vibrations and smoke; and it is error to allow evidence as to the difference in value of the whole tract before the condemnation of the right of way and afterwards. *Ibid.*

5. *Railroads—Condemnation—Dwellings—Tenant Houses — Interpretation of Statutes.*—A railroad proceeded to condemn the lands of a cotton mill corporation, and upon the easement to be acquired there were several tenant houses belonging to the defendant. The defendant resisted the plaintiff's right of condemnation upon the ground that the statute, Revisal, 2575, expressly requires the consent of the owner to the taking of his "dwelling-house, yard, kitchen," etc.: *Held*, the section referred to is an exception to section 2578, giving such public-service corporation the right to condemn lands, and does not apply to tenant houses, but only to the dwelling of the owner of the lands, which is preserved to him for sentimental reasons; and which could not exist where such owner is a corporation renting the dwellings to its tenants. *Ibid.*

6. *Vendor and Purchaser—Contracts—Warranties—Measure of Damages.* —Damages for the breach of warranty in the sale of an article—in this case, an automobile—are measured by the difference in the value of the car as it was represented and warranted to be and as it really was at the time of its purchase, with such special damages as the vendee incurred, at the request of the vendor, to ascertain if it could not be made to come up to the representation. *Underwood v. Car Co.*, 458.

7. *Mortgages—Sales—Advertisements—Irregularities — Second Mortgagee —Measure of Damages.*—Where there are two or more mortgages on the same land, and by a sale under the first mortgage, not advertised according to its terms, the lands have been acquired by subsequent grantees without notice of the irregularity, the second mortgagee may elect to sue the first mortgagee for any damage which he has suffered on account of the irregularity, the measure thereof being the difference between the amount due under the first mortgage and the value of the land at the time of the sale. *Hinton v. Hall*, 477.

8. *Attachment—Probable Cause—Damages—Malice.* — Where plaintiff in attachment without malice has sued out his writ and seized the property of the defendant without probable cause, he is liable to the defendant in that action in the amount of actual damages he has thereby sustained. *Tyler v. Mahoney*, 509.

DANGEROUS EMPLOYMENT. See Master and Servant.

DEADLY WEAPONS. See Homicide.

DECLARATIONS. See Homicide; Intoxicating Liquors, 11; Statutes, 28.

DEEDS AND CONVEYANCES. See Trusts and Trustees; Tax Deeds.

1. *Deeds and Conveyances—Color of Title—Nonsuit—Limitation of Actions.*—Defendant's possession under color is insufficient to ripen his

DEEDS AND CONVEYANCES—*Continued.*

title to lands, where it is shown that plaintiff's predecessor in title brought suit for the lands before the defendant had been in possession seven years, which action was nonsuited and another action was again instituted by the plaintiffs within a year. *Hopkins v. Crisp*, 97.

2. *Deeds and Conveyances—Description—Parol Evidence—Trials—Negligence—Evidence.*—In an action to recover damages of the defendant for negligently setting fire to and burning the timber lands of the plaintiff, it is held that the following general description is sufficient to admit of parol evidence of the identification of the lands, towit: "A certain tract or parcel of land in Rose Hill Township, Duplin County, adjoining the lands of this grantor, S. W., and others, and being on the south side of Maxwell and Beaver Dam creeks"; and it is further held that the evidence is sufficient of the defendant's negligence, under *Williams v. R. R.*, 140 N. C., 624. *Hawes v. Lumber Co.*, 101.

3. *Deeds and Conveyances—Reverse Calls—Location of Points—Calls in Deed—Acreage—Distance—Variance—Trials—Evidence.* — Where the disputed title to lands depends upon the location thereof contained in the description of a prior grant, which is represented upon the map filed as a parallelogram with the northern boundary as a river, the first call being definite and fixed, the second call being to a stake upon the river, which by actual survey is found to deflect sharply northward between the first and second calls of the grant, without giving the distance between them, but giving the distance between the other calls to a stake, it is correct that the calls be reversed by the surveyor for the ascertainment of the second call, and then follow course and distance given in grant; and it is held that this manner of ascertaining the boundaries of the land granted is not affected by the number of acres therein specified, or that the distance between the third and the last call does not conform to that given on the map. *Gunter v. Mfg. Co.*, 161.

4. *Grants—Plats—Variance—Trials—Evidence.*—A plat of the land attached to the original grant is not conclusive, and cannot control the words of the grant; and in connection with other testimony, it is competent as evidence that the location by an original survey was different from that actually ascertained by running the calls of the grant. *Ibid.*

5. *Corporations—Deeds and Conveyances—Probate.* — The probate of a deed of a corporation will not be held as defective when it appears to have been made in substantial compliance with the statute, as in this case. *Spruce Co. v. Hunnicutt*, 202.

6. *Deeds and Conveyances—Probate—De Facto Acts—Appeal and Error—Presumptions.*—Where the probate of a deed appears to be regular on its face, and taken before one apparently acting as a justice of the peace, it will be effectual as the act of an officer *de facto*, if not *de jure;* and where the incapacity of such officer does not appear in the record, the one who takes under the grantee will be adjudged to have acquired a good title. *Ibid.*

7. *Deeds and Conveyances—Disputed Lines—Evidence of Location.*—In passing upon the report of a referee to whom was referred an action involving title to adjoining lands of the parties litigant, there was

DEEDS AND CONVEYANCES—*Continued.*

evidence that the line called for in the plaintiff's deed and that in the defendant's deed were identical, and the finding of the trial judge, that the line between the parties should be varied to meet these descriptions according to the location testified by a witness, is held to be without error. *Mining Co. v. Mines Co.*, 229.

8. *Tax Deeds—Requisites of Statute—Color of Title.*—The purchaser of lands at a sale for taxes in 1898 who acquires a sheriff's deed therefor in 1899, without making the affidavit and giving the notice required by secs. 64 and 65, ch. 169, Laws 1897, has only color of title to the lands under his tax deed. *Fowle v. Whitley*, 445.

9. *Same—Possession—Presumptions—Burden of Proof—Trials—Evidence.*—R. was seized and possessed of certain lands, and lived thereon, until his death, with W. The latter received a tax deed from the sheriff to the lands, which operated only as color of title, and the two thereafter lived on the lands without change of attitude towards the possession, and after the death of R. his heirs at law sued to remove the tax deed as a cloud upon the title to the lands. W. testified that upon receiving the tax deed he immediately entered into possession of the land, cultivating it, etc. *Held*, there is no presumption in law of adverse possession against a true paper title, and the burden of proof was on W. to show some act of ouster of R., of which the evidence in this case is insufficient. *Ibid.*

10. *Deeds and Conveyances—Fraud—Trials—Evidence—Nonsuit—Principal and Agent—Schools.*—The plaintiff school trustees having acquired certain real estate by deed for permanent school purposes for freed men and children, irrespective of color, conducted a school thereon, with one of their number, their secretary, in charge, and when the building became inadequate for want of repair, and there being no available funds, the secretary applied for aid to the State Board of Education through its local board of managers, was informed that to receive aid for permanent improvements it was necessary for the title to the property to be in the State, which ultimately resulted in a deed from the plaintiff trustees to the defendant, the State Board of Education, reciting that it was to be held for the purposes of education of the colored youths, etc., whereupon this defendant expended $1,000 in permanent improvements. Thereafter, these buildings becoming again inadequate, this defendant procured about 23 acres of other lands, erected buildings thereon at a cost of $32,000 and therein conducted a satisfactory normal school for the colored race, and proposed to sell the lands acquired from the plaintiffs and use the proceeds to help pay for the property thus acquired. This action is brought to set aside plaintiffs' deed and enjoin the sale of the lands, on the ground that the plaintiffs' secretary had fraudulently represented to some of the plaintiff trustees, illiterate men, that the deed was only a lease of the lands, etc. There was no evidence that the defendants knew of or participated in the fraud, and it is held that a judgment of nonsuit upon the evidence should have been granted, there being no sufficient evidence to show that the plaintiffs' secretary was acting as the defendants' agent in the transaction, but only as the agent for his cotrustees, who executed the deed. *School Trustees v. Board of Education*, 462.

DEEDS AND CONVEYANCES—*Continued.*

11. *Deeds and Conveyances—Acknowledgments—Privy Examination—Notaries Public—Interests.*—The mere fact that the notary public taking the acknowledgment of the grantor in a mortgage deed to lands, and the privy examination of his wife, is a brother-in-law of the mortgagee does not disqualify him, for interest, to act as such notary, nor is he disqualified by the fact that under agreement with the mortgagor he received a certain part of the money loaned, in payment of obligations of the mortgagor to his wife and himself. *Hinton v. Hall*, 477.

12. *Deeds and Conveyances—Defective Probate—Title.*—It is held in this case that the objection to the validity of probate of a deed under which the plaintiff claims title to the land in dispute is immaterial, the plaintiff having shown a connected chain of title through another deed, which was properly probated. *Hinton v. Canal Co.*, 484.

13. *Deeds and Conveyances—Married Women—Abandonment—Joinder of Husband—Constitutional Law.*—Revisal, sec. 2117, authorizing a married woman to execute a valid conveyance of her real property, without the joinder of her husband, when she has been abandoned by him, is constitutional. *Bachelor v. Norris*, 506.

14. *Deeds and Conveyances—Married Women—Abandonment—Trials—Evidence.*—Evidence of abandonment of the wife by the husband is sufficient for her to execute a valid conveyance of her lands without his joinder, which tends to show that they had separated; he had gone to another State without leaving her anything for her support; that they had had numerous quarrels, the cause of which he had attributed to others living in the same house with them, where he had refused to remain. *Ibid.*

15. *Deeds and Conveyances—Words and Phrases—"Binding Lands"—Description—Vagueness—Parol Evidence—Trials.*—The term "binding lands" used in the description of a deed is equivalent to the call of another tract; and the following description in a deed is held sufficient to admit of parol evidence of identification, after reciting the county, etc.: "adjoining the lands of B. B. J., and others, bounded as follows, viz.: Beginning at an oak stump at the road gate, thence westwardly, binding the lands of B. B. J. to a holly tree; thence same course across the road; thence eastwardly, binding the swamp to a cypress tree; thence same course, binding the swamp to the first station, containing 4 acres, more or less." And where a witness, after identifying the lands, testifies on cross-examination that the oak stump, the beginning point named, was not upon the line referred to, and would not be reached again by following the swamp, this is only material upon the question of identification, and does not render the deed void for uncertainty of description. *Ibid.*

16. *Tax Deeds—Recitations—Interpretation—"Color" of Title.*—It is unnecessary that a tax deed to lands made by the sheriff should recite in specific words that the lands were sold for taxes to constitute color of title for the purchaser in possession, when it is perfectly apparent from its context and easily inferred from language used that the lands were thus sold; and it is held to be sufficient that the deed describes the lands, recites the date of sale, that it had not been redeemed, and that the holder of the certificate of purchase has com-

DEEDS AND CONVEYANCES—*Continued.*

plied with the laws of the State necessary to entitle him to a deed for the lands. *Lumber Co. v. Pearce*, 588.

17. *Tax Deeds—Descriptions—Identification—Parol Evidence.*—A sheriff's deed to land sold for taxes recites: "The following described real estate was sold, towit, a tract of 166 acres of land lying in S. Township, adjoining J. W. V., deceased, J. R., and others, being a part of the lands belonging to the estate of W. J. B., deceased." *Held*, the description was sufficiently definite to admit of parol evidence of identification of the lands; and further, it was also competent to show by parol whether J. J. B. and W. J. B. are identical. *Ibid.*

18. *Equity—Cloud Upon Title—Tax Deeds—"Color" of Title—Payment of Taxes—Burden of Proof.*—In an action brought to remove a tax deed as a cloud upon title to lands, the defendant as purchaser under such deed being in possession, it is necessary for the plaintiff to prove that the taxes upon the land for which it had been sold had been paid by him, as well as his own paper title. *Ibid.*

19. *Deeds and Conveyances—Married Women—Conveyance to Husband—Privy Examination—Certificate of Probate Officers—"Color"—Limitations of Actions.*—A conveyance of land by the wife to her husband without her privy examination and the certificate of the probate officer that the contract "is not unreasonable or injurious to her" (Revisal, sec. 2107) is "color of title" which will ripen into a perfect title by seven years adverse possession of the husband, and his children by a former marriage after her death, there being no issue born alive by the second marriage and therefore no tenancy by curtesy of the husband in the lands. *Norwood v. Totten*, 648.

20. *"Color of Title"—Approved Definition.*—Definition of "color of title" in *Smith v. Proctor*, 139 N. C., 324, specially approved. *Ibid.*

21. *Deeds and Conveyances—Description—Parol Evidence—Identification*—A description of lands in a deed, after naming the township and county, continued as follows: "Adjoining the lands of J. S. on the north and west, and the H. heirs on the east, and S. C. on the south, and bounded as follows: Containing 30 acres, more or less," is sufficient to admit of parol evidence of identification. *Ibid.*

DELAYS. See Trials, 61.

DISCIPLINE. See Convicts.

DISORDERLY CONDUCT. See Criminal Law, 14.

DRAWER AND DRAWEE. See Banks and Banking.

DYING DECLARATIONS. See Evidence, 3.

EASEMENTS. See Railroads, 1.

1. *Railroads—Condemnation—Right of Way—Measure of Damages—Offsets.*—The damages which may be awarded to the owner of lands through which a railroad company has condemned a right of way are such as are directly caused by and are confined to injuries peculiar to the lands condemned, and not such as are generally caused to lands in that community; nor is the railroad company entitled to have

EASEMENTS—*Continued.*

damages offset by advantages generally accruing to the community, but only those which accrue to and enhance the value of the particular lands condemned by reason of the advantages to be especially derived by them from the operation of the railroad. *R. R. v. Mfg. Co.*, 168.

2. *Railroads—Condemnation—Right of Way—Cotton Mills—Speculative Damages—Expert Evidence—Trials.*—Where a corporation is the owner of lands being condemned for a right of way by a railroad company, upon which it has tenant houses rented to its employees, and which are situated on a tract of land upon which defendant operates a cotton mill, the defendant is not entitled to recover damages of a speculative character, *i. e.*, such as possible inconvenience caused to its employees by the noise or smoke from the plaintiff's trains, or the inconvenience or danger to the operatives in going to or from work; or danger to their children caused by the operation of the railroad near their dwellings; or any possible increase in the cost of operating the plant caused by the running of the plaintiff's trains, etc.; and as the damages recoverable are those apparent to the ordinary observation of persons acquainted with the value of lands in that locality, the matter is not such as would call for "expert opinion" of those who have special knowledge of cotton mills generally and of operating conditions generally affecting their value. *Ibid.*

3. *Railroads—Condemnation—Rights of Way—Cotton Mills—Measure of Damages.*—Where lands of a cotton mill corporation are condemned for a right of way of a railroad company, the damages to be assessed are the value of the lands taken for the right of way, and any injury shown to have been done to the remaining part of the land, by way of special damages, such as impairing the physical property in the mechanical operation of its plant by vibration and smoke; and it is error to allow evidence as to the difference in value of the whole tract before the condemnation of the right of way and afterwards. *Ibid.*

4. *Railroads—Condemnation—Dwellings—Tenant Houses—Interpretation of Statutes.*—A railroad proceeded to condemn the lands of a cotton mill corporation, and upon the easement to be acquired there were several tenant houses belonging to the defendant. The defendant resisted the plaintiff's right of condemnation upon the ground that the statute, Revisal, 2575, expressly requires the consent of the owner to the taking of his "dwelling-house, yard, kitchen," etc.: *Held*, the section referred to is an exception to section 2578, giving such public-service corporation the right to condemn lands, and does not apply to tenant houses, but only to the dwelling of the owner of the lands, which is preserved to him for sentimental reasons; and which could not exist where such owner is a corporation renting the dwellings to its tenant. *Ibid.*

ELECTION. See Intoxicating Liquors, 10.

EMPLOYER AND EMPLOYEE. See Criminal Law, 7.

EQUITY. See Injunction; Reformation.

1. *Equity—Estoppel—Bond for Title—Laches.*—The defendants in this case are barred in equity of their rights claimed under a bond for title

EQUITY—*Continued.*

to lands by the long lapse of time in which they failed to assert them, which is not affected by reason of their supposing that they had a different and superior valid title. *Spruce Co. v. Hunnicutt*, 202.

2. *Equity—Contracts—Specific Performance—Trials—Evidence — Balance Due—Judgments.*—In an action for specific performance of a contract to convey and, the sufficiency of the writing being admitted, with evidence tending to show the full compliance on the part of the plaintiff, and to the contrary, that full amount of payment had not been made thereunder, a judgment of nonsuit is improperly allowed; and should on the new trial it be ascertained that defendant's contention is true in this case, the decree should direct a conveyance upon the payment by the plaintiff of the balance ascertained to be due. *Hooper v. Davies*, 236.
3. *Equity—Cloud Upon Title—Tax Deeds—"Color" of Title—Payment of Taxes—Burden of Proof.*—In an action brought to remove a tax deed as a cloud upon title to lands, the defendant as purchaser under such deed being in possession, it is necessary for the plaintiff to prove that the taxes upon the land for which it had been sold had been paid by him, as well as his own paper title. *Lumber Co. v. Pearce*, 589.

ESCAPE OF PRISONER. See Appeal and Error, 18.

ESTATES.

1. *Wills—Estates — Contingent Limitations — Death of Devisee — Direct Beneficiaries—Interpretation of Statutes.*—A devise of lands to B. in fee, "provided he has a child or children; but if he has no child, then to him for life," with limitation over to the testator's heirs at law, carries to the devisee a fee-simple estate, defeasible upon his death without having had a child, the contingent event by which the estate is determined referring to the death of the devisee and holder of the prior estate unless a contrary intent clearly appears from the will itself (Revisal, sec. 1581); and upon his death and nonhappening of the contingency named, the inheritance passes directly from the testator to the ultimate devisees. Hence, when the holder of the prior estate has acquired the interests therein of the children of the testator then living, he cannot convey a good title to the land; for prior to his death some of these heirs may have died leaving children, who, in that event, would take directly from the testator as his heirs at law. *Burden v. Lipsitz*, 523.
2. *Estates—Tenant for Life — Waste — Common-law Definition — Modern Application.*—While the common-law definition of waste is now held as sufficiently descriptive, the adaptation of the general principle to conditions existing in this country, as to the acts which constitute waste, have been variously modified until it has come to be established that a life tenant, as a general rule, may do what is required for the proper enjoyment of his estate to the extent that his acts and management are sanctioned by good husbandry in the locality where the land is situated, having regard, also, to its condition, and which do not cause a substantial injury to the inheritance. *Thomas v. Thomas*, 627.
3. *Same—Sale of Timber—Improvements—Present Intent—Honest Expenditure—Other Improvements—Trials—Burden of Proof.*—The general

ESTATES—*Continued.*

rule regarding waste by a life tenant in cutting and selling trees growing upon the inheritance is that he may not do so merely for his own profit; and when such is done for the improvement of the estate, it must be shown by him that sale of the timber was made with the present purpose of the improvements then contemplated, that the proceeds were honestly expended for such purpose, and with regard to the rule that the inheritance will not be substantially injured thereby, etc.; and it is not sufficient to show that the application of the proceeds of sale were subsequently made to improvements, or that in various ways he has expended sums of money in the improvement of the estate equaling that caused by the waste he has committed thereon. *Ibid.*

ESTOPPEL. See Equity, 1.

EVIDENCE. See Trials; Deeds and Conveyances; Reformation; Criminal Law, 2, 4; Homicide; Intoxicating Liquors; Attachment, 4; Statutes, 28; Contracts.

1. *Pleadings—Admissions—Trials—Proof.*—In an action to recover land the defendant cannot avail himself of the objection that there is no evidence of possession of the land by him when the complaint alleges possession by the defendant, and this allegation is not denied in the answer. *Spruce Co. v. Hunnicutt*, 202.

2. *Limitation of Actions—Adverse Possession — Evidence — Landlord and Tenant.*—Where adverse possession is relied on to establish title, directions of the party to his tenants to use the land is some evidence thereof. See *s. c.*, 150 N. C., 500. *Snowden v. Bell*, 208.

3. *Homicide—Dying Declarations—Trials—Evidence.*—Where the prisoner shot the deceased, causing death the following day, and there is evidence that the deceased was informed by his attending physician that he could not recover from the wound, and that he was aware of its fatal nature, his declarations are competent evidence against the prisoner upon trial for the homicide. *S. v. Shouse*, 306.

4. *Homicide—Deadly Weapon—Trials—Presumptions—Evidence — Appeal and Error—Harmless Error.*—Upon the trial for murder, the law presumes malice from the killing with a pistol shot, and it is for the prisoner to show that the shooting was done under such circumstances as would justify the act or render it manslaughter; and where the jury has returned, in such case, a verdict of murder in the second degree, errors committed in admitting evidence of previous threats upon the question of premeditation and deliberation necessary for conviction of murder in the first degree are rendered harmless. *Ibid.*

5. *Evidence—Corroboration.*—Where there is pertinent evidence, upon the measure of damages in an action for a personal injury, that since the time of the negligent act complained of the plaintiff suffered with rheumatism, which she had never had before then, testimony of her family physician that he had not heard her complain before of having rheumatism is competent as corroborative. *Elliott v. R. R.*, 481.

6. *Partnership—Dissolution—Division of Assets—Surviving Partner—Evidence—Book Entries.*—Three partners were in business, and one of them was bought out, and the controversy arises as to whether one of

EVIDENCE—*Continued.*

the remaining members bought out the retiring member in his own right or for the benefit of the remaining firm, one of whom has since died. In an action by the surviving partner against the representatives of the deceased one, it is competent, upon the question stated, for the plaintiff to show that the deceased partner was the manager of the firm, had possession of its books, and that it nowhere therein appeared by entry that the deceased had any interest in the firm's assets where entries of this character had been made. *Brantley v. Marshbourn*, 527.

7. *Contracts, Written—Timber—Words and Phrases—Lumber—Log Measurement——Expert Evidence—Instructions.*—Lumber is the manufactured product of logs, and where the defendant has entered into a contract with the plaintiff to purchase the timber on his lands, and pay therefor at a certain price per thousand feet of lumber, it is error for the trial judge to charge the jury that the measure of plaintiff's recovery was at the stated price "log measure, including the sawdust that was cut out by the saws and the slabs"; and the instruction is further held erroneous in ignoring testimony in this case of the custom and the standard ordinarily prevailing for ascertaining the measurement of the timber sold. *Hardison v. Lumber Co.*, 136 N. C., 174, cited and applied. *McKinney v. Matthews*, 576.

8. *Tax Deeds—Descriptions—Identification—Parol Evidence.* — A sheriff's deed to land sold for taxes recites: "The following described real estate was sold, towit, a tract of 166 acres of land lying in S. Township, adjoining J. W. V., deceased, J. R., and others, being a part of the lands belonging to the estate of W. J. B., deceased." *Held*, the description was sufficiently definite to admit of parol evidence of identification of the lands; and further, it was also competent to show by parol whether J. J. B. and W. J. B. are identical. *Lumber Co. v. Pearce*, 588.

9. *Deeds and Conveyances—Description—Parol Evidence—Identification.*—A description of lands in a deed, after naming the township and county, continued as follows: "Adjoining the lands of J. S. on the north and west, and the H. heirs on the east, and S. C. on the south, and bounded as follows: Containing 30 acres, more or less," is sufficient to admit of parol evidence of identification. *Norwood v. Totten*, 648.

EVIDENCE EXCLUDED. See Appeal and Error, 23.

EXCEPTIONS. See Appeal and Error; Reference.

EXCESSIVE PUNISHMENT. See Criminal Law, 3.

EXECUTORS AND ADMINISTRATORS. See Limitations of Actions, 1.

EXPERT EVIDENCE. See Trials, 20; Criminal Law.

EXPRESS COMPANIES. See Carriers of Goods, 8.

EXPRESSION OF OPINION. See Courts, 9.

FALSE PRETENSE. See Criminal Law.

FEDERAL EMPLOYER'S LIABILITY ACT. See Statutes, 7, 8, 9, 10.

FERTILIZER. See Contracts, 6; Statutes.

FIRE DISTRICTS. See Municipal Corporations, 12.

FLOGGING. See Convicts.

FRAUDS. See Trials, 13; Deeds and Conveyances, 10; Pleadings, 5.

1. *Negligence—Master and Servant—Release—Trials—Circumstantial Evidence—Fraud—Evidence—Questions for Jury.*—In this action brought by an administrator to recover damages of a railroad company for the wrongful death of an employee, there was evidence tending to show that the defendant obtained a release from the intestate for all damages arising from the injury, which eventually resulted in his death, for an inadequate consideration, when he was in pain and suffering from the result of the injury, but desired to keep his situation in the defendant's service; that the defendant's claim agent, who procured the release, made conflicting statements, as a witness in defendant's behalf, as to the time and place it was executed, and as to whether the intestate had sent for him; that the payment made to the intestate was only intended to cover the time he had lost from his employment, which it did not do, and not physical or mental pain or suffering caused by the injury; that the agent of defendant was the only one with the intestate when the release was obtained: *Held*, the evidence, though circumstantial in its character, was sufficient to sustain a finding of the jury in plaintiff's favor, upon the issue as to the fraud of the defendant's agent in procuring the release set up as a defense. *Causey v. R. R.*, 5.

2. *Bills and Notes—Fraud and Deceit—Innocent Purchaser—Trials—Burden of Proof.*—Where it is proved or admitted that a negotiable note sued on has been obtained from the maker by fraud, or deceit, the transferee, the plaintiff in the action, must show by the preponderance of the evidence that he was a *bona fide purchaser* or derived his title from such purchaser, and it is insufficient that he acquired the note for value, before maturity. *Bank v. Drug Co.*, 99.

3. *Same—Impeaching Evidence.*—The burden of proof being on the plaintiff, in his action to recover on a negotiable note, to show that he was a *bona fide* purchaser for value, where it is shown that the note was procured from the maker by fraud or deceit, it is not required that the defendant negatively prove that the plaintiff was not such purchaser, and the plaintiff's testimony is subject to attack and to be discredited on cross-examination. *Ibid.*

4. *Mortgages—Registration — Fraud — Trials — Evidence — Attorney and Client.*—Where the owner of lands takes a mortgage to secure the balance of the purchase price, but holds it and has it registered subsequent to the registration of another mortgage the purchaser has made and executed thereon, and the later made but prior registered mortgage is attacked for fraud and failure of consideration, it is competent for the attorney of such mortgagee to testify, in corroboration of his evidence as to the *bona fides* of the loan, that he had loaned as such attorney the money out of funds of his client in his hands for the purpose, and had made many transactions of a similar character for him. *Hinton v. Hall*, 477.

FRAUDS—*Continued.*

5. *Vendor and Purchaser—Principal and Agent—Contracts—Ratification—Knowledge—Fraud—Trials—Evidence—Nonsuit.* — For the unauthorized acts of an agent to bind his principal by ratification, it must appear that the principal acted with knowledge of the facts and circumstances in respect thereto, and where the person dealing with the agent is aware of the fact that he has exceeded his authority, and depends upon the agent's statement that his principal may act favorably thereon, the burden is upon such third person to show the matters necessary to bind the principal by his ratification of the agent's unauthorized act. Thus where an agent for the sale of gasoline entered into a contract with the purchaser to supply him at the former price after the market had greatly advanced, by antedating the contract, and the purchaser was aware of the fact that, at that time, the agent was not only unauthorized to sell the gasoline at the price named, but had been forbidden to do so, and, notwithstanding, relied upon the assertions of the agent that "he would try to get the contract through," the fact alone that the seller shipped out a part of the gasoline at the price specified, being deceived and imposed upon by the date appearing in the contract, is not evidence sufficient of his confirmation of the contract, and the burden of proof being upon the purchaser in his action to enforce delivery of the balance of the gasoline, at the price named, a judgment of nonsuit should be rendered. *Wise v. Texas Co.*, 610.

FRAUDULENT INTENT. See *Insurance.*

GEESE. See Railroads, 7, 8; Negligence, 15, 16.

GRANTS. See Deeds and Conveyances, 4.

GUARDS. See Convicts.

HABEAS CORPUS.

Habeas Corpus—Supreme Court—Supervisory Powers—Supersedeas—Custody of Child—Retention in State—Writ of Prohibition—Procedure—Motion in the Cause.—Pending an appeal in an action for divorce, the Supreme Court, in the exercise of its constitutional power to issue any remedial writ of supervision and control to inferior courts (Const., Art. IV, sec. 8), and under its general supervisory powers conferred by the Constitution, may issue a writ of supersedeas (Rev., secs. 590, 598) to a Superior Court judge before whom, in *habeas corpus* proceedings, the mother, living in another State, contends for the custody of a minor child, *pendente lite*, to the effect that the child be retained within the jurisdiction of the courts of this State. The writ of prohibition will not lie, for the judge with notice of the order will adjudge that the child is "legally detained," and dismiss the proceedings, and, in the absence of a supersedeas bond, award the custody of the child to some reliable person living in this State with sufficient surety for the safe keeping and proper care of the child, making such order in regard to its mother seeing the child as will appear to him to be proper. *Held*, in this case, the writ of *habeas corpus* was not the proper remedy, and the mother should have proceeded by motion in the cause. *Page v. Page*, 90.

HARMLESS ERROR. See Appeal and Error.

HEADLIGHTS. See Railroads.

HOMICIDE.

1. *Appeal and Error—Homicide—Escape—Filing Brief—Rules of Court.*—When an appellant escapes pending his appeal to this Court, the Court in its discretion will either dismiss the appeal or affirm the judgment or continue the case. It can make no difference that the appellant is convicted of a capital felony. That entitles him to no special privileges. *S. v. DeVane*, 281.
2. *Homicide—Motive—Evidence—Bad Blood.*—Upon a trial for murder, evidence is competent upon the question of motive for the crime, which tends to show ill-feeling of the prisoner towards the deceased, and the cause thereof; and where the deceased was the brother of the prisoner's deceased wife, it is competent to show that his wife's family, including the deceased, had charged the prisoner with having mistreated his wife. *S. v. McKenzie*, 290.
3. *Homicide—Subsequent Circumstances — Evidence.*—Testimony of relevant circumstances immediately following the homicide, and which tends to show the guilt of the prisoner, is competent. *Ibid.*
4. *Homicide—Evidence—Contradiction.*—Where on a trial for murder the prisoner's witness has been examined before the coroner and has made an affidavit before the clerk of the court, it is competent, for the purpose of contradiction, but not as substantive evidence, on cross-examination, to question him as to the statements he had thus theretofore made. *Ibid.*
5. *Homicide—Evidence—Impeaching.*—Evidence that the witness for the prisoner on trial for homicide had stayed in the same cell with him on the previous night is competent for the purpose of impeaching the testimony of the witness. *Ibid.*
6. *Homicide—Deadly Weapon—Malice Implied—Burden of Proof.*—The killing of deceased by the prisoner with a deadly weapon implies malice, which would sustain a conviction of murder in the second degree; the burden being upon the State to prove deliberation and premeditation for conviction for the greater offense of murder in the first degree, and upon the prisoner to show matters in defense to justify a less offense or acquittal. *Ibid.*
7. *Homicide—Premeditation—Evidence.*—The evidence on this trial for homicide tends to show that on the day thereof the prisoner had quarreled with the deceased, who was a brother of his deceased wife; he went to the place where the deceased worked and spoke to him in abusive language; the prisoner fired upon the deceased, who was unarmed, five times with a pistol as they were walking towards each other, and then inflicted the fatal wound with a gun he was also carrying. *Held*, evidence of deliberation and premeditation sufficient to sustain a verdict of murder in the first degree. *Ibid.*
8. *Appeal and Error—Recitals in Exceptions—Homicide—Trials—Prejudice.*—Where the prisoner has appealed from a sentence of murder in the first degree, and as a part of his exceptions states that the wife of the deceased, with her children, attended the trial in mourning, and boarded at the same place with the jury, such recitations, if con-

HOMICIDE—*Continued.*

sidered as a part of the case on appeal, will not alone be sufficient to set aside the sentence of the court. *Ibid.*

9. *Homicide—Dying Declarations—Trials—Evidence.*—Where the prisoner shot the deceased, causing death the following day, and there is evidence that the deceased was informed by his attending physician that he could not recover from the wound, and that he was aware of its fatal nature, his declarations are competent evidence against the prisoner upon trial for the homicide. *S. v. Shouse*, 306.

10. *Homicide—Deadly Weapon—Trials—Presumptions—Evidence—Appeal and Error—Harmless Error.*—Upon the trial for murder, the law presumes malice from the killing with a pistol shot, and it is for the prisoner to show that the shooting was done under such circumstances as would justify the act or render it manslaughter; and where the jury has returned, in such case, a verdict of murder in the second degree, errors committed in admitting evidence of previous threats upon the question of premeditation and deliberation necessary for conviction of murder in the first degree are rendered harmless. *Ibid.*

11. *Homicide—Deadly Weapon—Matters in Mitigation—Trials—Charge—State's Evidence—Appeal and Error—Harmless Error.*—Where the killing of a human being with a deadly weapon has been shown, and upon the trial of the accused for the homicide the judge has correctly charged that the burden was upon the prisoner to show matters in mitigation to reduce the degree of the crime from murder in the second degree, but the State must show premeditation and deliberation beyond a reasonable doubt for conviction in the first degree; and also, that the prisoner could rely upon the State's evidence, as well as his own, to show such matters in mitigation, it is not held for error that in his charge the court further stated they should find the less offense, "if the defendant has shown the matters in mitigation by his evidence," for taking the charge as a whole it does not restrict such evidence, in the consideration of the jury, to that offered by the prisoner alone. *S. v. McClure*, 321.

12. *Homicide—Murder in First Degree—Premeditation—"Fixed Purpose"—Trials—Instructions.*—Upon a trial for homicide, the burden of proof is upon the State to show premeditation and deliberation beyond a reasonable doubt to convict of murder in the first degree, and though a "fixed purpose" to kill may be formed under circumstances of mitigation or excuse, and may not alone be sufficient, yet when the charge of the judge has correctly stated the law in regard to premeditation and deliberation, it will not be held for reversible error that he also told the jury that they must find that the prisoner committed the act with a "fixed purpose," for the charge will be construed as a whole. *Ibid.*

13. *Same—Homicide—Sheriffs—Deadly Weapon—Murder in First Degree—Premeditation—Evidence—Trials.*—The prisoner was engaged with others in committing a misdemeanor, and, anticipating arrest for the offense, thereafter procured a shotgun with ammunition, and while going upon a highway to his home was met by a deputy sheriff and others whom the sheriff had deputized for the purpose of making the arrest. The officer had no warrant for the arrest of prisoner for the misdemeanor, and upon the latter's declaration that no one should

HOMICIDE—*Continued.*

arrest him therefor, permitted him to walk about 50 or 75 yards down the road, and then proposed to arrest him for assault made on him with the gun. The sheriff then aimed his pistol at the prisoner, several times called on him to halt, informed him of the offense for which he intended to arrest him, whereupon the prisoner snapped his gun at him, the sheriff shot at the prisoner, the prisoner shot the sheriff and inflicted the deadly wound. *Held,* (1) While an officer is not ordinarily permitted to use a firearm in making an arrest for a misdemeanor, the officer was justified in doing so under the circumstances, the prisoner's misdemeanor in making the assault upon the officer being in the officer's presence, and the use of the pistol found by the jury not to be force excessive of that required; (2) The evidence of premeditation and deliberation was sufficient to sustain a conviction of murder in the first degree; (3) The charge of the court was proper. *Ibid.*

14. *Homicide—Trials—Murder in First Degree—Instructions—Appeal and Error—Harmless Error.*—The trial judge having explained to the jury the principles of law applicable upon the evidence in a trial for homicide, a portion of the charge, that if the prisoner killed the deceased with premeditation and deliberation, as theretofore explained to them, and this is shown beyond a reasonable doubt, the prisoner would be guilty of murder in the first degree, is not held for error. *Ibid.*

15. *Homicide—Deadly Weapon—Malice—Presumptions — Murder.*— Malice is presumed from the killing of the deceased with a gun, a deadly weapon, making the prisoner, on trial for the homicide, guilty, at least, of murder in the second degree, unless he proves circumstances in excuse or mitigation of the offense to the satisfaction of the jury, the burden of proof being upon him. *S. v. Lane,* 333.

16. *Homicide—Perpetration of Crime—Presumptions—Murder—Statutes.*— A homicide committed in the perpetration of, or in an attempt to perpetrate, a robbery will be deemed murder in the first degree, the jury being governed by the evidence under proper instructions in finding that or a less offense. Revisal, sec. 3271. *Ibid.*

17. *Trials—Courts—"Reasonable Doubt" — Words and Phrases — Instructions—Evidence.*—The trial judge is not restricted to any particular formula in defining "reasonable doubt" to the jury upon a trial for homicide, and his charge in regard to the nature of the circumstantial evidence in this case and how the jury should consider it is held to be free from any error of which the prisoner can complain. *Ibid.*

18. *Appeal and Error—Trials—Instructions—Requests—Court's Discretion.* —An appeal will not lie from the refusal of the trial judge to give requested instructions after the jury had retired to make up their verdict, the action of the judge being solely discretionary under the circumstances. *Ibid.*

19. *Homicide—Murder—Trials—Confessions—Evidence.*—The verdict of the jury convicting the prisoner of murder in the first degree was well supported by the evidence, under correct instructions from the court, and the prisoner's voluntary confession to a fellow prisoner, while in the jail with him, that he had committed the crime deliberately and premeditatedly, is held to be competent evidence against him to prove his guilt as found by the jury. *Ibid.*

HOMICIDE—*Continued.*

20. *Homicide—Declarations—Third Persons—Admissions—Evidence—Hearsay.*—The declarations of a third person that he had killed the deceased for whose murder the defendant is being tried, is hearsay, and inadmissible in the defendant's behalf. *Ibid.*

21. *Homicide—Assault—Defense of Mother—Justification—Deadly Weapon—Superior Strength.*—Upon trial of the prisoner for homicide of his brother, justification was relied upon as a defense, and there was evidence tending to show that the defendant was physically deformed and the deceased was a man much stronger and of a dangerous character, who had assaulted their mother, had knocked the prisoner down when he attempted to interfere, and received the deadly cut from a knife the prisoner used while he was being held down. *Held*, that the prisoner was only permitted to use such force as the mother could have reasonably used in her own defense to repel the assault, and that the court properly charged the jury that they, in passing upon this question in relation to the personal assault made on the prisoner, should consider, under the circumstances, the relative size, strength, and position of the deceased and the prisoner, and determine whether the prisoner apprehended or had reasonable grounds to apprehend, at the time, either that he was in danger of losing his life or receiving great bodily harm. *S. v. Gaddy*, 341.

22. *Homicide—Assault — Justification — Apprehension of Harm — Without Fault.*—Where one, unprovoked, assaulted another, when he was at a place he had a right to be and doing what he had a right to do, the person assaulted may stand his ground and use such force in repelling the assault as he may reasonably believe, and which he does believe, necessary to prevent his being killed or receiving serious bodily harm at the hands of the assailant, to the extent of taking his life; and the charge in this case, that the prisoner must have been "without fault" in provoking the assault, is held to be a correct statement of the law arising from the evidence. *Ibid.*

23. *Same—Trials—Instructions—Burden of Proof—Questions for Jury.*—Upon a trial for murder wherein it appears that the prisoner killed the deceased with a deadly weapon while the latter was making an assault upon him unarmed, but that the deceased was of greatly superior strength and a dangerous character, matter in justification may be shown by the prisoner, both from his own and the State's evidence, that, under the circumstances, he killed his assailant with reasonable apprehension that it was necessary to do so either to save his own life or to keep himself from great bodily harm, though ordinarily the use of a deadly weapon would not be required, the question as to the degree of force the prisoner could use in his self-defense, and how the evidence should be considered, being for the jury under correct instructions from the court, the burden of proof being on the prisoner to show matters in mitigation to reduce the offense from murder in the second degree. *Ibid.*

24. *Homicide—Deadly Weapon—Mutual Fight—Aider and Abettor—Manslaughter.*—Where a homicide with a deadly weapon is shown, and there is evidence that the defendant gave the weapon, a pistol in this case, to his codefendant, who committed the homicide, and incited him to do it, in the fight which ensued between him and the deceased,

HOMICIDE—*Continued.*

the evidence tends to show that the prisoner was the principal offender, and is sufficient to sustain a verdict of manslaughter, at least. *S. v. Robertson*, 356.

25. *Homicide—Defense of Home—Justification—Trials—Evidence—Declarations.*—The principle that a man may, under certain circumstances, have the right to kill another in defense of his home, does not apply where it is shown that the prisoner, if he was not the aggressor, fought willingly and fiercely, and inflicted the wound when the deceased, who had been visiting his home in a friendly way, was retreating, and declaring he had no intention of hurting any one, and the prisoner's life or limb not being in jeopardy, and the declarations of the prisoner made immediately preceding the homicide and while committing it are competent as evidence against him. *Ibid.*

26. *Homicide—Self-defense—Mutual Fight—Willingness.*—Where upon the trial for a homicide there is evidence that the prisoners entered into the fight, which resulted in the death of the deceased, willingly, and fought fiercely and aggressively, and the deceased took no advantage of them, it is not error for the judge to instruct the jury that the plea of self-defense was not available if they should find the facts to be as thus testified. *Ibid.*

27. *Homicide—Deadly Weapon—Malice—Presumptions—Burden of Proof—Appeal and Error—Trials—Instructions.*—Malice will be presumed from the killing of a human being with a deadly weapon, a pistol, rendering the offense, nothing else appearing, murder in the second degree at least, with the burden of proof on the prisoner to show matters of justification, excuse, or mitigation; and where the instructions given by the court thereon are correctly but generally stated, the failure to give more full or exact instructions will not be held as error in the absence of special prayers therefor, aptly and at the proper time requested. *Ibid.*

28. *Homicide—Premeditation—Trials—Evidence—Murder—Presumptions—Burden of Proof.*—Upon the trial for homicide there was evidence tending to show that the prisoner worked for the deceased, and was angry and cursed him because he did not bring him some clothes he was expecting, and that he followed the deceased and killed him with a pistol, the deceased offering no resistance, and being unarmed. *Held*, evidence sufficient that the homicide was willful, deliberate, and premeditated, and the court properly instructed the jury to return a verdict of guilty of murder either in the first or second degree; and his further instruction, that they could acquit the prisoner, was not error of which he could complain. The charge of the court upon the law of premeditation, presumption of malice from the killing with a deadly weapon, and burden of proof, is approved. *S. v. Cameron*, 379.

29. *Indictment—Name of Deceased—Charge of Court.*—Where the indictment was for murder of "John A. Blue," and the court charged that the trial was murder of "J. A. (Archie) Blue," it is not error when there was no question of identity and no objection was taken at the time. *Ibid.*

30. *Public Officers—Criminal Law—Homicide—Arrest—Trials—Burden of Proof—Instructions—Several Motives—Presumption of Innocence.*—

HOMICIDE—*Continued.*

Where upon the trial for homicide the defense is interposed by the defendants that they killed the deceased in the performance of their duties as officers authorized to make an arrest in a manner justifiable, or that they had not shot the deceased, and were not responsible for his death, the question of guilt is for the jury to determine, under conflicting evidence, in accordance with how they should ascertain the facts to be, with the burden on the State of proving the defendants guilty beyond a reasonable doubt. *S. v. Rogers*, 389.

31. *Homicide—Trials—Self-defense—Evidence — Instructions — Appeal and Error.*—Upon a trial for a homicide there was evidence tending to show that the deceased and the prisoner were friendly; that V., at whose home prisoner was living, had several days before the homicide, given the deceased permission to use his horse and buggy, and that during the night the deceased, unknown to the prisoner, took the horse from the pasture to get a prescription filled for a sick member of his family; that the prisoner was awakened and told some one had stolen the horse, and, arming himself with a gun, went in search of the supposed thief; that soon he heard the horse returning, but did not recognize deceased, who had shaved off his beard, and called to him to stop, but he kept on riding and called out "Quit that!" "Quit that!" etc.; that prisoner twice fired in the air to cause the rider to stop, and the third and fatal shot was fired because prisoner mistook a medicine bottle, which the deceased "flourished," for a pistol; and prisoner testified that he fired in apprehension for his own safety. *Held*, this evidence was sufficient to be submitted to the jury upon the question of whether the defendant reasonably believed, under the circumstances, he was acting in self-defense, or to save himself from death or great bodily harm; and an instruction that the jury return a verdict of manslaughter was reversible error. *S. v. Johnson*, 392.

32. *Homicide—Trials—Defendant's Fault—Evidence.*—Upon this trial for homicide it is held that defendant's prayer for special instruction was properly refused, that "there was no evidence that he (the prisoner) did or said anything to bring on the difficulty with the deceased," there being evidence that he was the aggressor and entered into the fight willingly, and that the deceased, after making the assault, had retreated from five to seven steps, and the prisoner followed him and inflicted the mortal wound with a pistol shot. *S. v. Ray*, 420.

33. *Same—Instructions.*—When one, without fault, has been murderously assailed, he may stand his ground and defend himself even to the extent of taking the life of the assailant, when such is necessary, or it reasonably appears to him to be so, it being for the jury to determine the reasonableness of this necessity from the surrounding circumstances, as they appeared to the prisoner at the time; and where there is evidence tending to show that the prisoner, having been assaulted by the deceased, following him some six or seven steps, while the latter was retreating, and inflicted the deadly wound with a pistol shot, an instruction requested by the defendant upon the law of self-defense which omits the view that the defendant must be without fault in bringing on the difficulty, was properly refused. *Ibid.*

34. *Trials—Instructions—Self-defense — Necessity to Kill — Questions for Jury.*—The charge of the court to the jury should be construed as a

HOMICIDE—*Continued.*

whole, and upon a trial for homicide, wherein the plea of self-defense was relied on, it is not reversible error for the court to instruct the jury that the prisoner must have killed the deceased to save himself from death or great bodily harm, it appearing from the other parts of the charge that the jury were instructed to pass upon the matter in the view of the reasonableness of the necessity as it appeared to the prisoner at the time and under the circumstances, which instruction they could not have misunderstood. *Ibid.*

35. *Homicide — Self-defense — Uncommunicated Threats.* — Where upon a trial for homicide the killing with a deadly weapon is shown while the deceased was advancing upon the prisoner, and self-defense is relied upon, and it appearing that a verdict of manslaughter was rendered, evidently upon the idea that the prisoner used excessive force, the exclusion of evidence of uncommunicated threats is immaterial. *S. v. Melton*, 442.

36. *Homicide—Trials—Character Witnesses—Specific Acts.*—Upon the trial of a white man for the homicide of a negro boy, it is incompetent to ask a witness in the prisoner's behalf whether some third person had not told the deceased that he would eventually be killed for his impudence to white people; and it is also incompetent for the prisoner, in endeavoring to show the character of the deceased, to ask the witness in regard to special acts. *Ibid.*

HUSBAND AND WIFE. See Intoxicating Liquors, 12; Deeds and Conveyances, 13, 14, 19.

Wills—Wife a Beneficiary—Undue Influence—Presumptions.—Where the wife is the beneficiary under a will sought to be set aside for undue influence, the principles announced *In re Everett's Will* have no application. *In re Cooper's Will*, 210.

IMPEACHMENT. See Witnesses, 2.

IMPROVEMENTS. See Estates.

INDEPENDENT CONTRACTOR. See Master and Servant, 10.

INDICTMENT. See Intoxicating Liquors, 8, 10.

1. *Indictment—Motions to Quash—Interest of Grand Juror.*—A motion to quash a bill of indictment on the ground that the foreman of the grand jury was interested in the prosecution will be denied when it appears that the foreman took no part in passing upon the indictment and signed the bill under the direction of the grand jury and returned it in open court. Revisal, sec. 3232. *S. v. Pitt*, 268.

2. *Intoxicating Liquors—Warrants — Proviso — Matters of Defense — Motions to Quash.*—A motion in arrest of judgment upon an alleged defect in a warrant charging the unlawful sale of intoxicating liquors, for that the warrant did not negative the idea that the defendant was a druggist or medical depositary (ch. 44, Public Laws 1913, sec. 1), will not be granted, as the exception in the statute is no part of the definition or description of the offense, but simply withdraws certain persons from its operation, and is a matter of defense. *Semble*, such exception should be taken in the trial courts where the

INDICTMENT—*Continued.*

warrant may be amended, and not for the first time in the Supreme Court on appeal. *S. v. Moore*, 284.

3. *Criminal Laws—False Pretense—Indictment—Surplusage.*—In a warrant or indictment it is not necessary to charge an intent to defraud any particular person (Revisal, sec. 3432), and where the charge therein is made that the intent was to defraud an actual person and a fictitious one, the allegation as to the person is surplusage, and a motion in arrest of judgment for a fatal variance in that respect will be denied. *S. v. Ice Co.*, 366.

4. *Indictment—Name of Deceased—Charge of Court.*—Where the indictment was murder of "John A. Blue," and the court charged that the trial was for murder of "J. A. (Archie) Blue," it is not error when there was no question of identity and no objection was taken at the time. *S. v. Cameron*, 379.

INFERENCE. See Courts, 9.

INJUNCTION.

1. *Injunction—Vacating Restraining Order—Appeal and Error—Acts Committed—Courts—Procedure.*—Where a restraining order has been vacated and appealed from, and it appears, upon the hearing in the Supreme Court, that the act sought to be restrained has been practically done, it is only in rare and exceptional instances that the Court may satisfactorily and intelligently decide upon the matters presented, the practice being for the appellant to reserve his rights by exceptions, regularly taken, at the trial, if necessary, and present them on appeal from the final judgment in the Superior Court. *Yates v. Insurance Co.*, 134.

2. *Injunction—Restraining Order—Act Committed—Appeal and Error.*—The correctness of a ruling dissolving a restraining order will not be considered on appeal when it is made to appear that the act sought to be restrained has been committed. *Moore v. Monument Co.*, 211.

3. *Injunction—Restraining Order — Trials — Final Judgment — Courts—Terms.*—The sufficiency of the complaint will only be considered in determining the right to a restraining order, when the controversy is not before the court on its merits, and the action may not be dismissed by final judgment until the trial, and, except by consent of the parties, this must be in term of court of the county wherein the action is pending. *Ibid.*

INNKEEPERS.

Landlord's Lien—Guests—Surreptitious Departure—Trials—Questions for Jury.—When there is evidence that one having received accommodation at a hotel left with his baggage without notice to the proprietor and without having paid his hotel bill, it is sufficient for conviction, under ch. 816, Laws 1907; Pell's Rev., 3434a; it being for the jury to determine whether he surreptitiously removed the baggage to defeat the landlord's lien (Rev., 2037), the statute not requiring proof or charge of intent to defraud in such instances. *S. v. Hill*, 298.

INNOCENT PURCHASER. See Trusts and Trustees, 3.

INSTRUCTIONS. See Trials; Indictment, 4.

INSURANCE.

1. *Insurance, Life—Application — Questions Answered — Interpretation.*— The application of the insured and the policy of life insurance issued thereon should be construed together; and every question in the application specifically bearing upon the insurable condition of the applicant should be fairly, and at least substantially, answered by him, so that the insurer may obtain the desired information upon which to decide whether or not to accept the risk and issue the policy. *Schas v. Insurance Co.*, 55.

2. *Same—Material Representations—Fraudulent Intent.*—Every fact which is untruly stated or wrongfully suppressed in the application for a policy of life insurance must be regarded as material, if the knowledge of it in the one case or ignorance of it in the other would naturally or reasonably influence the judgment of the insurer in issuing the policy, or in estimating the degree or character of the risk, or in fixing the rate of premium, irrespective of the question of a fraudulent intent on the part of the applicant, the correctness of the statement, when called in question, being for the determination of the jury. Revisal, sec. 4808. *Bryant v. Insurance Co.*, 147 N. C., 181, cited as controlling. *Ibid.*

3. *Same—Trials—Questions for Jury—Questions for Court.*—In his application for a policy of life insurance the deceased represented he had not been under the care of a physician within two years; that he was at that time in good health; and there was evidence tending to show that both these answers were false, and that the insured had, within that period, and up to the time of his application, been suffering from a serious ailment, attended with nervous derangement and indigestion, the result of his own evil habits and self-abuse, and which, increasing in intensity, resulted in his suicide: *Held*, it was for the jury to determine, upon the evidence, whether the representations were false in the manner stated; and if so, the policy would be avoided as a matter of law, without reference to a fraudulent intent of the insured in making them. *Ibid.*

INTEREST. See Damages, 1; Judgments, 3.

INTERPRETATION OF STATUTES. See Statutes.

INTERSTATE COMMERCE. See Statutes, 9, 10; Commerce.

INTERSTATE COMMERCE COMMISSION. See Commerce.

INTOXICATING LIQUORS.

1. *Intoxicating Liquors—Prohibition Law—Druggists — Exceptions — License—Interpretation of Statutes.*—One of the restricted instances where the sale of intoxicating liquors is allowed under our prohibition laws, which have become the established public policy of our State, is by licensed and regular pharmacists upon the written prescription of a physician, etc. (Revisal, sec. 2063), and in order that an abuse of this public policy may not be allowed, our statutes have imposed certain conditions upon which the license may be obtained by a druggist, requiring application to be made to the board of county com-

INTOXICATING LIQUORS—*Continued.*

missioners, with certain safeguards as to character, place of sale, etc. (Revisal, sec. 2064); and that the license shall be printed in a certain form and issued by the sheriff upon the order of the board of commissioners (Revisal, sec. 2066). *Held*, that a license issued by the sheriff to a druggist to sell intoxicating liquors, without meeting these requirements, is void, and a sale made under such invalid license is a violation of the prohibition law. *Smith v. Express Co.*, 155.

2. *Intoxicating Liquors—Carriers of Goods—Refusal to Deliver—Penalty Statutes—Unlawful Sales—Interstate Commerce.*—A druggist who has not received a valid license, in accordance with the requirements of our statutes, to sell intoxicating liquors for the purposes and in the manner indicated, may not recover of the carrier the penalty provided by Revisal, sec. 2633, for the failure to deliver such liquors to him for the purposes of sale, for such are unlawful and prohibited, and cannot be aided or encouraged by the courts of the State, whether the shipment be intrastate or interstate. *Ibid.*

3. *Intoxicating Liquors—Unlawful Sales — Carriers of Goods — Penalty Statutes—Interstate Commerce—Constitutional Law.*—The delivery of intoxicating liquors for the purposes of sale is made unlawful by our statute, Revisal, sec. 3534, and the Webb-Kenyon law forbids delivery in interstate commerce; and whether this law is constitutional or otherwise, it could not be considered that our courts should penalize a carrier for refusing to deliver such shipment to the consignee in violation of our laws enacted to carry out our established public policy in relation to such matters. Federal Constitution, Art. I, sec. 8, clause 3. *Ibid.*

4. *Intoxicating Liquors—Prohibition Law—Exceptions—Validity of License—Collateral Attack—Direct Proceedings—Issues.*—Where a consignee of goods brings his action against the carrier to enforce the delivery to him of intoxicating liquors for the purposes of sale, claiming that he has a right to the liquors and the sale thereof, being a duly licensed druggist for whom an exception is made by our prohibition laws, the action puts the existence and validity of the license directly at issue, and the objection is not tenable that its validity is being collaterally attacked; especially, as in this case, where it appears that the license is invalid for the want of compliance with the provisions of the statute upon which alone its validity could be sustained. *Ibid.*

5. *Intoxicating Liquors—Sale—Evidence—Trials—Questions for Jury.*—On trial for the sale of whiskey in violation of our statute there was testimony by witnesses in behalf of the State: by one, that as he was watching through a crack in a wall upon the opposite side of the street, he saw the defendant give another a bottle of whiskey, and thought something passed between them, but did not know what it was; that "this was no more than a step" within the open door of a stable; by another, that he saw the defendant receive "some money" from the one to whom he had given the whiskey. The evidence further tended to show that the receipt of the whiskey and the passing of the money were at different times, between 2 and 5 o'clock of the same afternoon. *Held*, sufficient for conviction. *S. v. Harris*, 244.

INTOXICATING LIQUORS—*Continued.*

6. *Intoxicating Liquors—Warrants — Proviso — Matters of Defense—Motions to Quash.*—A motion in arrest of judgment upon an alleged defect in a warrant charging the unlawful sale of intoxicating liquors, for that the warrant did not negative the idea that the defendant was a druggist or medical depositary (ch. 44, Public Laws 1913, sec. 1), will not be granted, as the exception in the statute is no part of the definition or description of the offense, but simply withdraws certain persons from its operation, and is a matter of defense. *Semble*, such exception should be taken in the trial courts where the warrant may be amended, and not for the first time in the Supreme Court on appeal. *S. v. Moore*, 284.

7. *Intoxicating Liquors—Trials—Evidence — Declarations — Questions for Jury.*—Held in this case, charging an unlawful sale of intoxicating liquor under ch. 44, Public Laws 1913, sec. 1, testimony that the defendant did not have any business is competent upon the question as to whether he was a druggist, etc.; and as to whether his declarations that he had sold intoxicants were made in jest was properly for the determination of the jury. *Ibid.*

8. *Intoxicating Liquors—Criminal Law—Indictment — Offense Charged—Interpretation of Statutes.*—Where the prisoner is charged with an act made an offense by one statute, he may not be tried and convicted for another act made an offense under a different statute; and where the offense charged is an unlawful sale of whiskey made to a person named, the prisoner may not be convicted under Revisal, sec. 3534, relating to purchases from an illicit dealer; nor under Revisal, sec. 3527, relating to soliciting orders; nor under the Federal Penal Code. *S. v. Cardwell*, 309.

9. *Intoxicating Liquors—Lex Loci—Trials—Evidence—Ownership—Interstate Commerce.*—Where the defendant, upon trial for violating our prohibition laws, has received here money for the purchase of whiskey, which is delivered here through an express company, and there is no evidence that he has thus acted as the agent of a seller in another State, where such sale was lawful, or for the sole accommodation of the purchaser, here, without profit, the acts of the prisoner are consistent with ownership of the whiskey at the time of sale, notwithstanding he may have had it sent from another State; and the evidence is sufficient to sustain a conviction of the offense charged. The Federal statute known as the Webb-Kenyon Act has no application. *Ibid.*

10. *Intoxicating Liquors—Indictment—Various Sales—Elect Between—Evidence.*—Where the warrant for the unlawful sale of intoxicating liquors charges several separate sales at various times, the defendant's motion that the State elect between the evidence of the different sales will be denied. *Ibid.*

11. *Intoxicating Liquors—Trials—Evidence—Declarations — Conversations.*—Upon a trial of the defendants, husband and wife, for the unlawful sale of intoxicating liquors, a witness for the State testified that he was a private detective, and went with one M. to the home of the defendants, with evidence tending to show that he purchased whiskey from the wife in the presence of her husband, and, representing himself as a whiskey salesman, obtained orders from each of the de-

INTOXICATING LIQUORS—*Continued.*

fendants. *Held*, testimony of this witness, that in being introduced to the defendant by M. the latter said the witness could take orders from them, is not hearsay, but competent as a circumstance tending to show that the defendants were engaged in the liquor traffic. *S. v. Seahorn*, 373.

12. *Intoxicating Liquors—Husband and Wife—Trials — Instructions — Presumptions—Appeal and Error—Harmless Error.*—Upon this trial for the unlawful sale of intoxicating liquors, there was evidence tending to show that the defendants, husband and wife, kept such liquors for sale at their home, and that the *feme* defendant made the sale to the State's witness, in the presence of her husband, she testifying that she had not sold any intoxicants, and making no claim, therefore, that she was unlawfully acting under the restraint of her husband. *Held*, the judge erroneously instructed the jury as to their verdict upon their finding as to whether the wife or husband would be guilty upon the evidence of the husband's acquiescence or approval; but it is further held as harmless error, as the jury fully understood that her conviction rested entirely upon the question of whether she made the unlawful sale, and if so, did she act willingly and of her own accord. *Ibid.*

13. *Intoxicating Liquors—Search and Seizure — Possession — Prima Facie Case—Trials—Instructions—Appeal and Error—Harmless Error.*—An erroneous charge under the search and seizure law, that one gallon of intoxicating liquor made out a *prima facie* case that defendant had it for the purpose of an unlawful sale, is rendered harmless under the evidence in this case establishing the fact that the defendant had more than that quantity. *S. v. Moore*, at this term, approved, denying the defendant's motion in arrest of judgment for that the warrant did not negative that he was a druggist. *S. v. Atwood*, 438.

IRREGULARITIES. See Mortgages, 2, 3.

ISSUES. See Statutes; Pleadings, 1; Processioning.

Issues.—Where the trial judge has submitted to the jury issues upon the controverted facts which are fully determinative of the rights of the parties, his refusal to submit additional issues will not be held for reversible error. *Hinton v. Hall*, 477.

ISSUES STATED. See Reference.

JUDGMENTS. See Process; Injunction; Constitutional Law, 9.

1. *Judgments—Collateral Attack—Nonsuit—Independent Action — Motion in the Cause.*—A judgment may not be set aside for irregularities in an independent action, the proper procedure being in the original cause; and where the original action has been nonsuited, and another action has been brought upon the same subject-matter, between the same parties in interest, a defendant may not introduce evidence tending to show that he had not authorized an answer to be filed for him, to repel the bar of the statute of limitations, when the complaint therein was against all of the defendants who ostensibly had answered and proceeded with the trial of the cause to judgment, which appears to be regular on its face. *Bank v. Drug Co.*, 99.

JUDGMENTS—*Continued.*

2. *Verdicts—Judgments—Modification—Appeal and Error.*—In this action the verdict of the jury established certain interests in defendant's favor in the lands in controversy which were not adjudicated in the judgment rendered; and as the plaintiff did not appeal, the judgment is accordingly modified and affirmed. *Johnson v. Whilden*, 104.

3. *Judgments—Interest—Interpretation of Statutes—Trials—Instructions—Evidence.*—Interest is not allowed on a judgment rendered in the Superior Court for damages awarded by the jury to the owner for taking his lands in condemnation (Revisal, sec. 1954); for while the jury may award interest in their verdict, the owner may not complain when such has not been done, in the absence of a special request for instructions with relation to it, and the absence of evidence tending to show he is entitled to it. *R. R. v. Mfg. Co.*, 168.

4. *Equity—Contracts—Specific Performance—Trials—Evidence — Balance Due—Judgments.*—In an action for specific performance of a contract to convey land, the sufficiency of the writing being admitted, with evidence tending to show the full compliance on the part of the plaintiff, and to the contrary, that full amount of payment had not been made thereunder, a judgment of nonsuit is improperly allowed; and should on the new trial it be ascertained that defendant's contention is true in this case, the decree should direct a conveyance upon the payment by the plaintiff of the balance ascertained to be due. *Hooper v. Davies*, 236.

JUDICIAL NOTICE. See Negligence, 16; Courts.

JURISDICTION. See Courts.

JUROR, WITHDRAWING. See Trials, 54.

JUSTIFICATION. See Homicide, 21, 22, 25.

LACHES. See Equity, 1; Appeal and Error, 37.

LANDLORD AND TENANT. See Evidence, 2.

LANDLORD'S LIEN. See Innkeepers.

LARCENY. See Criminal Law, 7, 11.

LESSOR AND LESSEE. See Statutes, 10.

LEX LOCI. See Intoxicating Liquors, 9.

LIBEL. See Pleadings, 2.

LICENSE. See Intoxicating Liquors, 1, 4.

LIENS.

Statutory Liens—Material Men—Trusts and Trustees—"Ready, Able, and Willing"—Payment Into Court—Tender.—The relationship of the owner of a building to material men, etc., claiming a balance due to his contractor after receiving from them notice of their liens, is not that of debtor and creditor, in the ordinary sense, for he holds such balance in the nature of a trust to their use; and where the material men, etc., have entered suit in the nature of a creditor's bill to recover,

LIENS—*Continued.*

pro rata, the funds so held, the owner is not chargeable with interest on the claims or held to the duty of paying the funds, into court pending the action, unless so ordered, in order to avoid the payment of the interest; and the amounts of the respective claims necessarily being uncertain, it is sufficient that he has always been ready, able, and willing to pay them upon their being finally passed upon and adjudicated. *Bond v. Cotton Mills*, 20.

LIFE INSURANCE. See Insurance.

LIMITATIONS OF ACTIONS. See Evidence, 2.

1. *Limitation of Actions—Wrongful Death—Executors and Administrators—Interpretation of Statutes.*—The right of action for the wrongful death of the intestate is given by statute to his administrator, and did not exist at common law. Hence the statute of limitations does not begin to run against such cause of action until the death of the intestate, caused by the personal injury, has resulted. *Causey v. R. R.*, 5.
2. *Deeds and Conveyances—Color of Title — Nonsuit — Limitation of Actions.*—Defendant's possession under color is insufficient to ripen his title to lands, where it is shown that plaintiff's predecessor in title brought suit for the lands before the defendant had been in possession seven years, which action was nonsuited and another action was again instituted by the plaintiffs within a year. *Hopkins v. Crisp*, 97.
3. *Tax Deeds—Requisites of Statute—Color of Title.*—The purchaser of lands at a sale for taxes in 1898 who acquires a sheriff's deed therefor in 1899, without making the affidavit and giving the notice required by secs. 64 and 65, ch. 169, Laws 1897, has only color of title to the lands under his tax deed. *Fowle v. Whitley*, 445.
4. *Same—Possession—Presumptions—Burden of Proof—Trials—Evidence.*—R. was seized and possessed of certain lands, and lived thereon, until his death, with W. The latter received a tax deed from the sheriff to the lands, which operated only as color of title, and the two thereafter lived on the lands without change of attitude towards the possession, and after the death of R. his heirs at law sued to remove the tax deed as a cloud upon the title to the lands. W. testified that upon receiving the tax deed he immediately entered into possession of the land, cultivating it, etc. *Held*, there is no presumption in law of adverse possession against a true paper title, and the burden of proof was on W. to show some act of ouster of R., of which the evidence in this case is insufficient. *Ibid.*
5. *Carriers of Goods—Traffic Contracts—Connecting Carrier—Damage to Shipment—Payment—Limitation of Actions.*—Where the controversy between two carriers involves a balance alleged to be due the plaintiff under a traffic contract, and the plaintiff is allowed by the court to amend its complaint to allege damages it had had to pay a customer of the road, which arose from the defendant's negligence, the cause of action thus alleged arose to the plaintiff at the time it paid the damages complained of, and the statute of limitations would begin to run from that time. *Pritchard v. R. R.*, 532.

LOOK AND LISTEN. See Railroads.

LUMBER. See Contracts.

MAIL. See Trials, 10, 11.

MALICE. See Criminal Law, 2; Homicide; Damages.

MALICIOUS PROSECUTION.

1. *Malicious Prosecution—Trials—Evidence—Nonsuit.*—In an action for damages for malicious prosecution, where it is admitted that the defendant procured a warrant for the arrest of the plaintiff upon the charge of embezzlement, that the plaintiff was acquitted, and there was evidence of the want of probable cause, as well as malice on the part of the defendant in thus acting, a judgment as of nonsuit upon the evidence will be denied. *Michael v. Leach*, 223.

2. *Malicious Prosecution—Execution Against Person—Trials—Nonsuit.*—Where an action for damages for malicious prosecution alleges "an injury to the person or character" of the plaintiff, and upon the evidence the jury have answered the issues in the plaintiff's favor, a judgment is not held for error that execution issue against defendant's property, and if returned unsatisfied in whole or in part, then, upon motion of plaintiff, execution issue against the person of defendant, for the statute, Revisal, 727, gives the plaintiff this right of execution against the person of the defendant without incorporating it in the judgment. *Ibid.*

MANDAMUS.

Municipal Corporations—Bond—Subscription to Railroad Stock—Commissioners—Discretionary Power—Mandamus—Good Faith.—An act authorizing municipalities and townships along the line of a prospective railroad to vote bonds therefor and subscribe to its capital stock was subsequently amended so as to appoint representatives for the various communities for the purpose of making subscriptions *de novo* to the capital stock of the corporation, of issuing bonds, etc., "as conditions may require and as they may determine, after the conditions and requirements provided in the act are complied with." *Held*, the establishment of the bonds, etc., is not a ministerial but a discretionary duty, to compel which a mandamus will not lie, except for abuse of this discretion; and there being evidence that the commissioners have acted in good faith, but have exercised their discretion to the extent of subscribing for a certain amount of the railroad stock, the case is remanded, with direction that the Superior Court find the facts more fully upon the affidavits and evidence presented. *Fisher v. Commissioners*, 238.

MANSLAUGHTER. See Homicide.

MARRIED WOMEN. See Deeds and Conveyances, 13, 14, 19.

MASTER AND SERVANT. See Statutes, 8, 9, 10.

1. *Master and Servant—Assumption of Risks—Duty to Inspect and Report—Duty of Master—Negligence.*—Where it is the duty of a locomotive engineer to inspect his engine before taking it upon his run in the company's service, and to report any defects to the repair department, and, preparatory to making his run, he is injured while inspecting the engine, just received from the repair shop, by reason of a defect

MASTER AND SERVANT—*Continued.*

in its machinery unknown to him, the question of assumption of risks is not presented, it not being the duty of the engineer to repair the engine; and the company is responsible in damages for the injury if directly and proximately caused by the defective condition of the engine, it being its duty, by the exercise of proper care, to furnish its employee with a reasonably safe place to work and reasonably safe appliances with which to do it. *Lloyd v. R. R.*, 24.

2. *Master and Servant—Safe Appliances—Duty of Master—Inspection—Negligence—Trials—Burden of Proof.*—The plaintiff, an engineer on defendant's railroad, was injured while inspecting his locomotive or in operating a defective lever thereon, while making the inspection, and in his action to recover damages for personal injuries inflicted on him, a charge by the court to the jury is held correct which requires the plaintiff to show by the preponderance of the evidence that the defendant knew of the defect, or should have known thereof by exercising a reasonable inspection thereof. *Ibid.*

3. *Master and Servant—Trials—Gravel Pit—Supports—Negligence—Evidence—Nonsuit.*—The plaintiff's intestate, an employee of the defendant, was at work in the latter's gravel pit, under the supervision of their manager and with the manager's knowledge of the fact. The manager caused a bank of dirt which acted as a brace at the base of the gravel embankment to be removed without providing any support to take its place, and the gravel consequently rolled down upon the intestate and killed him. In an action by the intestate's administrator to recover damages for his death, alleged to have negligently been caused by the defendant, it is held that this was evidence of negligence, and the defendant's motion as of nonsuit was properly denied. *Neville v. Bonsal*, 218.

4. *Master and Servant—Dangerous Employment—Assumption of Risks—Master's Negligence—Nonsuit.*—Whatever is necessary for the servant to do in the course of his employment is incidental thereto and a part thereof, and the servant assumes the risk of the dangerous character of his duties when the employment is a dangerous one; but where an injury is directly caused to the servant by a negligent act of the master or another employee in a superior capacity, in connection with the work, the master is responsible. *Ibid.*

5. *Master and Servant—Trials—Contributory Negligence.*—It is held that this case was correctly tried in the court below, the jury correctly instructed upon the legal principles involved, and that the injury alleged was not caused by the defendant's negligence, but by plaintiff's inattention in operating a cotton gin. *Bolick v. Cline*, 227.

6. *Railroads—Master and Servant—Trials—Negligence—Moving Train—Contributory—Questions for Jury.*—An inexperienced employee of a railroad company acted under the peremptory order of the defendant's vice principal, whom he was required to obey, in attempting to board defendant's moving freight train, to go to another station to get the company's mail, and was thrown beneath the train, to his injury. *Held*, the verdict of the jury awarding damages was rendered under competent evidence, and correct instructions of the court in relation to employee's acting within the scope of his duties and to the issue of defendant's negligence; and that the issue as to contributory negli-

MASTER AND SERVANT—*Continued.*

gence could not properly be answered in defendant's favor as a matter of law. *Myers v. R. R.*, 233.

7. *Master and Servant—Safe Place to Work—Trials—Negligence—Questions for Jury.*—The plaintiff was an employee of the defendant in its power-driven manufacturing plant, and was injured while endeavoring to lace a belt in the course of his employment, on account of his hand being caught by the belt and carried to the shafting. There was evidence that the defendant furnished "blackjack" for the belt dressing, which was improper and would become very sticky, and that the plaintiff's hand, for that reason, was caught by the belt, resulting in the injury; that by the use of certain methods the belt could have been safely detached and laced in safety, and, also, that the plaintiff properly availed himself thereof; that the belt was old and worn and had broken several times on that day. *Held*, it was for the jury to determine whether the defendant had negligently failed in its duty to the plaintiff by furnishing defective material for the belt dressing, and whether such was the proximate cause of the injury; and, also, whether the plaintiff should have previously reported the defective material to the defendant under the circumstances of this case. *McAtee v. Mfg. Co.*, 448.

8. *Master and Servant—Safe Place to Work—Contributory Negligence—Trials—Questions for Jury.*—In this case it is held that whether the plaintiff, employee of the defendant, selected an unsafe way to do the work arising within the scope of his employment when in the exercise of proper care a safe way was open to him, is a question of fact for the determination of the jury. *Ibid.*

9. *Negligence—Contributory Negligence—Assumption of Risk—Trials—Burden of Proof.*—When assumption of risk and contributory negligence are relied on as defenses in an action to recover damages for a personal injury alleged to have been negligently inflicted on the plaintiff, the burden of proof of such defenses is on the defendant; and under the circumstances of this case it is held that issues of fact thereon were raised, and properly left to the determination of the jury. *Ibid.*

10. *Master and Servant—Independent Contractor—Issues—Trials — Questions for Jury.*—The evidence in this case is conflicting as to whether the defendant had let out the doing of the work, wherein the plaintiff was injured, to an independent contractor; and the charge of the trial judge upon the evidence, on this phase of the case, given upon the issue of negligence, is held no error, there being no specific issue submitted upon the question of independent contractor. *Keech v. Lumber Co.*, 503.

11. *Master and Servant—Safe Place to Work — Negligence — Evidence—Proximate Cause.*—While the master is not held to the requirement of guaranteeing the safety of a workman he has engaged to work for him upon the erection of his structure or building, it is nevertheless his duty to provide for him reasonably safe tools and machinery and place to work, and to keep them in such condition as to afford him reasonable protection; and this duty being one personally required of him, he may not delegate it to another and escape liability for dam-

MASTER AND SERVANT—*Continued.*

ages proximately caused to the servant in the performance of his duties. *Steele v. Grant*, 635.

12. *Master and Servant—Safe Place to Work—Personal Duty—Delegation of Duties—Principal and Agent—Concurring Negligence—Proximate Cause.*—Where the master has negligently failed in his duty to supply the servant with safe appliances and place for the work required of him, and this negligence concurs with that of a fellow-servant in proximately causing an injury to the servant, the master's responsibility is the same as if his negligence was the only cause thereof. *Ibid.*

13. *Same—Trials—Evidence—Nonsuit—Contributory Negligence—Assumption of Risks.*—Plaintiff was employed by the owner in erecting a concrete structure, wherein an elevator was used to take the materials up to the various floors to be used, etc. There was evidence tending to show that plaintiff assisted in raising the head block on the fifth floor, where it was elevated upon a "stiff knee," and the following morning the plaintiff was required by his superior to put in a "cut-off" plank to hold the concrete about to be used in the floors there; that plaintiff called his attention to the fact that the "head block" as placed rendered this work dangerous, and was told to do the work, that it could safely be done if the elevator was not used at that time, and that this would be prevented; that while doing the work with this assurance, the elevator was run by some one, resulting in the head block falling upon the plaintiff, owing to its insecure fastenings, to his injury. *Held*, evidence of defendant's actionable negligence proper to be submitted to the jury; and it is *Further held*, there was no evidence that plaintiff had assumed the risk of this dangerous work, or of his contributory negligence. *Ibid.*

MATERIAL MEN. See Liens.

MEASURE OF DAMAGES. See Damages.

MENTAL ANGUISH. See Telegraphs.

MISJOINDER. See Actions.

MORTGAGES.

1. *Mortgages—Registration—Fraud—Trials—Evidence—Attorney and Client.*—Where the owner of lands takes a mortgage to secure the balance of the purchase price, but holds it and has it registered subsequent to the registration of another mortgage the purchaser has made and executed thereon, and the later made but prior registered mortgage is attacked for fraud and failure of consideration, it is competent for the attorney of such mortgagee to testify, in corroboration of his evidence as to the *bona fides* of the loan, that he had loaned as such attorney the money out of funds of his client in his hands for the purpose, and had made many transactions of a similar character for him. *Hinton v. Hall*, 477.

2. *Mortgages—Sales—Advertisements—Irregularities—Notice—Immediate Purchasers—Remote Grantees—Chain of Title.*—While the immediate purchaser at a sale of lands under mortgage is required to see that proper advertisement of the lands has been made, this does not apply to subsequent or remote grantees of the land, for they acquire a good

MORTGAGES—*Continued.*

title if the recitals in their chain of title appear to be regular. *Eubank v. Becton* 158 N. C., 230, cited and distinguished. *Ibid.*

3. *Mortgages—Sales—Advertisements—Irregularities — Second Mortgagee —Measure of Damages.*—Where there are two or more mortgages on the same land, and by a sale under the first mortgage, not advertised according to its terms, the lands have been acquired by subsequent grantees without notice of the irregularity, the second mortgagee may elect to sue the first mortgagee for any damage which he has suffered on account of the irregularity, the measure thereof being the difference between the amount due under the first mortgage and the value of the land at the time of the sale. *Ibid.*

MOTIONS. See Indictment; Appeal and Error, 34; Removal of Causes, 4.

Habeas Corpus—Supreme Court—Supervisory Powers—Supersedeas—Custody of Child—Retention in State—Writ of Prohibition—Procedure—Motion in the Cause.—Pending an appeal in an action for divorce, the Supreme Court, in the exercise of its constitutional power to issue any remedial writ of supervision and control to inferior courts (Const., Art. IV, sec. 8), and under its general supervisory powers conferred by the Constitution, may issue a writ of supersedeas (Rev., secs. 590, 598) to a Superior Court judge before whom, in *habeas corpus* proceedings, the mother, living in another State, contends for the custody of a minor child, *pendente lite*, to the effect that the child be retained within the jurisdiction of the courts of this State. The writ of prohibition will not lie, for the judge with notice of the order will adjudge that the child is "legally detained," and dismiss the proceedings, and, in the absence of a supersedeas bond, award the custody of the child to some reliable person living in this State with sufficient surety for the safe keeping and proper care of the child, making such order in regard to its mother seeing the child as will appear to him to be proper. *Held*, in this case, the writ of *habeas corpus* was not the proper remedy, and the mother should have proceeded by motion in the cause. *Page v. Page*, 90.

MOTION IN THE CAUSE. See Judgments, 1.

MOTIONS TO QUASH. See Indictment.

MOTIVE. See Homicide.

MOTOR CARS. See Railroads, 9, 10.

MUNICIPAL CORPORATIONS. See Religious Societies, 1.

1. *Municipal Corporations—Township Bonds — General Authority — Limit Prescribed.*—An act providing for the issuance of township bonds for road purposes authorizing an issuance not to exceed at any one time an amount equal to 10 per cent of the taxable value of the property of the township, is a general and valid authority for an issuance of any amount of bonds, at various times for the purpose, within the limit prescribed, which may vary from year to year in accordance with the value of the taxable property therein. *Highway Commission v. Malone*, 1.

MUNICIPAL CORPORATIONS—*Continued.*

2. *Municipal Corporations—Township Bonds—Interest—Sinking Fund—Purchaser with Notice—Contracts.*—A purchaser of municipal bonds is fixed with notice of the provisions of the act under which they are issued, and may not repudiate the terms of his agreement to purchase them on the ground that the payment of interest and the creation of a sinking fund had not therein been provided for. In this case, however, it is held that the act provides for the interest and for a sinking fund from the moneys to be collected for that purpose. *Ibid.*

3. *Municipal Corporations—Township Bonds — Statutes — Amendments—Authority Suspended—Interpretation of Statutes.*—The Legislature passed an act authorizing the issuance by a township of bonds for road purposes, and passed an amendment thereto, at a subsequent session, that the former act should not be effective until the bonds shall have been issued and placed on the market at a fixed future date: *Held*, the power to negotiate the bonds was not suspended by the amendment, which carried with it the power to sell and deliver, at which time the provisions of the former act becomes effective, if the bonds have been issued and placed on the market within the time fixed therefor. *Ibid.*

4. *Municipal Corporations — Cities and Towns — Bond Issues — Market House—Necessaries—Constitutional Law.*—Bonds issued by a municipality to build a market house are for a necessary expense, and when authorized by statute do not require, for their validity, that they be submitted to the qualified voters of the municipality. *LeRoy v. Elizabeth City*, 93.

5. *Municipal Corporations—Cities and Towns — Bond Issues — Statutory Directions—Market House—Location.*—Where the statute requires that a market house authorized to be built by a municipality from a bond issue be located on a certain parcel of its lands, the validity of the bonds is not affected by its location elsewhere, the remedy of the taxpayer being to compel the city to use the proceeds of the lands as required by the statute. *Ibid.*

6. *Municipal Corporations—Cities and Towns — Bond Issues — Improper Use of Funds—Incidents.*—An improper use of the proceeds from the sale of municipal bonds for a market house does not affect the validity of the bonds; and in this case it is held that a reasonable expense incurred in attorney's fees, etc., or in paving an esplanade adjacent to the market house, is not an improper expenditure of the funds. *Ibid.*

7. *Municipal Corporations—Cities and Towns—Bond Issues—Aldermen—Majority Vote.*—Where a bond issue of a municipality is authorized by statute, and there is no charter or other statutory provision to the contrary, the exercise of the power by the municipality to issue the bonds is sufficient if by a majority of its aldermen. *Ibid.*

8. *Municipal Corporations—Cities and Towns—Ordinances — Violation—Trials — Negligence — Proximate Cause—Instructions.* The plaintiff sued the defendant for damages to his automobile, alleging that the defendant was negligently running his own automobile at the time on the left-hand side of a city street, forbidden by an ordinance, and thus caused a collision, resulting in the damages claimed in his action. There was conflicting evidence as to whether the plaintiff was on the wrong side of the street and caused the collision by turning his auto-

MUNICIPAL CORPORATIONS—*Continued.*

mobile as the defendant turned to the left side of the street to avoid the collision, when imminent, and whether the consequent damages resulted from the plaintiff's negligence. The ordinance made it lawful to cross over to the left-hand side of the street for certain purposes, and it is held for reversible error that the court charged the jury that the defendant was negligent if, at the time of the collision, he was on the left-hand side of the street, as such withdrew from the consideration of the jury that the defendant had a right under the provisions of the ordinance to drive on the left-hand side of the street for lawful purposes, and also the question of proximate cause. *Ledbetter v. English*, 125.

9. *Municipal Corporations—Cities and Towns—Ordinances—Trials—Negligence Per Se—Proximate Cause.*—While the violation of a city ordinance relating to the running of automobiles on the streets of a city is negligence *per se*, it is necessary, to recover damages alleged to have been caused thereby, that the plaintiff show that this negligence was the proximate cause of the injury complained of. *Ibid.*

10. *Municipal Corporations—Cities and Towns—Bond Issues—Necessaries—Single Ballot—Constitutional Law.*—Where a municipal corporation under a special legislative act, and voted upon in accordance with its charter provisions, submits to its qualified voters the question of the issuance of bonds for necessary municipal purposes, as in this case, for extending its sewer line, purchasing a site for and building a fire station, and for permanent pavements, proportioning a certain amount to be expended for the first two items and the balance of the issue for the last one, the purposes of the various items are related to each other, the information given being for an intelligent ballot, and the bonds voted upon as a single proposition or upon a single ballot, are valid. *City of Winston v. Wachovia Bank and Trust Co.*, 158 N. C., 512, cited and distinguished. *Briggs v. Raleigh*, 149.

11. *Municipal Corporations—Bond—Subscription to Railroad Stock—Commissioners—Discretionary Power—Mandamus—Good Faith.*—An act authorizing municipalities and townships along the line of a prospective railroad to vote bonds therefor and subscribe to its capital stock was subsequently amended so as to appoint representatives for the various communities for the purpose of making subscriptions *de novo* to the capital stock of the corporation, of issuing bonds, etc., "as conditions may require and as they may determine, after the conditions and requirements provided in the act are complied with." *Held*, the establishment of the bonds, etc., is not a ministerial but a discretionary duty, to compel which a mandamus will not lie, except for abuse of this discretion; and there being evidence that the commissioners have acted in good faith, but have exercised their discretion to the extent of subscribing for a certain amount of the railroad stock, the case is remanded, with direction that the Superior Court find the facts more fully upon the affidavits and evidence presented. *Fisher v. Commissioners*, 238.

12. *Cities and Towns—Fire Districts—Ordinances.*—A town ordinance creating and regulating a fire district within the town is valid when authorized by statute. *S. v. Shannonhouse*, 241.

MUNICIPAL CORPORATIONS—*Continued.*

13. *Same—Building Permits—Substantial Repair.*—An ordinance passed by a town under authority of a statute provides that no wooden building destroyed by fire, etc., or damaged more than a third, within the fire district, shall be repaired, "except as hereinafter provided," and a further section requires that permits for building and repairing within this fire district shall first be obtained from the town commissioners. *Held*, that a substantial repair cannot be made within such district, though less than "one-third," without obtaining the permit. Repairing a building by renewing piazza thereon is a substantial repair, and a violation of the ordinance if done without the permit. *Ibid.*

14. *Cities and Towns—Ordinances—Segregation of Races—Statutes—Interpretation.*—Legislative authority given to a town to pass any ordinance for the good order, good government, or general welfare of the city, provided it does not contravene the laws and Constitution of the State, does not contemplate the passage of an ordinance prohibiting the ownership of land in certain locations and districts, by white or colored people, in accordance with whether the majority of the landowners in that district are white or colored people, such being in contravention of the general policy of the State and questionable as to its validity under the Federal Constitution. *S. v. Darnell*, 300.

15. *Criminal Law—Municipal Corporations—Disorderly Conduct—Cursing—Ordinances—Statutes.*—Disorderly conduct is a minor offense, not known to the common law, and a person so offending is not indictable except under a statute or authoritative ordinance of a municipality; and where a person is indicted, under the provisions of an ordinance, for cursing on the streets of a town, loud enough to be heard by those passing by and in a disorderly manner, a conviction may not be sustained when it is shown that the cursing was only heard by the policeman making the arrest, though there were others standing near, and was done in a low tone of voice which could not have disturbed any one; and a motion for a nonsuit upon the evidence was properly sustained, Ch. 73, Laws 1913. *S. v. Moore*, 371.

16. *Municipal Corporations—Sidewalks—Obstructions—Trials—Negligence—Contributory Negligence—Questions for Jury—Nonsuit.*—In an action against an incorporated town to recover damages for a personal injury, there was evidence tending to show that for more than two months the defendant had permitted building material to obstruct the sidewalks on both sides of the street, and that the plaintiff's injury was received in consequence of her stumbling upon some loose brick or building material, rendering the sidewalk uneven, as she was going to her home at night; that at this place the obstructions on the sidewalk would not permit two persons to pass abreast of each other; and it was in a shadow cast by a street light from a shed that extended across the sidewalk; and that the plaintiff was mindful of the obstructions in endeavoring to choose her way along; *Held*, evidence sufficient of defendant's actionable negligence in failing to keep the sidewalk in proper condition, and this, with the question of plaintiff's contributory negligence, should be submitted to the jury. *Owens v. Charlotte*, 159 N. C., 332, and other like cases where the plaintiff knew

MUNICIPAL CORPORATIONS—*Continued.*

of the conditions and could have avoided the injury by the exercise of proper care, cited and distinguished. *Darden v. Plymouth*, 492.

17. *Cities and Towns—Claims for Damages—Statutory Notice—Reasonable Opportunity.*—A charter requirement that notice to a city must be given within ninety days after the occurrence of an injury for which it is claimed that the city is responsible through its negligence, is a valid one, and failure to give this notice will bar a plaintiff's right of recovery, unless it is shown by him that it was impossible, on account of his incapacity, with the ordinary means at his hands, to give such notice in the time required. *Hartsell v. Asheville*, 633.

18. *Same—Trials—Evidence—Questions for Jury.*—The reason of a charter requirement that notice be given within ninety days of a claim of damages arising from its negligence is that within that time opportunity will reasonably be afforded the claimant to give such notice; and in this case, there being evidence tending to show that the plaintiff was in a hospital for eight weeks, absolutely helpless, and practically so for three months, and longer, it is held that the question should be submitted to the jury for their finding as to whether or not the plaintiff had been afforded a reasonable opportunity to give the notice in the time required. *Ibid.*

MURDER. See Homicide.

MUTUAL MISTAKE. See Reformation, 1.

NECESSARIES. See Municipal Corporations, 4, 10.

NEGLIGENCE. See Statutes, 7; Trials; Railroads.

1. *Negligence—Master and Servant—Release—Trials—Circumstantial Evidence—Fraud—Evidence—Questions for Jury.*—In this action brought by an administrator to recover damages of a railroad company for the wrongful death of an employee, there was evidence tending to show that the defendant obtained a release from the intestate for all damages arising from the injury, which eventually resulted in his death, for an inadequate consideration, when he was in pain and suffering from the result of the injury, but desired to keep his situation in the defendant's service; that the defendant's claim agent, who procured the release, made conflicting statements, as a witness in defendant's behalf, as to the time and place it was executed, and as to whether the intestate had sent for him; that the payment made to the intestate was only intended to cover the time he had lost from his employment, which it did not do, and not physical or mental pain or suffering caused by the injury; that the agent of defendant was the only one with the intestate when the release was obtained: *Held*, the evidence, though circumstantial in its character, was sufficient to sustain a finding of the jury in plaintiff's favor, upon the issue as to the fraud of the defendant's agent in procuring the release set up as a defense. *Causey v. R. R.*, 5.

2. *Master and Servant—Assumption of Risks—Duty to Inspect and Report—Duty of Master—Negligence.*—Where it is the duty of a locomotive engineer to inspect his engine before taking it upon his run in the company's service, and to report any defects to the repair department,

NEGLIGENCE—*Continued.*

and, preparatory to making his run, he is injured while inspecting the engine, just received from the repair shop, by reason of a defect in its machinery unknown to him, the question of assumption of risks is not presented, it not being the duty of the engineer to repair the engine; and the company is responsible in damages for the injury if directly and proximately caused by the defective condition of the engine, it being its duty, by the exercise of proper care, to furnish its employee with a reasonably safe place to work and reasonably safe appliances with which to do it. *Lloyd v. R. R.*, 24.

3. *Master and Servant—Safe Appliances—Duty of Master—Inspection—Negligence—Trials—Burden of Proof.*—The plaintiff, an engineer on defendant's railroad, was injured while inspecting his locomotive or in operating a defective lever thereon, while making the inspection, and in his action to recover damages for personal injuries inflicted on him, a charge by the court to the jury is held correct which requires the plaintiff to show by the preponderance of the evidence that the defendant knew of the defect, or should have known thereof by exercising a reasonable inspection thereof. *Ibid.*

4. *Deeds and Conveyances—Description—Parol Evidence—Trials—Negligence—Evidence.*—In an action to recover damages of the defendant for negligently setting fire to and burning the timber lands of the plaintiff, it is held that the following general description is sufficient to admit of parol evidence of the identification of the lands, towit: "A certain tract or parcel of land in Rose Hill Township, Duplin County, adjoining the lands of this grantor, S. W., and others, and being on the south side of Maxwell and Beaver Dam creeks"; and it is further held that the evidence is sufficient of the defendant's negligence, under *Williams v. R. R.*, 140 N. C., 624. *Hawes v. Lumber Co.*, 101.

5. *Municipal Corporations—Cities and Towns — Ordinances — Violation—Trials—Negligence—Proximate Cause — Instructions.* The plaintiff sued the defendant for damages to his automobile, alleging that the defendant was negligently running his own automobile at the time on the left-hand side of a city street, forbidden by an ordinance, and thus caused a collision, resulting in the damages claimed in his action. There was conflicting evidence as to whether the plaintiff was on the wrong side of the street and caused the collision by turning his automobile as the defendant turned to the left side of the street to avoid the collision, when imminent, and whether the consequent damages resulted from the plaintiff's negligence. The ordinance made it lawful to cross over to the left-hand side of the street for certain purposes, and it is held for reversible error that the court charged the jury that the defendant was negligent if, at the time of the collision, he was on the left-hand side of the street, as such withdrew from the consideration of the jury that the defendant had a right under the provisions of the ordinance to drive on the left-hand side of the street for lawful purposes, and also the question of proximate cause. *Ledbetter v. English*, 125.

6. *Municipal Corporations—Cities and Towns—Ordinances—Trials—Negligence Per Se—Proximate Cause.*—While the violation of a city ordinance relating to the running of automobiles on the streets of a city

NEGLIGENCE—*Continued.*

is negligence *per se*, it is necessary, to recover damages alleged to have been caused thereby, that the plaintiff show that this negligence was the proximate cause of the injury complained of. *Ibid.*

7. *Railroads—Master and Servant—Trials—Negligence — Moving Train—Contributory Negligence—Questions for Jury.*—An inexperienced employee of a railroad company acted under the peremptory order of the defendant's vice principal, whom he was required to obey, in attempting to board defendant's moving freight train, to go to another station to get the company's mail, and was thrown beneath the train to his injury. *Held*, the verdict of the jury awarding damages was rendered under competent evidence, and correct instructions of the court in relation to employee's acting within the scope of his duties and to the issue of defendant's negligence; and that the issue as to contributory negligence could not properly be answered in defendant's favor as a matter of law. *Myers v. R. R.*, 233.

8. *Master and Servant—Safe Place to Work—Trials—Negligence—Questions for Jury.*—The plaintiff was an employee of the defendant in its power-driven manufacturing plant, and was injured while endeavoring to lace a belt in the course of his employment, on account of his hand being caught by the belt and carried to the shafting. There was evidence that the defendant furnished "blackjack" for the belt dressing, which was improper and would become very sticky, and that the plaintiff's hand, for that reason, was caught by the belt, resulting in the injury; that by the use of certain methods the belt could have been safely detached and laced in safety, and, also, that the plaintiff properly availed himself thereof; that the belt was old and worn and had broken several times on that day. *Held*, it was for the jury to determine whether the defendant had negligently failed in its duty to the plaintiff by furnishing defective material for the belt dressing, and whether such was the proximate cause of the injury; and, also, whether the plaintiff should have previously reported the defective material to the defendant under the circumstances of this case. *McAtee v. Mfg. Co.*, 448.

9. *Master and Servant—Safe Place to Work—Contributory Negligence—Trials—Questions for Jury.*—In this case it is held that whether the plaintiff, employee of the defendant, selected an unsafe way to do the work arising within the scope of his employment when in the exercise of proper care a safe way was open to him, is a question of fact for the determination of the jury. *Ibid.*

10. *Negligence—Contributory Negligence—Assumption of Risk—Trials—Burden of Proof.*—When assumption of risk and contributory negligence are relied on as defenses in an action to recover damages for a personal injury alleged to have been negligently inflicted on the plaintiff, the burden of proof of such defenses is on the defendant; and under the circumstances of this case it is held that issues of fact thereon were raised, and properly left to the determination of the jury. *Ibid.*

11. *Carriers of Passengers—Flag Stations—Failure to Stop—Tickets—Negligence—Interpretation of Statutes.*—A passenger on a railway train is entitled, as a matter of right, to have the train stop at a station to which he has purchased his ticket; and where his destination is a flag

NEGLIGENCE—*Continued.*

station at which the train fails to stop, attributable to the neglect of the conductor in failing to take up the passenger's ticket in time, the railroad company is answerable for the consequent damages. Revisal, sec. 2611. *Elliott v. R. R.*, 481.

12. *Municipal Corporations—Sidewalks—Obstructions—Trials — Negligence —Contributory Negligence—Questions for Jury—Nonsuit.*—In an action against an incorporated town to recover damages for a personal injury, there was evidence tending to show that for more than two months the defendant had permitted building material to obstruct the sidewalks on both sides of the street, and that the plaintiff's injury was received in consequence of her stumbling upon some loose brick or building material, rendering the sidewalk uneven, as she was going to her home at night; that at this place the obstructions on the sidewalk would not permit two persons to pass abreast of each other; and it was in a shadow cast by a street light from a shed that extended across the sidewalk; and that the plaintiff was mindful of the obstructions in endeavoring to choose her way along: *Held*, evidence sufficient of defendant's actionable negligence in failing to keep the sidewalk in proper condition, and this, with the question of plaintiff's contributory negligence, should be submitted to the jury. *Ovens v. Charlotte*, 159 N. C., 332, and other like cases where the plaintiff knew of the conditions and could have avoided the injury by the exercise of proper care, cited and distinguished. *Darden v. Plymouth*, 492.

13. *Bailments—Contracts—Hire of Mule—Negligence—Trials.* — An agreement of hire of a mule for plowing purposes for a period of two weeks, at the end of which time the mule should be returned in as good condition as received, is an ordinary bailment determined by the common law relating to bailments for hire; and the bailee, being held to exercise only ordinary care for its preservation and protection, is not responsible for the destruction of the mule and his consequent failure to return it, in the absence of any negligence on his part. *Robertson v. Lumber Co.*, 165 N. C., 4, cited and distinguished. *Sawyer v. Wilkinson*, 497.

14. *Railroads—Negligence—Contributory Negligence—Master and Servant —Insufficient Help—Trials—Evidence—Questions for Jury.*—In this action brought by an employee of the defendant railroad company for damages resulting while loading 560-pound rails, 30 feet long, upon a flat car, 4½ feet from the ground, there was evidence tending to show that the injury occurred while the plaintiff was attempting, under the orders of the defendant's vice principal, to load one of the rails with insufficient help; the plaintiff was on the ground with another man to help him lift the rail to such position and in such manner that others upon the car could receive and place it there; that while lifting a rail in this manner, it slipped from the hands of the plaintiff's helper, inflicting the injury complained of: *Held* sufficient, upon the question of defendant's actionable negligence in failing to furnish sufficient help, to be submitted to the jury, and plaintiff's cause of action was not barred by the defense of contributory negligence as a matter of law, under the evidence. *Pigford v. R. R.*, 160 N. C., 93, applied, and *Bryan v. R. R.*, 128 N. C., 387, distinguished. *Tillett v. R. R.*, 515.

NEGLIGENCE—*Continued.*

15. *Railroads—Animals — Negligence — Statutory Presumptions — Geese—Common Law—Trials—Burden of Proof.*—No presumption of negligence against a railroad company is raised by the mere fact of killing fowls, etc., upon its track in the operation of its trains. Revisal, sec. 2645, makes it *prima facie* evidence of negligence in respect only to "cattle and other live stock," which does not include "geese" or other fowl within its terms. *James v. R. R.*, 572.

16. *Railroads—"Geese"—Judicial Notice—Negligence — Signals — Trials — Evidence—Nonsuit.*—From the phlegmatic disposition of geese, the blowing of the whistle or ringing of the bell is not calculated to make them run or fly to leave the track, as turkeys, a nervous fowl, would do; hence, in an action to recover damages against a railroad company for the killing of geese upon its track by its train, it is not sufficient to submit to the jury, upon the question of defendant's negligence, evidence merely that the geese were killed upon the track by the defendant's train, and that its employees did not sound the whistle or ring the bell of the locomotive. *Lewis v. R. R.*, 163 N. C., 22, cited and distinguished. *Ibid.*

17. *Railroads—Motor Cars—Signals—Crossings—Negligence—Rule of Prudent Man—Questions for Jury.*—It is required of a railroad company that its rolling equipment, in this case a motor car, traveling upon its tracks, shall give such signals while approaching a public crossing as will be reasonably sufficient for the purpose of warning those who intend to cross of their danger, or such as a man of ordinary prudence would in the exercise of reasonable care consider proper under the circumstances of each case. *Hill v. R. R.*, 592.

18. *Same—Lights at Night—Deaf Persons—Look and Listen—Trials—Evidence—Proximate Cause—Questions for Jury.*—Where a deaf person has been injured while attempting to cross a railroad track at night, by a motor car of the railroad company traveling thereon, without a light, bell, or whistle, and there is evidence that he looked and listened before entering upon the track; that the defendant's employees on the car shouted to him to warn him of the danger; that had his hearing been normal he would have become aware of the approaching car; and also conflicting evidence of the speed of the car, and of its having been slowed by the defendant's employees as much as possible in their endeavor to prevent the injury, the issue as to the defendant's negligence is properly submitted to the jury under an instruction that the failure of the defendant to have a light on the car was evidence of negligence, which was actionable if it proximately caused the injury complained of. *Edwards v. R. R.*, 132 N. C., 99, cited and distinguished. *Ibid.*

19. *Railroads—Trials—Lights at Night—Negligence—Contributory Negligence—Defenses.*—The negligence of the employees on a train or motor car of a railroad company running at night without a light, on its railroad track, is not such continuing negligence as will deprive the defendant, in an action for damages for a personal injury, of the defense of contributory negligence on the plaintiff's part. The charge of the court in this case is approved. *Stanley v. R. R.*, 120 N. C., 514, is overruled on this point. *Ibid.*

NEGLIGENCE—*Continued.*

20. *Railroads—Public Crossings—Signals—Pedestrian Away from Crossings —Usages—Negligence—Evidence—Headlights.*—Where a pedestrian is injured by a railroad train while walking upon its track away from a public crossing, evidence is competent tending to show that pedestrians habitually used the track at this place; and where the evidence further tends to show the proximity of a crossing where signals are required to be given by the company, and that if they had been given on the occasion complained of the injury would not have been inflicted, such evidence is competent on the issue of defendant's negligence, relating to the question of whether the defendant was carefully operating its train and giving the signals required. *Powers v. R. R.*, 599.

21. *Railroads—Headlights—Negligence Per Se—Statutes—Criminal Law.*— Running a locomotive on the main line, at night, without a headlight is an indictable offense (Laws 1909, ch. 446), and hence negligence *per se*. *Ibid.*

22. *Railroads—Headlights—Negligence—Pedestrians—Trespassers — Trials —Evidence—Questions for Jury.*—It is negligence for a railroad company to run its train on its main line at night without a headlight on the forward end of the train, and it is responsible in damages for an injury thereby proximately caused to a pedestrian, whether he at the time was a licensee or a trespasser; and where the evidence tends to show that the plaintiff's intestate was seen walking upon the defendant's track at night, where pedestrians were accustomed to walk, going in a certain direction, and that soon thereafter the defendant's train was seen running there in the same direction, and the intestate was found the next morning mutilated on the track in such position as to indicate that he had been killed by the defendant's train, it is sufficient to be submitted to the jury upon the issue as to defendant's negligence, leaving the defense of contributory negligence available to the defendant under the surrounding circumstances. *Griffin v. R. R.*, 624.

23. *Master and Servant—Safe Place to Work — Negligence — Evidence— Proximate Cause.*—While the master is not held to the requirement of guaranteeing the safety of a workman he has engaged to work for him upon the erection of his structure or building, it is nevertheless his duty to provide for him reasonably safe tools and machinery and place to work, and to keep them in such condition as to afford him reasonable protection; and this duty being one personally required of him, he may not delegate it to another and escape liability for damages proximately caused to the servant in the performance of his duties. *Steele v. Grant*, 635.

24. *Master and Servant—Safe Place to Work—Personal Duty—Delegation of Duties—Principal and Agent—Concurring Negligence—Proximate Cause.*—Where the master has negligently failed in his duty to supply the servant with safe appliances and place for the work required of him, and this negligence concurs with that of a fellow-servant in proximately causing an injury to the servant, the master's responsibility is the same as if his negligence was the only cause thereof. *Ibid.*

25. *Same—Trials—Evidence—Nonsuit—Contributory Negligence—Assumption of Risks.*—Plaintiff was employed by the owner in erecting a

NEGLIGENCE—*Continued.*

concrete structure, wherein an elevator was used to take the materials up to the various floors to be used, etc. There was evidence tending to show that plaintiff assisted in raising the head block on the fifth floor, where it was elevated upon a "stiff knee," and the following morning the plaintiff was required by his superior to put in a "cut-off" plank to hold the concrete about to be used in the floors there; that plaintiff called his attention to the fact that the "head block" as placed rendered this work dangerous, and was told to do the work, that it could safely be done if the elevator was not used at that time and that this would be prevented; that while doing the work with this assurance, the elevator was run by some one, resulting in the head block falling upon the plaintiff, owing to its insecure fastenings, to his injury. *Held,* evidence of defendant's actionable negligence proper to be submitted to the jury; and it is *Further held,* there was no evidence that plaintiff had assumed the risk of this dangerous work, or of his contributory negligence. *Ibid.*

NEGRO. See Schools, 2.

NEW TRIALS. See Appeal and Error, 12.

NEWLY DISCOVERED EVIDENCE. See Appeal and Error, 34.

NONSUITS. See Trials.

NOTARIES PUBLIC. See Deeds and Conveyances.

NOTICE. See Tax Deeds; Statutes, 35.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error.

OFFICERS.

1. *Public Officers—Criminal Law—Arrest—Warrant—Offense Committed in Presence.*—An officer may not make an arrest without a warrant except for offenses committed in his presence, and then he should make known to the offender that he is an officer authorized to make the arrest. *S. v. Rogers,* 388.
2. *Public Officers—Criminal Law—Homicide—Arrest—Trials—Burden of Proof—Instructions—Several Motives — Presumption of Innocence.*— Where upon the trial for homicide the defense is interposed by the defendants that they killed the deceased in the performance of their duties as officers authorized to make an arrest in a manner justifiable, or that they had not shot the deceased, and were not responsible for his death, the question of guilt is for the jury to determine, under conflicting evidence, in accordance with how they should ascertain the facts to be, with the burden on the State of proving the defendants guilty beyond a reasonable doubt. *Ibid.*

OFFICERS, DE FACTO. See Deeds and Conveyances, 6.

OFFSETS. See Easements, 1.

ORDINANCES. See Municipal Corporations.

PARENT AND CHILD. See Habeas Corpus.

PAROL EVIDENCE. See Evidence; Deeds and Conveyances, 2, 15, 17; Contracts, 11, 12.

PARTNERSHIP.

1. *Contracts—Restraint of Trade—Partnerships—Waiver.*—F. and R., barbers, were partners in the town of M. F. bought out R. under an express agreement that the latter would not engage in the same business in the town of M. so long as F. continued it there. They again formed a partnership at M., and thereafter R. separately engaged in the trade of barber in opposition to F. *Held*, that the negative stipulation in the agreement of the parties in the former dissolution was intended to prevent rivalry between them in opposing the skill and influence of R. in the business of barber at M., which was not revoked impliedly by the formation of their second partnership, for therein both the skill and influence of R. was for the firm's benefit, and to the advantage of each member, and the formation of the second partnership could not in any manner conflict with the agreement entered into between F. and R. upon the dissolution of the first partnership, nor be considered as a waiver of the rights of F. to insist upon it; and it is further held that the agreement was not objectionable as being in restraint of trade, and is, therefore, enforcible. The law as to contracts in restraint of trade discussed by WALKER, J. *Faust v. Rohr*, 187.
2. *Partnership—Surviving Partner—Dissolution—Transactions, etc., with Deceased—Interpretation of Statutes.*—Where the action involves the question of division of partnership assets between the surviving partner and the heirs at law of the deceased one, and it is pertinent to the inquiry whether the surviving partner had bought out the interest of a third member of the firm and was entitled to his share thereof, testimony of a conversation between the surviving partner and this third person, still living, tending to show such transaction, etc., is not a transaction, etc., with a deceased person prohibited by Revisal, sec. 1631, and is competent. *Brantley v. Marshbourn*, 527.
3. *Partnership — Dissolution — Division of Assets — Surviving Partner—Declaration of Deceased.*—In an action by the surviving partner of a firm against the heirs at law of a deceased member thereof, where the shares of the partners in the assets of the firm are in question, it is held that declarations that had been made by the deceased partner against his interest are competent evidence for the defendants, but otherwise as to his declarations in his own favor made in the absence of the surviving partner. *Ibid.*
4. *Partnership—Dissolution—Division of Assets—Surviving Partner—Evidence—Book Entries.*—Three partners were in business, and one of them was bought out, and the controversy arises as to whether one of the remaining members bought out the retiring member in his own right or for the benefit of the remaining firm, one of whom has since died. In an action by the surviving partner against the representatives of the deceased one, it is competent, upon the question stated, for the plaintiff to show that the deceased partner was the manager of the firm, had possession of its books, and that it nowhere therein appeared by entry that the deceased had any interest in the firm's assets where entries of this character had been made. *Ibid.*

PEDESTRIANS. See Railroads.

PENALTY BOND. See Appeal and Error, 46.

PENALTY STATUTES. See Constitutional Law, 2; Intoxicating Liquors, 2, 3.

PETITION TO REVIEW. See Appeal and Error, 34.

PLEADINGS. See Courts.

1. *Pleadings—Assumption of Risks—Issues—Trials—Courts.*—In order for a defendant to avail itself of the defense of assumption of risk, it must, under our practice, be specially pleaded in the answer, and an issue should be tendered thereon unless it is submitted by the court on its own motion. *Lloyd v. R. R.*, 24.

2. *Actions—Pleadings—Amendments—New Cause of Action—Libel—Boycott—Appeal and Error.*—A new and distinct cause of action is not allowable by amendment to the complaint, and where the original complaint alleges a cause of action for libel, it may not be amended so as to maintain an action for damages arising from an alleged boycott by the defendant; for if the amendment be for the purpose alone of showing malice, it was unnecessary, and if relied on as a cause of action it was not permissible by amendment. *Supreme Council v. Grand Lodge*, 221.

3. *Actions—Misjoinder — Withdrawal of Party — Costs — Amendments—Court's Discretion.*—Where there has been a misjoinder of parties as well as causes of action, it is within the discretion of the trial judge at any time before verdict or adverse decision to permit the withdrawal of one of the parties, leaving the action to proceed singly as to the other, and to allow a proper amendment of the pleadings as to the remaining cause, where the defendant has asked for no affirmative relief and his defense cannot be prejudiced (Revisal, sec. 507); but the defendant is entitled to recover his cost against the party retiring from the case. *Campbell v. Power Co.*, 488.

4. *Severable Contract—Specific Property—Destruction—Pleadings—Counterclaim—Possession—Trials—Burden of Proof.*—The principle upon which a party to a contract with reference to specific property may be relieved from his obligation thereunder when the property has accidentally been destroyed, is in recognition of the general rule that business contracts are imperative in their nature, and where the other party to the contract insists that he has been wronged by the failure of performance, the position should be made available by counterclaim in the former's action to recover for services actually rendered, and where the property destroyed was in the possession of the plaintiff at the time, the burden is on him to show that he was in the exercise of proper care. *Steamboat Co. v. Transportation Co.*, 582.

5. *Bills and Notes—Due Course—Presumptions—Fraud—Pleadings—Burden of Proof—Statutes.*—To rebut the presumption that every holder of a negotiable instrument, acquired before maturity, is one in due course, it is necessary for the defendant in an action thereon to allege fraud, and when properly pleaded, the burden is upon the plaintiff to show the *bona fides* of the transaction (Revisal, secs. 2208, 2201); but in this case it is held that fraud has been insufficiently pleaded, the

PLEADINGS—*Continued.*

allegation being that the maker was induced to sign through the representations or promises of another and for accommodation, without in any manner connecting the plaintiff, who acquired for value and before maturity, with the transactions alleged. *Bank v. Seagroves*, 608.

POSSESSION. See Intoxicating Liquors, 13; Limitations of Actions.

POWER OF COURT. See Courts.

PREJUDICE. See Appeal and Error.

PREMEDITATION. See Homicide.

PRESUMPTIONS. See Trials, 10, 11; Appeal and Error; Husband and Wife; Homicide, 15, 16, 27; Intoxicating Liquors, 12; Criminal Law, 15; Limitations of Actions.

PRINCIPAL AND AGENT. See Banks and Banking, 3; Reformation; Criminal Law, 13; Schools; Vendor and Purchaser, 5.

1. *Principal and Agent—Limited Authority—Inquiry—Knowledge—Ratification.*—Where a special agent acts beyond his authority as such or a general agent acts beyond his ostensible powers, or there is a limitation put thereon of which the person dealing with him is put upon inquiry which would reasonably lead to knowledge that his powers were limited and that he was not authorized to act in the contemplated capacity as representing his principal, the principal would not be bound unless he afterwards ratified the transaction by knowingly receiving and retaining benefits thereunder, or otherwise. *Wynn v. Grant*, 39.

2. *Same—Deeds and Conveyances—Registration—Cancellation of Record—Innocent Purchaser.*—One dealing with a trustee in a deed of trust to secure borrowed money is fixed with notice of the terms expressed in the registered deed, and when it appears therein that one of the notes it secures has not reached maturity, the *cestui que trust* is not bound by any transaction made in his behalf by the trustee as his agent by which he agrees to take before maturity less than the amount specified in the note for its satisfaction and the cancellation of the deed of record; and his failure to produce the note when requested is evidence of his want of authority to thus act, sufficient to put the one dealing with him upon inquiry from which knowledge will be imputed. Hence, when under such circumstances a purchaser of lands has the trust deed thus canceled of record he is not an innocent purchaser for value without notice of the mortgagee's right, and the latter is not bound by the act of the trustee when he has not knowingly received a benefit therefrom, or has not otherwise ratified it. *Ibid.*

3. *Principal and Agent—Ratification—Knowledge.*—In order to bind a principal to the unauthorized acts of his agent by ratification, the act of ratification by the principal must have been done with knowledge of the material facts. *Ibid.*

4. *Same—Repudiation in Part.*—Where the principal has received no benefits from the unauthorized acts of his agent except those that he was otherwise entitled to receive, his retaining these benefits does not

PRINCIPAL AND AGENT—*Continued.*

alone amount to an act of ratification; and it is further held, under the circumstances of this case, that the doctrine forbidding the principal to ratify the acts of his agent to the extent of the benefits he has received, and repudiate it as to its disadvantages, has no application. *Ibid.*

PRINCIPAL AND SURETY. See Reformation.

PROBABLE CAUSE. See Attachment, 2, 5.

PROBATE. See Deeds and Conveyances.

PROCESS.

1. *Process—Personal Service—Court's Jurisdiction.*—An action of debt is one personal to the debtor, and requires that personal service be made on the defendant within the territorial jurisdiction of the court issuing the process, or that he has in some recognized manner, by his acts or conduct, acknowledged the jurisdiction of the court so as to become bound by its judgment, where the defendant has no property in the jurisdiction invoked. *Johnson v. Whilden*, 104.
2. *Same—Proceedings in Rem—Levy—Void Judgments.*—Where personal service cannot be obtained upon a debtor in an action upon a money demand, who has property within the jurisdiction of the court, which is sought to be subjected to the payment of the debt, the proceedings are *quasi in rem* against the property subject to execution and levy; and where the interest of the debtor in the property sought to be attached is incapable of levy and sale under execution, and the defendant has not personally been served with process or recognized the jurisdiction of the court, the judgment rendered against him in the proceeding is a nullity. Revisal, secs. 767, 784. *Ibid.*
3. *Same—Trusts and Trustees—Property Subject to Levy.*—A certain land company obtained a decree against its agent, who had bought certain lands with the company's money and had taken title in himself, that he be declared a trustee for his company for the said lands, sell the same and distribute the proceeds among the shareholders of the company. Thereafter a creditor of the land company obtained a judgment for services rendered by publication of summons in attachment against the lands, and under a judgment obtained by default sold the lands under execution and became the purchaser at the sale. The defendant land company being beyond the jurisdiction of the court, had not been served with personal process, nor had it in any manner recognized the jurisdiction of the court. *Held*, the interest of the defendant in the lands was incapable of levy and sale under the execution, and the judgment rendered against it was a nullity. *Ibid.*

PROCESSIONING.

Processioning—Trials—Issues of Fact—Judgment—Direction to Surveyor.—In this proceeding for processioning lands the questions involved are issues of fact found by the jury under correct instruction of the court as to the law thereon; and the judgment rendered according to the verdict, and directing the surveyor to run and mark the line thus ascertained, is held no error. *Austin v. McCollum*, 220.

PROSECUTION BOND. See Appeal and Error, 45.

PROXIMATE CAUSE. See Negligence.

PUBLIC OFFICER. See Officers.

PUBLICATION. See Tax Deeds.

QUESTIONS FOR COURT. See Trials.

QUESTIONS FOR JURY. See Trials.

QUESTIONS OF LAW. See Removal of Causes.

RACE. See Schools, 2.

RACES, SEGREGATION. See Constitutional Law, 8.

RAILROADS. See Statutes, 10; Master and Servant; Easements.

1. *Railroads—Right of Way — Necessary Superstructures — Warehouse—Leases to Patrons—Benefits—Public Duties.*—The principles of law which permit a railroad company to judge of the necessity for the use of its right of way for the convenience of the company and in the furtherance of its corporate business, extends for like purposes to the erection of warehouses or superstructures thereon, and it may permit or lease this right to its patrons as such in consideration of benefits to be received from them in the routing of their freight arising from the use of such buildings as stores and warehouses, when not prejudicial to its other patrons or inconsistent with its duties as a public-service corporation. *Coit v. Owenby*, 136.

2. *Railroads—Master and Servant—Trials—Negligence—Moving Train—Contributory Negligence—Questions for Jury.*—An inexperienced employee of a railroad company acted under the peremptory order of the defendant's vice principal, whom he was required to obey, in attempting to board defendant's moving freight train, to go to another station to get the company's mail, and was thrown beneath the train to his injury. *Held*, the verdict of the jury awarding damages was rendered under competent evidence, and correct instructions of the court in relation to employee's acting within the scope of his duties and to the issue of defendant's negligence: and that the issue as to contributory negligence could not properly be answered in defendant's favor as a matter of law. *Myers v. R. R.*, 233.

3. *Railroads—Negligence—Contributory Negligence—Master and Servant—Insufficient Help—Trials—Evidence—Questions for Jury.*—In this action brought by an employee of the defendant railroad company for damages resulting while loading 560-pound rails, 30 feet long, upon a flat car 4½ feet from the ground, there was evidence tending to show that the injury occurred while the plaintiff was attempting, under the orders of the defendant's vice principal, to load one of the rails with insufficient help; the plaintiff was on the ground with another man to help him lift the rail to such position and in such manner that others upon the car could receive and place it there; that while lifting a rail in this manner, it slipped from the hands of the plaintiff's helper, inflicting the injury complained of: *Held* sufficient, upon the question of defendant's actionable negligence in failing to furnish sufficient help, to be submitted to the jury, and plaintiff's cause of action was

RAILROADS—*Continued.*

not barred by the defense of contributory negligence as a matter of law, under the evidence. *Pigford v. R. R.*, 160 N. C., 93, applied, and *Bryan v. R. R.*, 128 N. C., 387, distinguished. *Tillett v. R. R.*, 515.

4. *Railroads—Crossings—Signals—Stops—Look and Listen—Negligence—Trials—Questions for Jury.*—Whether the failure of a traveler upon the highway in a conveyance to fully stop before entering upon a railroad track at a crossing, in addition to looking and listening, will amount to such contributory negligence as will bar his recovery for injuries consequently received there depends upon the facts and circumstances of each particular case, and is usually a question for the jury; and the absence of signals, warnings, or other precautionary measures usually observed by railroad companies at a given crossing where the injury has occurred is always relevant, and must be given due weight in determining whether the traveler has exercised the degree of care required of him for his own safety. *Shepard v. R. R.*, 539.

5. *Same — Corporation Commission — Orders.*—In this action to recover damages for injury to his automobile caused at night by a collision with the train of defendant railroad company at a public crossing, where there were obstructions caused by buildings coming within a short distance of the track, and when the plaintiff knew the crossing was dangerous, there was evidence tending to show that the plaintiff slowed down the machine and looked and listened before going upon the track, and the collision was caused without signal, light, or other warning, by the train coming suddenly backward upon him and not giving him time to stop his machine; that he was aware of a ruling of the Corporation Commission requiring the railroad company to stop its train before going upon this crossing, and to send an employee with a light ahead to signal to the engineer when there was no danger to those desiring to cross, and that he was looking for this man with the light, and, not seeing him, he did not fully stop his machine, as stated, but fruitlessly endeavored to do so when he became aware of his danger. *Held*, it was for the jury to determine whether the plaintiff was guilty of contributory negligence in not fully stopping his machine before attempting to cross the defendant's track. *Ibid.*

6. *Railroads—Corporation Commission — Orders — Dangerous Crossings—Particular Signals—Negligence.*—An order of the Corporation Commission relative to a certain crossing where the plaintiff in this case was injured required the railroad company to stop its cars at a certain distance from the edge of the street, "and said cars and engine shall remain standing until a man is sent forward to see that no one is approaching, such man at night to carry a lantern as a signal. No cars or engine shall be moved across the street until signaled to do so by the man sent out ahead, etc." *Held*, it is the purpose and intent of the order that the man sent ahead at night with the lantern shall remain upon the crossing with his lighted lantern to afford proper warning that the cars are approaching and to do what is reasonably required to prevent a collision. *Ibid.*

7. *Railroads—Animals—Negligence — Statutory Presumptions — Geese—Common Law—Trials—Burden of Proof.*—No presumption of negligence against a railroad company is raised by the mere fact of killing

RAILROADS—*Continued.*

fowls, etc., upon its track in the operation of its trains. Revisal, sec. 2645, makes it *prima facie* evidence of negligence in respect only to "cattle and other live stock," which does not include "geese" or other fowl within its terms. *James v. R. R.*, 572.

8. *Railroads—"Geese"—Judicial Notice — Negligence — Signals — Trials—Evidence—Nonsuit.*—From the phlegmatic disposition of geese, the blowing of the whistle or ringing of the bell is not calculated to make them run or fly to leave the track, as turkeys, a nervous fowl, would do; hence, in an action to recover damages against a railroad company for the killing of geese upon its track by its train, it is not sufficient to submit to the jury, upon the question of defendant's negligence, evidence merely that the geese were killed upon the track by the defendant's train, and that its employees did not sound the whistle or ring the bell of the locomotive. *Lewis v. R. R.*, 163 N. C., 33, cited and distinguished. *Ibid.*

9. *Railroads—Motor Cars—Signals—Crossings—Negligence—Rule of Prudent Man—Questions for Jury.*—It is required of a railroad company that its rolling equipment, in this case a motor car, traveling upon its tracks, shall give such signals while approaching a public crossing as will be reasonably sufficient for the purpose of warning those who intend to cross of their danger, or such as a man of ordinary prudence would in the exercise of reasonable care consider proper under the circumstances of each case. *Hill v. R. R.*, 592.

10. *Same—Lights at Night—Deaf Persons—Look and Listen—Trials—Evidence—Proximate Cause—Questions for Jury.*—Where a deaf person has been injured while attempting to cross a railroad track at night, by a motor car of the railroad company traveling thereon, without a light, bell, or whistle, and there is evidence that he looked and listened before entering upon the track; that the defendant's employees on the car shouted to him to warn him of the danger; that had his hearing been normal he would have become aware of the approaching car; and also conflicting evidence of the speed of the car, and of its having been slowed by the defendant's employees as much as possible in their endeavor to prevent the injury, the issue as to the defendant's negligence is properly submitted to the jury under an instruction that the failure of the defendant to have a light on the car was evidence of negligence, which was actionable if it proximately caused the injury complained of. *Edwards v. R. R.*, 132 N. C., 99, cited and distinguished. *Ibid.*

11. *Railroads—Trials—Lights at Night—Negligence — Contributory Negligence—Defenses.*—The negligence of the employees on a train or motor car of a railroad company running at night without a light, on its railroad track, is not such continuing negligence as will deprive the defendant, in an action for damages for a personal injury, of the defense of contributory negligence on the plaintiff's part. The charge of the court in this case is approved. *Stanley v. R. R.*, 120 N. C., 514, is overruled on this point. *Ibid.*

12. *Railroads—Public Crossings—Signals—Pedestrians Away from Crossings—Usages—Negligence — Evidence — Headlights.*—Where a pedestrian is injured by a railroad train while walking upon its track away from a public crossing, evidence is competent tending to show that

RAILROADS—*Continued.*

pedestrians habitually used the track at this place; and where the evidence further tends to show the proximity of a crossing where signals are required to be given by the company, and that if they had been given on the occasion complained of the injury would not have been inflicted, such evidence is competent on the issue of defendant's negligence, relating to the question of whether the defendant was carefully operating its train and giving the signals required. *Powers v. R. R.*, 599.

13. *Railroads—Headlights—Negligence Per Se—Statutes—Criminal Law.*—Running a locomotive on the main line, at night, without a headlight is an indictable offense (Laws 1909, ch. 446), and hence negligence *per se*. *Ibid.*

14. *Railroads—Headlights—Negligence—Pedestrians—Trespassers — Trials —Evidence—Questions for Jury.*—It is negligence for a railroad company to run its train on its main line at night without a headlight on the forward end of the train, and it is responsible in damages for an injury thereby proximately caused to a pedestrian, whether he at the time was a licensee or trespasser; and where the evidence tends to show that the plaintiff's intestate was seen walking upon the defendant's track at night, where pedestrians were accustomed to walk, going in a certain direction, and that soon thereafter the defendant's train was seen running there in the same direction, and the intestate was found the next morning mutilated on the track in such position as to indicate that he had been killed by the defendant's train, it is sufficient to be submitted to the jury upon the issue as to defendant's negligence, leaving the defense of contributory negligence available to the defendant under the surrounding circumstances. *Griffin v. R. R.*, 624.

RAPE. See Criminal Law, 28.

RATES. See Commerce, 1, 2, 3, 4.

REFERENCE.

1. *Reference, Compulsory—Exceptions to Order—Trial by Jury—Exceptions to Report—Issues Stated.*—A compulsory reference is proper in a controversy involving conflicting boundaries of lands, but a party may preserve his right to a trial by jury by objecting and excepting to the order at the time it was made; and where he thereafter aptly excepts to the findings of the referee, and sets forth the issues upon which he desires a jury trial, he will not be held to have waived his rights thereto. *Keerl v. Hayes*, 553.

2. *Reference, Compulsory—Exceptions—Collateral Agreements—Substitution of Referee—Waiver—Trial by Jury.*—Parties to an action which has been referred under a compulsory order of the court, who except to the order, but agree that it may be signed out of the term and district, do not by such agreement lose their right to a trial by jury; nor do they lose such right by agreeing to the substitution of another referee, under the terms of the original order, upon the death of the referee therein named. *Ibid.*

REFORMATION.

1. *Reformation—Mutual Mistake—Equity—Written Contracts—Parol Evidence.*—Equity will reform a written instrument when such is necessary to make it express the intention of the contracting parties, which, by reason of mutual mistake or the mistake of the draftsman, it fails to do, if no intervening or superior equities of third persons have arisen by reason of the mistake, this not coming within the rule that parol evidence will not be received to vary the terms of a written contract. *Archer v. McClure*, 140.

2. *Same—Burden of Proof—Trials—Questions for Jury.*—It is required that the proof of the mistake be clear, strong, and convincing, where a written contract is sought to be reformed, the burden of proof being on the party seeking the equitable relief, and the question as to whether the proof meets this requirement is one for the jury, and not for the court, to decide. *Ibid.*

3. *Same—Principal and Surety—Principal and Agent—Indemnity Bond.*—Where a bond of indemnity is given to an agent, instead of to his principal, for whom it was intended, and liability has arisen under its terms and conditions, it may be shown that, by mutual mistake or mistake of the draftsman, the name of the agent was inserted as the obligee, and, upon the proof required, the written instrument may be reformed by parol evidence to speak the true intent of the parties. *Ibid.*

4. *Same—Knowledge Implied—Quantum of Proof.*—In an action involving title to lands, the defendants were restrained from cutting the timber thereon, and it was agreed between the parties that the defendants be permitted to sell the timber to a third person upon indemnifying the plaintiff, with sufficient bond, against loss if he succeeded in his action. This bond was accordingly given, except that by mutual mistake the agent of the plaintiff was named as the obligee. *Held*, equity will reform the bond to make it conform to the actual agreement entered into; and it appearing that the bonding company had notice of the pending action and the purpose of the parties to indemnify the plaintiff therein against any loss of the character stated, it was some evidence of the mistake to be submitted to the jury. *Ibid.*

REGISTRATION. See Trusts and Trustees, 3; Mortgages.

RELEASE. See Fraud.

RELIGIOUS SOCIETIES.

1. *Constitutional Law—Corporations—Municipal Corporations—Taxation—Exemptions—Religious Corporations—Business Purposes.*—A municipal corporation is one designed to create within a prescribed territory a local government of the people therein, as a part of that exercised by the State, with certain and defined restrictions, and our State Constitution, Art. V, sec. 5, exempting municipal corporations from taxation, does not include within its meaning or intent a corporation composed of shareholders which in its form and controlling features is a business enterprise upon which municipal powers have been incidentally conferred in promotion of its primary purpose; and in this case it is held that the property of the Southern Assembly, chartered by special legislative act to establish a municipality for the benefit of

RELIGIOUS SOCIETIES—*Continued.*

the Methodist Episcopal Church, for the purposes of assemblies, conventions, public worship, and the like, may not be exempted from taxation, under our Constitution, it appearing that the ultimate control is in a body of stockholders and that the management shall be in commissioners elected by such stockholders, and that certain business enterprises may be carried on in furtherance of the general scheme. *Southern Assembly v. Palmer*, 75.

2. *Taxation—Special Exemptions—Repeal—Statutes, Interpretation of—Religious Corporations.*—The Southern Assembly was created a municipality for certain church work of the Methodist Episcopal Church by chapter 419, Laws 1909, with the primary purpose of engaging in certain business enterprises, and section 9 of the act exempted its property from taxation in express terms. *Held*, this special exemption was repealed by chapter 46, Public Laws 1911, construed in connection with the machinery act of 1911, ch. 50, sec. 71 (*Davis v. Salisbury*, 161 N. C., cited and applied). The revenue and machinery acts of 1913 should receive the same interpretation. *Ibid.*

REMOVAL OF CAUSES.

1. *Removal of Causes—Appeal and Error—Exceptions—Plea to Jurisdiction.*—Where the Superior Court has ordered a cause removed to the Federal court upon the petition and bond of a nonresident defendant, to which the plaintiff excepted and appealed, resulting in a reversal of this judgment upon the ground of the insufficiency of the petition, the defendant may not enter a plea to the jurisdiction of the State courts to entertain the cause and have the matter determined again. *Lloyd v. R. R.*, 24.

2. *Removal of Causes—Petition—Fraudulent Joinder—Allegations—Jurisdiction—Questions for State Courts.*—The complaint in an action against joint tort feasors determines, upon allegations made in good faith, whether the action shall be joint or several; and where one of the defendants is a nonresident of the State and files a petition and bond for the removal of the cause to the Federal court for diversity of citizenship, upon the ground of fraudulent joinder of the resident defendant, he should allege such facts as to raise the issue of fraud to be tried in the Federal jurisdiction, or the jurisdiction will be retained by the State court, which will determine for itself whether the allegations of the petition are sufficient in law to raise the issue of fraudulent joinder before surrendering its jurisdiction of the cause. *Ibid.*

3. *Removal of Causes—Diversity of Citizenship—Amount Involved—Title to Lands.*—Where a cause is sought to be removed from the State to the Federal court for diversity of citizenship, and it appears from the complaint that damages are alleged for cutting plaintiff's timber in the sum of $2,250, and the petition to remove denies plaintiff's title to the lands, valued at $800, the title to the lands is in controversy, and the amounts thus involved exceeding $3,000, exclusive of interest and cost, it is sufficient for the purposes of removal. *Corporation Commission v. R. R.*, 135 N. C., 81, cited and distinguished. *Brinkley v. Lumber Co.*, 501.

REMOVAL OF CAUSES—*Continued.*

4. *Removal of Causes—Corporations, Domestic—Cause of Action—Venue—Wrong County—Motion to Transfer.*—A corporation of this State should bring its action in the county wherein it has its principal place of business, and not in the county wherein the defendant resides; and where this has not been done, the defendant's remedy is by motion to remove the cause to the proper county. *R. R. v. Spencer*, 522.

5. *Appeal and Error—Transfer of Causes—Principles of Law.*—The action of the trial judge in transferring a cause of action to another county will be reviewed on appeal when such action is based solely on a proposition of law. *Ibid.*

6. *Removal of Causes—Corporations—Charter—Questions of Law—Statutes—Public Documents—Place of Citizenship—Judicial Notice—State Courts—Jurisdiction.*—Where a cause, upon proper petition and bond, is sought to be removed by the defendant from the State to the Federal courts for diversity of citizenship, upon the ground that the movant is a nonresident corporation, the question of citizenship depends upon the construction of its charter, and in determining it the State courts may take judicial notice of pertinent State legislation upon the subject, and reports made by the defendant to the Corporation Commission, which are public documents; and when therefrom it appears that the defendant is a domestic corporation, the State court will retain jurisdiction of the cause; and in this cause, upon examining the various acts of the Legislature incorporating the Atlantic Coast Line Railroad Company, and permitting the consolidation of the Wilmington and Weldon Railroad, and in respect to taxing its branch lines, etc., reserving jurisdiction in the State courts, it is held that this railroad is a domestic corporation as a matter of law, and is not entitled to the removal of the cause on the ground stated. *Cox v. R. R.*, 652.

REPRESENTATION. See Insurance.

RESISTANCE. See Criminal Law, 5.

RES JUDICATA. See Attachment, 3.

RESTRAINING ORDER. See Injunction, 2, 3.

RESTRAINT OF TRADE. See Partnerships.

REVISAL.

SEC.

450. Successful defendant on appeal is entitled to judgment on plaintiff's prosecution bond. *Kenney v. R. R.*, 566.

507. Upon misjoinder of parties and causes of action, the trial judge may permit withdrawal of party on payment of his costs and allow amendment to pleadings. *Campbell v. Power Co.*, 488.

590. Writ of prohibition will not lie from the Supreme Court pending appeal in action for divorce, regarding the custody of minor children. *Page v. Page*, 90.

598. Writ of prohibition will not lie from the Supreme Court pending appeal in action for divorce, regarding the custody of minor children. *Page v. Page*, 90.

REVISAL—*Continued.*

SEC.

605. This section requiring appeal bond has no application to sections 1251, 450; and thereunder successful defendant on appeal may recover on plaintiff's prosecution bond. *Kenney v. R. R.*, 566.

727. In action for malicious prosecution judgment may be issued against person of defendant when execution against property return unsatisfied, and need not be incorporated in the judgment. *Michael v. Leach*, 223.

1251. Successful defendant on appeal is entitled to judgment for costs in trial court and against surety on plaintiff's undertaking. *Kenney v. R. R.*, 566.

1267. In an action in the nature of a creditor's bill by material men to recover for materials furnished the contractor and used by the owner, it is discretionary with the trial judge to tax costs against trust funds in owner's hands. *Bond v. Cotton Mills*, 20.

1496 (29). Discussion of religious qualifications of witnesses. *S. v. Pitt*, 268.

1581. A devise of lands in a will with limitation over to testator's heirs carries a defeasible estate with reference to death of the holder of prior estate, unless contrary intent appears. *Burden v. Lipsitz*, 523.

1954. Interest on unliquidated damages are not recoverable. *Bond v. Cotton Mills*, 20.

1954. In absence of finding of jury, interest on the value of lands taken in condemnation proceedings may not be included by the judge in the judgment rendered. *R. R. v. Mfg. Co.*, 168.

1954. In absence of finding of jury, the judge may not award interest on value of lands taken in condemnation proceedings. *R. R. v. Mfg. Co.*, 168.

2037. When a guest at a hotel leaves without notice to proprietor and paying his bill, it is a question for the jury as to whether it was done surreptitiously to defeat landlord's lien, charge or proof of intent to defraud being unnecessary. *S. v. Hill*, 298.

2060. A license issued for the sale of intoxicating liquors is void and sale thereunder illegal when not issued according to statute. *Smith v. Express Co.*, 155.

2064. A license issued for the sale of intoxicating liquors is void and sale thereunder illegal when not issued according to statute. *Smith v. Express Co.*, 155.

2066. A license issued for sale of intoxicating liquors is void and sale thereunder illegal when not issued according to statute. *Smith v. Express Co.*, 155.

2107. It is not necessary that requirements of this section be met to constitute "color of title" in a wife's deed to her husband. *Norwood v. Totten*, 648.

2117. A married woman may execute conveyance of land without joinder of husband who has abandoned her, and statute is constitutional. *Bachelor v. Norris*, 506.

REVISAL—*Continued.*

SEC.

2173. Transfer of negotiable note to creditor before maturity for antecedent debts constitutes him a holder for value. *Bank v. Seagroves*, 608.

2201. To rebut presumption that holder of negotiable note acquired in due course, before maturity, fraud must be alleged. *Bank v. Seagroves*, 608.

2208. To rebut presumption that holder of negotiable note acquired in due course, before maturity, it is necessary to allege fraud. *Bank v. Seagroves*, 608.

2354. Discussing religious qualifications of witness. *S. v. Pitt*, 268.

2360. Discussing religious qualifications of witness. *S. v. Pitt*, 268.

2575. When consent of owner in taking tenant houses in condemnation proceedings is unnecessary. *R. R. v. Mfg. Co.*, 168.

2578. When consent of owner unnecessary in taking tenant houses in condemnation proceedings. *R. R. v. Mfg. Co.*, 168.

2611. A railroad company is liable in damages for its negligent failure to stop at a flag station to which a passenger had purchased a ticket, caused by not taking up ticket in time. *Elliott v. R. R.*, 481.

2633. Penalty for failure of carrier to deliver shipment of intoxicating liquors cannot be recovered by a druggist not having a valid license. *Smith v. Express Co.*, 155.

2644. The reason of the penalty attaching by this section only when the party recovers the full amount of his claim does not apply to excessive rates, when such have been paid on misinformation of the railroad agent. *Supply Co. v. R. R.*, 82.

2645. No presumption of negligence of railroad company in running over fowls on its track. *James v. R. R.*, 573.

3232. Indictment will not be quashed for interest of foreman of grand jury, when he took no part in passing upon it. *S. v. Pitt*, 268.

3271. Homicide committed in perpetration of, or attempt to perpetrate, a robbery, it is for the jury to determine whether the person charged is guilty of murder in first degree, or less offense. *S. v. Lane*, 334.

3349. Unnatural intercourse between male and male does not come within definition of sodomy, but is "a crime against nature" and punishable, as well as an attempt to commit it. Sec. 3269. *S. v. Fenner*, 247.

3369. An attempt at unnatural intercourse between male and male is punishable. *S. v. Fenner*, 247.

3432. It is not necessary to charge an intent to defraud any particular person, and when an employee obtains by false pretenses any thing of value for a corporation, which is retained by the corporation, the corporation and its employee may be made codefendants in the criminal action. *S. v. Ice Co.*, 366.

3527. A person charged with an offense under one statute may not be convicted under another statute. *S. v. Cardwell*, 309.

3534. Taking this section with the Webb-Kenyon law, the courts will not penalize a carrier for refusal to deliver shipment of intoxicants in violation of our statute. *Smith v. Express Co.*, 155.

REVISAL—*Continued.*

SEC.

3534. A person charged with an offense under one statute may not be convicted under another statute. *S. v. Cardwell*, 309.

3619. Upon trial for intent to produce an abortion, it is competent for experts to testify as to effect of capsule given in producing miscarriage; further, the woman is not an accomplice, and it is unnecessary for the State to show that the drug would have the desired effect. Three years sentence for offense not objectionable as an unusual or cruel punishment. *S. v. Shaft*, 407.

3620. Upon this trial for rape it was not error for judge to refuse two of the issues tendered and to substitute therefor an instruction relating to an assault upon the woman by a male over 18 years of age. *S. v. Lance*, 411.

3668. Upon a trial for rape the judge may charge the jury they should not consider the charges of less offense if they found the defendant guilty of rape, etc. *S. v. Lance*, 411.

3949, amended by ch. 96, sec. 2, Laws 1911, does not interfere with rights and remedies of parties in their personal dealings. *Tomlinson v. Morgan*, 557.

4086. The statute prohibiting entry of child in white school who has negro blood, however remote, is constitutional. *Johnson v. Board of Education*, 468.

RIGHT OF WAY. See Railroads, 1; Easements.

RULES OF COURT. See Appeal and Error.

SAFE APPLIANCES. See Master and Servant, 2.

SAFE PLACE TO WORK. See Master and Servant, 7, 8.

SALES. See Mortgages, 2, 3.

SCHOOLS.

1. *Deeds and Conveyances—Fraud—Trials—Evidence—Nonsuit—Principal and Agent—Schools.*—The plaintiff school trustees having acquired certain real estate by deed for permanent school purposes for freedmen and children, irrespective of color, conducted a school thereon, with one of their number, their secretary, in charge, and when the buildings became inadequate for want of repair, and there being no available funds, the secretary applied for aid to the State Board of Education through its local board of managers, was informed that to receive aid for permanent improvements it was necessary for the title to the property to be in the State, which ultimately resulted in a deed from the plaintiff trustees to the defendant, the State Board of Education, reciting that it was to be held for the purposes of education of the colored youths, etc., whereupon this defendant expended $1,000 in permanent improvements. Thereafter, these buildings becoming again inadequate, this defendant procured about 23 acres of other lands, erected buildings thereon at a cost of $32,000 and therein conducted a satisfactory normal school for the colored race, and proposed to sell the lands acquired from the plaintiffs and use the proceeds to help

SCHOOLS—*Continued.*

pay for the property thus acquired. This action is brought to set aside the plaintiff's deed and enjoin the sale of the lands, on the ground that the plaintiff's secretary had fraudulently represented to some of the plaintiff trustees, illiterate men, that the deed was only a lease of the lands, etc. There was no evidence that the defendants knew of or participated in the fraud, and it is held that a judgment of nonsuit upon the evidence should have been granted, there being no sufficient evidence to show that the plaintiff's secretary was acting as the defendant's agent in the transaction, but only as the agent for his cotrustees, who executed the deed. *School Trustees v. Board of Education*, 463.

2. *Schools—Colored Race—Negro Blood—Constitutional Law.*—Our Constitution, Art. IX, sec. 2, requiring that the General Assembly provide for a "general and uniform system of public schools," etc., and that "the children of the white race and the children of the colored race shall be taught in separate public schools, but that there be no discrimination in favor of or to the prejudice of either race," gives authority to the Legislature to declare what shall be considered a "white child" or a "colored child"; and Revisal, sec. 4086, prohibiting a child "with negro blood in his veins, however remote the strain," from attending a school for the white race is constitutional and valid. Art. XIV, sec. 8, of the Constitution, relating to marriages between the races, has no application. *Johnson v. Board of Education*, 468.

SEARCH AND SEIZURE. See Intoxicating Liquors, 13.

SELF-DEFENSE. See Criminal Law; Homicide, 26, 31, 34.

SERVICE. See Process.

SHERIFF. See Homicide.

SIDEWALKS. See Municipal Corporations, 16.

SIGNALS. See Railroads; Negligence, 16.

SINKING FUND. See Municipal Corporations, 2.

SLANDER.

Slander—Separate Charges—Separate Recovery — Trials — Instructions.— Where there are several and distinct actionable charges in the complaint made against the defendant in an action for slander, and not dependent on each other, with evidence tending to support them all, it is not error for the court to charge the jury that the plaintiff may recover damages should he establish either of the charges. *Watkins v. Lawson*, 216.

SODOMY. See Criminal Law, 1.

SPECIAL VERDICT. See Trials, 35, 38.

SPECIFIC PERFORMANCE. See Equity, 2.

SPECIFIC PROPERTY. See Contracts, 13.

STATEMENT OF PRISONER. See Criminal Law, 24.

STATUTES. See Removal of Causes; Constitutional Law, 2; Intoxicating Liquors.

1. *Municipal Corporations—Township Bonds—General Authority — Limit Prescribed.*—An act providing for the issuance of township bonds for road purposes authorizing an issuance not to exceed at any one time an amount equal to 10 per cent of the taxable value of the property of the township, is a general and valid authority for an issuance of any amount of bonds, at various times for the purpose, within the limit prescribed, which may vary from year to year in accordance with the value of the taxable property therein. *Highway Commission v. Malone*, 1.

2. *Municipal Corporations—Township Bonds — Statutes — Amendments—Authority Suspended—Interpretation of Statutes.* — The Legislature passed an act authorizing the issuance by a township of bonds for road purposes, and passed an amendment thereto, at a subsequent session, that the former act should not be effective until the bonds shall have been issued and placed on the market at a fixed future date: *Held*, the power to negotiate the bonds was not suspended by the amendment, which carried with it the power to sell and deliver, at which time the provisions of the former act becomes effective, if the bonds have been issued and placed on the market within the time fixed therefor. *Ibid.*

3. *Limitation of Actions—Wrongful Death—Executors and Administrators—Interpretation of Statutes.*—The right of action given for the wrongful death of the intestate is given by statute to his administrator, and did not exist at common law. Hence the statute of limitations does not begin to run against such cause of action until the death of the intestate, caused by the personal injury, has resulted. *Causey v. R. R.*, 5.

4. *Contracts—Interest — Interpretation of Statutes — Unliquidated Damages.*—The rule that all moneys due by contract except due on penal bonds shall bear interest (Revisal, sec. 1954) applies whenever a recovery is had for breach of contract and the amount is ascertained from the terms of the contract itself or from evidence relative to the inquiry, and due by one party to the contract to another; and it does not obtain as a matter of law where the interest sought does not come within the provisions of the statute and is by way of unliquidated damages, and there has been no adequate default on the part of the debtor in reference to withholding the principal sum, or a part of it. *Bond v. Cotton Mills*, 20.

5. *Same—Statutory Liens—Material Men—Trusts and Trustees—"Ready, Able, and Willing"—Payment Into Court—Tender.* The relationship of the owner of a building to material men, etc., claiming a balance due to his contractor after receiving from them notice of their liens, is not that of debtor and creditor, in the ordinary sense, for he holds such balance in the nature of a trust to their use; and where the material men, etc., have entered suit in the nature of a creditor's bill to recover, pro rata, the funds so held, the owner is not chargeable with interest on the claims or held to the duty of paying the funds into court pending the action, unless so ordered, in order to avoid the payment of the interest; and the amounts of the respective claims necessarily being uncertain, it is sufficient that he has always been

STATUTES—*Continued.*

ready, able, and willing to pay them upon their being finally passed upon and adjudicated. *Ibid.*

6. *Costs — Court's Discretion — Interpretation of Statutes — Trusts and Trustees.*—It is within the discretion of the trial court to tax the costs accruing upon either of the parties litigant, in an action in the nature of a creditor's bill, brought by material men, claiming under the statutory lien, the unpaid balance due by the owner of a dwelling, etc., to his contractor for its erection (Rev., sec. 1267); and the action of the judge in taxing the trust funds in the owner's hands with the cost is commended in this suit. *Ibid.*

7. *Federal Employers' Liability Act—Damages—Contributory Negligence —Trials—Issues.*—Damages for a personal injury inflicted on the employee by the master under the Federal Employers' Liability Act are considered upon the issue of damages alone, rendering unnecessary a separate issue as to contributory negligence and the amount to be consequently deducted; and the refusal of the trial court to submit such an issue to the jury was proper. *Lloyd v. R. R.*, 24.

8. *Master and Servant—Federal Employers' Liability Act—Trials — Instructions—Issues—Damages.*—Where an action for damages for a personal injury is brought under the Federal Employers' Liability Act, which does not bar the plaintiff's right to recover if he has been guilty of contributory negligence, but permits it to be considered only in diminution of damages, an instruction upon the question of contributory negligence should be addressed to the issue of damages, or it will not be considered. *Ibid.*

9. *Master and Servant—Federal Employers' Liability Act—Interstate Commerce.*—Where an injury is received by an engineer of a railroad company while examining his engine preparatory to taking an interstate train upon its usual run, an action for damages for the injury alleged thus negligently to have been inflicted comes within the meaning of the Federal Employers' Liability Act; for it is not required that the engine be coupled with a train actually employed at the time in carrying interstate commerce. *Ibid.*

10. *Master and Servant — Federal Employers' Liability Act — Railroads— Lessor Roads—Interstate Commerce—Liability of Lessor Roads.*—In this case it is held that the North Carolina Railroad Company, having leased its roadway to the Southern Railway Company necessarily in contemplation of its lessee road engaging in interstate commerce, and providing the necessary spur or lateral tracks for the purpose, is liable for an injury negligently inflicted by the lessee company on its employee, under the Federal Employers' Liability Act, while he was engaged in its interstate commerce, and the lessor road is a proper party to the action. *Ibid.*

11. *Judgments—Interest—Interpretation of Statutes—Trials—Instructions —Evidence.*—Interest is not allowed on a judgment rendered in the Superior Court for damages awarded by the jury to the owner for taking his lands in condemnation (Revisal, sec. 1954); for while the jury may award interest in their verdict, the owner may not complain when such has not been done, in the absence of a special request for instructions with relation to it, and the absence of evidence tending to show he is entitled to it. *R. R. v. Mfg. Co.*, 168.

STATUTES—*Continued.*

12. *Railroads—Condemnation—Dwellings—Tenant Houses — Interpretation of Statutes.*—A railroad proceeded to condemn the lands of a cotton mill corporation, and upon the easement to be acquired there were several tenant houses belonging to the defendant. The defendant resisted the plaintiff's right of condemnation upon the ground that the statute, Revisal, 2575, expressly requires the consent of the owner to the taking of his "dwelling-house, yard, kitchen," etc.: *Held,* the section referred to is an exception to section 2578, giving such public-service corporation the right to condemn lands, and does not apply to tenant houses, but only to the dwelling of the owner of the lands, which is preserved to him for sentimental reasons; and which could not exist where such owner is a corporation renting the dwelling to its tenants. *Ibid.*

13. *Courts—Expression of Opinion—Inferences from Evidence—Witnesses—Failure to Examine—Interpretation of Statutes.* Revisal, sec. 535, forbids the trial judge to express an opinion on the facts involved in the case, at any time, within the hearing of the jury, and this extends to any inference of fact arising from the evidence; and in a criminal prosecution for the sale of intoxicating liquors contrary to our statute, where the one to whom the alleged sale was made has been arrested by the State for the purpose of having his testimony, and he is not introduced as a witness, the prisoner's attorney has a right to comment upon this fact to the jury, as a favorable inference to be drawn by them in favor of his client, and an instruction by the court to disregard this argument is an expression of opinion forbidden by statute. *S. v. Harris,* 243.

14. *Criminal Law—Sodomy—Crime Against Nature—Attempt—Interpretation of Statutes.*—While the unnatural intercourse between male and male in the manner described in this case does not come within the definition of sodomy, it is forbidden by our statute, Revisal, sec. 3349, as a "crime against nature," and is an indictable offense; and an attempt to commit it is punishable under Revisal, sec. 3269. *S. v. Fenner,* 247.

15. *Landlord's Lien—Guests—Surreptitious Departure—Trials — Questions for Jury.*—When there is evidence that one having received accommodation at a hotel left with his baggage without notice to the proprietor and without having paid his hotel bill, it is sufficient for conviction, under ch. 816, Laws 1907; Pell's Rev., 3434a; it being for the jury to determine whether he surreptitiously removed the baggage to defeat the landlord's lien (Rev., 2037), the statute not requiring proof or charge of intent to defraud in such instances. *S. v. Hill,* 298.

16. *Cities and Towns—Ordinances—Segregation of Races—Statutes—Interpretation.*—Legislative authority given to a town to pass any ordinance for the good order, good government, or general welfare of the city, provided it does not contravene the laws and Constitution of the State, does not contemplate the passage of an ordinance prohibiting the ownership of land in certain locations and districts, by white or colored people, in accordance with whether the majority of the landowners in that district are white or colored people, such being in contravention of the general policy of the State and questionable as to its validity under the Federal Constitution. *S. v. Darnell,* 300.

STATUTES—*Continued.*

17. *Intoxicating Liquors—Criminal Law—Indictment—Offense Charged—Interpretation of Statutes.*—Where the prisoner is charged with an act made an offense by one statute, he may not be tried and convicted for another act made an offense under a different statute; and where the offense charged is an unlawful sale of whiskey made to a person named, the prisoner may not be convicted under Revisal, sec. 3534, relating to purchases from an illicit dealer; nor under Revisal, sec. 3527, relating to soliciting orders; nor under the Federal Penal Code. *S. v. Cardwell*, 309.

18. *Criminal Law—Municipal Corporations—Disorderly Conduct—Cursing—Ordinances—Statutes.*—Disorderly conduct is a minor offense, not known to the common law, and a person so offending is not indictable except under a statute or authoritative ordinance of a municipality; and where a person is indicted, under the provisions of an ordinance, for cursing on the streets of a town, loud enough to be heard by those passing by and in a disorderly manner, a conviction may not be sustained when it is shown that the cursing was only heard by the policeman making the arrest, though there were others standing near, and was done in a low tone of voice which could not have disturbed any one; and a motion for a nonsuit upon the evidence was properly sustained. Ch. 73, Laws 1913. *S. v. Moore*, 371.

19. *Criminal Law—Abortion—Trials—Evidence—Harmless Error—Interpretation of Statutes.*—Upon trial of a defendant for unlawfully, etc., administering a certain "noxious drug" to a pregnant woman with the intent to produce a miscarriage, against the provisions of Revisal, secs. 3618 and 3619, testimony as to sexual intercourse is immaterial, and its admission harmless error. *S. v. Shaft*, 407.

20. *Criminal Law — Abortion—Expert Evidence—Effect of Drug—Trials—Evidence—Interpretation of Statutes.*—Where the defendant is being tried for an intent to produce an abortion upon a pregnant woman, contrary to Revisal, secs. 3618 and 3619, and there is evidence that a capsule given contained a certain drug, it is competent for experts to testify as to the effect of such in producing a miscarriage. *Ibid.*

21. *Criminal Law—Accomplice—Trials—Evidence—Abortion—Interpretation of Statutes.*—While the judge should caution the jury as to the weight to be given the testimony of an accomplice to the crime upon which the defendant is being tried, a conviction may be had upon the unsupported testimony of the accomplice; but it is held that the victim of the defendant in the latter's effort to produce a miscarriage upon her, contrary to Revisal, secs. 3618 and 3619, is not an accomplice in the crime, in a legal sense, whether she consented thereto or not. *Ibid.*

22. *Criminal Law—Abortion—Intent—Interpretation of Statutes.* It is the intent with which a noxious drug is administered, and the purpose to produce an abortion, that is made indictable under our statutes, Revisal, secs. 3618 and 3619; and it is not necessary for the State to show that administering the drug named would have had the desired effect. *Ibid.*

23. *Criminal Law—Rape—Trials—Instructions—Evidence—Statutes.*—Upon a trial for rape, the prisoner's counsel requested the judge to charge the jury that there were five verdicts which they could return: (1)

STATUTES—*Continued.*

Rape; (2) Assault with intent to commit rape; (3) Assault with a deadly weapon; (4) Simple assault, and (5) Not guilty. The prisoner admittedly was 22 years of age, and there was no evidence of an assault with a deadly weapon. *Held*, it was not error for the judge to refuse to charge upon the third and fourth propositions, and to substitute therefor an instruction relating to an assault by a man or boy over 18 years of age, upon a woman (Revisal, sec. 3620); and *Further held*, the evidence in this case was more than sufficient to sustain a conviction of the capital offense. *S. v. Lance*, 411.

24. *Carriers of Passengers—Flag Stations—Failure to Stop—Tickets—Negligence—Interpretation of Statutes.*—A passenger on a railway train is entitled, as a matter of right, to have the train stop at a station to which he has purchased his ticket; and where his destination is a flag station at which the train fails to stop, attributable to the neglect of the conductor in failing to take up the passenger's ticket in time, the railroad company is answerable for the consequent damages. Revisal, sec. 2611. *Elliott v. R. R.*, 481.

25. *Courts—Expression of Opinion—Credibility of Witness—Interpretation of Statutes.*—Where a material witness for a party to an action has been asked a question which was withdrawn upon objection, and to his answer to the next question asked him adds the testimony called for in the question asked and withdrawn, it is reversible error for the judge to tell the jury that the objectionable part of the answer was stricken out, and to add, "This witness is too smart," for the added portion of the instruction is an expression of opinion by the judge upon the credibility of the witness, and is forbidden by statute. *Chance v. Ice Co.*, 495.

26. *Wills—Estates—Contingent Limitations—Death of Devisee—Direct Beneficiaries—Interpretation of Statutes.*—A devise of lands to B. in fee, "provided he has a child or children; but if he has no child, then to him for life," with limitation over to the testator's heirs at law, carries to the devisee a fee-simple estate, defeasible upon his death without having had a child, the contingent event by which the estate is determined referring to the death of the devisee and holder of the prior estate unless a contrary intent clearly appears from the will itself (Revisal, sec. 1581); and upon his death and nonhappening of the contingency named, the inheritance passes directly from the testator to the ultimate devisees. Hence, when the holder of the prior estate has acquired the interests therein of the childrn of the testator then living, he cannot convey a good title to the land; for prior to his death some of these heirs may have died leaving children, who, in that event, would take directly from the testator as his heirs at law. *Burden v. Lipsitz*, 523.

27. *Partnership—Surviving Partner—Dissolution—Transactions, etc., with Deceased—Interpretation of Statutes.*—Where the action involves the question of division of partnership assets between the surviving partner and the heirs at law of the deceased one, and it is pertinent to the inquiry whether the surviving partner had bought out the interest of a third member of the firm and was entitled to his share thereof, testimony of a conversation between the surviving partner and this third person, still living, tending to show such transaction,

STATUTES—*Continued.*

etc., is not a transaction, etc., with a deceased person prohibited by Revisal, sec. 1631, and is competent. *Brantley v. Marshbourn*, 527.

28. *Partnership—Dissolution—Division of Assets—Surviving Partner—Declaration of Deceased.*—In an action by the surviving partner of a firm against the heirs at law of a deceased member thereof, where the shares of the partners in the assets of the firm are in question, it is held that declarations that had been made by the deceased partner against his interest are competent evidence for the defendants, but otherwise as to his declarations in his own favor made in the absence of the surviving partner. *Ibid.*

29. *Fertilizers — Damage to Crop — Arbitrary Amount — Interpretation of Statutes.*—Rev., sec. 3949, amended by ch. 96, sec. 2, Laws 1911, appearing in Pell's Supplement, p. 239, was enacted as a police regulation to compel manufacturers of fertilizers to keep their goods to the reputed grade, and its provisions do not and were not intended to interfere with the rights and remedies of parties as stipulated and provided for in their personal dealings, so as to fix the damages at an arbitrary amount where the quality of the fertilizer is not as represented, and a recovery is permitted. *Tomlinson v. Morgan*, 557.

30. *Appeal and Error—Defendant's Appeal—Appellee's Costs—Costs—Prosecution Bond—Interpretation of Statutes.*—Where the defendant to an action has appealed from an adverse judgment rendered in the Superior Court, resulting in a reversal thereof in the Supreme Court, he is, upon motion made in the Supreme Court, under Revisal, sec. 1251, entitled to a judgment for his costs on appeal against the sureties on plaintiff's undertaking given in the lower court for the prosecution of the action; for under the language of this section and section 450 this undertaking or prosecution bond is required of the plaintiff to secure all costs, whether in the Superior or Supreme Court; and Revisal, sec. 605, requiring the appellant to give an undertaking for the costs on appeal, cannot apply to such instances. *Kenney v. R. R.*, 566.

31. *Same—Costs Superior Court—Penalty of Bond—Application to Increase.*—Where the defendant has been successful on his appeal to the Supreme Court, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the Superior Court, the remedy is by application to increase the penalty of the bond. *Ibid.*

32. *Railroads—Headlights—Negligence Per Se—Statutes—Criminal Law.*—Running a locomotive on the main line, at night, without a headlight is an indictable offense (Laws 1909, ch. 446), and hence negligence *per se*. *Powers v. R. R.*, 599.

33. *Bills and Notes—Antecedent Debt—Evidence — Trials — Instructions—Courts—Expression of Opinion—Statutes.*—Where a negotiable note held by a debtor bank has been transferred before maturity to its creditor bank, and there is evidence that at the time the former owed to the latter a larger sum of money than the amount of the note, and that the note was transferred as an extinguishment of the debt *pro tanto*, and in an action upon this note, it is introduced in evidence showing an indorsement on the back, made by the plaintiff, "For collection account," it is for the jury to find, under the conflicting evi-

STATUTES—*Continued.*

dence, whether the plaintiff received the note in part payment of the debt or for collection only, and an instruction by the judge that there is no evidence that the plaintiff paid value, and that it was its duty to appear and explain the transaction, is an expression of opinion forbidden by the statute. *Bank v. Seagroves*, 608.

34. *Bills and Notes—Due Course—Presumptions—Fraud—Pleadings—Burden of Proof—Statutes.*—To rebut the presumption that every holder of a negotiable instrument, acquired before maturity, is one in due course, it is necessary for the defendant in an action thereon to allege fraud, and when properly pleaded, the burden is upon the plaintiff to show the *bona fides* of the transaction (Revisal, secs. 2208, 2201); but in this case it is held that fraud has been insufficiently pleaded, the allegation being that the maker was induced to sign through the representations or promises of another and for accommodation, without in any manner connecting the plaintiff, who acquired for value and before maturity, with the transactions alleged. *Ibid.*

35. *Cities and Towns—Claims for Damages—Statutory Notice—Reasonable Opportunity.*—A charter requirement that notice to a city must be given within ninety days after the occurrence of an injury for which it is claimed that the city is responsible through its negligence, is a valid one, and failure to give this notice will bar a plaintiff's right of recovery, unless it is shown by him that it was impossible, on account of his incapacity, with the ordinary means at his hands, to give such notice in the time required. *Hartsell v. Asheville*, 633.

36. *Same—Trials—Evidence—Questions for Jury.*—The reason of a charter requirement that notice be given within ninety days of a claim of damages arising from its negligence is that within that time opportunity will reasonably be afforded the claimant to give such notice; and in this case, there being evidence tending to show that the plaintiff was in a hospital for eight weeks, absolutely helpless, and practically so for three months, and longer, it is held that the question should be submitted to the jury for their finding as to whether or not the plaintiff had been afforded a reasonable opportunity to give the notice in the time required. *Ibid.*

SUBSCRIPTIONS TO STOCK. See Municipal Corporations, 11.

SUPERIOR COURTS. See Courts.

SUPERSTRUCTURE. See Railroads, 1.

SUPREME COURT. See Courts.

SURVEYOR. See Processioning.

TAXATION. See Municipal Corporations.

1. *Constitutional Law—Corporations—Municipal Corporations — Taxation —Exemptions—Religious Corporations—Business Purposes.*—A municipal corporation is one designed to create within a prescribed territory a local government of the people therein, as a part of that exercised by the State, with certain and defined restrictions, and our State Constitution, Art. V, sec. 5, exempting municipal corporations from taxation, does not include within its meaning or intent a corpo-

TAXATION—*Continued.*

ration composed of shareholders which in its form and controlling features is a business enterprise upon which municipal powers have been incidentally conferred in promotion of its primary purpose; and in this case it is held that the property of the Southern Assembly, chartered by special legislative act to establish a municipality for the benefit of the Methodist Episcopal Church, for the purposes of assemblies, conventions, public worship, and the like, may not be exempted from taxation, under our Constitution, it appearing that the ultimate control is in a body of stockholders and that the management shall be in commissioners elected by such stockholders, and that certain business enterprises may be carried on in furtherance of the general scheme. *Southern Assembly v. Palmer*, 75.

2. *Taxation—Special Exemptions—Repeal—Statutes, Interpretation of—Religious Corporations.*—The Southern Assembly was created a municipality for certain church work of the Methodist Episcopal Church by chapter 419, Laws 1909, with the primary purpose of engaging in certain business enterprises, and section 9 of the act exempted its property from taxation in express terms. *Held*, this special exemption was repealed by chapter 46, Public Laws 1911, construed in connection with the machinery act of 1911, ch. 50, sec. 71 (*Davis v. Salisbury*, 161 N. C., cited and applied). The revenue and machinery acts of 1913 should receive the same interpretation. *Ibid.*

TAX DEEDS. See Deeds and Conveyances, 8, 16, 17, 18; Equity, 3.

Tax Deeds—Statutory Requirements—Notice—Publication.—The requirements of the statute relating to the sale of lands for taxes must be strictly complied with to give a good title to the purchaser; and it appearing in this case that the purchaser had not notified the trustee holding the legal title, and there being nothing to show that the publication was made either on the dates or for the number of times required by the statute, it is held that the tax deed is void and carries no title to the purchaser. *Johnson v. Whilden*, 104.

TECHNICAL WORDS. See Removal of Causes, 4, 5.

TELEGRAPHS.

Telegraphs—Mental Anguish—Other States—Lex Loci Contractus.—In an action against a telegraph company to recover damages for mental anguish alone for its negligent failure to transmit to and deliver a telegram in another State, and under the laws of that State a recovery for mental anguish may not be had unless accompanied with injury to the person or property, and it appears that the negligence complained of occurred wholly in such other State, the laws of that State control, and a recovery will accordingly be denied by our courts. *Hornthal v. Telegraph Co.*, 602.

TENANT FOR LIFE. See Estates.

TENDER. See Liens, 1.

TERMS. See Courts, 7.

THREATS. See Homicide.

TIMBER. See Estates.

TRANSFER OF CAUSES. See Removal of Causes, 4, 5.

TRESPASSER. See Railroads.

TRIALS. See Injunction; Appeal and Error; Homicide, 11, 12; Witnesses; Evidence.

1. *Negligence—Master and Servant—Release—Trials—Circumstantial Evidence—Fraud—Evidence—Questions for Jury.*—In this action brought by an administrator to recover damages of a railroad company for the wrongful death of an employee, there was evidence tending to show that the defendant obtained a release from the intestate for all damages arising from the injury, which eventually resulted in his death, for an inadequate consideration, when he was in pain and suffering from the result of the injury, but desired to keep his situation in the defendant's service; that the defendant's claim agent, who procured the release, made conflicting statements, as a witness in defendant's behalf, as to the time and place it was executed, and as to whether the intestate had sent for him; that the payment made to the intestate was only intended to cover the time he had lost from his employment, which it did not do, and not physical or mental pain or suffering caused by the injury; that the agent of defendant was the only one with the intestate when the release was obtained: *Held*, the evidence, though circumstantial in its character, was sufficient to sustain a finding of the jury in plaintiff's favor, upon the issue as to the fraud of the defendant's agent in procuring the release set up as a defense. *Causey v. R. R.*, 5.

2. *Master and Servant — Federal Employers' Liability Act — Trials — Instructions—Issues—Damages.*—Where an action for damages for a personal injury is brought under the Federal Employers' Liability Act, which does not bar the plaintiff's right to recover if he has been guilty of contributory negligence, but permits it to be considered only in diminution of damages, an instruction upon the question of contributory negligence should be addressed to the issue of damages, or it will not be considered. *Lloyd v. R. R.*, 25.

3. *Master and Servant—Safe Appliances—Duty of Master—Inspection—Negligence—Trials—Burden of Proof.*—The plaintiff, an engineer on defendant's railroad, was injured while inspecting his locomotive or in operating a defective lever thereon, while making the inspection, and in his action to recover damages for personal injuries inflicted on him, a charge by the court to the jury is held correct which requires the plaintiff to show by the preponderance of the evidence that the defendant knew of the defect, or should have known thereof by exercising a reasonable inspection thereof. *Ibid.*

4. *Appeal and Error — Trials — Instructions — Verdict, Directing — Procedure—Rules of Court.*—It is not required that an exception to the direction of a verdict by the court upon the evidence should conform to the particulars of Rules 19 and 34 of the Supreme Court regulating appeals, for it is analogous to instances of nonsuit, which require that the court examine into the pertinent evidence in the record. *Wynn v. Grant*, 39.

TRIALS—*Continued.*

5. *Insurance, Life—Material Representations—Trials—Questions for Jury —Questions for Court.*—In his application for a policy of life insurance the deceased represented he had not been under the care of a physician within two years; that he was at that time in good health; and there was evidence tending to show that both these answers were false, and that the insured had, within that period, and up to the time of his application, been suffering from a serious ailment, attended with nervous derangement and indigestion, the result of his own evil habits and self-abuse, and which, increasing in intensity, resulted in his suicide: *Held*, it was for the jury to determine, upon the evidence, whether the representations were false in the manner stated; and if so, the policy would be avoided as a matter of law, without reference to a fraudulent intent of the insured in making them. *Schas v. Insurance Co.*, 55.

6. *Deeds and Conveyances—Color of Title—Nonsuit—Limitation of Actions.*—Defendant's possession under color is insufficient to ripen his title to lands, where it is shown that plaintiffs' predecessor in title brought suit for the lands before the defendant had been in possession seven years, which action was nonsuited and another action was again instituted by the plaintiffs within a year. *Hopkins v. Crisp*, 97.

7. *Judgments—Collateral Attack—Nonsuit—Independent Action — Motion in the Cause.*—A judgment may not be set aside for irregularities in an independent action, the proper procedure being in the original cause; and where the original action has been nonsuited, and another action has been brought upon the same subject-matter, between the same parties in interest, a defendant may not introduce evidence tending to show that he had not authorized an answer to be filed for him, to repel the bar of the statute of limitations, when the complaint therein was against all of the defendants who ostensibly had answered and proceeded with the trial of the cause to judgment, which appears to be regular on its face. *Ibid.*

8. *Bills and Notes—Fraud and Deceit—Innocent Purchaser—Trials—Burden of Proof.*—Where it is proved or admitted that a negotiable note sued on has been obtained from the maker by fraud, or deceit, the transferee, the plaintiff in the action, must show by the preponderance of the evidence that he was a *bona fide* purchaser or derived his title from such purchaser, and it is insufficient that he acquired the note for value, before maturity. *Bank v. Drug Co.*, 99.

9. *Same—Impeaching Evidence.*—The burden of proof being on the plaintiff, in his action to recover on a negotiable note, to show that he was a *bona fide* purchaser for value, where it is shown that the note was procured from the maker by fraud or deceit, it is not required that the defendant negatively prove that the plaintiff was not such purchaser, and the plaintiff's testimony is subject to attack and to be discredited on cross-examination. *Ibid.*

10. *Trials—Banking—Nonsuit—Due Course of Mail—Presumptions—Evidence Conflicting—Questions for Jury.*—Where the evidence discloses that a letter containing a check on a bank would have been received by the bank in due course of the mail and of its business on a certain day, at which time there were sufficient funds of the maker on deposit with the bank to meet it, and the plaintiff, suing the bank for

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the amount of the check, introduced a part of the defendant's answer in which it was alleged that the defendant "found the check in its mail" two days later, upon a motion to nonsuit, taking the evidence in the light most favorable to the plaintiff, the first date will be taken as the one on which the defendant received the check, the implied allegation of a later date in the answer which was introduced by plaintiff, not being conclusive upon him, but making a conflict in testimony which is for the jury to settle. *Trust Co. v. Bank*, 112.

11. *Trials—Evidence—Mailing Letter—Presumptions.*—Evidence that a letter has been properly posted *prima facie* establishes the fact that it was received by the addressee in the usual course of the mails. *Ibid.*

12. *Municipal Corporations—Cities and Towns—Ordinances — Violation—Trials — Negligence — Proximate Cause — Instructions.*—The plaintiff sued the defendant for damages to his automobile, alleging that the defendant was negligently running his own automobile at the time on the left-hand side of a city street, forbidden by an ordinance, and thus caused a collision, resulting in the damages claimed in his action. There was conflicting evidence as to whether the plaintiff was on the wrong side of the street and caused the collision by turning his automobile as the defendant turned to the left side of the street to avoid the collision, when imminent, and whether the consequent damages resulted from the plaintiff's negligence. The ordinance made it lawful to cross over to the left-hand side of the street for certain purposes, and it is held for reversible error that the court charged the jury that the defendant was negligent if, at the time of the collision, he was on the left-hand side of the street, as such withdrew from the consideration of the jury that the defendant had a right under the provisions of the ordinance to drive on the left-hand side of the street for lawful purposes, and also the question of proximate cause. *Ledbetter v. English*, 125.

13. *Appeal and Error—Trials—Evidence Prejudicial—Fraud.*—In an action brought by individuals against a lumber corporation to recover damages for fraudulent representations as to the quantity and quality of timber owned by the defendant and purchased by the plaintiffs in certain localities, it is reversible error on the defendant's appeal for the court to admit evidence of a separate and different transaction whereby the plaintiffs had mortgaged their homes to the defendant, and had lost them under foreclosure of the mortgage; for such evidence could only be used for the purpose of unduly influencing the jury against the defendant in determining the issues of fraud, and would likely have that result. *Jones v. Pullen*, 115 N. C., 465, and that line of cases, cited and distinguished. *Shepherd v. Lumber Co.*, 130.

14. *Reformation—Mutual Mistake—Burden of Proof — Trials — Questions for Jury.*—It is required that the proof of the mistake be clear, strong, and convincing, where a written contract is sought to be reformed, the burden of proof being on the party seeking the equitable relief, and the question as to whether the proof meets this requirement is one for the jury, and not for the court, to decide. *Archer v. McClure*, 140.

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15. *Same—Principal and Surety—Principal and Agent—Indemnity Bond.*—Where a bond of indemnity is given to an agent, instead of to his principal, for whom it was intended, and liability has arisen under its terms and conditions, it may be shown that, by mutual mistake or mistake of the draftsman, the name of the agent was inserted as the obligee, and, upon the proof required, the written instrument may be reformed by parol evidence to speak the true intent of the parties. *Ibid.*

16. *Same—Knowledge Implied—Quantum of Proof.*—In an action involving title to lands, the defendants were restrained from cutting the timber thereon, and it was agreed between the parties that the defendants be permitted to sell the timber to a third person upon indemnifying the plaintiff, with sufficient bond, against loss if he succeeded in his action. This bond was accordingly given, except that by mutual mistake the agent of the plaintiff was named as the obligee. *Held*, equity will reform the bond to make it conform to the actual agreement entered into; and it appearing that the bonding company had notice of the pending action and the purpose of the parties to indemnify the plaintiff therein against any loss of the character stated, it was some evidence of the mistake to be submitted to the jury. *Ibid.*

17. *Deeds and Conveyances—Reverse Calls—Location of Points—Calls in Deed—Acreage—Distance—Variance—Trials—Evidence.*—Where the disputed title to lands depends upon the location thereof contained in the description of a prior grant, which is represented upon the map filed as a parallelogram with the northern boundary as a river, the first call being definite and fixed, the second call being to a stake upon the river, which by actual survey is found to deflect sharply northward between the first and second calls of the grant, without giving the distance between them, but giving the distance between the other calls to a stake, it is correct that the calls be reversed by the surveyor for the ascertainment of the second call, and then follow course and distance given in grant; and it is held that this manner of ascertaining the boundaries of the land granted is not affected by the number of acres therein specified, or that the distance between the third and the last call does not conform to that given on the map. *Gunter v. Mfg. Co.*, 161.

18. *Grants—Plats—Variance—Trials—Evidence.*—A plat of the land attached to the original grant is not conclusive, and cannot control the words of the grant; and in connection with other testimony, it is competent as evidence that the location by an original survey was different from that actually ascertained by running the calls of the grant. *Ibid.*

19. *Railroads—Condemnation—Right of Way—Cotton Mills—Speculative Damages—Expert Evidence—Trials.*—Where a corporation is the owner of lands being condemned for a right of way by a railroad company, upon which it has tenant houses rented to its employees, and which are situated on a tract of land upon which defendant operates a cotton mill, the defendant is not entitled to recover damages of a speculative character, *i. e.*, such as possible inconvenience caused to its employees by the noise or smoke from the plaintiff's

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trains, or the inconvenience or danger to the operatives in going to or from work; or danger to their children caused by the operation of the railroad near their dwellings; or any possible increase in the cost of operating the plant caused by the running of the plaintiff's trains, etc.; and as the damages recoverable are those apparent to the ordinary observation of persons acquainted with the value of lands in that locality, the matter is not such as would call for "expert opinion" of those who have special knowledge of cotton mills generally and of operating conditions generally affecting their value. *R. R. v. Mfg. Co.*, 168.

21. *Judgments—Interest—Interpretation of Statutes—Trials—Instructions —Evidence.*—Interest is not allowed on a judgment rendered in the Superior Court for damages awarded by the jury to the owner for taking his lands in condemnation (Revisal, sec. 1954); for while the jury may award interest in their verdict, the owner may not complain when such has not been done, in the absence of a special request for instructions with relation to it, and the absence of evidence tending to show he is entitled to it. *Ibid.*

22. *Pleadings—Admissions—Trials—Proof.*—In an action to recover land the defendant cannot avail himself of the objection that there is no evidence of possession of the land by him when the complaint alleges possession by the defendant, and this allegation is not denied in the answer. *Spruce Co. v. Hunnicutt*, 202.

23. *Slander—Separate Charges—Separate Recovery—Trials — Instructions.* —Where there are several and distinct actionable charges in the complaint made against the defendant in an action for slander, and not dependent on each other, with evidence tending to support them all, it is not error for the court to charge the jury that the plaintiff may recover damages should he establish either of the charges. *Watkins v. Lawson*, 216.

24. *Master and Servant—Trials—Gravel Pit—Supports—Negligence — Evidence—Nonsuit.*—The plaintiff's intestate, an employee of the defendant, was at work in the latter's gravel pit, under the supervision of their manager and with the manager's knowledge of the fact. The manager caused a bank of dirt which acted as a brace at the base of the gravel embankment to be removed without providing any support to take its place, and the gravel consequently rolled down upon the intestate and killed him. In an action by the intestate's administrator to recover damages for his death, alleged to have negligently been caused by the defendant, it is held that this was evidence of negligence, and the defendant's motion as of nonsuit was properly denied. *Neville v. Bonsal*, 218.

25. *Master and Servant—Dangerous Employment—Assumption of Risks— Master's Negligence—Nonsuit.*—Whatever is necessary for the servant to do in the course of his employment is incidental thereto and a part thereof, and the servant assumes the risk of the dangerous character of his duties when the employment is a dangerous one; but where an injury is directly caused to the servant by a negligent act of the master or another employee in a superior capacity, in connection with the work, the master is responsible. *Ibid.*

TRIALS—*Continued.*

26. *Processioning—Trials—Issues of Fact—Judgment—Direction to Surveyor.*—In this proceeding for processioning lands the questions involved are issues of fact found by the jury under correct instruction of the court as to the law thereon; and the judgment rendered according to the verdict, and directing the surveyor to run and mark the line thus ascertained, is held no error. *Austin v. McCollum*, 220.

27. *Malicious Prosecution—Trials—Evidence—Nonsuit.*—In an action for damages for malicious prosecution, where it is admitted that the defendant procured a warrant for the arrest of the plaintiff upon the charge of embezzlement, that the plaintiff was acquitted, and there was evidence of the want of probable cause, as well as malice on the part of the defendant in thus acting, a judgment as of nonsuit upon the evidence will be denied. *Michael v. Leach*, 223.

28. *Malicious Prosecution—Execution Against Person—Trials—Nonsuit.*—Where an action for damages for malicious prosecution alleges "an injury to the person or character" of the plaintiff, and upon the evidence the jury have answered the issues in the plaintiff's favor, a judgment is not held for error that execution issue against defendant's property, and if returned unsatisfied in whole or in part, then, upon motion of plaintiff, execution issue against the person of defendant, for the statute, Revisal, 727, gives the plaintiff this right of execution against the person of the defendant without incorporating it in the judgment. *Ibid.*

29. *Trials—Negligence—Nonsuit.*—In this action to recover damages of the defendant it appears that plaintiff, 5 or 6 years old, was injured while at play with other children, jumping from a heavy iron tank lying on defendant's yard. *Held*, the judgment of nonsuit entered in the lower court will not be disturbed, it appearing that an injury of this character could not have been reasonably anticipated, so far as the record discloses. *Wilson v. Lumber Co.*, 226.

30. *Appeal and Error—Nonsuit—Trials—Evidence—Fragmentary Appeal.*—An appeal from a judgment of nonsuit taken upon the ruling of the trial court upon admissibility of evidence not determinative of the controversy will not be considered. *Tester v. Mfg. Co.*, 151 N. C., 602, cited as controlling. *White v. Harris*, 227.

31. *Railroads—Master and Servant—Trials—Negligence—Moving Train—Contributory Negligence—Questions for Jury.*—An inexperienced employee of a railroad company acted under the peremptory order of the defendant's vice principal, whom he was required to obey, in attempting to board defendant's moving freight train, to go to another station to get the company's mail, and was thrown beneath the train to his injury. *Held*, the verdict of the jury awarding damages was rendered under competent evidence, and correct instructions of the court in relation to employee's acting within the scope of his duties and to the issue of defendant's negligence; and that the issue as to contributory negligence could not properly be answered in defendant's favor as a matter of law. *Myers v. R. R.*, 233.

32. *Equity—Contracts—Specific Performance—Trials—Evidence — Balance Due Judgments.*—In an action for specific performance of a contract to convey land, the sufficiency of the writing being admitted, with

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evidence tending to show the full compliance on the part of the plaintiff, and to the contrary, that full amount of payment had not been made thereunder, a judgment of nonsuit is improperly allowed; and should on the new trial it be ascertained that defendant's contention is true in this case, the decree should direct a conveyance upon the payment by the plaintiff of the balance ascertained to be due. *Hooper v. Davies*, 236.

33. *Intoxicating Liquors—Sale—Evidence — Trials — Questions for Jury.*— On trial for the sale of whiskey in violation of our statute there was testimony by witnesses in behalf of the State: by one, that as he was watching through a crack in a wall upon the opposite side of the street, he saw the defendant give another a bottle of whiskey, and thought something passed between them, but did not know what it was; that "this was no more than a step" within the open door of a stable; by another, that he saw the defendant receive "some money" from the one to whom he had given the whiskey. The evidence further tended to show that the receipt of the whiskey and the passing of the money were at different times, between 2 and 5 o'clock of the same afternoon. *Held*, sufficient for conviction. *S. v. Harris*, 243.

34. *Courts—Expression of Opinion—Inferences from Evidence—Witnesses —Failure to Examine—Interpretation of Statutes.* Revisal, sec. 535, forbids the trial judge to express an opinion on the facts involved in the case, at any time, within the hearing of the jury, and this extends to any inference of fact arising from the evidence; and in a criminal prosecution for the sale of intoxicating liquors contrary to our statute, where the one to whom the alleged sale was made has been arrested by the State for the purpose of having his testimony, and he is not introduced as a witness, the prisoner's attorney has a right to comment upon this fact to the jury, as a favorable inference to be drawn by them in favor of his client, and an instruction by the court to disregard this argument is an expression of opinion forbidden by statute. *Ibid.*

35. *Verdicts, Special—Inferences—Trials—Questions for Jury—Appeal and Error.*—It is for the jury to draw inferences from the facts found or agreed upon, and not for the courts; and a special verdict is defective which contains merely a recital of evidence of a circumstantial nature, and on appeal therefrom a new trial will be ordered. *S. v. Fenner*, 248.

36. *Evidence—Expression of Opinion—Inferences—Questions for Jury—Argument of Counsel—Appeal and Error.*—It is for the jury to draw reasonable inferences from the evidence, and counsel may argue to them the inferences to be drawn; and while the court may instruct the jury that there is no direct evidence of the conclusion argued, it is reversible error to charge them to pay no attention to the argument, as such is an expression of opinion forbidden by statute, and deprives the client of the benefit of his attorney's services therein. *S. v. Lee*, 250.

37. *Criminal Law—Evidence—Inference—Malice.*—Upon this trial for highway robbery alleged to have been committed at the point of a pistol as the prosecutor was on his way to church in a country community, at a place comparatively thickly settled, evidence that the defendant

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did not have a pistol; that shortly after the time of the offense charged the prisoner went into the meeting and afterwards left with a young woman, to whom he was engaged, living in the same neighborhood with the prosecutor, and whom the prosecutor knew, was, under the further circumstances of the case, sufficient upon which to base the inference and argument that the prosecutor had been influenced through jealousy and malice in swearing out the indictment. *Ibid.*

38. *Trials—Special Verdict—Inferences of Fact—Questions for Jury.*—A special verdict which refers to the decision of the judge any fact or inference of fact necessary to the determination of the issue is insufficient in law, and will be set aside. *S. v. Allen*, 265.

39. *Criminal Law—Arrest Without Warrant—Resistance—Necessary Force—Questions for Jury.*—One who is being arrested by the prosecutor, without a warrant, has a right to resist and use all the force which, in the judgment of a jury, was necessary to free himself, on the facts as they reasonably appeared to him at the time. *Ibid.*

40. *Same—Evidence—Inferences of Fact.*—In this case the prisoner was arrested for violating the prohibition law by the prosecutor without a warrant, while driving in a buggy on the highway, and found with from 3 to 5 gallons of intoxicating liquor in his possession. Later the prosecutor held the defendant's pistol in his right hand, and leaned over in the buggy to move the bottles or prevent the loss of them, and while in this position the prisoner cut him several times with a knife, a violent struggle ensued, in which the prosecutor was twice cut, which resulted in the prisoner's submission to be bound and taken to jail, wherein he was incarcerated without either warrant or mittimus. *Held*, it was for the jury to determine whether the prisoner cut the prosecutor in an effort to free himself; and whether it was necessary for such purpose is an inference of fact, likewise for their determination. *Ibid.*

41. *Criminal Law—Larceny from Employer—Confidence—Trials—Evidence.*—Upon a trial for larceny from an employer, evidence of whether or not the prisoner was trusted by the employer is incompetent. *S. v. Pitt*, 268.

42. *Criminal Law—Instructions—"Reasonable Doubt"—Definition.*— No particular formula is required of the judge in defining to the jury what is "reasonable doubt" in a criminal action; and his stating it to be "the same kind of reasonable doubt that an honest man meets up with in human life" is held to be no error in this case. *Ibid.*

43. *Intoxicating Liquors—Trials—Evidence—Declarations—Questions for Jury.*—Held in this case, charging an unlawful sale of intoxicating liquor under ch. 44, Public Laws 1913, sec. 1, testimony that the defendant did not have any business is competent upon the question as to whether he was a druggist, etc.; and as to whether his declarations that he had sold intoxicants were made in jest was properly for the determination of the jury. *S. v. Moore*, 284.

44. *Landlord's Lien—Guests—Surreptitious Departure—Trials—Questions for Jury.*—When there is evidence that one having received accommodation at a hotel left with his baggage without notice to the pro-

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prietor and without having paid his hotel bill, it is sufficient for conviction, under ch. 816, Laws 1907; Pell's Rev., 3434a; it being for the jury to determine whether he surreptitiously removed the baggage to defeat the landlord's lien (Rev., 2037), the statute not requiring proof or charge of intent to defraud in such instances. *S. v. Hill*, 298.

45. *Homicide—Dying Declarations—Trials—Evidence.*—Where the prisoner shot the deceased, causing death the following day, and there is evidence that the deceased was informed by his attending physician that he could not recover from the wound, and that he was aware of its fatal nature, his declarations are competent evidence against the prisoner upon trial for the homicide. *S. v. Shouse*, 306.

46. *Homicide—Deadly Weapon—Trials—Presumptions—Evidence — Appeal and Error—Harmless Error.*—Upon the trial for murder, the law presumes malice from the killing with a pistol shot, and it is for the prisoner to show that the shooting was done under such circumstances as would justify the act or render it manslaughter; and where the jury has returned, in such case, a verdict of murder in the second degree, errors committed in admitting evidence of previous threats upon the question of premeditation and deliberation necessary for conviction of murder in the first degree are rendered harmless. *Ibid.*

47. *Homicide—Trials—Murder in First Degree—Instructions—Appeal and Error—Harmless Error.*—The trial judge having explained to the jury the principles of law applicable upon the evidence in a trial for homicide, a portion of the charge, that if the prisoner killed the deceased with premeditation and deliberation, as theretofore explained to them, and this is shown beyond a reasonable doubt, the prisoner would be guilty of murder in the first degree, is not held for error. *S. v. McClure*, 321.

48. *Trials—Instructions—Evidence—Harmless Error.*—Where in the trial of an action evidence has been erroneously admitted and afterwards withdrawn by the court from the jury with an instruction to them that they must disregard it, this Court will presume that the jury have obeyed the instruction of the court, and that the error has been cured. *S. v. Lane*, 333.

49. *Trials—Evidence Admitted—Motion to Withdraw—Objections—Appeal and Error.*—When evidence has been admitted upon the trial of an action without objection from the appellant, his subsequent motion to strike it out is addressed to the discretion of the judge, and there is no appeal from his ruling thereon. *Ibid.*

50. *Trials—Attorney and Client—Argument—Irrelevant Matter—Courts.*—While counsel in their argument to the jury are usually permitted much latitude, they should confine themselves to relevant matters, and on a trial for murder it was not error for the court to stop the prisoner's counsel, when he was introducing irrelevant matters into his argument calculated to divert the minds of the jurors from the true issue and to prejudice the other side. *Ibid.*

51. *Homicide—Murder—Trials — Confessions — Evidence.*— The verdict of the jury convicting the prisoner of murder in the first degree was well supported by the evidence, under correct instructions from the court, and the prisoner's voluntary confession to a fellow prisoner, while in

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the jail with him, that he had committed the crime deliberately and premeditatedly, is held to be competent evidence against him to prove his guilt as found by the jury. *Ibid.*

52. *Trials—Courts—"Reasonable Doubt" — Words and Phrases — Instructions—Evidence.*—The trial judge is not restricted to any particular formula in defining "reasonable doubt" to the jury upon a trial for homicide, and his charge in regard to the nature of the circumstantial evidence in this case and how the jury should consider it is held to be free from any error of which the prisoner can complain. *Ibid.*

53. *Homicide—Assault—Trials—Instructions—Burden of Proof—Questions for Jury.*—Upon a trial for murder wherein it appears that the prisoner killed the deceased with a deadly weapon while the latter was making an assault upon him unarmed, but that the deceased was of greatly superior strength and a dangerous character, matter in justification may be shown by the prisoner, both from his own and the State's evidence, that, under the circumstances, he killed his assailant with reasonable apprehension that it was necessary to do so either to save his own life or to keep himself from great bodily harm, though ordinarily the use of a deadly weapon would not be required, the question as to the degree of force the prisoner could use in his self-defense, and how the evidence should be considered, being for the jury under correct instructions from the court, the burden of proof being on the prisoner to show matters in mitigation to reduce the offense from murder in the second degree. *S. v. Gaddy*, 341.

54. *Trials—Withdrawing Juror—Court's Discretion—Appeal and Error—Statutes.*—Upon the trial of misdemeanors and felonies less than capital, it is within the discretion of the trial judge to withdraw a juror and make a mistrial when to him the ends of justice seem to require; and in the absence of abuse of the exercise of this discretion therein, no appeal will lie; nor is this position affected by the provisions of ch. 73, Public Laws 1913, passed doubtless to enable a defendant to present the question of his innocence or guilt upon the State's evidence, etc., as a matter of law, with the right of appeal only from final judgment of guilt. *Semble*, if the statute affected the discretion of the trial judge, exception duly noted should be taken to his action and presented on appeal from final judgment or by *certiorari*. *S. v. Andrews*, 349.

55. *Criminal Law—Larceny—Trials—Evidence.*—Evidence is sufficient to sustain a verdict of guilty of larceny which tends to show that the defendant borrowed some money from A., was present in the room and saw A. take the money from his trunk, endeavored to borrow money from others about that time; went to see A. when he and all his family were absent except a little girl about the yard; was seen in A.'s room alone, and left upon the arrival of the wife of A.; had before then only small balance in one bank, not exceeding $50 at any time; and that thereafter, and soon after A.'s money was missing from the trunk, deposited $50 in another bank, in which he had not previously deposited, and two days later made therein another deposit of $200. *S. v. Wellman*, 354.

56. *Homicide—Defense of Home—Justification—Trials—Evidence — Declarations.*—The principle that a man may, under certain circumstances,

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have the right to kill another in defense of his home, does not apply where it is shown that the prisoner, if he was not the aggressor, fought willingly and fiercely, and inflicted the wound when the deceased, who had been visiting his home in a friendly way, was retreating, and declaring he had no intention of hurting any one, and the prisoner's life or limb not being in jeopardy, and the declarations of the prisoner made immediately preceding the homicide and while committing it are competent as evidence against him. *S. v. Robertson*, 356.

57. *Homicide—Deadly Weapon—Malice—Presumptions—Burden of Proof—Appeal and Error—Trials—Instructions.* — Malice will be presumed from the killing of a human being with a deadly weapon, a pistol, rendering the offense, nothing else appearing, murder in the second degree at least, with the burden of proof on the prisoner to show matters of justification, excuse, or mitigation; and where the instructions given by the court thereon are correctly but generally stated, the failure to give more full or exact instructions will not be held as error in the absence of special prayers therefor, aptly and at the proper time requested. *Ibid.*

58. *Trials—Instructions—Appeal and Error—Record.*—The charge of the court must be construed as a whole, and assignments of error thereon, not supported by the record, will be disregarded on appeal. *Ibid.*

59. *Intoxicating Liquors—Trials—Evidence—Declarations — Conversations.* —Upon a trial of the defendants, husband and wife, for the unlawful sale of intoxicating liquors, a witness for the State testified that he was a private detective, and went with one M. to the home of the defendants, with evidence tending to show that he purchased whiskey from the wife in the presence of her husband, and, representing himself as a whiskey salesman, obtained orders from each of the defendants. *Held*, testimony of this witness, that in being introduced to the defendant by M. the latter said the witness could take orders from them, is not hearsay, but competent as a circumstance tending to show that the defendants were engaged in the liquor traffic. *S. v. Seahorn*, 373.

60. *Intoxicating Liquors—Husband and Wife—Trials—Instructions—Presumptions—Appeal and Error—Harmless Error.*—Upon this trial for the unlawful sale of intoxicating liquors, there was evidence tending to show that the defendants, husband and wife, kept such liquors for sale at their home, and that the *feme* defendant made the sale to the State's witness, in the presence of her husband, she testifying that she had not sold any intoxicants, and making no claim, therefore, that she was unlawfully acting under the restraint of her husband. *Held*, the judge erroneously instructed the jury as to their verdict upon their finding as to whether the wife or husband would be guilty upon the evidence of the husband's acquiescence or approval; but it is further held as harmless error, as the jury fully understood that her conviction rested entirely upon the question of whether she made the unlawful sale, and if so, did she act willingly and of her own accord. *Ibid.*

61. *Trials—Instructions—Reading from Decisions — Appeal and Error—Harmless Error—Delays of Trial.*—It is not commended that the trial

TRIALS—*Continued.*

judge while instructing the jury should lengthily read from decisions of this Court bearing, though correctly, upon the law relating to the controversy at issue; but this will not be held for reversible error. *S. v. Cameron*, 379.

62. *Public Officers—Criminal Law—Homicide—Arrest—Trials—Burden of Proof—Instructions—Several Motives — Presumption of Innocence.*—Where upon the trial for homicide the defense is interposed by the defendants that they killed the deceased in the performance of their duties as officers authorized to make an arrest in a manner justifiable, or that they had not shot the deceased, and were not responsible for his death, the question of guilt is for the jury to determine, under conflicting evidence, in accordance with how they should ascertain the facts to be, with the burden on the State of proving the defendants guilty beyond a reasonable doubt. *S. v. Rogers*, 389.

63. *Judge's Charge—Two Motives Inferable—Jury.*—The defendants are not entitled to an instruction that where there are two or more motives for the crime committed the humanity of the law will ascribe it to that which is not criminal. *Ibid.*

64. *Homicide—Trials—Self-defense—Evidence — Instructions — Appeal and Error.*—Upon a trial for a homicide there was evidence tending to show that the deceased and the prisoner were friendly; that V., at whose home prisoner was living, had several days before the homicide given the deceased permission to use his horse and buggy, and that during the night the deceased, unknown to the prisoner, took the horse from the pasture to get a prescription filled for a sick member of his family; that the prisoner was awakened and told some one had stolen the horse, and, arming himself with a gun, went in search of the supposed thief; that soon he heard the horse returning, but did not recognize deceased, who had shaved off his beard, and called to him to stop, but he kept on riding and called out "Quit that!" "Quit that!" etc.; that prisoner twice fired in the air to cause the rider to stop, and the third and fatal shot was fired because prisoner mistook a medicine bottle, which the deceased "flourished," for a pistol; and prisoner testified that he fired in apprehension for his own safety. *Held*, this evidence was sufficient to be submitted to the jury upon the question of whether the defendant reasonably believed, under the circumstances, he was acting in self-defense, or to save himself from death or great bodily harm; and an instruction that the jury return a verdict of manslaughter was reversible error. *S. v. Johnson*, 392.

65. *Criminal Law—Abortion—Trials—Evidence — Harmless Error — Interpretation of Statutes.*—Upon the trial of a defendant for unlawfully, etc., administering a certain "noxious drug" to a pregnant woman with the intent to produce a miscarriage, against the provisions of Revisal, secs. 3618 and 3619, testimony as to sexual intercourse is immaterial, and its admission harmless error. *S. v. Shaft*, 407.

66. *Criminal Law—Accomplice—Trials—Evidence — Abortion — Interpretation of Statutes.*—While the judge should caution the jury as to the weight to be given the testimony of an accomplice to the crime upon which the defendant is being tried, a conviction may be had upon the unsupported testimony of the accomplice; but it is held that the victim of the defendant in the latter's effort to procure a miscarriage

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upon her, contrary to Revisal, secs. 3618 and 3619, is not an accomplice in the crime, in a legal sense, whether she consented thereto or not. *Ibid.*

67. *Trials—Instructions—Special Requests—Contentions—Inferences — Appeal and Error.*—It is not error for the trial judge to refuse to give a prayer for special instruction which recites the contentions of the parties, with favorable inferences to be deduced therefrom, it being for the attorney to draw such inferences from the evidence introduced in his argument to the jury; and where the court may have omitted to state a correct contention of the party, his attorney should bring it to the attention of the court at the proper time, and the party cannot complain when he has not done so. *S. v. Lance*, 411.

68. *Criminal Law—Rape — Trials — Instructions — Evidence — Statutes.*— Upon a trial for rape, the prisoner's counsel requested the judge to charge the jury that there were five verdicts which they could return: (1) Rape; (2) Assault with intent to commit rape; (3) Assault with a deadly weapon; (4) Simple assault, and (5) Not guilty. The prisoner admittedly was 22 years of age, and there was no evidence of an assault with a deadly weapon. *Held*, it was not error for the judge to refuse to charge upon the third and fourth propositions, and to substitute therefor an instruction relating to an assault by a man or boy over 18 years of age, upon a woman (Revisal, sec. 3620); and *Further held*, the evidence in this case was more than sufficient to sustain a conviction of the capital offense. *Ibid.*

69. *Criminal Law—Trials—Witnesses—Interest—Credibility—Instructions.* —Upon this trial for rape, the charge to the jury as to the weight they should give the testimony of the defendant and his relatives, that notwithstanding their personal interest, the jury could consider the testimony in accordance as the witnesses were found to be credible, and if found to be credible, to give it the same weight as that of other witnesses, was not reversible error. *Ibid.*

70. *Criminal Law—Rape—Trials—Instructions — Less Offenses.* — Upon a trial for rape, etc., when the evidence permits, it is proper for the judge to instruct the jury that if they should find the prisoner guilty of rape, they need not consider the less offenses charged in the indictment; but should they not so find, then to consider the question of assault with intent to commit rape, etc. Revisal, sec. 3268. *Ibid.*

71. *Trials—Improper Arguments—Courts—Correction—Appeal and Error—Presumptions.*—Remarks made by a solicitor in the prosecution of a case relating to extraneous matters, calculated to unduly prejudice the defense, should, in proper cases, be promptly rebuked from the bench, with such instruction as will remove from the minds of the jury the prejudice that may have been caused thereby; and when a motion for relief has been made in the trial court based upon matters of this character, set out in an affidavit, upon which the court has not stated the facts, or there are no such findings appearing in the record on appeal, and it does not appear that he was requested to state them, it will be presumed that the facts were found adversely to the appellant, or that the prejudice had been properly removed in some way by the trial judge. This Court cannot consider the affidavit as findings of fact. *S. v. Ray*, 421.

TRIALS—*Continued.*

72. *Trials—Instructions—Self-defense — Necessity to Kill — Questions for Jury.*—The charge of the court to the jury should be construed as a whole, and upon a trial for homicide, wherein the plea of self-defense was relied on, it is not reversible error for the court to instruct the jury that the prisoner must have killed the deceased to save himself from death or great bodily harm, it appearing from the other parts of the charge that the jury were instructed to pass upon the matter in the view of the reasonableness of the necessity as it appeared to the prisoner at the time and under the circumstances, which instruction they could not have misunderstood. *Ibid.*

73. *Homicide—Trials—Defendant's Fault—Evidence.*—Upon this trial for homicide it is held that defendant's prayer for special instruction was properly refused, that "there was no evidence that he (the prisoner) did or said anything to bring on the difficulty with the deceased," there being evidence that he was the aggressor and entered into the fight willingly, and that the deceased, after making the assault, had retreated from five to seven steps, and the prisoner followed him and inflicted the mortal wound with a pistol shot. *S. v. Ray*, 420.

74. *Same—Instructions.*—When one, without fault, has been murderously assailed, he may stand his ground and defend himself even to the extent of taking the life of the assailant, when such is necessary, or it reasonably appears to him to be so, it being for the jury to determine the reasonableness of this necessity from the surrounding circumstances, as they appeared to the prisoner at the time; and where there is evidence tending to show that the prisoner, having been assaulted by the deceased, following him some six or seven steps, while the latter was retreating, and inflicted the deadly wound with a pistol shot, an instruction requested by the defendant upon the law of self-defense which omits the view that the defendant must be without fault in bringing on the difficulty, was properly refused. *Ibid.*

75. *Trials—Instructions — Self-defense — Necessity to Kill — Questions for Jury.*—The charge of the court to the jury should be construed as a whole, and upon a trial for homicide, wherein the plea of self-defense was relied on, it is not reversible error for the court to instruct the jury that the prisoner must have killed the deceased to save himself from death or great bodily harm, it appearing from the other parts of the charge that the jury were instructed to pass upon the matter in the view of the reasonableness of the necessity as it appeared to the prisoner at the time and under the circumstances, which instruction they could not have misunderstood. *Ibid.*

76. *Intoxicating Liquors—Search and Seizure — Possession — Prima Facie Case—Trials—Instructions—Appeal and Error—Harmless Error.*—An erroneous charge under the search and seizure law, that one gallon of intoxicating liquor made out a *prima facie* case that defendant had it for the purpose of an unlawful sale, is rendered harmless under the evidence in this case establishing the fact that the defendant had more than that quantity. *S. v. Moore*, at this term, approved, denying the defendant's motion in arrest of judgment for that the warrant did not negative that he was a druggist, etc. *S. v. Atwood*, 438.

77. *Homicide—Trials—Character Witnesses—Specific Acts.*—Upon the trial of a white man for the homicide of a negro boy, it is incompetent to

TRIALS—*Continued.*

ask a witness in the prisoner's behalf whether some third person had not told the deceased that he would eventually be killed for his impudence to white people; and it is also incompetent for the prisoner, in endeavoring to show the character of the deceased, to ask the witness in regard to special acts. *S. v. Melton*, 442.

78. *Tax Deeds—Possession—Presumptions—Burden of Proof—Trials—Evidence.*—R. was seized and possessed of certain lands, and lived thereon, until his death, with W. The latter received a tax deed from the sheriff to the lands, which operated only as color of title, and the two thereafter lived on the lands without change of attitude towards the possession, and after the death of R. his heirs at law sued to remove the tax deed as a cloud upon the title to the lands. W. testified that upon receiving the tax deed he immediately entered into possession of the land, cultivating it, etc. *Held*, there is no presumption in law of adverse possession against a true paper title, and the burden of proof was on W. to show some act of ouster of R., of which the evidence in this case is insufficient. *Fowle v. Whitley*, 445.

79. *Master and Servant—Safe Place to Work—Trials—Negligence—Questions for Jury.*—The plaintiff was an employee of the defendant in its power-driven manufacturing plant, and was injured while endeavoring to lace a belt in the course of his employment, on account of his hand being caught by the belt and carried to the shafting. There was evidence that the defendant furnished "blackjack" for the belt dressing, which was improper and would become very sticky, and that the plaintiff's hand, for that reason, was caught by the belt, resulting in the injury; that by the use of certain methods the belt could have been safely detached and laced in safety, and, also, that the plaintiff properly availed himself thereof; that the belt was old and worn and had broken several times on that day. *Held*, it was for the jury to determine whether the defendant had negligently failed in its duty to the plaintiff by furnishing defective material for the belt dressing, and whether such was the proximate cause of the injury; and, also, whether the plaintiff should have previously reported the defective material to the defendant under the circumstances of this case. *McAtee v. Mfg. Co.*, 448.

80. *Master and Servant—Safe Place to Work—Contributory Negligence—Trials—Questions for Jury.*—In this case it is held that whether the plaintiff, employee of the defendant, selected an unsafe way to do the work arising within the scope of his employment when in the exercise of proper care a safe way was open to him, is a question of fact for the determination of the jury. *Ibid.*

81. *Negligence—Contributory Negligence — Assumption of Risk — Trials—Burden of Proof.*—When assumption of risk and contributory negligence are relied on as defenses in an action to recover damages for a personal injury alleged to have been negligently inflicted on the plaintiff, the burden of proof of such defenses is on the defendant; and under the circumstances of this case it is held that issues of fact thereon were raised, and properly left to the determination of the jury. *Ibid.*

82. *Vendor and Purchaser—Contracts — Warranties — Trials — Evidence—Questions for Jury.*—Representations made by the vendor in the sale

TRIALS—*Continued.*

of an automobile, that it was durable, reliable, first-class in workmanship and material, was well made, and suitable for the roads upon which the vendee would use it; that it would run a certain distance on 1 gallon of gasoline, and was better than a certain other car, are evidence of an express warranty of the car consequently purchased. *Underwood v. Car Co.*, 458.

83. *Deeds and Conveyances—Fraud—Trials—Evidence — Nonsuit — Principal and Agent—Schools.*—The plaintiff school trustees having acquired certain real estate by deed for permanent school purposes for freedmen and children, irrespective of color, conducted a school thereon, with one of their number, their secretary, in charge, and when the buildings became inadequate for want of repair, and there being no available funds, the secretary applied for aid to the State Board of Education through its local board of managers, was informed that to receive aid for permanent improvements it was necessary for the title to the property to be in the State, which ultimately resulted in a deed from the plaintiff trustees to the defendant, the State Board of Education, reciting that it was to be held for the purposes of education of the colored youths, etc., whereupon this defendant expended $1,000 in permanent improvements. Thereafter, these buildings becoming again inadequate, this defendant procured about 23 acres of other lands, erected buildings thereon at a cost of $32,000 and therein conducted a satisfactory normal school for the colored race, and proposed to sell the lands acquired from the plaintiffs and use the proceeds to help pay for the property thus acquired. This action is brought to set aside the plaintiff's deed and enjoin the sale of the lands, on the ground that the plaintiff's secretary had fraudulently represented to some of the plaintiff trustees, illiterate men, that the deed was only a lease of the lands, etc. There was no evidence that the defendants knew of or participated in the fraud, and it is held that a judgment of nonsuit upon the evidence should have been granted, there being no sufficient evidence to show that the plaintiff's secretary was acting as the defendant's agent in the transaction, but only as the agent for his co-trustees, who executed the deed. *School Trustees v. Board of Education*, 462.

85. *Carriers of Passengers—Flag Stations—Negligence—Trials—Requests—Appeal and Error—Objections and Exceptions.*—An exception that the court did not limit the admission of corroborative evidence to its corroborative character must be taken to the refusal of the court to so limit it upon appellant's request; and where the record is silent in this respect, it is presumed on appeal that this was properly done by the trial court. *Elliott v. R. R.*, 481.

86. *Canals—Water and Water-courses—Bridges — Maintenance — Convenience—Title—Damages—Trials—Evidence.* — "Turner's Cut" was dug by the predecessor of the defendant from the mouth of its canal to a point on the Pasquotank River to avoid going through "Moccasin Tract" with boats, and thus saving some distance in their travel. When the defendant purchased the property of its predecessor, the Dismal Swamp Canal Company, there was a bridge over "Turner's Cut," which it maintained, and erected a phone station to notify boats and rafts going through the "cut." In cutting down expenses, the

defendant did away with the phone station and ceased to maintain the bridge. The plaintiffs seek to compel the defendant to maintain this bridge for the benefit of their toll road, and by amendment of the pleadings to recover damages for the defendant's failure to maintain it. *Held*, it was competent for the defendant to prove that it had never acquired or claimed title to the lands through which "Turner's Cut" had been dug; that the United States Government had taken over and controlled the "cut" as a part of its public waterways, appropriating large sums of money for its maintenance; and that the defendant had previously maintained the bridge only for its own convenience; and *Further held*, that upon the facts established, there was no liability upon the defendants. *Hinton v. Canal Co.*, 484.

87. *Municipal Corporations—Sidewalks—Obstructions—Trials — Negligence —Contributory Negligence—Questions for Jury—Nonsuit.*—In an action against an incorporated town to recover damages for a personal injury, there was evidence tending to show that for more than two months the defendant had permitted building material to obstruct the sidewalks on both sides of the street, and that the plaintiff's injury was received in consequence of her stumbling upon some loose brick or building material, rendering the sidewalk uneven, as she was going to her home at night; that at this place the obstructions on the sidewalk would not permit two persons to pass abreast of each other; and it was in a shadow cast by a street light from a shed that extended across the sidewalk; and that the plaintiff was mindful of the obstructions in endeavoring to choose her way along: *Held*, evidence sufficient of defendant's actionable negligence in failing to keep the sidewalk in proper condition, and this, with the question of plaintiff's contributory negligence, should be submitted to the jury. *Ovens v. Charlotte*, 159 N. C., 332, and other like cases where the plaintiff knew of the conditions and could have avoided the injury by the exercise of proper care, cited and distinguished. *Darden v. Plymouth*, 492.

88. *Bailments—Contracts—Hire of Mule—Negligence—Trials.*—An agreement of hire of a mule for plowing purposes for a period of two weeks, at the end of which time the mule should be returned in as good condition as received, is an ordinary bailment determined by the common law relating to bailments for hire; and the bailee, being held to exercise only ordinary care for its preservation and protection, is not responsible for the destruction of the mule and his consequent failure to return it, in the absence of any negligence on his part. *Robertson v. Lumber Co.*, 165 N. C., 4, cited and distinguished. *Sawyer v. Wilkinson*, 497.

89. *Trials—Negligence—Evidence—Questions for Jury.*—The plaintiff was injured while engaged in sawing logs for the defendant, and was struck by a log which had improperly been placed across a near-by pile of them by the defendant in such position that it would be likely to fall at any moment and strike him. *Held*, sufficient evidence of defendant's actionable negligence to be submitted to the jury. *Keech v. Lumber Co.*, 503.

90. *Master and Servant—Independent Contractor—Issues — Trials — Questions for Jury.*—The evidence in this case is conflicting as to whether the defendant had let out the doing of the work, wherein the plaintiff

TRIALS—*Continued.*

was injured, to an independent contractor; and the charge of the trial judge upon the evidence, on this phase of the case, given upon the issue of negligence, is held no error, there being no specific issue submitted upon the question of independent contractor. *Ibid.*

91. *Attachment—Probable Cause—Trials — Questions for Jury — Questions for Court.*—In this case it is held that the question of probable cause is a mixed one of law and fact, leaving for the jury to determine from the evidence, as a matter of fact, whether the circumstances show the cause to be probable or not probable; but whether, admitting them to be true, they amount to a probable cause is a question of law for the judge. *Tyler v. Mahoney*, 509.

92. *Railroads—Negligence—Contributory—Negligence—Master and Servant —Insufficient Help—Trials—Evidence—Questions for Jury.*—In this action brought by an employee of the defendant railroad company for damages resulting while loading 560-pound rails, 30 feet long, upon a flat car 4½ feet from the ground, there was evidence tending to show that the injury occurred while the plaintiff was attempting, under the orders of the defendant's vice principal, to load one of the rails with insufficient help; the plaintiff was on the ground with another man to help him lift the rail to such position and in such manner that others upon the car could receive and place it there; that while lifting a rail in this manner, it slipped from the hands of the plaintiff's helper, inflicting the injury complained of: *Held*, sufficient, upon the question of defendant's actionable negligence in failing to furnish sufficient help, to be submitted to the jury, and plaintiff's cause of action was not barred by the defense of contributory negligence, as a matter of law, under the evidence. *Pigford v. R. R.*, 160 N. C., 93, applied, and *Bryan v. R. R.*, 128 N. C., 387, distinguished. *Tillett v. R. R.*, 515.

93. *Carriers of Goods—Negligence—Water Damage—Evidence—Questions for Jury.*—*Held*, in this action to recover of the defendant carrier damages caused to a shipment of a carload of peanuts, that the evidence of actionable negligence on the defendant's part was sufficient which tended to show that the shipment was received from it in a damaged condition from water; that during its transportation it had been raining; that the roof of the car leaked, and that the condition of the car was such that the rain could have beaten in between its slats. *Pritchard v. R. R.*, 532.

94. *Same—Trials—Burden of Proof.*—Where one carrier sues another for damages, alleged to have been paid by it, and caused by the latter's negligence, the burden of proof is on the plaintiff to show that the defendant's negligence caused the damages and that the plaintiff had paid them in the amount alleged; and in this case the evidence is held sufficient to be submitted to the jury that the damages were paid by plaintiff's drafts on money in defendant's hands, owing by the latter to the former. *Ibid.*

95. *Contracts—Vendor and Vendee—Deferred Payments—Trials—Evidence.* —The plaintiff carrier purchased from the defendant carrier certain steamboats upon a certain cash payment, with agreement that the balance of the purchase price should be paid in equal amounts at stated times. There was evidence tending to show that the defendant

TRIALS—*Continued.*

carrier had moneys in its hands owing to plaintiff, under a traffic arrangement, sufficient to meet these deferred payments when due, and by the defendant's testimony it was admitted that it had plaintiff's money on hand, but could not state the amounts, and it was *Held*, on the question of allowing the defendant interest on the deferred payments, that it was for the defendant to show exactly what funds it had of plaintiff's on hand at the various times for the payment of interest, and the question was properly left to the determination of the jury. *Ibid.*

97. *Railroads—Crossings—Signals—Stop, Look, and Listen—Negligence—Trials—Questions for Jury.*—Whether the failure of a traveler upon the highway in a conveyance to fully stop before entering upon a railroad track at a crossing, in addition to looking and listening, will amount to such contributory negligence as will bar his recovery for injuries consequently received there depends upon the facts and circumstances of each particular case, and is usually a question for the jury; and the absence of signals, warnings, or other precautionary measures usually observed by railroad companies at a given crossing where the injury has occurred is always relevant, and must be given due weight in determining whether the traveler has exercised the degree of care required of him for his own safety. *Shepard v. R. R.*, 540.

98. *Same—Corporation Commission—Orders.*—In this action to recover damages for injury to his automobile caused at night by a collision with the train of defendant railroad company at a public crossing, where there were obstructions caused by buildings coming within a short distance of the track, and when the plaintiff knew the crossing was dangerous, there was evidence tending to show that the plaintiff slowed down the machine and looked and listened before going upon the track, and the collision was caused without signal, light, or other warning, by the train coming suddenly backward upon him and not giving him time to stop his machine; that he was aware of a ruling of the Corporation Commission requiring the railroad company to stop its train before going upon this crossing, and to send an employee with a light ahead to signal to the engineer when there was no danger to those desiring to cross, and that he was looking for this man with the light, and, not seeing him, he did not fully stop his machine, as stated, but fruitlessly endeavored to do so when he became aware of his danger. *Held*, it was for the jury to determine whether the plaintiff was guilty of contributory negligence in not fully stopping his machine before attempting to cross the defendant's track. *Ibid.*

99. *Carriers of Goods—Express Companies—Failure to Transport—Trials—Evidence—Negligence.*—In an action against an express company for damages arising from the refusal of the defendant to transport a shipment tendered it at a small station where receipts for shipments were not issued, there was evidence tending to show that the railroad and express company had the same local agent, and that the express company received freight for shipment there; the railroad baggage man on the train was also the agent of the express company; the porter on the train usually helped to load express, but refused in this instance, and the shipment was too heavy to be handled by the express messen-

TRIALS—*Continued.*

ger alone; the station agent told the plaintiff, before he tendered the shipment, that it could go by express; the express messenger had his attention called to the shipment and requested the porter to assist him in loading it; the consignment thus tendered was beef, and remained at the station until it had spoiled and was worthless. *Held*, (1) a judgment of nonsuit upon the evidence as to the railroad company was properly rendered; (2) it was for the jury to determine, under conflicting evidence, whether the defendant express company through its authorized agents refused to accept the shipment. *Nelson v. R. R.*, 548.

100. *Contracts—Breach of Warranty—Fertilizer—Tobacco—Evidence.* — In this action to recover the purchase price of certain fertilizers sold and delivered, the defendant set up as counterclaim damages arising from a breach of warranty in the contract of sale; and there was evidence tending to show that the plaintiff had represented the fertilizer to be a certain high-grade brand especially adapted to tobacco, for which the defendant desired it; that the defendant used it upon proper soil for the purpose, and had properly planted and cultivated the crop, and there was a marked diminution of the value of the crop owing to lack of manure; and further, when a member of plaintiff's firm was asked to examine the crop, he said he wished to look no further, for he thought the factory had made a mistake in the use of acid for phosphate. *Held*, evidence sufficient to sustain a verdict awarding damages to the crop arising from the breach of plaintiff's warranty of the quality of fertilizer sold. *Tomlinson v. Morgan*, 557.

101. *Contracts—Interpretation—Technical Words and Expressions—Trials—Evidence—Questions for Jury.*—Where words or expressions used in a contract have a known technical meaning with reference to the subject-matter, this meaning may be shown in evidence, by competent witnesses, and when accepted by the jury will control the interpretation of the contract. *Neal v. Ferry Co.*, 563.

102. *Same—Bridges—Piling—Approximation.*—In an action upon a contract to recover the price for building a bridge, according to the specifications and plans of the defendant's chief engineer, the length and number of the piles were estimated, with the provision that they were an "approximation as nearly as may be forecasted from the plans, profiles, and inspection of the soil, but is not a definite term in this contract." *Held*, it was competent for the plaintiff, who qualified as an expert bridge builder, to testify that in all specifications for bridge building the word approximation is a technical term and has a technical meaning, and an approximate length of pile would mean that it should be within 3 to 5 per cent of the absolute or true length, and that the pilings necessary for the construction of the bridge in accordance with the contract exceeded this discrepancy in their length, upon the question of recovery for the extra material and work accordingly required in their construction. *Ibid.*

103. *Railroads — Animals — Negligence — Statutory Presumptions—Geese—Common Law—Trials—Burden of Proof.*—No presumption of negligence against a railroad company is raised by the mere fact of killing fowls, etc., upon its track in the operation of its trains. Revisal, sec. 2645, makes it *prima facie* evidence of negligence in respect only to

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"cattle and other live stock," which does not include "geese" or other fowl within its terms. *James v. R. R.*, 572.

104. *Railroads—"Geese"—Judicial Notice—Negligence — Signals — Trials—Evidence—Nonsuit.*—From the phlegmatic disposition of geese, the blowing of the whistle or ringing of the bell is not calculated to make them run or fly to leave the track, as turkeys, a nervous fowl, would do; hence, in an action to recover damages against a railroad company for the killing of geese upon its track by its train, it is not sufficient to submit to the jury, upon the question of defendant's negligence, evidence merely that the geese were killed upon the track by the defendant's train, and that its employees did not sound the whistle or ring the bell of the locomotive. *Lewis v. R. R.*, 163 N. C., 33, cited and distinguished. *Ibid.*

105. *Contracts, Written—Timber—Words and Phrases—Lumber—Log Measurement—Expert Evidence — Instructions.*—Lumber is the manufactured product of logs, and where the defendant has entered into a contract with the plaintiff to purchase the timber on his lands, and pay therefor at a certain price per thousand feet of lumber, it is error for the trial judge to charge the jury that the measure of plaintiff's recovery was at the stated price "log measure, including the sawdust that was cut out by the saws, and the slabs"; and the instruction is further held erroneous in ignoring testimony in this case of the custom and the standard ordinarily prevailing for ascertaining the measurement of the timber sold. *Hardison v. Lumber Co.*, 136 N. C., 174, cited and applied. *McKinney v. Matthews*, 576.

106. *Contracts, Written—Executory Contracts — Subsequent Modification—Parol Evidence—Trials—Instructions.* — While a written executory contract is still in the course of performance it may be modified by parol evidence as to subsequent obligations mutually imposed by the parties, and such is not objectionable as varying the writing; and the waiver of any legal rights under the written contract is sufficient consideration to support the promises resting in parol. Hence, where under the written contract sued on the defendant bought the timber on plaintiff's land, to be paid for at a certain price per thousand feet of lumber, and the evidence is conflicting upon the question on the quantity of lumber the defendant had received, it is competent for defendant to show that it was agreed by parol, subsequent to the execution of the writing, and relating to transactions since occurring, that the "tallies" or account kept by the defendant's vendee should control. *Ibid.*

107. *Contracts, Written—Parol Evidence — Explanation — Trials — Instructions.*—Where the number of feet of lumber sold by the plaintiff to defendant is controverted in an action to recover the purchase price, and the defendant had not kept an account thereof, it is error for the trial judge to charge the jury that this was a circumstance they could consider in plaintiff's favor, and exclude from their consideration the defendant's testimony, in explanation, that subsequent to the written contract sued on the parties had mutually agreed by parol to take the tallies of the defendant's vendee, which were introduced in evidence. *Ibid.*

TRIALS—*Continued.*

108. *Several Contracts — Pleadings — Counterclaim — Possession — Trials— Burden of Proof.*—The principle upon which a party to a contract with reference to specific property may be relieved from his obligations thereunder when the property has accidentally been destroyed, is in recognition of the general rule that business contracts are imperative in their nature, and where the other party to the contract insists that he has been wronged by the failure of performance, the position should be made available by counterclaim in the former's action to recover for services actually rendered, and where the property destroyed was in the possession of the plaintiff at the time, the burden is on him to show that he was in the exercise of proper care. *Steamboat Co. v. Transportation Co.*, 582.

109. *Equity—Cloud Upon Title—Tax Deeds—"Color" of Title—Payment of Taxes—Burden of Proof.*—In an action brought to remove a tax deed as a cloud upon title to lands, the defendant as purchaser under such deed being in possession, it is necessary for the plaintiff to prove that the taxes upon the land for which it had been sold had been paid by him, as well as his own paper title. *Lumber Co. v. Pearce*, 588.

110. *Railroads—Motor Cars—Signals—Crossings—Negligence—Rule of Prudent Man—Questions for Jury.*—It is required of a railroad company that its rolling equipment, in this case a motor car, traveling upon its tracks, shall give such signals while approaching a public crossing as will be reasonably sufficient for the purpose of warning those who intend to cross of their danger, or such as a man of ordinary prudence would in the exercise of reasonable care consider proper under the circumstances of each case. *Hill v. R. R.*, 592.

111. *Same—Lights at Night—Deaf Persons—Look and Listen—Trials—Evidence—Proximate Cause—Questions for Jury.*—Where a deaf person has been injured while attempting to cross a railroad track at night, by a motor car of the railroad company traveling thereon, without a light, bell, or whistle, and there is evidence that he looked and listened before entering upon the track; that the defendant's employees on the car shouted to him to warn him of the danger; that had his hearing been normal he would have become aware of the approaching car; and also conflicting evidence of the speed of the car, and of its having been slowed by the defendant's employees as much as possible in their endeavor to prevent the injury, the issue as to the defendant's negligence is properly submitted to the jury under an instruction that the failure of the defendant to have a light on the car was evidence of negligence, which was actionable if it proximately caused the injury complained of. *Edwards v. R. R.*, 132 N. C., 99, cited and distinguished. *Ibid.*

112. *Railroads—Trials—Lights at Night—Negligence — Contributory Negligence—Defenses.*—The negligence of the employees on a train or motor car of a railroad company running at night without a light, on its railroad track, is not such continuing negligence as will deprive the defendant, in an action for damages for a personal injury, of the defense of contributory negligence on the plaintiff's part. The charge of the court in this case is approved. *Stanley v. R. R.*, 120 N. C., 514, is overruled on this point. *Ibid.*

TRIALS—*Continued.*

113. *Bills and Notes—Transferee for Value—Evidence—Trials—Instructions—Courts—Expression of Opinion—Statutes.*—Where a negotiable note held by a debtor bank has been transferred before maturity to its creditor bank, and there is evidence that at the time the former owed to the latter a larger sum of money than the amount of the note, and that the note was transferred as an extinguishment of the debt *pro tanto*, and in an action upon this note, it is introduced in evidence, showing an indorsement on the back, made by the plaintiff, "For collection account," it is for the jury to find, under the conflicting evidence, whether the plaintiff received the note in part payment of the debt or for collection only, and an instruction by the judge that there is no evidence that the plaintiff paid value, and that it was its duty to appear and explain the transaction, is an expression of opinion forbidden by the statute. *Bank v. Seagroves*, 608.

114. *Bills and Notes—Due Course—Presumptions—Fraud—Pleadings—Burden of Proof—Statutes.*—To rebut the presumption that every holder of a negotiable instrument, acquired before maturity, is one in due course, it is necessary for the defendant in an action thereon to allege fraud, and when properly pleaded, the burden is upon the plaintiff to show the *bona fides* of the transaction (Revisal, secs. 2208, 2201); but in this case it is held that fraud has been insufficiently pleaded, the allegation being that the maker was induced to sign through the representations or promises of another and for accommodation, without in any manner connecting the plaintiff, who acquired for value and before maturity, with the transactions alleged. *Ibid.*

115. *Vendor and Purchaser—Principal and Agent—Contracts—Ratification—Knowledge—Fraud—Trials — Evidence — Nonsuit.*—For the unauthorized acts of an agent to bind his principal by ratification, it must appear that the principal acted with knowledge of the facts and circumstances in respect thereto, and where the person dealing with the agent is aware of the fact that he has exceeded his authority, and depends upon the agent's statement that his principal may act favorably thereon, the burden is upon such third person to show the matters necessary to bind the principal by his ratification of the agent's unauthorized act. Thus where an agent for the sale of gasoline entered into a contract with the purchaser to supply him at the former price after the market had greatly advanced, by antedating the contract, and the purchaser was aware of the fact that, at that time, the agent was not only unauthorized to sell the gasoline at the price named, but had been forbidden to do so, and, notwithstanding, relied upon the assertions of the agent that "he would try to get the contract through," the fact alone that the seller shipped out a part of the gasoline at the price specified, being deceived and imposed upon by the date appearing in the contract, is not evidence sufficient of his confirmation of the contract, and the burden of proof being upon the purchaser in his action to enforce delivery of the balance of the gasoline, at the price named, a judgment of nonsuit should be rendered. *Wise v. Texas Co.*, 610.

116. *Railroads—Headlights—Negligence—Pedestrians—Trespassers — Trials—Evidence—Questions for Jury.*—It is negligence for a railroad company to run its train on its main line at night without a headlight on

TRIALS—*Continued.*

the forward end of the train, and it is responsible in damages for an injury thereby proximately caused to a pedestrian, whether he at the time was a licensee or trespasser; and where the evidence tends to show that the plaintiff's intestate was seen walking upon the defendant's track at night, where pedestrians were accustomed to walk, going in a certain direction, and that soon thereafter the defendant's train was seen running there in the same direction, and the intestate was found the next morning mutilated on the track in such position as to indicate that he had been killed by the defendant's train, it is sufficient to be submitted to the jury upon the issue as to defendant's negligence, leaving the defense of contributory negligence available to the defendant under the surrounding circumstances. *Griffin v. R. R.*, 624.

117. *Estates—Waste — Sale of Timber — Improvements — Present Intent—Honest Expenditure—Other Improvements—Trials—Burden of Proof.* —The general rule regarding waste by a life tenant in cutting and selling trees growing upon the inheritance is that he may not do so merely for his own profit; and when such is done for the improvement of the estate, it must be shown by him that sale of the timber was made with the present purpose of the improvements then contemplated, that the proceeds were honestly expended for such purpose, and with regard to the rule that the inheritance will not be substantially injured thereby, etc.; and it is not sufficient to show that the application of the proceeds of sale were subsequently made to improvements, or that in various ways he has expended sums of money in the improvement of the estate equaling that caused by the waste he has committed thereon. *Thomas v. Thomas*, 627.

118. *Cities and Towns—Reasonable Notice—Statutes — Trials — Evidence—Questions for Jury.*—The reason of a charter requirement that notice be given within ninety days of a claim of damages arising from its negligence is that within that time opportunity will reasonably be afforded the claimant to give such notice; and in this case, there being evidence tending to show that the plaintiff was in a hospital for eight weeks, absolutely helpless, and practically so for three months, and longer, it is held that the question should be submitted to the jury for their finding as to whether or not the plaintiff had been afforded a reasonable opportunity to give the notice in the time required. *Hartsell v. Asheville*, 633.

119. *Master and Servant—Trials—Evidence—Nonsuit—Contributory Negligence—Assumption of Risks.*—Plaintiff was employed by the owner in erecting a concrete structure, wherein an elevator was used to take the materials up to the various floors to be used, etc. There was evidence tending to show that plaintiff assisted in raising the head block on the fifth floor, where it was elevated upon a "stiff knee," and the following morning the plaintiff was required by his superior to put in a "cut-off" plank to hold the concrete about to be used in the floors there; that plaintiff called his attention to the fact that the "head block" as placed rendered this work dangerous, and was told to do the work, that it could safely be done if the elevator was not used at that time, and that this would be prevented; that while doing the work with this assurance, the elevator was run by some one, resulting

TRIALS—*Continued.*

in the head block falling upon the plaintiff, owing to its insecure fastenings, to his injury. *Held*, evidence of defendant's actionable negligence proper to be submitted to the jury; and it is *Further held*, there was no evidence that plaintiff had assumed the risk of this dangerous work, or of his contributory negligence. *Steele v. Grant*, 635.

TRIAL BY JURY.

1. *Reference, Compulsory—Exceptions to Order—Trial by Jury—Exceptions to Report—Issues Stated.*—A compulsory reference is proper in a controversy involving conflicting boundaries of lands, but a party may preserve his right to a trial by jury by objecting and excepting to the order at the time it was made; and where he thereafter aptly excepts to the findings of the referee, and sets forth the issues upon which he desires a jury trial, he will not be held to have waived his rights thereto. *Keerl v. Hayes*, 553.
2. *Reference, Compulsory—Exceptions—Collateral Agreements—Substitution of Trustee—Waiver—Trial by Jury.*—Parties to an action which has been referred under a compulsory order of the court, who except to the order, but agree that it may be signed out of the term and district, do not by such agreement lose their rights to a trial by jury; nor do they lose such right by agreeing to the substitution of another referee, under the terms of the original order, upon the death of the referee therein named. *Ibid.*

TRUSTS AND TRUSTEES.

1. *Statutory Liens—Material Men—Trusts and Trustees — "Ready, Able, and Willing"—Payment Into Court—Tender.*—The relationship of the owner of a building to material men, etc., claiming a balance due to his contractor after receiving from them notice of their liens, is not that of debtor and creditor, in the ordinary sense, for he holds such balance in the nature of a trust to their use; and where the material men, etc., have entered suit in the nature of a creditor's bill to recover, pro rata, the funds so held, the owner is not chargeable with interest on the claims or held to the duty of paying the funds into court pending the action, unless so ordered, in order to avoid the payment of the interest; and the amounts of the respective claims necessarily being uncertain, it is sufficient that he has always been ready, able, and willing to pay them upon their being finally passed upon and adjudicated. *Bond v. Cotton Mills*, 20.
2. *Costs—Court's Discretion — Interpretation of Statutes — Trusts and Trustees.*—It is within the discretion of the trial court to tax the costs accruing upon either of the parties litigant, in an action in the nature of a creditor's bill, brought by material men, claiming under the statutory lien, the unpaid balance due by the owner of a dwelling, etc., to his contractor for its erection (Rev., sec. 1267); and the action of the judge in taxing the trust funds in the owner's hands with the cost is commended in this suit. *Ibid.*
3. *Principal and Agent—Ratification—Deeds and Conveyances—Registration—Cancellation of Record—Innocent Purchaser.*—One dealing with a trustee in a deed of trust to secure borrowed money is fixed with

TRUSTS AND TRUSTEES—*Continued.*

notice of the terms expressed in the registered deed, and when it appears therein that one of the notes it secures has not reached maturity, the *cestui que trust* is not bound by any transaction made in his behalf by the trustee as his agent by which he agrees to take before maturity less than the amount specified in the note for its satisfaction and the cancellation of the deed of record; and his failure to produce the note when requested is evidence of his want of authority to thus act, sufficient to put the one dealing with him upon inquiry from which knowledge will be imputed. Hence, when under such circumstances a purchaser of lands has the trust deed thus canceled of record he is not an innocent purchaser for value without notice of the mortgagee's right, and the latter is not bound by the act of the trustee when he has not knowingly received a benefit therefrom, or has not otherwise ratified it. *Wynn v. Grant*, 39.

TURKEYS. See Negligence, 16; Railroads, 8.

UNDERTAKING. See Attachment, 1.

UNDUE INFLUENCE. See Wills, 1.

VENDOR AND PURCHASER. See Municipal Corporations, 2; Contracts, 5, 6, 7.

1. *Vendor and Purchaser—Contracts—Warranties — Trials — Evidence—Questions for Jury.*—Representations made by the vendor in the sale of an automobile, that it was durable, reliable, first-class in workmanship and material, was well made, and suitable for the roads upon which the vendee would use it; that it would run a certain distance on 1 gallon of gasoline, and was better than a certain other car, are evidence of an express warranty of the car consequently purchased. *Underwood v. Car Co.*, 458.

2. *Same—Consideration.*—Warranties made by the vendor of an article after the contract of sale has been completed are unenforcible for the want of consideration; but in this case the evidence was contradictory on the question of whether the warranty was contemporaneously made with the sale, and was properly left to the determination of the jury, under a correct charge from the court. *Ibid.*

3. *Vendor and Purchaser—Contracts—Warranties—Measure of Damages.*—Damages for the breach of warranty in the sale of an article—in this case, an automobile—are measured by the difference in the value of the car as it was represented and warranted to be and as it really was at the time of its purchase, with such special damages as the vendee incurred, at the request of the vendor, to ascertain if it could not be made to come up to the representation. *Ibid.*

4. *Contracts—Vendor and Vendee—Deferred Payments—Trials—Evidence.*—The plaintiff carrier purchased from the defendant carrier certain steamboats upon a certain cash payment, with agreement that the balance of the purchase price should be paid in equal amounts at stated times. There was evidence tending to show that the defendant carrier had moneys in his hands owing to plaintiff, under a traffic arrangement, sufficient to meet these deferred payments when due, and by the defendant's testimony it was admitted that it had plain-

VENDOR AND PURCHASER—*Continued.*

tiff's money on hand, but could not state the amounts, and it was *Held*, on the question of allowing the defendant interest on the deferred payments, that it was for the defendant to show exactly what funds it had of the plaintiff's on hand at the various times for the payment of interest, and the question was properly left to the determination of the jury. *Pritchard v. R. R.*, 532.

5. *Vendor and Purchaser—Principal and Agent—Contracts—Ratification—Knowledge—Fraud—Trials—Evidence—Nonsuit.* — For the unauthorized acts of an agent to bind his principal by ratification, it must appear that the principal acted with knowledge of the facts and circumstances in respect thereto, and where the person dealing with the agent is aware of the fact that he has exceeded his authority, and depends upon the agent's statement that his principal may act favorably thereon, the burden is upon such third person to show the matters necessary to bind the principal by his ratification of the agent's unauthorized act. Thus where an agent for the sale of gasoline entered into a contract with the purchaser to supply him at the former price after the market had greatly advanced, by antedating the contract, and the purchaser was aware of the fact that, at that time, the agent was not only unauthorized to sell the gasoline at the price named, but had been forbidden to do so, and, notwithstanding, relied upon the assertions of the agent that "he would try to get the contract through," the fact alone that the seller shipped out a part of the gasoline at the price specified, being received and imposed upon by the date appearing in the contract, is not evidence sufficient of his confirmation of the contract, and the burden of proof being upon the purchaser in his action to enforce delivery of the balance of the gasoline, at the price named, a judgment of nonsuit should be rendered. *Wise v. Texas Co.*, 610.

VERDICTS. See Judgments, 2; Trials, 35, 38.

Verdicts—Agreement—Taken by Clerk—Unanswered Issues — Subsequent Answers—Judgments—Unapproved Practice.—It having been agreed by the parties that the clerk should take the verdict of the jury during recess of court, the foreman put the verdict in his pocket, the jury separated, some of them telling what the verdict was, and the foreman handed it to the judge upon reconvening of court. The judge then reassembled the jury, asked them if they had agreed upon their verdict, was informed that they had, and then read the issues and answers to them, which they said was their verdict, agreed upon before they separated. The judge sustained the verdict thus rendered, and it is held on appeal to be no error. The custom permitting clerks of court to take verdicts in recess in the absence of the judge is not approved. *Tillett v. R. R.*, 515.

VERDICT, DIRECTING. See Trials, 4.

WAIVER. See Partnerships; Trial by Jury.

WAREHOUSE. See Railroads, 1.

WARRANT. See Officers.

WARRANTIES. See Vendor and Purchaser, 1, 3; Contracts, 5, 6, 7.

WARRANTS FOR ARREST. See Criminal Law.

WASTE. See Estates.

WATER AND WATER-COURSES. See Canals.

WILLS. See Contracts, 4.

1. *Wills—Wife a Beneficiary—Undue Influence—Presumptions.*—Where the wife is the beneficiary under a will sought to be set aside for undue influence, the principles announced *In re Everett's Will* have no application. *In re Cooper's Will*, 210.

2. *Wills—Estates—Contingent Limitations—Death of Devisee — Direct Beneficiaries—Interpretation of Statutes.*—A devise of lands to B. in fee, "provided he has a child or children; but if he has no child, then to him for life," with limitation over to the testator's heirs at law, carries to the devisee a fee-simple estate, defeasible upon his death without having had a child, the contingent event by which the estate is determined referring to the death of the devisee and holder of the prior estate unless a contrary intent clearly appears from the will itself (Revisal, sec. 1581); and upon his death and nonhappening of the contingency named, the inheritance passes directly from the testator to the ultimate devisees. Hence, when the holder of the prior estate has acquired the interests therein of the children of the testator then living, he cannot convey a good title to the land; for prior to his death some of these heirs may have died leaving children, who, in that event, would take directly from the testator as his heirs at law. *Burden v. Lipsitz*, 523.

WITNESSES. See Trials, 34, 69, 77.

1. *Witnesses—Qualifications—Appeal and Error.*—The determination of the trial judge of the disqualifications of witnesses to testify for lack of sufficient age or mental capacity is not reviewable on appeal. The religious requirements of a witness discussed, and Revisal, secs. 1496 (29), 2360, and 2354, referred to by CLARK, C. J. *S. v. Pitt*, 268.

2. *Witnesses—Trials—Impeachment—Specific Acts—Admissions—Contradictions.*—A female witness, a married woman, testified upon the trial for homicide, in behalf of the defendants. She was shown a letter signed in her name, which she admitted to have written to a man, soliciting his visits, in the absence of her husband, for the purpose of improper relations. She then testified that if she had written the letter, it was for another woman. *Held*, that while the answer of a witness to questions asked concerning collateral matters for the purpose of impeaching his testimony is conclusive, and no specific act may be inquired into on cross-examination, it was competent to contradict the statement made by this witness with the contents of the letter she admittedly had written. *S. v. Robertson*, 356.

WRIT OF PROHIBITION. See Habeas Corpus.